

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

---

In the Matter of	)	
	)	
CHICAGO BRIDGE & IRON COMPANY N.V.	)	
	)	
a foreign corporation,	)	Docket No. 9300
	)	
CHICAGO BRIDGE & IRON COMPANY	)	
	)	<b>(PUBLIC VERSION)</b>
a corporation, and	)	
	)	
PITT-DES MOINES, INC.	)	
	)	
a corporation.	)	

---

To: The Honorable D. Michael Chappell  
Administrative Law Judge

**COMPLAINT COUNSEL'S CORRECTED RESPONSES TO RESPONDENTS'  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Rhett R. Krulla  
Morris A. Bloom  
Deputy Assistant Directors

J. Robert Robertson  
Senior Litigation Counsel

Susan Creighton  
Deputy Director

Joseph J. Simons  
Director

Bureau of Competition  
Federal Trade Commission

Michael A. Franchak  
Chul Pak  
Hector Ruiz  
Eric M. Sprague  
April Tabor  
Robert S. Tovsky  
Cecelia M. Waldeck  
Steven L. Wilensky  
Complaint Counsel

Yasmine Carson  
Honors Paralegal

Mary Forster  
Merger Analyst

Jacqueline Tapp  
Investigative Assistant

March 14, 2003

TABLE OF CONTENTS

<b>I.</b>	<b>LNG REPLY FINDINGS OF FACT</b> .....	2
<b>A.</b>	<b>LNG Background</b> .....	2
<b>B.</b>	<b>There Are No Viable Alternatives To CB&amp;I In The LNG Market</b> .....	20
<b>C.</b>	<b>The Absence Of Post-Acquisition Competition Demonstrates CB&amp;I's Acquisition Of PDM EC Did Substantially Lessen Competition</b> .....	119
<b>D.</b>	<b>CB&amp;I's Anticompetitive Actions And Public Statements Show That CB&amp;I Faces No Fierce Competition In The United States LNG Market</b> .....	156
<b>E.</b>	<b>Barriers To Entry Will Prevent Foreign Entry</b> .....	178
<b>F.</b>	<b>Respondent's Witnesses Lack Foundation</b> .....	202
<b>G.</b>	<b>Anticompetitive Effects Have Occurred In The LNG Market</b> .....	219
<b>II.</b>	<b>LPG FINDINGS OF FACT</b> .....	246
<b>A.</b>	<b>The LPG Industry</b> .....	246
<b>B.</b>	<b>CB&amp;I Is The Dominant Firm And Foreign Firms Have Not Restrained CB&amp;I's Market Power</b> .....	248
<b>C.</b>	<b>The U.S. LPG Market Has Not Seen Entry By Independent Firms</b> .....	265
<b>D.</b>	<b>The U.S. LPG Market Has Substantial Barriers To Entry</b> .....	271
<b>E.</b>	<b>Complaint Counsel's LPG Witnesses Have Foundation</b> .....	292
<b>III.</b>	<b>LIN/LOX FINDINGS OF FACT</b> .....	296
<b>A.</b>	<b>The LIN/LOX/LAR Industry</b> .....	296
<b>B.</b>	<b>CBI's Acquisition Of PDM Has, By All Measures, Substantially Lessened Competition For The Sale Of LIN/LOX/LAR Tanks</b> .....	303

C.	<b>Diminished Competition On Post-Acquisition Projects Has Influenced     CB&amp;I’s State Of Mind Regarding Competition</b> .....	347
D.	<b>The U.S. LIN/LOX/LAR Market Has Substantial Barriers To Entry</b> .....	351
E.	<b>Document Authored By Dan Knight Entitled “The Benefits     Of Combining PDM With CB&amp;I” Is An Accurate Assessment Of     The Acquisition And Represents The Thoughts And Ideas Of CB&amp;I     And PDM Management</b> .....	353
IV.	<b>THERMAL VACUUM CHAMBER FINDINGS OF FACT</b> .....	358
A.	<b>There Is Demand For TVCs</b> .....	358
B.	<b>CBI Is The Dominant Firm In The Production Of TVCs</b> .....	365
C.	<b>There Are No Economic Substitutes For TVCs</b> .....	377
D.	<b>TVC Customers Require A Reliable Supply Of TVCs</b> .....	379
E.	<b>CBI’s Remedy Package Ignores The Law And Does Not     Address The Competitive Concerns Posed By CBI’s     Acquisition of PDM</b> .....	380
F.	<b>Anticompetitive Effects Have Occurred</b> .....	390
V.	<b>COMPLAINT COUNSEL CARRIED ITS BURDEN OF PROOF AND MORE</b> .....	422
A.	<b>Complaint Counsel Demonstrated Anticompetitive     Effects And That Budget Pricing Is Used In Customers’     Decision-Making Process</b> .....	422
B.	<b>CB&amp;I and PDM Exchanged Competitive Information     Prior To The Acquisition</b> .....	439
C.	<b>Economic Findings Of Fact</b> .....	442
VI.	<b>EXITING ASSETS FINDINGS OF FACT</b> .....	511
A.	<b>PDM Was CBI’s Only Low-Cost Competitor In The Relevant     Product Markets</b> .....	511

<b>B.</b>	<b>PDM Could Have Successfully Competed With CB&amp;I Or Been Sold To An Alternative Acquirer</b>	513
<b>C.</b>	<b>Goldman Sachs Valued PDM’s EC Division At \$51 Million</b>	515
<b>D.</b>	<b>Tanner And PDM Did Not Seek Out Alternative Buyers</b>	518
<b>E.</b>	<b>The PDM EC And Water Divisions Were Profitable And Successful Divisions of PDM</b>	529
<b>F.</b>	<b>PDM’s EC Division Could Have Continued Profitably</b>	529
<b>G.</b>	<b>CBI Preemptively Acquired PDM</b>	534
<b>H.</b>	<b>PDM’s Managers Never Decided To Sell PDM To An Alternate Acquirer</b>	535
<b>VII.</b>	<b>REMEDY FINDINGS OF FACT</b>	539
<b>A.</b>	<b>Complaint Counsel’s Remedy Seeks To Follow The Law And Restore The Pre-Acquisition Competition</b>	539
<b>B.</b>	<b>Complaint Counsel Exceed The Law’s Requirements And Presented Record Evidence Demonstrating The Need For The Proposed Remedy</b>	540
<b>C.</b>	<b>The Remedy Is Necessary And Indeed Mandated By The Clayton Act And Supreme Court Precedent</b>	545
<b>D.</b>	<b>The Restoration Of Competition Is Required By The Law</b>	547
<b>E.</b>	<b>The Applicable Law Dictates A Restoration Of Competition And Requires Divestiture In Both The Relevant Product Markets And All Markets Necessary To Support The Relevant Product Markets</b>	555
<b>F.</b>	<b>There Are No Other Adequate Or Permissible Remedies</b>	555

## **COMPLAINT COUNSEL'S RESPONSES TO RESPONDENTS' FINDINGS OF FACT**

Complaint Counsel hereby submits their responses to Respondents' proposed findings of fact. Our responses are presented first with the verbatim text of each proposed finding of fact that merits a response (noted in smaller font), and then followed immediately by Complaint Counsel's response thereto (noted in larger font). Throughout the document, we have used the following abbreviations: "CCFF" refers to Complaint Counsel's Proposed Findings of Fact, submitted on February 14, 2003; "CCRFF" refers to Complaint Counsel's response to Respondents' Proposed Findings of Fact; "RFOF" refers to Respondents' Proposed Findings of Fact, submitted on February 14, 2003.<sup>1</sup>

---

<sup>1</sup> Complaint Counsel respectfully draws the Tribunal's attention to certain inadvertent citation errors in Complaint Counsel's Proposed Findings of Fact and Post-Trial Brief. Complaint Counsel cited CX 190 (in finding of fact #406), CX 370 (in findings of fact #956-961, 964-965, 970-971 and 1286), CX 822 (in finding of fact #1356), CX 823 (in finding of fact #737), CX 1591 (in finding of fact #318), CX 1682 (in finding of fact #744), CX 1685 (in finding of fact #416) and RX 778 (in findings of fact #79-80, 82), all of which have not been admitted into evidence.

CX 370 is the deposition transcript of Daniel W. Britton of Fairbanks Natural Gas. By letter dated December 1, 2002, Complaint Counsel and Respondents' Counsel had reached agreement that Mr. Britton's deposition would be admitted into evidence (except certain portions not at issue here). Complaint Counsel inadvertently did not place Mr. Britton's deposition transcript on the stipulated joint exhibit list. Complaint Counsel notes that there is substantial additional evidence that support and corroborate the findings of fact relating to Mr. Britton's testimony, all of which have been admitted into evidence.

Complaint Counsel's citation to CX 823 was a typographical error. The correct citation is CX 832, which has been admitted into evidence. Complaint Counsel's citation to RX 788 was a clerical error. The correction citation is JX 10, which has been admitted into evidence. With respect to the other CXs cited but not in evidence, each such CX reference is one piece of evidence in a string of documents and testimony in support of the particular proposed finding of fact.

Complaint Counsel also notes that Respondents' Proposed Findings of Fact rely on CX 1571 (in findings #3.502 and 3.506) and RX 131 (in finding #4.93), none of which are in evidence.

We apologize for any inconvenience to the Tribunal.

## I. LNG FINDINGS OF FACT

### A. LNG BACKGROUND

- 3.2 The term methane cannot be used interchangeably with the term LNG because natural gas may contain other components such as nitrogen, ethane and higher hydrocarbons. (Kistenmacher, Tr. 889). Natural gas is not pure methane. (Kistenmacher, Tr. 889). For example, in Europe natural gas may be comprised of at least 10% nitrogen. (Kistenmacher, Tr. 889).

#### Response to RFOF 3.2

It is incomplete and misleading that the term “methane” may not be interchangeable with the term “LNG.” LNG tanks store methane in that methane is the “main component” of liquefied natural gas. (Kistenmacher, Tr. 876; *see also Id.* 889). Methane constitutes 96-98% of LNG. (Blaumeuller, Tr. 281-82). There is “no difference at all” between a tank built to store pure liquefied natural gas and pure methane. (Blaumeuller, Tr. 282). Indeed, CB&I’s “Tank Estimate Summary Sheets” for “LNG” projects define the “Product” as “Methane.” (CX 906 at CBI 031075-HOU).

- 3.7 A double containment tank is a conventional single containment tank surrounded by a close-in but separate, high concrete dike. (Price, Tr. 531; RX 428, at CB&I001193-PLA). [ ] ([ ], Tr. 4720). For a double containment tank, both the inner tank and the impoundment wall are capable of containing the liquefied natural gas. (Price, Tr. 531; RX 428, at CB&I001193-PLA). The outer tank/wall, however, is not required to contain vapor released due to leakage from the inner tank. (Price, Tr. 531-32; RX 428, at CB&I001193-PLA). A double containment tank has never been constructed in the continental U.S. (Scorsone, Tr. 4919-20). Neither CB&I nor PDM have ever constructed a double or full containment tank in the continental U.S. (Scorsone, Tr. 4920).

#### Response to RFOF 3.7

The finding is misleading because it implies that Respondents are incapable of constructing double or full containment tanks in the United States. No firm has ever constructed a double or full containment tank in the continental United States, although Respondents have built such tanks outside of the United States. (CX 758 at CBI-PL031543-59, *in camera*; CX 145 at PDM-S 001430-431). Respondents have built all of the LNG tanks in the continental United States since at least 1975. (CX 125 at PDM-HOU 2017162-7169).

- 3.10 The decision as to what tank type to build in a particular circumstance is governed by a variety of factors the most important of which is Federal Energy Regulatory Commission (“FERC”) regulations, which look at factors such as amount of available land and population density. (*See* Bryngelson, Tr. 6133). Other factors include owner preference and political pressure. (*See e.g.*, Bryngelson, Tr. 6133). When the customer does not have a large amount of land, a double wall or full-containment tank is preferable and may be required by FERC. (*See e.g.*, Bryngelson, Tr. 6133, 6192; J. Kelly, Tr. 6268). A single containment tank can be appropriate when the tank is to be located far from a populated or industrialized area and where the owner has a large amount of land; if the customer is close to a heavily populated area, a double or full containment tank is preferable and may even be required. (*See e.g.*, Bryngelson, Tr. 6133; J. Kelly, Tr. 6268).

### Response to RFOF 3.10

Respondents' mischaracterize the testimony of Mr. Bryngelson. The El Paso representative said nothing about "owner preference or political pressure." Respondents are also incorrect in asserting that either Mr. Kelly or Mr. Bryngelson claimed that a double or full containment tank may be "required" by FERC.

In fact, customers do not find it "preferable" to build a double or full containment tank. Mr. Kelly of CMS, cited by Respondents, testified that CMS considered building a double or full containment tank for its LNG expansion project in Louisiana, but deemed it preferable to build a single containment tank because it is "less expensive." (J. Kelly, Tr. 6274). Mr. Bryngelson, also cited by Respondents, testified that if a single containment tank is permitted, El Paso would find it preferable to build a single containment tank because it is "cheaper." (Bryngelson, Tr. 6242-43).

Respondents correctly state that FERC regulations are the factor of "most import" in determining what type of LNG tank will be permitted for a facility.

3.11 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). Customers are specifying double and full containment tanks because the tanks have a secondary containment integral with the tank structure to contain LNG in the event of a spill. (Glenn, Tr. 4112-13; Scorsone, Tr. 4922). Therefore, 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).

### Response to RFOF 3.11

Respondents engage in sheer speculation. There is no evidence from FERC, the "most important" factor in determining what type of LNG tanks will be permitted for a facility, that the "trend" in the United States has shifted from single containment tanks to double or full containment LNG tanks.

The only evidence cited by Respondents is the testimony of Messrs. Glenn and Scorsone. Their testimony is not supported by any business records indicating that there is a "trend" away from single containment tanks, and if so, that CB&I perceives itself to be at a competitive disadvantage. If Respondents' future competitive position were truly threatened by a "trend" toward double or full containment tanks, surely there would be e-mails, presentations or memos assessing the extent of the "trend," its accuracy and credibility, and analysis of ways to counteract any threat.

Respondents also cite the testimony of Mr. Izzo of Calpine, but Mr. Izzo admitted that he does not know what type of tank FERC will require for Calpine's LNG facility in California and would have to "guess" as to whether FERC will require a single, double or full containment tank. (Izzo, Tr. 6522-23).

There is no “trend” toward double or full containment tanks in the United States. CB&I is in the process of constructing a single-containment tank at Cove Point, Maryland. CMS Energy chose a single containment tank for the expansion of its LNG import terminal at Lake Charles, Louisiana. (Kelly, Tr. 6260). Southern Natural Gas, an affiliate of El Paso, is planning on building a single containment LNG tank at Elba Island, Georgia. (Bryngelson, Tr. 6214). Memphis Light Gas & Water will likely build a single containment tank when it expands its current facility. (Hall, Tr. 1831, 1842).

Only two facility owners have actually committed to building tanks other than single containment tanks: [ ], which has decided to forego competition from foreign LNG suppliers in favor of sole-source negotiations with CB&I; and Dynegy, a competitive bidding situation in which CB&I could have submitted a competitive price quote but chose not to do so. CCF 577-578; 1000-1001. The [ ] projects are telling because [ ] viewed the acquisition of PDM as the opportunity for CB&I to “dominate the US market,” and [ ] decision to deal exclusively with CB&I suggests that in [ ] view, CB&I’s dominance extends across all types of LNG tanks. (CX 693 at [ ] 01 027, *in camera*).

Ultimately, from Mr. Glenn’s perspective, it does not matter whether the “trend” is for single, double or full containment tanks because CB&I “can win the work every time technically.” (CX 1731 at 44-45).

3.12 LNG customers also see a trend toward double and full containment tanks in the United States. (Izzo, Tr. 6491-92; Cutts, Tr. 2501). Calpine expects that new LNG tanks in the United States will be “at least double containment if not full containment.” (Izzo, Tr. 6492). LNG customers have also indicated that the “enhanced value” of double containment may be greater than the additional cost and, therefore, that might be what they build in the future. (Cutts, Tr. 2501). Customers also view full and double containment tanks as safer than single-containment tanks. (Glenn, Tr. 4112-13; Hall, Tr. 1842-43). As demonstrated by the plans of several owners including Dynegy, Williams, and Cheniere, 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).

### Response to RFOF 3.12

Respondents mischaracterize the extent to which LNG customers “see a trend toward double and full containment tanks in the United States.” Respondents cite Messrs. Izzo and Cutts, neither of whom have ever been involved in the construction of an LNG tank in the United States, and, in the case of Mr. Cutts, has not been involved in the construction of an LNG tank anywhere. (Izzo, Tr. 6513-14; Cutts, Tr. 2393-94). Mr. Izzo testified that Calpine has not decided what type of containment system it will build, and if FERC authorizes the construction of a single containment LNG tank, Calpine will not build a double or full containment tank. (Izzo, Tr. 6522-23). Mr. Cutts testified that for “smaller applications,” customers will continue to build single containment tanks, and for larger applications, Mr. Cutts does not “really” know because he does not “understand the FERC regulations,” has not been a “party to any first hand meetings with FERC regulators associated with permitting LNG tanks,” and has not been told by anyone at FERC that requirements for LNG tanks are going to change in the future. (Cutt, Tr. 2394, 2498-99).

Customers do not view double or full containment tanks to be “safer” than single containment tanks. A double or full containment tank is “no safer” than a single containment tank. (J. Kelly, Tr. 6276). Any added safety benefit may be outweighed by the increased cost of a double or full containment tank, thereby steering customers to choose single containment tanks. (Hall, Tr. 1831). Full-containment tanks are 30-100% more expensive than single-containment tanks. CCF 573.

The building plans of Williams and Cheniere are in limbo. Williams has sold the Cove Point project and there is no evidence from the new owner concerning its future LNG tank size plans; Cheniere’s Freeport LNG project is in the early design stages and may never be built. (Eyer mann, Tr. 7043-7044; CX 1607 at 1).

3.13 Current LNG competitors also believe there is a trend to build double and full containment LNG tanks in the U.S. The trend is to reduce the risk, which means full and double containment is becoming more popular. (Cutts, Tr. 2573). AT&V believes the trend partly stems from customers concerns about terrorism. (Cutts, Tr. 2573). AT&V believes FERC’s expectations have changed since 9-11 to require safer applications of LNG tanks. (Cutts, Tr. 2498-2500). [ ] ([ ], Tr. 4683-84). [ ] ([ ], Tr. 4683-84, 4764). [ ] ([ ], Tr. 4725).

### Response to RFOF 3.13

Respondents only support for this finding are the selective statements of Messrs. Cutts and Jolly. As described in Complaint Counsel’s Response to RFOF 3.12, Mr. Cutts’ belief about LNG tank “trends” is suspect since his firm has never built an LNG tank anywhere in the world and he admits that he does not “understand FERC regulations.” (Cutts, Tr. 2393-94, 2499). As discussed more fully in Response to RFOF 3.164, [ ] (*in camera*).

3.14 Two current expansion projects in Cove Point, Maryland and Lake Charles, Louisiana specify the use of additional single containment tanks. (Eyer mann, Tr. 7054). Unlike a new facility, however, these expansions are constructing tanks on sites that already contain numerous single containment LNG tanks. (Eyer mann, Tr. 7054). These owners are allowed to build additional single containment tanks because the new construction is “grandfathered”. (Eyer mann, Tr. 7054).

### Response to RFOF 3.14

Respondents rely upon Mr. Eyer mann, an employee of Freeport LNG, but his firm does not own or work on the projects in Maryland and Louisiana. (Eyer mann, Tr. 6959-60). Respondents do not cite any evidence from the owners of the Maryland and Louisiana projects in support of the finding.

3.16 Owners of import terminals may include major utilities, oil companies and pipeline companies. (Glenn, Tr. 4070). The LNG tank usually represents only a third or less of the cost of these facilities. (*See e.g.* Puckett, Tr. 4566-67).

### Response to RFOF 3.16

Respondents' assertion that "the LNG tank usually represents only a third or less of the cost of these facilities" is misleading and incomplete in that it tends to minimize the size of LNG tank contracts. Puckett, the witness from Dynegy, testified that he expected that the three tanks for the Hackberry facility would cost around \$140 million and that: ". . . the tanks, the size and magnitude, that they are essentially an EPC contract in and of themselves, a major project." (Puckett, Tr. 4552, 4566). Respondents further attempted to minimize the importance of LNG tanks to a project by omitting the fact that LNG tanks can represent anywhere from forty to sixty percent of the cost of a peak shaving facility. (Price, Tr. 541; JX 22 at 12 (Bryngelson, Dep.)).

3.18 El Paso is developing technology for a shipboard regasification, which it believes could serve as a substitute for LNG import terminals. (Bryngelson, Tr. 6158). The shipboard regasification technology involves an LNG tanker with on-board regasification equipment. (Bryngelson, Tr. 6158). A subsea interconnect will then transfer gas from the ship onto shore into a pipeline. (Bryngelson, Tr. 6158). El Paso believes the shipboard regasification technology will allow natural gas to be transferred to specific markets in a quicker time, and may not be subject to certain permitting hurdles. (Bryngelson, Tr. 6158-59).

### Response to RFOF 3.18

Respondents' first and final assertions are misleading and incomplete in that they suggest that El Paso's shipboard regasification technology is a substitute for LNG import terminals. Mr. Bryngelson of El Paso testified that the disadvantage of this technology is that it has volume limitations because it takes a tanker six to seven days to discharge its contents directly into a pipeline versus 14 hours at an LNG terminal. (Bryngelson, Tr. 6219-20). Thus, a land-based terminal affords cost advantages over this alternative technology for transporting and delivering large volumes of LNG. (Bryngelson Tr. 6219). If the price of the LNG tanks for El Paso's planned LNG import terminal at Altamira, Mexico were to increase by 10%, El Paso would not turn to its "energy bridge" technology because energy bridge has volume limitations and land-based terminals do not. (Bryngelson, Tr. 6218).

3.23 There are several companies that compete with CB&I for liquefaction units for peak-shaving facilities in the U.S. including Air Products, Black & Veatch, Air Liquide, Lotepro, and BOC. (Davis, Tr. 3188). Since 1990, Air Products has bid on peak-shaving projects for Alabama Gas Company; Key Span on Long Island; Cove Point; and Philadelphia Gas Works in Richmond, Virginia. (Davis, Tr. 3193). These projects involved the replacement of liquefiers, and did not involve the construction of an LNG tank. (Davis, Tr. 3193-94, 3204).

### Response to RFOF 3.23

Respondents' final two assertions are incomplete and misleading because they fail to mention that Air Products bid on two LNG peak shaving plants that included LNG tanks in conjunction with PDM, at Memphis, Tennessee and Atlanta, Georgia. (Davis, Tr. 3194).

3.25 Peak-shaving plants are only used a few days per year. (Davis, Tr. 3186). There are several substitutes to address demand peaks without using a peak-shaving facility including: (1) excess pipeline capacity; (2) cavern storage; and (3) natural gas holders that store vapor phase natural gas. (Davis, Tr. 3185). One company considered using underground cave storage and an option to use propane air mixtures as

alternatives to building an LNG tank at its peak-shaving facility. (Hall, Tr. 1781).

### Response to RFOF 3.25

Respondents' assertion that LNG-peak shaving plants are only used a few days a year is incomplete and misleading. LNG is only **vaporized** a few days per year. (emphasis supplied). Utilities spend up to \$80 million (the cost of the LNG peak shaving plant at Pine Needles, N.C., CX 1212 at 6) for these plants because they are used during the coldest days of year and without them municipal utilities would have to curtail gas supply to their customer base. (Davis, Tr. 3187; Hall, Tr. 1775-76).

Respondents' assertion that there are several substitutes for LNG peak shaving plants is incomplete and misleading in that they fail to mention that these alternatives are poor substitutes for LNG peak shaving plants. Underground storage facilities are only feasible in areas with specific geological properties, and take much longer to discharge the gas. ( Davis, Tr. 3186). Because an LNG peak-shaving plant would only operate for a few days each year, it is difficult to justify excess pipeline capacity simply to meet peak demand needs. (Davis, Tr. 3185-86). Mr. Hall of Memphis Light & Gas testified that for the Capleville LNG project, an LNG peak shaving plant was the best alternative by far. (Hall, Tr. 1781, 1786). Mr. Andrukiewicz of Yankee Gas also testified that the LNG peak shaving plant that the company is considering for Waterbury, Connecticut offered the best economics when compared to alternatives. (Andrukiewicz, Tr. 6698-99).

3.26 CB&I uses the same construction steps when it build an LNG tanks as it does when it builds any ambient-temperature flat-bottom tank. (Scorsone, Tr. 4885). The steps include: (1) the development of engineering drawings; (2) procurement of materials; (3) fabrication of materials; (4) transporting equipment; (5) employing labor; and (6) erecting the tank. (Scorsone, Tr. 4885, 4895-96).

### Response to RFOF 3.26

Mr. Scorsone's assertion that CB&I "uses the same construction steps when it build[s] (sic) an LNG tan[k] (sic) as it does when it builds any ambient-temperature flat bottom tank" is self-serving, misleading, and contradicted by witnesses who testify that the construction of an LNG tank is "highly specialized" work. (Hall, Tr. 1831; Kistenmacher, Tr. 881; *see* Andrukiewicz, Tr. 6702 ("just in my own knowledge of LNG we're talking about a cryogenic fluid that is stored at minus 260 degrees Fahrenheit, clearly has different handling characteristics than the oil tank that may be located in my basement for heating fuel. So clearly there is a degree of specialized -- in fact, the preliminary engineering report speaks to the specialty nature of the construction of these facilities."); Cutts, Tr. 2379 ("You don't just weld [ ] 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...")). For example, in an e-mail to his superiors, [ ] notes that "[t]hese are very specialized tanks and PDM and CB&I were the main U.S. contractors/fabricators prior to the acquisition/merger." (CX 691 at [ ] 01 032, *in camera*).

Even Mr. Glenn disagrees with Mr. Scorsone. When addressing his investors, Mr. Glenn

emphasized that “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**.” (CX 1731 at 44-5, emphasis supplied).

Contrary to Respondents’ finding, LNG tanks differ greatly from ambient-temperature tanks. They involve unique and difficult challenges, in engineering, design, construction and materials, because of the extreme temperature conditions that the tank must withstand. CCRFF 3.28, 3.29, 3.33. LNG tanks are insulated, involve double-wall construction, and are built using 9% nickel steel (an alloy that can withstand cryogenic temperatures); ambient temperature, flat bottomed tanks are constructed from carbon steel. (Kistenmacher, Tr. 879, 881-82; Newmeister, Tr. 1595; Davis, Tr. 3180-83).

Respondents’ assertion is also misleading because it implies that the skill set needed to build an LNG tank is the same skill set needed for any ambient-temperature flat-bottom tank. Mr. Hall explained that there is “special expertise” required in constructing an LNG tank, because “you would have to use the right welding technique to weld that particular type steel,” which is a “different type of welding technique from ordinary carbon steel.” (Hall, Tr. 1792). Mr. Hall further noted that CB&I has the expertise needed to construct LNG tanks. (Hall, Tr. 1793).

Mr. Newmeister of Matrix, a firm that has constructed LIN/LOX tanks in the past and is knowledgeable regarding requirements for entry into the LNG tank market, states that LNG tanks are more difficult to design and manufacture than LIN/LOX tanks, which in turn are more difficult to engineer and construct than other ambient temperature flat bottomed tanks. (Newmeister, Tr. 1566, 1597; CCRFF 5.13). Mr. Cutts also testified that firms such as AT&V that have experience in ambient-temperature tanks and even LIN/LOX tanks must be trained in the construction of LNG tanks. (Cutts, Tr. 2343-4).

3.27 The engineering phase involves the performance of calculations and analysis to determine the size and shapes of the various components to be placed in the structure. (Scorsone, Tr. 4886). This phase entails writing the specifications for the various materials and welding processes that will be used. (Scorsone, Tr. 4886). Drawings are created to be used by fabrication shops, construction crews, and subcontractors. (Scorsone, Tr. 4886-87).

Respondents’ first assertion is incomplete and misleading in that it implies that “the performance of calculations and analysis to determine the size and shapes of various components to be place in the structure” is the same for an LNG tank as it is for an ambient temperature flat bottom tank” That is incorrect. As Mr. Newmeister of Matrix explained in relation to cryogenic tanks: “[t]hey require much more sophisticated engineering analysis. They require probably some finite element analysis. It takes into account expansion and contraction because of differences in temperatures. They’re supported internally on insulation systems. You have to be able to design or perform heat loss calculations for both bottom insulations, sidewall insulations. (Newmeister, Tr. 1566; Kistenmacher, Tr. 881 (the same is true for larger cryogenic tanks used for storing LNG)). CCRFF 3.28 also explains other ways in which the engineering of an LNG tank differs from the engineering on ambient temperature, flat bottom tank.

3.28 The engineering of an LNG tank does not differ from the engineering of any cylindrical flat-bottomed tank. (Rano, Tr. 5894). The same processes are used. (Rano, Tr. 5894). In each case, the specifications

provided by the customers are digested, drawings are produced, and lists of needed raw materials are generated. (Rano, Tr. 5894-95).

### Response to RFOF 3.28

Of all the project directors currently employed by CB&I who work in the United States, Respondents chose to call Mr. Peter Rano a project director whose “responsibility is for all of CBI’s activities in -- on Bonny Island in **Nigeria**,” to testify regarding tank construction and competition in the United States LNG market. (Rano, Tr. 5868, emphasis supplied). Respondents’ sole support for this finding and many after is of the testimony of Mr. Rano, a CB&I employee who has not worked on a U.S. LNG project since 1974. (Rano, Tr. 5873-75). Mr. Rano has never worked on a U.S. LNG project in an engineering or management capacity, but only as a mechanic, a welder, and a foreman. (Rano, Tr. 5870-72). Rano has spent virtually all of his career since 1974 working on projects outside of the U.S. (Rano, Tr. 5875-83).

Moreover, Mr. Rano has negligible knowledge of LNG projects in the United States. Mr. Rano was asked if he could identify one prospective LNG project that CB&I is considering in the United States. He responded that he “think[s] the **DynEnergy (sic)** job is one.” (Rano, Tr. 5992, emphasis supplied). Mr. Rano could not even identify the location of the “DynEnergy” project. (“I don’t know”). (Rano, Tr. 5993). When asked if he could think of any other LNG projects in the United States, Mr. Rano replied “No not off the top of my head.” (Rano, Tr. 5993).

Mr. Eyermann, Respondents’ witness representing Freeport LNG, readily recognized that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: “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. . . It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyermann, Tr. 7071). Just as Mr. Eyermann suggests that the LNG markets outside of the United States have no bearing on the U.S. LNG market, Complaint Counsel submits that Mr. Rano has no foundation to assess competition, pricing, or tank erection in the United States for lack of experience or knowledge of in the United States LNG market. As a result, Respondents’ finding lacks any support.

Moreover, Respondents’ statement that “[t]he engineering of an LNG tank does not differ from the engineering of any cylindrical flat-bottomed tank” is misleading. CCRFF 3.26, 3.27.

The engineering of a LNG tank entails special challenges. The inner tank of a LNG tank holds cryogenic fluid at a very low temperature while the outer tank is at ambient temperature. (Kistenmacher, Tr. 842). The inner tank shrinks when it comes into contact with the cryogenic fluid and there are differential rates of shrinking between the inner and outer tank. (Kistenmacher, Tr. 842). Consequently, a LNG tank engineer must have very specialized knowledge relating to how tank materials behave during the shrinking process; how to design piping for the tank; and how to avoid cracking of the tank components. (Kistenmacher, Tr. 842). Additionally, there are specific FERC requirements governing the siting and construction of LNG tanks that do not apply to other tanks.

(Newmiester, Tr. 1597-98).

- 3.29 CB&I does not have an engineering staff that is solely directed at working on LNG projects, LIN/LOX projects, LPG projects, or thermal vacuum chambers projects. (Scorsone, Tr. 4887). CB&I uses its engineers across several product lines. (Scorsone, Tr. 4888). Engineers who design flat-bottom tanks also have the capability to design LNG tanks. (Glenn, Tr. 4114-15; Scorsone, Tr. 4888). CB&I's engineers are located in Pittsburgh, Pennsylvania, Plainfield, Illinois, Houston, Texas, Canada, the Middle East, Philippines, and Australia. (Scorsone, Tr. 4887).

### Response to RFOF 3.29

Respondents' assertions are incomplete and misleading in that they imply that any engineers who design flat-bottom tanks can also design a LNG tank. Because CB&I has a large engineering staff with expertise in many different areas, CB&I does "not have an engineering staff that is solely directed at working" on LT&C projects. CB&I has a much larger engineering staff in general compared with U.S. tank firms. (CB&I has 1000-plus engineers, whereas most U.S. tank competitors such as AT&V have small engineering staffs; Glenn, Tr. 4356; CX 460 at CBI-E 007235). That is not to say that all engineers who design flat-bottom tanks have the capability to design LNG tanks. The construction of LT&C tanks entails special engineering expertise. CCRFF 3.26, 3.27, 3.28. For example, even though Matrix has engineers proficient with flat-bottom tank design and has designed and constructed four LIN/LOX tanks, the company would have to hire engineers with LNG tank experience to construct an LNG tank. (Newmeister, Tr. 1599).

- 3.31 One essential part of the procurement process for an LNG tanks is the purchase of nine percent nickel steel. (Rano, Tr. 5896; Scorsone, Tr. 4890). The supply base for nine percent nickel steel is "limited." (Rano, Tr. 5896-97). Prior to the acquisition, PDM purchased nine percent nickel steel from steel mills located in Europe, including Charleroi and Cruset Loix. (Scorsone, Tr. 4890-91). CB&I currently procures nine percent nickel steel from sources in either Europe or Japan, including NKK and Mitsui. (Scorsone, Tr. 4891).

### Response to RFOF 3.31

As discussed in CCRFF 3.28, Respondents' finding relies upon the testimony of Mr. Rano, a witness with no foundation to discuss CB&I's erection procedures in the United States, and is supplemented by the self-serving testimony of Mr. Scorsone. Respondents present no documents to corroborate the testimony of these two witnesses. As a result, Respondents' finding lacks any relevant support.

- 3.32 In the past, CB&I made an effort to locate an American supplier of 9% nickel steel. (Rano, Tr. 5897). As a result of that search, it became clear that there are "no credible suppliers of 9 percent nickel steel in the U.S." (Rano, Tr. 5897).

### Response to RFOF 3.32

As noted in CCRFF 3. 28, Respondents' sole support for this finding is, once again, self-serving testimony from Mr. Rano, from a CB&I employee who has had no experience in the United States LNG market.

Respondents' assertions are misleading in that they imply because all LNG competitors may have to import 9% nickel steel from abroad, CB&I would have no advantage over foreign LNG tank constructors. The inner tank of an LNG tank, which requires 9% nickel steel, is just one component of an LNG tank. The outer tank of an LNG tank, which is made of carbon steel, also must be fabricated. CB&I has never suggested that it would fabricate the outer tank for a U.S. LNG project abroad. In fact, a CB&I document reveals that the LNG tank for Cove Point had such extensive fabrication requirements that CB&I had to utilize all three of its fabrication facilities and resort to subcontracting: ("We are utilizing 3 different CB&I shops for manufacturing (Warren, Clive, & Houston) plus 5 sublet locations [ ]!") (RX 602 at CBI 061611) CB&I has repeatedly touted its locational advantage over foreign LNG tank constructors in its documents. (CX 1731 at 44-45; CX 1061 at 11). Potential LNG competitors have also recognized that advantage that CB&I has because it owns a fabrication facility. ([ ], Tr. 1635-37, *in camera*; [ ], Tr. 4721, *in camera*).

3.33 Steel fabrication for LNG tanks is a simple process, involving the squaring, beveling, and rolling of manufactured steel plate. (Rano, Tr. 5898). The fabrication process for LNG tanks is the same as that used for other types of tanks, including water tanks, oil storage tanks, and LPG tanks. (Rano, Tr. 5898).

#### Response to RFOF 3.33

Respondents' first assertion is incorrect in that it states that fabrication "is a simple process." The fabrication of a cryogenic tank is much more difficult than fabrication of an ambient-temperature tank. For example, Mr. Hilgar of Air Products testified that the fabrication process for a LIN/LOX tanks is a "particularly complex process." (Hilgar, Tr. 1343-44). According to Mr. Hilgar, the customer will have a major problem on its hands if the pieces get to the field and they don't fit. (Hilgar, Tr. 1343-44). Air Products would want to prequalify a fabrication subcontractor on a LIN/LOX project. (Hilgar, Tr. 1368). Air Products considered it advantageous that prior to the merger both CB&I and PDM could execute turn-key LIN/LOX jobs, without having to subcontract engineering, fabrication, or field erection. (Hilgar, Tr. 1371-72).

Respondents' second assertion is incomplete and misleading. Not every company that constructs flat bottomed tanks has a fabrication facility that can fabricate LNG tanks. Matrix, the second largest tank constructor in the U.S., would need to spend about \$2 million for a large press and a large number of dyes and \$2-3 million for the automated blast and paint system to be able to fabricate LNG tanks internally, to be competitive in the market place. (Newmeister, Tr. 1591, 1599).

3.34 In most cases, steel plate fabrication occurs near the mill where the steel plate is purchased. (Rano, Tr. 5899). Steel mills generally have a fabrication facility within them or associated with them. (Rano, Tr. 5899). 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).

#### Response to RFOF 3.34

This finding is irrelevant because what happens in steel mills "generally" has no bearing on the fabrication of steel for LNG tanks in the U.S. What is relevant is that CB&I has a U.S.-based

fabrication facility, which would afford them a competitive advantage with the fabrication of steel on an LNG project, and that other firms do not. This is a significant advantage for CB&I, as recognized by the members of the [ ] partnership. ([ ], Tr. 1635-37, *in camera*; [ ], Tr. 4721, *in camera*). Respondents' assertions are incomplete and misleading in that they imply that CB&I would have no advantage over foreign LNG tank constructors on a U.S. LNG project. CCRFF 3.32.

3.35 PDM EC used three fabrication facilities located in Warren, Pennsylvania, Clive, Iowa, and Provo, Utah. (Scorsone, Tr. 4892). CB&I Industrial utilizes fabrication shops in Houston, Texas and Provo, Utah. (Scorsone, Tr. 4893). The water division uses the fabrication shops in Clive, Iowa and Warren, Pennsylvania, however, CB&I Industrial uses those shops for storage tanks when it is geographically convenient. (Scorsone, Tr. 4893).

### Response to RFOF 3.35

Complaint counsel agrees.

3.36 The nine percent nickel steel procured for the Cove Point LNG project and Puerto Rico LNG project was fabricated in Europe and shipped to the job site. (Scorsone, Tr. 4893-94). Although CB&I had the capability and the capacity to fabricate the steel for the Cove Point project at one of its fabrication facilities, it chose to have it fabricated overseas because it was "less expensive." (Scorsone, Tr. 4894-95; *see also* Glenn, Tr. 4118-19). Similarly, for the Bonny Island, Nigeria LNG project, CB&I fabricated the steel in Japan, where it was purchased. (Rano, Tr. 5898-99).

### Response to RFOF 3.36

Respondents' assertions are incomplete and misleading in that they imply that CB&I would have no advantage over foreign LNG tank constructors on a U.S. LNG project. As has been recognized by competitors for U.S. LNG projects, CB&I has a U.S.-based fabrication facility, which gives it an advantage over other firms. CCRFF 3.32. Glenn and Rano's testimony relating to sourcing of fabrication is self-serving, irrelevant and unreliable. The source for the 9% nickel steel plate used on the Bonny Island project in Nigeria is irrelevant to the topic of U.S. LNG projects.

3.38 CB&I owns approximately 90% of its equipment, however, it typically rents large cranes. (Scorsone, Tr. 4897). CB&I carries the cost of owning equipment whether or not it uses it. (Scorsone, Tr. 4897). The PDM EC Division shared tools, equipment, and fabrication facilities with PDM's Water Division. (Scorsone, Tr. 4779).

### Response to RFOF 3.38

Complaint counsel agrees and emphasizes the importance of Respondents' finding. Because "the PDM EC division shared tools, equipment, and fabrication facilities with the PDM Water division," Complaint counsel seeks full divestiture of both the PDM EC and Water divisions.

Respondents' incorrectly assert that "CB&I carries the cost of owning equipment whether or not it uses it." (Scorsone, Tr. 4897). If CB&I is not utilizing its equipment for the construction of an

LT&C (Low Temperature and Cryogenic), it can utilize the same equipment

for ambient-temperature tank projects, which makes equipment a variable cost for CB&I. (Simpson, Tr. 3005).

Moreover, Mr. Scorsone's testimony is directly contradicted by Mr. Glenn, who testified that CB&I's "preference is not to own the equipment. We do own some but the equipment is generally available from a third party. We found that our cost is much lower if we can get it from a third-party. We found that our cost is much lower if we can get it from a third party. They have a better chance of having high utilization than we've experienced in our own equipment." (Glenn, 4122-3). As Mr. Glenn testified, equipment represents a variable cost for CB&I.

Accordingly, Respondents' variable cost is greater than Dr. Harris' estimate. As Mr. Glenn suggests, much of CB&I's equipment represents a variable cost in the organization. (Glenn, Tr. 4122-3; Simpson, Tr. 3005). As variable costs increase as a percent of the price, the contribution margin decreases. The lower a contribution margin, the more profitable a price increase will be to a company. (Simpson, Tr. 3019; CX 1642 at 2).

3.39 The next step in the construction of an LNG facility is to assemble a labor force. (Rano, Tr. 5905). CB&I's strategy in the U.S. is the same as it is elsewhere in the world: CB&I recruits local labor, workers who live less than 100 miles from the jobsite, to construct the facility. (Rano, Tr. 5906-07). CB&I will use a small, core team of 4-5 management employees, including a project manager and two or three key people to begin the project. (Rano, Tr. 5917-18, 5952-53). The bulk of the labor force, however, will be locally recruited. (Rano, Tr. 5917-18, 5952-53).

### Response to RFOF 3.39

The sole source for Respondents' finding is Mr. Rano. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. CCRFF 3.31. Consequently, Mr. Rano has no foundation to comment on how labor is staffed for a U.S. LNG project.

Respondents' assertions are incomplete and misleading in that they imply that CB&I would have no advantage over foreign LNG tank constructors on a U.S. LNG project. CB&I's 2000 SEC 10-K stresses the advantage the company has through its knowledge of local labor markets: "In addition, the Company believes that it is viewed as a local contractor in a number of the 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 1061 at 11).

Mr. Hall also testified to the advantages CB&I's knowledge of the U.S. labor market brought to the Memphis peak shaving project: "Now, as the project went on, I did realize that this constitutes a considerable amount of market strength for any firm to have a relationship with employees they can bring from out of state and bring onto a job. A lot of the foremen that were there were from Texas or Louisiana or various oil country places that they brought in. . . . I think that they brought in a lot of expertise, a lot of expertise that probably could not have been obtained locally. (Hall, Tr. 1797-98).

Mr. Hall's testimony is also corroborated by documents from other customers. A [ ] document notes that "CB&I: See themselves as 'metal erectors,' and like to use their own, internationally mobile crews. This means **they will not work where local content has to be too high**, or they do not have a local partner." (CX 693 at 01 027, emphasis supplied). Because Mr. Rano's testimony is uncorroborated and contradicted by both third-party documents, testimony from witnesses, and CB&I's public statements, Mr. Rano's testimony is unreliable.

3.41 Field labor is very migratory and generally flows to where work is available. (Rano, Tr. 5917-18, 5953). Many field laborers work for different companies depending on where work is available. (Rano, Tr. 5953-54, 5957).

#### Response to RFOF 3.41

Respondents' assertions are incomplete and misleading in that they imply that CB&I would have no advantage over foreign LNG tank constructors on a U.S. LNG project relating to the labor component. CCRFF 3.40. PDM's offering memorandum, stresses the value of its highly trained, internal work force and contradicts the assertion that CB&I gains no advantage from its experienced hourly workforce: "The Division has over 800 hourly field workers who are responsible for construction of facilities and PDM EC oversees all phases of the construction work. The Division's employees are highly trained in safety, welding and erection and have an average of 10 years of experience in the construction of storage facilities." (CX 385 at 13).

3.42 All field crew hands in the U.S., including those in the core group, are paid on an hourly basis. (Rano, Tr. 5953). Most of the touch-craft field labor and supervision is paid on an hourly basis. (Scorsone, Tr. 4896). Construction supervisors are paid on a salaried basis. (Scorsone, Tr. 4896). CB&I carries the cost of paying salaried field construction personnel whether or not they are used. (Scorsone, Tr. 4897).

#### Response to RFOF 3.42

Respondents' finding is misleading. The finding suggests that the costs to CB&I of "salaried field construction personnel" are incurred whether or not these employees are used. Respondents imply that these personnel represent a fixed cost to CB&I whereas the evidence clearly shows that they are variable cost. (Simpson, Tr. 3005). Company documents reveal that "salaried field construction personnel" can be moved to other field-construction projects if they are not used for the construction of a low temperature and cryogenic tank construction project. (CX 1563 at CBI/PDM-H 4006729 ("Fleming, Paul [-] Move Paul to Houston and manage ABL project," "Dillott, Fred [-] Spectrum Astro Project or ABL"). Dr. Simpson testified that "since the employment of these individuals depends upon the output at the company, they would clearly be a variable cost." (Simpson, Tr. 3005-06, CX 1559).

Because Dr. Harris fails to take into account Respondents' employment practices, he greatly underestimates Respondents' variable cost. Dr. Harris incorrectly treats field erection as a fixed cost. (Simpson, Tr. 3007-08). As variable costs increase as a percent of the price, the contribution margin decreases. The lower a contribution margin, the more profitable a price increase will be to a company.

(Simpson, Tr. 3018-9; CX 1642 at 2). As Respondents' testimony corroborates Dr. Simpson's beliefs regarding more variable costs for CB&I's projects

and lower contribution margins, any price increase for CB&I would be very profitable. (Simpson, Tr. 3018-21; CX 1641; CX 1642).

3.43 The next step in building a field-erected LNG tank is to construct the foundation. (Rano, Tr. 5920-21). CB&I subcontracts 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). Since it is not necessary for the subcontractor to have extensive experience with LNG work, CB&I has used subcontractors with no prior experience in LNG concrete work. (Rano, Tr. 5950-51).

#### Response to RFOF 3.43

As further explained in CCRFF 3.28, Mr. Rano lacks foundation to testify regarding the construction of LNG tanks in the United States. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. CCRFF 3.31. Mr. Rano has no foundation to comment on how CB&I would execute the concrete work for a U.S. LNG project.

3.45 CB&I has never self-performed the construction of concrete walls for field-erected LNG tanks; it has always subcontracted this function to "competent concrete people." (Rano, Tr. 5923). The concrete subcontract on a full containment, field-erected LNG tank is "significant," and can amount to 40% of the value of the work. (Rano, Tr. 5923). With respect to full containment tanks to be built in the U.S., CB&I has determined that it will subcontract the concrete work for these jobs. (Rano, Tr. 5923-24).

#### Response to RFOF 3.45

The sole source for Respondents' finding is Mr. Rano. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. As further explained in CCRFF 3.28, Mr. Rano has no foundation to comment on how CB&I would execute the concrete work for a U.S. LNG project.

Respondents' finding is misleading in that it implies that there is a trend towards double and full containment LNG tanks in the U.S. There is no trend toward double and full containment LNG tanks in the U.S. CCRFF 3.11-3.14.

Moreover, Respondents' assertions are incomplete and misleading in that they imply that CB&I has no experience constructing full containment LNG tanks. Respondents have ample experience constructing full containment LNG tanks in other parts of the world, as CB&I notes in its web-site. (CX 1615; Glenn, Tr. 4190)

In fact, to better compete on full containment LNG tanks, in December 1999 CB&I formed a new department in Plainfield to focus on the integrated execution of precontract and contract engineering for all LNG, LPG, and other product tanks requiring concrete. (CX 1235 at CBI-HWH 015977). The initiative had positive results. A 2001 document references the full containment projects and states "[r]ecent open tenders we have participated in have shown CB&I to have the most economical design, significantly in the concrete outer tank, where our slab, wall and roof thickness' are

well below those of our major competitors” and “CBI designed and built the world’s first LNG tank, the world’s first Peak Shaving Plant, the world’s first Full Containment LNG Tank (Das Island 1980’s), and has always been recognized as the industry leader. We have also been recognized as the most expensive in the industry. Not any more. Recent proposals and bid openings have shown we are the price leader in FC LNG Tanks, and Terminals.” (CX 428 at CBI-E 009332-33).

3.46 The field erection process for an industrial tank involves erecting the structure in accordance with the plans and contract specifications, and testing the work quality. (Scorsone, Tr. 4895-96). The construction of both flat-bottom and LNG tanks involves rigging, which is the practice of attaching cables, slings, and ropes to pieces and hoisting them into position. (Scorsone, Tr. 4897-98). The rigging "skill sets are identical" for both flat-bottom and LNG tanks. (Scorsone, Tr. 4898).

#### Response to RFOF 3.46

Respondents’ assertions are incomplete and misleading in that they suggest that the construction of LNG tanks is no different than the construction of ambient temperature flat-bottom tanks. As explained CCRFF 3.26 and recognized by LNG customers and competitors alike, the field erection of LNG tanks requires very specialized skills.

3.48 In order to weld a field-erected LNG tank, two different welding processes are used: (1) hand welding, in which the welder holds the welding cable in his hand; and (2) submerged arc welding, which involves the use of a welding machine. (Rano, Tr. 5930-31). These welding processes are not only used for LNG tanks, but also for LPG tanks, water tanks, and oil tanks. (Rano, Tr. 5931).

#### Response to RFOF 3.48

Respondents’ assertions are incomplete and misleading in that they suggest that the welding of LNG tanks is no different than the welding of ambient temperature flat-bottom tanks. Construction of LNG tanks requires welders trained in procedures unique to welding 9% nickel steel (a special alloy that is not widely used), that can weld together the tank’s large steel pieces with a precision that eliminates leaks. (Cutts, Tr. 2379; Kistenmacher, Tr. 881-82; [ ], Tr. 1628-29, *in camera*; Hall, Tr. 1792; JX 30 at 180-81 ([ ] Tr., *in camera*).

Mr. Cutts, a vice president with ATV, states that LNG tanks are “. . . built out of fairly sophisticated materials. You don’t just weld them up any old way. And its actually automated equipment that you weld them up with. 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 and the procedures that go with that make it very unique. . . .” (Cutts, Tr. 2379). 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).

3.49 All welders that work on a field-erected LNG tank for CB&I or anyone else in the industry must be certified in accordance with ASME Section 9 -- the international code that governs certification of welders. (Rano, Tr. 5931-32). In addition, customers and owners often require CB&I to re-certify and re-qualify welders for a particular job. (Rano, Tr. 5932).



### Response to RFOF 3.49

Respondents' finding is misleading because it suggests that CB&I has no advantage over other firms in the construction of lng tanks because "all welders . . . must be certified in accordance with...the international code." CB&I retains a cost advantage over other firms domestically because its welders are located in the United States and are familiar with CB&I as a local contractor. CB&I's 2000 SEC 10-K stresses the advantage the company has through its knowledge of local labor markets. (CX 1061 at 11). Customers also testify as to the advantages CB&I has through its knowledge of U.S. welders with experience in LNG projects. (Hall, Tr. 1797-98). CCRFF 3.39.

3.50 CB&I does not always use welders who have already been certified by any authority. (Rano, Tr. 5933). In many cases, CB&I will train local workers with some aptitude for welding. (Rano, Tr. 5932-33). Prior experience with welding nine percent nickel steel is not a prerequisite for working on an LNG tank. (*See e.g.*, Rano, Tr. 6031-32). Workers with some welding experience can be trained and qualified to weld nine percent nickel steel in 1-2 weeks, while workers with no prior welding experience can be trained in 2-3 weeks. (Rano, Tr. 5947-48).

### Response to RFOF 3.49 and 3.50

Respondents contradict themselves. In RFOF 3.49, they claimed that "all welders . . . must be certified in accordance with ASME Section 9." In RFOF 3.50, they claim that "CB&I does not always use welders who have already been certified."

The sole source for Respondents' finding is Mr. Rano. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. CCRFF 3.31. Mr. Rano has no foundation to comment on how CB&I would staff a U.S. LNG project with welders. The manner in which CB&I staffed its LNG project with welders in Nigeria has no bearing on how CB&I would staff a U.S. LNG project with welders.

Respondents' finding is misleading because it implies that the welding techniques needed to construct an LNG tank are easy to learn. Numerous customers and LNG competitors testified that welding 9% nickel requires special techniques and training. CCRFF 3.48.

Respondents' assertions are incomplete and misleading in that they imply that CB&I would have no advantage over foreign LNG tank constructors on a U.S. LNG project with respect to hiring welders. CCRFF 3.40. CB&I states its welding expertise constitutes a competitive advantage. A CB&I due diligence report on PDM's construction practices states that "CBI has some of the best welders in the industry . . . Over the years CBI has felt that our welding expertise is one of our core strengths." (CX 1357 at CBI-H 4000270-271).

3.51 The other types of work needed to construct the steel portion of an LNG tank -- steel erection and non-destructive examination/quality control -- are identical to tasks that are done for every cylindrical tank. (Rano, Tr. 5945). In many cases, the workers necessary to perform these tasks cannot be found -- they are trained. (Rano, Tr. 5945).



### Response to RFOF 3.51

The sole source for Respondents' finding is Mr. Rano. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. CCRFF 3.31. Mr. Rano has no foundation to comment on how CB&I would staff a U.S. LNG project with workers to execute the steel erection and non-destructive examination/quality control of an LNG tanks.

Respondents' assertions are incomplete and misleading in that they suggest that the construction of LNG tanks is no different than the construction of ambient temperature flat-bottom tanks. CCRFF 3.26.

3.52 The LNG tank market is a "worldwide market" in which a few LNG contractors compete against each other all over the world. (Eyermann, Tr. 6994; J. Kelly, Tr. 6262). [redacted] ([redacted], Tr. 6091). [redacted] ([redacted], Tr. 6091). El Paso agrees that the LNG business is an "international business" in which "no one participant controls the market." (Bryngelson, Tr. 6160).

### Response to RFOF 3.52

Complaint Counsel agrees that Respondents and other LNG tank suppliers compete against each other internationally, and have done so for decades, but competition is also localized.

This finding is misleading and incomplete. Messrs. Eyermann and Bryngelson have an international view of the LNG market because they have no experience with an LNG project in the United States, and lack information about pre-merger competition in the United States. (Eyermann, Tr. 7025; Bryngelson, Tr. 6228-9).

[redacted], testified that if an LNG facility is to be built "in the U.S., then generally it's been PDM or CB&I. If it's international, then the international players get to play. In Japan, it's been almost all Japanese. In Korea, it's been the Koreans." ([redacted], Tr. 699).

Dr. Simpson compiled a world map documenting all locations where LNG tanks have been constructed and which firms have constructed each tank. (CX 1649). Dr. Simpson's analysis showed that "The U.S. builders get the jobs in the U.S., the Asian builders, the Korean and Japanese builders, get the jobs in Japan and Korea, the European builders tend to get the jobs in Europe. And that –and in some areas like Nigeria and the Middle East and India, that the winner could be a Japanese firm, U.S. firm, or a European firm. So, this document is consistent with LNG tank builders having a home court advantage." (Simpson, Tr. 3227-8; CX 1649 at 1; RX 738 at FTC 001535 ([redacted], Dec.) ("A contractor for LNG projects has an economic advantage in the country in which it is located, because there are cost savings when operating in a customer's home base" (RX 738 at FTC 001535 ([redacted], Dec.), emphasis supplied)).



CB&I's annual 10-K filings with SEC make the same point. 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 (emphasis supplied)). 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.**" (*Id.* at 8; CX 1061 at 10-11; CX 1032 at 8; CX 1575 at 6-7 (emphasis supplied)). CB&I's "competitive advantage through knowledge of local vendors and suppliers, as well as of local labor markets and supervisory personnel" underscore the significant barriers that make entry into the United States market not easy. CCF 291-419.

Given its "prominent position as a local contractor" and "competitive advantage" as a result thereof, it is not surprising that Respondents are the only firms that have built LNG tanks in the United States since 1975. (CX 853 at PDM-HOU011488; CX 154 at CBI-PL002958, 002961; CX 125 at PDM-HOU 2017162-7169).

3.53 Demand for LNG in the United States has been very small over the past 20 to 30 years. (Glenn, Tr. 4091; Carling, Tr. 4513; J. Kelly, Tr. 6263). The U.S. has been the least active market for the sale of LNG tanks worldwide. (Scorsone, Tr. 4859). Most of the LNG tanks in the world have been sold in Japan and Korea. (Scorsone, Tr. 4859).

### Response to RFOF 3.53

Demand for LNG in the United States has not been "very small." There have been four LNG import terminals constructed in the United States since the 1970s, all of which were constructed by Respondents. (CX 853 at PDM-HOU011488; CX 154 at CBI-PL002958, 002961). There were about 90 LNG peak shaving plants built in the United States, all but two of which were constructed by Respondents. (CX 228 at CBI-PL046034; CX 125 at PDM-HOU 2017162-7169).

Demand for LNG tanks has not been so "very small" to stop TKK and Whessoe from trying to beat Respondents for the LNG tank project in 1994 for Memphis Gas Light & Water (CCF 930-944) or Whessoe from trying to beat Respondents for the recent LNG tank projects for [ ] (CCF 831-882). TKK and Whessoe failed to enter the United States market because of the significant entry barriers that made their prices significantly higher than Respondents' prices, not a lack of demand for LNG tanks. (*Id.*; CCF 291-419).

3.54 [ ] ([ ], Tr. 4683).

For the reasons stated in Complaint Counsel's Response to RFOF 3.53, Respondents mischaracterize the robust level of activity in the United States LNG market. Respondents' reliance upon Mr. Jolly is misplaced since he believed [ ] but clearly there was active construction of LNG tanks by Respondents in the United States before 2001. ([ ], Tr. 4701-2, *in camera*).

3.55 CB&I believes that the global demand for LNG is rising and will continue to rise over the next 10 to 20 years. (Glenn, Tr. 4090). Demand for LNG facilities has increased since the 1990s, as a number of companies are developing LNG import terminals in the U.S., Caribbean, and Mexico. (Scorsone, Tr. 4934). In the U.S., LNG demand has exceed supplies, causing prices to rise, so CB&I believes demand is rising and will continue to rise over the next 10 to 20 years, due to rising gas prices. (Glenn, Tr. 4091).  
[ ] ([ ], Tr. 699).

### Response to RFOF 3.55

For the reasons stated in Complaint Counsel’s Response to RFOF 3.53, Respondents mischaracterize the robust level of activity in the United States LNG market, and therefore, also misleadingly suggest that any “rise” in demand since the merger will trigger increased entry into the United States market. Foreign LNG tank suppliers attempted to enter the United States market before the merger but failed because of the significant entry barriers and competitive advantages enjoyed by Respondents, not because of a lack of demand for LNG tanks. CCF 291-419 (entry barriers and Respondents’ competitive advantages), 831-882 ([ ]), 930-944 (1994 Memphis project). These significant entry barriers and CB&I’s competitive advantages remain in place today. As a result, of the 11 new LNG projects announced recently, CB&I has won or has the inside track on winning at least six projects (CMS, [ ] (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). CCF 581-91.

## **B. THERE ARE NO VIABLE ALTERNATIVES TO CB&I IN THE LNG MARKET**

3.56 [ ] ([ ], Tr. 726-27; [ ], Tr. 4683).

Respondents’ finding mischaracterizes the record. Prior to the acquisition, [ ], but found that they were uncompetitive compared to CB&I or PDM. When asked if [ ] had ever “tried to enter the U.S. LNG market prior to CB&I’s acquisition of PDM,” [ ] responded “Well, actually we were not invited. We had no choice.” ([ ], Tr. 4757).

Furthermore, Foreign firms – *e.g.*, Whessoe and TKK – did in fact “look at the U.S. market” and sought to beat Respondents (unsuccessfully) for an LNG project in 1994 for Memphis Light Gas & Water (CCF 930-944) and for LNG projects beginning in 1998 for [ ]. CCF 831-882.

### **1. Skanska/Whessoe Has Not Entered the U.S. LNG Market**

3.57 Skanska AB (“Skanska”) is one of the world’s largest construction groups, and is a well-established Swedish based civil contractor that has operated internationally for more than 50 years. (RX 839, at 4/17; RX 870, at 25/138). In 2002, ENR ranked Skanska as the number one contractor in the world. (RX 736, at 1/17). Skanska earned an annual revenue of more than \$14 billion in 2001. (RX 736, at 1/17). ENR ranked Skanska Inc., a subsidiary of Skanska located in Whitestone, New York, as the third best contractor in the

United States. (RX 737, at 1/16). In August of 2000, Skanska acquired Whessoe International ("Whessoe"). (RX 770, at 33/49).

### Response to RFOF 3.57

Skanska, a company that has done business all over the world for more than 50 years, did not grow to become a \$14 billion company overnight, and yet, since 1975, Skanska has not built a single LNG tank in the United States. CCFF 129-130.

Respondents' reliance on ENR's rankings is misleading for at least two reasons. First, ENR's rankings are based on "construction revenue" for 2001, not which firm is the "best contractor" as Respondents state. (RX 737 at 1). Second, ENR's rankings based on revenues do not provide meaningful information about the state of competition in the relevant product markets in the United States. Based on 2001 "construction revenue," ENR ranks Skanska third and CB&I 41st. (RX 737 at 1, 2). However, based on market shares of LNG tanks constructed in the United States, Respondents are ranked first and second, while neither Skanska nor its subsidiary Whessoe appear in the rankings at all. CCFF 129-150.

3.58 Whessoe is a 200 year old engineering and construction firm with a well established reputation in the international LNG business. (RX 908, at 1/19). Whessoe has had continuous involvement in the LNG industry for more than 40 years. (RX 839, at 2/17). Whessoe has been involved in various aspects of LNG storage for facilities including an 80,000 M<sup>3</sup> LNG tank in Trinidad; two (2) 150,000 M<sup>3</sup> LNG tanks in Dahl, India; one (1) 105,000 M<sup>3</sup> LNG tank in Cartagena, Spain, and LNG storage in Greece and Algeria. (RX 839, at 5-8/17).

### Response to RFOF 3.58

Respondents' finding is only supported by puffery taken from Whessoe's company profiles. As noted in CCRFF 3.59, this type of information is unreliable and immaterial.

Whessoe has had "continuous involvement in the LNG industry for more than 40 years," and yet, since 1975, Whessoe has never built a single LNG tank in the United States. CCFF 129-130.

Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier's work in one country is "not relevant" to its work in another country, including price comparisons: "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. . . It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071).

It is misleading to state that Whessoe's "reputation" in the LNG business is "well established." Whessoe's recent record on LNG projects is spotty and may have already deterred United States customers from viewing Whessoe as a viable competitor.

On the Dabhol, India project for Enron, CB&I replaced Whessoe on construction of the fourth LNG tank because of concerns about Whessoe's ability to complete the first three tanks in a timely manner. (CX 301 at CBI/PDM-H4002566 (Whessoe was teamed with Punj Lloyd).

On the Atlantic LNG project in Trinidad, Bechtel precluded Whessoe from bidding on the third LNG tank citing Whessoe's poor performance on construction of the first two tanks. (JX 32 at 57-58 (Rapp, Dep.)). Skanska "tried hard to convince Bechtel to allow them to bid," but was unsuccessful; Bechtel did not believe that "they [ ] are a different company now, and should not be judged by past Whessoe problems." (CX 135 at CBI 009268-HOU, *in camera*).

[ ] (CX 693 at [ ] 01 028). [ ] made this observation in connection with an analysis of possible contractors for its [ ] upcoming LNG facility projects. [ ] has since entered sole-source negotiations with CB&I. (Glenn, Tr. 4180).

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). Another PDM strategic planning document notes that "Noell-Whessoe is the weakest performer." (CX 107 at PDM-HOU005016).

3.59 Skanska/Whessoe is now poised as a specialist EPC company combining contracting and risk management with engineering and design skills to offer its clients a complete package in the design and construction of facilities for cryogenic gas storage and handling. (RX 870, at 5/138). [ ] ([ ], Tr. 4699). From its UK base, Skanska/Whessoe operates worldwide to design and build LNG tanks and terminals. (RX 870, at 5/138).

### Response to RFOF 3.59

As support for RFOF 3.59, Respondents cite material printed from Skanska/Whessoe's website on October 31, 2002, Skanska's 2001 Annual Report, and testimony from a witness who is neither a customer nor an employee of Skanska to know what [ ]. (RX 870). Nothing in the materials cited by Respondents' in RFOF 3.59 discuss Skanska/Whessoe's ability to compete in the United States to the same extent as PDM.

There is no evidence that the materials were even reviewed by CB&I. RX 870 was printed on October 31, 2002, two weeks before the commencement of this hearing. 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).

As explained in greater detail in Complaint Counsel's Response to RFOF 3.95, there is also no evidence that the materials had any impact on CB&I bidding or pricing strategies.

- 3.60 Skanska/Whessoe offers a combination of skills for the LNG and associated markets that "few can rival." (RX 870, at 6/138). Skanska/Whessoe combines the engineering and construction skills of Skanska Construction with the design, engineering and procurement skill of Whessoe International Skanska. (RX 870, at 6/138). The result is a single company that offers this specialist market a total capability to take a project through from inception to completion. (RX 870, at 6/138). This lump sum turnkey capability is backed by the worldwide financial and technical strengths of the Skanska group. (RX 870, at 6/138).

#### Response to RFOF 3.60

This finding relies on the same evidence as RFOF 3.59 and is incomplete and misleading for the reasons noted in Complaint Counsel's Response to RFOF 3.59.

- 3.61 Skanska/Whessoe set new records for LNG storage tank design and construction by concurrently building three of the worlds largest LNG tanks, including air-lifting the 77 ton roofs, within a six month overlap. (RX 870, at 6/138).

#### Response to RFOF 3.61

Similar to RFOF 3.59, this finding relies on puffery. Respondents' finding is incomplete and misleading for the reasons noted in Complaint Counsel's Response to RFOF 3.59. Moreover, Skanska/Whessoe's reputation to design and construct LNG tanks is tarnished by its poor performance on the India and Trinidad LNG projects as noted in Complaint Counsel's Response to RFOF 3.58.

- 3.62 Skanska/Whessoe engineers have coordinated a number of the original patents for the LNG storage industry. (RX 870, at 9/138). These engineers continue to sit on code committees that drive the LNG industry forward towards technical excellence. (RX 870, at 9/138).

#### Response to RFOF 3.62

This finding relies on the same evidence as RFOF 3.59 and is incomplete and misleading for the reasons noted in Complaint Counsel's Response to RFOF 3.59.

- 3.63 Skanska is clearly one of the largest contractors in the world and one of the top builders in the United States. (Izzo, Tr. 6496).

#### Response to RFOF 3.63

This finding is incomplete for the reasons noted in Complaint Counsel's Response to RFOF 3.57. Skanska's size as a general contractor says nothing about its competitiveness in the LNG market in the United States, where Respondents together have built all of the LNG tanks since 1975 and Skanska/Whessoe has built none.

- 3.65 Freeport LNG understands that Skanska/Whessoe teamed with Black & Veatch for the Dynegey project.

(Eyer mann, Tr. 6986-87). In June 2001, Freeport LNG received a letter from Black & Veatch it which it indicated that it had formed an alliance with Whessoe to build LNG tanks in the Western Hemisphere. (Eyer mann, Tr. 6992; RX 935, at CHE0357) (state of mind). Based on this document, Eyer mann believes that Black & Veatch and Whessoe are "serious and trying to compete." (Eyer mann, Tr. 6992; RX 935, at CHE0357) (state of mind).

### Response to RFOF 3.65

Mr. Eyer mann is an employee of Freeport LNG, not Skanska/Whessoe or Black & Veatch and, therefore, lacks foundation to testify about Skanska/Whessoe or Black & Veatch. The cited "state of mind" evidence about the purported "alliance" between Whessoe and Black & Veatch is just that and nothing more; the exhibit was not offered or admitted for the truth of the matter asserted therein.

Moreover, timely, likely and sufficient entry is not established just because a customer believes that Whessoe is "serious and trying to compete." There is no evidence that Skanska/Whessoe has restrained CB&I's pricing to the same extent as PDM, and therefore, Whessoe's attempts to compete for Freeport LNG's business does not satisfy Respondents' burden to prove that effective entry has occurred.

3.66 [

] ( [ ] ).

### Response to RFOF 3.66

It is irrelevant that [ ] (*in camera*). Preload last built an LNG tank in the United States in 1971. (CX 125 at PDM-HOU2017164). Preload's concrete technology is a "very costly design and [would] not be a competitive design to the tanks that the other people could build." (Price, Tr. 550; *see also* Hall, Tr. 1817). [ ] ( [ ] ), *in camera*).

Respondents' finding is misleading in that it implies that there is a trend towards double and full containment LNG tanks in the U.S. Because there is no trend toward double and full containment LNG tanks in the U.S, Skanska/Whessoe's [ ] is irrelevant. CCRFF 3.11-3.14.

Even if there were a trend towards double and full containment tanks, Respondents' assertions are incomplete and misleading in that they imply that CB&I has no experience constructing full

containment LNG tanks. Respondents have ample experience constructing full containment LNG tanks in other parts of the world, as CB&I notes in its web-site. (CX 1615; Glenn, Tr. 4190)

In fact, to better compete on full containment LNG tanks, in December 1999 CB&I formed a new department in Plainfield to focus on the integrated execution of precontract and contract engineering for all LNG, LPG, and other product tanks requiring concrete. (CX 1235 at CBI-HWH 015977). The initiative had positive results. A 2001 document references the full containment projects and states “[r]ecent open tenders we have participated in have shown CB&I to have the most economical design, significantly in the concrete outer tank, where our slab, wall and roof thickness’ are well below those of our major competitors” and “CBI designed and built the world’s first LNG tank, the world’s first Peak Shaving Plant, the world’s first Full Containment LNG Tank (Das Island 1980’s), and has always been recognized as the industry leader. We have also been recognized as the most expensive in the industry. Not any more. Recent proposals and bid openings have shown we are the price leader in FC LNG Tanks, and Terminals.” (CX 428 at CBI-E 009332-33).

3.67 [ ] ( [ ] ). [ ] ( [ ] ) (state of mind).

Response to RFOF 3.67

CB&I’s “state of mind” about [ ] is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein. There is no evidence that [ ] To the contrary, when asked if the inner tank will be concrete, Mr. Andrukiewicz of Yankee Gas testified that a preliminary report from one of its consultants discussed a concrete inner tank, but a concrete inner tank is “not what has to be specified as long as the tank design that is ultimately proposed...meets the siting requirement...**at this time we’ve made no commitment on tank design.**” (Andrukiewicz, Tr. 6464-65) (emphasis supplied).

CB&I’s own business records state that “Yankee Gas was beginning to realize that concrete inner tanks were not common and not the norm and that more conventional designs using steel as the product container were equally as safe (or safer) and probably less expensive. Yankee Gas agreed to do their best to get the concrete inner tank requirement removed.” (CX 1507 at CBI 059484).

As shown in CCRFF 3.66, CB&I has access to its own more “economical” concrete tank technology, and is fully skilled in the construction of double and full containment tanks.

3.68 Skanska/Whessoe endeavored, and interviewed with Dynegy, to become the EPC contractor for the Hackberry facility. (Puckett, Tr. 4547). Skanska/Whessoe was ultimately successful as Dynegy awarded it the EPC contract (Puckett Tr. 4547). Dynegy decided to bid the LNG tank portion of the project separately and Skanska/Whessoe submitted a bid to win this portion of the project as well. (Puckett, Tr. 4543-44, 4556). [ ] ( [ ] ). [ ] ( [ ] ).

## Response to RFOF 3.68

This finding is incomplete and misleading for two reasons.

First, Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. Timely, likely and sufficient entry is not established just because Skanska/Whessoe won an EPC contract. Respondents do not cite any evidence that Skanska/Whessoe will likely restrain CB&I's prices to the same level as PDM did before the merger. Winning an EPC contract is not the same as acting as an effective price restraint on CB&I. As explained in Complaint Counsel's Response to RFOF 3.95, the post-merger evidence – consisting of Respondents' statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I's market power. Absent evidence of an ability to restrain CB&I's market power, Skanska/Whessoe is not an entrant who satisfies Respondents' burden of proving that timely and sufficient entry has occurred or is likely to occur.

Second, the Dynegy story is hardly an example of sufficient entry; rather, it is an example of an anticompetitive effect. First, CB&I persistently refused to bid except on terms that would permit it to earn higher margins – a bidding structure that Dynegy desired to avoid through competitive bidding. Second, CB&I's deliberate refusal to bid under Dynegy's rules forced Dynegy to incur higher prices by turning to higher-cost foreign LNG firms like Skanska/Whessoe. Skanska/Whessoe “won” the EPC portion of the Dynegy project [ ] only because CB&I refused to participate in the bidding.

(1) In order to maximize competition and obtain the best price, Dynegy chose to “break the project up into pieces” and use a competitive bidding process rather than let one firm handle all phases of the project on a turnkey basis. (Puckett, Tr. 4543-46). 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; CX 139 at CBI 019781-HOU). CB&I wanted a turnkey project because “[t]urnkey, design build projects typically return higher margins than stand alone storage tank projects.” (CX 660 at PDM-HOU005013; Scorsone, Tr. 2812-13; CX 431 at 46 (Glenn, Dep.)). CB&I told Dynegy that [ ] (CX 139 at CBI 019779-HOU *in camera*).

Acceding to CB&I's ultimatum would have denied Dynegy the fruits of competitive bidding. 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 CBI 019867-HOU). Dynegy “wanted to maintain competition on the [ ] tanks, because they're such a big cost component of the project.” (Price, Tr. 609-10). If CB&I became the EPC contractor for the Hackberry project it would not allow competitive bidding of the LNG tanks. (Glenn, Tr. 4242). Dynegy chose Skanska as the EPC contractor because Skanska agreed that the LNG tank supplier would be selected from a

competitive bidding process open to multiple suppliers, not just itself. (CX 138 at CBI 019913-HOU).

In late 2001, Dynegy solicited tank pricing from CB&I, TKK/ATV, Technigaz, and Skanska/Whessoe. (Puckett, Tr. 4552-53). Black & Veatch, Dynegy's consultant, was eager to have CBI's bid because of "concerns that if we do not have a domestic tank price for that project that the prices that [ ] would receive for those tanks would be higher." (Price, Tr. 622). CB&I refused to submit its LNG tank pricing information. (CX 517 at CBI 019784-HOU). 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 CBI 019784-HOU). Dynegy rejected CB&I's conditions, and CB&I chose not to submit a bid for the LNG tanks. (CX 518 at CBI 019777-HOU; Puckett, Tr. 4556-7; Glenn, Tr. 4248).

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 and offered a procedure whereby CB&I's and other tank bids would be evaluated by someone other than Skanska. (CX 518 at CBI 019777-HOU). By the time CB&I changed its mind, it was too late. Dynegy felt compelled to decline CBI'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).

(2) Dynegy and CB&I each observed that Dynegy [ ] (CX 1528 at CBI 071381 *in camera*; CX 138 at CBI 019913-HOU *in camera*). [ ] (CX 1528 at CBI 071381 *in camera*).

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 CBI, PDM and Lotepro/Whessoe. 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. CCF 937. 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" using Skanska/Whessoe or some other foreign firm than if CB&I had been selected. (Price, Tr. 590, 622).

3.69 In June of 2001, Skanska/Whessoe responded to an inquiry from Yankee Gas' consultant CHI Engineering concerning the Waterbury peak-shaving facility. (Andrukiewicz, Tr. 6445; RX 4, at 2/4). Skanska/Whessoe sent CHI Engineering information regarding the Waterbury facility that included: preliminary design solutions; preliminary design data sheets complete with design drawings; and pricing information. (Andrukiewicz, Tr. 6445; RX 4, at 2/4).

### Response to RFOF 3.69

Entry is not timely, likely and sufficient just because Skanska/Whessoe sent CHI Engineering



It is also irrelevant that Skanska/Whessoe has built LNG tanks in India, Trinidad and Greece. As Mr. Eyermann testified, the “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.” (Eyermann, Tr. 7071).

3.73 A Skanska/Whessoe sales representative told Nigel Carling that Skanska/Whessoe is "keen to enter the [ ] market." ([ ]).

### Response to RFOF 3.73

It is irrelevant that Skanska/Whessoe told Mr. Carling about its desire to enter the United States. Entry is not timely, likely and sufficient just because Skanska/Whessoe told somebody that it is “keen” to do something.

3.75 Dynegy is also satisfied that Skanska/Whessoe has the necessary reputation, the ability to do the requisite fabrication and field erection and the ability to manage the actual construction of the LNG tanks for the Hackberry facility. (Puckett, Tr. 4557-58). Dynegy is also satisfied that Skanska/Whessoe will be capable of meeting the necessary United States codes and standards. (Puckett, Tr. 4551). [ ] ( )).

### Response to RFOF 3.75

Respondents misleadingly suggest that Dynegy is “satisfied” with Skanska/Whessoe, when in fact, Dynegy has reason to be concerned that it is paying a higher price for LNG tanks with Skanska/Whessoe than if CB&I had not refused to submit price quotes. As explained in greater detail in Complaint Counsel’s Response to RFOF 3.68, Dynegy is relying on Black & Veatch to advise Dynegy on the LNG tanks bids. Brian Price, Black & Veatch’s Vice President for LNG technology, based on his experience on the Memphis project and industry knowledge, has “concerns” that the price Dynegy will pay for the LNG tanks would be “higher” using Skanska/Whessoe or some other foreign firm than if CB&I had been selected. (Price, Tr. 590, 622).

Dynegy has reason to be concerned that the price that it is paying to Skanska/Whessoe is higher than the price it would have paid if CB&I and PDM had been competing for the project. According to Mr. Price, Dynegy developed its budget for the Hackberry project based on pricing information from Whessoe, a foreign supplier with higher costs than CB&I. (Price, Tr. 602-3). Whessoe’s pricing was further cushioned because it took into account the higher business risks that Whessoe would have on its first project in the U.S. (Price, Tr. 608-9, 590). The fact that foreign firms may have met this level of "satisfaction," for Dynegy, a company that does "not have the staff, experience or knowledge to analyze the bids [ ] and make an informed selection," tells nothing about the ability of these firms to compete with CB&I. (CX 138 at CBI 019913-HOU).

In fact, a comparison of Whessoe’s LNG tank price before the acquisition with Whessoe’s price for an identical tank post-acquisition shows that Dynegy is paying a much higher price than it would have if PDM had not been acquired. According to Mr. Price, the pricing that Dynegy used to determine its budget for its 160,000 cubic meter full containment tank was a [ ] million price quote from Whessoe. Dynegy used Whessoe’s price to satisfy itself that the bids for the Hackberry project were within the “expected price range.” (Puckett, Tr. 4540, 4557; Price, Tr. 602-3). Only four years earlier, Whessoe had submitted a “bid” of [ ] million for an **identical** full containment tank to [ ]. (CX 691 at [ ] 02 004, in camera, emphasis supplied). **Whessoe’s new price to Dynegy represents a price increase in excess of 33%.** (emphasis supplied). This number is significant for two reasons. First, it shows that Dynegy will, in fact, pay a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project. (Price, Tr. 622 (“We

had concerns that if we do not have a domestic tank price for that project that the prices that the client would receive for those tanks would be higher.”). Second, in keeping with economic theory, Whessoe’s price increase to Dynegy confirms that **other firms in the market have also begun to increase prices to keep up with CB&I’s post-acquisition price increases.** (See generally, 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, emphasis supplied).

Because of CB&I’s and PDM’s experience in building LNG tanks in the United States, Black & Veatch’s Mr. Price believes that there would be less overall risk to the customer if it relies on CB&I or PDM to supply an LNG tank in the United States than if the customer relies on a foreign supplier. (Price, Tr. 590-91). Accordingly, Mr. Price believes that the project risks to Dynegy are higher because Dynegy has been forced to rely on foreign suppliers, with no experience in the United States market. (Price, Tr. 626-28).

Having the potential to construct an LNG tank is not the same as acting as an effective price restraint on CB&I. Regardless of whether Skanska/Whessoe can construct an LNG tank, until there is evidence that it can restrain CB&I’s prices to the same extent as PDM, Skanska/Whessoe is not an entrant who satisfies Respondents’ burden of proving that timely and sufficient entry has occurred or is likely to occur.

3.76 In the preliminary engineering report CHI’s submitted to Yankee Gas for the Waterbury facility, CHI 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). The concrete double containment tank cited in CHI’s report was specifically related to the Skanska/Whessoe proposal. (Andrukiewicz, Tr. 6447).

### Response to RFOF 3.76

Respondents misleadingly suggest that Yankee Gas has made a decision to pursue a double containment tank. Mr. Andrukiewicz of Yankee Gas testified that Yankee Gas has **“made no commitment on tank design.”** (Andrukiewicz, Tr. 6464-5, emphasis supplied). Moreover, CHI, the consulting firm that prepared the preliminary engineering report, has been replaced by another firm, SEA Consultants. (Andrukiewicz, Tr. 6444-5). SEA Consultants will handle the “plan to build the facility” and to assist in the evaluation of the responses from LNG tank suppliers. (Andrukiewicz, Tr. 6445).

3.77 CMS Energy believes that Whessoe is qualified to construct LNG tanks in the United States. (J. Kelly Tr. 6261). [

] ([ ] (in camera). [ ] ([ ])

### Response to RFOF 3.77

Timely, likely and sufficient entry is not established just because some customers believe that Skanska/Whessoe is “qualified to construct LNG tanks in the United States” or that Skanska/Whessoe

is viewed as an “alternative” vendor. Having the potential to construct an LNG tank is not the same as acting as an effective price restraint on CB&I.

For all of CMS’ beliefs about Skanska/Whessoe, CMS ultimately chose CB&I over Skanska/Whessoe to construct the LNG tanks for its next LNG facility. (Glenn, Tr. 4399). The CMS example is one of failed entry.

3.78 British Petroleum would include Whessoe on a potential bidder list for LNG projects in the United States. (Sawchuck, Tr. 6062). [

] ( [ ] ). [ ] ( [ ] ).

### Response to RFOF 3.78

As with CMS, for all of [ ] beliefs about Skanska/Whessoe, [ ] ultimately chose [ ] CB&I over Skanska/Whessoe to construct the LNG tanks for [ ]. (Scorsone, Tr. 4995). The [ ] example is one of failed entry.

3.79 Calpine would be comfortable hiring Skanska to construct an LNG tank in the United States because Calpine considers Skanska one of the top two construction builders in the America. (Izzo, Tr. 6505). Calpine has no doubt that Skanska/Whessoe can build LNG tanks. (Izzo, Tr. 6498). Calpine considers Skanska to be an extremely qualified, large contractor. (Izzo, Tr. 6498). Based on his experience with Whessoe while at Enron, Izzo believes Skanska/Whessoe can construct an LNG tank in the United States to API standards. (Izzo, Tr. 6500). In Dabhol, Whessoe was able to coach the Indian contractor, Punj Lloyd, to construct its design. (Izzo, Tr. 6498). Therefore, a company with a competent engineering design could work with an American constructor to build an LNG in the United States. (Izzo, Tr. 6498). According to Larry Izzo, Skanska is “clearly one of the largest contractors in the world, one of the top builders in the United States.” (Izzo, Tr. 6496, 6505).

### Response to RFOF 3.79

Timely, likely and sufficient entry is not established just because Calpine may be “comfortable” hiring Skanska/Whessoe. Respondents do not cite any evidence that Skanska/Whessoe will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

As further discussed in CCRFF 3.587, Mr. Izzo of Calpine has not experienced the vicious competition between Respondents in the United States LNG market and, therefore, admits that he would not know if CB&I had raised prices to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.95, Calpine and other customers likely lack perfect information to know that because of the significant gap between Skanska/Whessoe’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Skanska/Whessoe’s price and (b) appears “reasonable” to the customer.

3.80 Freeport LNG knows that Skanska is a "very big" construction company. (Eyermann, Tr. 6980). Freeport LNG believes that Whessoe is "serious and trying to compete." (Eyermann, Tr. 6992). Freeport LNG believes that Skanska/Whessoe is a potential supplier of LNG tanks and plans to solicit a bid from Skanska/Whessoe for the Freeport LNG project. (Eyermann, Tr. 6993). Freeport LNG plans to solicit a bid from Skanska/Whessoe for its Freeport LNG facility. (Eyermann, Tr. 6993).

### Response to RFOF 3.80

This finding is misleading and incomplete. As noted in Complaint Counsel's Response to RFOF 3.574, 3.575, and 3.576, Mr. Eyermann lacks foundation to speak about the United States market since he "never worked on an LNG project in the U.S." (Eyermann, Tr. 7025). All of Mr. Eyermann's experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyermann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG tank bidders. (Eyermann, Tr. 7025-7028).

Timely, likely and sufficient entry is not established just because Freeport LNG may believe that Skanska/Whessoe is "serious and trying to compete." Respondents do not cite any evidence that Skanska/Whessoe will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

As explained in greater detail in Complaint Counsel's Response to RFOF 3.95, Freeport LNG and other customers likely lack perfect information to know that because of the significant gap between Skanska/Whessoe's prices for LNG tanks in the United States and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Skanska/Whessoe's price and (b) appears "reasonable" to the customer.

3.81 Freeport LNG is not concerned that Skanska/Whessoe has not previously built an LNG tank in the United States. (Eyermann, Tr. 6993-94). If Whessoe can build an LNG tank in India with Indian labor or in Trinidad with Trinidadian labor, "they should be able to do that in America with local labor." (Eyermann, Tr. 6994).

### Response to RFOF 3.81

Freeport LNG's lack of "concern" about Skanska/Whessoe's experience is irrelevant for the same reasons discussed in Complaint Counsel's Response to RFOF 3.80.

3.82 Bechtel also believes Whessoe is able to competitively pursue LNG jobs in the United States. (Rapp, Tr. 1326-27). Bechtel acknowledges that Whessoe is a tank builder with experience constructing LNG tanks internationally. (Rapp, Tr. 1316). Bechtel is "satisfied" that the tanks Whessoe built in Trinidad are "well-constructed." (Rapp, Tr. 1333).

### Response to RFOF 3.82

Timely, likely and sufficient entry is not established just because Bechtel "assumes" that Skanska/Whessoe may be able to competitively pursue LNG jobs in the United States. (Rapp, Tr. 1326-27). Respondents do not cite any evidence that Skanska/Whessoe will likely enter the United

States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

To the contrary, Mr. Rapp of Bechtel testified that "Bechtel does not have a favorable view of Whessoe's performance during" a prior construction project. (Rapp, Tr. 1289-90).

As explained in greater detail in Complaint Counsel's Response to RFOF 3.95, Bechtel and other customers likely lack perfect information to know that because of the significant gap between Skanska/Whessoe's prices for LNG tanks in the United States and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Skanska/Whessoe's price and (b) appears "reasonable" to the customer.

3.83 El Paso believes it would pre-qualify Skanska to build LNG tanks in the United States. (Bryngelson, Tr. 6131-32). El Paso already pre-qualified Skanska for its Altamira project. (Bryngelson, Tr. 6125-26). El Paso believes Skanska has sufficient financial stability to satisfy its requirements. (Bryngelson, Tr. 6128). Based on input received from its consultant KBR, El Paso believes that Skanska has a good reputation for building LNG tanks. (Bryngelson, Tr. 6130). El Paso believes that Skanska is capable of building LNG tanks in the United States at a competitive price. (Bryngelson, Tr. 6132).

### Response to RFOF 3.83

This finding is incomplete and misleading. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 9-10, 57, 116 (Bryngelson, Dep.)). Moreover, Mr. Bryngelson has never spoken to a single employee of Skanska about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

Timely, likely and sufficient entry is not established just because El Paso "believes" it would "pre-qualify" Skanska. Respondents do not cite any evidence that Skanska will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

For all of El Paso's beliefs about Skanska, El Paso decided to enter into sole-source negotiations with CB&I over Skanska for its next LNG projects. (Glenn, Tr. 4233-34). The El Paso example is one of failed entry.

As explained in CCRFF 3.578, Mr. Bryngelson has no knowledge of pricing competition for LNG tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). He has no direct knowledge of PDM. (Bryngelson, Tr. 6233).

3.84 Enron saw Skanska as a very large international engineering and construction company with operations in the U.S., and one of the larger contractors for steel structures in the U.S. (Carling, Tr. 4466). A former Enron employee with extensive experience in the LNG industry considers Whessoe as "very interested" and "increasingly enthusiastic" about competing in the United States market. (Carling, Tr. 4514). Carling would pre-qualify Skanska to obtain competitive bids for an LNG project in the United States. (Carling, Tr. 4485-86). In fact, Enron solicited a bid from Skanska/Whessoe for its Bahamas project based on Skanska's

"significant financial strength" and "logistical expertise". (Carling, Tr. 4481). Carling considers Skanska/Whessoe to be a competitor for LNG facilities in the United States because it is actively pursuing work in America. (Carling, Tr. 4482). Skanska wanted to be on the bidders list for several LNG opportunities in the United States. (Carling, Tr. 4482-83). Carling would consider hiring Skanska/Whessoe for an LNG project in the United States. (Carling, Tr. 4485).

### Response to RFOF 3.84

Timely, likely and sufficient entry is not established just because a former Enron employee considers Skanska/Whessoe as “very interested” about competing in the United States market. Respondents do not cite any evidence that Skanska/Whessoe will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

As shown in Complaint Counsel’s Response to RFOF 3.571-3.573, Mr. Carling has no experience at all in assessing the degree of competition between CBI and PDM on projects in the United States. (Carling, Tr. 4513). In the only instances in which Mr. Carling himself solicited bids for projects outside of the United States, the companies he relied upon to compete for the projects were CBI and PDM because “all the expertise was between PDM and CBI.” (Carling, Tr. 4500).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.95, customers likely lack information to know that because of the significant gap between Skanska/Whessoe’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Skanska/Whessoe’s price and (b) appears “reasonable” to the customer.

3.85 Clay Hall of Memphis, Light, Gas and Water believes that as of 1994 or 1995 Whessoe had significant international experience in building field-erected LNG tanks and that it had the capability to engineer an LNG tank. (Hall, Tr. 1805, 1845).

### Response to RFOF 3.85

This finding underscores the irrelevance of international LNG tank construction experience to the United States market. Complaint Counsel agrees that Mr. Hall believed that Whessoe had the experience and “capability” to engineer an LNG tank, but that experience did not translate into a LNG tank price that was competitive with CB&I or PDM. To the contrary, Whessoe’s price to Memphis in 1994 was 43% higher than CB&I and PDM. (CX 829 at 5; Hall, Tr. 1810, 1876; Price, Tr. 561, 648).

As one of the few witnesses to have experienced the vicious competition between Respondents before the merger and the ineffectiveness of foreign firms compared to Respondents, Mr. Hall has the foundation to testify that LNG tank prices will likely rise post-merger. According to Mr. Hall, “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.” (Hall Tr. 1830).

3.86 [ ])

### Response to RFOF 3.86

Timely, likely and sufficient entry is not established just because Whessoe may have an “acceptable reputation” as an LNG tank builder. Respondents do not cite any evidence that Skanska/Whessoe will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

To the contrary, [ ] testified that it is [ ] for a new entrant to come in and beat CB&I; [ ]

[ ]  
([ ], *see also* [ ], *in camera*). [ ] added that jobs where there has not been effective competition between CB&I and PDM have resulted in [ ] higher prices than jobs where there was a competitive bidding process. ([ ], *in camera*). Based on [ ] dealings with LNG facility owners, customers are “[ ]” ([ ], *in camera*).

3.87 Enron selected Whessoe to construct three LNG tanks in Dabhol, India. (Carling, Tr. 4455; Izzo, Tr. 6483). The Dabhol facility consisted of a power plant and an import facility. (Izzo, Tr. 6478). Enron used a competitive bid process to select the EPC contractor for the LNG import terminal. (Izzo, Tr. 6483). Enron solicited and received bids from Whessoe, PDM, Technigaz and CB&I for the Dabhol LNG tanks. (Carling, Tr. 4452; Izzo, Tr. 6483). Enron selected Whessoe for the three LNG tanks because it offered the lowest price. (Carling, Tr. 4455; Izzo, Tr. 6485). Nigel Carling, formerly of Enron, testified that the three bids submitted by Whessoe, PDM, and CB&I were within 5 percent (in U.S. dollars) of each other. (Carling, Tr. 4455).

#### Response to RFOF 3.87

Whessoe’s prices on a project in India have no bearing on its likely prices in the United States. As Respondents’ own witness Mr. Eyer mann testified, the “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 . . . on the Gulf Coast of Texas. . . It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyer mann, Tr. 7071-72).

3.88 Prior to selecting Whessoe as the winning bidder, Larry Izzo, formerly of Enron, reviewed Whessoe’s experience and his staff advised him that Whessoe was qualified to be a bidder and a winner. (Izzo, Tr. 6485).

#### Response to RFOF 3.88

Whessoe’s win on a project in India has no bearing on whether it is likely to restrain CB&I’s prices in the United States. Mr. Izzo, who selected Whessoe for the first phase of the India project for

Enron, agreed that “if a particular LNG tank firm is competitive in one part of the world, it does not necessarily mean the firm will be competitive in another part of the world.” (Izzo, Tr. 6521).

3.91 While the Whessoe group initially encountered some work glitches, Enron was satisfied with the quality of work by Whessoe, Kvaerner, and Punj Lloyd. (Carling, Tr. 4458-59). Kvaerner, Whessoe, and Punj Lloyd did an "excellent job" on the Dabhol tanks, and were responsive to Enron's earlier concerns about scheduling; Carling's opinion of their reputation rose after the project was completed. (Carling, Tr. 4464-65). Enron was pleased with Whessoe, Kvaerner, and Punj Lloyd because they were responsive and competent in controlling the local labor force. (Carling, Tr. 4459-60). The Dabhol job was more difficult to construct than the double containment tank built by PDM in Penuelas, Puerto Rico. The increased difficulty lay in the remoteness of the Indian facility and the quality of the labor force. (Carling, Tr. 4473-74).

### Response to RFOF 3.91

Respondents misleadingly state that Whessoe encountered only “some work glitches” on the Dabhol, India project. Concerns about Whessoe’s performance on the first three tanks of the project prompted Enron to select CB&I over Whessoe for the fourth LNG tank project. (CX 301 at CBI/PDM-H4002566). PDM’s Luke Scorsone expected a potential customer, Unocal, to look favorably upon PDM relative to Whessoe “given that [ ] Whessoe has performed poorly at Trinidad and Dabhol.” (CX 115 at PDM-HOU017554).

3.92 Whessoe/Kvaerner successfully constructed LNG tanks for Enron in Dabhol, India. (Izzo, Tr. 6488). Kvaerner and 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). By the end of the project, Enron was satisfied with the schedule, completion and quality of the Dabhol job. (Izzo, Tr. 6487).

### Response to RFOF 3.92

As explained in Complaint Counsel’s Response to RFOF 3.91, Whessoe’s performance on the Dabhol, India project was not a “success.”

3.93 [ ] ([ ]), [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

### Response to RFOF 3.93

Respondents’ sole support for this finding is the testimony of Mr. Jolly. It is irrelevant what Mr. Jolly of Technigaz thinks of [ ] as a competitor in the United States.

[ ] ([ ]), *in camera*). Technigaz has no basis to opine about whether [ ] will likely enter the United States in a timely and sufficient manner.

3.94 AT&V views Skanska/Whessoe as one of TKK/AT&V's competitors for LNG projects in the United States. (Cutts, Tr. 2450).



Response to RFOF 3.94

It is irrelevant what AT&V thinks of Skanska/Whessoe as a competitor in the United States. AT&V has never built an LNG tank in the United States. (Cutts, Tr. 2393-94). AT&V's fortunes in the LNG tank business are tied to TKK, its partner in the United States, but [ ] (Cutts, Tr. 2336, *in camera*). AT&V has no basis to opine about whether Skanska/Whessoe will likely enter the United States in a timely and sufficient manner.

3.95 [ ] (Glenn, Tr. 4221) (state of mind). Whessoe has been a longtime competitor in the global LNG market. (Scorsone, Tr. 4852). CB&I competed against Skanska for the Dabhol, India LNG project and for an LNG project in Spain. (Scorsone, Tr. 4863-64; Glenn, Tr. 4093). Skanska/Whessoe is competing in the U.S. for LNG tank projects, and specifically is involved in the development of the Hackberry, Louisiana LNG import terminal for Dynegy. (Scorsone, Tr. 4863).

Response to RFOF 3.95

CB&I's "state of mind" about Skanska/Whessoe is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Messrs. Glenn's and Scorsone's testimony about CB&I's "state of mind" are uncorroborated by Respondents' regular course of business documents and statements – many of which were authored or made by Messrs. Glenn and Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would "create barriers to entry" and use its "pricing advantage" to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I's "competitive advantages" in the United States and the absence of competition post-merger that had previously eroded CB&I's profitability; he also gave the October 31, 2002 conference call that touted CB&I's higher margins, improved business prospects and ability to win every project.

Moreover, CB&I's purported "state of mind" about Skanska/Whessoe and other competitors is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes. [ ]

[ ] is considered by Respondents to be so alien to its investors, employees and customers that Respondents request *in camera* treatment for its state of mind.

Respondents do not cite to any business record or competitive bidding instance in the United States LNG market in which the presence or perceived threat of competition from Skanska/Whessoe had any impact on CB&I's ability to win LNG projects or restrain its pricing. This is in stark contrast to the numerous pre-merger business records in which CB&I fretted that PDM "is eating our lunch" (CX 243 at CBI-PL 4004707) and that PDM loomed over CBI as its "main" competitor (CX 163 at CBI-PL006679). [ ]

[ ] one would expect a flurry of similar e-mails,

presentations and memos articulating [ ] and proposed countermeasures that CB&I should undertake. (*in camera*). Respondents cannot cite what does not exist.

CB&I's actual post-merger conduct demonstrates not that CB&I [ ] but rather that Skanska/Whessoe and other firms do not pose a competitive threat to CB&I's ability to exercise market power. The post-merger evidence consists of (1) CB&I's public statements, and (2) higher prices and margins on LNG projects, such as Cove Point, CMS and others.

(1) Beginning in 1997, CB&I filed a series of "S-1" forms with the SEC warning investors that competition from firms such as PDM negatively impacted CBI's profitability. CB&I stated in the section on "Risk Factors" that "**competition has resulted in substantial pressure on pricing and operating margins,**" that competitors had engaged in "**aggressive price competition,**" and that this competition required CB&I to react in a manner that "**adversely [ ] 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). Today, CB&I informs the SEC that it 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 that discuss "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).

Unrestrained by competition, CB&I's financial picture has improved since the merger. CBI's July 2002 "Investor Presentation" reports that since the "transformational acquisitions" in 2000, which includes the PDM acquisition, CBI'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.*). CB&I makes no mention of any threat from Skanska/Whessoe.

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). On the same day, CB&I held a conference call with the investment community to discuss its third-quarter financial results.

When asked how the competitive environment had changed "over the last five to ten years," Mr. Glenn answered as follows:

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).

When asked about CB&I's higher margins, Mr. Glenn responded as follows:

**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).

When asked about CBI's prospects going forward, Mr. Glenn answered as follows:

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); Scorsone, Tr. 5302, *in camera*).

(2) Mr. Glenn is sanguine about CB&I's ability to generate higher margins and win LNG projects because of CB&I's significant cost advantage against foreign firms, such as Skanska/Whessoe. This cost advantage permits CB&I to increase prices by as much as [ ] above

pre-merger levels, and still leaves CB&I sufficient cushion against Skanska/Whessoe's prices to allow customers to perceive that they have received "reasonable" prices from CB&I and other firms. CCFF 872. This cost advantage also permits CB&I to demand contract terms that are highly favorable to CB&I, e.g., refusing to work on an LNG project unless the customer agrees to a sole-source/turnkey arrangement with CB&I. CCFF 984. Although these types of arrangements are generally costlier to the customer, without an economically viable alternative to CB&I, the customer is likely to acquiesce.

The bidding experience from 1994 for Memphis Light Gas & Water's LNG project in Tennessee shows that Whessoe's price was 43% above CB&I's LNG tank price. CCFF 937. Consistent with the Memphis data point, CB&I's annual 10-K filings with the SEC reports 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...[and CB&I] 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)).

CB&I knew that increased market power obtained from acquiring PDM would not disappear as a result of new entry. In 1999, when CB&I previously considered acquiring PDM, a planning document predicted that the acquisition [ ] (CX 213 at CBI-PL033084, *in camera*). In October of 2000, after Respondents agreed to merge, Mr. Scorsone and other executives held a "brainstorming" session to define merger objectives, two of which were to (1) "Create barriers to entry as they can be built;" and (2) "Ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets." (CX 101 at PDM-HOU002359-60). Shortly after the "brainstorming" session, Mr. Scorsone and other members of the integration team held an "Integration Kick-off Meeting" in which it was agreed that CB&I would implement plans to (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 CBI 057941).

CB&I's cost advantage against Skanska/Whessoe and other LNG suppliers is also verified by price quotes submitted to [ ]. In November 1998, [ ] compiled "bids" from PDM, CB&I, and Whessoe for various sizes and types of LNG tanks. (RX 157 at [ ] 02 001-002, 02 004, *in camera*). Mr. Scorsone testified that [ ] price comparison model "very, very accurately" predicts LNG tank prices. (Scorsone, Tr. 4996). [ ] "very, very accurate[]" pricing model shows that Whessoe's prices are nearly double CB&I's prices. (Scorsone, Tr. 4996; RX 157 at [ ] 02 004, *in camera*). Whessoe's prices for a single containment LNG tank were far higher than CB&I's, ranging from [ ] higher, for [ ] cubic meter tanks, to [ ] higher for an [ ] cubic meter tank. (RX 157 at [ ] 02 004, *in camera*).

Based on actual prices obtained from CB&I, PDM and Whessoe, [ ] knew that CB&I and PDM offered significantly lower prices than other firms. [ ] knew that with the acquisition of PDM,

CB&I would “dominate” the United States market. Without PDM to turn to, [ ] could “deepen the market in the US by encouraging competition” from higher-priced alternatives like Skanska/Whessoe. However, because [ ] needs “guarantee[d] access to the resources” necessary to complete LNG projects in the United States, [ ] has no choice but to acquiesce to CB&I’s demand that [ ] work exclusively with CB&I, which may increase the costs to [ ]. CCF 831-882.

This price gap between CB&I and Skanska/Whessoe and other foreign firms permitted CB&I to exercise market power on the Cove Point project. On the Cove Point project, pre-merger competition between Respondents drove the price down from [ ] to approximately [ ]. CCF 779-788. On September 8, 2000, immediately after Respondents signed their letter of intent to merge, PDM raised the price to [ ] for one size tank and [ ] for a slightly larger tank. CCF 789-795. On November 2, PDM raised the price again to [ ]. This higher price incorporated cost items and profit and margin expectations from prior estimates that were already [ ] CCF 796-811. Since the November 2 bid, CB&I has [ ]. CB&I currently projects that it will earn a margin of approximately [ ] on Cove Point, or [ ] of the current price. This dollar amount is a little less than five times the projected margin of [ ] 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 [ ]. (RX 127 at CBI-H008204). CCF 813-815.

Respondents’ post-merger prices on Cove Point demonstrate that CB&I has established a new price curve that is substantially higher than its pre-merger price curve, but sufficiently below Whessoe’s price curve to assure that CB&I maintains a competitive advantage. CCF 833-928.

Since Cove Point, CB&I has used PDM’s [ ] cost estimates on Cove Point as a benchmark to implement higher prices and margins to CMS Energy. CMS is a sole-source negotiated fixed-price contract recently awarded to CB&I. (Scorsone, Tr. 5074). CMS was satisfied with the price of \$35 million quoted by CB&I for the 140,000-cubic meter, single containment tank. ([ ], Tr. 6260, 6284-85, *in camera*). CMS agreed to CB&I’s LNG tank price [ ]. ([ ], Tr. 6284-85, 6290, 6293, *in camera*).

Skanska/Whessoe quoted to CMS a price of approximately [ ], or about [ ] higher than CB&I’s price. ([ ], Tr. 6285, *in camera*). Skanska/Whessoe’s quote to CMS was essentially the same as Whessoe’s earlier quote to [ ] for a 140,000 cubic meter single containment LNG tank. (RX 157 at [ ] 02 004 *in camera*). After reviewing the Skanska/Whessoe budgetary quote, [ ] ([ ], Tr. 6284, *in camera*).

CMS did not know that prior to the acquisition, CB&I had quoted to [ ] a price of [ ] for a 140,000-cubic meter single containment LNG tank. (RX 157 at [ ] 02 004 *in camera*). In fact, CB&I’s price to CMS for the tank is [ ] higher than the price CB&I quoted for

that size tank prior to the acquisition. [( [redacted] )].

Moreover, when CMS accepted CB&I's \$35 million price, CMS [

] ([redacted], Tr. 6260, 6290, *in camera*). CMS observed, [

] ([redacted], Tr. 6284, *in camera*). CMS was unaware that the Cove Point price quoted by Respondents included “fat” and “excessive” cost estimates or that following the acquisition,

CB&I took advantage of project delays and change orders to inflate the price of the Cove Point LNG tank to [redacted]. ([redacted], Tr. 5333-34, *in camera*).

Despite [redacted] ([redacted], Tr. 6293, *in camera*), CB&I has imposed on CMS a price even higher than the current price of the Cove Point project.

Since Cove Point, CB&I has also used PDM's "fat" and "excessive" cost estimates on Cove Point as a benchmark to implement higher prices and margins on projects in Memphis, Tennessee (CCFF 944-954), Fairbanks, Alaska (CCFF 955-967), and the Yankee Gas project in Connecticut (CCFF 1007-1026). Indeed, CB&I has raised prices since the merger so that it can earn margins ranging from [redacted] to above [redacted], whereas before the merger, CB&I's margins on LNG projects averaged as little as [redacted]. CCFF 1027-1052.

3.96 Skanska's acquisition of Whessoe created a "formidable pair" in the LNG industry. (Scorsone, Tr. 4864). Scorsone has a high regard for Skanska/Whessoe as a competitor. (Scorsone, Tr. 4864).

#### Response to RFOF 3.96

For the reasons described in Complaint Counsel's Response to RFOF 3.95, CB&I's purported "high regard" for Skanska/Whessoe as a competitor is uncorroborated and contradicted by the evidence.

3.97 Gerald Glenn sees Skanska/Whessoe is a large competitor. (Glenn, Tr. 4092). Mr. Glenn believes that Skanska is currently ranked the largest engineering construction company in the world and the third largest in the United States for that division. (Glenn, Tr. 4093). Mr. Glenn believes that Skanska/Whessoe is promoting itself to many owners or potential projects in the area. (Glenn, Tr. 4094).

#### Response to RFOF 3.97

For the reasons described in Complaint Counsel's Response to RFOF 3.95, Mr. Glenn's purported view of Skanska/Whessoe as a "large competitor" is uncorroborated and contradicted by the evidence.

Moreover, Mr. Glenn testified that "when [redacted] first heard that [redacted] was a possibility of an outer concrete wall, that's what led [redacted] to believe that [redacted] may have to face Technigaz or Skanska/Whessoe as competitors." (Glenn, Tr. 4174-5). By Mr. Glenn's own words, this means that in a United States project that does **not** involve any concrete, Mr. Glenn believes that CB&I does **not** face any competition from Skanska/Whessoe and Technigaz.

3.98 [redacted] ([redacted], Tr. [redacted]) (state of mind). [redacted]

[redacted] ([redacted], Tr. [redacted]) (state of mind).



## Response to RFOF 3.98

CB&I's "state of mind" about Skanska/Whessoe is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

For the reasons described in Complaint Counsel's Response to RFOF 3.95, CB&I's "state of mind" regarding Skanska/Whessoe is uncorroborated and contradicted by the evidence.

## **2. TKK/ATV Has Not Entered the U.S. LNG Market**

3.99 Toyo Kanetsu K.K ("TKK"), established in 1941, is a Japanese company involved in the construction of low temperature and cryogenic tanks. (RX 872, at 2/14). TKK has successfully constructed some of the largest above ground storage tanks in the world, including 180,000 k/ crude oil tanks and a 180,000 k/ LNG tank. (RX 872, at 5/14; RX 186, at TWC 000084). With over 4,500 tank installations across the world, TKK is recognized as a leader in the field, and it claims to continue to set new records for size and safety. (RX 872, at 5/14; RX 186, at TWC 000084). TKK's annual sales are approximately 34.9 billion Yen. (RX 872, at 2/14).

## Response to RFOF 3.99

This finding is misleading and incomplete. TKK has done business all over the world for more than 50 years and, and yet, since 1975, TKK has not built a single LNG tank in the United States. CCFF 129-130.

Respondents sole support for this finding is taken from a TKK Company Profile and a TKK Systems Product Manual. (RX 872 and RX 186). Nothing in the materials discuss TKK's ability to compete in the United States to the same extent as PDM. There is no evidence that the materials were even reviewed by CB&I. 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).

There is also no evidence that the materials had any impact on CB&I bidding or pricing strategies. Respondents do not cite to any business record or competitive bidding instance in the United States LNG market in which the presence or perceived threat of competition from foreign LNG suppliers had any impact on CB&I's ability to win LNG projects or restrain its pricing. If foreign entry threatened CB&I as much as Respondents contend to this Tribunal, one would expect a flurry of e-mails, presentations and memos in CB&I's post-merger business documents. Respondents cannot cite what does not exist.

3.100 TKK is based in Japan but works on a world-wide basis. (*See e.g.*, RX 772, at 6-11/50). TKK has completed over 200 low temperature tanks throughout the world, including 72 LNG storage tanks. (RX 772, at 2-21/50; RX 818). TKK has built LNG tanks in Malaysia, Brunei, Oman, Nigeria, Australia, Indonesia, Algeria, nd Korea. (RX 772, at 2-21/50). TKK has also built low temperature tanks in Qatar, Saudi Arabia, Greece, Iran, Iraq, Libya, Taiwan, and Japan. (RX 772, pp. 2-21).

### Response to RFOF 3.100

Respondents support for this finding comes from a TKK Product Guide (RX 772) and a press release. (RX 818). As discussed in CCRFF 3.99, Respondents have not shown that CB&I reviewed these types of marketing brochures or that these materials have had any impact upon CB&I's business strategies.

This finding is incomplete and misleading. TKK's experiences in "Malaysia, Brunei, Oman, Nigeria, Australia, Indonesia, Algeria, and Korea" does not prove that TKK can construct LNG tanks in the United States at the same low-cost levels as PDM. Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier's work in one country is "not relevant" to its work in another country, including price comparisons: "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. . . It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071).

Respondents have also not shown that TKK can overcome country-specific barriers to entry, such as: knowing local regulations and local subcontractors, having established customer contacts locally, bidding experience in the United States, an experienced work force, and possessing a fabrication facility and equipment in the United States. CCFF 370-385. Respondents cannot show that TKK is capable of surmounting these barriers to entry because TKK has never constructed an LNG tank in the United States. CCFF 136.

3.101 TKK is the "world's leader" in constructing double containment and full containment LNG tanks. (Cutts, Tr. 2572-73). TKK has build more double containment and full containment LNG tanks than any other constructor in the world. (Cutts, Tr. 2572-73).

### Response to RFOF 3.101

Mr. Cutts' testimony is self-serving and uncorroborated. There is no evidence that TKK is the "world leader" in constructing double containment and full containment LNG tanks. To the contrary, the only double containment tank built in the United States (Puerto Rico) was constructed by PDM, not TKK. (Izzo, Tr. 6516-17). [

]. (CX 693 at [ ] 01 0127, *in camera*; Glenn, Tr. 4180). For all of TKK's self-touting about its double and full containment experience, it has yet to win an LNG project of any kind in the United States.

3.102 American Tank & Vessel, Inc. ("AT&V") is an engineering and construction firm that was incorporated in 1982. (RX 818). AT&V, based in Mobile, Alabama, offers complete turnkey services for, and has extensive experience in, the engineering, design, and fabrication of tanks, vessels and spheres. (RX 31, at 9/70; Carling, Tr. 4489).

### Response to RFOF 3.102

Respondents' finding is misleading because it implies that AT&V has experience in the relevant market. **AT&V has never built an LNG tank of any kind.** (Cutts, Tr. 2393-94, emphasis supplied). Because the construction process for an LNG tank is different than that of constructing an ambient tank, AT&V's experience in other industries is not relevant. CCRFF 3.26.

3.103 AT&V has engineering facilities in Birmingham, Alabama, Houston, Texas, George County, Mississippi, and Mobile, Alabama. (RX 31, at 1/70). AT&V also has fabrication facilities in George County, Mississippi and Houston, Texas. (RX 31, at 1/70). The Mississippi fabrication facility contains five sets of plate rolls and three presses. (RX 31, at 2/70). AT&V's field erection equipment consists of automatic welding equipment, cranes, air compressors, and generators. (RX 31, at 3/70).

### Response to RFOF 3.103

Respondents' finding is incomplete and misleading. Possessing a fabrication facility and equipment are just a few of many qualifications necessary to replace PDM in the relevant markets. Mr. Cutts, vice president of AT&V, testified that AT&V would still need the following assets to effectively compete in the relevant markets: “. . . [ ] 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.” (Cutts, Tr. 2372).

Mr. Cutts also emphasized AT&V's competitive disadvantages with regard to its lack of experience and lack of name recognition. Mr. Cutts suggested that in order to build a reputation similar to that of PDM, AT&V would have to spend over a million dollars in marketing alone for the next three years. (Cutts, Tr. 2382). AT&V would also be less competitive without the PDM “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).

3.104 In addition to the U.S., AT&V maintains global operations of service and support in Mexico, Argentina, Brazil, Ecuador, Trinidad, Philippines, Indonesia, and Thailand. (RX 31, at 19/70). AT&V has worked on “hundreds and hundreds” of projects overseas. (Cutts, Tr. 2476-77). AT&V has brought over foreign employees from Indonesia, Japan, Venezuela and Argentina to the U.S. to witness the construction of projects several times in the past five years. (Cutts, Tr. 2477-78). TKK/AT&V have established partnerships with two companies located in Trinidad and one firm in Chile for field-erected tanks. (Cutts, Tr. 2481).

### Response to RFOF 3.104

Respondents' finding is false. Mr. Cutts did not testify that his firm had worked on “hundreds and hundreds” of **projects** overseas. Mr. Cutts was asked “What **companies** have you dealt with in the past?” and he answered “It would be hundreds and hundreds.” (Cutts, Tr. 2477) (emphasis supplied). Moreover, bringing foreign workers to “witness” unspecified construction projects does not mean those same workers have the skills to construct LNG tanks in the United States in a cost-effective manner.

3.105 In November 2001, AT&V entered into an agreement with TKK to jointly supply all types of large-scale LNG storage tanks to the U.S. market. (RX 250; Cutts, Tr. 2437-38; RX 818 (state of mind)). As part of this joint venture, TKK will carry the lead responsibility for performing the engineering and design work for LNG tanks. (Cutts, Tr. 2327). AT&V will be responsible for providing the field labor and field erection for LNG tanks in North America. (Cutts, Tr. 2328). Additionally, TKK and AT&V have "developed an understanding and general relationship" to also jointly pursue projects outside of North America. (Cutts, Tr. 2444).

### Response to RFOF 3.105

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. Timely, likely and sufficient entry is not established just because AT&V/TKK have established a joint venture. Respondents do not cite any evidence that AT&V/TKK will likely restrain CB&I's prices to the same level as PDM did before the merger. As explained in Complaint Counsel's Response to RFOF 3.95, the post-merger evidence – consisting of Respondents' statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I's market power. Absent evidence of an ability to restrain CB&I's market power, AT&V/TKK is not an entrant who satisfies Respondents' burden of proving that timely and sufficient entry has occurred or is likely to occur.

Respondents' first statement relies on the same evidence as RFOF 3.99 and is irrelevant for the reasons noted in Complaint Counsel's Response to RFOF 3.99. CB&I's "state of mind" about AT&V's agreement with TKK is just that, and nothing more; the press release was not offered or admitted for the truth of the matter asserted therein.

AT&V has never built a single, double or full containment LNG tank. (Cutts, Tr. 2393-94). AT&V's fortunes in the LNG tank business are tied to TKK, a firm that has never built an LNG tank in the United States. (Cutts, Tr. 2336).

3.106 AT&V chose TKK as its partner because of TKK's track record in the LNG industry and other tank structures. (Cutts, Tr. 2462). AT&V entered into the relationship with TKK to obtain the "complete package of technology" for building LNG projects in the U.S. (Cutts, Tr. 2463-64). TKK will provide engineering expertise, management expertise, and welding technology to the TKK/AT&V partnership. (Cutts, Tr. 2376-77).

### Response to RFOF 3.106

There is no evidence that by forming a joint venture, AT&V and TKK together can overcome the competitive disadvantages that historically made them ineffective or non-existent competitors to Respondents. As shown in Complaint Counsel's Responses to RFOF 3.103 and 3.105, AT&V and TKK are competitively disadvantaged compared to CB&I and cannot replace PDM.

3.107 Part of AT&V's goal in building a relationship with TKK for LNG projects is to provide stability: "stability requires you to sometimes do things at break even or modest profitability or almost none at all . . . ." (Cutts,

Tr. 2461). AT&V is also aware of TKK's ability to obtain better bonding capacity. (Cutts, Tr. 2556-57).

Customers have felt satisfied that TKK is of sufficient size to be able to provide a financial guarantee for an LNG project. (Cutts, Tr. 2557-58).

### Response to RFOF 3.107

There is no evidence that at “break even or modest profitability or almost none at all” AT&V/TKK will be able to restore competition to pre-merger levels. Respondents present no evidence that AT&V/TKK can fill the significant cost gap between Respondents and other LNG tank suppliers. In bidding for the Memphis project, Respondents submitted price quotes that reflected a 59% cost advantage over TKK, which had partnered with another American construction firm. CCF 937, 952. AT&V/TKK will have to price significantly below “break even” levels in order to come near PDM’s cost structure.

Because the ability to obtain bonding is only one of many requirements needed in order to compete in the United States, bonding capability does not mean that a firm can compete effectively with CB&I. CCF 304-306. Competitors must possess intangible assets, such as experience constructing the relevant products in the United States, a reputation, business relationships with local subcontractors and material vendors, and a track record that shows successful completion of multiple projects. CCF 305.

3.108 AT&V is capable, by itself, of building double-wall steel LNG tanks. (Cutts, Tr. 2439). Prior to entering into the joint venture with TKK, AT&V solicited work from customers for LNG tanks. (Cutts, Tr. 2438). Employees of AT&V have experience building LNG tanks in the U.S. (Cutts, Tr. 2463). AT&V believes that its existing fabrication facilities are sufficient to pursue and fabricate LNG tanks in the U.S. market. (Cutts, Tr. 2457). AT&V has undertaken steps to research, design, and develop steps associated with scheduling, welding technology, and general construction sequencing for LNG tanks. (Cutts, Tr. 2440). AT&V has researched and developed techniques to weld nine percent nickel steel. (Cutts, Tr. 2464).

### Response to 3.108

What Mr. Cutts’ believes about his firm’s capabilities is far removed from what it has accomplished in the LNG market. AT&V has never constructed an LNG tank. (Cutts, Tr. 2393-94).

There is no evidence that the steps undertaken by AT&V have lowered its costs vis-a-vis Respondents. It is undisputed that CB&I and PDM were the only two companies that had extensive experience building the relevant products in the United States. CCF 136, 151, 172, 192, 393-398. As a result of their extensive localized experience and knowledge, Respondents currently have a distinct competitive advantage against other firms, particularly foreign suppliers. CCF 400-418. This was shown in the Memphis project when TKK, partnered with another American construction firm, submitted a price significantly higher than Respondents. CCF 952.

3.109 AT&V has expended capital on the TKK/AT&V joint venture for estimating, drafting, design, coordinating, and bidding. (Cutts, Tr. 2341-42). Personnel from TKK have come to AT&V’s offices to train employees. (Cutts, Tr. 2441). TKK has trained employees of AT&V for LNG tanks on estimating, scheduling, construction techniques, welding, operation of welding equipment, and coordinating. (Cutts, Tr. 2324-25). TKK and AT&V will bear its own costs for the training of employees. (Cutts, Tr. 2443).

### Response to RFOF 3.109

As explained in greater detail in Complaint Counsels' Response to RFOF 3.108, "expend[ing] capital," and "train[ing] employees" does not constitute sufficiency of entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

- 3.110 TKK has also trained an AT&V project manager on scheduling, and has plans to train field employees and fabrication shop employees of AT&V. (Cutts, Tr. 2325-26, 2442). TKK personnel have spent between 40 and 250 hours training with AT&V's estimators. (Cutts, Tr. 2441).

### Response to RFOF 3.110

As explained in greater detail in Complaint Counsels' Response to RFOF 3.108, "train[ing] field employees and fabrication shop employees" does not constitute sufficiency of entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

- 3.111 TKK has provided information to AT&V to assist it in the development of technical specifications for LNG tanks. (Cutts, Tr. 2564-65) TKK will be sharing welding technology with AT&V, and plans to train AT&V's welders on nine percent nickel steel. (Cutts, Tr. 2442, 2565-66).

### Response to RFOF 3.111

As explained in greater detail Complaint Counsels' Response to RFOF 3.108, "providing information" does not constitute sufficiency of entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

- 3.112 AT&V has independently taken steps to provide LNG construction services to customers in the U.S. by marketing, researching, staffing, bidding and by procuring equipment. (Cutts, Tr. 2437). AT&V's marketing steps include publicizing its capabilities, calling on customers, and educating its sales force. (Cutts, Tr. 2439). AT&V emphasizes its relationship with TKK with respect to its marketing effort for large scale LNG tanks in the U.S. (Cutts, Tr. 2439). AT&V has created formal marketing materials that allude to TKK as its partner. (Cutts, Tr. 2439-40).

### Response to RFOF 3.112

As explained in Complaint Counsels' Response to RFOF 3.108, "marketing, researching staffing, bidding and ... procuring equipment" does not constitute sufficiency of entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

- 3.113 TKK's sales force will supplement AT&V's sales force in the LNG area. (Cutts, Tr. 2569-70). While AT&V and TKK jointly made sales calls to customers, TKK does its own sales and marketing in the U.S. as well. (Cutts, Tr. 2440). AT&V, with Dywidag and TKK, recently approached Linde to form an alliance to build import terminals and peak-shaving plants. (Kistenmacher, Tr. 902-03, 915).



### Response to RFOF 3.113

As explained in Complaint Counsels' Response to RFOF 3.108, making joint "sales calls," doing "marketing in the U.S.," and "approaching" customers does not constitute sufficiency of entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

3.114 AT&V/TKK have bid on three LNG projects for three separate customers during the past year. (Cutts, Tr. 2464-65). TKK/AT&V has also submitted budget pricing for three LNG projects. (Cutts, Tr. 2447). For a given project that TKK/AT&V work on, each company places a profit on the job, and neither company discloses to the other what their profits will be. (Cutts, Tr. 2482-84).

### Response to RFOF 3.114

As explained in Complaint Counsels' Response to RFOF 3.108, making bids and submitting budget pricing does not constitute timely, likely, and sufficient entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks. For example, TKK made a "bid" and submitted "budget pricing" to Memphis, but provided no competitive threat to Respondents because of its significantly higher costs and prices.

Moreover, as explained in CCRFF 3.95, there is no evidence that the presence of TKK and AT&V in bidding situations has restrained CB&I's market power. Entry that is timely, likely and sufficient must deter or counteract the likely anticompetitive effects of a merger. In this case, all of CB&I's post-merger public statements, regular course of business documents and pricing to customers, such as CMS, the Cove Point owners and other LNG projects, indicate that it has market power and that foreign firms have not restrained CB&I's ability to raise prices and margins. The post-merger evidence reflects a complete reversal of CB&I's fortunes from before the merger when PDM served as CB&I's closest competitor and price restraint. The actual post-merger evidence belies Respondents' contention that TKK and other would-be entrants have deterred or counteracted the anticompetitive effects of this merger.

3.115 Around February 1, 2002, TKK/AT&V submitted a bid proposal to Dynegy for the construction of three LNG tanks. (Puckett, Tr. 4556; Cutts, Tr. 2468-69). Both TKK and AT&V assisted in preparing the bid proposal. (Cutts, Tr. 2470). TKK/AT&V's bid met Dynegy's technical expectations and was within Dynegy's expected price range. (Puckett, Tr. 4557). Dynegy is "entirely comfortable with ATV and TKK and their ability to execute" the contract for Dynegy. (Price, Tr. 639-40).

### Response to RFOF 3.115

Submitting bid proposals does not constitute timely, likely, and sufficient entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks. As explained further in CCRFF 3.123, the Dynegy example only shows that customers post-acquisition will be saddled with prices that may appear to be within the "expected price range" but are in reality significantly higher than had CB&I not acquired PDM.

3.116 TKK/AT&V have a comprehensive plan for executing the Dynegy job through its own work and the extensive use of subcontractors. For example, if TKK/AT&V win the Hackberry LNG project, it will subcontract the concrete work to Dywidag. (Cutts, Tr. 2471-72). Dywidag, a German company partnered with TKK/AT&V, is responsible for performing civil engineering and civil construction coordination. (Cutts, Tr. 2358-59, 2472-73, 2484-85). Dywidag will also implement the engineering and design that TKK submits for the project. (Cutts, Tr. 2484-85).

#### Response to RFOF 3.116

As explained in Complaint Counsels' Responses to RFOF 3.108 and 3.114, "hav[ing] a comprehensive plan" for how to execute a project does not constitute timely, likely, and sufficient entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

3.117 AT&V, TKK, and Dywidag have had discussions in an attempt to lower their bid price by reducing their costs. (Cutts, Tr. 2488).

#### Response to RFOF 3.117

As explained in Complaint Counsels' Responses to RFOF 3.108 and 3.114, "hav[ing] discussions" regarding how to execute a project does not constitute timely, likely, and sufficient entry, and does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

3.118 AT&V does not expect that Japanese laborers will participate in the erection of the Hackberry LNG tanks. (Cutts, Tr. 2472-73). AT&V personnel and the subcontractors will be responsible for tank erection while four to eight Japanese employees will travel to the United States to supervise. (Cutts, Tr. 2472-73). A lot of the engineering will be done by TKK, in Japan, and electronically transmitted to AT&V for review. (Cutts, Tr. 2473).

#### Response to RFOF 3.118

As further discussed in Complaint Counsel's Responses to RFOF 3.108 and 3.114, Respondents' finding is irrelevant. How AT&V and TKK intend to divide tank construction responsibilities between each other does not prove that entry by the partnership has been timely, likely, or sufficient. Most importantly, it does not show that the TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks.

3.119 AT&V predicts that the joint venture will purchase components from both Japan and the United States. (Cutts, Tr. 2473-74). The joint venture will purchase components from the country offering the best price, schedule, quality, and process. (Cutts, Tr. 2473-74). Heavy nine percent nickel steel will be purchased from Japan. (Cutts, Tr. 2474-75). TKK/AT&V plan on fabricating components in the country from which they are purchased. (Cutts, Tr. 2473-74). Thus, a component purchased in Japan will be fabricated in Japan and a component purchased in the United States will be fabricated in the United States. (Cutts, Tr. 2473-75).

#### Response to RFOF 3.119

How AT&V and TKK intend to “purchase components” does not prove that entry by the partnership has been timely, likely, or sufficient. Most importantly, it does not show that the

TKK/AT&V joint venture can replace PDM as a low cost, quality supplier of LNG tanks. CCRFF 3.108 and 3.114.

3.120 TKK has also provided a comprehensive budget quotation package to Halliburton KBR in connection with Williams plans to expand its existing Cove Point LNG facility in Cove Point, Maryland. (See RX 185). This budget pricing package contains engineering designs, pricing, estimates and detailed technical drawings and reports. (See RX 185). To execute this project, TKK has formed a consortium with Dywidag. (RX 185, at TWC 000035). TKK will be responsible for the project management, engineering, procurement, and construction of the tanks. (RX 185, at TWC 000035). Dywidag will be responsible for the civil design/engineering, while AT&V will be responsible for the construction, under TKK's direct control. (RX 185, at TWC 000035-36).

### Response to RFOF 3.120

As explained in Complaint Counsel's Response to RFOF 3.108, timely, likely and sufficient entry is not established just because TKK has provided pricing information to a customer or "formed a consortium with" another firm. The fact remains that TKK and AT&V have never constructed an LNG tank in the United States. CCF 136. Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

3.121 In 2001, TKK/AT&V approached Freeport LNG for a proposed LNG project in Freeport, Texas. (Eyer mann, Tr. 6999-7000). TKK/AT&V prepared presentations on the companies' capabilities, and discussed contracting capabilities. (Eyer mann, Tr. 7000-01). AT&V portrayed the TKK/AT&V to Freeport LNG as being "at the forefront of the [cryogenic tank] industry within the United States." (RX 936) (state of mind).

### Response to 3.121

This finding is misleading and incomplete. Mr. Eyer mann lacks foundation to speak about AT&V/TKK because he has never worked with either firm. (Eyer mann, Tr. 7062).

Moreover, CB&I's "state of mind" evidence about what AT&V "portrayed" to Freeport LNG is just that, and nothing more; the document from which Respondents cite was not offered or admitted for the truth of the matter asserted therein.

It is irrelevant that TKK/AT&V "approached" Freeport LNG. Entry is not timely, likely and sufficient just because TKK/AT&V had a meeting with a potential customer.

Moreover, the project is uncertain. TKK/AT&V may never build an LNG tank for Freeport LNG because Freeport LNG is not "sure" whether the LNG project will ever come to fruition or even if bids from TKK/AT&V and other firms will ever be sought. (Eyer mann, Tr. 7043-44).

3.122 TKK/AT&V also successfully competed against CB&I for an LNG tank project in Trinidad. (Carling, Tr. 4488-89).

### Response to RFOF 3.122

Respondents' finding misconstrues the record. First, Trinidad is not in the relevant geographic market, which makes it irrelevant to assessing TKK/AT&V's competitiveness in the United States LNG market. Second, Respondents completely ignore the fact that CB&I increased its price for the fourth tank of the Trinidad project. (JX 11 at 2). *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).

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).

3.123 Dynegy is satisfied that TKK/AT&V has the reputation necessary to construct the Hackberry LNG tanks, is capable of doing the necessary fabrication and field erection work on the Hackberry LNG tanks and will be able to manage the actual construction of the LNG tanks for the Hackberry facility. (Puckett, Tr. 4557-58). Dynegy was "quite comfortable about the capability of teaming TKK with AT&V and the ability to execute a project here in the States." (Puckett, Tr. 4584-85).

### Response to RFOF 3.123

The Dynegy story is hardly an example of sufficient entry; rather, it is an example of an anticompetitive effect. First, CB&I persistently refused to bid except on terms that would permit it to earn higher margins – a bidding structure that Dynegy desired to avoid through competitive bidding. Second, CB&I's deliberate refusal to bid under Dynegy's rules forced Dynegy to incur higher prices by turning to higher-cost foreign LNG firms like TKK/AT&V. TKK/AT&V may "win" the LNG tank contract only because CB&I refused to participate in the bidding. As a result, Dynegy will pay more for its LNG tanks than it would have paid absent the acquisition. *See* CCRFF 3.68. Mr. Price, who was involved in the bidding for the Memphis project in 1994 and has first-hand knowledge about TKK's high price for the LNG tank, expressed "concerns" that the price Dynegy will pay for the LNG tanks would be "higher" using TKK/AT&V or some other foreign firm than if CB&I had been selected. (Price, Tr. 590, 622). CCF 937.

3.124 CMS believes that TKK is qualified to build LNG tanks in the U.S. (J. Kelly, Tr. 6262).

### Response to RFOF 3.124

It is irrelevant that CMS may "believ[e] that TKK is qualified," because CMS has decided to sole-source its project with CB&I, indicating that the TKK/AT&V joint venture is not competitive and does not constitute timely, likely and sufficient entry.

3.125 [

] ( [ ]).



### Response to RFOF 3.125

As further explained in CCRFF 3.133, timely, likely and sufficient entry is not established just because a customer believes that TKK may have a “good reputation” as an LNG tank builder. Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

3.126 El Paso would pre-qualify TKK for a U.S. based LNG project. (Bryngelson, Tr. 6131-32). El Paso believes that TKK has sufficient financial stability, and is technically capable to build LNG tanks. (Bryngelson, Tr. 6128). El Paso pre-qualified TKK for LNG projects in Altamira, Mexico and Rosarito, Mexico. (Bryngelson, Tr. 6125-26).

### Response to RFOF 3.126

This finding is misleading and incomplete. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 8-10, 57, 116 (Bryngelson, Dep.)). Moreover, Mr. Bryngelson has never spoken to a single employee of TKK about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

Timely, likely and sufficient entry is not established just because El Paso would “pre-qualify” TKK/AT&V. Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger. To the contrary, Mr. Bryngelson of El Paso has no knowledge of pricing competition for LNG tanks in the United States prior to or after the merger. (Bryngelson, Tr. 6246-47).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.95, El Paso and other customers likely lack perfect information to know that because of the significant gap between TKK/AT&V’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts TKK/AT&V’s price and (b) appears “reasonable” to the customer.

3.127 Nigel Carling, a former Enron employee with substantial experience in the LNG industry, would pre-qualify TKK/AT&V for a U.S. LNG project. (Carling, Tr. 4447-48, 4485-86, 4489). Carling believes that TKK’s prices for LNG tanks in the U.S. will be competitive to the level of PDM’s prices. (Carling, Tr. 4519). Since TKK has a proven track record of entering into alliances with local contractors in countries such as Egypt, Indonesia, and Ras Laffan, Carling believes that TKK will be successful working in the U.S. (Carling, Tr. 4522-23). Mr. Carling is aware that AT&V employs many ex-CB&I workers. (Carling, Tr. 4489).

### Response to RFOF 3.127

Timely, likely and sufficient entry is not established just because a former Enron employee “would pre-qualify TKK/AT&V for a U.S. LNG project.” Respondents do not cite any evidence that

TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger. To the contrary, Mr. Carling had no experience at all in assessing the degree of competition between CBI and PDM on projects in the United States. (Carling, Tr. 4513). In the only instances in which Mr. Carling himself solicited bids, the companies he relied upon to compete for the projects were CBI and PDM because "all the expertise was between PDM and CBI." (Carling, Tr. 4500).

As explained in greater detail in Complaint Counsel's Responses to RFOF 3.95 and 3.135, customers have imperfect information and cannot know that because of the significant gap between TKK/AT&V's prices and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts TKK/AT&V's price and (b) appears "reasonable" to the customer.

3.128 Bechtel would consider pre-qualifying TKK for an LNG project in the U.S. (Rapp, Tr. 1326). Bechtel acknowledges TKK as having international LNG experience. (Rapp, Tr. 1326).

#### Response to RFOF 3.128

Timely, likely and sufficient entry is not established just because Bechtel "would consider pre-qualifying TKK for an LNG project in the U.S." Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

As explained in greater detail in Complaint Counsel's Responses to RFOF 3.95 and 3.135, Bechtel and other customers likely have imperfect information and cannot know that because of the significant gap between TKK/AT&V prices for LNG tanks in the United States and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts TKK/AT&V's price and (b) appears "reasonable" to the customer.

3.129 Calpine would put TKK/AT&V on its EPC bid list for a proposed LNG tank project in Humboldt Bay, California. (Izzo, Tr. 6494-95). Calpine believes that TKK/AT&V has the experience and the balance sheet necessary to construct a large LNG project. (Izzo, Tr. 6495). Calpine further believes that AT&V is a competent cryogenic tank contractor that could compete on an LNG tank project alone, if TKK guaranteed it. (Izzo, Tr. 6499, 6536).

#### Response to 3.129

Timely, likely and sufficient entry is not established just because Calpine would "put TKK/AT&V on its EPC bid list." Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger. Moreover, Mr. Izzo of Calpine is not qualified to opine on the competitive environment post-acquisition. Mr. Izzo has not experienced the vicious competition between Respondents in the United States LNG market and, therefore, admits that he would not know if CB&I had raised prices to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.135, Calpine and other customers likely have imperfect information and cannot know that because of the significant gap between TKK/AT&V’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts TKK/AT&V’s price and (b) appears “reasonable” to the customer.

3.130 Freeport LNG received a variety of documents from TKK/AT&V, and met with its representatives regarding the Freeport LNG project. (Eyermann, Tr. 7002-04). Freeport LNG believes that TKK/AT&V is a strong competitor for U.S. LNG projects. (Eyermann, Tr. 7004-05). Freeport LNG perceives that AT&V has quality welders which will be sufficient to perform the proposed LNG project in Freeport, Texas. (Eyermann, Tr. 7001-02). Freeport LNG also believes that TKK is a qualified tank constructor with the ability to adapt to different working conditions in different countries. (Eyermann, Tr. 7000, 7004-05). Freeport LNG plans on soliciting bids from TKK/AT&V, even though the partnership has never constructed a field erected LNG tank in the U.S. (Eyermann, Tr. 7005).

### Response to RFOF 3.130

This finding is misleading and incomplete. Mr. Eyermann lacks foundation to speak about the United States market since he “never worked on an LNG project in the U.S.” (Eyermann, Tr. 7025). All of Mr. Eyermann’s experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyermann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG tank bidders. (Eyermann, Tr. 7025-7028).

Moreover, Mr. Eyermann lacks foundation to speak about AT&V/TKK because he has never worked with either firm. (Eyermann, Tr. 7062).

Timely, likely and sufficient entry is not established just because Freeport LNG may believe that TKK/AT&V is “a strong competitor.” Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

Furthermore, Mr. Eyermann of Freeport LNG lacks foundation to comment on the capabilities of the TKK/AT&V joint venture. Mr. Eyermann has never participated in choosing an LNG tank constructor anywhere and has not experienced the vicious competition between Respondents in the United States. (Eyermann, Tr. 7025-7031).

As explained in greater detail in Complaint Counsel’s Responses to RFOF 3.95 and 3.135, Freeport LNG and other customers likely have imperfect information cannot know that because of the significant gap between TKK/AT&V’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts TKK/AT&V’s price and (b) appears “reasonable” to the customer.

3.131 S&B Engineers and Constructors approached TKK/AT&V in the past year to solicit their services for LNG projects. (Cutts, Tr. 2450-51).



Response to RFOF 3.131

Entry is not timely, likely, or sufficient just because a customer “approached” TKK/AT&V to “solicit their services for LNG projects.” Respondents have presented no evidence to show that TKK/AT&V will enter the U.S. LNG market in a timely and sufficient manner.

3.132 MLGW permitted TKK to bid on an LNG project in 1994 because it believed TKK was capable of building field-erected LNG tanks in the United States. (Hall, Tr. 1805, 1849-50). MLGW would consider soliciting a bid from TKK/AT&V if and when it requires an additional LNG facility. (Hall, Tr. 1854).

Response to RFOF 3.132

Complaint Counsel agrees that Mr. Hall “permitted TKK to bid on” the LNG project in 1994 to engineer an LNG tank, but that experience did not translate into a LNG tank price that was competitive with CB&I or PDM. To the contrary, TKK’s price to Memphis in 1994 was 59% higher than CB&I and PDM. (CX 829 at 5; Hall, Tr. 1810, 1876; Price, Tr. 561, 648). Furthermore, Respondents’ finding is misleading. MLGW would only “consider soliciting a bid from TKK/AT&V” because “You would consider anyone that says they’re qualified.” (Hall, Tr. 1854).

As one of the few witnesses to have experienced the vicious competition between Respondents before the merger and the ineffectiveness of foreign firms compared to Respondents, Mr. Hall has the foundation to testify that LNG tank prices will likely rise post-merger. According to Mr. Hall, “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.” (Hall Tr. 1830).

3.133 [ ] ([ ]).

Response to RFOF 3.133

Timely, likely and sufficient entry is not established just because TKK may have an “good reputation worldwide” as an LNG tank builder. Respondents do not cite any evidence that TKK/AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

[ ] testified that it is [ ] for a new entrant to come in and beat CB&I; [ ]

[ ] ([ ], *in camera*). [ ] added that jobs where there has not been effective competition between CB&I and PDM have resulted in [ ] higher prices than jobs where there was a competitive bidding process. ([ ], *in camera*). Based on [ ] dealings with LNG facility owners, customers are “[



camera). ]” ([ ], *in*

3.134 [ ] ([ ]).

#### Response to RFOF 3.134

It is irrelevant what [ ] thinks of TKK as a competitor in the United States. [ ] has never built an LNG tank in the United States (CCFF 136), and does not have a sense of the cost of building LNG tanks in the U.S. ([ ], *in camera*). As a result, [ ] has no basis to opine about whether TKK/AT&V will likely enter the United States in a timely and sufficient manner.

3.135 Based on RX 818, a press release announcing the TKK/AT&V partnership, CB&I perceives that TKK/AT&V is very serious about capturing LNG storage work in the United States and North American. (Scorsone, Tr. 4856, 4861) (Glenn, Tr. 4102) (state of mind evidence).

#### Response to 3.135

CB&I’s “state of mind” testimony regarding TKK/AT&V as a “very serious” competitor that wants to “capture LNG storage work” is just that, and nothing more; Respondents’ press release was not offered or admitted for the truth of the matter asserted therein.

As explained in Complaint Counsel’s Response to RFOF 3.95, Messrs. Glenn’s and Scorsone’s testimony about CB&I’s “state of mind” are uncorroborated by Respondents’ regular course of business documents and statements – many of which were authored or made by Messrs. Glenn and Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would “create barriers to entry” and use its “pricing advantage” to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I’s “competitive advantages” in the United States and the absence of competition post-merger that had previously eroded CB&I’s profitability; he also gave the October 31, 2002 conference call that touted CB&I’s higher margins, improved business prospects and ability to win every project.

CB&I’s purported “state of mind” about TKK/AT&V and other competitors is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes. Ironically, CB&I’s purported beliefs regarding [ ] is considered by Respondents to be so alien to its investors, employees and customers that Respondents request *in camera* treatment for its state of mind.

Respondents do not cite to any business record or competitive bidding instance in the United States LNG market in which the presence or perceived threat of competition from the TKK/AT&V joint venture had any impact on CB&I’s ability to win LNG projects or restrain its pricing. This is in

stark contrast to the numerous pre-merger business records in which CB&I fretted that PDM “is eating our lunch” (CX 243 at CBI-PL 4004707) and that PDM loomed over CBI as its “main” competitor. (CX 163 at CBI-PL006679). If TKK/AT&V threatened CB&I as much as Respondents contend to this Tribunal, one would expect a flurry of similar e-mails, presentations and memos articulating the nature of the threat and proposed countermeasures that CB&I should undertake. Respondents cannot cite what does not exist.

As explained in CCRFF 3.95, CB&I’s actual post-merger conduct demonstrates not that CB&I believes the TKK/ATV joint venture is viable as a competitor, but rather than TKK/ATV and other firms do not pose a competitive threat to CB&I’s ability to exercise market power. Complaint Counsel’s post-merger evidence includes higher prices and margins on LNG projects, such as Cove Point, CMS and others.

3.136 CB&I perceives TKK as a very formidable, global LNG competitor that has operated in Africa, Nigeria, the Middle East, southeast Asia, Malaysia, and Japan. (Scorsone, Tr. 4856, 4860; Glenn, Tr. 4092). CB&I competed against, and lost to, TKK for a project in Malaysia. (Glenn, Tr. 4093). TKK has developed state of the art nine percent nickel welding technology. (Scorsone, Tr. 4860).

#### Response to RFOF 3.136

For the reasons described in Complaint Counsel’s Responses to RFOF 3.135 and 3.95, Messrs. Scorsone and Glenn’s self-serving statements are uncorroborated; indeed, their testimony about TKK as a “formidable, global LNG competitor” is contradicted by CB&I’s own statements to the public and among its employees – none of which mention TKK as a competitor in the United States – and in the higher prices it charges customers.

3.137 In the 1970’s, PDM had a licensing agreement with TKK, under which PDM provided LNG construction technology to TKK in exchange for royalties. (Scorsone, Tr. 4857).

#### Response to RFOF 3.137

PDM may have “provided LNG construction technology to TKK” in the 1970s, but this is irrelevant to assessing TKK’s competitiveness today. Indeed, TKK did not prove itself to be competitive during the 1994 Memphis bidding, despite having information regarding “construction technology” from PDM. CCF 937, 939.

3.138 CB&I views AT&V as the third largest tank builder in the U.S. (Glenn, Tr. 4103) (state of mind evidence). AT&V is an experienced and reputable company, having a strong understanding of the design and construction of cryogenic tanks. (Glenn, Tr. 4103; Scorsone, Tr. 4866).

#### Response to RFOF 3.138

Respondents’ state of mind evidence is just that, and nothing more; Mr. Glenn’s testimony was not offered or admitted for the truth of the matter asserted therein. For the reasons described in Complaint Counsel’s Response to RFOF 3.135, CB&I’s view of AT&V as “an experienced and

reputable company” is contradicted by CB&I’s statements to the public and among its employees – none of which mention AT&V as an LNG competitor – and the higher prices charged to customers.

3.139 Although AT&V has never built an LNG tank project, CB&I perceives that AT&V has "always been willing to push itself into new areas" such as pressure spheres and LOX/LIN tanks. (Scorsone, Tr. 4867).

#### Response to RFOF 3.139

For the reasons described in Complaint Counsel’s Response to RFOF 3.135, Mr. Scorsone’s self-serving testimony is uncorroborated and contradicted by the CB&I’s statements to the public and among its employees – none of which mention AT&V as an LNG competitor – and the higher prices charged to customers.

3.140 [ ] (Glenn, Tr. 4221). Based on CB&I’s loss to TTK/AT&V for an LNG tank in Trinidad, CB&I perceives that the partnership will be a tough competitor to CB&I in the U.S. (Scorsone, Tr. 4866, 4874-75).

#### Response to RFOF 3.140

For the reasons described in Complaint Counsel’s Response to RFOF 3.135, the idea that [ ] is contradicted by the evidence.

As explained in Complaint Counsel’s Response to RFOF 3.95, Messrs. Glenn’s and Scorsone’s testimony about CB&I’s “state of mind” are uncorroborated by Respondents’ regular course of business documents and statements – many of which were authored or made by Messrs. Glenn and Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would “create barriers to entry” and use its “pricing advantage” to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I’s “competitive advantages” in the United States and the absence of competition post-merger that had previously eroded CB&I’s profitability; he also gave the October 31, 2002 conference call that touted CB&I’s higher margins, improved business prospects and ability to win every project.

### **3. Technigaz/Zachry Has Not Entered the U.S. LNG Market**

3.141 From its establishment in 1964, French based SN Technigaz has handled the conceptual design, engineering and construction of LNG facilities. (RX 773, at 2/40). In 1984, Technigaz became a subsidiary of Bouygues, a leading construction group worldwide. (RX 773, at 2/40). Bouygues is the fourth largest contractor in the world with 2001 revenue of more almost \$13 billion. (RX 736, at 2/17). Bouygues is highly-skilled in the implementation and management of large-scale international projects and in the vanguard of construction and civil works technologies. (RX 773, at 2/40).

#### Response to RFOF 3.141

This finding is misleading and incomplete. Technigaz has done business all over the world for

more than 40 years and had revenues in 2001 of \$13 billion and, and yet, since 1975, TKK has not built a single LNG tank in the United States. CCF 129-130.

Respondents sole support for this finding is material printed from a Technigaz marketing brochure. (RX 773). Nothing in the materials discuss Technigaz’s ability to compete in the United States to the same extent as PDM.

There is no evidence that the materials were even reviewed by CB&I. 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).

There is also no evidence that the materials had any impact on CB&I bidding or pricing strategies. Respondents do not cite to any business record or competitive bidding instance in the United States LNG market in which the presence or perceived threat of competition from foreign LNG suppliers had any impact on CB&I's ability to win LNG projects or restrain its pricing. If foreign entry threatened CB&I as much as Respondents contend to this Tribunal, one would expect a flurry of e-mails, presentations and memos in CB&I's post-merger business documents. Respondents cannot cite what does not exist.

3.142 The Bouygues Group provided Technigaz with its knowledge of giant concrete structures, and the financial backing to undertake major projects. (RX 773, at 2/40). Technigaz has not had difficulty obtaining bonding or parent guarantees when bidding large LNG projects around the world. (Jolly, Tr. 4438).

#### Response to RFOF 3.142

Respondents’ first claim relies upon immaterial marketing brochures, a source of information that even CB&I does not pay attention to in its regular course of business. CCRFF 3.141.

Furthermore, the ability to obtain bonding is only one of many factors that a competitor must possess in order to compete in the U.S. LNG tank market. CCF 304-306. A competitor must possess tangible assets, such as a fabrication plant in the United States, equipment, such as automatic welding machines and cranes, and a large work force experienced in the construction of LNG tanks. CCF 305. Moreover, competitors must possess intangible assets, such as experience constructing the relevant products in the United States, a reputation, business relationships with local subcontractors and material vendors, and a track record that shows successful completion of multiple projects. CCF 305.

3.143 Technigaz was recently acquired by Saipem making it one of the largest engineering construction companies in the world, many, many times the size of CB&I. (Glenn, Tr. 4093).

#### Response to RFOF 3.143

A firm’s size is meaningless if it does not possess the many other tangible and intangible assets necessary to compete in the U.S. LNG market. *See* CCRFF 3.142. Although Technigaz may be

“many, many” times CB&I’s size, CB&I has won “many, many” more LNG projects in the United States than Technigaz since CB&I acquired PDM and Saipem acquired Technigaz.

3.144 Technigaz and its parent company earn an annual revenue of more than \$3 billion and employ about 20,000 people. (Jolly, 4438). Technigaz has considerable experience in the design and construction of LNG tanks worldwide. (RX 43, at ZCC000005). Technigaz is one of the world’s leading suppliers of liquefied gas facilities. (RX 871, at 6/78). Technigaz has a solid reputation with both customers and partners. (RX 871, at 6/78).

#### Response to RFOF 3.144

This finding relies upon the same types of immaterial evidence (RX 43, RX 871) that even CB&I does not pay attention to in the ordinary course of business. CCRFF 3.141.

Technigaz’s size is only one qualification needed to successfully enter the U.S. LNG market, and does not show sufficiency of entry. See CCRFF 3.142.

Respondents are incorrect in asserting that Technigaz has ever constructed an LNG tank. While Technigaz may have overseen the construction of projects in other parts of the world, [redacted] ([redacted], Tr. 4718, emphasis supplied; [redacted], *in camera*) Therefore, in the Technigaz/Zachry partnership, [redacted] (Fahel, Tr. 1402; [redacted], Tr. 4438, 4718, emphasis supplied ([redacted] ([redacted], *in camera*; RX 871 at 77)).

Moreover, this finding is misleading and incomplete. Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: “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. . . It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyermann, Tr. 7071-72).

3.145 Technigaz offers a broad range of services including: feasibility studies and conceptual design, basic and detail engineering, project management, procurement, quality control, construction, coordination of subcontractors, supervision and technical assistance, commissioning and start-up, and operation. (RX 773, at 3/40).

#### Response to RFOF 3.145

Respondents again rely on Technigaz’s immaterial marketing brochure (RX 773) even though CB&I’s executives do not pay attention to such material. CCRFF 3.141. Because Technigaz’s skill set has never been tested in the United States on an LNG project, Respondents’ cannot show that Technigaz is competitive in the relevant geographic market.

3.146 Technigaz has the ability to undertake large-scale turnkey projects and is in a position to carry out a project right through from front-end engineering to delivery. (RX 773, at 3/40). Technigaz is one of the few companies in the world capable of carrying out the design and construction of complete liquefied gas terminals. (RX 773, at 3/40).

Response to RFOF 3.146

This finding relies upon the same types of self-serving evidence described in CCRFF 3.141. Although Technigaz may believe itself to be “one of the few companies in the world capable of carrying out the design and construction of complete liquefied gas terminals,” CB&I shares all of Technigaz’s capabilities. For example, according to Mr. Glenn, CB&I prefers to perform LNG projects as a sole-source turnkey contractor. (Glenn, Tr. 2659-60). Moreover, CB&I has the added competitive advantage of being an incumbent domestic contractor with lower costs than Technigaz. See CCRFF 3.147.

3.147 Technigaz’s capabilities also cover all aspects of the design and construction of LNG peak-shaving facilities. (RX 773, at 4/40). Technigaz supplies the associated liquefaction units and send-out systems for peak-shaving facilities. (RX 773, at 4/40). [ ] ([ ]).

Response to RFOF 3.147

Respondents support for this finding is material printed from a Technigaz brochure. (RX 773). Respondents do not pay attention to such material in their ordinary course of business but ask the Tribunal to do otherwise.

While Technigaz may have [ ] [ ] ([ ] ([ ])). Moreover, [ ] is irrelevant to its capabilities in the United States, due to country-specific barriers to entry, such as: knowing local regulations and local subcontractors, having established customer contacts and an experienced work force, and possessing a fabrication facility and equipment in the United States.

Mr. Jolly realizes that there are specific advantages gained from LNG experience within the U.S. He acknowledges that [ ] ([ ], Tr. 4756, RX 738 at FTC001537 ([ ])). Mr. Jolly goes on to say, [ ] (RX 738 at FTC 001535 ([ ]), emphasis supplied).

Technigaz admits that it is [ ]

[ ] (RX 738 at FTC001533 ([ ])

)). However, [ ,] Zachry will not be able to facilitate ease of entry. Zachry does not possess the necessary tangible and intangible assets that Technigaz lacks, and will therefore have to work its way down a substantial learning curve by winning projects over a long period of time (Simpson, Tr. 3259).

3.148 Technigaz primarily works on two types of LNG tanks, both of which utilize concrete outer tank: membrane tanks and full containment tanks with nine percent nickel inner tanks. ([ ]). In designing and

building full-containment type storage tanks, Technigaz draws on its skills in post-tension concrete and its experience with steel tanks. (RX 773, at 5/40). Technigaz's [ ] membrane technology relies on a post-tensioned concrete outer tank for structural resistance and a stainless steel corrugated membrane for liquid and gas tightness. ([ ], Tr. 4730-31; RX 773, at 5/40).

Response to RFOF 3.148

This finding is misleading and incomplete. [ ] ([ ], Tr. 4731). [ ] ([ ], Tr. 4731).

3.149 Therefore, if an owner specifies a concrete-and-steel design, Technigaz can propose either a membrane or full containment concept, both being equivalent regarding safety towards internal or external hazards. (RX 773, at 5/40). Technigaz has experience working on double containment concrete tanks as well. (Jolly, Tr. 4439). Technigaz has specific concrete experience and built the world's largest concrete LNG tanks. (Jolly, Tr. 4439; RX 773, at 7/40).

Response to RFOF 3.149

[ ] See CCRFF 3.148. [ ] See CCRFF 3.144.

As such, Technigaz employees would not be qualified to train welders or other Zachry field-crews in tank construction.

Moreover, there is no trend towards double and full containment tank construction in the U.S. in the future. See CCRFF 3.164, 3.11. 3.149.

3.150 Technigaz currently has eight full-containment LNG tanks under construction around the world: Spain, Egypt and India. (Jolly, Tr. 4440). [ ] ([ ], Tr. 4732). [As part of the first project, which will be completed next year, Technigaz is constructing two full containment LNG tanks in Bilbao, Spain] ([ ], Tr. 4732). [ ] ([ ], Tr. 4732). Technigaz has already constructed three full-containment LNG tanks in Qatar. ([ ], Tr. 4439-440).

Response to RFOF 3.150

Technigaz's previous and ongoing projects in other parts of the world with partners other than H.P. Zachry are irrelevant to the Technigaz/Zachry partnership's ability to compete in the United States for the reasons stated in Complaint Counsel's Response to RFOF 3.147.

3.151 Taking into account the eight LNG currently under construction, Technigaz believes it, in the last ten years, has built more full containment LNG tanks than any other company in the world. ([ ], Tr. 4440). [ ] ([ ], Tr. 4689).

Response to RFOF 3.151

In spite of his belief that Technigaz is the [

] See CCRFF 3.147. [

] ([ ], Tr. 4721-

2). [

] ([ ], Tr. 4713, 4721-2, [ ] Tr. 1629, *in camera*). [

] ([ ], Tr. 4715).

3.152 [

] ([ ], Tr. 4725). [

]

([ ], Tr. 4747).

Response to RFOF 3.152

[ ] self-serving testimony is uncorroborated. [

] The only double containment tank built in the United States (Puerto Rico) was constructed by PDM, not Technigaz. (Izzo, Tr. 6516-17). [

]. (CX 693 at [ ] 01 0127, *in camera*).

For all of [ ] it has yet to win an LNG project of any kind in the United States.

Moreover, Respondents have ample experience designing and building both steel and concrete LNG tanks, including full-containment tanks. (CX 758 at CBI-PL031543-59, *in camera*; CX 145 at PDM-S 001430-431).

3.153 Technigaz pursues an active partnership policy, which has for many years enabled it to develop cooperation with industrial partners in various countries. (RX 773, at 7/40). For example, Technigaz has partnered with local construction companies to build facilities in Spain (with Initec), Qatar (with Midmac), and Greece (with Technical Union). (RX 773, at 13-15/40).

Response to RFOF 3.153

Technigaz’s partnerships outside of the United States are irrelevant to the Technigaz/Zachry partnership’s ability to replace PDM as a low-cost, high-quality supplier of LNG tanks in the United States. CCRFF 3.147. Moreover, the uncertain Technigaz/Zachry partnership has no experience constructing LNG tanks together. CCRFF 3.166, 3.144.

3.154 Technigaz has built an LNG tank to Appendix Q design codes and specifications. ([ ], Tr. 1410).

[ ] ([ ], Tr. 4721).



### Response to RFOF 3.154

Respondents' finding is misleading and incomplete. Neither Technigaz nor Zachry has ever constructed an LNG tank to Appendix Q design codes and specifications. (Fahel, Tr. 1410). According to Mr. Fahel, Technigaz has only worked on LNG projects "as a prime contractor," and as such has never itself constructed a tank to American design standards. (Fahel, Tr. 1410).

Furthermore, having [ ] to construct LNG tanks, Technigaz would still be at a significant competitive disadvantage against CB&I in the U.S. LNG market. *See* CCRFF 3.147.

3.155 Founded in 1924, Texas-based Zachry Construction Corporation is a leading United States construction company, with sales of around \$1.7 billion and more than 14,000 employees in 2001. (RX 43, at ZC 000002). In 2001, Zachry was ranked eighteenth in the annual ranking of top construction contractors by Engineering News-Record, a leading industry publication. (RX 871, at 71/78). Zachry placed fifteenth overall among construction firms that also sold their own design work. (RX 871, at 71/78).

### Response to RFOF 3.155

Respondents' sole support for this finding is material from press releases and marketing brochures that CB&I's executives do not maintain. CCRFF 3.141.

3.156 Zachry's broad capabilities in construction and industrial maintenance have earned the company a track record of successes and trust. (RX 871, at 77/78). That reputation has fostered alliances with customers, engineers, and manufacturers, resulting in even greater success for the benefit of all. (RX 871, at 77/78).

### Response to RFOF 3.156

Zachry's "broad capabilities" and "reputation" are self-serving statements contained in its own marketing brochure, and there is no evidence that CB&I ever saw it. CCRFF 3.141.

Zachry's "broad capabilities" in civil construction are irrelevant to LNG tank construction. Zachry's experience in the construction business is limited to civil work construction, on structures such as highways or dams. ([ ], Tr. 4685, *in camera*; RX 871 at 77; *see also* Rapp, Tr. 1293, 1295-96 (Mr. Rapp testified that PDM and CB&I would technically rate higher than Technigaz-Zachry because Zachry is a general contractor like Bechtel rather than a specialized tank firm.)). LNG tank construction is very different from civil construction. CCRFF 3.26. Zachry has never constructed an LNG tank. (Fahel, Tr. 1400). As such, Zachry's alliances with civil construction customers, engineers and manufacturers does not demonstrate the firm's ability to become a cost-effective LNG tank supplier to the same extent as PDM.

3.157 Zachry is the largest direct hire open shop contractor in the United States. (RX 43, at ZCC 000005). Zachry owns more than 6,000 pieces of equipment. (RX 45, at ZCC 000037). Zachry has worldwide experience. (RX 45, at ZCC 000037). Zachry is stable, secure and reliable and has never failed to complete a project. ((RX 45, at ZCC 000039). Zachry is seasoned and experienced with a proven safety program. (RX 45, at ZCC 000039).





Response to RFOF 3.160

Complaint Counsel adopts and emphasizes Respondents’ assertion that “Zachry has never built an LNG tank before.” For the reasons stated in CCRFF 3.156, however, Zachry’s “broad capabilities” in other industries are irrelevant to the construction of LNG tanks in the United States.

3.161 Zachry is an experienced civil contractor in the United States with licensed engineers and access to local labor in the United States. (Price, Tr. 656-57).

Response to RFOF 3.161

[

]

3.162 [ ] ([ ], Tr. 4683).

[

] ([ ], Tr. 4729). [ ] ([ ], Tr. 4757).

Response to RFOF 3.162

This finding is misleading and incomplete. [

] ([ ], Tr. 4729, 4757, *in camera*).

[

] ([ ], Tr. 4757, *in camera*). Mr. Jolly confirmed that it would be [

] ([ ], Tr. 4757-58, *in camera*) (emphasis supplied). [

].

3.163 [

([ ], Tr. 4693-94).

]

Response to RFOF 3.163

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. To the contrary, [

]

[ ] ([ ], Tr. 4758, *in camera*). [ ] (*Id.*) After all, as Mr. Jolly testified, [ ] (*Id.* at 4758-59, *in camera*).

3.164 [ ] ([ ], Tr. 4694, 4764; *see also, e.g.,* Cutts, Tr. 2501). [ ] ([ ], Tr. 4702). [ ] ([ ], Tr. 4725). Technigaz decided to create a strategic alliance with Zachry to broaden its competencies and geographic reach. (RX 871, at 46/78). Technigaz consider its alliance with Zachry a "valuable asset" that enables it to leverage opportunities in a high-potential market. (RX 871, at 46/78).

Response to RFOF 3.164

[ ] ([ ], Tr. 4725, *in camera*). When questioned about his foundation for the trend, [ ] ([ ], Tr. 4758, *in camera*). [ ] ([ ], Tr. 4758, *in camera*). Referring to his theory that the United States would turn to full-containment tanks, [ ] ([ ], Tr. 4684, *in camera*).

[ ] realizes that within three and a half years, if he is “wrong” about what he is “smelling,” Technigaz may abandon attempts to enter the United States market – “C’est la vie.” ([ ], Tr. 4753-4, *in camera*).

3.165 [ ] ([ ], Tr. 1676).

Response to RFOF 3.165

Complaint Counsel agrees that there are “not many qualified entities to construct major LNG projects.” [ ] arose because CB&I’s acquisition of PDM would lead to higher price levels at which Technigaz, for the first time, could compete profitably in the United States. See Response to RFOF 3.163.

3.166 [ ]

] (RX 43, at ZCC000002). [ ] ([ ], Tr. 4718). [ ] ([ ], Tr. 4685).

### Response to RFOF 3.166

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. Timely, likely and sufficient entry is not established just because [

] have established a joint venture, made sales calls, may be capable of build an LNG tank or similar pre-conditions. The real test, and the only test that the antitrust laws are concerned about, is whether Technigaz/Zachry is likely to enter the United States LNG market in a timely manner and will be profitable at pre-merger price levels so that the firm can be counted on to restrain CB&I's market power to the same extent as PDM over the long run.

Respondents fail this test with respect to Technigaz/Zachry (and every would-be entrant cited by Respondents) because there is no evidence that Technigaz/Zachry will likely restrain CB&I's prices to the same level as PDM did before the merger. As explained in Complaint Counsel's Response to RFOF 3.95, the post-merger evidence – consisting of Respondents' statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I's market power. None of these documents or statements mention Technigaz/Zachry. Absent evidence of an ability to restrain CB&I's market power, Technigaz/Zachry is not an entrant who satisfies Respondents' burden of proving that timely and sufficient entry has occurred or is likely to occur.

The Technigaz/Zachry partnership likely will not provide price-restraining competition to CB&I for at least three reasons. First, Respondents themselves note [

] (RFOF 3.166, *in camera*).

Second, Mr. Jolly stated that [ ] (RX 738 at FTC001536 ([ ]); *see also* [ ], Tr. 4753-4, *in camera*). Technigaz has been [ ] ([ ], Tr. 4690-91, *in camera*). Technigaz has [ ] That brings the total of lost or likely losses to [ ] By Mr. Jolly's count, [ ]

Third, Technigaz/Zachry will [ ] which inherently means that Technigaz/Zachry cannot restrain CB&I's market power on those projects. ([ ], Tr. 1652-54; *in camera*). As Mr. Jolly admits, Technigaz is [

] (RX 738 at ¶ 10 ([ ]), *in camera*).

3.167 In the press release, the alliance held itself out as pooling Technigaz's recognized turnkey LNG project expertise and broad-based knowledge of the market with Zachry's construction capabilities and strong positions in the Americas. (RX 43, at ZCC000002). The press release also stated that the two companies are already working together on a number of tenders for LNG construction in the United States and Mexico. (RX 43, at ZCC000002).

### Response to RFOF 3.167

This finding is irrelevant because it relies on a self-serving press release that CB&I does not pay attention to in the ordinary course of its business. Response to RFOF 3.141.

Respondents' claim that Technigaz and Zachry are "working together" does not prove that entry is timely, likely, or sufficient. Respondents present no proof that Technigaz/Zachry will be able to competitively constrain CB&I as PDM did prior to the acquisition.

3.168 A subsequent press release characterized the combination as enabling Technigaz/Zachry to play a "major role" in the high-potential, fast-growing LNG market. (RX 8) (state of mind evidence).

### Response to RFOF 3.168

This finding relies on a self-serving press release, the same unreliable kind of support as RFOF 3.141 and is irrelevant for the reasons noted in CCRFF 3.141. Respondents have not shown that these press releases were viewed or acted upon by CB&I management. Mr. Scorsone noted that they were unimportant enough to him that he probably threw them out. CCRFF 3.141.

Respondents cite to "state of mind" evidence to show that CB&I is aware of the Technigaz/Zachry alliance. Respondents' state of mind evidence is just that, and nothing more; the press release was not offered or admitted for the truth of the matter asserted therein.

3.169 [ ] ([ ], Tr. 4684). [ ] ([ ], Tr. 4685).

### Response to RFOF 3.169

Why "[ ] and [ ] do not show that the Technigaz/Zachry partnership is capable of competing at the same competitive level as PDM did prior to the acquisition. CCRFF 3.144, 3.147.

3.170 [[ ] ([ ], Tr. 1684). [ ] (See [ ], Tr. 1684).

### Response to RFOF 3.170

Technigaz's [

] CCRFF 3.142, 3.147 As stated in CCRFF 3.144, [ ]

3.171 [ ] ([ ], Tr. 4702).  
[ ] ([ ], Tr. 4689, 4709). [ ]  
[ ] ([ ], Tr. 4689). [ ]  
[ ] ([ ], Tr. 4710).

### Response to RFOF 3.171

This finding is incomplete and misleading. With respect to single-containment tanks, [ ] ([ ], Tr. 4708-09, *in camera*). This means that [ ] (*Id.* at 4709). Technigaz/Zachry admits that it [ ] (*Id.* at 4711). Simply put, Technigaz/Zachry is not a [ ], and for customers who will want such a tank for their facility, Respondents cannot point to Technigaz/Zachry as someone who may restrain CB&I's market power.

With respect to double and full containment tanks, for all of [ ] self-touting about its double and full containment experience, it has yet to win an LNG project of any kind in the United States. Respondents have won or are likely to win more double and full containment tank projects in the United States than Technigaz ever has, or likely will win. Response to RFOF 3.152.

3.172 [ ] ([ ], Tr. 4687). [ ]  
[ ] ([ ], Tr. 4687).

### Response to 3.172

Mr. Jolly does state that Technigaz has [ ] ([ ], Tr. 4687, *in camera*). Mr. Jolly's generalized statement does not, however, specify the geographic regions where its [ ] come into play. It is probable that Technigaz has [ ] in France, and possibly in Europe. Mr. Jolly did not testify or imply, however, that Technigaz enjoys those same competitive advantages anywhere in the United States. (*Id.*).

In fact, Mr. Jolly testified that [ ]  
[ ] ([ ], Tr. 4715, *in camera*).

Moreover, Respondents' documents show that there is no tank constructor with the "in-house ability to offer the tank and systems as a single LSTK [Lump-Sum Turnkey] package except CB&I." (CX 364 at CBI-E 009279). In a CB&I strategic document discussing Respondents' involvement in the LNG market, Technigaz was named as a worldwide competitor, but is not singled out as a domestic competitive threat. Respondents' do not mention Technigaz's alleged "in-house capabilities."

3.173 [ ] ([ ], Tr.4690). [ ] ([ ], Tr. 1684-85). The alliance represented to Dynegy that it, along with its parent companies, was prepared to commit the resources to support the Hackberry project immediately. (RX 45, at ZCC 000059).

### Response to RFOF 3.173

This finding is incomplete and misleading. [ ] ([ ], Tr. 4690-91 ([ ]), *in camera*). CCRFF 3.179. This finding represents an example of failed entry by Technigaz/Zachry, rather than entry that satisfies Respondents burden of proof.

3.174 [ ] ([ ], Tr.4692). [ ] ([ ], Tr. 1650-51, 1689) (*in camera*). [ ] ([ ], Tr. 1652). [ ] ([ ], Tr. 1656). [ ] ([ ], Tr. 1657).

### Response to RFOF 3.174

As explained in CCRFF 3.95, there is no evidence that the presence of Technigaz/Zachry in bidding situations has restrained CB&I's market power. Entry that is timely, likely and sufficient must deter or counteract the likely anticompetitive effects of a merger. In this case, all of CB&I's post-merger public statements, regular course of business documents and pricing to customers, such as CMS, the Cove Point owners and other LNG projects, indicate that it has market power and that foreign firms have not restrained CB&I's ability to raise prices and margins. The post-merger evidence reflects a complete reversal of CB&I's fortunes from before the merger when PDM served as CB&I's closest competitor and price restraint. The actual post-merger evidence belies Respondents' contention that Technigaz/Zachry and other would-be entrants have deterred or counteracted the anticompetitive effects of this merger.

Moreover, "marketing ... services" and meeting with customers does not constitute timely, likely, and sufficient entry. None of the customers cited awarded a project to Technigaz/Zachry, and Respondents have not presented any evidence that in these bidding situations CB&I's pricing strategy was disciplined by Technigaz/Zachry.

3.175 Technigaz/Zachry approached Freeport LNG to present its alliance. (Eyer mann, Tr. 6994). The alliance sent Freeport LNG marketing materials describing its expertise in liquefied gas facilities and Technigaz's experience building LNG tanks. (Eyer mann, Tr. 6996-98). In these marketing materials, Technigaz/Zachry held itself out being committed to engage in all types of undertakings to provide its expertise and long standing excellent reputation as designers/constructors of LNG terminal facilities. (RX 934, at CHE 0310) (state of mind evidence). The alliance emphasized that Technigaz is currently constructing large terminal facilities in Spain, India and other locations. (RX 934, at CHE 0310) (state of mind evidence). Based on these representations, Freeport LNG believes that Technigaz is "keenly interested" in working on the

Freeport LNG project. (Eyer mann, Tr. 6996-98). Technigaz/Zachry also marketed itself to Williams Energy.] ([ ], Tr. 1657).

### Response to RFOF 3.175

Respondents' "state of mind" evidence to show that Technigaz/Zachry is involved in projects in other parts of the world is just that, and nothing more; Technigaz/Zachry's marketing materials were not offered or admitted for the truth of the matter asserted therein.

Furthermore, this finding is misleading and incomplete. Mr. Eyer mann lacks foundation to speak about Technigaz/Zachry because he has never worked with either firm. (Eyer mann, Tr. 7062).

Technigaz has no [ ] constructing LNG tanks in "Spain, India, and other locations." CCRFF 3.144.

The fact that Technigaz/Zachry may have "sent ... marketing materials" containing puffery, "emphasized" its experience outside of the United States, or communicated that it was "committed to engage in all types of undertakings to provide its expertise" to Freeport does not constitute timely, likely, or sufficient entry. CCRFF 3.182. These actions do not prove Technigaz/Zachry's ability to replace PDM. Without evidence of competitive pricing from Technigaz/Zachry that had the effect of restraining CB&I prices, Freeport's belief that "Technigaz is 'keenly interested' in working" on its project is irrelevant.

3.176 In its marketing documents, Technigaz/Zachry explained that the joint venture parties are committed to safety, excellence, and community service, the parties to the joint venture have never failed to complete a project under any circumstance, the parties to the joint venture enjoy a world renowned reputation for performance, and the joint venture parties aspire to be the best in class in all their doings. (RX 45, at ZCC 000032-33).

### Response to RFOF 3.176

Puffery contained in marketing documents does not establish that entry is timely, likely, or sufficient. CCRFF 3.141. There is no evidence that Technigaz/Zachry has had any impact in restraining CB&I's market power. Until this has been achieved, there has been no entry.

3.177 [ ] ([ ], Tr.4685). [ ] ([ ], Tr.4693). On June 12, 2001, in response to a request from Yankee Gas' consultant CHI Engineering, the alliance submitted a preliminary pricing proposal for an LNG storage tank. (RX 4, at 3/4). [ ] ([ ], Tr.4693).

### Response to RFOF 3.177

It is irrelevant that Technigaz/Zachry has [ ] Entry is not timely, likely and sufficient just because Technigaz/Zachry has [ ] There is no evidence that Technigaz/Zachry has had any impact in restraining CB&I's

market power. Until this has been achieved, there has been no entry.

In fact, CB&I is currently in negotiations with [

] (CX 1507 at CBI 059484; *see also* CX 787 at CBI 065244, *in camera*)

([

])).

3.178 [

]. ([ ], Tr.4764-65).

### Response to RFOF 3.178

Technigaz's self-serving perception of its own competitiveness is irrelevant to whether it is, in reality, able to restrain CB&I's prices to the same extent as PDM. There is no evidence that Technigaz's self-perceptions are shared by CB&I in the United States. As explained in Complaint Counsel's Response to RFOF 3.95, none of the post-merger evidence from Respondents even mentions Technigaz/Zachry. There is no evidence that Technigaz/Zachry has restrained CB&I's market power – CB&I continues to raise prices to its customers unabated by Technigaz/Zachry or any other firm. Until this has been achieved, there has been no entry.

3.179 Dynegy has made it clear that it is satisfied that Technigaz/Zachry has the necessary reputation, the ability to do the requisite fabrication and field erection and the ability to manage the actual construction of the LNG tanks for the Hackberry facility. (Puckett, Tr. 4557-58). Dynegy is also satisfied that Technigaz will be capable of meeting the necessary United States codes and standards. (Puckett, Tr. 4551).

### Response to RFOF 3.179

Respondents' assertion is misleading. The ability to construct an LNG tank does not equate to an ability to restrain CB&I's market power and restore competition to pre-merger price levels. [

] ([ ], Tr.4690-91, *in camera*).

3.180 El Paso believes it would pre-qualify Technigaz to build LNG tanks in the United States. (Bryngelson, Tr. 6131-32). El Paso already pre-qualified Technigaz for its Altamira and Rosarito projects. (Bryngelson, Tr. 6125-26). El Paso believes Technigaz has sufficient financial stability to satisfy its requirements. (Bryngelson, Tr. 6128). Based on input received from its consultant KBR, El Paso believes that Technigaz has a good reputation for building LNG tanks. (Bryngelson, Tr. 6130). El Paso believes that Technigaz is capable of building LNG tanks in the United States at a competitive price. (Bryngelson, Tr. 6132).

### Response to RFOF 3.180

This finding is incomplete and misleading. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 9-10, 57, 116 (Bryngelson, Dep.)).

Timely, likely and sufficient entry is not established just because El Paso has “pre-qualified” Technigaz for projects. There is no evidence that Technigaz’s capability to be “pre-qualified” for a project has prompted CB&I to stop raising prices to customers since the merger.

Furthermore, Mr. Bryngelson lacks foundation to assess Technigaz/Zachry’s competitiveness in the market. Mr. Bryngelson of El Paso has no knowledge of pricing competition for LNG tanks in the United States prior to or after the merger. (Bryngelson, Tr. 6246-47). Mr. Bryngelson has never spoken to a single employee of Technigaz directly about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42). Mr. Bryngelson incorrectly believed that Technigaz/Zachry had multiple “fabrication facilities” in the United States, a statement directly contradicted by Technigaz/Zachry. (JX 22 at 115-6 (Bryngelson, Dep.); [ ], Tr. 4715).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.189, El Paso and other customers likely have imperfect information and cannot know that because of the significant gap between Technigaz/Zachry’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Technigaz/Zachry’s price and (b) appears “reasonable” to the customer.

3.181 Calpine considers Zachry a competent American contractor capable of teaming with an LNG design company to build LNG tanks. (Izzo, Tr. 6499). Calpine is “perfectly comfortable” with Zachry building an LNG tank based on its familiarity with Zachry’s skill sets. (Izzo, Tr. 6505). Calpine has used Zachry extensively to build power plants; Zachry is one of its five “go-to” contractors. (Izzo, Tr. 6496). Zachry has built half a dozen or more power plants for Calpine. (Izzo, Tr. 6499). Calpine believes Zachry has an experienced labor force. (Izzo, Tr. 6505). Calpine believes Technigaz has built LNG tanks to API standards. (Izzo, Tr. 6501). More importantly, Calpine believes Technigaz will guarantee the standards in its contracts. (Izzo, Tr. 6501).

### Response to 3.181

Timely, likely and sufficient entry is not established just because Calpine is “perfectly comfortable” with the Technigaz/Zachry partnership. Respondents do not cite any evidence that Technigaz/Zachry will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger. Indeed, Mr. Izzo of Calpine has not experienced the vicious competition between Respondents in the United States LNG market and, therefore, admits that he would not know if CB&I had raised prices to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534).

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.189, customers such as Calpine likely have imperfect information and cannot know that because of the significant gap between CB&I’s prices and the pricing of other foreign firms in the United States, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Technigaz’s price and (b) appears “reasonable” to the customer.

3.182 Despite the fact that Technigaz/Zachry has never built an LNG facility in the United States, Freeport LNG considers the alliance to be a potential LNG tank supplier for its Freeport LNG project. (Eyermaun, Tr. 6998).

Freeport LNG plans to solicit a bid from Technigaz/Zachry for the Freeport LNG project. (Eyer mann, Tr. 6999).

### Response to RFOF 3.182

This finding is misleading and incomplete. There is no evidence that Technigaz/Zachry’s “potential” to be an LNG tank supplier has prompted CB&I to stop raising prices to customers since the merger.

Mr. Eyer mann lacks foundation to speak about the United States market since he “never worked on an LNG project in the U.S.” (Eyer mann, Tr. 7025). All of Mr. Eyer mann’s experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyer mann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG tank bidders. (Eyer mann, Tr. 7025-7028).

Moreover, Mr. Eyer mann has never conducted business with Technigaz or Zachry nor seen the partnership’s pricing on a project. (Eyer mann, Tr. 7063). His views about Technigaz/Zachry are entirely speculation because Freeport LNG is not “sure” whether the LNG project will ever come to fruition or even if bids from Technigaz/Zachry and other firms will ever be sought. (Eyer mann, Tr. 7043-44).

Complaint Counsel agrees that “Technigaz/Zachry has never built an LNG facility in the United States,” which places Technigaz/Zachry at a competitive disadvantage. Furthermore, it is irrelevant that “Freeport LNG considers the Technigaz/Zachry alliance to be a potential LNG tank supplier for its Freeport LNG project.” Entry is not timely, likely and sufficient just because Technigaz/Zachry may be asked to submit a bid for a project. Respondents do not cite any evidence that Technigaz/Zachry will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

3.183 British Petroleum accepted Technigaz’s bid for an LNG project in Bilbao, Spain. (Sawchuck, Tr. 6053). British Petroleum believes that Technigaz has the technical capabilities to construct and execute an LNG import terminal, and would consider Technigaz as a viable supplier for LNG products in the U.S. (Sawchuck, Tr. 6062-63, 6092).

### Response to RFOF 3.183

This finding is incomplete and misleading. There is no evidence that Technigaz’s “technical capability” to construct an LNG tank has prompted CB&I to stop raising prices to customers since the merger.

Despite having relations with [ ] in other parts of the world, [ ] ([ ], Tr. 4696, *in camera*). Indeed, [ ] and instead initiated [ ] negotiations with CB&I for [ ] U.S. projects. (CX693 at [ ] 01 028, *in camera*; Glenn, Tr. 4180; Scorsone, Tr. 4995). No wonder then that CB&I continues to increase

prices to customers unabated by the purported threat of entry by Technigaz/Zachry.

3.184 Bechtel also considers Zachry to be a reputable company. (Rapp, Tr. 1325). Bechtel regards Zachry's field labor force as "well-trained and experienced." (Rapp, Tr. 1325). Further, Bechtel believes that the Technigaz/Zachry joint venture can effectively compete for LNG jobs in the United States. (Rapp, Tr. 1325).

], Tr.1661, 1688).

#### Response to 3.184

Timely, likely and sufficient entry is not established just because Bechtel "considers Zachry to be a reputable company." (Rapp, Tr. 1325-26). There is no evidence that some customers may think Technigaz/Zachry to be "reputable" has prompted CB&I to stop raising prices to customers since the merger.

Bechtel did not choose Technigaz/Zachry for its projects in Trinidad, and to this day, Bechtel has not used Technigaz/Zachry as a competitive leverage point against CB&I in the United States. Until such time as Technigaz/Zachry proves itself able to restrain CB&I's market power with customers in the United States, Technigaz/Zachry is not an entrant for purposes of this merger analysis; and because it is unlikely that Technigaz/Zachry will replace PDM, CB&I continues to increase prices to customers unabated by the purported threat of entry by Technigaz/Zachry.

Bechtel has not built an LNG tank in the United States recently and has little information about the downward pressure on prices exerted by Respondents as they dueled each other for LNG tank business before the merger. As explained in greater detail in Complaint Counsel's Response to RFOF 3.189, Bechtel and other customers likely have imperfect information and cannot know that because of the significant gap between Technigaz's prices for LNG tanks in the United States and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Technigaz/Zachry's price and (b) appears "reasonable" to the customer.

3.185 In June of 2001, Technigaz/Zachry received an invitation from Enron to bid on a project in the Bahamas. ([ ], Tr.1400). Nigel Carling, a former Enron employee, would pre-qualify Technigaz/Zachry to obtain competitive bids for an LNG project in the United States. (Carling, Tr. 4485-86). Mr. Carling believes that Technigaz has a proven track record of designing and managing the construction of LNG tanks. (Carling, Tr. 4487). Mr. Carling considers Zachry one of the larger construction companies in the United States with experienced construction practices, labor forces, and pricing structures. (Carling, Tr. 4487). Mr. Carling would feel comfortable having Zachry construct an LNG tank because it is one of the "powerhouse contractors in the United States" and because a tank "is a relatively straightforward exercise when compared with other aspects of construction." (Carling, Tr. 4526). Mr. Carling would consider hiring Technigaz/Zachry for an LNG project in the United States. (Carling, Tr. 4487-88).

#### Response to RFOF 3.185

As shown in CCRFF 3.84, timely, likely and sufficient entry is not established just because Mr. Carling, a former Enron employee, considers Technigaz as having "a proven track record of designing and managing the construction of LNG tanks." There is no evidence that "a proven track record" has

prompted CB&I to stop raising prices to customers since the merger.

Furthermore, the fact that Zachry is “one of the larger construction companies in the United States” has little bearing on the LNG market. The reality is that [ ] CCRFF 3.144. (*in camera*) After two years of attempted entry into the U.S. LNG market, Technigaz has still not won or successfully completed a project.

Mr. Carling had no experience at all in assessing the degree of competition between CBI and PDM on projects in the United States. (Carling, Tr. 4513). In the only instances in which Mr. Carling himself solicited bids, the companies he relied upon to compete for the projects were CBI and PDM because “all the expertise was between PDM and CBI.” (Carling, Tr. 4500). As explained in greater detail in Complaint Counsel’s Response to RFOF 3.189, Mr. Carling has imperfect information and cannot know that because of the significant gap between Technigaz’s prices for LNG tanks in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Technigaz/Zachry’s price and (b) appears “reasonable” to the customer.

3.186 [ ] ([ ], Tr. 745-46).

### Response to RFOF 3.186

As explained in Complaint Counsel’s Response to RFOF 3.86, timely, likely and sufficient entry is not established just because Technigaz may have an [ ] as a foreign LNG tank builder. Respondents cite no evidence that Technigaz’s [ ] has prompted CB&I to stop raising prices to customers since the merger.

Moreover, [ ] does not believe that new entrants can compete against CB&I. [ ] believes that its too big a [ ] for foreign entrants to do so: [ ] ([ ], Tr. 703, 716, 727, *in camera*). [ ] believes that prices are higher absent the competition between CB&I and PDM. ([ ], Tr. 701, 720-21, *in camera* [ ]).

Ultimately, [ ] knows that customers are “[ ]” ([ ], Tr. 725, *in camera*).

3.187 AT&V views Technigaz/Zachry as TKK/AT&V’s competitor for LNG projects in the United States. (Cutts, Tr. 2450).

### Response to RFOF 3.187

It is irrelevant what AT&V thinks of Technigaz as a competitor in the United States since AT&V/TKK has never constructed an LNG tank in the United States. This finding is akin to Apple asking IBM if they view each other as competitors to Microsoft. So what?

The real inquiry is whether CB&I's pricing strategy to LNG customers is restrained by Technigaz/Zachry to the same extent as PDM did before it was acquired by CB&I. There is no

evidence that AT&V's views about Technigaz/Zachry as its competitor has not prompted CB&I to stop raising prices to customers since the merger.

3.188 CB&I has been aware of the Technigaz/Zachry alliance since its announcement. (*See* RX 256) (state of mind evidence). CB&I has also tracked the success and strength of Technigaz's parent company, Bouygues. (*See* RX 271).

#### Response to RFOF 3.188

Respondents do not cite any evidence from one of their witnesses that they were "aware of the Technigaz/Zachry alliance since its announcement." Instead, Respondents cite a press release that Mr. Scorsone admitted neither he nor anyone keeps in their files. CCRFF 3.189 and CCRFF 3.141.

3.189 CB&I considers Technigaz to be one of its main competitors in the LNG market. (Glenn, Tr. 4095; RX 234). CB&I competes against Technigaz in the global competitor. (Glenn, Tr. 4093). CB&I recently competed against Technigaz and lost, a project in Egypt. (Glenn, Tr. 4093).

#### Response to RFOF 3.189

This finding relies on the self-serving and uncorroborated testimony of Mr. Glenn. Moreover, it is irrelevant to the United States market how Technigaz is perceived in Egypt or elsewhere outside the United States.

3.190 Mr. Glenn also considers Technigaz to be a competitor in the domestic market. (Glenn, Tr. 4095). Mr. Glenn knows Zachry to have a lot of experience in the U.S., particularly in concrete construction. (Glenn, Tr. 4095). Mr. Glenn believes Zachry has a very good reputation in the United States as a general contractor with particular expertise in things like highway construction, power plants and concrete placement. (Glenn, Tr. 4097).

#### Response to RFOF 3.190

As explained in Complaint Counsel's Response to RFOF 3.95, Mr. Glenn's self-serving and uncorroborated testimony should be given little weight. Mr. Glenn's views about Technigaz/Zachry as a "competitor" in the United States is uncorroborated and contradicted by Respondents' regular course of business documents and statements – many of which were authored or made by Mr. Glenn and his senior executive for LNG tanks, Mr. Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would "create barriers to entry" and use its "pricing advantage" to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I's "competitive advantages" in the United States and the absence of competition post-merger that had previously eroded CB&I's profitability; he also gave the October 31, 2002 conference call that touted CB&I's higher margins, improved business prospects and ability to win every project.

What CB&I believes about the Technigaz/Zachry partnership's competitiveness has had no bearing on the issue of greatest importance to this case – CB&I's market power. Respondents do not

cite to any business record or competitive bidding instance in the United States LNG market in which the presence or perceived threat of competition from Technigaz/Zachry had any impact on CB&I's ability to win LNG projects or restrain its pricing. If Technigaz/Zachry threatened CB&I as much as Respondents contend to this Tribunal, one would expect a flurry of e-mails, presentations and memos articulating the nature of the threat and proposed countermeasures that CB&I could undertake. Respondents cannot cite what does not exist.

CB&I's actual post-merger conduct demonstrates not that CB&I "considers Technigaz to be one of its main competitors in the LNG market," but rather than Technigaz/Zachry and other firms do not pose a competitive threat to CB&I's ability to exercise market power. As Complaint Counsel's Response to 3.95 shows, internal company records and public statements made by CB&I – none of which identify [ ] – and Respondents' higher prices and margins on LNG projects (*i.e.* Cove Point, CMS, and others) show that CB&I feels no threat from any other competitors in the LNG market.

Moreover, Mr. Glenn agreed that "when [he] first heard that [ ] was a possibility of an outer concrete wall, that's what led [him] to believe that [ ] may have to face Technigaz or Skanska/Whessoe as competitors." (Glenn, Tr. 4175). By Mr. Glenn's own words, this means that in a United States project that does **not** involve any concrete, Mr. Glenn believes that CB&I does **not** face any competition from Skanska/Whessoe and Technigaz.

3.191 [ ] ([ ], Tr. 4222). [ ] ([ ], Tr. 4222). [ ] ([ ], Tr. 4222). [ ] ([ ], Tr. 4222).

### Response to RFOF 3.191

Mr. Glenn's self-serving and uncorroborated testimony should be given little weight. As discussed in CCRFF 3.190, Mr. Glenn's views about Technigaz/Zachry are contradicted by his own statements, by CB&I's business documents and SEC filings, and CB&I's price increases to LNG customers since the merger.

3.192 Scorsone perceives that Technigaz and Zachry are "very serious" about winning contracts in the U.S. (Scorsone, Tr. 4854). Scorsone's perception of Technigaz as an LNG competitor in the U.S. is based, in part, on alliance's January, 2002 press release. (Scorsone, Tr. 4854-55; RX 306). Scorsone perceives that Technigaz/Zachry has the sales and marketing expertise to promote its joint venture. (Scorsone, Tr. 4855).

### Response to RFOF 3.192

Mr. Scorsone's self-serving and uncorroborated testimony should be given little weight. As discussed in CCRFF 3.190, Mr. Scorsone's views about Technigaz/Zachry are contradicted by his own documents, by CB&I's public statements and SEC filings, and CB&I's price increases to LNG customers since the merger.

3.193 Given Zachry's heavy civil construction background, Scorsone perceives the partnership of Technigaz/Zachry as a "formidable competitor" given the number of LNG projects in the U.S. employing concrete containment tanks. (Scorsone, Tr. 4865-66).

#### Response to RFOF 3.193

Mr. Scorsone's self-serving and uncorroborated testimony should be given little weight. As discussed in CCRFF 3.190, Mr. Scorsone's views about Technigaz/Zachry are contradicted by his own documents, by CB&I's public statements and SEC filings, and CB&I's price increases to LNG customers since the merger.

3.194 PDM partnered with Technigaz on the execution of an LNG import terminal in Turkey, and an LNG export terminal in Qatar. (Scorsone, Tr. 4861).

#### Response to RFOF 3.194

Technigaz's experiences outside of the United States will not imbue Technigaz/Zachry with the ability to overcome the entry barriers and other competitive disadvantages that make it unlikely for Technigaz/Zachry to replace PDM in the U.S. LNG market. CCRFF 3.142 and 3.147.

As instructed by Respondents' witness Mr. Eyermann of Freeport LNG, an LNG tank supplier's work in one country is "not relevant" to its work in another country: "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...It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071-2).

### **4. Daewoo/S&B Has Not Entered the U.S. LNG Market**

3.195 Daewoo Engineering & Construction Co., Ltd. ("Daewoo"), a Korean company that was founded in 1973, has been a prominent name in the construction of LNG terminals, pipelines and related facilities. (RX 760, at 10/31). Headquartered in Seoul, South Korea, Daewoo is the 61st top international contractor. (RX 736, at 6/17). In 2001, Daewoo had revenues exceeding 2.3 billion. (RX 736, at 6/17).

#### Response to RFOF 3.195

Daewoo has been doing business for 30 years and has been a "prominent name in the construction of LNG terminals," and yet, since 1975, Daewoo has not built a single LNG tank in the United States. CCF 129-130.

Respondents' support for this finding is a brochure from Daewoo. (RX 760). There is no evidence that CB&I reviewed the brochure. Daewoo's experience list shows that the vast majority of its LNG experience has been in Korea. Nothing in the materials discuss Daewoo's ability to compete in the United States.

Respondents' reliance on ENR's rankings is misleading. ENR's rankings are based on

international “construction revenue” for 2001. (RX 736 at 1). ENR’s rankings fail to provide meaningful information about the state of competition in the relevant product markets in the United States. Based on 2001 “construction revenue,” ENR ranks Daewoo 61st and CB&I 53rd.

(RX 736 at 6/17). However, based on market shares of LNG tanks constructed in the United States, Respondents are ranked first and second, and Daewoo does not appear in the rankings at all. CCF 129-150.

3.196 Daewoo is a world leader for the construction of full-containment LNG tanks, and plays a leading role in the construction LNG terminals in Korea. (RX 873, at 3/77). Korea is the world's second largest importer of LNG, and Daewoo holds itself out as the dominant contractor in the design and construction of LNG terminals and gas main trunklines in Korea over the past decade. (RX 10) (state of mind evidence). Since 1990, Daewoo has acted as a turnkey constructor for at least 12 LNG tanks for LNG projects located in Korea and Nigeria. (RX 760, at 10/31, 29/31; RX 873, at 3-6/77). Daewoo has constructed several LNG facilities for Korea Gas Corporation and Shell Petroleum Development Co. (RX 760, at 29/31; RX 873, at 5-6/77).

### Response to RFOF 3.196

The “state of mind” evidence about Daewoo is just that and nothing more; the cited document (RX 10) was not offered or admitted for the truth of the matter asserted therein.

Respondents support for this finding is material printed from Daewoo’s website on October 31, 2002 and Daewoo’s brochure. (RX 873; RX 760). Nothing in the materials discuss Daewoo’s ability to compete in the United States. There is no evidence that the materials were even reviewed by CB&I. RX 873 was printed on October 31, 2002, two weeks before the commencement of this hearing. 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).

Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: “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...It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyermann, Tr. 7071-72).

Complaint Counsel agree that Daewoo’s principal experience has been in Korea and has no experience in the United States. This is consistent with the observation of [

], that competition is localized, and therefore, foreign firms would be unlikely to enter the United States market: If an LNG facility is to be built “in the U.S., then generally it’s been PDM or CB&I. If it’s international, then the international players get to play. In Japan, it’s been almost all Japanese. In Korea, it’s been the Koreans.” ([ ], Tr. 699).

3.197 S&B Engineers and Constructors, Ltd. (“S&B”) is an engineering contracting firm with corporate headquarters located in Houston, Texas. (RX 873, at 61/77). S&B offers a wide range of services including feasibility studies, engineering, procurement, field construction, and plant start-up. (RX 873, at 61/77). S&B has formed alliances with various international companies to perform projects in the Asia-

Pacific and India. (RX 873, at 61-63/77). S&B's clients for the design and construction of process plants include Phillips, Shell USA, Arco Chemical, Conoco, and Chevron. (RX 873, at 61/77).

### Response to RFOF 3.197

This finding relies on the same evidence as RFOF 3.196 and is irrelevant for the reasons noted in Complaint Counsel's Response to RFOF 3.196. Moreover, S&B has never constructed an LNG tank in the United States. CCF 129-130.

3.198 In mid 2002, Daewoo and S&B represented to the public that it had signed an agreement to jointly pursue LNG receiving terminals in North America. (RX 10) (state of mind evidence). The alliance further represented that S&B, Daewoo, and specialized LNG consultants formed teaming agreements to provide a complete range of services for LNG projects throughout North America, including fast track regulatory and insurance approvals, financial guidance, developmental and detailed engineering, material procurement, and construction and commissioning services. (RX 10) (state of mind evidence).

### Response to RFOF 3.198

The "state of mind" evidence about Daewoo and S&B is just that and nothing more; the cited document (RX 10) was not offered or admitted for the truth of the matter asserted therein.

Respondents' sole support for this finding is a news article dated March of 2002. (RX 10). There is no evidence that the article was even reviewed by CB&I. 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).

3.199 According to the firms, S&B's project execution, construction management skills and knowledge of the U.S. EPC market, along with Daewoo's international experience in LNG technology form a strong competitor in the North American LNG market. (RX 10) (state of mind evidence).

### Response to RFOF 3.199

This "state of mind" evidence about Daewoo and S&B is just that and nothing more; the cited document (RX 10) was not offered or admitted for the truth of the matter asserted therein.

This finding relies on the same evidence as RFOF 3.198 and does not demonstrate Respondents' "state of mind" because there is no evidence that Respondents reviewed it.

3.200 Daewoo approached Dynegy, seeking to be included on Dynegy's bid list for the LNG tanks at the Hackberry, Louisiana LNG facility. (Puckett, Tr. 4553).

Response to RFOF 3.200

“Approaching” Dynegy does not constitute entry, particularly since Daewoo was not awarded any part of the Dynegy project. As a result, Dynegy is an example of failed entry, and demonstrates that Daewoo cannot provide timely, likely and sufficient entry.

Moreover, entry is not timely, likely and sufficient just because Daewoo “approached” Dynegy “seeking to be included on Dynegy’s bid list.”

3.201 [ ]  
( [ ], Tr. 6078, 6090).

Response to RFOF 3.201

[ ] [ ]

3.202 [ ] ( [ ], Tr. 754).

Response to RFOF 3.202

[ ] Entry is not timely, likely and sufficient just because Daewoo has a plan to bid on a project.

3.203 S&B contacted Freeport LNG and indicated it had combined its efforts with Daewoo to compete in the American market for LNG tanks. (Eyer mann, Tr. 6976-77). Representatives from S&B and Daewoo had a meeting with Freeport LNG to discuss its capabilities, experience with current projects, and contracting strategies. (Eyer mann, Tr. 6976-77; 7008). S&B and Daewoo also presented various brochures to Freeport LNG. (Eyer mann, Tr. 7008). Based on these discussions, Freeport LNG requested Daewoo’s LNG tank drawings to be used in connection with Freeport LNG’s FERC application for its proposed LNG facility in Freeport, Texas. (Eyer mann, Tr. 6976-77).

Response to RFOF 3.203

It is irrelevant that S&B and Daewoo had a “meeting” with Freeport LNG. Entry is not timely, likely and sufficient just because S&B and Daewoo had a meeting and handed out brochures to a potential customer.

3.204 Dynegy believes that Daewoo has the requisite experience and capabilities to build the LNG tanks at Dynegy’s Hackberry, Louisiana facility. (Puckett, Tr. 4553).

Response to RFOF 3.204

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. Timely, likely and sufficient entry is not established just because Daewoo may have the “experience and capabilities” to build an LNG tank. Respondents do not cite any evidence that Daewoo will likely restrain CB&I’s prices to the same level as PDM did before the merger. Having the ability to construct an LNG tank is not the same as acting as an effective price restraint on CB&I. As explained in Complaint Counsel’s Response to RFOF 3.95, the post-merger evidence – consisting of Respondents’ statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I’s market power. Absent evidence of an ability to restrain CB&I’s market power, Daewoo is not an entrant who satisfies Respondents’ burden of proving that timely and sufficient entry has occurred or is likely to occur.

For all of Dynegy’s beliefs about Daewoo, Dynegy did not award a contract to Daewoo for its Louisiana LNG facility. The Dynegy example is one of failed entry.

3.205 [ ] believes that Daewoo has the capabilities and skills to construct LNG tanks in the U.S. (Sawchuck, Tr. 6062). [ ] would consider accepting a bid from Daewoo for the construction of an LNG tank on one of its proposed projects in the U.S. (Sawchuck, Tr. 6062).

#### Response to RFOF 3.205

Timely, likely and sufficient entry is not established just because [ ] “believes” that Daewoo has the “capabilities and skills” to build an LNG tank. Respondents do not cite any evidence that Daewoo will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

[ ] [ ] [ ]

3.206 Freeport LNG considers Daewoo/S&B to be a potential supplier of LNG tanks for the proposed LNG project in Freeport, Texas, and intends on sending them a bid package and a request for a bid. (Eyer mann, Tr. 7014). Freeport LNG believes, based on reviewing Daewoo’s brochures and technical documents, that Daewoo has experience building LNG tanks outside of Korea, and is considered a pioneer in the LNG industry. (Eyer mann, Tr. 7010-11; *See also* RX 940, RX 929, RX 930) (state of mind evidence). Freeport LNG was also satisfied with LNG tank drawings that Daewoo provided to Freeport LNG for its FERC application. (Eyer mann, Tr. 6974-75).

#### Response to RFOF 3.206

The “state of mind” evidence is just that and nothing more; the cited documents were not offered or admitted for the truth of the matter asserted therein.

This finding is misleading and incomplete. Mr. Eyer mann lacks foundation to speak about the United States market since he “never worked on an LNG project in the U.S.” (Eyer mann, Tr. 7025).

CCRFF 3.74-3.76. All of Mr. Eyermann's experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyermann has never been involved in evaluating or selecting an LNG tank supplier for a

project, and has never reviewed the prices submitted by LNG tank bidders. (Eyermann, Tr. 7025-7028).

Timely, likely and sufficient entry is not established just because Freeport LNG may consider Daewoo to be a “potential supplier.” Respondents do not cite any evidence that Daewoo will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

As explained in greater detail in Complaint Counsel’s Response to RFOF 3.95, Freeport LNG and other customers likely lack perfect information to know that because of the significant gap between foreign LNG suppliers’ prices in the United States and CB&I’s prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts Daewoo’s price and (b) appears “reasonable” to the customer.

3.207 [ ] ([ ], Tr. 753). [ ] ([ ], Tr. 753-54).

Response to RFOF 3.207

[ ]

[ ] ([ ], Tr. 727, *see also* 703, 716, *in camera*).

3.208 Bechtel believes that S&B is a qualified company that can construct an LNG tank in the U.S. if partnered with an experienced foreign LNG tank company. (Rapp, Tr. 1327).

Response to RFOF 3.208

Timely, likely and sufficient entry is not established just because Bechtel may believe that S&B may be “qualified” to “construct” an LNG tank. Respondents do not cite any evidence that S&B will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

3.209 El Paso would consider pre-qualifying Daewoo and S&B Engineering for LNG projects in North America. (Bryngelson, Tr. 6145-46).

### Response to RFOF 3.209

This finding is incomplete and misleading. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 9-10, 57, 116 (Bryngelson, Dep.)).

Timely, likely and sufficient entry is not established just because El Paso “believes” it would “pre-qualify” Daewoo. Respondents do not cite any evidence that Daewoo will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

For all of El Paso’s beliefs about Daewoo, El Paso decided to enter into sole-source negotiations with CB&I over Daewoo for its next LNG projects. (Glenn, Tr. 4233-34). The El Paso example is one of failed entry.

Moreover, Mr. Bryngelson has no knowledge of pricing competition for LNG tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). He has no direct knowledge of PDM. (Bryngelson, Tr. 6233). CCRFF 3.578.

3.210 [ ]  
(Glenn, Tr. 4223) (state of mind evidence). Mr. Scorsone of CB&I perceives that the team of Daewoo/S&B Engineers is “formidable, tough, experienced, worldly competition.” (Scorsone, Tr. 4858). Scorsone also views Daewoo as a serious competitor for LNG projects in the U.S. (Scorsone, Tr. 4862). PDM competed and lost to Daewoo for an LNG terminal in Pyong Taek, Korea. (Scorsone, Tr. 4862). CB&I executives saw a press release, dated March of 2002, announcing the Daewoo/S&B alliance. (Scorsone, Tr. 4857-58).

### Response to RFOF 3.210

CB&I’s “state of mind” about Daewoo/S&B is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

As explained in Complaint Counsel’s Response to RFOF 3.95, Messrs. Glenn’s and Scorsone’s testimony about CB&I’s “state of mind” are uncorroborated by Respondents’ regular course of business documents and statements – many of which were authored or made by Messrs. Glenn and Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would “create barriers to entry” and use its “pricing advantage” to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I’s “competitive advantages” in the United States and the absence of competition post-merger that had previously eroded CB&I’s profitability; he also gave the October 31, 2002 conference call that touted CB&I’s higher margins, improved business prospects and ability to

win every project.

Moreover, CB&I's purported "state of mind" about Daewoo and S&B is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes. As explained in greater detail in Complaint Counsel's Response to RFOF 3.95, CB&I's post-merger anticompetitive conduct, including raising prices and margins to LNG customers, belies Respondents' contention that Daewoo/S&B is an example of likely, timely and sufficient entry.

3.211 [ ] (Glenn, Tr. 4223) (state of mind evidence). [ ] (Glenn, Tr. 4223) (state of mind evidence).

### Response to RFOF 3.211

CB&I's "state of mind" about Daewoo is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

For the reasons described in Complaint Counsel's Response to RFOF 3.210 and RFOF 3.95, CB&I's "state of mind" regarding Daewoo/S&B is uncorroborated and contradicted by the evidence.

## **5. Tractebel Has Not Entered the U.S. LNG Market**

3.212 Tractebel, the energy division of SUEZ, is a global energy and services business. (RX 874, at 1/8). SUEZ is a French-Belgium conglomerate that provides energy, water, waste and communication services to municipal, residential, and industrial customers. (RX 389, at CB&I065924). In 2001, SUEZ had revenues of \$36.5 billion. (RX 389, at CB&I065924). Tractebel contributed \$19.36 billion to SUEZ's 2001 revenue. (RX 389, at CB&I065924). Tractebel is able to design and build LNG facilities. (RX 389, at CB&I065921).

### Response to RFOF 3.212

For all of Tractebel's international scope, size and experience, there is no evidence from Tractebel that it intends to enter the United States LNG tank construction industry. Moreover, Tractebel did not become a \$36.5 billion company overnight, and yet, since at least 1975, Tractebel has never built an LNG tank in the United States. CCFF 129-130.

3.214 [ ] ([ ], Tr. 4703).

### Response to RFOF 3.214

This finding is uncorroborated. Mr. Jolly did not explain the basis for his [ ] and Respondents do not cite any documentary evidence in support of it.

Moreover, “trying” to enter the LNG market does not constitute entry, particularly since there is no evidence that any United States customer is relying on Tractebel to provide competition against CB&I. Entry is not timely, likely and sufficient just because Tractebel may have a plan to bid on a project.

3.215 Tractebel is often a direct competitor of CB&I for LNG terminals around the world. (Glenn, Tr. 4150-51). Tractebel is a very large Belgian company; Tractebel is involved in building, owning and operating LNG facilities. (Glenn, Tr. 4094). Tractebel owns the LNG facility in the Massachusetts area. (Glenn, Tr. 4150). By purchasing Entrepose, Tractebel now has the ability to build LNG tanks. (Glenn, Tr. 4150).

### Response to RFOF 3.215

This finding misleadingly suggests that Tractebel intends to enter the United States and supply LNG tanks, but Respondents provide no corroborating evidence. The only support for this finding is Mr. Glenn's uncorroborated testimony.

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. Timely, likely and sufficient entry is not established just because of Mr. Glenn's self-serving and uncorroborated testimony about Tractebel's presence in the United States. Respondents do not cite any evidence that Tractebel will likely restrain CB&I's prices to the same level as PDM did before the merger. Purchasing Entrepose or an LNG plan are not the same as acting as an effective price restraint on CB&I. As explained in Complaint Counsel's Response to RFOF 3.95, the post-merger evidence – consisting of Respondents' statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I's market power. Absent evidence of an ability to restrain CB&I's market power, Tractebel is not an entrant who satisfies Respondents' burden of proving that timely and sufficient entry has occurred or is likely to occur.

3.216 Former Enron executive Nigel Carling would consider using Tractebel/Entrepose as an LNG tank contractor for a U.S. project. (Carling, Tr. 4491). Tractebel representatives expressed to Mr. Carling that it is interested in U.S. LNG projects. (Carling, Tr. 4514). Tractebel/Entrepose recently won a job in Hammerfest, Norway for Statoil involving three LNG tanks. (Carling, Tr. 4491). Tractebel/Entrepose submitted a bid for Enron's Bahamas project. (Carling, Tr. 4490). Enron ultimately sold the Bahamas project to Tractebel. (Scorsone, Tr. 4998). CB&I believes that Tractebel, as EPC contractor, could build the Bahamas project by itself. (Scorsone, Tr. 4998) (state of mind).

### Response to RFOF 3.216

CB&I's "state of mind" about Tractebel is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Timely, likely and sufficient entry is not established just because a former Enron employee "would consider" Tractebel/Entrepose as an LNG tank contractor in the United States or that Tractebel expressed its "interest" in the United States. Respondents do not cite any evidence that Tractebel will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

Respondents cite Mr. Carling, but he has had no experience in assessing the degree of competition between CBI and PDM on projects in the United States. (Carling, Tr. 4513).

Mr. Carling's experience with foreign LNG tank suppliers is exclusively on LNG projects outside of the United States. (Carling, Tr. 4454-55, 4465, 4480-82). Thus, he has no "experience evaluating how competitive" foreign LNG firms have been compared to Respondents in the United States. (Carling, Tr. 4514). CCRFF 3.571-3.573.

For the reasons discussed in Complaint Counsel's Response to RFOF 3.95, Mr. Scorsone's "state of mind" about Tractebel's abilities is uncorroborated and inconsistent with his statements to fellow employees and Respondents' business records, including those authored by Mr. Scorsone.

## **6. MHI Has Not Entered the U.S. LNG Market**

3.217 Mitsubishi Heavy Industries ("MHI") is well-renowned for its LNG cryogenic technology; it has an excellent history of performance in the design and production of transportation and storage facilities. (RX 767, at 16/26). MHI has been active in the field of cryogenic storage tanks for many decades. (See RX 767). MHI is capable of constructing single containment and full-containment tanks. (RX 875, at 2/9). MHI has received orders of 36 large LNG storage tanks including: a full containment LNG tank for Oasaka Gas Co., Ltd. in 2000; the world's largest class membrane LNG tank for Toho Gas Co., Ltd. in 2001; and three full containment tanks at Ras Laffan, Qatar. (RX 875, at 5-7/9, 9/9).

### Response to RFOF 3.217

MHI may be "well-renowned" and may possess an "excellent history" and yet, since 1975, MHI has not built a single LNG tank in the United States. CCFF 129-130.

Respondents support for this finding is material printed from MHI's website on November 6, 2002 and MHI's brochure. (RX 875; RX 767). Nothing in the materials discuss MHI's ability to compete in the United States. There is no evidence that the materials were even reviewed by CB&I. RX 875 was printed on November 6, 2002, one week before the commencement of this hearing. 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).

Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier's work in one country is "not relevant" to its work in another country, including price comparisons: "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. . . It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071).

Complaint Counsel agree that MHI's principal experience has been in Asia and has no experience in the United States. (RX 767 at 1). [

699).

3.218 British Petroleum would consider soliciting a bid from MHI to construct LNG tanks for its various projects in the United States. (Sawchuck, Tr. 6062). [ ] believes MHI has the technical capabilities and skills to construct LNG tanks in the United States. (Sawchuck, Tr. 6062-63). [ ] (Sawchuck, Tr. 6092).

Response to RFOF 3.218

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. [

] Respondents do not cite any evidence that MHI will likely restrain CB&I’s prices to the same level as PDM did before the merger. An invitation to bid sometime in the future is not the same as acting as an effective price restraint on CB&I. As explained in Complaint Counsel’s Response to RFOF 3.95, the post-merger evidence – consisting of Respondents’ statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I’s market power. Absent evidence of an ability to restrain CB&I’s market power, MHI is not an entrant who satisfies Respondents’ burden of proving that timely and sufficient entry has occurred or is likely to occur.

For all of [ ] beliefs about MHI, [ ] decided to enter into [ ] negotiations with CB&I over MHI for [ ] LNG projects. (Scorsone, Tr. 4995) The [ ] example is one of failed entry.

3.219 El Paso believes it would pre-qualify MHI to build LNG tanks in the United States. (Bryngelson, Tr. 6131-32). El Paso already pre-qualified MHI for its Altamira and Rosarito projects. (Bryngelson, Tr. 6125-26). El Paso believes MHI has sufficient financial stability to satisfy its requirements. (Bryngelson, Tr. 6128). Based on input received from its consultant KBR, El Paso believes that MHI has a good reputation for building LNG tanks. (Bryngelson, Tr. 6130). El Paso believes that MHI is capable of building LNG tanks in the United States at a competitive price. (Bryngelson, Tr. 6132).

Response to 3.219

This finding is incomplete and misleading. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 9-10, 57, 116 (Bryngelson, Dep.)). Moreover, Mr. Bryngelson has never spoken to a single employee of MHI about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

Timely, likely and sufficient entry is not established just because El Paso “believes” it would “pre-qualify” MHI. Respondents do not cite any evidence that MHI will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

For all of El Paso's beliefs about MHI, El Paso decided to enter into sole-source negotiations with CB&I over MHI for its next LNG projects. (Glenn, Tr. 4233-34). The El Paso example is one of failed entry.

Moreover, Mr. Bryngelson has no knowledge of pricing competition for LNG tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). He has no direct knowledge of PDM. (Bryngelson, Tr. 6233). CCRFF 3.578.

3.220 Bechtel pre-qualified MHI to construct the LNG tanks for the train four Trinidad expansion. (Rapp, Tr. 1318). Bechtel recognizes that MHI has experience in constructing LNG tanks on an international scale. (Rapp, Tr. 1309, 1316).

### Response to RFOF 3.220

Timely, likely and sufficient entry is not established just because Bechtel "pre-qualified" MHI. Respondents do not cite any evidence that MHI will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

3.221 Former Enron executive Nigel Carling would consider using MHI as an LNG tank contractor for a U.S. project if MHI worked with a domestic partner. (Carling, Tr. 4492). MHI is "one of the big players in Japan" and has built tanks in Ras Laffan, Qatar, Taiwan, and Indonesia. (Carling, Tr. 4492).

### Response to RFOF 3.221

There is no evidence that MHI has secured a "domestic partner," and therefore MHI cannot compete in the United States.

Moreover, timely, likely and sufficient entry is not established just because a former Enron employee "would consider" MHI as an LNG tank contractor in the United States. Respondents do not cite any evidence that MHI will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

Respondents cite Mr. Carling, but he has had no experience in assessing the degree of competition between CBI and PDM on projects in the United States. (Carling, Tr. 4513). Mr. Carling's experience with foreign LNG tank suppliers is exclusively on LNG projects outside of the United States. (Carling, Tr. 4454-55, 4465, 4480-820). Thus, he has no "experience evaluating how competitive" foreign LNG firms have been compared to Respondents in the United States. (Carling, Tr. 4514). CCRFF 3.571-3.573.

3.222 Based on its recent bidding activity for LNG projects in Mexico, CB&I believes that MHI is positioned to compete in the U.S. for LNG tank projects. (Scorsone, Tr. 4849).

## Response to RFOF 3.222

Mr. Scorsone's testimony is uncorroborated by Respondents' regular course of business documents. Moreover, as explained in greater detail in Complaint Counsel's Response to RFOF 3.95, CB&I's "belief" about MHI is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes.

### **7. IHI Has Not Entered The U.S. LNG Market**

3.223 Ishikawajima-Harima Heavy Industries, Co., Ltd. ("IHI") is rated as the world's leading constructor of LNG receiving terminals. (RX 764, at 6/36). IHI LNG storage tanks are currently operating at all LNG terminals in Japan. (RX 764, at 6/36). IHI is capable of constructing double and full containment LNG tanks. (RX 764, at 22/36).

## Response to RFOF 3.223

IHI may be "rated as the world's leading constructor of LNG receiving terminals" and yet, since its inception, IHI has not built a single LNG tank in the United States. CCF 129-130.

Respondents sole support for this finding is an brochure. (RX 764). Nothing in the material discuss IHI's ability to compete in the United States. There is no evidence that the material was even reviewed by CB&I. 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).

Mr. Eyermann of Freeport LNG admitted that an LNG tank supplier's work in one country is "not relevant" to its work in another country, including price comparisons: "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...It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071).

Complaint Counsel agree that IHI's principal experience has been in Japan and that IHI has no experience in the United States. (RX 764 at 6). This is consistent with the observation of [ ], that competition is localized, and therefore, foreign firms would be unlikely to enter the United States market: If an LNG facility is to be built "in the U.S., then generally it's been PDM or CB&I. If it's international, then the international players get to play. In Japan, it's been almost all Japanese. In Korea, it's been the Koreans." ([ ]).

3.224 British Petroleum would consider soliciting a bid from IHI to construct LNG tanks for its various projects in the United States. (Sawchuck, Tr. 6062). [ ] believes IHI has the technical capabilities and skills to

construct LNG tanks in the United States. (Sawchuck, Tr. 6062-63). [ ] ([ ]).

### Response to RFOF 3.224

Respondents must demonstrate that new entry is likely to occur in a timely and sufficient manner to deter or counteract the likely anticompetitive effects of this merger. Respondents have failed to do so. [ ]

[ ] Respondents do not cite any evidence that IHI will likely restrain CB&I's prices at the same level as PDM did before the merger. A possible invitation to bid sometime in the future is not the same as acting as an effective price restraint on CB&I. As explained in Complaint Counsel's Response to RFOF 3.95, the post-merger evidence – consisting of Respondents' statements to the public and its employees in SEC filings, investor presentations, and ordinary course of business documents, together with higher prices to customers – demonstrate that foreign firms have not restrained CB&I's market power. Absent evidence of an ability to restrain CB&I's market power, IHI is not an entrant who satisfies Respondents' burden of proving that timely and sufficient entry has occurred or is likely to occur.

For all of [ ] beliefs about IHI, [ ] decided to enter into [ ] negotiations with CB&I over IHI for [ ] LNG projects. (Scorsone, Tr. 4995). The [ ] example is one of failed entry.

3.225 Freeport LNG believes that if IHI finds an American partner it will be a potential supplier of LNG tanks in the United States. (Eyer mann, Tr. 7017). In October 2002, Freeport LNG was contacted by a representative of IHI; the representative, stationed in New York, sent Freeport LNG marketing materials listing IHI's experience. (Eyer mann, Tr. 7015-16; RX 931) (state of mind evidence). Freeport LNG understands IHI to have built 23 LNG terminals in Japan, with each terminal containing between 4 and 6 LNG tanks. (Eyer mann, Tr. 7015-16).

### Response to RFOF 3.225

This finding is misleading and incomplete. Mr. Eyer mann lacks foundation to speak about the United States market since he “never worked on an LNG project in the U.S.” (Eyer mann, Tr. 7025). All of Mr. Eyer mann's experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyer mann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG tank bidders. (Eyer mann, Tr. 7025-7028).

There is no evidence that IHI has secured an “American partner,” and therefore IHI cannot compete in the United States for Freeport LNG's business.

Timely, likely and sufficient entry is not established just because Freeport LNG may consider IHI to be a “potential supplier” or because IHI sent “marketing materials” to a potential customer. Respondents do not cite any evidence that IHI will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

As explained in greater detail in Complaint Counsel's Response to RFOF 3.95, Freeport LNG and other customers likely lack sufficient information to know that because of the significant gap between foreign LNG suppliers' prices in the United States and CB&I's prices, CB&I can raise prices significantly above pre-merger levels and yet still quote a price that (a) undercuts IHI's price and (b) appears "reasonable" to the customer.

3.226 IHI is included on the list of LNG tank contractors El Paso considers for its LNG projects. (Bryngelson, Tr. 6126). Bechtel recognizes IHI as a company with experience constructing LNG tanks on an international scale. (Rapp, Tr. 1309, 1316).

### Response to 3.226

This finding is incomplete and misleading. Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (JX 22 at 9-10, 57, 116 (Bryngelson, Dep.)). CCRFF 3.28.

Timely, likely and sufficient entry is not established just because El Paso put IHI on a "list" of LNG tank contractors or because Bechtel "recognizes" IHI as a firm with "experience" constructing LNG tanks internationally. Respondents do not cite any evidence that IHI will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

For all of El Paso's beliefs about IHI, El Paso decided to enter into sole-source negotiations with CB&I over IHI for its next LNG projects. (Glenn, Tr. 4233-34). The El Paso example is one of failed entry.

Moreover, Mr. Bryngelson has no knowledge of pricing competition for LNG tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). He has no direct knowledge of PDM. (Bryngelson, Tr. 6233).

3.227 Based on its recent bidding activity for LNG projects in Mexico, CB&I believes that IHI is positioned to compete in the U.S. for LNG tank projects. (Scorsone, Tr. 4849).

### Response to RFOF 3.227

Mr. Scorsone's testimony is uncorroborated by Respondents' regular course of business documents. Moreover, as explained in greater detail in Complaint Counsel's Response to RFOF 3.95, CB&I's "belief" about IHI is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents, and its customers in its price quotes.

3.228 In addition to facility owners, LNG tanks are often procured by general contractors known as engineering, procurement, and construction ("EPC") contractors. (Scorsone, Tr. 4934-35). EPC contractors do not perform every aspect of an LNG project. (Scorsone, Tr. 4935). Rather, they use specialty subcontractors,



In another CB&I internal e-mail, 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 CBI-PL012446). CB&I liked “our chances better in what then boils down to a 2 horse race.” (*Id.*)

Customers such as Brian Price, Vice President of LNG Technology for Black & Veatch, an EPC contractor for LNG projects, questioned the ability of foreign tank suppliers after the Memphis LNG project. Mr. Price confirmed that Black & Veatch “had concerns about finding a partner for turnkey LNG facilities that require LNG tanks.” (Price, Tr. 634). Mr. Price further explained his concerns: “Well, our concerns are can we partner with a foreign tank supplier that can provide a competitive price so that we can compete on a peak-shaving facility that also includes an LNG tank.” (Price, Tr. 635).

Representatives for domestic EPC contractors, such as Mr. Price, believe that there is a “lack of a domestic supplier that [ ] can go to to bid with on a peak-shaving unit,” and that this “lack” of a low-cost, qualified partner “puts [ ] at a disadvantage to compete on that project” (Price, Tr. 636). Because CB&I has a stronghold on the LNG tank market and because CB&I is the [ ] it has a distinct competitive advantage over other firms. (CX 364 at CBI-E 009279, *in camera*; see also CX 428 at CBI-E 009331; CX 310 at CB&I 049044).

The Dynegy, [ ], and Yankee Gas stories show that CB&I is currently executing its business strategy of forcing the customer to award both the EPC and tank contracts to CB&I by leveraging the sale of the tank with the overall contractor position. Public statements made by Respondents also show their intentions and perceived ability to exercise market power.

## **8. The Dynegy Example**

The Dynegy example demonstrates the possible harms that can befall a customer who does not agree to CB&I’s terms of being the turnkey contractor for a project. CB&I made three failed attempts to convince Dynegy to abandon its policy of competitive bidding in favor of allowing CB&I to perform the role of the turnkey EPC contractor for the entire project. CCF 978-987 CB&I declined to bid for any portion of the project separately. CCF 978-989.

Dynegy has reason to be concerned that the price that it is paying to Skanska/Whessoe is higher than the price it would have paid if CB&I and PDM had been competing for the project. According to Mr. Price, Dynegy developed its budget for the Hackberry project based on pricing information from Whessoe, a foreign supplier with higher costs than CB&I. (Price, Tr. 602-3). Whessoe’s pricing was further cushioned because it took into account the higher business risks that Whessoe would have on its first project in the U.S. (Price, Tr. 608-9, 590). The fact that foreign firms may have met this level of “satisfaction,” for Dynegy, a company that does “not have the staff, experience or knowledge to analyze the bids [ ] and make an informed selection” tells nothing about the ability of these firms to compete with CB&I. (CX 138 at CBI 019913-HOU).



In fact, a comparison of Whessoe's LNG tank price before the acquisition with Whessoe's price for an identical tank post-acquisition shows that Dynegy is paying a much higher price than it would have if PDM had not been acquired.

According to Mr. Price, the pricing that Dynegy used to determine its budget for its 160,000 cubic meter full containment tank was a [ ] million price quote from Whessoe. Dynegy used Whessoe's price to satisfy itself that the bids for the Hackberry project were within the "expected price range." (Puckett, Tr. 4540, 4557; Price, Tr. 602-3).

Only four years earlier, [

] (CX 691 at [ ] 02 004, *in camera*, emphasis supplied).

**Whessoe's new price to Dynegy represents a price increase in excess of 33%** (emphasis supplied).

This number is significant for two reasons. First, it shows that Dynegy will, in fact, pay a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project. (*See* Price, Tr. 622 ("We had concerns that if we do not have a domestic tank price for that project that the prices that the client would receive for those tanks would be higher.")).

Second, in keeping with economic theory, Whessoe's price increase to Dynegy confirms that **other firms in the market have also begun to increase prices to keep up with CB&I's post-acquisition price increases.** (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, emphasis added).

Because of CB&I's and PDM's experience in building LNG tanks in the United States, Black & Veatch's Mr. Price believes that there would be less overall risk to the customer if it relies on CB&I or PDM to supply an LNG tank in the United States than if the customer relies on a foreign supplier. (Price, Tr. 590-91).

Accordingly, Mr. Price believes that the project risks to Dynegy are higher because Dynegy has been forced to rely on foreign suppliers, with no experience in the United States market. (Price, Tr. 626-28).

As demonstrated by the Dynegy example, CB&I touts its ability to "walk away" if it "can't get comfortable with the funding and with the terms" of a project. (CX 1731 at 33). CB&I's strategy is in keeping with its desire to dictate projects on its own terms.

## 9. The Yankee Gas Example

Although Yankee Gas preferred to have prices exclusively for the LNG tank portion of the project rather than "facility turnkey pricing," CB&I wanted to do the work on a turnkey basis. (CX 1507 at CBI 059483; CX 417 at CBI 026845-6-HOU).

In April 2001, Yankee Gas' LNG consultant CHI solicited pricing from CB&I, Skanska/Whessoe and Technigaz for Yankee Gas' 360,000 barrel LNG peak shaving facility in Waterbury, Connecticut. (CX 1507 at CBI 059483; JX 21 at 17-18, 24 (Andrukiewicz, Dep.)).

Guarding its proprietary pricing information and designs from any potential "competitor[s]" (CHI), CB&I wanted the owner's ear alone and refused to submit pricing information unless it was selected as the turnkey contractor. (CX 430 at CBI 026934-HOU; CX 1507 at CBI 059483). Eric Frey, CB&I's representative to Yankee Gas, vowed to "make every effort to restructure how the project will be bid and executed." (CX 430 at CBI 026934-HOU).

On October 26, 2001, CB&I's strategy succeeded: "Yankee Gas requested that CB&I submit a proposal for contracting for the facility directly to Yankee Gas and requests a second meeting with CB&I." (CX 1507 at CBI 059484; *see also* CX 787 at CBI 065244, *in camera*) (in December of 2001, Frey reports that the "'third' competitor dropped out of the race. It is currently just CB&I and CHI.")).

As CB&I had direct access to Yankee Gas, CHI turned 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 CBI 059484).

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. CCF 952, 939.

CB&I continues to press Yankee Gas to proceed on a turnkey basis with CB&I. (CX 787 at CBI 065242, *in camera*). Respondents presented no evidence that its post-merger strategy with Yankee Gas was negatively impacted by any competitor, foreign or domestic.

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.)).

## 10. The [ ] Example

When Respondents asked a [ ] executive to provide an affidavit in affirmation of their case, the executive turned to [ ] and some of his colleagues to provide him with updated information on competition in the LNG tank market. CCF 865.

After performing an analysis of the various competitors in the market and pondering the best way of going forward, [ ] realized that its [ ]

at [ ] 01 028, *in camera*).

It was clear to [ ] that CB&I was the [ ] (CX 693 at [ ] 01 027, *in camera*; CX 691 at [ ] 01 032, *in camera*).

Despite the fact that CB&I could increase its prices significantly to [ ] 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 CBI’s pressure to enter into a sole-source turnkey relationship would at least provide [ ] with [ ] CCFF 837-841 (CX 693 at [ ] 01 028, *in camera*).

Given the limited choices, [ ] has decided to negotiate for sole-source agreements with CB&I for its [ ] LNG import terminal projects in the United States. (Scorsone, Tr. 4995).

Public statements made by CB&I executives to shareholders and the general public show that CB&I’s monopolistic stronghold in the LNG tank market enables it to gain more turnkey work. Mr. Asherman of CB&I emphasizes the possibilities ahead in LNG facilities. “It means **the elephants, the LNG facilities that we’ve been tracking and talking about, are still in front of us, and we’re confident that our guidance for year end results of over a billion two can certainly be achieved.**” (CX 1729 at 6-7, emphasis supplied).

Mr. Glenn has also made clear to CB&I’s investors that the firm finds itself is attempting to be very selective in the jobs that it pursues: “the marketplace, in general, I don’t see any significant shifts one way or the other other than **we’re just, I think, doing a better job of being more selective and certainly a better work process in how we’re bidding our work and winning our work.**” (CX 1729 at 10-1, emphasis supplied).

3.229 An owner may hold a bidding process to select its EPC contractor. (Izzo, Tr. 6494-95; Puckett, Tr. 4546-47). While CB&I has experience acting as an EPC contractor for various projects throughout the world, there are a number of global and U.S. based EPC firms that compete with CB&I for the development of LNG facilities including: Skanska; Technigaz; TKK; Fluor Daniel; Halliburton Kellogg Brown & Root; Tractebel; Bechtel; Foster Wheeler; Chiyoda JGC; and Black & Veatch Pritchard. (Scorsone, Tr. 4934-35; Izzo, Tr. 6494-95; Sawchuck, Tr. 6061). Each of these companies are experienced, have a good reputation, and are capable of serving as an EPC contractor for LNG projects. (Izzo, Tr. 6494-95; Sawchuck, Tr. 6061).

Response to RFOF 3.229

Respondents’ use of the word “compete” is misleading. Respondents present no evidence that any of the above-named firms is competitive when pitted against CB&I. There is no evidence in the record that Tractebel, Foster Wheeler, Fluor Daniel, or Chiyoda JGC have bid against CB&I on U.S. LNG facilities. Moreover, other firms, such as TKK and [ ], have never been awarded an EPC contract, because they cannot provide competitive pricing to the

customer. (See, e.g. [ ], Tr. 4690-91, *in camera* (Dynergy told us to “sharpen our pencil to be more competitive next time”).

As noted in CCRFF 3.228, CB&I maintains a domestic advantage over other firms because it can provide LNG tanks and the accompanying systems in a single turnkey package. Because of its position, CB&I can exercise market power by making the sale of the LNG tank contingent upon being awarded the EPC contract for any given project. Respondents’ laundry list of possible firms is misleading because it implies that all the listed firms have CB&I’s capabilities, which they do not, and because it implies that all of the listed firms supply LNG tanks, which they do not.

Moreover, Respondents’ support for this finding is unreliable: Mr. Scorsone’s testimony is inherently self-serving; [ ] testimony that many possible EPC constructors exist is specious because [ ]; and Mr. Izzo conceded that he has never supervised any LNG tank construction projects for Calpine in the U.S. or abroad. (Izzo, Tr. 6513).

Mr. Sawchuck has no direct knowledge of the capabilities of the EPC contractors listed in Respondents’ finding. Mr. Sawchuck performed a small role for two LNG projects outside of the relevant geographic market. For these lump sum turnkey projects [ ] only obtained bids from PDM, CB&I, Technigaz, and Whessoe. (Sawchuck, Tr. 6052-53). On the Bilbao project, Mr. Sawchuck’s responsibilities were limited to some work on front end development (Sawchuck, Tr. 6053), while on the Trinidad project, he only acted as a process engineering consultant to Amoco. (Sawchuck, Tr. 6052).

Finally, Mr. Sawchuck’s intentions are questionable because of [ ]. (*in camera*).

When Respondents asked [ ] for an affidavit in this matter, [ ] asked for guidance on the apparent “sticky” situation from his colleagues, including [ ]. [ ] and his colleagues “did a bit of research into the USA companies referenced by CB&I,” as competitors in the U.S. LNG market, (RX 155 at [ ] 01 032), and concluded that “the reality for today is that in the US, [CB&I/PDM] are the leading company in the LNG Tank Business and the other competitors will need to demonstrate their capabilities in this market.” (RX 155 [ ] 01 at 032). “Since their acquisition of PDM, CB&I now dominate the US market.” (RX 156 at [ ] 01 027).

Despite finding all evidence to the contrary of Respondents’ case, in August 2001, [ ] (CX 691 at [ ] 01 032, *in camera*, emphasis supplied). As a result, Mr. Sawchuck’s views about the competitive nature of the LNG market must be viewed with skepticism.

Mr. Izzo’s testimony with respect to competition in the U.S. should be given little weight

because he has no experience selecting an EPC or LNG tank contractor for a U.S. LNG facility. Additionally, he has limited direct experience with the selection of EPC contractors for LNG facilities on international projects. (Izzo, Tr. 6514, 6521). Mr. Izzo's has only worked with Kvaerner/Whessoe, CB&I, PDM, and Technigaz. (Izzo, Tr. 6514, 6516-19). The Calpine representative further acknowledges that the only EPC contractors that Mr. Izzo has actually worked with on the construction of an LNG facility were Kvaerner/Whessoe, CB&I and PDM. (Izzo, Tr. 6516, 6518, 6519). Mr. Izzo's testimony regarding the reputations and experience of EPC contractors in the U.S. LNG market is not based on his first hand experience but rather on hearsay. (Izzo, Tr. 6520). *See* CCRFF 3.587.

For the reasons listed above, Respondents' finding is misleading and fails to address the competitive advantage that CB&I holds in the United States as an incumbent firm with turnkey capabilities.

3.230 Because owners impose bonding requirements, the size of an EPC contractor is a substantial factor which can influence the competitiveness of the contractor. (Scorsone, Tr. 4938; Price, Tr. 656). Most of CB&I's EPC contractor competitors are significantly larger than CB&I. (*See* RX 736; RX 737).

#### Response to RFOF 3.230

Although Complaint Counsel agrees generally with the proposition that firms with a larger revenue base is important to being able to meeting the bonding requirements of some firms, Respondents grossly overstate the importance of bonding capabilities and mischaracterize the record.

Mr Price testified only that size "make[s] a difference." (Price, Tr. 656). He did not claim that it was a "substantial factor" affecting the competitiveness of the contractor. Mr. Scorsone's equally lukewarm testimony on the matter ("Size has an influence") is inherently self-serving and unreliable. (Scorsone, Tr. 4938).

Moreover, Respondents' finding is misleading and incomplete. Bonding Capabilities represent only one of many qualities that an EPC contractor must possess in order to successfully compete in the United States. CCF 335-364.

Respondents base their assertion that "Most of CB&I's EPC contractor competitors are significantly larger than CB&I" on ENR rankings. These rankings are misleading for at least two reasons. First, ENR's rankings are based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1). Having the ability to meet bonding requirements are meaningless if a firm in the industry does not possess a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCF 335-364.

Furthermore, Respondents fail to acknowledge Mr. Price's testimony that owners have different bonding requirements for different facilities. (Price, Tr. 656). It is unclear how large a supplier has to be in order to have bonding capability for an EPC contract. Respondents fail to present testimony from customers stating that CB&I is not large enough to meet bonding requirements for

projects.

Moreover, Respondents' argument that "Most of CB&I's EPC contractor competitors are significantly larger than CB&I" is misleading to the extent that it implies that CB&I is not large enough to meet bonding requirements. The fact that other contractors may be larger than CB&I is really irrelevant because Respondents have not presented documentation to suggest that CB&I is not large enough to perform the same functions as other contractors, especially considering CB&I's newly established stronghold over the EPC and LNG markets.

3.231 Bechtel, with annual revenues of over \$11 billion, is the 6th largest international contractor in revenue, and is the number one ranked contractor in the U.S. (RX 736, at 2/17; RX 737, at 1/16). Bechtel employs approximately 50,000 employees worldwide, and is regarded as a world-class engineering construction firm. (Rapp, Tr. 1303-04). Bechtel is currently serving as the EPC contractor for the Trinidad project, and has engineered and constructed LNG facilities in Kenai, Alaska for Phillips; Arun, Indonesia; Badak, Indonesia; and Arzu, Algeria. (Rapp, Tr. 1286, 1310).

### Response to RFOF 3.231

Respondents once again rely upon ENR rankings to reflect the competitiveness of EPC contractors. These rankings are misleading because ENR's rankings are based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1).

Having the ability to meet bonding requirements are meaningless if a firm cannot win projects for lack of a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCRFF 335-364. Respondents present no evidence that Bechtel meets all the necessary qualifications. CCRFF 3.230.

"International contractors," such as Bechtel, serve as general contractors on LNG projects, and do not have tank construction capabilities. (CX 693 at [ ] 01 027, *in camera* (Included on [ ] list of "General contractors for re-gas" are Halliburton Kellogg, Brown & Root, Bechtel, Foster Wheeler, Fluor Daniel, and Black & Veatch)). As noted by [ ] in an internal analysis of competition in the LNG market, "Several of the usual general contractors are capable of providing FEED and EPC for regasification terminals, although most would subcontract construction." (CX 693 at [ ] 01 027; Scorsone, Tr. 4936-7).

Mr. Scorsone admitted that CB&I's ability to "construct LNG tanks" over firms such as "Bechtel, Fluor and KBR" constituted "part of [ ] advantage" at the EPC level of LNG tank construction. (Scorsone, Tr. 4937).

The only domestic tank supplier that [ ] lists as an "established tank sub-contracto[r]" is CB&I. To obtain the most competitive price from an LNG tank constructor, firms such as Bechtel will turn to CB&I to solicit a bid. As further explained in Complaint Counsel's Response to RFOF 3.228, if CB&I refuses to supply an LNG tank to Bechtel, the contractor must then turn to a higher-priced foreign firm in order to obtain the tank.

Bechtel's overall price for an LNG facility would be higher and less competitive with a foreign firm's tank bid than it would be with a tank bid from a low-cost domestic supplier such as CB&I or PDM. (*See, e.g.* CCF 935-938 (Black & Veatch and Lotepro's price quotations for the Memphis peakshaver were less competitive than CB&I and PDM's because the foreign tank vendors that they partnered with could not provide a competitive price on the LNG tank.)). CB&I's bid for a turnkey facility would therefore be higher than Bechtel's.

3.232 Skanska, with revenues of over \$14 billion, is the number one international contractor in terms of revenues. (RX 736, at 1/17). Skanska has domestic operations out of Whitestone, New York, and is considered the third ranked domestic contractor. (RX 737, at 1/16).

### Response to RFOF 3.232

As further explained in CCRFF 3.230, the financial size of a contractor is not the only qualification necessary to be awarded the EPC contract for an LNG facility.

As discussed in CCRFF 3.228, Skanska and its tank supplier Whessoe represent one of the higher-priced firms that customers, such as Dynegy, will have to turn to unless they accede to CB&I's demand to be the turnkey EPC contractor.

Respondents cite to ENR rankings as support for Skanska's revenue information. These rankings are misleading because ENR's rankings are based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1).

Having the ability to meet bonding requirements are meaningless if a firm does not possess a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCF 335-364. Respondents present no evidence that Skanska meets all the necessary qualifications. CCRFF 3.230.

In fact, Complaint Counsel has shown that Skanska's subsidiary, Whessoe has experienced reputation problems in the past, which may well affect Skanska's reputation and a customer's willingness to work with Skanska as an EPC contractor. CCRFF 3.58.

3.233 Fluor is a large EPC contractor that has a high-grade reputation across a number of industries including large industrial complexes and petroleum/petrochemical facilities. (Scorsone, Tr. 4942). Fluor Corp. is ranked second among domestic contractors, and 11th among international contractors. (RX 736, at 2/17; RX 737, at 1/16). Fluor earned revenues in excess of \$7 billion in 2001. (RX 736, at 2/17).

### Response to RFOF 3.233

Respondents once again rely upon ENR rankings to reflect the competitiveness of EPC contractors. These rankings are misleading because ENR's rankings are based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1).

Mr. Scorsone's testimony that Fluor has a "high-grade reputation" is self-serving and uncorroborated by documents or the testimony of fact witnesses.

Having the ability to meet bonding requirements are meaningless if a firm cannot win projects for lack of a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCF 335-364. Respondents present no evidence that Fluor meets all the necessary qualifications. CCRFF 3.230

As discussed in Complaint Counsel's Response to RFOF 3.231, Fluor Daniel serves as a general contractor on LNG projects, and does not have tank construction capabilities. CCRFF 3.231. To obtain the most competitive price from an LNG tank constructor, firms such as Fluor will turn to CB&I to solicit a bid. As further explained in Complaint Counsel's Response to RFOF 3.228, if CB&I refuses to supply an LNG tank to Fluor, the contractor must then turn to a higher-priced foreign firm in order to obtain the tank. Fluor's overall price for an LNG facility would be higher and less competitive with a foreign firm's tank bid than it would be with a tank bid from a low-cost domestic supplier such as CB&I or PDM. CCRFF 3.231.

3.234 Halliburton KBR, the sixth ranked U.S. contractor, is based in Houston, Texas. (RX 737, at 1/16). KBR is rated as the fifth largest international contractor with over \$5 billion in revenues. (RX 736, at 2/17). Halliburton KBR is the "leading EPC contractor dealing with owner issues, front-end engineering studies, specifications development, taking the bids, construction terminals." (Scorsone, Tr. 4941).

### Response to RFOF 3.234

Respondents once again rely upon ENR rankings to reflect the competitiveness of EPC contractors. These rankings are misleading because ENR's rankings are based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1).

Mr. Scorsone's testimony that Halliburton Kellogg, Brown, & Root is the "leading EPC contractor" is self-serving.

Having the ability to meet bonding requirements are meaningless if a firm cannot win projects for lack of a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCF 335-364. Respondents present no evidence that Halliburton KBR meets all the necessary qualifications. CCRFF 3.230.

As further explained in Complaint Counsel's Response to RFOF 3.231, Halliburton KBR serves as a general contractor on LNG projects, and does not have tank construction capabilities. CCRFF 3.231; (Izzo, Tr. 6524). To obtain the most competitive price from an LNG tank constructor, firms such as Halliburton will turn to CB&I to solicit a bid. As further explained in Complaint Counsel's Response to RFOF 3.228, if CB&I refuses to supply an LNG tank to Halliburton, the contractor must then turn to a higher-priced foreign firm in order to obtain the tank. Halliburton's overall price for an LNG facility would be higher and less competitive with a foreign firm's tank bid than it would be with a tank bid from a low-cost domestic supplier such as CB&I or PDM. CCRFF 3.231.

3.235 Foster Wheeler is headquartered in Clinton, New Jersey, and is the 15th largest domestic contractor. (RX 737, at 2/16). Foster Wheeler has annual revenues of over \$2 billion, and is rated as the 16th largest international contractor by revenue. (RX 736, at 2/17).

### Response to RFOF 3.235

Respondents' sole support for this finding is taken from an ENR website containing rankings of firms based on "construction revenue" for 2001, not based upon which firm is the most competitive

contractor. (RX 737 at 1).

Having the ability to meet bonding requirements are meaningless if a firm cannot win projects for lack of a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCRFF 335-364. Respondents present no evidence that Foster Wheeler meets all the necessary qualifications. CCRFF 3.230.

Similar to Bechtel, as discussed in Complaint Counsel's Response to RFOF 3.231, Foster Wheeler serves as a general contractor on LNG projects, and does not have tank construction capabilities. CCRFF 3.231. To obtain the most competitive price from an LNG tank constructor, firms such as Foster Wheeler will turn to CB&I to solicit a bid. As further explained in Complaint Counsel's Response to RFOF 3.228, if CB&I refuses to supply an LNG tank to Foster Wheeler, the contractor must then turn to a higher-priced foreign firm in order to obtain the tank. Foster Wheeler's overall price for an LNG facility would be higher and less competitive with a foreign firm's tank bid than it would be with a tank bid from a low-cost domestic supplier such as CB&I or PDM. CCRFF 3.231.

3.236 Black & Veatch is the 27th largest domestic contractor in the U.S., and the 69th largest international contractor in revenue. (RX 736, at 6/17; RX 737, at 2/16).

#### Response to RFOF 3.236

Once again, Respondents' sole support for this finding is taken from an ENR website containing rankings of firms based on "construction revenue" for 2001, not which firm is the best contractor. (RX 737 at 1).

Having the ability to meet bonding requirements are meaningless if a firm cannot win projects for lack of a good reputation, experience, and a track record for successfully acting as an EPC contractor. CCRFF 335-364. Respondents present no evidence that Black & Veatch meets all the necessary qualifications. CCRFF 3.230.

As shown in Complaint Counsel's Response to RFOF 3.231, Black & Veatch serves as a general contractor on LNG projects, and does not have tank construction capabilities. CCRFF 3.231 (Izzo, Tr. 6524). To obtain the most competitive price from an LNG tank constructor, firms such as Black & Veatch will turn to CB&I to solicit a bid. As further explained in Complaint Counsel's Response to RFOF 3.228, if CB&I refuses to supply an LNG tank to Black & Veatch, the contractor must then turn to a higher-priced foreign firm in order to obtain the tank. Black & Veatch's overall price for an LNG facility would be higher and less competitive with a foreign firm's tank bid than it would be with a tank bid from a low-cost domestic supplier such as CB&I or PDM. CCRFF 3.231.

Mr. Price, Vice President of LNG Technology for Black & Veatch, affirms that he has "had concerns about finding a partner for turnkey LNG facilities that require LNG tanks" since the Memphis LNG project. (Price, Tr. 634). Mr. Price further questions whether Black & Veatch can "partner with a foreign tank supplier that can provide a competitive price so that [Black & Veatch] can compete on a peak-shaving facility that also includes an LNG tank." (Price, Tr. 635).

Representatives for domestic EPC contractors, such as Mr. Price, believe that there is a “lack of a domestic supplier that [ ] can go to bid with on a peak-shaving unit,” and that this “lack” of a low-cost, qualified partner “puts [ ] at a disadvantage to compete on that project.” (Price, Tr. 636). Because CB&I has a stronghold on the LNG tank market and because CB&I is the [

] (CX 364 at CBI-E 009279, *in camera*, emphasis supplied; *see also* CX 428 at CBI-E 009331, *in camera*; CX 310 at CB&I 049044).

3.237 CB&I, however, is only the 41st largest contractor in the U.S., and the 53rd largest international contractor. (RX 736, at 6/17; RX 737, at 2/16).

### Response to RFOF 3.237

Respondents base their assertion that “Most of CB&I’s EPC contractor competitors are significantly larger than CB&I” on ENR rankings. These rankings are misleading because they are based on “construction revenue” for 2001, not which firm is the best contractor. (RX 737 at 1).

CB&I’s financial stature is not as important as its monopolistic position in the LNG tank market, and its ability to construct LNG tanks at a low price.

Bechtel, Fluor, Halliburton KBR, Foster Wheeler, and Black & Veatch cannot construct LNG tanks, and Skanska is incapable of providing LNG tanks at as low a price as CB&I. CCRFF 3.231-3.236.

Post-acquisition, CB&I has sufficient market power to force customers into turnkey, sole-source arrangements for which CB&I would act as both the EPC and tank supplier. *See* CCRFF 3.228. In fact, the shift in CB&I’s business strategy to being more “selective” and going after “the elephant[t]” LNG facilities shows that CB&I is taking advantage of that market power.

3.238 CB&I offered to become the EPC contractor for an LNG import terminal to be built in Baja, California by Marathon. (Scorsone, Tr. 4939). However, Marathon rejected CB&I’s offer because it felt that CB&I was not large enough to “tackle such a job.” (Scorsone, Tr. 4939).

### Response to RFOF 3.238

Respondents’ sole support for this finding is the uncorroborated, self-serving testimony of Mr. Scorsone. Respondents have presented no documents or testimony that concur with Mr. Scorsone’s statement that “CB&I was not large enough to ‘tackle’” the Marathon LNG import terminal. No flurry of e-mails, internal memorandums, notes or meeting minutes reflect that CB&I lost the bid to the EPC contractor for the Cove Point expansion project.

Moreover, Respondents’ fail to mention Mr. Scorsone’s testimony that CB&I is currently the EPC contractor for “the expansion of the Lake Charles terminal for CMS in Lake Charles, Louisiana,” and that CB&I is currently in “negotiations for an expansion of the LNG import terminal at Elba Island.”

(Scorsone, Tr. 4939).

3.239 CB&I also competed, but was not successful, to become the EPC contractor for the expansion of the Cove Point LNG terminal. (Scorsone, Tr. 4937). Marlboro Enterprises was the successful EPC contractor for this project. (Scorsone, Tr. 4937-38).

#### Response to RFOF 3.239

Respondents' sole support for this finding is the uncorroborated, self-serving testimony of Mr. Scorsone. Respondents have presented no documents or testimony that concur with Mr. Scorsone's statement that "CB&I also competed, but was not successful, to become the EPC contractor for the expansion of the Cove Point LNG terminal." No flurry of e-mails, internal memorandums, notes or meeting minutes reflect that CB&I lost the bid to be the EPC contractor for the Cove Point expansion project.

As shown in CCRFF 3.238, Respondents' fail to mention Mr. Scorsone's testimony that CB&I is currently the EPC contractor for "the expansion of the Lake Charles terminal for CMS in Lake Charles, Louisiana," and that CB&I is currently in "negotiations for an expansion of the LNG import terminal at Elba Island." (Scorsone, Tr. 4939).

Marlboro Enterprises won the EPC contract even though it is an engineering company that is too small to be listed in ENR's lists of the top 400 domestic engineering contractors and the top 225 international engineering contractors. (Scorsone, Tr. 4937-38); (RX 736, at 6/17; RX 737, at 2/16). Marlboro's alleged "win" only shows that the financial requirements that Respondents cite as a "substantial factor" in selecting an EPC contractor are not as "substantial" as Respondents claim. CCRFF 3.330.

3.240 CB&I does not perceive that it can force an owner to select CB&I for the EPC position of an LNG terminal by refusing to bid the tank portion of the work out competitively. (Scorsone, Tr. 4938). After a six week, world-wide, search, Dynegy ultimately selected Skanska/Whessoe as EPC contractor for the Hackberry LNG project over CB&I and several other bidders. (Puckett, Tr. 4545-47). While conducting the search, Dynegy first reviewed all the contractors it felt had adequate experience and capabilities to do the project. (Puckett, Tr. 4546-47). Along with a contractor's capabilities, Dynegy also considered the size of the projects a contractor would typically construct. (Puckett, Tr. 4544-45).

#### Response to RFOF 3.240

Respondents' contention that "CB&I does not perceive that it can force an owner to select CB&I for the EPC position of an LNG terminal by refusing to bid the tank portion of the work out competitively" is false. As shown in CCRFF 3.228 and 3.95, CB&I's conduct post-acquisition with respect to the Dynegy, Yankee Gas, and examples, as well as statements that CB&I has made to its investors regarding CB&I's business strategy to be more "selective" and go after "the elephant[t]" LNG facilities shows that CB&I perceives its market power and takes advantage of it by linking its construction of the LNG tank and facility together.

Respondents' finding also misleadingly states that Dynegy selected Skanska/Whessoe as EPC contractor "over CB&I." Simply put, CB&I took itself out of the running. Mr. Glenn even conceded that CB&I declined to participate in any part of the Dynegy bidding.

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 would build the facility portion of the project. (Glenn, Tr. 4242; Puckett, Tr. 4570). CB&I wanted to be the turnkey EPC contractor because “[t]urnkey, design build projects typically return higher margins than stand alone storage tank projects.” (CX 660 at PDM-HOU005013; Scorsone, Tr. 2812-13; *see* CX 431 at 46 (Glenn, Dep.)).

Dynegy did not want one contractor to construct the facility and the tank. The customer 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 CBI 019867-HOU). As Dynegy recounted to CB&I: “You elected at that time to remove your name from consideration for performing the FEED study. You indicated that you were not interested in participating in the terminal portion of the project if we were going to competitively bid the LNG tanks.” (CX 139 at CBI 019777-HOU). Mr. Glenn confirmed that if CB&I became the EPC contractor, it would not allow competitive bidding of the LNG tanks. (Glenn, Tr. 4242).

Respondents’ finding also misleadingly suggests that Dynegy is capable of assessing the capabilities and relevant experiences of EPC contractors. As further explained in CCRFF 3.241, Mr. Puckett’s definition of a “capable” EPC contractor is questionable, because the Dynegy representative has had limited experience in selecting an EPC contractor.

3.241 Dynegy identified six contractors that met its guidelines. (Puckett, Tr. 4545-46). The six contractors that made Dynegy’s list were Kvaerner, Technip, Skanska, CB&I, Kellogg Brown & Root, and Bechtel. (Puckett, Tr. 4546). Dynegy believed these contractors had some level of LNG experience and the ability and capacity to execute the Hackberry project in the required time frame. (Puckett, Tr. 4545).

### Response to RFOF 3.241

Mr. Puckett’s assessment of Dynegy’s six contractors is tenuous. As noted in CCRFF 3.583, prior to the acquisition, Mr. Puckett had no experience in procuring or preselecting an EPC or LNG contractor. Mr. Puckett’s search for EPC contractors did not even begin until the spring-fall time period of 2001, after CBI acquired PDM. (Puckett, Tr. 4546). The Dynegy representative never had the benefit of being courted by PDM and never experienced the fierce competition between CB&I and PDM that resulted in lower prices prior to the acquisition. Because CB&I did not submit pricing information for any component of the Dynegy project, Mr. Puckett has also never seen how competitive CB&I’s pricing is compared with foreign firms. (CX 518 at CBI 019777-HOU; CX 517 at CBI 019784-HOU).

Even if Mr. Puckett was able to see CB&I pricing for tanks, his firm would be unqualified to analyze bids: [

] (CX 1528 at CBI 071381, *in camera*). For the Reasons listed above, Mr. Puckett definition of “competitive pricing” is questionable.

3.242 Dynegy interviewed all six firms on its list. (Puckett, Tr. 4547). At the conclusion of the interview process, Dynegy felt that all six companies were qualified to provide EPC service for the Hackberry LNG project.

(Puckett, Tr. 4547). Dynegy believes all of the companies on its EPC list are capable of meeting United States' codes and standards. (Puckett, Tr. 4551).

### Response to RFOF 3.242

As further explained in CCRFF 3.241, Mr. Puckett's definition of a "qualified" or "capable" company is suspect because Mr. Puckett has had no prior experience in procuring or preselecting an EPC or LNG contractor.

3.243 During CB&I's interview, CB&I indicated that it wanted to do the entire project, including the tanks and the terminal, on a turnkey basis. (Puckett, Tr. 4558). CB&I felt that it could give Dynegy a faster and less expensive result by doing the entire project. (Puckett, Tr. 4558). Dynegy rejected this approach and disqualified CB&I as a bidder for the EPC portion of the job. (Puckett, Tr. 4559).

### Response to RFOF 3.243

Complaint Counsel agrees and adopts Respondents' finding that "CB&I indicated that it wanted to do the entire project, including the tanks and the terminal, on a turnkey basis."

Respondents' finding regarding CB&I's motives for proposing a turnkey approach to the Dynegy project is, however, misleading and incomplete, because it fails to note the most important reason that CB&I wanted to be the turnkey EPC contractor: "[t]urnkey, design build projects typically return higher margins than stand alone storage tank projects." (CX 660 at PDM-HOU005013; Scorsone, Tr. 2812-13; *see* CX 431 at 46 (Glenn, Dep.)).

Respondents mischaracterize Mr. Puckett's testimony. Mr. Puckett testified that Dynegy "rejected" CB&I's "second attempt to propose a turnkey" approach, but he never said that Dynegy, in fact, "disqualified" CB&I as a bidder for the EPC portion of the project, as Respondents claim. As shown in CCRFF 3.240, CB&I declined to bid for the EPC portion of the project because Dynegy would not let CB&I construct the project as a turnkey contractor.

3.244 Dynegy chose Skanska/Whessoe, as its EPC, based on a deal it negotiated for the Front End Engineering Design ("FEED") work, Skanska's experience based on the recent work it had done on a project in Dabhol, India, for Enron, Skanska/Whessoe's ability to execute the Hackberry project, and its willingness to do the project in the United States. (Puckett, Tr. 4548-49).

### Response to RFOF 3.244

As shown in CCRFF 3.241, Mr. Puckett's assessment of the competitiveness of Skanska/Whessoe is questionable due to his limited experience in selecting EPC contractors and procuring LNG tank suppliers.

As further discussed in Complaint Counsel's response to RFOF 3.58, Whessoe's recent record on LNG projects is spotty and may have already deterred United States customers from viewing Whessoe as a viable competitor.

Respondents's finding misleadingly suggests that Skanska/Whessoe is competitive when compared with CB&I or PDM. To the contrary, Dynegy is now forced to pay a higher price to a foreign firm because CB&I refused to bid for the project unless it was named the EPC contractor and tank supplier for the whole facility.

When CB&I refused to submit a bid for the tank portion of the contract, Dynegy was forced to turn to a higher priced foreign LNG tank supplier. (Glenn, Tr. 4242; Puckett, Tr. 4570). Dynegy developed its budget for the LNG tanks from pricing provided by Whessoe. (Price, Tr. 602-603). Whessoe's budget price estimated the cost of an LNG tank at \$55 million. (Price, Tr. 602-03) This amount reflected the "business risks" Whessoe faced in its first project in the United States. (Price, Tr. 608-09). Dynegy used Whessoe's budget price to determine how much to budget for the tanks and to determine the expected range for tank bids on the Hackberry project. (Price, Tr. 602). Therefore, Dynegy's statement that the three foreign firms' price quotes for the LNG tanks were within the "expected price range" of \$55 million for each tank, is ambiguous.

As shown in CCRFF 3.75, a comparison of Whessoe's LNG tank price before the acquisition with Whessoe's price for an identical tank post-acquisition shows that Whessoe has increased its prices in excess of [ ]; that Dynegy is paying a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project; and that other firms in the market have also begun to increase prices to keep up with CB&I's post-acquisition price increases. The price Dynegy could have received had CB&I submitted a price quote would have been lower than these foreign firms.

As outlined in CCF 978-1006, CB&I attempted to leverage its dominant position in the LNG tank market to win a sole-source contract for Dynegy's LNG terminal. Because Dynegy did not agree to allow CB&I to construct its LNG facility turnkey, Dynegy will likely pay a higher price for the LNG tanks and overall facility. *See* CCRFF 3.228; CCF 997-1006.

3.245 [ ] believes it has many options for EPC contractors for its proposed LNG terminals in the U.S. (Sawchuck, Tr. 6061). These options include Halliburton KBR, Fluor Daniel, Bechtel, Kvaerner, and Foster Wheeler. (Sawchuck, Tr. 6061). [ ] believes each of these companies has the requisite skills and capabilities to serve as an EPC contractor. (Sawchuck, Tr. 6061).

#### Response to 3.245

Contrary to Respondents claim that "[ ] believes it has many options for EPC," the record shows that [ ] has [ ].

Mr. Sawchuck has no previous experience in the United States LNG market and therefore has no foundation to comment on the competitiveness of EPC contractors in the United States. (Sawchuck, Tr. 6052-53). Moreover, as shown in CCRFF 3.581, Mr. Sawchuck's testimony cannot be given any weight due to his extreme concern over [ ] business relationship with CB&I.

3.246 Calpine is considering Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V to be its EPC contractor. (Izzo, Tr. 6494-95). El Paso believes that Halliburton KBR and Fluor have the capability to be an EPC contractor for an LNG facility. (Bryngelson, Tr. 6146).

### Response to RFOF 3.246

Respondents' finding relating to Mr. Izzo's testimony is incomplete. Mr. Izzo also testified that Calpine is considering CB&I as its EPC contractor. (Izzo, Tr. 6494-95).

As further explained in Complaint Counsel's Response to RFOF 3.587, Mr. Izzo's testimony with respect to competition in the U.S. should be given little weight because he has no past experience selecting an EPC or LNG tank contractor for a U.S. LNG facility. Additionally, he has only limited direct experience with the selection of EPC contractors for LNG facilities on international projects. (Izzo, Tr. 6514, 6521).

As discussed in greater detail in CCRFF 3.579, Mr. Bryngelson does not have foundation to assess the competitiveness or "capabilit[ies] of Halliburton KBR and Fluor as EPC contractors. (Bryngelson, Tr. 6146). Mr. Bryngelson has no knowledge of the United States LNG market prior to the acquisition and has never previously been involved in the construction of an LNG tank. (Bryngelson, Tr. 6201, 6205).

The projects that Mr. Bryngelson is now working on are in Mexico and the Bahamas, not the U.S. (Bryngelson, Tr. 6123, 6214).

Furthermore, the El Paso representative lacks experience with foreign firms, and therefore has no basis to testify regarding the competitiveness of foreign firms.

For the reasons listed above, Respondents' witnesses lack foundation to assess the competitiveness of EPC contractors in the United States prior to the acquisition, and Respondents' finding lacks support.

3.247 LNG owners are sophisticated buyers who know what an LNG project ought to cost. (Glenn, Tr. 4125-26).

### Response to RFOF 3.247

Respondents' sole support for this finding is the self-serving testimony of Mr. Glenn.

Respondents' finding implies that LNG owners are sophisticated buyers because they routinely purchase LNG tanks. This is not true, particularly for LNG import terminal owners. The last time import terminals were built in the U.S. was in the 1970's. (CX 853 at PDM-HOU011488).

As further explained in CCRFF 3.95, Most owners of LNG facilities, such as [ ], are not very sophisticated or knowledgeable about procuring LNG tanks. ([ ], Tr. 705, *in camera*; see CX 1507 at CBI 059484 (Yankee Gas must hire someone to evaluate pricing because

“they know very little about the LNG industry and they were banking heavily on the report from CHI); CX 138 at CBI 019913-HOU ([ ] is not willing to take bids directly themselves since they do not have the staff, experience, and knowledge to analyze the bids and make an informed selection.”).

Owners of LNG facilities will also rely on engineering consultants due to their inexperience procuring LNG tanks. Dynegy is relying on various consultants and engineering firms to develop its Hackberry facility. (CCRFF 3.241).

The same is true of other owners such as Freeport LNG and El Paso who have no recent experience procuring LNG tanks. (Bryngelson Tr. 6060-61, 6208) (the last time El Paso purchased an LNG tank was in the late 1970's or early 1980's); (Eyermann, Tr. 7033) (Freeport LNG and its predecessor Cheniere Energy have never built an LNG facility before); see also, (J. Kelly, Tr. 6257) (the tanks at CMS's only U.S. LNG terminal were built in the late 1970's); (JX 26 at 53 (J. Kelly Dep.) (CMS relied on Interface Consulting for reviewing CB&I's tank pricing for current expansion)).

Mr. Bryngelson of El Paso testified that past pricing for LNG tanks is “not something that's well known.” Because of these confidentiality provisions, “experienced engineering firms such as Kellogg ... can provide a rough benchmark, but that's about the best we can do.” (Bryngelson, Tr. 6239). Moreover, because LNG tank pricing has decreased over time, past historical data from Kellogg tends to be overstated or too high. (Bryngelson, Tr. 6215).

Even with open book sole-source contracts, customers do not know how a supplier's pricing compares to that of other suppliers. Mr. Bryngelson of El Paso, which has an open book contract with CB&I for its Bahamas LNG terminal, admits to being “in the dark in terms of knowing what the costs are for LNG tanks suppliers.” (Bryngelson, Tr. 6238, *see also* 6177-78). Although CB&I's reputation “from the market . . . is that they are a low-cost provider,” he has no direct knowledge of how CB&I's costs compare to other LNG tank suppliers. (JX 22 at 139, 142, 145, 179 (Bryngelson Dep.)).

3.248 Dynegy, the owner of what will be the largest LNG import terminal ever constructed in the United States, is satisfied with the post-merger LNG pricing it has received for the Hackberry project. (Puckett, Tr. 4540, 4587-88).

### Response to RFOF 3.248

Respondents misleadingly imply that the prices submitted by Skanska/Whessoe, TKK and Technigaz would have been competitive with pricing from CB&I. Because the three foreign firms could not provide Dynegy with the most competitive price, the customer is paying a higher price for the import terminal.

Dynegy obtained budget pricing for the LNG tanks only from Whessoe. (Price, Tr. 602-603). Whessoe's budget price estimated the cost of an LNG tank at \$55 million. (Price, Tr. 602-03) This amount reflected the “business risks” Whessoe faced in its first project in the United States. (Price, Tr. 608-09). Dynegy used Whessoe's budget price to determine how much to budget for the tanks and to determine the expected range for tank bids on the Hackberry project. (Price, Tr. 602). Therefore,

Dynegy's statement that the three foreign firms' price quotes for the LNG tanks were within the "expected price range" of \$55 million for each tank, is ambiguous.

As shown in CCRFF 3.75, a comparison of Whessoe’s LNG tank price before the acquisition with Whessoe’s price for an identical tank post-acquisition shows that Whessoe has increased its prices in excess of [ ]; that Dynegy is paying a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project; and that other firms in the market have also begun to increase prices to keep up with CB&I’s post-acquisition price increases.

However, the price Dynegy could have received had CB&I submitted a price quote would have been lower than these foreign firms. Dynegy and CB&I each observed that Dynegy does [

] (CX 1528 at CBI 071381 *in camera*; CX 138 at CBI 019913-HOU *in camera*).

Mr. Price of Black & Veatch testified that generally clients don’t complain about firm fixed pricing that is within the budget price estimated for a project. (Price, Tr. 607-608).

Finally, owners of LNG facilities, such as Dynegy, [ ] (JX 30 at 77 ([ ]), *in camera*; CX 138 at CBI 019913-HOU)). *See also*, CCRFF 3.241.

3.249 Bechtel believes it can obtain a reasonable price for an LNG tank in the United States as a result of a bidding process between CB&I and Technigaz. (Rapp, Tr. 1333-34).

#### Response to RFOF 3.249

As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.

Respondents’ finding is misleading. Mr. Rapp testified that he “assumes” he “could get a reasonable price as a result of the bidding process between CB&I and Technigaz.” (Rapp, Tr. 1333-34). He did not testify as to whether a “reasonable price” is a competitive price or a price equivalent to the pricing available from PDM and CB&I prior to the acquisition. Moreover, he testified that he had no basis for knowing whether a bid from Technigaz or Zachary would be as competitive as a bid from PDM. (Rapp, Tr.1293-94).

Mr. Rapp also acknowledged that a suppliers “prior actual experience in the geographic area where the project was being constructed” is an important issue in the selection of a tank supplier. (Rapp, 1294-95).

When asked for his opinion on current competition within the U.S. for LNG tanks, Mr. Rapp testified that “I don’t know of any LNG storage tanks to be built in the United States, and the only firms that I know that are organized to do that would be CB&I and then this new **Tractebel**-Zachary alliance.” (Rapp, Tr. 60-61); *see, also* (Rapp, Tr. 66) (No opinion as to the extent of competition for LNG tanks in the U.S.).

Because Mr. Rapp has never worked on a U.S. LNG tank project, he lacks foundation to assess the competitive effects, including pricing effects, from the acquisition. He currently works as the project director for an LNG export terminal expansion project in Trinidad. (JX 32 at 11, 22 (Rapp. Dep.)). His experience with selecting an LNG tank supplier is limited to two separate bid contests for tanks for the Trinidad export terminal. (Rapp, Tr. 1286-87, 1318). His experience working with LNG tank suppliers is limited to CB&I and Whessoe. (Rapp, Tr. 1290).

Mr. Rapp testified that he was not aware of foreign companies — Whessoe, TKK, Technigaz, and Daewoo — bidding on LNG tanks in the U.S. (Rapp, Tr. 1328). When he was directly asked if he was “knowledgeable of the current competition in the United States for constructing LNG storage tanks?”, Mr. Rapp responded that **“I would characterize myself as knowing what I know, and I know that there’s two there now: CB&I and then this alliance or agreement we talked about with Technigaz and Zachary.”** (Rapp, Tr. 1290).

3.250 Calpine does not believe that the PDM acquisition will allow CB&I to raise its prices. (Izzo, Tr. 6534).

#### Response to RFOF 3.250

As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.

Respondents’ finding is misleading. Mr. Izzo also testified that he **does not know** whether CB&I is able to raise its prices on U.S. projects to obtain a higher margin. Further, he testified that he **does not know** whether CB&I would be able to impose a 5% price increase. If foreign suppliers’ pricing was right about on par with CB&I after this price increase, the LNG tank market would still look competitive to Mr. Izzo. (Izzo, Tr. 6535).

3.251 El Paso, which is currently developing four LNG projects in the United States, Bahamas and Mexico, does not believe that the merger has affected the price for field-erected LNG tanks. (Bryngelson, Tr. 6155). Because the LNG industry is “an international business”, El Paso believes that “no one participant controls the market.” (Bryngelson, Tr. 6159-60). El Paso believes the LNG market is a “very competitive global market” and has not seen CB&I exert dominance with respect to any of El Paso’s LNG projects. (Bryngelson, Tr. 6146).

#### Response to RFOF 3.251

**As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.**

Little weight should be given Mr. Bryngelson’s testimony relating to the effects of the acquisition on the LNG market. As described in CCRFF 3.246, Mr. Bryngelson has only two years experience in the LNG industry. As such, Mr. Bryngelson has no direct knowledge of PDM. (Bryngelson, Tr. 6233, 6249); (JX 22 at 51 (Bryngelson Dep.)). Nor does he know about the pricing competition for LNG

tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). Because he prequalified LNG tank suppliers after February 2001, the time of the acquisition, he did not receive any pricing from PDM for El Paso's LNG projects in Mexico. (Bryngelson, Tr. 6247-48).

Moreover, Mr. Bryngelson testified that if the acquisition led to a 5 percent increase in LNG tank prices, Mr. Bryngelson would not view this increase "as a negative impact." Such an increase is "not a huge problem. And I don't know, I'd say 5 percent falls within normal fluctuations on pricing. . ." (Bryngelson, Tr. 6198). Mr. Bryngelson considers any LNG tank bid as competitive if it is within 10-15 percent of the lowest bid – "But if we saw somebody who was 20 percent higher or more in rough numbers, that would make me step back. And if it really was any higher than 15 percent, it would make me step back. But in the 10 to 15 percent range, that's normal for any of these bids." JX 22 at 164 (Bryngelson Tr.).

For several reasons, it is difficult, if not impossible, for Mr. Bryngelson and other buyers to recognize an anti-competitive price increase in the LNG tank market. First, as described in CCRF 3.247, Mr. Bryngelson testified that past pricing for LNG tanks is "not something that's well known." (JX 22 at 72-73, 139 (Bryngelson Dep.)). Second, because LNG tanks "have gotten cheaper and continue to get cheaper as people are more familiar with working with cryogenic materials," prices have gone down over time. (Bryngelson Tr 6215.). Thus, suppliers can increase their margins just by keeping their pricing at the same level as past prices. *See* CCRFF 3.579.

3.252 Freeport LNG, currently developing an LNG import terminal in Freeport, Texas, is comfortable with the options it currently has available for builders of field-erected LNG tanks for its project. (Eyer mann, Tr. 6959-60, 7019).

#### Response to RFOF 3.252

**As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.**

Little weight should be given to Respondents' finding that Mr. Eyer mann "is comfortable" with the options Freeport LNG has for building LNG tanks because it is vague.

Moreover, Mr. Eyer mann's assessment of competition in the U.S., including the effects of the acquisition, lack foundation because he has no past experience evaluating LNG tank pricing or selecting an LNG tank supplier. (Eyer mann, Tr. 7025-7026, 7029). Mr. Eyer mann's employment relating to LNG projects has been as a process engineer on the technical side rather than commercial side. (Eyer mann, Tr. 7031). On the international LNG projects that he worked on, Mr. Eyer mann was not involved in the selection of the supplier of the LNG tanks. (Eyer mann, Tr. 7026-28). For example, on Enron's Dabhol LNG project, Mr. Eyer mann was the resident engineering manager in India and did not review the bids from the tank suppliers (Eyer mann, Tr. 6967, 7028).

Freeport LNG and its predecessor Cheniere Energy have never built an LNG facility before.

(Eyer mann, Tr. 7033). In his current position at Freeport LNG, a small company with fifteen employees, Mr. Eyer mann has not obtained any bids or selected a supplier for the LNG tanks planned for the Freeport, TX import terminal. (Eyer mann, Tr. 7029, 7036). This terminal is in the early stages of development. At the time of trial, Freeport LNG had not yet filed for FERC approval of the terminal. (Eyer mann, Tr. 6977). At the earliest, assuming timely FERC approval, Freeport LNG will award a LNG tank contract in February 2004. (Eyer mann, Tr. 6978).

Despite working in the LNG industry for 25 years, Mr. Eyer mann has no direct experience working with PDM, TKK, AT&V, Zachary, and Technigaz. Because he is not familiar with PDM's business or its past pricing for LNG tanks, he does not have any foundation for assessing the pricing effects of the acquisition. (Eyer mann, Tr. 7063-64.)

3.253 Nigel Carling, a former Enron employee with extensive experience in the LNG industry, does not believe the acquisition has adversely affected his ability to get a competitively priced LNG tank. (Carling, Tr. 4494). Competition since the acquisition has increased as foreign competitors are now trying to break into the United States market. (Carling, Tr. 4494). Mr. Carling believes there is no reason to believe they cannot be competitive in the United States. (Carling, Tr. 4495). These foreign competitors have excellent credentials and they have been able to put together competitive pricing. (Carling, Tr. 4494). In Mr. Carling's view, increased competition means prices will decrease. (Carling, Tr. 4495).

#### Response to RFOF 3.253

**As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.**

Although Mr. Carling testified that the acquisition has not adversely affected his ability to get a competitively priced LNG tank, he has never seen pricing for U.S. LNG projects. Mr. Carling testified that he has no knowledge of how competitive Skanska and other offshore LNG tanks suppliers were compared to CB&I and PDM on U.S. projects. (Carling Tr., 4514, 4518-19). Mr. Carling was not familiar with past pricing or bid contests for U.S. LNG tank projects. (Carling Tr., 4513-14, 4517-18).

3.254 Likewise, CMS, which is adding an LNG tank to its existing Lake Charles, Louisiana facility, does not believe it is likely that prices for LNG tanks in the United States will increase as a result of the merger between CB&I and PDM. (J. Kelly, Tr. 6263-64). CMS believes the LNG market will remain competitive. (J. Kelly, Tr. 6263-64.)

#### Response to RFOF 3.254

As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.

Mr. Kelly's testimony indicates that he does not have enough knowledge of the foreign

firms bidding on U.S. projects to comment intelligently on their ability to compete against CB&I in the U.S. For example, in response to a question about the capabilities of the foreign firms to subcontract work in the U.S., Mr. Kelly responded [

] (JX 26 at 23-24 (J. Kelly Dep.); *see also* (JX 26 at 59-60 (J. Kelly Dep.) (Mr. Kelly has little or no knowledge of AT&V, Zachary, TKK, Daewoo).

Little weight should be given to Mr. Kelly's testimony regarding competitive effects from the acquisition and pricing in the LNG market because he has limited experience procuring LNG tanks. He did not work at CMS at the time the LNG tanks at its Lake Charles import terminal were built in the late 1970's. (J. Kelly, Tr. 6256-57). [

] (JX 26 at 10-11, 15 ([ ]), *in camera*).

[ ] (JX 26 at 12-14 ([ ])). Mr. Kelly's testimony relating to this pricing supports Complaint counsel's position that foreign suppliers such as Skanska will not be able to constrain CB&I's pricing at pre-acquisition levels. [

] (JX 26 at 14-15 ([ ]), *in camera*).

The fact that CMS decided to sole-source its expansion project with CB&I indicates that CB&I is CMS's first choice tank supplier. This is consistent with Complaint counsel's theory that CB&I and PDM were the first and second choices of LNG tank customers in the U.S. *See*, CCF 204-217.

3.255 British Petroleum, currently deciding between sole-sourcing and competitively bidding three potential LNG projects, believes that the current level of competition will provide a fair and reasonable price. (Sawchuck, Tr. 6066). MLGW has seen no evidence to date that CB&I has the ability to control a market as a result of the Acquisition. (Hall, Tr. 1858-59). It is possible that there may be more competition for LNG tanks in the U.S. today as compared to 1994-1995. (Hall, Tr. 1860-61).

### Response to RFOF 3.255

**As shown in CCRFF 3.95, Customers often lack sufficient information to determine whether firms or pricing is competitive. Because it has access to perfect information, the FTC can identify anticompetitive effects in the form of price increases.**

Respondents' finding is incorrect with respect to Mr. Sawchuck's testimony on page 6066. The testimony on that page did not relate at all to Respondents' finding.

Moreover, at trial, about four months after Mr. Sawchuck's deposition, Mr. Glenn testified that

British Petroleum decided to sole-source its three planned LNG terminal projects with CB&I. (Glenn, Tr. 4180). As described in CCRFF 3.243, the preponderance of the evidence shows that sole-sourcing LNG projects increases costs as compared to competitive procurements.

As described in CCRFF 3.245, Mr. Sawchuck's testimony on competition in the U.S. LNG tank market at his deposition was unreliable and biased.

Although in 2002, [ ] obtained budget pricing from CB&I for a new LNG tank for [ ], he did not obtain competitive pricing for comparison from any foreign suppliers because he does not consider the pricing from foreign suppliers to be reliable. (RX 732 at CBI 071499-500, *in camera*); (Hall, Tr. 1825, 1827-28).

**C. THE ABSENCE OF POST-ACQUISITION COMPETITION DEMONSTRATES CB&I'S ACQUISITION OF PDM EC DID SUBSTANTIALLY LESSEN COMPETITION**

3.260 Dynege chose to specify full containment LNG tanks to be built at the Hackberry facility because full containment tanks are more secure and will meet the requirements of the air dispersion modeling, which suggests the use of full containment tanks, due to the relatively small size of Dynege's property. (Puckett, Tr. 4541-42). Given the amount of land at the Hackberry site, Dynege does not believe it would be allowed to build single containment tanks. (Puckett, Tr. 4585). Additionally, due to terrorist concerns, more secure tanks are desirable. (Puckett, Tr. 4586-87).

Response to RFOF 3.260

Respondents' finding is misleading to the extent that it suggests that customers prefer full containment tanks. It is unclear the extent to which future LNG tank owners will build full-containment tanks, in addition to single-containment tanks. LNG tank owners will specify what type of LNG tank to build based upon what FERC decides is necessary for any given location. ([ ], 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.

Given a choice, customers will seek the lowest-cost LNG tank to build. (Izzo, Tr. 6523; Kelly, Tr. 6260, 6274-75).

Complaint Counsel agrees that Dynege chose to specify full containment tanks. Dynege's efforts to get CB&I to bid on the project, including offers to create special bidding procedures for CB&I (Puckett, Tr. 4578; CX 518 at CBI 019777-HOU)), demonstrates that Dynege believes CB&I can construct full containment tanks as effectively and economically, if not more, as any foreign LNG tank supplier; otherwise, Dynege would not have gone out of its way for CB&I.

3.263 Dynege began its process by selecting an EPC contractor for the facility. (Puckett, Tr. 4543-44). After a six week, world-wide, search, Dynege ultimately selected Skanska/Whessoe as EPC contractor for the Hackberry LNG project over CB&I and several other bidders. (Puckett, Tr. 4545, 4547). While conducting the search, Dynege first reviewed all the contractors it felt had adequate experience and capabilities to do the project. (Puckett, Tr. 4544-45). Along with a contractor's capabilities, Dynege also considered the size of the projects the contractors had typically constructed. (Puckett, Tr. 4545).

### Response to RFOF 3.263

Respondents misleadingly state that Dynegy selected Skanska/Whessoe as EPC contractor “over CB&I.” Simply put, CB&I took itself out of the running.

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 CBI 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)).

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 would build the facility portion of the project. (Glenn, Tr. 4242; Puckett, Tr. 4570). CB&I wanted to be the turnkey EPC contractor because “[t]urnkey, design build projects typically return higher margins than stand alone storage tank projects.” (CX 660 at PDM-HOU005013; Scorsone, Tr. 2812-13; *see* CX 431 at 46 (Glenn, Dep.)).

CB&I’s demands were at total odds with Dynegy’s goals. 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). CCF 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). Dynegy informed CB&I “We still believe, as we discussed during our selection of the EPC firm for providing the FEED portion of our project, that competitive bidding the [LNG] tanks will provide Dynegy with the best economics.” (CX 139 at CBI 019777-HOU). Dynegy “wanted to maintain competition on the [LNG] tanks, because they’re such a big cost component of the project” (Price, Tr. 609-10).

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 CBI 019867-HOU). As Dynegy recounted to CB&I: “You elected at that time to remove your name from consideration for performing the FEED study. You indicated that you were not interested in participating in the terminal portion of the project if we were going to competitively bid the LNG tanks.” (CX 139 at CBI 019777-HOU). Mr. Glenn confirmed that if CB&I became the EPC contractor, it would not allow competitive bidding of the LNG tanks. (Glenn, Tr. 4242).

Dynegy chose Skanska, who would work with Black & Veatch, to perform the EPC portion of the project. (Puckett, Tr. 4547-48; CX 138 at CBI 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 CBI 019913-HOU).



3.265 Dynegy told all the parties up-front that it planned to bid the LNG tank portion of the project separately. (Puckett, Tr. 4550).

#### Response to RFOF 3.265

Complaint Counsel agrees that Dynegy told CB&I “up-front” that it planned to bid the LNG tank portion separately. Dynegy wanted the tank portion of the project bid separately from the EPC contract because “of our interest in not having additional fees or handling fees put on top of the costs of those.” (Puckett, Tr. 4550). CB&I chose to ignore Dynegy’s instructions and attempted to impose its own structure whereby it would serve as the EPC contractor and supply the LNG tank. (Puckett, Tr. 4558).

3.269 During CB&I’s interview, CB&I indicated that it wanted to do the entire project, including the tanks and the terminal, on a turnkey basis. (Puckett, Tr. 4558). CB&I felt that it could give Dynegy a faster and less expensive result by doing the entire project. (Puckett, Tr. 4558).

#### Response to RFOF 3.269

Complaint Counsel agrees that CB&I “wanted to do the entire project, including the tanks and the terminal, on a turnkey basis.”

3.270 CB&I ultimately submitted a proposal to become Dynegy’s EPC contractor. (Glenn, Tr. 4128-29). Dynegy rejected this approach and disqualified CB&I as a bidder for the EPC portion of the job. (Puckett, Tr. 4558; Glenn, Tr. 4410).

#### Response to RFOF 3.270

Respondents did not submit a “proposal” to become Dynegy’s EPC contractor. Instead, CB&I refused to bid. Respondents cite Mr. Glenn’s testimony, but it is not corroborated by any document reflecting a detailed “proposal” from CB&I to Dynegy.

CB&I may have “offer[ed] to come in and provide a full EPC turnkey solution” to Dynegy (CX 139 at CBI 019777-HOU), but on February 11, 2002, CB&I wrote Dynegy that CB&I “respectfully decline to bid in this situation” (CX 517 at CBI 019784-HOU), and then on February 12, CB&I acknowledged to Dynegy that “we do not intend to bid [because of] internal company decision – project as structured does not fit our corporate strategy” and returned Dynegy’s bidding documents (CX 139 at CBI 019779-HOU).

Respondents misleadingly state that Dynegy “disqualified CB&I as a bidder for the EPC portion of the job.” The reason Dynegy did not select CB&I was not because of issues with CB&I’s capabilities to serve as an EPC, but rather because CB&I refused to abide by the contracting structure Dynegy wanted. Dynegy’s point person on the project, William Puckett, understood CBI’s position to be that CB&I was “not interested in participating in the terminal portion of the project if [ ] going to competitively bid the LNG tanks.” (CX 518 at CBI 019777-HOU; Puckett, Tr. 4558; CX 1528 at CBI 071381, *in camera* (“[CB&I]...would not

competitively bid the LNG tanks’’)). Accessing to CB&I’s ultimatum would have denied Dynegy the fruits of competitive bidding – lower LNG tank prices. Dynegy informed CB&I that it was dropped from consideration on the EPC contract because 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 CBI 019867-HOU).

3.273 During the EPC search, Skanska/Whessoe and Black & Veatch essentially presented themselves as a team. (Puckett, Tr. 4579). Black & Veatch ended up partnering with Skanska on the EPC contract. (Price, Tr. 600). Black & Veatch was responsible for evaluating the LNG tank bids taking charge of a number of engineering parts of the project. (Puckett, Tr. 4548; Glenn, Tr. 4130).

#### Response to RFOF 3.273

This finding is incomplete. Black & Veatch is a subcontractor to Skanska/Whessoe (Puckett, Tr. 4579), but Black & Veatch also has strong independent ties directly to Dynegy. In selecting the LNG tank supplier, Dynegy assigned Black & Veatch the role of evaluating the bids – without involvement by Skanska/Whessoe – and “reporting directly” to Dynegy. (Puckett, Tr. 4575). Black & Veatch handled the evaluations out of its Kansas City office, while Skanska was located near Dynegy. (Puckett, Tr. 4575-76). Dynegy believed Black & Veatch “had every reason to do exactly what we asked for because Black & Veatch was also a major contractor to us on the power side of our business. So they [Black & Veatch] had quite a relationship with Dynegy that they had no desire to do anything that would cause that to be put in jeopardy.” (Puckett, Tr. 4576).

3.274 To develop the budget for the Hackberry facility, Black & Veatch obtained a budget price for the LNG tanks from Whessoe. (Price, Tr. 601-02). Whessoe’s budget price estimated the cost of an LNG tank at \$55 million. (Price, Tr. 602-03). Black & Veatch did not request budget pricing from CB&I because it was already working with Skanska; it was natural to ask Skanska for pricing. (Price, Tr. 603-04).

#### Response to RFOF 3.274

Complaint Counsel agrees that Brian Price of Black & Veatch, the witness cited by Respondents in support of this finding, had knowledge that Whessoe’s budget price for each LNG tank was \$55 million.

3.278 As a result of the interviews and documents, Dynegy was satisfied that each of the four firms could construct the three LNG tanks as part of the Hackberry project. (Puckett, Tr. 4554).

#### Response to RFOF 3.278

Complaint Counsel agrees that Dynegy was satisfied that CB&I could construct full containment tanks as well as the three foreign firms.

With respect to the TKK, Technigaz and Skanska/Whessoe, timely, likely and sufficient entry is not established just because Dynegy was “satisfied” that the three foreign firms “could construct” an LNG tank. Respondents do not cite any evidence that Skanska/Whessoe, TKK, or Technigaz will

likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

Moreover, as shown in CCRFF 3.583 and 3.584, Mr. Puckett has no experience in procuring an LNG tank.

3.279 Dynege is satisfied that Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V all have the reputation necessary to construct the Hackberry LNG tanks. (Puckett, Tr. 4557).

#### Response to RFOF 3.279

For the same reasons discussed in Complaint Counsel’s Response to RFOF 3.278, Dynege’s “satisfaction” with a foreign firm’s “reputation” does not imply that entry is sufficient to restore the competition to pre-merger levels would be timely or likely.

Moreover, as shown in CCRFF 3.583 and 3.584, Mr. Puckett has no experience in procuring an LNG tank.

3.280 Dynege believes that Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V are all capable of doing the necessary fabrication and field erection work on the Hackberry LNG tanks. (Puckett, Tr. 4557-58).

#### Response to RFOF 3.280

For the same reasons discussed in Complaint Counsel’s Response to RFOF 3.278, Dynege’s “belief” about a foreign firm’s “capability” says nothing about the likelihood that the foreign firm will timely and sufficiently enter to restore competition to pre-merger levels.

Moreover, as shown in CCRFF 3.583 and 3.584, Mr. Puckett has no experience in procuring an LNG tank.

3.281 Dynege believes that Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V will all be able to manage the actual construction of the LNG tanks for the Hackberry facility. (Puckett, Tr. 4558).

#### Response to RFOF 3.281

For the same reasons discussed in Complaint Counsel’s Response to RFOF 3.278, Dynege’s “belief” about a foreign firm’s “ability” says nothing about the likelihood that the foreign firm will timely and sufficiently enter to restore competition to pre-merger levels.

Moreover, as shown in CCRFF 3.583 and 3.584, Mr. Puckett has no experience in procuring an LNG tank.

3.284 Although Daewoo was not on Dynege's original list, Daewoo approached Dynege just after Dynege released the specifications to the bidders. (Puckett, Tr. 4553). Daewoo appeared capable of constructing the LNG tanks, but Dynege chose not to include it in the bidding process because Dynege did not want too many bidders bidding on the Hackberry project. (Puckett, Tr. 4553).

#### Response to RFOF 3.284

For the reasons discussed in Complaint Counsel’s Response to RFOF 3.204, the appearance of a capability to construct an LNG tank does not constitute likely, timely and sufficient entry. Dynegy did not award a contract to Daewoo, and therefore, the Dynegy example is one of failed entry.

3.288 All three of the bids Dynegy received met its technical expectations and were within Dynegy's expected price range. (Puckett, Tr. 4557). Dynegy's consultants are studying the LNG tank bids it received. (Puckett, Tr. 4557).

### Response to RFOF 3.288

Respondents misleadingly state that the prices submitted by Skanska/Whessoe, TKK and Technigaz “were within Dynegy’s expected price range.” The prices submitted by the foreign firms may have been in the “expected price range,” but had CB&I bid, Dynegy would have received a lower price than the “expected price range.”

Dynegy obtained budget pricing for the LNG tanks only from Whessoe. (Price, Tr. 602-603). Whessoe's budget price estimated the cost of an LNG tank at \$55 million. (Price, Tr. 602-03) This amount reflected the “business risks” Whessoe faced in its first project in the United States. (Price, Tr. 608-09). Dynegy used Whessoe’s budget price to determine how much to budget for the tanks and to determine the expected range for tank bids on the Hackberry project. (Price, Tr. 602). Therefore, Dynegy’s statement that the three foreign firms’ price quotes for the LNG tanks were within the “expected price range” of \$55 million for each tank, is ambiguous.

As shown in CCRFF 3.75, a comparison of Whessoe’s LNG tank price before the acquisition with Whessoe’s price for an identical tank post-acquisition shows that Whessoe has increased its prices in excess of [ ]; that Dynegy is paying a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project; and that other firms in the market have also begun to increase prices to keep up with CB&I's post-acquisition price increases.

However, the price Dynegy could have received had CB&I submitted a price quote would have been lower than these foreign firms. Dynegy and CB&I each observed that Dynegy does [

] (CX 1528 at CBI 071381 *in camera*; CX 138 at CBI 019913-HOU *in camera*). Accordingly, Dynegy relied on Black & Veatch, an engineering firm with extensive experience in the LNG industry, to advise Dynegy on the LNG tank bids. (CX 1528 at CBI 071381 *in camera*). One of the consultants Dynegy is relying on is Mr. Price of Black & Veatch. (Price, Tr. 624). Mr. Price 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 CBI, PDM and Lotepro/Whessoe. 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. CCF 999.

As advisor to Dynegy, Mr. Price testified that “we had concerns that if we do not have a domestic tank price for that project that the prices that the client would receive for those tanks would be higher.” (Price, Tr. 622). Mr. Price added that “we’d prefer the domestic supplier because they

have done work in the United States, know the – 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...We would expect the domestic supplier to have a lower cost, a lower – I’m sorry – a lower price on the tank.” (Price, Tr. 590).

3.289 Gerald Glenn perceived Skanska/Whessoe, TKK/AT&V, and Technigaz/Zachry as competitors for the Hackberry LNG tanks. (Glenn, Tr. 4094-95, 4097-98) (state of mind evidence).

### Response to RFOF 3.289

CB&I’s “state of mind” about Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Glenn’s testimony is uncorroborated by any other evidence. Michael Miles was CB&I’s sales representative to Dynegy and the CB&I individual identified in the correspondence between CB&I and Dynegy, but CB&I never called Mr. Miles to testify and “corroborate” Mr. Glenn’s testimony.

Moreover, CB&I’s purported “state of mind” about Skanska/Whessoe and other competitors is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes. Complaint Counsel’s Response to RFOF 3.95 explains in greater detail the inaccuracies and incompleteness of this finding.

Moreover, Respondents have not presented one single business record demonstrating that CB&I’s purported “state of mind” was negatively impacted by the presence of these foreign firms on the Dynegy project. As Respondents point out in RFOF 3.262, the dollar value for the entire Dynegy project is between \$550 to \$700 million. If Respondents truly perceived Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry as “competitors,” on a project of this magnitude one would expect internal e-mails, memos and other business records discussing the need to reduce prices, “sharpen pencils” or similar aggressive business strategies in order to win the project. However, the only business records in evidence relate to CB&I’s insistence that Dynegy accept CB&I’s demands that it serve as the turnkey EPC contractor and the LNG tank supplier. (CX 516; 517; 518; 138; 139). These documents hardly portray a firm with a “state of mind” threatened by foreign competitors.

As explained in Complaint Counsel’s Response to RFOF 3.95, Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would “create barriers to entry” and use its “pricing advantage” to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I’s “competitive advantages” in the United States and the absence of competition post-merger that had previously eroded CB&I’s profitability; he also gave the October 31, 2002 conference call that touted CB&I’s higher margins, improved business prospects and ability to win every project.

3.292 TKK and AT&V both played a part in preparing the Dynegy LNG tank bid. (Cutts, Tr. 2470). AT&V projects that its combined margin and contingency for the Dynegy project is approximately ten percent.

(Cutts, Tr. 2357).

### Response to RFOF 3.292

Timely, likely and sufficient entry is not established just because TKK and AT&V prepared a bid to Dynegy. Respondents do not cite any evidence that TKK and AT&V will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices at the same level as PDM did before the merger.

3.295 [ ] ([ ], Tr. 1684-85). [ ] ([ ], Tr. 1685). [ ] ([ ], Tr. 1630). [ ] ([ ], Tr. 1632).

### Response to RFOF 3.295

Timely, likely and sufficient entry is not established just because [ ] prepared a bid to Dynegy. Respondents do not cite any evidence that [ ] will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices at the same level as PDM did before the merger.

3.296 [ ] ([ ], Tr. 1693; *See also* RX 45, at ZCC000059). [ ] ([ ], Tr. 1694; *See also* RX 43, at ZCC000005). [ ] ([ ], Tr. 1694; *See also* RX 43, at ZCC000005).

### Response to RFOF 3.296

For the reasons discussed in Complaint Counsels's Response to RFOF 3.295, this finding does not satisfy Respondents' burden of proving that entry will be likely, timely and sufficient.

3.297 CB&I was also offered the opportunity to bid on the LNG tank portion of the Hackberry project. (Glenn, Tr. 4133). As part of the bid procedure, Dynegy required CB&I to submit its drawings, technical information and a firm price to Black & Veatch, a competitor. (Glenn, Tr. 4130). Besides sending CB&I an inquiry package, Black & Veatch did not make any efforts to encourage CB&I to submit a tank-only bid. (Price, Tr. 619).

### Response to RFOF 3.297

This finding is incomplete and misleading. Having refused to submit price quotes on Dynegy's terms for the EPC portion of the project, CB&I continued the same strategy for the LNG tank portion of the project. Dynegy went out of its way to try to get CB&I to quote prices for the LNG tanks. Dynegy recognized that LNG tank suppliers would have a concern submitting bids through Skanska/Whessoe, and therefore established a procedure whereby CB&I and other LNG tank bidders would submit their proposals to Black & Veatch rather than Skanska/Whessoe. (Puckett, Tr. 4575-76). Black & Veatch would review the proposals out of its Kansas City office, while Skanska/Whessoe would remain in Houston. (Puckett, Tr. 4575). Black & Veatch would report directly to Dynegy and "do exactly what [Dynegy] asked" because "Black & Veatch "had no desire to do anything that would cause [the relationship with Dynegy] to be put in jeopardy." (Puckett, Tr. 4575).

As with the EPC portion of the project, CB&I again refused to quote a price to Dynegy for the LNG tanks. (CX 517 at CBI 019784-HOU ("Therefore, we respectfully decline to bid in this situation")). Dynegy then offered to implement yet further special procedures uniquely designed to protect CB&I. CB&I suggested that if it submitted information to Black & Veatch, CB&I was concerned about "the information somehow getting to Skanska." (Puckett, Tr. 4577-78). To further allay CB&I's concern, on February 21, 2002, Dynegy advised CB&I that Black & Veatch would only act as a "repository for the bids" and that Dynegy had "hired a separate third party that has extensive experience in the LNG business to help Dynegy evaluate the bids." (CX 518 at CBI 019777-HOU). Dynegy added that if CB&I "still have a concern, we would be happy to have you "directly submit the bid to Ron Hand [a Dynegy employee] and we will not share the information with Black & Veatch. The evaluation will be conducted strictly by Dynegy and our outside third party. Again, if this methodology is not sufficient, then please let us know what would meet your needs to bid the LNG tanks." (CX 518 at CBI 019777-HOU).

Instead of bidding on the LNG tanks as Dynegy requested, CB&I offered to submit a "lump sum, firm fixed price proposal for the total EPC scope of the projec." (CX 517 at CBI 019784-HOU). Dynegy declined because, "as we discussed during our selection of the EPC firm for providing the FEED portion of our project, that competitive bidding the tanks will provide Dynegy with the best economics." (CX 518 at CBI 019777-HOU). Dynegy closed the letter by again inviting CB&I to bid on the LNG tanks.

Sometime after the February 21, 2002 letter, CB&I's Mike Miles, a sales representative, called to request if CB&I could still submit a tank bid. Dynegy declined because "it was so late in the bidding cycle in that we had received bids...I did not feel it would be fair to the other bidder." (Puckett, Tr. 4572). CB&I's Mr. Glenn then arranged a meeting with Dynegy's CEO. Even after this meeting, Mr. Puckett testified that CB&I neither "asked to or approached us about submitting a late bid." (Puckett, Tr. 4573-74). Thus, despite all of Dynegy's efforts to get CB&I to bid on the LNG tanks, CB&I refused. CB&I did not "lose" Dynegy; it took itself out of the running.

There was no need for Black & Veatch to make any efforts "to encourage" any firm to submit a tank-only bid since the inquiry package called for a tank-only bid. Unlike CB&I, the firms that did

submit a tank-only bid understood the instructions and had no problem submitting bids to Black & Veatch. (Puckett, Tr. 4577). It was only with CB&I that Dynegy experienced difficulty. Dynegy went to the trouble of hiring yet another third-party to review the LNG tank bids and even offered to CB&I the opportunity to submit its bid directly to a Dynegy employee. (CX 518 CBI 019777-HOU). The reason Dynegy was eager to have CBI's bid was 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).

3.298 CB&I met with Dynegy and indicated that it was uncomfortable providing a bid given that the Skanska/Black & Veatch group, a major competitor, was acting as the EPC contractor. (Puckett, Tr. 4574-75). CB&I did not want Skanska to obtain its bidding information; CB&I did not want a competitor to gain access to its prices and designs. (Puckett, Tr. 4577-78).

### Response to RFOF 3.298

As described in Complaint Counsel’s Response to RFOF 3.297, Dynegy developed special procedures to protect CB&I’s interests and address its concerns.

3.301 CB&I ultimately decided not to submit a tank-only bid because Black & Veatch, a company under contract with Skanska/Whessoe, was evaluating the bids and Skanska/Whessoe was a bidder. (Glenn, Tr. 4411). Given these circumstances, CB&I believed that its chance of being awarded the project was slim even if it provided the lowest bid. (Glenn, Tr. 4411). Under these conditions, CB&I did not believe it would get a fair shake; bidding would be a waste of time and money. (Glenn, Tr. 4411).

### Response to RFOF 3.301

Mr. Glenn’s testimony is at odds with the evidence. As described in Complaint Counsel’s Response to RFOF 3.297, Dynegy developed special procedures to protect CB&I’s interests and address its concerns, including hiring a third-party to review CB&I’s bid and to permit CB&I to submit its bid directly to Dynegy rather than Black & Veatch.

3.305 Gerald Glenn was not happy with Mr. Puckett's response and he personally phoned Dynegy's CEO, Chuck Watson. (Glenn, Tr. 4137). Based on his conversation with Mr. Watson, Gerald Glenn believed Dynegy was perfectly happy with the three bids it received. (Glenn, Tr. 4137) (state of mind evidence). 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) (state of mind evidence).

### Response to RFOF 3.305

CB&I’s self-serving “state of mind” about Dynegy is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

3.306 Subsequently, CB&I did not submit a tank-only bid to Dynegy. (Glenn, Tr. 4138; Puckett, Tr. 4573).

### Response to RFOF 3.306

Complaint Counsel agrees that CB&I did not submit a tank-only bid to Dynegy.

3.307 [ ] ( [ ], Tr. 4691). [ ] ( [ ], Tr. 1632).

] ([ ], Tr. 4760). [

] ([ ], Tr. 4760).

[ ] ( [ ], Tr. 4760). [ ] ( [ ], Tr. 4761).

### Response to RFOF 3.307

This finding further supports Complaint Counsel’s proposed findings that [ ] are not likely to provide timely and sufficient entry to restrain CB&I’s market power. CCF 542-566 (*in camera*). Complaint Counsel established that prior to the merger, PDM was CB&I’s closest competitor and served as the competitor that restrained CB&I’s prices. CCF 196-250. Complaint Counsel further established that without PDM to restrain it, CB&I could anticompetitively raise prices because foreign firms could not replace PDM as a competitive restraint at pre-merger prices. CCF 291-447.

Complaint Counsel established that [ ] is not likely to enter in a timely or sufficient manner to replace PDM because, among other things, it has substantially higher costs than CB&I or PDM, as shown in the head-to-head price quotations on the Memphis, [ ] and CMS projects. CCF 530-541. Respondents’ finding shows that [ ] are higher priced than [ ] (*in camera*). Thus, although [ ] is not a likely entrant, [ ] are even more unlikely entry candidates to replace PDM because they are higher priced than [ ]. CCF 542-570. (*in camera*).

3.313 Dynege is satisfied with the post-merger LNG pricing it has received for the Hackberry project. (Puckett, Tr. 4568-69, 4587-88).

### Response to RFOF 3.313

This finding is incomplete and misleading. Mr. Puckett testified that the bids from the foreign firms “were in the expected price range.” (Puckett, Tr. 4557). As discussed in Complaint Counsel’s Response to RFOF 3.288, Dynege’s “expected price range” was based on a budget price from Whessoe that was higher than what a domestic firm such as CB&I or PDM could have quoted, and ultimately the prices that Dynege will pay will be higher because CB&I refused to bid for the LNG tanks.

As shown in CCF 3.75, a comparison of Whessoe’s LNG tank price before the acquisition with Whessoe’s price for an identical tank post-acquisition shows that Whessoe has increased its prices in excess of [ ]; that Dynege is paying a much higher price to foreign firms than it would have paid if CB&I and PDM had competed for the Hackberry project; and that other firms in the market have also begun to increase prices to keep up with CB&I’s post-acquisition price increases.

3.317 CB&I believes that the Trinidad LNG facility supplies gas to the U.S. market. (Glenn, Tr. 4104-05) (state of mind).

### Response to RFOF 3.317

CB&I's "state of mind" about Trinidad is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

The relevant geographic market in which to analyze this merger is the United States, not Trinidad.

Mr. Glenn's "state of mind" about where the gas goes from Trinidad is uncorroborated and irrelevant. Moreover, this finding and all of Respondents' findings regarding the Trinidad project are void of any citation to any ordinary business documents and pricing information. It appears that CB&I's computerized pricing programs suddenly stopped working on the Trinidad project, e-mails were shut down, notes were never taken, meetings and discussions were never held, and letters were never written to or received from the customer. Based on Respondents' reliance strictly on the testimony of Messrs. Scorsone and Glenn, all of the business was conducted by the two of them alone and without any written material.

3.319 Whessoe constructed the first two LNG tanks for the Trinidad LNG facility. (Rapp, Tr. 1287; Glenn, Tr. 4139). Bechtel is satisfied that the tanks Whessoe built are "well-constructed" and built to API standards. (Rapp, Tr. 1332-33). Whessoe imported a supervisory staff, and trained local labor for the Trinidad project. (Rapp, Tr. 1310).

#### Response to RFOF 3.319

As explained in Complaint Counsel's Response to RFOF 3.58, Whessoe performed poorly on the Trinidad project and was not allowed to work on the third and fourth tanks. Bechtel is "reluctant" to employ Whessoe in the future as a result of the Trinidad experience. (Rapp, Tr. 1291).

3.325 CB&I recently submitted a bid, and competed against TKK, for a fourth LNG tank at the Trinidad LNG facility. (Scorsone, Tr. 4950). CB&I believes that AT&V was involved with TKK's bid because TKK formed a joint venture with AT&V, and because AT&V has a connection in Trinidad. (Scorsone, Tr. 5224).

#### Response to RFOF 3.325

Mr. Scorsone's self-serving testimony is not corroborated by any evidence, including any business documents.

3.327 Based on conversations with Bechtel, CB&I perceived that "[t]he price that TKK and ATV was awarded was greater than 5 percent or more under the price that CB&I submitted for the project." (Scorsone, Tr. 4950-52) (state of mind).

#### Response to RFOF 3.327

CB&I's "state of mind" about TKK/AT&V is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Scorsone's self-serving testimony is not corroborated by any evidence, including any

business documents.

3.328 CB&I initially bid the project with a 10% profit margin, anticipating that it would have to reduce its price throughout the course of negotiations with Bechtel. (Scorsone, Tr. 4954).

#### Response to RFOF 3.328

Mr. Scorsone's self-serving testimony is not corroborated by any evidence, including any business documents. CB&I did not present its bidding documents to confirm that it bid the project with a "10% profit margin" or any records showing that it anticipated reducing its price throughout negotiations with Bechtel.

3.329 CB&I was told that there was at least a 5% price difference between its bid and TKK's bid. (Scorsone, Tr. 4954).

#### Response to RFOF 3.329

Mr. Scorsone's self-serving testimony is uncorroborated by any evidence, including any business documents.

3.330 CB&I cut its initial price it offered to Bechtel for the Trinidad project. (Scorsone, Tr. 4953-54). CB&I reduced its margin to a 5% level. (Scorsone, Tr. 4954). CB&I's best and final offer was five to six percent higher than CB&I's contract price for the third LNG tank. (JX 11, at par. 11). CB&I did not have the lowest bid. (Glenn, Tr. 4140).

#### Response to RFOF 3.330

Mr. Scorsone's self-serving testimony is not corroborated by any evidence, including any business documents. Respondents have not produced any documents showing that it "cut its initial price," "reduced its margin," or any business record relating to the Trinidad project.

This finding is also incomplete with respect to CB&I's pricing. CB&I submitted a price on the fourth tank that was 5-6% higher than the contract price of the third tank's contract price, but this 5-6% price increase was "over and above additional materials and other cost escalations" for the fourth tank versus the third tank. (JX 11 ¶ 2). In other words, CB&I's price increase was greater than 5-6%.

CB&I is likely to have increased its margin on the fourth tank by more than 5-6%. CB&I's actual costs in performing the work on the fourth tank 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). CB&I did not pass through its cost savings in its price quote for the fourth tank, and if it had, CB&I would have been more likely to have won the project. CCF 698.

3.331 CB&I believes that TKK, through the course of negotiations, reduced its price to the point that there "was greater than 5 percent between the prices" CB&I and TKK offered. (Scorsone, Tr. 4954).

Response to RFOF 3.331

Mr. Scorsone’s self-serving testimony is not corroborated by any evidence, including any business documents. Respondents have not produced any documents showing its price or TKK’s price or any “negotiations.”

3.332 CB&I believed that it had a competitive advantage over TKK for the Trinidad project. (Scorsone, Tr. 4954; Glenn, Tr. 4140). CB&I was currently working on the site where the fourth tank would be constructed at the time the bid was awarded to TKK/AT&V. (Scorsone, Tr. 4954). CB&I was already employing labor from Trinidad at the time of the award. (Scorsone, Tr. 4954-55). CB&I has a good knowledge of local labor in Trinidad based on working in Trinidad over the past 30 years. (Scorsone, Tr. 4955). CB&I has a good relationship with the local labor. (Scorsone, Tr. 4956). CB&I also has good knowledge of the local regulatory environment in Trinidad, and has good knowledge of the local subcontractors available in Trinidad. (Scorsone, Tr. 4956).

Response to RFOF 3.332

Complaint Counsel agrees that CB&I’s knowledge of local conditions and assets in place would have reduced its costs on the fourth tank compared to its price quote on the third tank. CB&I did not, however, pass through these cost savings to the customer on its price quote on the fourth tank, which would have made it more likely that CB&I would have won the new project. CCF 698.

Instead, CB&I chose to submit an offer that was 5-6% higher, “over and above additional **materials** and other cost escalations” for the fourth tank. (JX 11 ¶ 2) (emphasis supplied). As demonstrated in Respondents pricing actions on the Cove Point project, Respondents can increase the price to the customer by fattening “cost” items, such as “**materials**,” that they build into the price quote. CCF 805 (citing (CX 1160 at CBI/PDM-H 4007486-7487, *in camera*) (emphasis supplied).

3.333 Despite all the advantages CB&I perceived it had in Trinidad, it still cut the price of its bid for the fourth tank. (Scorsone, Tr. 4958). CB&I was surprised and upset that it lost future work at Trinidad. (Glenn, Tr. 4140).

Response to RFOF 3.333

Messrs. Scorsone’s and Glenn’s self-serving testimony are uncorroborated. Respondents do not cite any bidding documents showing what the original price was and how much it was purportedly “cut,” any documents reflective of CB&I’s “surprise” or being “upset,” or why CB&I did not win the project.

3.335 [ ] ([ ], Tr. 4697). [ ] ([ ], Tr. 4698).

### Response to RFOF 3.335

“Regrets” and hindsight do not constitute likely, timely or sufficient entry.

- 3.336 The pricing CB&I perceived that TKK/AT&V submitted in Trinidad has influenced CB&I's perception of TKK/AT&V's ability to compete for U.S. LNG projects. (Scorsone, Tr. 4951-52) (state of mind). CB&I perceives that TKK/AT&V is "a very serious competitor, that [is] highly focused . . . ." (Scorsone, Tr. 4953).

### Response to RFOF 3.336

CB&I's "state of mind" about TKK/AT&V is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Scorsone's testimony about CB&I's "state of mind" is uncorroborated by Respondents' regular course of business documents. Moreover, as explained in Complaint Counsel's Response to RFOF 3.95, CB&I's purported "state of mind" about AT&V/TKK is completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and its customers in its price quotes.

As explained in Complaint Counsel's Response to RFOF 3.95, Messrs. Glenn's and Scorsone's testimony about CB&I's "state of mind" are uncorroborated by Respondents' regular course of business documents and statements – many of which were authored or made by Messrs. Glenn and Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would "create barriers to entry" and use its "pricing advantage" to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I's "competitive advantages" in the United States and the absence of competition post-merger that had previously eroded CB&I's profitability; he also gave the October 31, 2002 conference call that touted CB&I's higher margins, improved business prospects and ability to win every project.

Moreover, CB&I has been selected by El Paso as the sole-source supplier for an LNG tank in the Bahamas and Mexico, which also goes to CB&I's "state of mind." (Glenn, Tr. 4234).

- 3.340 [ ] ([ ], Tr. 4693).

### Response to RFOF 3.340

It is irrelevant that [ ] "contacted" Yankee Gas to "express its interest." Entry is not timely, likely and sufficient just because [ ] "contacted" Yankee Gas.

- 3.341 Yankee Gas hired CHI Engineering ("CHI") to perform a preliminary engineering analysis to determine the siting capabilities, budgetary costs and economic need for the Waterbury facility. (Andrukiewicz, Tr. 6444). As part of its analysis, CHI sought information regarding the Waterbury LNG tank from several potential

LNG tank constructors. (Andrukiewicz, Tr. 6445).

### Response to RFOF 3.341

This finding is incomplete. [ ] (JX 30 at 25 ([ ]), *in camera*). [ ] (Id.)

CHI no longer has a “contractual relationship” with Yankee Gas. (Andrukiewicz, Tr. 6459-60). CHI has been replaced by SEA Consultants. (*Id.* at 6445). Yankee Gas will “look to SEA to provide us with the potential builders of this facility.” (*Id.* at 6452).

3.342 CHI received responses and information from Skanska/Whessoe, Technigaz and CB&I. (Andrukiewicz, Tr. 6445). Each of the three tank builders provided pricing information, for the Waterbury LNG tank, as part of its submission. (Andrukiewicz, Tr. 6446).

### Response to RFOF 3.342

This finding is incomplete and misleading. CHI received responses from the three firms but very little was done with the information. Mr. Andrukiewicz of Yankee Gas testified that CHI identified who had provided information but did **not** “come out and say that there is this list of tank manufacturers that can built this facility for you.” (Andrukiewicz, Tr. 6445).

Yankee Gas has not determined that Skanska/Whessoe or Technigaz are qualified to bid. Indeed, the “pre-qualification” process has not started. (Andrukiewicz, Tr. 6451). SEA Consultants, the consultant that replaced CHI, will be responsible for evaluating the potential builders. (*Id.* at 6452). At this point, Yankee Gas has **not** “built the criteria by which we will evaluate any particular contract constructor of any component of the plant.” (*Id.* at 6453).

3.343 In August 2001, CHI presented Yankee Gas with a preliminary engineering report. (Andrukiewicz, Tr. 6444). The report estimated the cost for the entire Waterbury facility in the \$53 million range. (Andrukiewicz, Tr. 6461). The LNG tank itself would cost between \$25 and \$28 million. (Andrukiewicz, Tr. 6462). In addition to providing its own cost estimate, CHI’s report also contained the supporting pricing documentation provided by Skanska/Whessoe, Technigaz and CB&I. (Andrukiewicz, Tr. 6445).

### Response to RFOF 3.343

This finding is misleading and incomplete. Among the firms that supplied information, Mr. Andrukiewicz has “no direct knowledge of who specifically – whose specific pricing [CHI] used in the evaluation of that cost [the total cost of the facility with component breakdowns for major aspects of the plant].” (Andrukiewicz, Tr. 6446).

3.344 CHI’s preliminary report indicated that due to the size of the Waterbury site, Yankee Gas would be required to build a double containment LNG tank. (Andrukiewicz, Tr. 6443). CHI’s report 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). The concrete double containment tank cited in CHI’s report was

specifically related to the Skanska/Whessoe proposal. (Andrukiewicz, Tr. 6447).

### Response to RFOF 3.344

Respondents misleadingly suggest that Yankee Gas has made a decision to pursue a double containment tank. Mr. Andrukiewicz of Yankee Gas testified that Yankee Gas has “**made no commitment on tank design.**” (Andrukiewicz, Tr. 6464-65) (emphasis supplied). Mr. Andrukiewicz wanted to clarify that although CHI’s preliminary report discussed the use of concrete, “that is not what has to be specified [by Yankee Gas] as long as the tank design that is ultimately proposed under the premise of the CFR 193 and NFPA 59A requirements meets the siting requirements.” (*Id.* at 6464).

Moreover, CHI, the consulting firm that prepared the preliminary engineering report, has been replaced by another firm, SEA Consultants. (Andrukiewicz, Tr. 6445). SEA Consultants will handle the “plan to build the facility” and to assist in the evaluation of the responses from LNG tank suppliers. (Andrukiewicz, Tr. 6445).

3.345 CB&I believes Yankee Gas has indicated a preference, based on discussions with the community and other constituencies, for a double concrete wall full containment LNG tank. (Glenn, Tr. 4098, 4141) (state of mind). CB&I also bases its belief on Yankee Gas’ submittal to the Connecticut Department of Public Utilities. (Scorsone, Tr. 4988).

### Response to RFOF 3.345

CB&I’s “state of mind” about Yankee Gas is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Messrs. Glenn’s and Scorsone’s self-serving statements are uncorroborated by any evidence, including business documents. Respondents do not cite any internal document reflecting CB&I’s purported “belief” that Yankee Gas has a “preference” to build a double containment tank.

An April 12, 2002 CB&I internal memo prepared by Eric Frey, the sales representative to Yankee Gas, describes the state of negotiations with Yankee Gas, including the concrete tank issue, and flatly contradicts Messrs. Glenn and Scorsone: “Due to the events of 9/11, and the fact that the report from CHI indicated that a concrete inner tank was safer than a steel inner tank, Yankee Gas decided not to approach the issue with the DPUC at that time. Yankee Gas was beginning to realize that concrete inner tanks were not common and not the norm and that more conventional designs using steel as the product container were equally as safe (or safer) and probably less expensive. **Yankee Gas agreed to do their best to get the concrete inner tank requirement removed**” (CX 1507 at CBI 059484) (emphasis supplied).

3.346 Concrete is a major component of a double concrete wall full containment LNG tank. (Glenn, Tr. 4141). CB&I does not execute its own concrete work or possess a double concrete wall full containment LNG tank design. (Glenn, Tr. 4141; Scorsone, Tr. 4989). CB&I knows of two companies with experience in this type of construction: Technigaz and Skanska/Whessoe. (Glenn, Tr. 4141).

### Response to RFOF 3.346

Messrs. Glenn's and Scorsone's self-serving statements are uncorroborated and misleading. CB&I knew that there was at least a possibility that Yankee Gas might build a concrete wall tank, but this did not stop CB&I from submitting price quotes to Yankee Gas; nor did Yankee Gas dismiss CB&I because it "does not execute its own concrete work" or possess the specific design. To the contrary, CB&I has convinced Yankee Gas to open direct dialogues, and CB&I has elevated itself to one of two firms competing for the EPC portion of the contract: "Yankee Gas requested that CB&I submit a proposal for contracting for the facility directly to Yankee Gas and requests a second meeting with CB&I." (CX 1507 at CBI 059484; *see also* CX 787 at CBI 065244, *in camera* ([

])).

3.357 Yankee Gas would consider qualifying Skanska/Whessoe, Technigaz, CB&I and CHI for the Waterbury project. (Andrukiewicz, Tr. 6453-54). Yankee Gas has not disqualified Skanska/Whessoe, Technigaz, CB&I, CHI or any other company from the pre-qualification process. (Andrukiewicz, Tr. 6452-53).

### Response to RFOF 3.357

This finding is incomplete and misleading. Yankee Gas "has no experience building facilities of this magnitude." (Andrukiewicz, Tr. 6458). Yankee Gas is looking to SEA Consultants "to provide us with the potential builders of this facility." (*Id.* at 6452). Yankee Gas and SEA Consultants "have not yet built the criteria by which we will evaluate any particular contract constructor of any component of the plant to this point in time." (*Id.* at 6453). Thus, Yankee Gas' refusal to disqualify any firm at this early stage of the project says nothing about whether or not Yankee Gas or SEA Consultants would qualify, let alone hire, any foreign LNG tank supplier.

Moreover, timely, likely and sufficient entry is not established just because Yankee Gas "would consider qualifying" a foreign firm or CHI or just because Yankee Gas has not "disqualified" a firm. Respondents do not cite any evidence that Skanska/Whessoe, Technigaz, CHI or any other firm will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger.

3.359 It is unclear whether CB&I will bid on the Yankee Gas project if the design calls for a double concrete wall full containment LNG tank. (Scorsone, Tr. 4989-90; Glenn, Tr. 4141).

### Response to RFOF 3.359

Messrs. Scorsone's and Glenn's self-serving statements are uncorroborated by any evidence, including business documents. CB&I does not let a little concrete get in its way of high margins. Dynegey's inclination to construct full containment tanks did not prevent CB&I from trying to convince Dynegey to combine the EPC portion of the project and the LNG tank supply into one package. Having achieved at least a 50% chance of becoming the EPC contractor to Yankee Gas, it seems unlikely that CB&I would suddenly walk away from the project.

3.360 CB&I believes Technigaz/Zachry and Skanska/Whessoe will be competitors for the Waterbury facility. (Glenn, Tr. 4098). CB&I believes both companies will be strong competitors because they are the only two companies with direct experience with, and a design for, double concrete full containment LNG tanks. (Glenn, Tr. 4098). Preload licensed its double wall concrete design to Skanska/Whessoe. (Scorsone, Tr. 4989).

### Response to RFOF 3.360

Messrs. Glenn's and Scorsone's self-serving testimony are uncorroborated by Respondents' regular course of business documents or any other evidence. Moreover, as explained in Complaint Counsel's Response to RFOF 3.95, CB&I's purported beliefs about Skanska/Whessoe and Technigaz/Zachry are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes. Indeed, the presence of Technigaz/Zachry and Skanska/Whessoe in the picture did not stop CB&I from submitting a price quote to Yankee Gas that anticipates a [ ] margin, well above its pre-merger levels. (RX 54 at CBI 026812-HOU, *in camera*; CX 421 at CBI 026843-HOU; [ ], Tr. 5317, *in camera*).

3.361 [ ] ([ ], Tr. 4685).  
[ ] ([ ], Tr. 4693). [ ] ([ ], Tr. 4693, 4752). [ ] ([ ], Tr. 4693).

### Response to RFOF 3.361

Timely, likely and sufficient entry is not established just because [ ]. Respondents do not cite any evidence that [ ] or any other firm will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I's prices to the same level as PDM did before the merger. Moreover, as shown in CCRFF 3.345, Yankee Gas has promised CB&I that they will "do their best to get the concrete inner tank requirement removed," a statement that directly contradicts [ ] belief that [ ] (CX 1507 at CBI 059484) (emphasis supplied).

3.363 El Paso's non-regulated business is developing three land-based terminals in North America which will require LNG tanks: (1) the Rosarito terminal in Baja California, Mexico; (2) the Altamira terminal in Altamira, Mexico; and (3) the Bahamas terminal on the Grand Bahamas Island. (Bryngelson, Tr. 6122-23). El Paso has partnered with Shell for the Altamira project. (Scorsone, Tr. 4992; Bryngelson, Tr. 6168-69).

### Response to RFOF 3.363

El Paso is currently negotiating sole-source contract terms with CB&I for the Bahamas and Altamira, Mexico projects, as well as the El Paso project in Elba Island. (Glenn, Tr. 4234).

Moreover, the relevant geographic market in which to analyze this merger is the United States,

not Mexico or the Bahamas.

3.365 The Altamira terminal will have three LNG tanks, each with a capacity of 150,000 cubic meters. (Bryngelson, Tr. 6123). [ ] ([ ], Tr. 4695). [ ] ([ ], Tr. 4695).

### Response to RFOF 3.365

This finding is incomplete and misleading. Although [ ] [ ] ([ ], Tr. 1653-54, *in camera*). [ ] ([ ], Tr. 1652-53, *in camera*). CCF 553. [ ] also chose not to bid against CB&I on Enron's project in the Bahamas for similar reasons. (*See* [ ], Tr. 1659, *in camera*; [ ], Tr. 4749, *in camera*). CCF 554.

3.370 El Paso's pre-qualification list of LNG tank builders varies depending on who it partners with for a specific job. (Bryngelson, Tr. 6126). El Paso's general list of contractors that it considers for projects includes TKK, MHI, CB&I, TKK, Technigaz, Skanska, and IHI. (Bryngelson, Tr. 6126).

### Response to RFOF 3.370

This finding is incomplete and misleading. Mr. Bryngelson of El Paso testified that El Paso has a list of contractors but "I wouldn't say they're prequalified for any job...we prequalify them on a job-by-job basis." (Bryngelson, Tr. 6127).

Moreover, placement on El Paso's list is of limited value. Mr. Bryngelson has "never spoken to a single employee of Technigaz directly" or anyone from TKK, MHI, Skanska or Entrepose about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

3.371 For the Rosarito terminal, El Paso pre-qualified TKK, MHI, CB&I, Entrepose (which is owned by Tractebel) and Technigaz. (Bryngelson, Tr. 6125-26). Each of the companies on the pre-qualification list for the Rosarito job have sufficient financial stability that satisfy El Paso's requirements and are technically capable of building LNG tanks. (Bryngelson, Tr. 6128-29).

### Response to RFOF 3.371

Respondents' finding is irrelevant because the Rosarito terminal will not be constructed in the relevant geographic market.

Moreover, Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on projects outside the United States. (Bryngelson, Tr. 6122-23, 6201, 6228-9). Moreover, Mr. Bryngelson has “never spoken to a single employee of Technigaz directly” or anyone from TKK, MHI, Skanska or Entropose about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

Timely, likely and sufficient entry is not established just because El Paso “pre-qualifies” a firm. Respondents do not cite any evidence that TKK, MHI, Entropose and Technigaz or any other firm will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

3.372 CB&I believes that El Paso will solicit bids from Skanska/Whessoe, TKK, MHI, IHI, and Technigaz/Zachry for the Rosarito (Baja California) project. (Scorsone, Tr. 4992-93) (state of mind evidence); (Glenn, Tr. 4146) (state of mind).

### Response to RFOF 3.372

CB&I’s “state of mind” about El Paso and these foreign firms is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Messrs. Glenn’s and Scorsone’s self-serving testimony are uncorroborated by Respondents’ regular course of business documents or any other evidence. Moreover, as explained in Complaint Counsel’s Response to RFOF 3.95, CB&I’s purported beliefs about Skanska/Whessoe, TKK, MHI, IHI and Technigaz/Zachry are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes.

3.373 Each of the companies on the Rosarito list submitted bids, and “they’re still in the running.” (Bryngelson, Tr. 6139-40). El Paso has not yet awarded a contract for this project. (Bryngelson, Tr. 6138-39).

### Response to 3.373

Complaint Counsel agrees that El Paso has not awarded a contract for the Rosarito project. Given CB&I’s success in convincing El Paso to negotiate sole-source arrangements for the Bahamas, Altamira, Mexico and Elba Island projects, the foreign firms may not be “in the running” for much longer.

3.374 El Paso pre-qualified six LNG tank companies for the Altamira terminal including: TKK; MHI (Mitsubishi Heavy Industries); CB&I; Technigaz; and Skanska. (Bryngelson, Tr. 6125). Each of the companies on the pre-qualification list for the Altamira job have sufficient financial stability that satisfy El Paso’s requirements, and are technically capable of building LNG tanks. (Bryngelson, Tr. 6128-29).

### Response to RFOF 3.374

Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United

States since he has only been working on LNG projects for about two years, all of which have been on projects outside the United States. (Bryngelson, Tr. 6122-23, 6201, 6228-9). Moreover, Mr. Bryngelson has “never spoken to a single employee of Technigaz directly” or anyone from TKK, MHI, Skanska or Entropose about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

Timely, likely and sufficient entry is not established just because El Paso “pre-qualified” some foreign firms. Respondents do not cite any evidence that the foreign firms will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

For all of El Paso’s beliefs about these foreign firms, El Paso will enter into sole-source negotiations with CB&I over these foreign firms for its Altamira project. (Glenn, Tr. 4234).

3.375 El Paso has not yet solicited bids, or awarded a contract, for the Altamira project. (Bryngelson, Tr. 6138-39).

#### Response to RFOF 3.375

This finding is misleading and incomplete. El Paso will enter into sole-source negotiations with CB&I. (Glenn, Tr. 4234).

3.376 [ ] ([ ], Tr. 1668).

#### Response to RFOF 3.376

[ ] is too late. El Paso will enter into sole-source negotiations with CB&I. (Glenn, Tr. 4234).

3.379 Based on input received from KBR and El Paso's engineering staff, El Paso believes that all of the bidders on the Altamira and Rosarito bid list are technically qualified, and have a good reputation for building LNG tanks. (Bryngelson, Tr. 6129-30). All of the companies on the Altamira and Rosarito bid lists are "fairly equal as far as reputation for building field-erected LNG tanks." (Bryngelson, Tr. 6130-32). El Paso also believes that each of the companies on the Altamira and Rosarito bid lists, including IHI, can serve as a turnkey contractor for an LNG facility. (Bryngelson, Tr. 6144-45).

#### Response to RFOF 3.379

Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (Bryngelson, Tr. 6122-23, 6201, 6228-9). Moreover, Mr. Bryngelson has “never spoken to a single employee of Technigaz directly” or anyone from TKK, MHI, Skanska or Entropose about their ability to qualify to build LNG tanks in the United States. (Bryngelson, Tr. 6240-42).

For the reasons described in Complaint Counsel’s Response to RFOF 3.374, being

“technically qualified” or having a “good reputation” are not evidence of timely, likely and sufficient entry to restrain CB&I’s market.

3.380 El Paso is sole-sourcing the Grand Bahamas job with CB&I. (Bryngelson, Tr. 6126). However, the EPC contract for the Bahamas job has not yet been awarded to CB&I. (Bryngelson, Tr. 6134). El Paso believes that all of the companies on the Altamira and Rosarito bid lists are capable of building the LNG tank for the Bahamas job at a competitive price. (Bryngelson, Tr. 6138).

#### Response to RFOF 3.380

Although the sole-source contract has not technically been awarded by El Paso, “there is an agreement in place to work with CBI and get an EPC contract ultimately.” (Bryngelson, Tr. 6134). For all of El Paso’s “beliefs” about the capabilities of other firms on the Altamira and Rosarito bid lists, those foreign firms did not beat CB&I.

3.381 El Paso would pre-qualify each of the companies on the Altamira and Rosarito bid lists to build tanks in the U.S., and believes that each of the companies are capable to build tanks in the U.S. at a competitive price. (Bryngelson, Tr. 6131-32).

#### Response to RFOF 3.381

This finding is incomplete and misleading. Mr. Bryngelson of El Paso, like other customers, including Respondents’ third-party witnesses, have imperfect information about (1) the pre-merger price competition between Respondents, (2) CB&I’s post-merger ability to manipulate the “costs” that it claims are incurred on a project in explaining its higher prices to customers, and (3) the significant cost advantage CB&I enjoys compared to foreign firms. This lack of information provides a false confidence on the part of customers, such as Mr. Bryngelson, that they can obtain a “competitive price” when, in fact, CB&I can increase prices dramatically from pre-merger levels and still remain “competitive” against foreign firms.

Mr. Bryngelson has not been involved in any LNG tank bids in the United States. (Bryngelson, Tr. 6229). He does not know about the Memphis project bidding, the Pine Needle project pricing or any “past pricing of LNG tanks within the United States.” (*Id.* at 6247). He has no knowledge “whatsoever” about PDM, its bidding history or its costs in the United States. (*Id.* at 6233, 6246-47).

Mr. Bryngelson admitted that pricing on LNG tanks is “not something that’s well known.” (Bryngelson, Tr. 6207). El Paso also finds it “difficult” to obtain information about LNG prices from other buyers of LNG tanks because “it’s not very shared information.” (*Id.*) El Paso does not have its own reliable database because it last bought an LNG tank in the late 1970s or early 1980s. (*Id.* at 6208).

El Paso does not have “enough experience to say one way or the other” whether CB&I costs are higher or lower than other firms because “previous tank bids and tanks costs are not very well publicized.” (Bryngelson, Tr. 6235-36). Mr. Bryngelson must rely on CB&I’s “reputation” as a “low cost provider” but he has no “direct experience to make that assessment.” (*Id.* at 6238). However,

Mr. Bryngelson testified that “tanks in particular have gotten cheaper and continue to get cheaper as people are more familiar with working with cryogenic materials.” (*Id.* at 6215).

El Paso will have the right to review CB&I’s “costs” as part of the sole-source arrangement, but El Paso can only compare those “costs” to what “we consider other comparative costs in the industry,” a comparison that Mr. Bryngelson frankly admits is a “guess” since he doesn’t know with certainty what the industry costs are. (Bryngelson, Tr. 6238). In other words, El Paso is “operating a little bit in the dark in terms of knowing what the costs are for LNG tank suppliers.” (*Id.*).

Mr. Bryngelson’s definition of a “competitive” price is broad: “But if we saw somebody who was 20 percent higher or more in rough numbers, that would make me step back. And if it really was any higher than 15 percent, it would make me step back. But in the 10 to 15 percent range, that’s normal for any of these bids.” (Bryngelson, Tr. 6190).

These exact same conditions has led to anticompetitive price increases on the Cove Point project and to CMS. As explained in Complaint Counsel’s Response to RFOF 3.95 and CCFF 796-811, Respondents raised prices to the customer on the Cove Point project by increasing the price of numerous line items, including “materials,” “flat costs” and “SGA.” CCFF 800-809. Mr. Steimer of PDM wrote that the increases were on top of estimates that already were [ ] [ ] and [ ] (CX 1160 at CBI/PDM-H 4007486-7487, *in camera*). After these price increases, CB&I again raised the price on Cove Point. Mr. Scorsone testified that the price increases were implemented because of project delays and change orders even though the delay **lowered** CBI’s cost of doing the project. ([ ], Tr. 5334, 5337-39, *in camera*) (emphasis supplied). Respondents raised the Cove Point price from an already inflated bid of [ ] to [ ]. CCFF 792, 812.

Using the Cove Point price as a benchmark, CB&I quoted [ ] to CMS for its 140,000 cubic meter LNG tank to be built in Louisiana. ([ ], Tr. 6260, 6284-85, *in camera*). CB&I provided its [ ]. (*Id.* at 6283-84, *in camera*).

In order to gain comfort about CB&I’s price, CMS looked to the only data points available to it. First, CMS [ ]. (*Id.* at 6284-85, 6293 *in camera*). [ ] (RX 157 at [ ] 02 004, *in camera*).

Second, CMS [ ] ([ ], Tr. 6290, *in camera*). Seeing that it was being charged a price by CB&I that was comparable to [ ] but [ ] below [ ], CMS felt [ ] and that it had obtained a [ ]. ([ ], Tr. 6284, *in camera*).

CMS did not know that prior to the acquisition (in 1998), CB&I had quoted to [ ] a price of [ ] for the same-sized tank. (RX 157 at [ ] 02 004 *in camera*). CMS was also unaware that the Cove Point price quoted by Respondents included [ ] and [ ]

cost estimates or that following the acquisition, CB&I took advantage of project delays and change orders to inflate the price of the Cove Point LNG tank to [ ]. ([ ], Tr. 5333-34 *in camera*).

El Paso is in the same situation as [ ]. El Paso does not have its own history of LNG tank purchases in the United States to draw upon, has no knowledge about PDM's pricing, and finds it "difficult" to obtain information about LNG tank prices. El Paso can only "guess" about the veracity of an LNG tank supplier's cost estimates and make rough comparisons to industry costs. All this lack of information leaves El Paso admittedly "in the dark."

CB&I can take advantage of its superior information to raise prices from pre-merger levels and claim to the customer that the increase is the result of higher "costs" that are, in fact, simply increased profits. El Paso would find it difficult to compare the price, and if it performs the same comparison as CMS – looking to the inflated Cove Point price – would be lulled into believing that it had received a competitive price. Moreover, Mr. Bryngelson's definition of a "competitive" price inherently permits a 10-15% comfort zone – the same differential observed by [ ]

[ ]. This leaves CB&I with a cushion to increase its prices from pre-merger levels to within 10-15% of its next closest competitor, just as it did to [ ]. El Paso's lack of information would cause it to be unaware that an anticompetitive effect had occurred, and, in fact, El Paso would believe it was receiving a "competitive" price from CB&I.

Moreover, for the reasons described in Complaint Counsel's Response to RFOF 3.374, "pre-qualification" is not evidence of timely, likely and sufficient entry to restrain CB&I's market power.

3.382 El Paso would not be concerned about using a company to build an LNG tank in the U.S. if that company had no prior experience in the U.S.: "So the actual construction of the tank, it would be the same in the U.S. as it would be in an international location, by and large." (Bryngelson, Tr. 6141).

#### Response to RFOF 3.382

Mr. Bryngelson has no basis to speak about the construction of an LNG tank in the United States since he has only been working on LNG projects for about two years, all of which have been on project outside the United States. (Bryngelson, Tr. 6122-23, 6201, 6228-9). Mr. Bryngelson also does not have direct knowledge of the technical requirements of API 620, Appendix Q, which is the United States standard for LNG tanks, and DOT regulations for LNG terminals. (*Id.* at 6203).

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

#### Response to RFOF 3.383

This finding is incomplete and misleading because, as described in Complaint Counsel's

Response to RFOF 3.381, Mr. Bryngelson lacks experience in and information about the United States market. Moreover, Mr. Bryngelson's beliefs about competition and this merger are "strictly" limited to outside the United States. (Bryngelson, Tr. 6247).

3.384 [ ] ( [ ] ) [ ] ( [ ] )  
D).

### Response to RFOF 3.384

Respondents cannot demonstrate that [ ] is likely to enter the United States LNG market in a timely and sufficient manner just because [ ] and [ ] Respondents do not identify what the [ ] were or if they had any relationship to LNG tanks.

3.391 Freeport LNG ultimately selected Daewoo because it "had the lowest fee, and we know that they can do the job, so that's why we asked them to do it." (Eyermann, Tr. 6976).

### Response to RFOF 3.391

This finding is misleading and incomplete. Daewoo was chosen, in part, because CB&I "declined." (Eyermann, Tr. 7049). CB&I "wanted to be the complete engineer on this whole project from the start through EPC contracting." (*Id.* at 7069). Freeport LNG did not want to have a "sole-source" relationship with CB&I. (*Id.*)

3.394 Several foreign LNG tank builders have contacted Freeport LNG, expressing interest in constructing the Freeport LNG facility including: Skanska/Whessoe (Eyermann, Tr. 6981-83); Technigaz/Zachry (Eyermann, Tr. 6994-96); TKK/AT&V (Eyermann, Tr. 7000-01); Daewoo/S&B Engineers (Eyermann, Tr. 7008); and IHI (Eyermann, Tr. 7015-16).

### Response to RFOF 3.394

"Contacting" a customer does not demonstrate that timely and sufficient entry to restrain CB&I's market power is likely to occur. Any firm can place a telephone call to a customer or mail a brochure.

3.395 Freeport LNG will seek bids from at least Technigaz, TKK, CB&I, Daewoo, and Skanska/Whessoe to receive a competitive price for the LNG tanks. (Eyermann, Tr. 7018, 7022-23).

### Response to RFOF 3.395

This finding is misleading and incomplete. Mr. Eyermann lacks foundation to speak about the United States market since he "never worked on an LNG project in the U.S." (Eyermann, Tr. 7025). All of Mr. Eyermann's experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyermann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG tank bidders. (Eyermann, Tr. 7025-7028).

Mr. Eyermann lacks foundation to speak about AT&V/TKK because he has never worked with either firm. (Eyermann, Tr. 7062). Mr. Eyermann lacks foundation to speak about Technigaz/Zachry because he has never worked with either firm. (Eyermann, Tr. 7062).

For the reasons discussed in Complaint Counsel's Response to RFOF 3.381, because of Mr.

Eyermann's lack of experience in the United States market and lack of information about

United States prices and costs, Mr. Eyermann lacks foundation to know whether a foreign firm can provide a “competitive price” in the United States.

Moreover, Mr. Eyermann admitted that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: “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...It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyermann, Tr. 7071-72).

3.396 Freeport LNG has "obtained budgetary pricing unofficially from different vendors" for the Freeport LNG project. (Eyermann, Tr. 7030). CB&I perceives, based on discussions with Freeport LNG, that Technigaz, TTK/AT&V, Skanska Whessoe, MHI, and IHI have submitted budgetary pricing to Cheniere. (Scorsone, Tr. 4990-91) (state of mind); (Glenn, Tr. 4145).

### Response to RFOF 3.396

This finding is misleading and incomplete. Mr. Eyermann admitted that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: “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...It is not relevant to know the price of an LNG tank in Freeport or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.” (Eyermann, Tr. 7071).

The self serving testimony of Messrs. Glenn and Scorsone are uncorroborated. Their testimony about their “state of mind” about the Freeport LNG project is just that and nothing more; there is no evidence that these foreign firms have in fact submitted “budgetary pricing.”

Moreover, as explained in Complaint Counsel’s Response to RFOF 3.95 CB&I’s purported “state of mind” about Skanska/Whessoe, TTK, MHI, IHI and Technigaz/Zachry are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes.

3.398 Freeport LNG is comfortable with the options that it currently has available for LNG tank builders for the Freeport project. (Eyermann, Tr. 7019).

### Response to RFOF 3.398

For the reasons discussed in Complaint Counsel’s Responses to RFOF 3.395 and RFOF 3.381, Mr. Eyermann’s testimony that he is “comfortable” with his options means that Freeport LNG may become another unknowing payor of the [ ], [ ] and [ ] benchmark price established by CB&I during the Cove Point project.

3.402 Due to a current trends, Calpine expects that new LNG tanks built in the United States will be at least double containment and possibly full containment. (Izzo, Tr. 6491-92).



### Response to RFOF 3.402

This finding is misleading and incomplete. Mr. Izzo testified that he would have to “guess” as to whether FERC will require Calpine to build a single, double or full containment tank. (Izzo, Tr. 6523). If FERC authorizes construction of a single-containment tank, Calpine will construct a single-containment tank rather than a double or full containment tank. (*Id.*)

3.403 Calpine will probably hire an EPC contractor for the tank and facility. (Izzo, Tr. 6494). Calpine believes that at least Skanska/Whessoe, Technigaz/Zachry, CB&I and TTK/AT&V are qualified to bid for the EPC contracts. (Izzo, Tr. 6494-95). Calpine would include at least these four companies on its bid list. (Izzo, Tr. 6494-95). Calpine believes that all four companies have the requisite experience and balance sheets necessary to construct a large LNG project. (Izzo, Tr. 6495). Calpine would also consider Kellogg, Brown & Root and Black & Veatch as an overall engineer or manager for its project. (Izzo, Tr. 6497).

### Response to RFOF 3.403

This finding is incomplete and misleading. Mr. Izzo testified that he does not have “firsthand knowledge” about the pricing and performance capabilities of foreign LNG tank firms in the United States. (Izzo, Tr. 6521). Mr. Izzo lacks foundation to speak about foreign firms’ capabilities to construct LNG tanks in the United States because his knowledge about LNG tank suppliers comes from his experience outside the United States; he has never been involved in an LNG project in the United States, except in Puerto Rico. (Izzo, Tr. 6513-14).

Moreover, Mr. Izzo has not spoken to Skanska/Whessoe, Zachry/Technigaz or AT&V/TKK about the Calpine project. (Izzo, Tr. 6524-25). He would have to “guess” as to whether any of these three firms will provide a bid to Calpine, what the price will be and how they will compare to CB&I’s price. (*Id.* at 6525).

Whessoe is the only foreign firm with which Mr. Izzo has first-hand knowledge about its construction performance and prices, and this was based on Whessoe’s work in India. (Izzo, Tr. 6519). The only other firms with which he has worked on an LNG construction project are CB&I and PDM. (Izzo, Tr. 6514-16).

Timely, likely and sufficient entry is not established just because Calpine may have a “belief” about these foreign firms’ capabilities. Respondents do not cite any evidence that the foreign firms will likely enter the United States LNG market in a timely and sufficient manner to restrain CB&I’s prices to the same level as PDM did before the merger.

Mr. Izzo recognizes that Kellogg, Brown and Root and Black & Veatch do not build field-erected LNG tanks themselves and will have to find a firm to build the LNG tank, such as CB&I. (Izzo, Tr. 6524).

3.404 Calpine would consider Skanska/Whessoe, Technigaz/Zachry, CB&I, TTK/AT&V, and maybe others, to construct the Humboldt Bay LNG tank. (Izzo, Tr. 6496, 6501).



### Response to RFOF 3.404

This finding is misleading and incomplete for the same reasons discussed in Complaint Counsel's Response to RFOF 3.403.

- 3.405 Calpine believes there are enough competitors for it to obtain a very competitive bid. (Izzo, Tr. 6495). Calpine needs four bidders to get a very good competitive bid and Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V and CB&I are qualified to provide such bids. (Izzo, Tr. 6494-95).

### Response to RFOF 3.405

This finding is misleading and incomplete. Mr. Izzo admits that he is engaging in "conjecturing" and "speculation" about what competition will look like if and when Calpine decides to purchase an LNG tank. (Izzo, Tr. 6526).

Mr. Izzo can only speculate because he has never been involved in a "competitive bidding situation" for an LNG tank in the United States. (Izzo, Tr. 6514). Mr. Izzo has no experience or knowledge about pre-merger competition between Respondents and the impact this competition had on each firm's prices and margins. (Izzo, Tr. 6528-29). Mr. Izzo also lacks knowledge about the pricing and performance capabilities of foreign LNG tank firms in the United States. (Izzo, Tr. 6521).

Because of his ignorance of market conditions, Mr. Izzo of Calpine is in the same shoes as CMS and other customers as far as comparing pre-merger competition in the United States and with the post-merger costs and prices of CB&I and foreign firms in the United States. Thus, Mr. Izzo conceded that Calpine would not know if CB&I raised the price to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534). He added that if CB&I raised its price by 5% from pre-merger levels and this higher price was "on par" with the prices of foreign firms, the market would appear "competitive" to Calpine. (Izzo, Tr. 6535-36).

- 3.407 CB&I believes that Calpine will competitively bid the Humboldt Bay project. (Scorsone, Tr. 4994) (state of mind). CB&I considers Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, Daewoo/S&B, MHI and IHI as potential competitors for this project. (Glenn, Tr. 4102, 4147; Scorsone, Tr. 4994) (state of mind).

### Response to RFOF 3.407

CB&I's "state of mind" about Calpine and these foreign firms is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Izzo never identified Daewoo/S&B, MHI and IHI as candidates to supply LNG tanks for the Calpine project. *See* RFOF 3.403.

Moreover, as explained in Complaint Counsel's Response to RFOF 3.95 CB&I's purported "state of mind" about Skanska/Whessoe, Daewoo, TKK, MHI, IHI and Technigaz/Zachry are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its

employees in meetings and internal documents and customers in its price quotes.

3.411 Initially, CB&I refused to provide any front-end services unless [ ] awarded it the full contract. (Sawchuck, Tr. 6069). CB&I wanted [ ] to choose CB&I as its contractor of choice. (Sawchuck, Tr. 6069). [ ] was uncomfortable with this arrangement, because it wanted to keep its options open, and held serious discussions with CB&I. (Sawchuck, Tr. 6069).

### Response to RFOF 3.411

Complaint Counsel agrees with this finding.

3.413 [ ] has indicated that it will sole-source negotiate with CB&I, but, it will explore other options with other contractors if it cannot reach an agreement with CB&I. (Scorsone, Tr. 4995).

### Response to RFOF 3.413

Mr. Scorsone's testimony is uncorroborated and misleading. There is no other testimony that [ ] has plans to "explore other options." Mr. Glenn, Mr. Scorsone's boss, suggested that it is only a matter of time before CB&I is awarded the contract. (Glenn, Tr. 4180). During his direct examination and cross examination, Mr. Glenn was asked to identify competitors for the [ ] project but he did not name any firms. (Glenn, Tr. 4149, 4180). When asked if he was "trying to give the impression" that "other people are still competing against CB&I" for the [ ] projects, Mr. Glenn did not answer in the affirmative. (Glenn, Tr. 4180).

Moreover, [ ] has already analyzed whether to enter into sole-source negotiations with CB&I or pursue new entrants and opted for the sole-source route. A June 2001 [ ] memorandum to one of its executives outlined the options available for [ ] new LNG projects in the United States. The memorandum stated that since the acquisition of PDM, [

[ ] (CX 693 at [ ] 01 027, *in camera*) (emphasis supplied). [ ] stated that with respect to LNG tank suppliers, [

[ ] (CX 693 at [ ] 01 027, *in camera*).

[

] (CX 693 at [ ] 01

027, *in camera*). [

[ ] [ ] prices for a single containment LNG tank were far higher than CB&I's, ranging from [ ] higher, for [ ] cubic meter tanks, to [ ] higher for an [ ] cubic meter tank. (RX 157 at [ ] 02 004, *in camera*).

Having assessed the firms that could supply the LNG tanks as a subcontractor or as a main contractor, [ ] asked what would be the best way of going forward. [

] (CX 693 at [ ] 01 028, *in camera*). chose to [ ] (Glenn, Tr. 4180).

3.413 [ ] is a sophisticate worldwide play; [ ] knows how much LNG storage should cost. (Glenn, Tr. 4149). CB&I does not believe it can dictate pricing and terms to [ ]. (Scorsone, Tr. 4995).

### Response to RFOF 3.413

The testimony of Messrs. Glenn and Scorsone are self-serving and uncorroborated. For the reasons explained in Complaint Counsel's Response to RFOF 3.414, experience with other customers indicates that CB&I can dictate pricing and terms to [ ].

3.415 [ ] has internal benchmarks that it could use to determine the cost of LNG facilities. (Sawchuck, Tr. 6075). CB&I believes that [ ] has developed a sophisticated pricing model enabling it to very accurately predict the cost of some of these facilities. (Scorsone, Tr. 4995-96) (state of mind). CB&I employees that have worked with [ ] model believe it to be very accurate. (Scorsone, Tr. 4997) (state of mind). CB&I believes [ ] model will affect how CB&I will negotiate with [ ]. (Scorsone, Tr. 4997) (state of mind).

### Response to RFOF 3.415

This finding is misleading and incomplete. As with other projects, such as Cove Point and CMS, customers have imperfect information about costs and prices. Unbeknownst to customers, CB&I can use its price advantage against foreign firms to raise prices from pre-merger levels and yet still quote a price below foreign firms.

received price quotes from CB&I, PDM and Whessoe in 1998 for LNG tanks to be built in the United States. Whessoe's prices for a single containment LNG tank were far higher than CB&I's, ranging from [ ] higher, for [ ] cubic meter tanks, to [ ] higher for an [ ] cubic meter tank. (RX 157 at [ ] 02 004, *in camera*). Based on [ ] data, [PDM was CBI's closest competitor for LNG tanks.] (RX 157 at [ ] 02 004, *in camera*). CB&I could raise prices only up to the level of PDM's prices in order to remain competitive. (RX 157 at [ ] 02 004, *in camera*).

Without PDM as a competitive constraint, CB&I can increase its prices [ ] for [ ] cubic meter tanks before Whessoe becomes competitive. (RX 157 at [ ] 02 004, *in camera*). CB&I can increase its prices for a [ ] cubic meter tank by [ ] before Whessoe's prices become competitive. (RX 157 at [ ] 02 004, *in camera*).

[ ] internal LNG tank cost and price models cannot fully protect [ ] from an anticompetitive price increase. Mr. Sawchuck of [ ] testified that [

]. (JX 33 at 73 ([ ]), *in camera*). Mr. Sawchuck also acknowledged that there are "hundreds of other variables" in the construction of each LNG tank that can cause the costs to change from one location to another. (*Id.* at 37-38).

As explained in Complaint Counsel’s Response to RFOF 3.381, CB&I can take advantage of its superior information to raise prices from pre-merger levels by manipulating the “costs” that it purportedly incurs to construct an LNG tank. On the Cove Point project, CB&I increased the price several times by claiming to the customer that the price increases were the result of higher “costs” that were, in fact, simply increased profits. [ ] may find it difficult to compare the costs and prices. [ ] could look to the Cove Point price as [ ] did as a reference, which would be natural since [ ] is a supplier to Cove Point and in the past has had meetings with the Cove Point expansion team to learn about CB&I’s performance. ([ ], Tr. 6072). [ ] could also compare CB&I’s price to Whessoe’s price. But both of these references would likely lull [ ] into believing that it had received a competitive price as long as CB&I’s price was within the range of the Cove Point price and below Whessoe’s price.<sup>2</sup>

3.416 CB&I submitted budget pricing to [ ] for its proposed LNG terminals. ([ ], Tr. 6075). [ ] evaluated the budget price against its own estimate, and found that the budget price was within the accuracy of the estimate. ([ ], Tr. 6076).

### Response to RFOF 3.416

This finding is misleading and incomplete. Complaint Counsel agrees that CB&I submitted budget prices to [ ]. Because the project is in the preliminary engineering stage, [ ] has a relatively [

[ ] ([ ], Tr. 6109, *in camera*).

3.419 [ ] ([ ], Tr. 6112). [ ] ([ ], Tr. 6109-10). [ ] ([ ], Tr. 6112). [ ] ([ ], Tr. 6112).

### Response to RFOF 3.419

This finding is misleading and incomplete. [ ] ([ ], Tr. 6110, *in camera*). Mr. Sawchuck added that if [ ] has a [ ] ([ ], Tr. 6110, *in camera*). [ ] (*Id.*)

3.420 [ ] ([ ], Tr. 6088). The Cryocrete technology can be used as a single concrete wall and is an alternative to a metal single

---

<sup>2</sup> Since CB&I submitted budget prices to [ ] in 1998, it would not necessarily attempt to raise its prices by the full [ ] differential between it and Whessoe, but CB&I could increase its prices substantially and still justify the increase to [ ] as “cost” increases since 1998.

containment structure. ([ ], Tr. 6078-79). [ ] ([ ], Tr. 6087).

### Response to RFOF 3.420

This finding is misleading and incomplete. CB&I does not own Cryocrete technology, but [ ] nevertheless has chosen to enter into sole-source negotiations with CB&I.

3.421 CB&I believes that [ ] is planning to build full-containment LNG tanks at its confidential locations. (Scorsone, Tr. 4995).

### Response to RFOF 3.421

Mr. Scorsone's self-serving and uncorroborated testimony is directly contradicted by Mr. Sawchuck of [ ], who testified that [ ] See Complaint Counsel's Response to RFOF 3.419.

3.423 [ ] 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. ([ ] Tr. 6062). The potential bidder list includes: Whessoe, Mitsubishi Heavy Industries, IHI, Daewoo, Hyundai, Technigaz and CB&I. ([ ], Tr. 6062). [ ] believes that all seven of these companies have the capabilities and skills to construct LNG tanks in the United States. ([ ], Tr. 6062-63). Each of these companies have successfully constructed LNG projects in other parts of the world. ([ ], Tr. 6063).

### Response to RFOF 3.423

Timely, likely and sufficient entry is not demonstrated just because [ ] would consider accepting bids from foreign firms. Respondents do not cite any evidence that these foreign firms are likely to enter the United States in a timely and sufficient manner to restrain CB&I's market power. Moreover, [ ] decision to enter sole-source negotiations with CB&I over these foreign firms demonstrates that [ ] is a case of failed entry by these foreign firms.

3.424 [ ] [ ] [ ] ([ ], Tr. 6087). [ ] ([ ], Tr. 6088).

### Response to RFOF 3.424

For the same reasons discussed in Complaint Counsel's Response to RFOF 3.423, this finding does not satisfy Respondents' burden to prove timely, likely and sufficient entry.

3.425 [ ] [ ] ([ ], Tr. 6090).

Response to RFOF 3.425

For the same reasons discussed in Complaint Counsel's Response to RFOF 3.423, this finding does not satisfy Respondents' burden to prove timely, likely and sufficient entry.

3.426 [ ] ([ ], Tr. 1657). [ ] ([ ], Tr. 4696). In fact, [ ] recently awarded Technigaz an LNG project in Bilbao, Spain. ([ ], Tr. 6053). [ ] ([ ], Tr. 4696). [ ] ([ ], Tr. 4696).

### Response to RFOF 3.426

For the same reasons discussed in Complaint Counsel’s Response to RFOF 3.423, this finding does not satisfy Respondents’ burden to prove timely, likely and sufficient entry.

3.427 [ ] believes that the current level of competition will provide it with a fair and reasonable LNG tank price. ([ ], Tr. 6075).

### Response to RFOF 3.427

This finding is incomplete and Respondents cite the testimony inaccurately. Mr. Sawchuck testified that “if [ ] decides to go the competitive bidding route,” [ ] would receive a “fair and reasonable price on the LNG tanks.” ([ ], Tr. 6075). As explained in Complaint Counsel’s Response to RFOF 3.414, Mr. Sawchuck testified that [

] Moreover, [ ] has imperfect information to detect an anticompetitive price increase by CB&I.

3.428 Williams has plans to add between four and six new LNG tanks to its existing Cove Point facility in Cove Point, Maryland (“Cove Point II expansion”). (Scorsone, Tr. 4987-88). These additional tanks are required to be full-containment designs because of property limitations at Cove Point. (Scorsone, Tr. 4988). [ ] ([ ], Tr. 4693).

### Response to RFOF 3.428

The self-serving testimony of Mr. Scorsone and the testimony of Mr. Jolly are uncorroborated. Nobody from Williams testified about what type of tank would be built on Cove Point II expansion. In 2002, Williams sold Cove Point to Dominion Resources and the new owner’s views about what types of tanks will be built are unknown. (CX 1607 at 1).

3.430 TTK, in partnership with DYWIDAG and AT&V, submitted budgetary pricing to Halliburton KBR for the Cove Point II expansion. (RX 185). Under this arrangement, TTK would execute the engineering, procurement, and select vendors/subcontractors. (RX 185, at TWC 000036). AT&V will be responsible, under TTK’s direct control, for site construction and fabrication of materials done in the U.S. (RX 185, at TWC 000036). DYWIDAG will be responsible for the civil engineering aspects of the facility. (RX 185, at TWC 000035).

### Response to RFOF 3.430

Timely, likely and sufficient entry is not demonstrated just because TTK has “submitted budgetary pricing” to one customer. Respondents do not cite any evidence that these foreign firms are likely to enter the United States in a timely and sufficient manner to restrain CB&I’s market power.

Moreover, Williams sold Cove Point to Dominion Resources, and it is unknown whether the new owner will expand the facility, seek bids from foreign firms or enter sole-source negotiations with CB&I. (CX 1607 at 1).

3.432 [ ] ([ ], Tr. 4693). CB&I believes that Williams is investigating the possibility of using a membrane type tank technology, which is exclusively owned by Technigaz. (RX 237).

### Response to RFOF 3.432

Williams sold Cove Point to Dominion Resources, and it is unknown whether the new owner will expand the facility, seek bids from foreign firms or enter sole-source negotiations with CB&I. (CX 1607 at 1).

For the same reasons discussed in Complaint Counsel's Response to RFOF 3.430, this finding does not satisfy Respondents' burden to prove timely, likely and sufficient entry.

3.433 CB&I believes that Skanska/Whessoe, TKK/AT&V and possibly Technigaz/Zachry are potential competitors for the Cove Point II expansion. (Glenn, Tr. 4148) (state of mind evidence).

### Response to RFOF 3.433

Williams sold Cove Point to Dominion Resources, and it is unknown whether the new owner will expand the facility, seek bids from foreign firms or enter sole-source negotiations with CB&I.

Mr. Glenn's statement is self-serving and uncorroborated. Moreover, as explained in Complaint Counsel's Response to RFOF 3.95, CB&I's purported "state of mind" about Skanska/Whessoe, TKK and Technigaz/Zachry are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents and customers in its price quotes.

3.436 CB&I was not allowed to pursue a bid as an EPC contractor based on its size. (Scorsone, Tr. 4938-39). CB&I made an overture toward Marathon to become the turnkey EPC contractor and Marathon told CB&I that it appreciated CB&I's efforts but it did not feel CB&I was large enough to tackle such a job. (Scorsone, Tr. 4938-39).

### Response to RFOF 3.436

Mr. Scorsone's self-serving testimony is uncorroborated. Moreover, the portion of the Marathon project that CB&I sought to win was to serve as the "turnkey EPC contractor," *i.e.*, to be the "overall contractor for the entire terminal," not just the LNG tank supplier. (Glenn, Tr. 4151).

3.437 CB&I believes, based on a conversation with Marathon, that Marathon did not think CB&I had the financial capacity and bonding capability to handle the \$500 to \$700 million project. (Glenn, Tr. 4151) (state of mind).

Response to RFOF 3.437

Mr. Glenn’s self-serving testimony is uncorroborated. Moreover, for the reasons discussed in Complaint Counsel’s Response to RFOF 3.436, this finding is incomplete and misleading.

3.439 [ ] ([ ], Tr. 753).

Response to RFOF 3.439

This finding is misleading and incomplete. [ ] ([ ], Tr. 754-55) (emphasis supplied). There is no evidence that CB&I will not be asked to bid for the LNG tank portion of the project even though it may not act as the EPC contractor.

3.440 [ ] ([ ], Tr. 754).

Response to RFOF 3.440

This finding is misleading and incomplete. As discussed in Complaint Counsel’s Response to RFOF 3.439, Daewoo/S&B is bidding on the tank portion of the project, not to “build the import terminal” itself.

Moreover, timely, likely and sufficient entry is not demonstrated just because [ ] Respondents do not cite any evidence that these foreign firms are likely to enter the United States in a timely and sufficient manner to restrain CB&I’s market power.

3.443 Enron solicited, and received, competitive bids for LNG tanks in the Bahamas from CB&I, Skanska/Whessoe and Tractebel. (Carling, Tr. 4480-81). Each of these companies expressed interest in bidding the project, and had proven track records of designing LNG tanks. (Carling, Tr. 4480-81).

Response to RFOF 3.443

The Bahamas is not in the relevant geographic market. Moreover, timely, likely and sufficient entry is not demonstrated just because Skanska/Whessoe and Tractebel bid on a project in the Bahamas. Respondents do not cite any evidence that these foreign firms are likely to enter the United States in a timely and sufficient manner to restrain CB&I’s market power.

3.444 [ ] ([ ], Tr. 1400, 1659, 1688). [ ] ([ ], Tr. 1660).



Response to RFOF 3.444

Complaint Counsel agrees that [ ]

3.445 Enron received the three bids for the Bahamas job in September/October 2001. (Carling, Tr. 4481). The bids for the Bahamas project were "close" and were within a "range of 7 to 10 percent." (Carling, Tr. 4481). The "Tractebel bid was the low one, with Skanska second and CB&I third." (Carling, Tr. 4481-82).

Response to RFOF 3.445

For the reasons described in Complaint Counsel's Response to RFOF 3.443, this finding relates to an irrelevant geographic market and does not demonstrate timely, likely and sufficient entry in the United States. Moreover, CB&I's competitiveness in the Bahamas has been reaffirmed by its recent sole-source negotiation position with El Paso.

3.446 The LNG tanks for the Bahamas job were never awarded because of Enron's bankruptcy. (Carling, Tr. 4482). Enron sold the Bahamas project to Tractebel, which recently acquired Entrepose. (Scorsone, Tr. 4998; Glenn, Tr. 4150). CB&I believes that Tractebel, an EPC contractor, could build the Bahamas project by utilizing its own forces. (Scorsone, Tr. 4998) (state of mind) (Glenn, Tr. 4151).

Response to RFOF 3.446

Messrs. Glenn's and Scorsone's self-serving testimony are uncorroborated. The "state of mind" testimony is just that and nothing more; this testimony was not offered to prove the truth of the matter asserted therein, *i.e.*, that Tractebel can build the Bahamas project with its own forces.

Moreover, as explained in Complaint Counsel's Response to RFOF 3.95, Respondents' finding relating to competition from foreign firms in the Bahamas (and prior findings relating to Mexico and Trinidad) are completely at odds with what CB&I tells the public in its SEC filings and conference calls, its employees in meetings and internal documents, and customers in its price quotes in the United States.

3.450 [ ] ([ ], Tr. 4685-86).

Response to RFOF 3.450

There is no evidence from CB&I whether it will bid on this project. There is also no evidence that this project will go forward.

Moreover, timely, likely and sufficient entry is not demonstrated just because [ ] Respondents do not cite any evidence that [ ] is likely to enter the United States in a timely and sufficient manner to restrain CB&I's market power as a result of this project.

**D. CB&I'S ANTICOMPETITIVE ACTIONS AND PUBLIC STATEMENTS SHOW THAT CB&I FACES NO FIERCE COMPETITION IN THE UNITED STATES LNG MARKET.**

**1. CB&I Does Not Perceive a Competitive Threat in the U.S. LNG Market**

3.451 [ (state of mind). [ of mind). ] (Glenn, Tr. 4223-24) ] (Glenn, Tr. 4224) (state

Response to RFOF 3.451

Mr. Glenn's self-serving testimony is flatly contradicted by his own statements outside the courtroom, CB&I's SEC filings, CB&I's ordinary course of business documents and statements to customers that it can command higher prices because they have no economic alternatives. Mr. Glenn's "state of mind" is just that, and nothing more; Mr. Glenn's testimony was not offered or admitted for the truth of the matter asserted therein.

As explained in Complaint Counsel's Response to RFOF 3.95, Mr. Glenn's views about the state of competition in the United States LNG market is at odds with its post-merger business. Respondents' regular course of business documents and statements – many of which were authored or made by Mr. Glenn and his senior executive for LNG tanks, Mr. Scorsone. Mr. Scorsone spearheaded the merger planning documents that discussed how CB&I would improve margins from "12.5% to 17%," "create barriers to entry" and use its "pricing advantage" to prevent foreign entry; he also approved the price increases on the Cove Point project and others. Mr. Glenn approved the SEC statements that described CB&I's "competitive advantages" in the United States and the absence of competition post-merger that had previously eroded CB&I's profitability; he also gave the October 31, 2002 conference call that touted CB&I's higher margins, improved business prospects and ability to win every project. None of these statements and documents hinted at "vicious" competition.

In truth, what CB&I "perceives" regarding "competition in the domestic LNG market" is that it now has market power. If CB&I felt threatened by any other firm, documentation produced during the discovery period would have included e-mails, presentations and memos articulating the nature of the threat and proposed countermeasures that CB&I could undertake. Respondents cannot cite what does not exist. Instead, CB&I's actual post-merger conduct consists of raising prices to LNG customers and forcing them to negotiate sole-source arrangements when the customers know that competitive bidding generally affords the customer better terms. As discussed in CCRFF 3.95, CB&I (1) has raised prices on the Cove Point project and to CMS, (2) has quoted higher margins to customers in Memphis, Tennessee, Fairbanks, Alaska, and (3) has the ability to raise prices to customers with imperfect information, such as [ ], El Paso and Calpine.

3.452 CB&I believes that in some instances its competitors may be at a cost advantage for a specific project over CB&I; e.g. double concrete full containment or full containment. (Glenn, Tr. 4408-09) (state of mind).

### Response to RFOF 3.452

Respondents' "state of mind" evidence is just that, and nothing more; Mr. Glenn's testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Glenn's self-serving and uncorroborated testimony should be given no weight. There is no evidence that "in some instances," competitors may be at a "cost advantage." To the contrary, CB&I has repeatedly stated to the SEC, investors and in its merger planning documents that it has a "competitive advantage" in all product markets, a "pricing advantage" that it can use against competitors in all product markets, and that it can "win the work every time" in all product markets. CCRFF 3.95.

Moreover, Mr. Glenn's purported "state of mind" is contradicted by his own testimony showing how many LNG projects involving single, double and full containment tanks CB&I has won or is likely to win since the merger. CB&I has won all of the post-acquisition LNG projects for which it has competed or negotiated. Of the 11 LNG projects in various stages of negotiation or construction in the United States, CB&I has won or has the inside track on winning at least six projects, a chance of winning in four other projects, and has refused to submit pricing in a timely manner in the 11th project (Dynegy). CCF 583-590.

Mr. Glenn is confident that CB&I has at least a "50%" chance of winning each project, regardless of what type of tank is considered. (CX 1729 at 9) (emphasis supplied). In accordance with Mr. Glenn's way of thinking, if there are, indeed, four other firms that equally "threaten" CB&I, their chances of winning a project would be a "threatening" 12.5% each.

The odds appear better than 50% because the only double or full containment project in the United States that Respondents have not won is the one time CB&I refused to bid (Dynegy); and in the other double or full containment projects, of which there are less than a handful, Respondents won the project or CB&I is likely to win the project under a sole-source arrangement. (CCFF 578, 585, 586; JX 33 at 74 ([redacted]), *in camera*; Glenn, Tr. 4180).

3.453 [redacted] ([redacted]), Tr. 4224) (state of mind). [redacted] ([redacted]), Tr. 4224) (state of mind). CB&I does not perceive 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).

### Response to RFOF 3.453

Messrs. Glenn's and Scorsone's self-serving testimony is uncorroborated, and is contradicted by the post-merger evidence, including statements by Mr. Glenn to the SEC and investors and documents sponsored by Mr. Scorsone, as discussed in CCRFF 3.451 and 3.452.

Mr. Glenn's reference to "some projects" CB&I "should have won" is vague and misleading.

As discussed in CCRFF 3.452, CB&I has not “been beaten” on any projects in the United States since the acquisition. CB&I has either won or is in the process of negotiating sole-source contracts with CMS, [ ], El Paso, and Poten and Partners. CCFF 832

(Glenn, Tr. 4177, 4180, 4234, 4399; CX 1478 at CBI 010191-HOU, *in camera*). Yankee Gas is also considering entering into a turnkey arrangement with either CB&I or CHI. CCF 1008.

Three other projects are under consideration, but the customers of these various projects have yet to determine whether these projects will be sole-sourced or competitively bid. The three pending LNG projects are for Freeport LNG, Calpine and Williams. (Glenn, Tr. 4140-2, 4145-8). 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, although Mr. Glenn is confident that CB&I has at least a “50%” chance of winning each project. (Glenn, Tr. 4267; CX 1729 at 9).

Finally, CB&I did not get “beaten” on the Dynegey project. CB&I declined to submit a price quote for the Dynegey project because the customer would not structure the project to accommodate CB&I’s business strategies. CCF 984 (Glenn, Tr. 4245, 4247-8).

Mr. Glenn’s reference to a [ ] is vague. CB&I’s prices on the Cove Point project and to CMS indicate that a “low price” is one that is at least 60% above pre-merger levels but 10% below its nearest competitor [( )]. CCF 3.95. CB&I’s anticompetitive prices are “low” only in that they are not higher.

Mr. Scorsone’s assertion that “CB&I does not perceive that it can get away with a 5% price increase on LNG tanks” is clearly false. It was Mr. Scorsone who led the “brainstorming” sessions to plot out CB&I’s business strategy once the merger was finalized. The result of the sessions was a document titled “PDM Merger Objectives Brainstorm Results,” and one of the objectives was “**Improve pricing to achieve margin growth from 12.5% to 17%.**” (CX 101 at PDM-HOU002359-60) (emphasis supplied).

Complaint Counsel has shown that CB&I can indeed “get away with a 5% price increase.” Since the acquisition, Respondents have increased the price for the Cove Point LNG tank [ ] since announcing the merger, and applied the same “fat,” “excessive” and “rich” price as a benchmark for higher prices and margins to CMS and other customers. CCF 3.95.

Customers with imperfect information and lack of experience with pre-merger competition, *i.e.*, Respondents’ customer witnesses, would not know that CB&I had raised prices by 5%. For example, Mr. Izzo of Calpine admitted that he would not know if CB&I raised prices by “5%” to Calpine from pre-merger levels. (Izzo, Tr. 6534). As explained in Complaint Counsel’s Response to RFOF 3.381, customers do not have easy access to prior pricing information and each tank supplier’s costs. Mr. Bryngelson of El Paso agreed that customers are “a little bit in the dark in terms of knowing what the costs are for LNG tank suppliers.” (Bryngelson, Tr. 6238). Thus, Respondents raised prices on the Cove Point project by increasing their stated “costs,” when in fact they were simply raising their profits. CCF 3.381. Customers like CMS then compare the price they received to the few publicly available price data points and conclude, based on misleading data, that they have not been price gouged. CCF 3.381.



3.454 Mr. Scorsone's perceptions about competition in the LNG market have changed over time. (Scorsone, Tr. 5225). CB&I's current competitors are not the same companies Mr. Scorsone perceived to be PDM's competition for LNG tanks in 1997, 1998, 1999, and 2000. (Scorsone, Tr. 4850-52).

#### Response to RFOF 3.454

Mr. Scorsone's self-serving statement is uncorroborated. In one internal business record after another, many of which were authored by Mr. Scorsone, the only firm PDM perceived to be its competitor in 1997, 1998, 1999 and 2000 was CB&I; PDM did not identify any foreign LNG tank supplier as a competitor in the United States market. *See, e.g.*, CCF 206-210. As discussed in CCRFF 3.57, 3.99, 3.141, 3.195, 3.212, 3.217, and 3.223, CB&I's purported "competitors" are firms that have been known to Respondents for decades, and some have previously tried to enter the United States (TKK and Whessoe), but none have succeeded in competing against Respondents in the United States. Contrary to Mr. Scorsone's assertion, these foreign firms today are "the same companies" he dismissed as competitors in PDM's pre-merger business documents.

Respondents do not cite a single document since 2000 reflective of the purported "change in their view of competition – no e-mails, presentations to the board of directors, memos to employees advising them that the competitive landscape had changed and that new strategies had to be developed to deal with the new competitors. Complaint Counsel submits that Mr. Scorsone's perceptions about competition "change" only when the audience is not his fellow employees.

3.455 Mr. Scorsone knew that CB&I was a competitor to PDM for LNG tanks, but believed foreign companies could, and probably would, enter the market if demand increased. (Scorsone, Tr. 4851). This belief was based on some of the foreign companies involvement with Memphis Gas in 1994. (Scorsone, Tr. 4851).

#### Response to RFOF 3.455

Mr. Scorsone's self-serving testimony is uncorroborated and misleading. Mr. Scorsone's belief that "foreign companies could, and probably would, enter the market if demand increased" implies that there was little demand for LNG tanks prior to the acquisition. In reality, however, demand for LNG tanks was just as high in the United States before the acquisition. Between 1970 and the acquisition, four LNG import terminals and 90 peak shaving plants were constructed in the United States. (CX 853 at PDM-HOU011488; CX 154 at CBI-PL002958, 002961; CX 228 at CBI-PL046034; CX 125 at PDM-HOU 2017162-7169). **All of the peak shaving plants and import terminals were built by respondents.** (*Id.*) (emphasis added). It was not demand that kept foreign firms out; foreign firms could not enter the LNG market due to their higher costs, the significant entry barriers in the U.S. market, and the competitive advantages enjoyed by Respondents.

Complaint Counsel agrees with Respondents that the 1994 Memphis project was important in determining CB&I's relationship to foreign firms for LNG tanks prior to the acquisition. TKK and Whessoe attempted to enter the market in an effort to bid for the Memphis project. CCF 930-944. TKK and Whessoe could not enter the U.S. market because of the significant entry barriers that made their prices anywhere from 43% to 59% higher than Respondents' prices, not a lack of demand for

LNG tanks. (*Id.*; CCF 291-419, 937). “Lack of demand” did not prevent Whessoe from trying to beat Respondents for the recent LNG tank projects for [    ]. CCF 831-882.

3.456    Mr. Scorsone's perception about LNG competition changed in 2001, when press releases announced the formal establishment of joint venture companies, involving a number of global LNG builders, to pursue work in the U.S. (Scorsone, Tr. 4851).

#### Response to RFOF 3.456

Mr. Scorsone’s self-serving testimony is uncorroborated. This finding is incomplete and misleading for two reasons. First, Mr. Scorsone admitted that he could not recall whether Respondents even 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) (emphasis supplied).

Second, if Mr. Scorsone’s perceptions about LNG competition “changed in 2001,” he did not share this information with anyone at CB&I, the SEC or CB&I’s investors. CB&I’s SEC filing in 1997 warned investors that “aggressive price competition” had placed “substantial pressure on pricing and operating margins.” (CX 1633 at 15). In **November of 2001** and in **July 2002**, the time period **after** Mr. Scorsone’s purported change in perception, CB&I filed prospectuses with the SEC in connection with two separate stock offerings. (CX 1718 at 1 of 15 (filed as of November 9, 2001); CX 1021 (dated July 2, 2002)). 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).

The 2002 prospectus contains a separate section about “Competition,” but CBI’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).

Complaint Counsel submits that Mr. Scorsone’s perceptions about competition “change” depending upon the audience.

3.457    Mr. Scorsone's perception of LNG competition changed between 2000 and early 2002 when: (1) the "market began to increase" as "potential LNG projects were being developed" in the U.S. and North America; and (2) formal announcements were made of the Technigaz/Zachry joint venture, the TKK/ATV joint venture, and in that time period Skanska acquired Whessoe from Kvaerner. (Scorsone, Tr. 4852).

### Response to RFOF 3.457

Mr. Scorsone's self-serving and uncorroborated testimony is flatly contradicted by the evidence noted in Complaint Counsel's Response to RFOF 3.456.

3.458 Additionally, as President of PDM EC, Mr. Scorsone was responsible for submitting board reports to the Board of Directors. (Scorsone, Tr. 4883). There was a competitors section in these board reports, which included PDM EC's competitors Scorsone perceived at the time. (Scorsone, Tr. 4883). The competitors section, however, did not include an exhaustive list of PDM EC's competitors; rather, it only represented a "quick snapshot". (Scorsone, Tr. 4883). Mr. Scorsone's perceptions as to competition in the relevant markets has changed since the time he had responsibility to submit board reports to the PDM board of directors. (Scorsone, Tr. 4884).

### Response to RFOF 3.458

Mr. Scorsone's self-serving and uncorroborated testimony about a "change" in his perceptions is flatly contradicted by the evidence noted in Complaint Counsel's Response to RFOF 3.456.

Numerous ordinary course of business documents from PDM repeatedly cite CB&I as the "main competitor" or the firm to "beat." CCF 206-210. These documents date back to at least 1996 and consist of e-mails and memos distributed among the sales staff all the way up to PDM's board of directors. Thus, it appears that Mr. Scorsone's inclination to just give a "quick snapshot" of PDM's competitors was widely shared within PDM. In any event, the documents speak for themselves and Mr. Scorsone's self-serving attempts to explain them away should be given no weight.

Moreover, this finding mischaracterizes the record. Mr. Scorsone only admitted that his reports did not include "an exhaustive discussion of all the various competitors that **could exist and would exist out there.**" With his admission, Mr. Scorsone implied that he only included the competitors that did exist, which is why CB&I was the only competitor that ever made the list. (Scorsone, Tr. 4883-84).

3.459 Mr. Scorsone perceives that each of the foreign LNG tank builders are technically capable of constructing and executing an LNG project in the U.S. (Scorsone, Tr. 4873-74) (state of mind). Mr. Scorsone also perceives that each of the foreign LNG tank builders will be able to competitively price LNG tanks against CB&I in the U.S. (Scorsone, Tr. 4874) (state of mind). While competing against foreign companies that have never previously built an LNG tank in the U.S., CB&I will assume that the foreign companies will "have a very good chance of successfully capturing the work". (Scorsone, Tr. 4872).

### Response to RFOF 3.459

Mr. Scorsone's self-serving testimony is uncorroborated and contradicted by the evidence, including his own documents, as noted in Complaint Counsel's Response to RFOF 3.451 and 3.95. Moreover, Mr. Scorsone's "state of mind" is just that, and nothing more; Mr. Scorsone's testimony was not offered or admitted for the truth of the matter asserted therein.

## 2. Post-Acquisition, Customers Are Forced into Negotiating Sole Source Arrangements and Paying Higher Prices

3.460 LNG contracts can be awarded either by a competitive bidding process or through a sole-source arrangement. (Scorsone, Tr. 4959). A bidding process can take between 3 and 6 months to complete. (Bryngelson, Tr. 6134-35). Owners also incur an expense while reviewing bids. (Rapp, Tr. 1304-05). Reviewing bids can cost as much as one million dollars (Bryngelson, Tr. 6135), and [ ] ([ ], Tr. 6299).

### Response to RFOF 3.460

Respondents' finding is incomplete and misleading. First, Respondents have taken Mr. Bryngelson's testimony out of context. When asked "how much the bidding process would cost to a company like El Paso," Mr. Bryngelson replied "**I couldn't specifically quantify it. I would guess...**" (Bryngelson, Tr. 6135) (emphasis supplied). Respondents also mislead the Tribunal in implying that competitively bidding a project is more expensive than sole-sourcing that same project. Customers have said that, in general, they prefer to competitively bid projects because they save money in the process.

Mr. Puckett of Dynege testified that Dynege 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." (Puckett, Tr. at 4571). Mr. Hall also testified that Memphis Light Gas and Water "lik[es] to have at least three [bidders]" on a project, and encourages as much competition as possible in order to "maximiz[e] the competition. That generally helps us keep prices down when we bid things. We know if we have more competitors, it – it allows for more competition." (Hall, Tr. 1803, 1800). For Mr. Price, "the primary way" to "obtain low pricing is to have a competitive bid for the facility." (Price, Tr. 558). According to Mr. Crider, customers pay less through a competitive bidding process, because competitive bidding makes it "easier to subcontract something that you 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).

In LPG, Ms. Warren testified that Fluor "tr[ies] to create an environment through multiple bidders that would create a competitive environment." (Warren, Tr. 2302). In LIN/LOX, competitively bidding projects is better because the customer can [ ]. ([ ], *in camera*).

Mr. Thompson, Spectrum Astro's president testified that he wanted to competitively bid the Gilbert, Arizona TVC because "we wanted obviously to get the best price we could get." (Thompson, Tr. 2051). Mr. Thompson also found that competition "will tend to drive innovation into the system." (Thompson, Tr. 2051). [ ], a TVC representative for [ ], used a competitive bidding process to procure the [ ] because competitively bidding the TVC would provide [ ] with the lowest cost possible. ([ ], *in camera*).

Considering the testimony from witnesses in this matter, it is apparent that the “expense while reviewing bids” and “thousands of man-hours” that might go into a competitive bidding process are worth a customer’s effort. Through competitively bidding a project, the lower prices that customers ultimately pay because of a competitive bidding situation outweigh the customer’s expended resources and effort to create the bidding situation.

3.461 Under a sole-source agreement, an owner negotiates a contract exclusively with one contractor. (Scorsone, Tr. 4959). Owners choose to sole-source negotiate contracts even if they have competitive alternatives. (Bryngelson, Tr. 6137-38; Scorsone, Tr. 4959).

### Response to RFOF 3.461

Respondents’ finding is misleading. Owners **can** choose to sole-source negotiate contracts even if they have competitive alternatives, but customers also choose to sole-source negotiate for lack of competitive alternatives. The latter situation is true in the U.S., where [ ] internal assessment of the lack of competition pushed it into sole-sourcing its three new import terminals with CB&I.

In order to select a constructor for its three projects, [ ] analyzed competition for LNG contractors. CCFF 854-881. After conducting its extensive analysis of CB&I and various foreign LNG tank suppliers, [ ] resolved that CB&I “dominate[s] the US market,” and posited: • 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 [ ] 01 027-028, *in camera*). [ ] knows that in order to “deepen the market in the US by encouraging competition,” [ ] would have to pay foreign firms, such as Whessoe, significantly more for LNG tanks than it would pay to CBI. To assure [ ] “guarantee[d] access to the resources we need for our US regas projects,” [ ] has decided to develop a sole-source relationship with CB&I for its three upcoming LNG import terminals. (CX 693 at [ ] 01 028, *in camera*; Scorsone, Tr. 4995).

Respondents’ failure to acknowledge the [ ] scenario as a reality and an anticompetitive effect of the acquisition makes their statement that “[o]wners choose to sole-source negotiate contracts even if they have competitive alternatives” incomplete and misleading.

3.462 Owners chose to engage in sole-source negotiations with a contractor for efficiency, continuity, and to save resources by not holding a bidding process. (J. Kelly, Tr. 6267). Sole-sourcing “oftentimes result in a shorter overall schedule.” (Scorsone, Tr. 4959). Companies will sole-source projects when their schedules do not allow sufficient time for a bidding process. (Glenn, Tr. 4124).

### Response to RFOF 3.462

As explained in Complaint Counsel’s Response to RFOF 3.461, because Respondents’ finding fails to acknowledge customers who have decided to sole-source LNG projects in the United States for lack of alternatives, RFOF 3.462 is misleading and incomplete.

3.463 Owners will also sole-source projects when they do not have the in-house staff available to manage a bid

process. (Glenn, Tr. 4124). Sole-sourcing with one contractor can provide an owner with greater flexibility, less costs, and can save time when a project is under development. (Bryngelson, Tr. 6134; Scorsone, Tr. 4959). This creates "[a] certain degree of comfort" for the owner. (Scorsone, Tr. 4959). An owner may solicit bids because of a company policy or a loose schedule. (Glenn, Tr. 4124).

### Response to RFOF 3.463

Respondents' finding is misleading and incomplete because it implies that customers prefer sole-sourcing, that customers lack resources to evaluate bids, and that suppliers gain no advantages from securing sole-source contracts.

As explained in Complaint Counsel's Response to RFOF 3.461, because Respondents' finding fails to acknowledge customers who have decided to sole-source LNG projects in the United States for lack of alternatives, RFOF 3.462 is misleading and incomplete.

Moreover, Respondents' finding is incorrect. Customers who "do not have the in-house staff available to manage a bid process" can hire consultants to take bids and analyze them. This was the case for both the Dynegy and Yankee Gas project. CCF 990, 1009-10.

For reasons explained in CCRFF 3.460, a substantial number of customers have testified that competitively bidding a project is more cost effective than sole-sourcing it because increased competition results in lower prices for the owner. As such, Respondents' assertion that "Sole-sourcing with one contractor can provide an owner with ... less costs" is unsupported by the record.

Respondents' finding is also incomplete because it ignores the most important characteristic of sole-source contracting: **sole-sourcing a project is much more lucrative for the supplier**. Traditionally, sole-source contractors earn a higher margin for their work. For example, before the merger, by securing a sole-source relationship with a customer, CB&I earned 8-10% for negotiated work versus an average of 2.5% for CB&I's total work sold. (CX 227 at CBI-PL045109; *see also* 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"))).

Industry participants have also testified that sole-sourcing a project is more lucrative to the supplier than competitive bidding. Mr. Price of Black & Veatch testified that being the sole-source EPC contractor would mean that a firm "do[es]n'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). Mr. Kamrath of Air Liquide also testified that he "found that always a competitive bid resulted in a better cost for [Air Liquide]." (Kamrath, Tr. 2030). Respondents also fail to note [ ] testimony regarding the Pine Needle facility. Reflecting on [ ] extensive experience in the LNG market, [ ] recounted that the cost of the Pine Needle facility, sole-sourced with CB&I, was [ ] more than comparable facilities. ([ ], *in camera*).

Mr. Glenn testified that CB&I prefers to perform LNG projects on a negotiated basis as the

sole-source turnkey contractor. (Glenn, Tr. 2659-60). After CB&I secured the sole-source agreements for [ ] three import terminal projects, he relayed to his investors 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).

In sum, sole-sourcing is generally preferred by the supplier, not by the customer; the customer knows that competition breeds lower prices and that sole-source suppliers are in a position to increase their margins at the customer's expense.

3.464 The ultimate decision regarding what format the contracting process will take is the owners decision. (Glenn, Tr. 4125; Izzo, Tr. 6480-81).

#### Response to RFOF 3.464

Respondent's finding is only true to the extent that customers make "decisions" based upon having choices. Post-acquisition, if no viable, low-cost competitors exist in the LNG market besides CB&I, customers such as have no choice and make the only "decision" that they can: choosing to sole-source with CB&I, and likely paying a higher price. CCRFF 3.461.

3.465 Prior to the acquisition, customers commonly sole-source negotiated LNG projects in the U.S. (Scorsone, Tr. 4959-60). The three most recently constructed LNG projects in the U.S. prior to the acquisition were sole-source negotiated. In 1994, PDM negotiated a sole-source contract with Enron for an LNG import terminal in Penuelas, Puerto Rico. (Scorsone, Tr. 4960; Izzo, Tr. 6480). In 1995, CB&I negotiated a sole-source agreement for the Pine Needle peak-shaving plant, consisting of two single-containment LNG tanks, in North Carolina. (Scorsone, Tr. 4960; RX 447). PDM also entered into sole-source negotiations, and was granted a letter of intent, with Williams to construct the Cove Point LNG facility just prior to the acquisition in 2001. (Scorsone, Tr. 4963).

#### Response to RFOF 3.465

Respondents' finding is misleading. Out of seven completed pre-acquisition projects, Respondents' only sole-sourced two projects: The Pine Needle peak-shaving project, and the Penuelas, Puerto Rico project. CCFF 136.

Moreover, Respondents imply that the Cove Point project has always been a sole-source negotiation, which is incorrect. The Cove Point project began as a competitively bid project prior to the signing of the letter of intent, saving the customer approximately [ ]. CCFF 785. Williams only committed to a sole-source contract with PDM after CB&I dropped out of the bidding for the 850,000 barrel tank. (Scorsone, Tr. 4965).

3.466 The Puerto Rico project consisted of a power plant and import regasification facility, including a one million barrel double containment tank. (Izzo, Tr. 6478-79). Enron was comfortable with the open-book process it used with PDM for the Puerto Rico project, and believed that it got a "reasonable, fair price". (Izzo, Tr. 6481).

#### Response to RFOF 3.466

Mr. Izzo did not define what he meant by a "reasonable, fair price" on the Puerto Rico project. Moreover, Mr. Izzo's opinion about the Puerto Rico project further supports Complaint Counsel's evidence that the knowledge of CB&I's existence in the LNG market prior to the acquisition deterred PDM from imposing significant price increases, and vice versa.

3.467 While negotiating, PDM did not assume it had no competition for the Puerto Rico project: "my view of our business is that there's always competition at some point and throughout the negotiations on a sole-source basis the customer can at any time change their mind and decide to drop you and pursue the project with some other contractor." (Scorsone, Tr. 4960).

### Response to RFOF 3.467

Mr. Scorsone's self-serving testimony is uncorroborated. Complaint Counsel, however, agrees that prior to the acquisition, the threat of losing a sole-source contract to CB&I forced PDM to provide the best service possible at the lowest price possible. Post-acquisition, however, there is no competitor for customers to turn to when CB&I imposes price increases or engages in anticompetitive behavior. CCRFF 3.56-3.227 (None of Respondents' claimed "entrants" can replace PDM).

### **3. CB&I Has Imposed a Price Increase for the CMS Project**

3.470 CMS entered into an EPC agreement with CB&I for the Lake Charles expansion. (J. Kelly, Tr. 6260).  
[  
] ([ ]).

### Response to RFOF 3.470

Respondents mischaracterize Mr. Kelly's testimony. [ ] Mr. Kelly was asked [ ] After listing the firms named by Respondents, Mr. Kelly added that those firms "**would be the primary three I'd be looking at.**" ([ ], *in camera*, emphasis added). In the use of the word "would," Mr. Kelly communicates that he never "look[ed] at" the firms in the first place, but that if the sole-source arrangement with CB&I did not work out, that he would begin to look at these other firms.

Moreover, Respondents imply that Mr. Kelly would have found the EPC firms listed equally as qualified as CB&I when, in reality, none of those EPC firms are capable of constructing an LNG tank, and none have as much experience as Respondents in building peak-shavers or import terminals. CCFF 136; CCRFF 3.228

3.471 CMS engaged in a sole-source negotiation with CB&I due to efficiency, continuity and resource savings; CMS saved resources by foregoing a formal bid process. (J. Kelly, Tr. 6267). [ ] ([ ]).

### Response to RFOF 3.471

Respondents' finding is misleading because it implies that CMS is better off having sole-sourced the Lake Charles project with CB&I. As explained below in CCRFF 3.474 and 3.475, CB&I used the same "fat" price quotes from the Cove Point project for the CMS project.

3.472 [ ] ([ ]). As part of the agreement, CMS went through CB&I's cost estimate process. (J. Kelly, Tr. 6266). [ ] ([ ]). By having CB&I open its books, CMS became more comfortable that CB&I's price was reasonable. (J. Kelly, Tr. 6266-67). [ ] ([ ]).

Response to RFOF 3.472

Respondents' finding is misleading because it suggests that every aspect of the construction of the facility was "open" for CMS's review. As the EPC contractor, CB&I was responsible for the construction of the entire project and may have simply grouped the LNG tank costs as one line item. [

] ([ ], *in camera*; see also CCRFF 3.476). As described in the discussion about CB&I's price increases on the Cove Point project, CB&I can hide price increases by padding cost items such as "materials," "margin" and "overhead/SGA" costs. CCF 801, 805.

3.473 [ ] ([ ]). [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

Response to RFOF 3.473

Respondents misleadingly suggest that Skanska/Whessoe, a foreign firm with higher costs, provided an accurate standard from which to judge CB&I's tank pricing. As shown in CCRFF 3.474, in pre-merger bids to [ ] CB&I quoted prices [ ] below Whessoe. Post-acquisition, CB&I submitted a price to CMS that was only [ ] below Skanska/Whessoe's price. RFOF 3.474. CMS' "check" on CB&I was meaningless since it did not catch CB&I's substantial price increase since the merger.

3.474 [ ] ([ ]). [ ] ([ ]). [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

Response to RFOF 3.474

The cited testimony demonstrates the false sense of security customers experience when they simply compare CB&I's post-merger prices to higher-priced foreign competitors. Because Mr. Kelly

sees that Skanska/Whessoe's price is within a [ ] range of CB&I's price, he is  
"very comfortable' with CB&I's tank price."

Lacking information about pre-merger prices, Mr. Kelly does not know how much anticompetitive harm CMS has actually incurred. Skanska/Whessoe's quote of [ ] to CMS was essentially the same as Whessoe's pre-acquisition quote to [ ] for the same sized single containment LNG tank. ([ ], *in camera*; RX 157 at [ ] 02 004 *in camera*). CB&I quoted [ ] a price of [ ] for the same sized tank. (RX 157 at [ ] 02 004 *in camera*). However, CB&I's price to CMS, [ ], is [ ] higher than CB&I's price to [ ] of [ ]. (J. Kelly, Tr. 6260; RX 157 at [ ] 02 004, *in camera*).

In other words, the anticompetitive effect of the merger to CMS is [ ].

3.475 [ ]  
([ ] D. [ ]  
[ ] ([ ] D).

### Response to RFOF 3.475

This finding is incomplete and misleading. To check CB&I's quoted price of [ ] (*in camera*) CMS saw that the LNG tank for Cove Point was priced between [ ]. ([ ], *in camera*). Comparing the budget price it had received to the [ ], CMS [ ] ([ ], *in camera*).

CMS could not have known that the Cove Point price quoted by Respondents included "fat" and "excessive" cost estimates and that following the acquisition, CB&I took advantage of project delays and change orders to inflate the price of the Cove Point LNG tank to [ ]. ([ ] *in camera*).

Despite the absence of project delays or change orders in the CMS project, CB&I has imposed on CMS a price even higher than the current price of the Cove Point project.

3.476 [ ]  
[ ] ([ ] D).  
[ ] ([ ] D). [ ]  
[ ] ([ ] D) [ ]  
[ ] ([ ] D).

### Response to 3.476

Respondents' finding is incomplete and misleading. Mr. Kelly testified that [ ] did not "review margin and overhead costs for the tank portion of the project." ([ ], *in camera*). Without this critical information, [ ] evaluation of the competitiveness of CB&I's tank price would be incomplete. As described in the discussion about CB&I's price increases on the Cove Point project, many of the price increases were hidden as items

such as “margin” and “overhead/SGA” costs, all of which were already “fat” and “excessive” even before CB&I’s third price increase on Cove Point. CCF 801, 805.

3.477 [ ] ( [ ] ).  
[ ] ( [ ] ).  
[ ] ( [ ] ).  
[ ] ( [ ] ).

Response to RFOF 3.477

To the extent that Respondents suggest that CMS’s “check” was sufficient to prove the competitiveness of CB&I’s price, Respondents’ finding is misleading. As shown in CCRFF 3.474, 3.475, and 3.476, the various steps that Mr. Kelly took to ensure that CMS would get a competitive price relied on insufficient information. When PDM existed, customers could “check” one firm’s price against the other, each of whom were willing to price aggressively in order to win the business – competition dictated what was a “competitive” price. In the absence of PDM however, customers do not have the benefit of competition; there is only CB&I, and its incentive is to maximize its profits.

3.478 [ ] ( [ ] ). [ ] ( [ ] ).  
[ ] ( [ ] ). [ ] ( [ ] ).  
[ ] ( [ ] ).  
(state of mind evidence).

Response to RFOF 3.478

Mr. Scorsone’s self-serving testimony is uncorroborated. The testimony is also “state of mind” evidence and nothing more; Mr. Scorsone’s testimony was not offered or admitted for the truth of the matter asserted therein. Respondents presented no evidence proving that CB&I was concerned about “competitive pressure.” The only “competitive pressure” for CB&I was whether to raise the price to CMS by [ ] above pre-merger levels or higher. Respondents also presented no evidence corroborating Mr. Scorsone’s testimony that CB&I feared that CMS “would be forced to go elsewhere.” The only other place CMS could go was Skanska/Whessoe, but its price was [ ] higher than CB&I.

3.479 [ ] ( [ ] ). CMS never felt that it was at a disadvantage during its negotiation with CB&I. (J. Kelly, Tr. 6272). [ ] ( [ ] ). [ ] ( [ ] ).  
[ ] ( [ ] ).

Response to RFOF 3.479

As explained in Complaint Counsel’s Response to RFOF 3.474 to 3.477, CMS was “comfortable” only because it had insufficient information and could not know that it had incurred [ ]

] in anticompetitive harm as a result of the merger.

3.480 CMS does not believe that CB&I is the only vendor that can provide these services. (J. Kelly, Tr. 6267). CMS felt it had options other than CB&I; CMS was prepared to go forward with these options if it was not able to obtain a minimally acceptable contract from CB&I. (J. Kelly, Tr. 6272).

### Response to 3.480

This finding is incomplete and misleading. Mr. Kelly lacks sufficient knowledge about foreign firms to judge whether those firms are capable of providing sole-source services at pre-merger price levels. Mr. Kelly admitted that he is not knowledgeable about the skills or capabilities of any foreign-based LNG tank vendor in the United States. Mr. Kelly has not

[

] ([ ], *in camera*).

Mr. Kelly testified that he has [ ] (JX 26 at 58 ([ ]), *in camera*). When questioned about ATV and H.B. Zachry, Mr. Kelly answered [ ] (JX 26 at 59 ([ ]), *in camera*). Mr. Kelly did know [

] (JX 26 at 59 ([ ]), *in camera*). Mr. Kelly did not know [ ] (JX 26 at 60 ([ ]), *in camera*).

CB&I is the only non-foreign based firm that can self-construct an LNG tank and CMS is currently only knowledgeable about CB&I's capabilities.

3.481 For example, CMS would not discount a foreign-based LNG tank constructor just because it was a foreign company. (Kelly, Tr. 6261). CMS is not aware that foreign-based tank constructors would have a problem complying with United States codes. (Kelly, Tr. 6263).

### Response to RFOF 3.481

Respondents' misleadingly suggest that Mr. Kelly has foundation to opine about the abilities of foreign LNG tank firms. As shown in CCRFF 3.480, Mr. Kelly is unfamiliar with foreign-based firms. The assertion by Respondents that Mr. Kelly's is "not aware" that foreign-based tank constructors would have a problem complying with United States regulations and codes is **not** an affirmation of what Mr. Kelly knows to be true; it only shows that CMS lacks information about entry barriers.

3.482 The size of a tank constructor is important because for the Lake Charles expansion contract, CMS requested a parent guarantee; the parent company needed to be financially large enough to support the size of the project. (Kelly, Tr. 6264).

### Response to RFOF 3.482

Respondents misleadingly suggest that CMS has a requirement or guideline regarding the size of

its LNG tank constructors. [

] (JX 26 at 48-9 ([                    ]), *in camera*).

3.483 CMS believes there is enough competition from international vendors to ensure that a single tank supplier will not be able unilaterally raise prices. (Kelly, Tr. 6263-64).

#### Response to RFOF 3.483

If CMS knew that as a result of the elimination of PDM, CB&I had anticompetitively raised the LNG tank price to CMS by [                    ] but right below the price of a foreign LNG tank supplier, CMS may change its beliefs about competition since the merger.

Moreover, as demonstrated in Complaint Counsel’s Response to RFOF 3.480, Mr. Kelly lacks foundation to opine whether there “is enough competition from international vendors to ensure that a single tank supplier will not be able to unilaterally raise prices.” CCRFF 3.480.

[

]

#### **4. Bidding on the Memphis Project Is Highly Probative of Current Market Conditions**

3.493 In 1994, Memphis Light, Gas & Water (“MLGW”), a public utility located in Tennessee, solicited bids for a field-erected peak-shaving facility. (Hall, Tr. 1771, 1778-80). The Memphis project was a turnkey job involving the construction of a liquefaction unit and an LNG tank. (Price, Tr. 548).

#### Response to RFOF 3.493

Respondents’ proposed finding mischaracterizes the record. Bidders on the MLGW LNG project were given three options: “they could bid the tank and the process; they could bid the process; or they could bid the tank alone.” (Hall, Tr. 1817). MLGW did not have a preference for one type of bid versus another; “our intent was to look at everything we got and then do a mix or match type of combination. If we were seeing bids that we didn’t like for the whole plant, we could. have possibly had selected a process designer and a tank manufacturer as two separate entities and two separate contracts.” (Hall, Tr. 1820).

3.494 MLGW sent requests for proposals to CB&I, PDM, Black & Veatch, Lotepro, and Stebbing & Associates. (Hall, Tr. 1802-03). MLGW made affirmative efforts to encourage these companies to bid on the project. (Hall, Tr. 1801-03).

#### Response to RFOF 3.494

Respondents’ proposed finding is incomplete and misleading. The only viable competitors for the LNG tank portion of the project were CB&I and PDM. MLGW did not consider Black & Veatch, Lotepro, and Stebbing & Associates to be viable alternatives to CB&I and PDM, as they

lacked the capability to build the LNG tank. (Hall, Tr. 1801-02 (MLGW

agreed to consider Black & Veatch, Lotepro and Stebbing & Associates as viable candidates only if they teamed up with a tank partner)).

Prior to sending out the request for the Memphis LNG project, MLGW researched who had built LNG tanks in the United States in the past. (Hall, Tr. 1799). Based on this research, MLGW learned that “essentially we had two viable companies in the United States that could compete:” CB&I and PDM. (Hall, Tr. 1799, 1800). With only these two companies as its options, competition was not maximized. As Mr. Hall testified, more competitors “generally helps us keep prices down when we bid things. We know if we have more competitors, it -- it allows for more competition. It's just that simple, yes. That's the answer. There's no more to it.” (Hall, Tr. 1800).

CB&I “represented [to MLGW] that they would not build the tank as a separate item from the plant itself...[t]he process unit.” (Hall, Tr. 1821). MLGW was disappointed with CB&I's representation “because it didn't give us [MLGW] an opportunity to compete firms like [Black & Veatch] Pritchard's design. We felt like Pritchard had adequate design capability to build an LNG plant, but they could not build a tank, per se.” (*Id.*). Hall described CB&I's refusal to bid the tank separately as “a take-it-or-leave-it deal where we would rather I guess the expression is cherry-pick the best designs in the best areas.” (*Id.*)

Black & Veatch and Lotepro were reluctant to bid on the LNG project because “they were worried about their acceptability if they teamed up with foreign tank builders.” (Hall, Tr. 1801-02; *see id.* 1800 (“I don't think Lotepro was originally going to compete.”)). Lotepro and Black & Veatch lacked the capability to build a tank. “[E]ach of the people that could not build LNG tanks, such as us, needed a partner to provide the tank.” (Price, Tr. 548).

Stebbing & Associates was unable to submit a bid for the entire facility because they could not post the necessary bond. (Price, Tr. 555 (“And then there was another bidder that in the last minute couldn't qualify for -- they had to post a bond and they had a problem there, so they were going to build a liquefaction unit probably but did not submit a bid.”)).

3.495 Several companies bid on the Memphis project including: (1) PDM; (2) CB&I; (3) Lotepro; and (4) Black & Veatch. (Hall, Tr. 1804-05; Price, Tr. 548, 555). CB&I was the successful bidder for this project. (Scorsone, Tr. 5010).

### Response to RFOF 3.495

Respondents' proposed finding is incomplete. Complaint Counsel agrees that CB&I was the successful bidder. One reason CB&I won is that Lotepro and Black & Veatch, who used foreign LNG tank suppliers, submitted substantially higher price quotes for the LNG tanks. The following shows each firm's bid for the LNG tank portion of the Memphis project: PDM \$10.5 million; CB&I \$10.5 million; Lotepro/Whessoe \$15 million; Black & Veatch/TKK \$16.7 million. (CX 829 at 5; Hall, Tr. 1876; Price, Tr. 648).

Mr. Hall of MLGW testified that the level of competition between CB&I and PDM was “very

competitive.” (Hall, Tr. 1804). The other companies “weren’t even close.” (*Id.*) CB&I’s review of the bid determined that “Lotepro’s total facility bid using Whessoe tank and Pritchard’s bid using TTK tank did not turn out to be very competitive.” (CX 186 at CBI-PL012446).

3.497 Lotepro (Linde) bid on the Memphis project using quotations from Noell Whessoe and Titan Constructors and/or Erected Steel Products. (Hall, Tr. 1833-34; Kistenmacher, Tr. 896; Scorsone, Tr. 5013). Noell 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). Lotepro "had difficulties" getting Noell Whessoe to provide an engineering quote. (Kistenmacher, Tr. 940). Noell Whessoe requested to be reimbursed for the engineering quote because it did not want to take the risk of bidding the project. (Kistenmacher, Tr. 940).

#### Response to RFOF 3.497

Respondents’ proposed finding is incomplete. Lotepro was forced to seek quotations from Noell Whessoe and Titan Constructors because Lotepro “had difficulties finding a qualified vendor to build that tank because the major players, PDM and CB&I, declined to quote to us.” (Kistenmacher, Tr. 893-94, 896).

Whessoe’s engineering package included “all the detailed know-how about how to build an LNG tank,” leaving Lotepro “here in the U.S. looking for a construction company that would construct that tank.” (Kistenmacher, Tr. 895-96).

3.501 In the Black & Veatch/TKK/Graver Tank arrangement, TTK would provide the design/engineering, manage the construction, and specify the materials. (Price, Tr. 552). Graver Tank would perform the construction of the tank. (Price, Tr. 552). Black & Veatch would be responsible for "some of the civil engineering." (Price, Tr. 545).

#### Response to RFOF 3.501

The Black & Veatch/TKK/Graver Tank arrangement, which was not competitive in the MLGW bid, is similar to the current arrangement between ATV and TTK. In its arrangement with ATV, TTK is responsible for the engineering and design of the LNG tank, as well as providing training to ATV’s employees on how to construct the tank. (Cutts, Tr. 2327, 2379). Mr. Cutts, ATV’s president, believes that ATV needs several years of experience before its employees will work as efficiently as CB&I’s. (Cutts, Tr. 2379).

Mr. Price of Black & Veatch testified that they could not rely on CB&I and PDM to provide a tank: “They were bidding against us for that facility. There would be no reason for them to provide us with a competitive price.” (Price, Tr. 549). Black & Veatch formed a team that surveyed over 30 companies, foreign and domestic, and winnowed the list to three firms. Black & Veatch could find only one domestic tank supplier, other than CB&I or PDM, that was a viable option: Preload. (Price, Tr. 550). However, Preload’s tank design was costly and Black & Veatch was concerned that Preload would not be competitive. (Price, Tr. 550). The two foreign options were TTK and Whessoe. (Price, Tr. 550-51).

3.502 Two Black & Veatch documents, RX 888 and CX 1571, provide a price estimate of the LNG tank Black & Veatch submitted for the Memphis project. Although MLGW requested a specified breakout of the price of the LNG tank, both PDM and Lotepro ignored this requirement. (RX 888). --RX 888 indicates that Black & Veatch's tank price, using TKK's design, was approximately \$13 million. (RX 888). 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). This document further indicates that "the erection costs quoted by Graver Tank are very high." (RX 888). CX 1571, which represents the bid results of the Memphis project, indicates that Black & Veatch's tank price was \$16.7 million. (Price, Tr. 646; CX 1571).

### Response to RFOF 3.502

CX 1571 is not admitted in evidence and, therefore, the portions of this finding that rely on CX 1571 should be disregarded.

Moreover, Respondents' proposed finding is misleading and is incomplete. Black & Veatch Pritchard determined that "the material costs including shop fabrication and taxes seem to be in line." (RX 888 at 2). The portion of Graver's costs that Black & Veatch considered to be high are its field-erection costs. (*Id.*) Pritchard determined that the bid was also not competitive because "the CB&I design fee for the tank alone is much less than that quoted by TKK." (*Id.*)

Mr. Price's testimony, as cited by the Respondents, does not state that CX 1571 reflects the bid results on the Memphis project. Before Mr. Price could answer that question, Complaint Counsel objected and the question was withdrawn. (Price, Tr. 647).

3.503 Brian Price of Black & Veatch conceded that a primary reason it was unsuccessful at Memphis was because its liquefaction unit had a high cost. (Price, Tr. 561, 645). Black & Veatch's total bid price for the Memphis project was \$47,700,000. (Price, Tr. 648). Black & Veatch submitted a liquefaction bid that was \$31 million. (Price, Tr. 648; CX 1571). Black & Veatch's liquefaction bid was \$11 million higher than PDM's bid, and \$9 million dollars higher than CB&I's bid. (Price, Tr. 648-49). In fact, even if Black & Veatch partnered with PDM to bid on the Memphis project, the Black & Veatch/PDM bid still would have finished fourth in the bidding process. (Price, Tr. 648-49).

### Response to RFOF 3.503

The critical point of the Memphis example – a point essentially undisputed by Respondents – is that the price of an LNG tank from foreign firms is dramatically higher than Respondents' prices. The price of a liquefaction unit, which is not a relevant product market for this case, and whether or not Black & Veatch would have won the project, are both irrelevant.

Respondents' proposed finding is misleading and misstates the testimony in the record. Mr. Price did not state that the high cost of the liquefaction process was the primary reason that it was unsuccessful. On direct examination, Mr. Price testified that Black & Veatch was unsuccessful, not only because of its costs on the liquefaction process, but also because it needed "better pricing on the tank to be competitive on the tank portion of the project." (Price, Tr. 561). Mr. Price concluded that using TKK as the tank supplier caused the tank price to be high. (Price, Tr. 561). Mr. Price confirmed this conclusion on cross-examination. (Price, Tr. 644-45).

Respondents' proposed finding is also misleading in that it implies that TKK's tank bid played no part in Black & Veatch's noncompetitive bid. Black & Veatch's review of the preliminary bids submitted for the MLGW project concluded that the Black & Veatch/TKK/Graver's bid was not competitive, in part, because "the CB&I design fee for the tank alone is much less than that quoted by TKK." (RX 888 at 2).

3.504 Preload also submitted a tank only bid for the Memphis project. (Price, Tr. 555). Preload proposed to build a steel-lined concrete tank. (Hall, Tr. 1816-17).

#### Response to RFOF 3.504

This finding is misleading and incomplete. Mr. Hall of MLGW testified that Preload's bid using its steel-lined concrete tank design "was extremely high compared to the CB&I or the Pitt Des-Moines or I believe it might have been higher than the Lotepro/Whessoe tank...because of the method of construction they were using." (Hall, Tr. 1817). Mr. Hall added that "on numerous occasions, I tried to discourage them from bidding, primarily because I knew that they didn't have a chance." (*Id.*)

3.505 While PDM/Air Products submitted the lowest bid for the Memphis project, its bid did not conform to MLGW's specifications. (Hall, Tr. 1823-24; Davis, Tr. 3196). In fact, PDM's bid had approximately 157 shortcomings that were out of line with MLGW's request for proposal. (Hall, Tr. 1823-24). PDM also failed to address a variety of engineering issues. (Hall, Tr. 1838-40). Because of these shortcomings, PDM/Air Products' bid was disqualified. (Hall, Tr. 1823-24; Scorsone, Tr. 5012). PDM's bid and CB&I's bid were "not quoted on the same item." (Hall, Tr. 1839-40).

#### Response to RFOF 3.505

Respondents' proposed finding is incomplete and misleading. PDM's "tank design itself was within the parameters that [MLGW] had – that we had laid out." (Hall, Tr. 1876). The reason PDM/Air Products was not selected was because of design issues unrelated to the LNG tank portion of the project. The two companies thought that MLGW's design requirements, as specified in the bid proposal, "had a lot of inefficiencies in them, and we thought a lower price to a municipal utility might be attractive." (Davis, Tr. 3196). As part of its bid strategy, PDM/Air Products "did some redesign work to save money." (*Id.*)

3.506 PDM did not submit a separate break-out price for the LNG tank, apart from the liquefaction unit bid. (Scorsone, Tr. 5010). Because PDM failed to provide a separate price for the LNG tank, Mr. Scorsone testified that it would be difficult to determine what the cost break-out of PDM's tank bid was for the Memphis project. (Scorsone, Tr. 5011-12). CX 1571, a Black & Veatch document that represents the bid results of this project, suggests that PDM's tank price was approximately \$13 million. (Price, Tr. 646; CX 1571). It is unclear whether CB&I's tank price for the Memphis project was \$10.5 million (RX 888) or \$13 million. (CX 1571).

#### Response to RFOF 3.506

CX 1571 is not admitted in evidence. As a result, the portion of this finding that relies on CX 1571 should be disregarded.

Respondents' proposed finding misstates the record. Lotepro obtained the cost breakdown for each competitor's bid for the Memphis LNG project when these numbers were published. (Kistenmacher, Tr. 898). This cost breakdown is reflected in CX 829 (Kistenmacher, Tr. 897-98), and it shows that CB&I's tank price for the Memphis project was \$10.513 million. (CX 829 at 5).

3.507 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). First, the Memphis project occurred nine years ago. (Scorsone, Tr. 5014). Second, neither Noell Whessoe nor TKK announced plans to construct LNG facilities in the U.S. in 1994: "They had not planted their flag at that point . . . ." (Scorsone, Tr. 5014).

### Response to RFOF 3.507

Mr. Scorsone's self-serving testimony is uncorroborated and contradicted by the evidence.

There is no evidence that "planting their flags" in the United States has changed the substantial price advantage enjoyed by Respondents against foreign LNG tank firms. To the contrary, as discussed in Complaint Counsel's Response to RFOF 3.95, Respondents' (1) post-merger business documents, many of which were authored by Mr. Scorsone, (2) statements to the public and in SEC filings and (3) higher prices to customers all reflect CB&I's continued price advantage against foreign LNG firms. There is no evidence that the price advantage has dissipated just because some foreign firms developed new partnerships. Whessoe and TKK had American partners in 1994 on the Memphis project and they have American partners today. The only change is that since the merger, the price gap between CB&I and foreign LNG tank suppliers has narrowed; not because the prices of foreign firms has declined, but rather because CB&I has implemented significant anticompetitive price increases.

Second, it should be remembered that Whessoe was active in Trinidad about the same time it was bidding on the Memphis project. Whessoe was able to win projects in Trinidad but could not transfer that success to the United States. This fact demonstrates that there are business conditions unique to the United States that make entry difficult and help maintain Respondents' competitive advantage. If we juxtapose the Whessoe/Trinidad/Memphis example to today, Respondents' reliance on AT&V/TKK's win in Trinidad (and other foreign firms' attempts to win projects in the Bahamas) is misplaced. Winning a project in Trinidad or anywhere else outside the United States is not a precursor to successful entry in the United States. To the contrary, CB&I continues to win the majority of LNG projects in the United States just as it did before the merger, except today it charges higher prices.

Finally, Respondents' proposed finding is misleading. The fact that the Memphis project occurred nine years ago does not diminish its importance. CB&I relies on the results of the MLGW project to determine its strategy to not quote separate tank prices on future LNG projects. In 1997, CB&I considered whether to continue to bid tank-only prices for future LNG projects in the U.S. In an internal e-mail, a CB&I vice president, Mr. Carroll Davis, noted that "Prior to bidding Memphis, we had request(s) for us to bid tank only to process contractors." (CX 186 at CBI-PL012446). Based on its analysis of the Memphis bid, CB&I concluded that it would only provide turnkey quotes for the total LNG facility:

With PDM tied in with Air Products, it is in CB&I's best interest NOT to quote separate tank price. Quoting a separate tank price will only serve to make the process-only contractors viable. At Memphis, Lotepro's total facility price was \$40MM. They

quoted breakout price of \$25MM for process only. If we had quoted a tank only price, the combination of Lotepro process and CBI tank would have been a serious threat to CBI total facility price. **Lotepro's total facility bid using Whessoe's tank and Pritchard's bid using TKK tank did not turn out to be very competitive.**

(*Id.*) (emphasis supplied).

This all-or-nothing strategy, based on the MLGW bid, has been implemented during the bidding process for at least two LNG projects – Dynegy and Yankee Gas. *See* CCF 984-1001 (CB&I refused to bid on the tank portion of the Dynegy LNG project, requesting instead, expressly against the client's wishes, to bid the facility turnkey); CCF 1010-1024 (CB&I pressuring client to purchase LNG facility on a turnkey basis, and refusing to provide detailed tank quotes to customer).

Industry members still rely on the MLGW project in making business decisions. In 2001, when CB&I acquired PDM, Air Products was concerned that it was losing its ally, and began to consider who would replace PDM. According to Mr. Davis, if Air Products was unable to form an alliance with CB&I to bid on LNG facilities, then Air Products would be unable to compete on future turnkey LNG projects because “we couldn't find another domestic tank builder with their experience and their market presence.” (Davis, Tr. 3199-200). Air Products requires a domestic tank building partner because, based on “Memphis...we saw that the overseas tank suppliers weren't as competitive and were not a presence, a market presence, with the LNG community.” (Davis, Tr. 3199). Since the merger, Air Products has chosen to pursue an alliance with PDM's successor, CB&I. (Davis, Tr. 3198-99).

As a consultant to Dynegy, Mr. Price testified that he was concerned that Dynegy would pay a higher price for the LNG tanks if CB&I did not bid on the tank portion. (Price, Tr. 622); CCF 1000. This concern was based, in part, on his experience bidding for the MLGW LNG project. (*Id.*)

3.508 At the time of the Memphis bid, Noell Whessoe was not affiliated with Skanska, and did not have offices in the U.S. (Kistenmacher, Tr. 939). Black & Veatch and TKK formed an alliance for the sole purpose of bidding on the Memphis project. (Hall, Tr. 1838). “TKK clearly came in on a one-shot deal in 1994 to work with” Black & Veatch on this project. (Price, Tr. 650).

### Response to RFOF 3.508

Respondents' proposed finding is misleading and incomplete. There is no evidence that Whessoe was \$5 million higher on the Memphis LNG tank because it lacked an “office” in the United States. Nor is there any evidence that TKK was \$6.7 million higher than Respondents because the bid was a “one-shot deal.” TKK had every incentive to put its best foot forward in terms of price and quality since a win in Memphis would have been its first in the United States and strengthened a relationship with a top-notch EPC contractor in Black & Veatch. TKK had a better opportunity to win in partnership with a firm of Black & Veatch's experience than with its current partner AT&V, a firm which was never been involved in an LNG project and admits to having a long learning curve ahead of it. (Cutts, Tr. 2379, 2393-94).

## E. BARRIERS TO ENTRY WILL PREVENT FOREIGN ENTRY

3.509 Nigel Carling, formerly of Enron, testified that "Building a tank is like any other construction job, it's all about the logistics of managing the job, managing the quality, managing the safety, managing the regulations and managing the unions." (Carling, Tr. 4526). Building a tank "is a relatively straightforward exercise when compared with other aspects of construction." (Carling, Tr. 4526).

### Response to RFOF 3.509

Building an LNG tank is far from a "relatively straightforward exercise." Construction of LNG tanks is a multi-step process that takes two to three years to complete. (CX 162 at CBI-PL006153; CX 167 at CBI-PL007052; CX 1385 at CBI-PL033809). CB&I employee Peter Rano describes LNG tank projects as "monsters" and testifies that "[t]hey are fairly large construction." (Rano, Tr. 5888-89).

As shown in Complaint Counsel's Response to RFOF 3.26, many witnesses disagree with Mr. Carling, including, but not limited to, Mr. Kistemacher, Mr. Andrukiewicz, Mr. Hall, Mr. Sawchuck, Mr. Davis, and Mr. Newmeister. Even Mr. Glenn's testimony contradicts Mr. Carling's. Mr. Glenn tell his investors that "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**." (CX 1731 at 44-5, emphasis supplied). CCRFF 3.26

The construction of LNG tanks requires specially-trained construction workers, particularly welders who have experience welding 9% nickel steel (a special alloy that is not widely used), who can weld together the tank's large steel pieces with a precision that eliminates leaks. (Cutts, Tr. 2379-80; Kistenmacher, Tr. 881-82; [ ], *in camera*); CCF 326. Mr. Cutts, vice president of ATV, one of the companies Respondents cite to as an entrant into the LNG market, states "You don't just weld [LNG tanks] 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); CCF 327.

3.514 El Paso specified the use of NFPA 59A and API 620 standards for both the Altamira, and Rosarito, Mexico LNG jobs. (Bryngelson, Tr. 6147). El Paso retained PTL to determine whether the designs for these projects comply with U.S. codes and regulations. (Bryngelson, Tr. 6157, 6162). El Paso believes that all of the foreign companies on the Altamira and Rosarito pre-qualification lists are able to build field-erected LNG tanks to NFPA 59A and API 620 standards. (Bryngelson, Tr. 6147). El Paso further believes that all of the bidders on its Altamira and Rosarito pre-qualification lists have the necessary experience to build LNG tanks in the U.S. because "it is no more difficult to build it in the United States than it would be in other parts of the world." (Bryngelson, Tr. 6149).

### Response to RFOF 3.514

Respondents' finding is misleading and lacks support. Mr. Bryngelson has no basis for his opinion that "it is no more difficult to build [an LNG tank] in the United States than it would be in other

parts of the world.” Mr. Bryngelson has only been working on LNG projects for two years (Bryngelson, Tr. 6201) and has never previously been involved in the construction of an LNG tank. (Bryngelson, Tr. 6205). The projects that Mr. Bryngelson is now working on are in Mexico and the Bahamas, not the U.S. (Bryngelson, Tr. 6123, 6214).

As shown in CCRFF 3.578, Mr. Bryngelson lacks experience with foreign firms, and therefore has no basis to testify whether these firms “have the necessary experience to build LNG tanks in the U.S.” Mr. Bryngelson testified that he has not had any conversations with anyone from Technigaz or TKK about their ability to qualify for an LNG tank project in the United States. (Bryngelson, Tr. 6241-2 (“I have never spoken to a single employee of Technigaz directly”); Bryngelson, Tr. 6241 (Mr. Bryngelson has never “spoken with anyone from TKK about their ability to qualify for an LNG tank project in the United States”).

Mr. Bryngelson also testified that he had never had “any conversations with any of the other bidders that have bid on the Altamira or the Baja LNG projects relating to whether that particular bidder was qualified to build LNG tanks in the United States.” (Bryngelson, Tr. 6242). Because Mr. Bryngelson cannot attest to the ability of these firms to compete in the United States, Respondents’ finding is irrelevant and lacks support from a witness with the foundation to speak regarding the qualifications of foreign firms.

Respondents’ proposed finding is misleading and contradicts the evidence in this matter; it implies that any LNG tank supplier can successfully compete in the United States. The fact that a firm can build an LNG tank does not translate into an ability to compete for an LNG tank in the United States and win. CCRFF 3.565.

The reality is that only LNG tank suppliers with experience building LNG tanks in the United States are able to successfully compete against CB&I – unfortunately, this is a null set. As stated in CCRFF 3.522-3.526, LNG customers prefer a supplier who has experience dealing with the U.S. codes and regulations. The only tank company in the United States with unmatched experience dealing with these codes and regulations is CB&I. ([redacted], *in camera* ([redacted]

)]).

3.515 The LNG tanks constructed by Whessoe/Kvaerner in Dabhol, India for Enron were built to API 620 standards. (Carling, Tr. 4463; Izzo, Tr. 6488). Enron also specified that the Bahamas project be built to API 620 standards and FERC guidelines. (Carling, Tr. 4479). Shell also required that the LNG tanks built by TKK and CB&I in Bonny Island, Nigeria conform to NFPA and API standards. (Rano, Tr. 5890-91). Tanks built in the Dominican Republic, Spain, Malaysia, Australia, the Middle East, and Africa were built to API 620 standards. (Rano, Tr. 5891). Whessoe built LNG tanks in Trinidad to API 620 standards. (Rapp, Tr. 1332).

3.516 Several foreign LNG companies have built LNG tanks to API 620 standards including: (1) Technigaz - built

tanks in Turkey and Qatar; (2) TKK - built tanks in Indonesia, Australia, and Nigeria; (3) Whessoe - built tanks in Dabhol, India and Trinidad; and (4) MHI - built a tank in Ras Laffan. (Scorsone, Tr. 4926-27).



enables customers to build its facilities in a shorter timeframe: “CB&I brings unmatched experience in preparing the documents describing the facility that are necessary for permitting and/or filings for FERC authorization permis...This critical stage in your project [ ] is best undertaken by CB&I, whom the permitting agencies, most especially FERC, know and respect.” (CX 516 at CBI-19867-19868-HOU).

Customers agree that Respondents’ experience regarding FERC issues gives Respondents a competitive advantage over foreign tank builders. Mr. Blaumueller used experience dealing with FERC as a factor in his consideration of potential LNG tank suppliers for the Joliet LNG project. (Blaumueller, Tr. 315-16). [ ] who works for one of the companies that Respondents allege is capable of handling FERC filings, testified that the competitiveness of foreign tank builders is hindered by their unfamiliarity with U.S. regulations: “Foreign firms are trying to become competitive in the U.S., but because of the relationships that need to be developed between the owners and the subcontractors for foreign firms and understanding the U.S. codes and the relationships with the permitting agencies in the United States, I really think that it would take — it’s going to take some time for foreign firms to be able to come up on the learning curve and be competitive.” ([ ], *in camera*).

It will be difficult for foreign suppliers of LNG tanks [ ] for a U.S. LNG tank, in part, because [ ] ([ ], *in camera*).

The tank contractor provides the LNG facility owner studies, designs and other information that is key to the preparation of the FERC filing. FERC looks closely at the tank portion of the facility, and requests information about the design of the tank. (Price, Tr. 572). If this information is not correct, the LNG facility will not get FERC approval. (*Id.*). For the FERC filing, the tank contractor provides “the actual design of the whole facility, a lot of information about each of the items in the facility, the equipment, the tanks, the piping, the impact it would have on the community, all sorts of impacts from creating jobs, positive impact, creating jobs, but also the impact on the community of -- any industrial facility that we see today has impacts on the community that you have to evaluate, the impact of cultural resources, and so forth.” (Price, Tr. 573-74). Facility owners rely on this information that tank contractors provide in preparing its FERC filings.

Mr. Bryngelson, who Respondents rely upon for this finding, does not know about the FERC process. He has not been involved in the FERC filing process for any LNG tanks. (JX 22 at 173 (Bryngelson, Dep.)). He does not know what information much be provided to the person putting the filing together or which information for the filing would come from the LNG tank supplier. (*Id.*). He does not know whether designs for the LNG tank must be included in a FERC filing. (*Id.*).

The other LNG customer Respondents rely upon, Mr. Carling, was unable to prepare the FERC filing himself, and his company, Enron, had to subcontract a company to perform a survey



As the tank contractor, CB&I can provide essential information that outside consultants cannot. CCRFF 3.522; (Price, Tr. 573-74). [ ], who is considering [ ] LNG projects, testified that [CB&I is the only company that has experience building LNG terminals and going through the FERC process.] ([ ], *in camera*) (discussing CB&I's domination of the market: [

]. [

)).

Prior to obtaining assistance from Daewoo on one aspect of the FERC filing, Cheniere first discussed with CB&I the possibility that CB&I do all the FERC filings. (Eyer mann, Tr. 7049-50). Because they did not use CB&I to do the entire FERC filing, Cheniere has to manage multiple subcontractors who each handle a different aspect of the filing. (Eyer mann, Tr. 6973-75) (at least five different subcontractors, including Daewoo).

3.528 The construction of an LNG tank requires the use of welders who can weld nine percent nickel steel. (Glenn, Tr. 4120). Nine percent nickel steel is a type of steel with a high content of nickel. (Bryngelson, Tr. 6152).

#### Response to RFOF 3.528

Complaint counsel agrees with Respondents' proposed finding.

3.530 CB&I does not have a competitive advantage over foreign companies such as Technigaz, TKK, MHI, and Skanska with regards to welding nine percent nickel steel. (Bryngelson, Tr. 6125, 6152). Moderately skilled welders have the capability to weld nine percent nickel steel (Rano, Tr. 5932-33), and local workers can be trained to weld nine percent nickel steel. (Bryngelson, Tr. 6152).

#### Response to RFOF 3.530

CB&I has publicly announced to its shareholders that its welding skills give it a competitive advantage over other companies. In fact, Mr. Glenn told CB&I's shareholders, "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 ... We have an excellent track record." (CX 1731 at 44-45). CCF 428. Part of this competitive advantage is due to the fact that CB&I has patented welding equipment that is useful for welding large tanks. CX 706 at 98-99 (Newmeister, IHT).

From Memphis Gas' perspective, CB&I's use of welders who were experienced constructing LNG projects was a critical advantage because it helped assure the quality of the project. (Hall, Tr. 1798).

[ ] is competitively disadvantaged in the United States because its construction

partner, [ ], lacks employees with experience welding 9% nickel steel. ([ ], *in camera*). As a result, [ ] ([ ], *in camera*).

Further, Respondents' proposed finding is misleading in its implication that it is easy for Technigaz, TKK, MHI, and Skanska to win LNG projects in the United States. For foreign-based tank companies, winning an LNG project in the United States is far from easy. These companies have been trying to win LNG projects in the United States for years, and none of these companies have been successful. CCRFF 3.95, 3.556, 3.558, 3.565. The only LNG project in which a foreign-based contractor has a reasonable shot of winning is the LNG tank project for Dynegy; the only reason that CB&I does not have a chance at winning this project is because CB&I refused to bid. (CX 517 at CBI 019874-HOU); CCFF 991.

3.531 CB&I does not have any permanent salaried welders on its payroll. (Glenn, Tr. 4121). The welders CB&I employs are hired on a job by job basis. (Glenn, Tr. 4121).

#### Response to RFOF 3.531

Regardless of whether CB&I has any "permanent salaried welders on its payroll," CB&I has a faithful following of welders that go from project site to project site for the company. Mr. Hall testified that for the Memphis project in 1994, CB&I brought its own welders to the project site. These welders may not have been permanent salaried employees, but Mr. Hall testified that "a lot" of the welders "had worked on prior LNG projects for CB&I." (Hall, Tr. 1797).

Moreover, CB&I touts its welding staff in its documents. A CB&I due diligence report on PDM's construction practices states that "CBI has some of the best welders in the industry . . . Over the years CBI has felt that our welding expertise is one of our core strengths." (CX 1357 at CBI-H 4000270-271).

Not only does CB&I have the "best welders in the industry," it also has an in-house training program for inexperienced welders: "We have a welding training capability in-house where we can take a person with no skill and train them to weld or we can take a welder who knows how to weld carbon steel and teach him how to weld 9 percent nickel." (Glenn, Tr. 4121).

3.532 The welding methods used for cryogenic tanks are an open art. (Scorsone, Tr. 4899). Nine percent nickel steel welders use the exact same processes and techniques that carbon steel welders use. (Rano, Tr. 5872-73). In fact, welding nickel and carbon steel is easier than welding stainless steel or aluminum. (Rano, Tr. 5873). While the processes and techniques used to weld nine percent nickel steel are the same used for welding other types of metals, the welding procedures may vary. (Rano, Tr. 5947; Rapp, Tr. 1287-88; Scorsone, Tr. 4899).

#### Response to RFOF 3.532

Respondents contradict themselves; the techniques and processes for welding nine percent

nickel steel, according to Mr. Glenn, are “more sophisticated” than welding carbon steel. (Glenn, Tr. 4120-21).

Respondents also contradict their assertion that welding procedures are “open art.” Peter Rano, a CB&I Vice President and project director, 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). Prior to the acquisition, PDM developed

specialized welding procedures and techniques for welding 9 percent nickel steel. (CX 109 at PDM-HOU006700-01; Knight, Tr. 2614-15).

LNG customers attest that 9 percent nickel steel has its own unique welding procedure that is different from carbon steel or stainless steel. (Rapp, Tr. 1287-88). (*See* Hall, Tr. 1792 (Memphis Light, Gas & Water: there is a “special expertise required in the welding of 9 percent nickel plate,” in that “you would have to use the right welding technique to weld that particular type of steel.”); Cutts, Tr. 2379 (ATV: welding of 9 percent nickel steel requires specialized skills); Kistenmacher, Tr. 881-82 (Linde BOC/Lotepro: there is specialized experience related to the welding of 9 percent nickel steel); [ ], *in camera* ([ ]: for 9 percent nickel steel, “its metallurgy [ ] requires certain techniques of welding it and putting it together and those techniques require certain skills and there isn’t an abundant supply of work force to do that type of work.”)

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

3.535 Prior experience with welding nine percent nickel steel is not a prerequisite for working on an LNG tank. (Rano, Tr. 6031-32). In connection with an LNG tank CB&I built in Bonny Island, Nigeria, CB&I’s four welding supervisors did not have prior experience welding nine percent nickel steel. (Rano, Tr. 6031-32). CB&I’s supervisors on LNG projects in Indonesia, Das Island, and Spain also did not have experience in working with nickel steel. (Rano, Tr. 6031-32).

### Response to RFOF 3.535

Respondents’ proposed finding is misleading in relying on Mr. Rano’s testimony regarding CBI’s supervisors on LNG projects in Indonesia, Das Island and Spain. All of these LNG tanks had 85,000 or fewer cubic meters in volume. (Rano, Tr. 6034-6035). There is a trend towards LNG tanks of 100,000 cubic meters in volume in the United States. (Rano, Tr. 6035). Moreover, as noted in CCRFF 3.28, Mr. Rano does not have foundation to testify regarding the relevant geographic market.

Respondents’ proposed finding is misleading in its implication that a company with no employees experienced in welding 9 percent nickel steel can win an LNG project in the United States. As stated in CCRFF 3.532, LNG customers recognize that tank suppliers who have no experience with 9 percent nickel steel lack the specialized skills that welding 9 percent nickel plate requires. One LNG customer, El Paso, stated that it would not allow inexperienced field personnel (i.e., personnel that had never built an LNG tank before) to work on an LNG project, but would first have to consider the risks, and would have to obtain sufficient financial guarantees to cover El Paso’s daily losses should these inexperienced personnel make mistakes. (JX 22 at 176 (Bryngelson, Dep.)). Mr. Cutts of AT&V stated that “these tanks are built out of fairly sophisticated materials. You don’t just weld them up any old way.” (Cutts, Tr. 2379).

3.536 CB&I does not have plans to staff its domestic LNG projects with welders who have experience nine percent nickel steel. (Rano, Tr. 5936-37). The use of experienced nine percent nickel welders is

unnecessary, and can be counterproductive because: (1) the welder's qualifications may have lapsed; (2) the welder would have to be retested; and (3) improperly trained welders may need to be "untrained." (Rano, Tr. 5937).

### Response to RFOF 3.536

Respondents' proposed finding is incomplete. Mr. Rano testified that CB&I will look for welders with experience first, but if there are none to be found, then CB&I will train the necessary people. (Rano, Tr. 5935-36).

Any discussion of barriers to entry in the United States by Mr. Rano should be discounted for at least the following two reasons. First, Mr. Rano had no work experience on any specific LNG project in the US since 1971. (Rano, Tr. 5997-5998). Second, outside of limited discussions regarding construction processes, Mr. Rano has never had any management experience on any specific LNG project in the US. (Rano, Tr. 5997-5998, 6041).

3.538 With respect to the Bonny Island, Nigeria project, CB&I's newly-trained Nigerian welders achieved a weld acceptance rate of over 99 percent, which is well above industry norms in the U.S. and worldwide. (Rano, Tr. 5918-19).

### Response to RFOF 3.538

Respondents' finding is irrelevant. CB&I's welders in Nigeria are have no bearing on CB&I's welders in the United States. Moreover, as shown in CCRFF 3.28, Mr. Rano, Respondents' sole source for this finding has no experience in the relevant geographic market.

Respondents' proposed finding may be misleading. Mr. Rano testified to the weld acceptance rate in Nigeria, but he did not testify to the number of welders used to obtain that acceptance rate relative to the number of welders normally used in the U.S. to gain the industry norm acceptance rate. Nigerian workers certainly were available more cheaply than U.S. workers: the highest classification of welder in Nigeria was paid \$236 a month. (Rano, Tr. 5998-5999). Other foreign LNG projects have involved more workers than domestic LNG projects; Enron's Dabhol LNG project involved 4000 workers, which was much less than its Penuelas, Puerto Rico LNG project. (Carling, Tr. 4515-4517).

3.539 Whessoe has knowledge of procedures to weld nine percent nickel as evidenced by the two LNG tanks that they built in Trinidad. (Rapp, Tr. 1312). In 1999, Whessoe and Kvaerner trained local Indian workers to weld nine percent nickel steel for an LNG project they were constructing in Dabhol, India. (Carling, Tr. 4461-62). The Indian labor force passed the welding tests within a week. (Carling, Tr. 4462). The welding failure rate on this project was below 2%, which fell within the acceptable performance range for similar sized jobs. (Carling, Tr. 4459).

### Response to RFOF 3.539

Respondents' proposed finding is misleading in that it implies that Whessoe can compete successfully in the United States without any hindrance. As stated in CCF 536, 538, 539, 541, 937 and CCRFF 3.95, Whessoe cannot successfully compete against CB&I for LNG projects within the

United States.

Whessoe lacks CB&I's reputation for excellent quality work. 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.)).

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).

Even though Whessoe had 2% weld failure rate on the Dabhol, India, LNG project, the customer, Enron, remained concerned about Whessoe's performance; consequently, Enron bid the fourth and fifth tanks on the Dabhol project, with the intent of transferring the work on the third tank (which had already been awarded to Whessoe) from Whessoe to the winner of the fourth and fifth tank. (CX 1167 at CBI-H008904).

In the 1994 bid for the Memphis LNG project, Whessoe's bid was 43% higher than CB&I and PDM. CCF 935, 937. (CX 829 at 5; Hall, Tr. 1876; Price, Tr. 648). (*See also* Hall, Tr. 1810; Price, Tr. 561; Kistenmacher, Tr. 901).

Pricing given to [ ] in 1998 showed that Whessoe's prices for a single containment LNG tank were far higher than CB&I's, ranging from [ ] higher, for [ ] cubic meter tanks, to [ ] higher for an [ ] cubic meter tank. CCF 872 (RX 157 at [ ] 02 004, *in camera*).

3.540 TTK is sharing welding technology with AT&V, and training AT&V's welders on 9% nickel steel. (Cutts, Tr. 2442, 2565). [ ] ([ ]).

#### Response to RFOF 3.540

Respondents' proposed finding is misleading in that it implies that TTK can compete successfully in the United States without any hindrance. As stated in CCF 558, 560-566, and 1314, and CCRFF 3.539, TTK cannot successfully compete against CB&I for LNG projects within the United States.

Even with training, TTK's partner, AT&V, admits that it would require years of experience building LNG tanks before its personnel is as efficient as CB&I employees. (Cutts, Tr. 2379-80). CCF 558.





was competitive [on the Memphis project] but their total price was “really strained by not being able to include a CB&I or PDM tank.” (CX 186 at CBI-PL012447). Lotepro inquired whether CB&I would be interested in teaming with Lotepro now on future LNG projects. (*Id.*)

Following an internal analysis based on the outcome of the Memphis project, CB&I decided “it is in CBI’s best interest NOT to quote separate tank price [to Lotepro].” (CX 186 at CBI-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...Lotepero’s total facility bid using Whessoe tank and Pritchard’s bid using TKK tank did not turn out to be very competitive.” (*Id.*)

Another CB&I e-mail described the unsuccessful efforts of Marlboro Enterprises to subcontract the LNG tank portion of the project to a domestic tank contractor: “I recall receiving several calls from Roger Stebbins of Marlboro Enterprises begging us to quote a tank price only.” (CX 185 at CBI-PL012442).

A 1997 PDM Customer Briefing reported that Lotepro Corporation wanted to work with PDM on LIN/LOX and LNG facilities. The report stated, however: “PDM has teamed with Air Products and Chemicals, Inc. to provide liquefaction process design for LNG facilities. With only two capable LNG tank builders in the U.S. (PDM and CBI) **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)).

PDM itself has found it difficult to subcontract the tank portion of domestic projects. PDM was a non-union company, so when it pursued union projects, it needed to rely on a union-constructor, typically Nooter, to provide union labor. (Knight, Tr. 2623-24). Mr. Knight testified that this hurt PDM’s competitiveness because Nooter is not a tank constructor and its work force is consequently not as efficient as PDM’s workforce. (Knight, Tr. 2624) Luke Scorsone, PDM EC’s former President, conceded that PDM EC was not competitive when it attempted to gain union projects. (Scorsone, Tr. 4790).

Further evidence of the inefficiency of partnering with another entity to execute tank projects may be found in PDM’s lack of success in penetrating the Canadian market. In contrast to CB&I, which had its own Canadian division, PDM had to subcontract with another firm for field erection in Canada. (Knight, Tr. 2629). Mr. Knight testified “[a]s we discussed earlier, bringing another company on board to perform work that may be slightly outside of their realm increased costs.” (Knight, Tr. 2630). Mr. Knight testified that PDM added its own standard mark-up of 9% for S&GA and 4% for profit on field-erection work done for PDM by a subcontractor in Canada, where PDM had none of its own construction crews and had to employ a sub-contractor to compete. (CX 442 at 238 (Knight, Dep.)).

TKK, a Japanese LNG tank builder, tried to compete for the Memphis Gas LNG project, relying on a domestic tank company, Graver, as its local partner for that project. TKK planned to

“provide the design, the engineering,” planned to “specify the material completely,” and provide people “on-site to oversee the construction.” They would “depend on Graver to assist in getting the materials on-site and doing the actual tank erection.” (Price, Tr. 552). However, managing the relationship added to the costs, for the proposed budget included funds for TKK to bring people to the U.S. to interface with Graver. (Price, Tr. 587 ). The need to manage the relationship with the local company also added complexities that made TKK less likely to be able to erect the tank on a timely basis. Black & Veatch was concerned that it would pay penalties, as the EPC, if it did not meet the construction schedule. (Price, Tr. 588).

For the reasons listed above, foreign firms will find that subcontracting the LNG tank portion of an LNG project makes the partnership less competitive, especially when competing against a firm capable of performing the same LNG project turnkey from start to finish, such as CB&I. (Glenn, Tr. 2659-60).

3.543 Subcontracting certain portions of an LNG tank job does not necessarily increase 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 in performing work. (Bryngelson, Tr. 6143-44). 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).

### Response to RFOF 3.543

As shown in Complaint Counsel’s Response to RFOF 3.578, Mr. Bryngelson has no foundation to assess pricing or competition in the U.S. LNG market.

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). we didn’t want that EPC firm to be doing additional markups on items that we felt that we could run across our books.” (Puckett, Tr. 4544)

Subcontracting lowers costs only if you are using a subcontractor “with good expertise in an area who has done a number of jobs, for instance, of a similar approach, they can use a standardized approach to perform that work.” (Bryngelson, Tr. 6143-44).

Mr. Bryngelson also testified that “[t]here is a point when you subcontract too much, and subcontract every single piece of it out, the supervisory staff necessary to pull all that together in the admission because an added level of cost that blows your competitive -- there is a point of diminishing returns. (Bryngelson, Tr. 6230)

Respondents’ proposed finding further mischaracterizes Mr. Bryngelson’s testimony. On the Altamira and Baja projects for El Paso, Mr. Bryngelson stated that El Paso saves money by not allowing the EPC contractor to subcontract the LNG tank:

Q. And why are you taking on that contract directly? Why are you going to have contract privity between El Paso and the LNG tank supplier rather than have KBR handle the contracting with the LNG tank supplier?...

A. It is such a large portion of the plant cost that it's something that we want to just contract separately for and make it as competitive as possible.

Q. So by obtaining -- by selecting the LNG tank supplier yourself, you're hoping to save costs?

A. Also to save money. If we have Kellogg Brown & Root do it, KBR do it, they'll charge us to do that; and there's no reason for them to charge us to do that when we can do it ourselves..."

(JX 22 at 199 (Bryngelson, Dep.)).

3.544 A turnkey contractor can reduce its overhead costs by using a local subcontractor because hiring local labor may be cheaper than retaining higher paid people on staff. (Bryngelson, Tr. 6144).

#### Response to RFOF 3.544

There is no evidence that LNG tank contractor can reduce its overhead costs by using a local subcontractor, and to the extent that Respondents' proposed finding implies as such, Respondents' proposed finding is misleading. (Bryngelson, Tr. 6144).

Respondents' sole support for this finding is a statement made by Mr. Bryngelson, who lacks the experience to give testimony regarding "a turnkey contractor[']s cost." CCRFF 3.578.

3.545 One project owner, El Paso, would not be concerned about qualifying a supplier to construct an LNG tank if more than fifty percent of the work would be subcontracted out to another company. (Bryngelson, Tr. 6169).

#### Response to RFOF 3.545

Respondents' proposed finding mischaracterizes Mr. Bryngelson's testimony. If more than 50 percent of the LNG tank work was to be subcontracted to another company, Mr. Bryngelson would want financial guarantees to cover loss for every day that the plant is not operational. (JX 22 at 80, 81 (Bryngelson, Dep.)). The less experienced the tank supplier, the higher the financial guarantee that El Paso will demand to allow the tank work to be subcontracted. (Id. at 80).

As shown in CCRFF 3.578, Mr. Bryngelson, lacks experience with any foreign firms other than Whessoe, and does not know if any of the firms that El Paso has pre-qualified would be competitive in the United States LNG market, whether or not they subcontracted portions of LNG projects.

3.546 CB&I regularly subcontracts certain aspects of construction projects, such as concrete, to other firms. (Rano, Tr. 5923). Concrete work is not one of CB&I's core competencies. (Rano, Tr. 5920-21). CB&I has never self-performed the construction of concrete walls for field-erected LNG tanks, regularly subcontracts out concrete work for the tank's foundation. (Rano, Tr. 5920-23). CB&I has always subcontracted this

function to competent concrete companies. (Rano, Tr. 5923). The concrete subcontract on a full-containment LNG tank is significant, and can represent almost 40% of the project's total value. (Rano, Tr. 5923).

### Response to RFOF 3.546

As further explained in CCRFF 3.28, Mr. Rano lacks foundation to testify regarding the construction of LNG tanks in the United States. Mr. Rano has not worked on a U.S. LNG project since 1974 and has never worked on a U.S. LNG project in an engineering or management capacity. CCRFF 3.31. Mr. Rano has no foundation to comment on how CB&I would execute the concrete work for a U.S. LNG project. Moreover, Mr. Rano's testimony of the percentage of the total value of the concrete subcontract is skewed in that he only worked on LNG project at or under 85,000 cubic meters in size while there is current trend for LNG tanks to exceed 100,000 cubic meters. (Rano, Tr. 6034-6035).

Respondents' proposed finding is misleading. Concrete walls are only necessary in double-containment or full-containment LNG tanks. (Rano, Tr. 5923; CX 1074 at CBI 001243-PLA). CCRFF 56. The type of LNG tank that is traditionally built in the United States is a single containment tank, and there is no trend towards double and full containment tanks. (Glenn, Tr. 4110-4111; CCRFF 3.11-3.14). Because the acquisition afforded CBI the opportunity to acquire PDM workers experienced with constructing a double-containment LNG tank in Penuelas, CB&I now owns expertise in the construction of double and full containment tanks. (Scorsone, Tr. 4920-21).

For single-containment tanks, which do not require the construction of concrete walls, CB&I has a competitive advantage. ([redacted]), *in camera* (agreeing that CB&I would have an advantage in over [redacted] in the fabrication and erection of the inner tank of a full-containment LNG tank, i.e. the main component of a single-containment tank)).

3.548 Current customers agree that nine percent nickel steel is internationally sourced from a few steel mills. (Izzo, Tr. 6503). [redacted] ([redacted]). [redacted] ([redacted]). [redacted] ([redacted]). AT&V concurs that steel for the Dynege project must be imported from Japan because it is not available in the United States. (Cutts, Tr. 2474-75). [redacted] ([redacted]).

### Response to RFOF 3.548

Respondents' finding is misleading to the extent that it suggests that foreign firms are on an equal footing with CB&I in the United States for working with 9 percent nickel steel. Foreign companies have a disadvantage in the United States on LNG projects because of CB&I's experience working with 9 percent nickel steel. [redacted] testified that [redacted]

[redacted] ([redacted]), *in camera*).



3.549 CB&I does not believe it has a competitive advantage over foreign LNG firms for the procurement of steel for jobs in the U.S. because "it's a global, competitive market." (Scorsone, Tr. 4892).

#### Response to RFOF 3.549

As explained in CCRFF 3.95 what CB&I claims to "believe" regarding its competitive position in the market is directly contradicted by the anticompetitive effects of the acquisition and public statements made by Mr. Glenn. Just two weeks prior to trial, CB&I's CEO announced to its shareholders 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).

Mr. Glenn had faith that CB&I could maintain its dominant position in the "global, competitive market" Mr. Scorsone described, 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). Mr. Glenn commented 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." (CX 1731 at 4, 27-28).

CB&I's 10-K, filed April 1, 2002, declares that CB&I is "invited to bid on projects for which other competitors do not qualify." (CX 1033 at 4).

3.551 CB&I's salaried personnel on LNG projects include superintendents, construction supervisors, lead workers, and an accountant or time keeper. (Glenn, Tr. 4120; Scorsone, Tr. 4896). However, LNG projects are not unique; project directors with prior LNG experience are not required for LNG projects. (Rapp, Tr. 1306-07).

#### Response to RFOF 3.551

As shown in CCRFF 3.532 CB&I boasts about its employees' expertise in its documents. Customers prefer using construction workers with prior experience working on LNG projects because one important part of being an experienced firm is having experienced workers.. For example, Mr. Hall of MLGW testified that CB&I's use of experienced personnel was an advantage ". . . they brought in a lot of expertise, a lot of good expertise that could not have been obtained locally." (Hall, Tr. 1797-98). Other LNG customers testified that experience was very important to them in choosing an LNG tank constructor. For example, the witness from Yankee Gas stated that "[e]xperience will have a - will hold a lot of weight in our evaluation. (Andrukiewicz, Tr. 6703).

3.556 A foreign company building an LNG tank in the United States will not incur additional costs over a U.S. competitor as a result of having to import foreign labor. (Bryngelson, Tr. 6150). Similar to CB&I, a foreign company seeking to build an LNG tank in the United States would hire domestic workers from a local labor pool. (Bryngelson, Tr. 6150; Rano, Tr. 5906-07). Local labor in developed countries such as the U.S. has the necessary knowledge, expertise, and skill sets to build an LNG facility. (Rano, Tr. 5909).



### Response to RFOF 3.556

As shown in CCRFF 3.28 and 3.578, neither Mr. Rano nor Mr. Bryngelson have the experience necessary in the relevant market to assess how competitive foreign firms will be against Respondents.

Furthermore, Respondents' proposed finding is misleading and incomplete. Mr. Bryngelson frequently found that local LT&C contractor companies had efficiency or cost advantages over offshore construction companies. These advantages included "[e]xisting relationships with suppliers" that allowed the local company to "get a better deal across the table . . ." Additionally, the local company had "knowledge of who to go to, who had what resources." Finally, local companies had more contacts with the local labor force. This knowledge provided advantages in terms of cost savings and other efficiencies. (Bryngelson, Tr. 6224-25). At Enron, use of foreign labor on a construction project would drive the cost up. (Bryngelson, Tr. 6225).

3.557 CB&I, having field crews stationed in the U.S., does not have a competitive advantage over foreign companies in the construction of domestic LNG tanks. (Bryngelson, Tr. 6150). CB&I carries the cost of paying salaried field construction personnel whether or not they are used. (Scorsone, Tr. 4897). In this regard, CB&I may be at a disadvantage to foreign tank builders because CB&I incurs significant constant overhead as opposed to foreign companies who would hire temporary local labor forces on a job-by-job basis. (Bryngelson, Tr. 6150). Using local labor, as opposed to maintaining a permanent staff, can reduce labor costs, and result in lower overall costs for a company. (Bryngelson, Tr. 6150-51).

### Response to RFOF 3.557

Respondents' finding is misleading. The finding suggests that the costs to CB&I of "salaried field construction personnel" are incurred whether or not these employees are used. Respondents imply that these personnel represent a fixed cost to CB&I whereas the evidence clearly shows that they are variable cost. (Simpson, Tr. 3005). Company documents reveal that "salaried field construction personnel" can be moved to other field-construction projects if they "are not used" for the construction of a low temperature and cryogenic tank construction project. (CX 1563 at CBI/PDM-H 4006729 ("Fleming, Paul [-] Move Paul to Houston and manage ABL project," "Dillott, Fred [-] Spectrum Astro Project or ABL"). Dr. Simpson testified that "since the employment of these individuals depends upon the output at the company, they would clearly be a variable cost." (Simpson, Tr. 3005-06, CX 1559).

Because Dr. Harris fails to take into account Respondents' employee practices, he greatly underestimates Respondents' variable cost. Dr. Harris incorrectly treats field erection as a fixed cost. (Simpson, Tr. 3007-08). As variable costs increase as a percent of the price, the contribution margin decreases. The lower a contribution margin, the more profitable a price increase will be to a company. (Simpson, Tr. 3018-9; CX 1642 at 2). As Respondents' testimony corroborates Dr. Simpson's beliefs regarding more variable costs for CB&I's projects and lower contribution margins, any price increase for CB&I would be very profitable. (Simpson, Tr. 3018-21; CX 1641; CX 1642).

Respondents' SEC filings conclude that CB&I's local presence in the United States provides it

with a competitive advantage over foreign companies. In its 1997 10-K, CB&I states, "In addition, the Company believes that it is viewed as a local contractor in a number of the 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 1575 at 5) (emphasis supplied).

Based on his review of the parties' documents and deposition testimony, Dr. Simpson concluded that 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). CCF 372.

Dr. Simpson further testified that CB&I and PDM's use of workers throughout the U.S. provide CB&I and PDM with a competitive advantage because over time, CB&I and PDM learned who the good workers are and thus learn which workers to hire for which projects, and 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)). CCF 373.

This conclusion is corroborated by the testimony of AT&V's Cutts, who admitted that even with training, TKK's partner, AT&V, admits that it would require years of experience building LNG tanks before its personnel is as efficient as CB&I employees. (Cutts, Tr. 2379-80). CCF 558. It is further corroborated by CB&I sales representative Mr. Knight, who testified that pre-acquisition, PDM's use of an inexperienced tank constructor, Nooter, harmed PDM's competitiveness on a Canadian LNG project, as Nooter's inexperienced workforce was not as efficient as PDM's experienced one. (Knight, Tr. 2624).

CB&I's public statements to its shareholders contradict Respondents' assertion that they are at a cost disadvantage from "significant constant overhead" – as Mr. Glenn told his shareholders, "...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). CCF 771.

An LNG customer, Mr. Hall, testified to the advantages CB&I's knowledge of the U.S. labor market brought to the Memphis peak shaving project: "Now, as the project went on, I did realize that this constitutes a considerable amount of market strength for any firm to have a relationship with employees they can bring from out of state and bring onto a job. A lot of the foremen that were there were from Texas or Louisiana or various oil country places that they brought in. . . . I think that they brought in a lot of expertise, a lot of expertise that probably could not have been obtained locally. (Hall, Tr. 1797-98). CCF 339.

Another customer, Mr. Norman Kelley, prefers a company that has a local presence, because local companies are "just more accessible [] and it's easier to do business." (JX 27 at 91 (N. Kelley,

Dep.)).

- 3.558 A foreign company's ability to work with local labor forces in a variety of different countries is a factor in determining whether that foreign company would be well-situated to work with local labor in the United States. (Rapp, Tr. 1337-38). Whessoe used local labor to build LNG tanks in Dabhol, India. (Carling, Tr. 4461-62). Whessoe was successful working with local labor in India even though the Indian labor force had skills and educational levels inferior to Western workers. (Carling, Tr. 4461-62). Whessoe also has experience working with a local labor force in Trinidad. (Rapp, Tr. 1310).
- 3.559 TKK has experience constructing field-erected LNG tanks in Nigeria. (Rano, Tr. 5926). The average U.S. worker has some high school education and some training in the crafts. (Rano, Tr. 5972-73). By contrast, the average worker in a place like Nigeria has very little education and infrastructure to support him. (Rano, Tr. 5972-73). These differences make it easier to construct a field-erected LNG tank in the U.S. as opposed to a place like Nigeria. (Rano, Tr. 5972-73).

### Response to RFOF 3.558 and 3.559

Respondents' sole support for RFOF 3.559 is testimony from Mr. Rano who, as explained in CCRFF 3.28 and as indicated in the actual text of Respondents' finding, has no foundation to discuss the competitiveness of firms in the United States. As pointed out in RFOF 3.559, Mr. Rano's experience is limited to LNG tank construction in Nigeria. *See* CCRFF 3.28.

Any experience gleaned by Whessoe during the Dabhol or Trinidad projects is irrelevant to its ability to construct LNG tanks in the United States as a replacement for PDM. Throughout the trial, Respondents failed to call one witness who was knowledgeable about pricing before the acquisition, pricing after the acquisition, competition in the United States for LNG tanks, and the competitiveness of foreign LNG firms in the competitive environment of the U.S. Instead, Respondents consistently put forth examples in India, Trinidad, Mexico, the Bahamas, or Nigeria, which are irrelevant to competition in the United States.

Mr. Eyermann, Respondents' witness representing Freeport LNG, readily recognized that an LNG tank supplier's work in one country is "not relevant" to its work in another country, including price comparisons: "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...It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There's just no comparison." (Eyermann, Tr. 7071). Just as Mr. Eyermann suggests that the LNG markets outside of the United States have no bearing on the U.S. LNG market, Complaint Counsel submits that Mr. Rano has no foundation to assess competition, pricing, or tank erection in the United States for lack of experience or knowledge of in the United States LNG market. As a result, Respondents' finding lacks any support.

Respondents' implication that foreign-based tank companies can successfully compete for LNG projects within the United States if they have used local labor on international projects is misleading. As stated in CCRFF 3.556 and 3.557, local construction companies have both cost and competitive advantages over foreign-based tank suppliers. The locally based company has greater knowledge of which workers are the most skilled. CCRFF 3.556, 3.557. As the locally based company uses these workers over several projects, over time, the company's training and hiring costs decrease and the workers become more efficient. CCRFF 3.557.



Although Whessoe has experience working with local labor on international LNG tanks, Whessoe has been unable to win an LNG project within the United States. Whessoe has been competing for LNG projects in the United States since at least 1994. In the Memphis bid in 1994, Skanska's price was 43% higher than the next lowest bidder. (CX 829 at 5; Hall, Tr. 1876; Price, Tr. 648; *see also* Hall, Tr. 1810; Price, Tr. 561; Kistenmacher, Tr. 901). In 1998, Whessoe's prices for a single containment LNG tank were far higher than CB&I's, ranging from [ ] higher, for [ ] cubic meter tanks, to [ ] higher for an [ ] cubic meter tank. (RX 157 at [ ] 02 004, *in camera*). CCF 872. Skanska Whessoe [ ] (CX 1528 at CBI 071381, *in camera*). CCF 992.

Like Whessoe, TKK has never won an LNG project within the United States. TKK has been attempting to win LNG projects within the United States since at least 1994, when it bid on the Memphis LNG project. It lost the bid; its price was 59% higher than CB&I's. CCF 935, 937. TKK's most recent bid, for the Dynegy project, is unlikely to be competitive; based on his experience on the Memphis project and industry knowledge, Mr. Price is concerned that the price Dynegy will pay for the LNG tanks would be "higher" without CBI's participation in the bidding. (Price, Tr. 622). CCF 1000.

In fact, 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). CCF 562. 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). CCF 562.

3.563 The nine percent nickel steel procured for the Cove Point LNG project and Puerto Rico LNG project was fabricated in Europe and shipped to the job site. (Glenn, Tr. 4118; Scorsone, Tr. 4893-94). Although CB&I had the capability and the capacity to fabricate the steel for the Cove Point project at one of its fabrication facilities, it chose to have it fabricated overseas because it was "less expensive." (Scorsone, Tr. 4894-95). Similarly, CB&I purchased pre-fabricated steel from Japan for an LNG tank it built in Salley, South Carolina. (Glenn, Tr. 4118-19). For the Bonny Island, Nigeria LNG project, CB&I also fabricated the steel in Japan, where it was purchased. (Rano, Tr. 5899).

Response to RFOF 3.563

Respondents' proposed finding is misleading in its implication that CB&I's fabrication of its 9 percent nickel plate internationally places foreign-based tank companies on equal footing with CB&I. As stated in CCF 3.548, [ ] ([ ]), *in camera*). This advantage is [ ] ([ ]), *in camera*).

Technigaz' partner, Zachry, also [ ] ([ ])). PDM's business documents suggest that internal fabrication of the LNG tank parts provides it with "better control" of the fabrication process, helps ensure timely delivery of materials, and provides

competitive advantage through cost control and unique capabilities. (CX 71 at PDM-C1003168). See CX 619 (describing problems PDM has had working with local contractor on project in Mexico); CX 479 at PDM-CH003040 (describing costs added by sub-contractors). Subcontracting fabrication would therefore be one source of competitive disadvantage for overseas tank suppliers.

3.564 [ ] ([ ] ([ ]); see also Glenn, Tr. 4117, 4119; Rano, Tr. 5898).

#### Response to RFOF 3.564

Respondents' proposed finding mischaracterizes Mr. Jolly's testimony. [

] ([ ]), *in camera*).

3.565 Foreign LNG tank builders are able to work in countries where they don't have a permanent physical presence for several reasons: (1) they make an effort to understand the cultures of the countries they operate in; (2) they are sophisticated worldwide procurers of materials; (3) they mobilize an expatriate work force, while using a high degree of local labor and global subcontractors; and (4) they are very good at logistically planning, and project management. (Scorsone, Tr. 4869).

#### Response to RFOF 3.565

Respondents' proposed finding is incomplete. Although foreign-based LNG tank contractors are technically capable of building an LNG tank, these tank contractors are unable to successfully compete for and win LNG projects in the United States, where they don't have a permanent physical presence. CCRFF 3.95, 3.540, 3.542, 3.558, 3.559.

(1) Foreign-based LNG tank companies have higher costs than CB&I. CCF 441, 530-541, 543, 549, 555, 560, 935. As shown in CCRFF 3.558 and 3.559, Skanska Whessoe and TKK's high prices from past bids suggest that its costs are much higher than CB&I's. These prices are not competitive. (JX 22 at 164 (Bryngelson, Dep.) (Bryngelson considers any bid within 10 percent of the lowest bid as competitive, but "if we saw somebody who was 20 percent higher or more in rough numbers, that would make me step back.")).

Likewise, 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). CCF 350, 402. Indeed, "any time you perform work for the first time you would incur expenses that you can improve when you perform the same work the second or third time or subsequent times." ([

], *in camera*). Technigaz also [

] ([ ]), *in camera*). CCF 546.

Moreover, as stated in CCRFF 3.95, today, CB&I informs the SEC that it 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 that discuss "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).

In contrast, S-1 filings submitted prior to the acquisition warned investors that competition from firms such as PDM negatively impacted CBI's profitability. CB&I stated in the section on "Risk Factors" that "**competition has resulted in substantial pressure on pricing and operating margins,**" that competitors had engaged in "**aggressive price competition,**" and that this competition required CB&I to react in a manner that "**adversely [affects] 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).

(2) Foreign companies lack the experience of building projects within the United States. In selecting a tank supplier for LNG projects, LNG customers prefer a tank supplier with experience in the United States. Mr. Hall expressed concern that no firms in the market can compete with CB&I/PDM because they lack the depth of experience that CB&I/PDM provides. (Hall, Tr. 1830, 1831). Black & Veatch's representative, Mr. Price, testified that he would prefer to do business with "the domestic supplier because they have done work in the United States, know the - 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).

Even if a foreign-based firm has experience building LNG tanks outside the United States, this experience does not overcome what Mr. Cutts of AT&V describes as "the number one barrier to entry" in the LNG market – the customer, and "his attitude or appreciation for what you've built in the past and/or what you build in the future." (Cutts, Tr. 2390).

3.566 Luke Scorsone of CB&I perceives that global companies such as British Gas, British Petroleum, Exxon Mobil, and Shell would be comfortable using a foreign LNG tank supplier even if they have never worked in the U.S. before. (Scorsone, Tr. 4869-70) (state of mind). This perception is based on Mr. Scorsone's knowledge that foreign builders have constructed LNG tanks for these international companies in remote, greenfield areas around the world. (Scorsone, Tr. 4870-71) (state of mind). A "greenfield" location is an area that is not industrially developed. (Scorsone, Tr. 4871).

### Response to RFOF 3.566

CB&I's "state of mind" about foreign LNG firms is just that and nothing more; the cited testimony was not offered or admitted for the truth of the matter asserted therein.

Mr. Scorsone's statement is unsupported by the record. No foreign company has ever built an LNG tank within the United States, despite repeated attempts for almost the last decade. CCRFF 3.95, 3.558, 3.559, 3.565.

Mr. Scorsone's current business conduct undermines Mr. Scorsone's self-serving statements. CCF 435. 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).

Mr. Scorsone's testimony is uncorroborated by Respondents' regular course of business documents, and is at odds with what CB&I tells the public, its shareholders, its employees and its customers. CCRFF 3.95. As described in CCRFF 3.565, CB&I no longer represents to potential shareholders in its S-1 filings that competition is a threat to its profitability. (*Compare* pre-acquisition SEC filings mentioning competition – CX 1633 at 18; CX 1635 at 18; CX 1714 at 18; CX 1715 at 19-20; CX 1716 at 15 – to post-acquisition SEC filings that now omit competition as a risk factor – CX 1021 at 7-13; CX 1718 at 3 of 15 - 9 of 15).

Although Respondents suggest that international companies, *e.g.*, TKK, IHI, Hyundai, Technigaz, and Whessoe, are competitors who can compete effectively at pre-merger prices, the evidence suggests otherwise. For example, PDM documents identify these firms as competitors only on international projects. (CX 116 at PDM-HOU019181; *see* CX 96 at PDM-HOU 2009785). Moreover, [ ], an LNG customer who did an analysis of competition in the United States, concluded that these tank companies are inadequate competitors for LNG projects in the United States: "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 [ ] 01 032, *in camera*). CCF 866-867.

3.567 It is much easier for a tank builder to construct an LNG tank in the U.S. than it is to construct in a remote, greenfield location such as Nigeria where tank builders encounter obstacles relating to: (1) the local political environment; (2) weather; and (3) communication and infrastructure limitations. (Scorsone, Tr. 4871; Rano, Tr. 5973-87).

### Response to RFOF 3.567

For the reasons stated in CCRFF 3.565, Respondents' proposed finding is misleading in its implication that a supplier that has built a LNG tank in a remote international location will be able to successfully compete for projects in the United States.

3.568 The political situation in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. (Rano, Tr. 5973-74). Based on his experience throughout the world, and on the information that he has acquired as Vice President of CB&I, Peter Rano is able to compare the ability to deal with the political situation in the United States with abilities outside of the U.S. (Rano, Tr. 5973-74). In a place like Nigeria, it is difficult to deal with the political situation: laws change regularly; the enforcement of those laws is erratic; and contractors must deal with various civil governments, and various local rulers. (Rano, Tr. 5974-76). These political aspects create an added burden that does not exist in developed countries, such as the United States, where the "laws are stated and understood and applied equally."

(Rano, Tr. 5974-76).

### Response to RFOF 3.568

For the reasons stated in CCRFF 3.565, Respondents' proposed finding is misleading in its implication that a supplier that has built a LNG tank in politically unstable locations will be able to successfully compete for projects in the United States.

3.569 The weather in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. (Rano, Tr. 5977-79). Based on his experience throughout the world, and on the information that he has acquired as Vice President of CB&I, Mr. Rano is able to compare the ability to deal with weather in the United States with abilities outside of the U.S. (Rano, Tr. 5977-78). It is far more difficult to work in places such as Nigeria (rain) and the Middle East (heat) than it is to work in the United States. (Rano, Tr. 5978-79). Weather in the U.S. is much more moderate. (Rano, Tr. 5978-79).

### Response to RFOF 3.569

For the reasons stated in CCRFF 3.565, Respondents' proposed finding is misleading in its implication that a supplier that has built a LNG tank in a thunderstorm or during a heat wave will be able to successfully compete for projects in the United States.

Moreover, Respondents' proposed finding is irrelevant; there is no record of any customer that has asserted that weather was a factor that it considered in selecting a LNG tank supplier.

3.570 The communications and infrastructure that are available in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. (Rano, Tr. 5980-81). Based on his experience throughout the world, Mr. Rano is able to compare communications and infrastructure available in the U.S. to that which is available elsewhere in the world. (Rano, Tr. 5980-81). In countries such as Nigeria, the available infrastructure is minimal and telephones work less than half of the time. Communication is important for many reasons, such as problem solving and informing management of developments. (Rano, Tr. 5986-87). Because of the developed communication infrastructure in the U.S., it is easier to construct a field-erected LNG tank in the U.S. than in other, less developed parts of the world. (Rano, Tr. 5986-87).

### Response to RFOF 3.570

For the reasons stated in CCRFF 3.565, Respondents' proposed finding is misleading in its implication that a supplier that has built a LNG tank with limited access to a phone will be able to successfully compete for projects in the United States.

Moreover, Respondents' proposed finding is irrelevant; there is no record of any customer that has asserted that access to telephones or communications equipment is a factor that is considered in selecting a LNG tank supplier.

While Respondents Have Attempted to Invent Barriers to Entry that Complaint Counsel Has Never Even Proposed, they Have Failed to Refute that Experience and Having a Track Record Are Barriers to Entry. CCRFF 335-364.

## F. RESPONDENTS' WITNESSES LACK FOUNDATION

3.571 Nigel Carling served as a vice president for Enron Engineering and Construction from October 1998 through August 2002. (Carling, Tr. 4447-48). During this time, he was responsible for, and involved in, LNG projects in Dabhol, India, Penuelas, Puerto Rico, and the Bahamas. (Carling, Tr. 4448).

### Response to RFOF 3.571

Mr. Carling lacks foundation to evaluate the competitive environment post-acquisition because he has not witnessed competition in the United States. Customers who have not witnessed competition in the United States are also at a disadvantage when evaluating pricing from tank vendors. Complaint Counsel has shown that there are many country-specific barriers to entry that would affect a foreign firm's ability to offer low prices in the United States. CCRFF 3.147. Moreover, PDM and CB&I, as domestic suppliers, would have a [

] (RX 738 at FTC 001535 ([ ]), *in camera*); CCRFF 3.147. This advantage would translate into lower prices and higher efficiency in constructing LNG tanks. Mr. Carling's experience in "Dabhol, India, Penuelas, Puerto Rico, and the Bahamas" is irrelevant to assessing competition between CB&I and PDM pre-acquisition in the United States. *See* CCRFF 3.572.

3.572 Prior to the acquisition, Mr. Carling witnessed LNG pricing submitted by Whessoe, PDM, and CB&I, for LNG tanks built in Dabhol. (Carling, Tr. 4455). Mr. Carling also personally reviewed bid prices for an LNG tank submitted by CB&I, PDM, and Skanska for an expansion of the Dabhol project. (Carling, Tr. 4465, 4473). Further, Mr. Carling was extensively involved in the Puerto Rico LNG facility that PDM constructed. (Carling, Tr. 4473-74).

### Response to RFOF 3.572

Mr. Carling's experience at Dabhol and in Puerto Rico has no bearing on competition in the United States. Mr. Carling, who first became involved with LNG tanks in October 1998 and is now retired from the LNG business, has no experience at all in assessing the degree of competition between CBI and PDM on projects in the United States. CCRFF 3.571. (Carling, Tr. 4446-8, 4510-4). Furthermore, Mr. Carling's testimony made it clear how little he actually knows about the LNG tank market in the U.S. Mr. Carling did not know whether overseas firms have ever bid against CBI and PDM for projects in the United States, and how competitive they have been when they did bid. (Carling, Tr. 4513-4).

Mr. Carling did not know whether "some of the firms ... such as Whessoe, Tractebel, TKK, prior to 1998 have made proposals in connection with the LNG tank projects." (Carling, Tr. 4513-4). According to Mr. Carling, Technigaz/Zachry would be "interested in single-containment and double-containment and full-containment tanks" in the United States. (Carling, Tr. 4527). Mr. Carling even claimed that Technigaz has built "all these kinds in Europe and West Africa." (Carling, Tr. 4527). However, that testimony was directly contradicted by [ ], who claims that [ ] ([ ], *in camera*).



Internationally, the *only* project for which Mr. Carling was responsible for overseeing the final decision on selecting an LNG tank supplier for a field-erected LNG tank was during the second phase of the Dabhol, India LNG project. (Carling, Tr. 4502, emphasis supplied). In fact, when Mr. Carling has solicited bids (on projects outside of the relevant geographic market), the companies he has relied upon to compete for the projects were CBI and PDM. On the fourth tank at Dabhol, Enron did not want to work with Skanska/Whessoe, and invited bids from the people they “felt comfortable with,” which were PDM and CBI. (Carling, Tr. 4504). Enron chose CB&I to supply the fourth tank for Dabhol. (Carling, Tr. 4505-6). In the Venezuela LNG project which he was involved in during 2000, the only companies that Enron considered were CBI and PDM, because “all the expertise was between PDM and CBI.” (Carling, Tr. 4500). Finally Mr. Carling’s present employment at Chevron Phillips Chemicals does not involve the procurement of LNG tanks. (Carling, Tr. 4445-46).

3.573 Mr. Carling witnessed competition in the LNG market after the acquisition through his involvement in a LNG project proposed by Enron in the Bahamas. (Carling, Tr. 4477-82). Enron received three competitive bids for the Bahamas job in September/October 2001 by CB&I, Skanska, and Tractebel. (Carling, Tr. 4480-81). Mr. Carling observed that the bids were within a “range of 7 to 10 percent” of each other. (Carling, Tr. 4481).

#### Response to RFOF 3.573

Mr. Carling’s experience in the Bahamas is irrelevant to his ability to assess competition before or after the acquisition in the United States. *See* CCRFF 3.571, 3.572.

3.574 Volker Eyer mann serves as the vice president of engineering for Freeport LNG, a firm that is developing an LNG import terminal in Freeport, Texas. (Eyer mann, Tr. 6959-60). Mr. Eyer mann first worked for an LNG tank project in 1976 for El Paso, and subsequently worked for several LNG projects in Indonesia, Trinidad, India, and China. (Eyer mann, Tr. 6963-67).

#### Response to RFOF 3.574

Respondents’ assertion is incomplete. Mr. Eyer mann’s “LNG tank project in 1976 for El Paso” was a project in Algeria. That project, along with projects in “Indonesia, Trinidad, India, and China” are irrelevant to any discussion of competition for LNG tanks in the United States. CCRFF 3.147, 3.571. Mr. Eyer mann himself admitted that an LNG tank supplier’s work in one country is “not relevant” to its work in another country, including price comparisons: **“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...It is not relevant to know the price of an LNG tank in report or in Malaysia to know what your tank in Freeport will cost. There’s just no comparison.”** (Eyer mann, Tr. 7071-2, emphasis supplied).

The reality is that Mr. Eyer mann lacks foundation to speak about the United States market because, prior to Freeport, he “never worked on an LNG project in the U.S.” (Eyer mann, Tr. 7025). All of Mr. Eyer mann’s experience has been on projects outside the United States, and during the entirety of this non-United States career, Mr. Eyer mann has never been involved in evaluating or selecting an LNG tank supplier for a project, and has never reviewed the prices submitted by LNG

tank bidders. (Eyermann, Tr. 7025-7028).

3.575 Mr. Eyermann is currently involved in all technical aspects of the Freeport LNG project, including contracting strategies, detailed engineering, and is responsible for coordinating the activities Freeport LNG's consultants. (Eyermann, Tr. 6960, 6968).

#### Response to RFOF 3.575

Freeport LNG and its predecessor Cheniere Energy have never built an LNG facility before. (Eyermann, Tr. 7033). In his current position at Freeport LNG, a small company with fifteen employees, Mr. Eyermann has not obtained any bids or selected a supplier for the LNG tanks planned for the Freeport, TX import terminal. (Eyermann, Tr. 7036, 7029). This terminal is in the early stages of development. At the time of trial, Freeport LNG had not yet filed for FERC approval of the terminal. (Eyermann, Tr. 6977). At the earliest, assuming timely FERC approval, Freeport LNG will award a LNG tank contract in February 2004. (Eyermann, Tr. 6978).

Moreover, Mr. Eyermann's assessment of competition in the U.S., including the effects of the acquisition, lack foundation because he has no past experience evaluating LNG tank pricing or selecting an LNG tank supplier. (Eyermann, Tr. 7025-9). Mr. Eyermann's employment relating to LNG projects has been as a process engineer on the technical side rather than commercial side. (Eyermann, Tr. 7031). On the international LNG projects that he worked on, Mr. Eyermann was not involved in the selection of the supplier of the LNG tanks. (Eyermann, Tr. 7025-29). For example, on the Indonesia project, "The tanks were already built when [Mr. Eyermann] got there." (Eyermann, Tr. 6965). Similarly, on Enron's Dabhol LNG project, Mr. Eyermann was the resident engineering manager and did not review the bids from the tank suppliers (Eyermann, Tr. 6967, 7028). None of Mr. Eyermann's experience involves procuring an LNG tank, and none of the projects that he worked on were in the United States. His assessments of competition in the United States, therefore, lack foundation. *See* CCRFF 3.574 (Mr. Eyermann does not believe that one can compare the prices or the construction of an international LNG tank to a domestic LNG tank).

3.576 Mr. Eyermann received budgetary pricing from various vendors for the Freeport project. (Eyermann, Tr. 7030). He also had discussions with several LNG tank contractors regarding their capabilities and contracting strategies including: Skanska Whessoe (Eyermann, Tr. 6981-83), Technigaz (Eyermann, Tr. 6994-96), TTK/AT&V (Eyermann, Tr. 6999-7001), Daewoo/S&B (Eyermann, Tr. 7008), and IHI (Eyermann, Tr. 7015-16).

#### Response to RFOF 3.576

Complaint Counsel agrees with Respondents's acknowledgment of budget prices as a form of competition. CCRFF 7.1, 7.2, 7.4, 7.7, 7.9.

Despite the fact that Mr. Eyermann has seen budget pricing from foreign firms in the United States, his assessment of competition is still irrelevant because he has had no opportunity to assess CB&I's present-day pricing, nor pricing from CB&I or PDM prior to the acquisition.

The fact that Mr. Eyermann has “had discussions with several LNG tank contractors” does not mean that Mr. Eyermann has foundation to offer testimony regarding the capabilities of foreign firms in the United States. Despite working in the LNG industry for 25 years, Mr. Eyermann has no direct experience working with PDM, TKK, AT&V, Zachary, and Technigaz. (Eyermann, Tr. 7062-4). Because he is not familiar with PDM’s business or its past pricing for LNG tanks, he does not have the foundation to assess the competitive effects of the acquisition.

3.577 Robert Bryngelson is the Managing Director of Business Development for El Paso Global LNG, and is responsible for developing LNG infrastructure throughout the world. (Bryngelson, Tr. 6121).

#### Response to RFOF 3.577

Mr. Bryngelson does not have the foundation to assess competition in the United States in the LNG market. *See* CCRFF 3.578.

3.578 Mr. Bryngelson is currently managing a team for the development of three LNG terminals in Altamira, Mexico, Baja California, Mexico, and on the Grand Bahama Island. (Bryngelson, Tr. 6161-62). He was involved in identifying a list of qualified LNG tank bidders for these projects. (Bryngelson, Tr. 6124).

#### Response to RFOF 3.578

Mr. Bryngelson does not have foundation to assess the competitive climate of the LNG market in the United States post-acquisition because he did not witness competition between CB&I and PDM prior to the acquisition. Customers who have not witnessed competitive pricing between CB&I and PDM prior to the acquisition are disadvantaged because they have no standard to which they can compare present day pricing levels. As a result, their views regarding competition in the market are based upon higher pricing from both CB&I and foreign firms.

Mr. Bryngelson has only been working on LNG projects for two years (Bryngelson, Tr. 6201) and has never previously been involved in the construction of an LNG tank. (Bryngelson, Tr. 6205). The projects that Mr. Bryngelson is now working on are in Mexico and the Bahamas, not the U.S. (Bryngelson, Tr. 6123, 6214). El Paso has not purchased an LNG tank since the late 1970’s or early 1980’s. (Bryngelson, Tr. 6208).

Moreover, Mr. Bryngelson did not receive any pricing from PDM for any of the projects he is currently working on, and has no knowledge of pricing competition for LNG tanks in the U.S. prior to or after the acquisition. (Bryngelson, Tr. 6246-47). The El Paso representative admits that he has “no knowledge of PDM, where they fit in and how they affected the competitors.” (JX 22 at 186 (Bryngelson, Dep.); *See also* Bryngelson, Tr. 6233).

Furthermore, the El Paso representative lacks experience with foreign firms, and therefore has no basis to testify regarding the competitiveness of foreign firms. Mr. Bryngelson testified that he has not had any conversations with anyone from Technigaz that led him to believe that any of the firms had experience building tanks that comply with U.S. codes and requirements. (Bryngelson, Tr. 6241 (“I

have never spoken to a single employee of Technigaz directly’’). Mr. Bryngelson has also never “spoken to anyone from TKK about their ability to qualify for an LNG tank project in the United States” (Bryngelson, Tr. 6241). Finally, Mr. Bryngelson admitted that he had never had “any conversations with any of the other bidders that have bid on the Altamira

or the Baja LNG projects relating to whether that particular bidder was qualified to build LNG tanks in the United States.” (Bryngelson, Tr. 6242).

3.579 Mr. Bryngelson relied upon input provided by Kellogg Brown & Root, a reputable engineering contractor and consultant, who examined each of the LNG tank bidders and determined that they all have the necessary qualifications and reputations to successfully build LNG tanks for El Paso's projects. (Bryngelson, Tr. 6129-30). Halliburton KBR has access to historical pricing information of LNG tanks. (Scorsone, Tr. 4940). Halliburton KBR is capable of determining whether the price of an LNG tank price submitted is reasonable based on its access to historical tank pricing. (Scorsone, Tr. 4940). Halliburton KBR assists owners in evaluating tank bids. (Scorsone, Tr. 4940-41).

### Response to RFOF 3.579

Both Halliburton KBR and Mr. Bryngelson possess imperfect information and cannot detect the anticompetitive effects of the acquisition. Cost-breakdown sheets given to customers contain less detailed information than CB&I internal cost-estimate summary sheets. Customers do not generally have access to margin information and, due to the price variation for line-items such as materials and labor, customers are rarely able to question the subjectivities of the contractor.

Respondents do not specify the “historical pricing information” to which Halliburton KBR has access. Respondents provide no evidence that Halliburton, has compared CB&I’s pre and post-acquisition pricing to the bids that they have received from foreign firms. Moreover, Respondents have not shown that Halliburton has compared post-acquisition pricing from foreign firms to PDM’s pricing before the acquisition. *See* CCRFF 3.578.

Moreover, having access to historical pricing information may be irrelevant, depending on what information Halliburton KBR does possess. For example, CMS compared CB&I’s final price for its tank to CB&I’s final price for the Cove Point tank and found little variation. CCRFF 7.1-7.26. If CMS had access to perfect information, however, it would have determined that CB&I had drastically raised its price for the Cove Point tank over pricing given to [ ] before the acquisition. *See* CCF 910. CMS would also have found that CB&I padded its costs for the Cove Point tank to increase its profit. *See* CCF 797. Even if Halliburton KBR has access to “historical pricing information” from CB&I, it would not necessarily have access to perfect information including line-item costs and margins. Customers and consultants, therefore, are forced to rely upon imperfect information, while the FTC is given access to all pricing information so that it can fully analyze the effect of the acquisition.

Moreover, for Mr. Bryngelson, pricing is considered “reasonable” if bids are within a “10 to 15 percent” range of each other which is “normal for any of these bids.” (JX 22 at 164 (Bryngelson Tr. 6190)). If CB&I has increased its pricing to a range that is within 10 to 15 percent of foreign firms, Mr. Bryngelson would not consider its pricing to be unreasonable, even if CB&I had increased its pricing 50%. CCF 937, 872. Because CB&I’s prices before the acquisition were anywhere from 59% to 90.4% lower than those of foreign firms, CB&I is in a position to take advantage of the customer through a price increase. CCF 937, 872. CB&I can increase its margin and pad its costs a substantial amount before the prices of any of the joint

venture constrain its pricing. Moreover, CB&I can *remain the low-cost supplier despite the price increases that it imposes*.

Finally, a customer can be satisfied and still not realize that an anticompetitive price increase has occurred. If there were evidence that the acquisition led to a 5 percent increase in LNG tank prices, Mr. Bryngelson would not view this effect “as a negative impact.” Such an increase is “not a huge problem.” (Bryngelson, Tr. 6198-99).

3.580 Jeffrey Sawchuck is employed by British Petroleum, which is developing three potential LNG import terminals in the U.S., costing hundreds of millions of dollars. (Sawchuck, Tr. 6054, 6066). Mr. Sawchuck is responsible for the LNG technology program and LNG network within . (Sawchuck, Tr. 6050-51).

### Response to RFOF 3.580

Mr. Sawchuck has no previous experience in the United States LNG market and therefore has no foundation to comment on the competitive environment in the United States. (Sawchuck, Tr. 6052-53). CCRFF 3.581.

3.581 Mr. Sawchuck is entrusted by [ ] to oversee every LNG project which might be completed in the U.S. He has ultimate responsibility for the evaluation of potential LNG vendors. (Sawchuck Tr. 6050-51).

### Response to RFOF 3.581

Mr. Sawchuck has no previous experience in the United States LNG market. *See* CCRFF 3.580. Moreover, Mr. Sawchuck’s testimony cannot be given any weight due to his extreme concern over [ ] business relationship with CB&I. During the Commission’s investigation, Gerald Glenn of CB&I asked [ ], to provide an affidavit stating that “CB&I’s acquisition of Pitt-Des Moines (PDM) does not significantly affect the competitiveness of construction of low temperature and cryogenic industrial storage tanks.” (RX 157 at [ ] 01 033).

Because he wanted to maintain a good relationship with CBI, [ ] requested help with this “sticky” situation from his colleagues, [ ]. [ ] and his colleagues “did a bit of research into the USA companies referenced by CB&I,” as competitors in the U.S. LNG market, (RX 155 at [ ] 01 032), and concluded that “the reality for today is that in the US, CB&I/PDM are the leading company in the LNG Tank Business and the other competitors will need to demonstrate their capabilities in this market.” (RX 155 [ ] 01 at 032). “Since their acquisition of PDM, CB&I now dominate the US market.” (RX 156 at [ ] 01 027).

Despite finding all evidence to the contrary of Respondents’ assertions, in August 2001, [ ] urged [ ] to write the affidavit in favor of Respondents’ position: “*I think we should look at the value which the affidavit would bring to [ ]*.” (CX 691 at 01 032, *in camera*, emphasis supplied). As a result, Mr. Sawchuck’s views about the competitive nature of the market must be viewed with skepticism.

3.582 Mr. Sawchuck has worked on a number of [ ] LNG projects in Trinidad and in Spain, and has evaluated bids from various suppliers including PDM, CB&I, and Whessoe. (Sawchuck, Tr. 6052-53). Mr. Sawchuck was also involved in the Bilbao, Spain LNG project, in which selected Technigaz as the LNG tank contractor. (Sawchuck, Tr. 6052-53).

### Response to RFOF 3.582

Mr. Sawchuck's experience outside of the United States is irrelevant to assessing the competitiveness of LNG tank suppliers in the United States. *See* CCRFF 3.571.

3.583 As vice president of technical services, William Puckett is responsible for the execution of Dynegy's major projects including Dynegy's current plan to build the largest LNG regasification facility in the United States. (Puckett, Tr. 4539-40).

### Response to RFOF 3.583

This finding ignores the fact that Mr. Puckett has otherwise never been involved in the procurement or construction of an LNG tank. (Puckett, Tr. 4535-4538). As such, Mr. Puckett has no basis to compare the pre-acquisition and post-acquisition pricing or markets for LNG tanks.

3.584 In addition to conducting a six week, world-wide search for an EPC contractor, Mr. Puckett has also performed a pre-qualification process for the LNG tank portion of the project. (Puckett, Tr. 4545, 4552).

### Response to RFOF 3.584

As noted in CCRFF 3.583, prior to the acquisition, Mr. Puckett had no experience in procuring or preselecting an EPC or LNG contractor. Mr. Puckett's search for EPC contractors did not even begin until the spring-fall time period of 2001, after CBI acquired PDM. (Puckett, Tr. 4546). The Dynegy representative never had the benefit of being courted by PDM and never experienced the fierce competition between CB&I and PDM that resulted in lower prices prior to the acquisition. Because CB&I did not submit pricing information for any component of the Dynegy project, Mr. Puckett has also never seen how competitive CB&I's pricing is compared with foreign firms. (CX 518 at CBI 019777-HOU; CX 517 at CBI 019784-HOU).

Even if Mr. Puckett was able to see CB&I pricing for tanks, his firm would be unqualified to analyze bids: [

] (CX 1528 at CBI 071381, *in camera*). For the Reasons listed above, Mr. Puckett definition of "competitive pricing" is questionable.

3.585 During the pre-qualification process, Dynegy reviewed promotional materials of, conducted meetings with and interviewed four potential tank providers. (Puckett, Tr. 4554). Dynegy received bids from three of the contractors, Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry. (Puckett, Tr. 4556).

### Response to RFOF 3.585

As shown in CCRFF 3.584, Mr. Puckett has never experienced the benefit of competition before the acquisition, and has never seen pricing information from either CB&I or PDM. He therefore lacks foundation to testify regarding the competitiveness of pricing.

3.586 Dynegy hired a consultant, Black & Veatch, to analyze the bids. (Puckett, Tr. 4557). All of the bids were within Dynegy's expected price range. (Puckett, Tr. 4557).

### Response to RFOF 3.586

Dynegy's "expected price range" is suspect for two reasons: Dynegy did not have the benefit of a competitive price from CB&I to compare the other bids to; and budget pricing provided by Skanska/Whessoe, a foreign supplier with higher costs than CB&I, defined the upper bounds of Dynegy's "expected price range." (CX 518 at CBI 019777-HOU; CX 517 at CBI 019784-HOU; Price, Tr. 602-3). Based upon his years of experience in the LNG market, Mr. Price of Black & Veatch testified that he is "concerned" that Dynegy will pay a "higher" price for the tanks because CB&I refused to bid on the LNG tanks. (Price, Tr. 622).

3.587 Larry Izzo of Calpine is considering constructing an LNG import facility at a cost of approximately \$250 million. (Izzo, Tr. 6493). As senior vice president, Mr. Izzo is responsible for the company's current plans to construct an LNG facility in Humboldt Bay, California. (Izzo, Tr. 6474).

### Response to RFOF 3.587

Mr. Izzo conceded that he has never supervised any LNG tank construction projects for Calpine in the U.S. or abroad. (Izzo, Tr. 6513). Indeed, if the Humboldt project never comes to fruition, Mr. Izzo will miss his next chance to supervise an LNG project. Mr. Izzo testified that the Humboldt, California facility is "in the early stages of possible development," and that because "Calpine is experiencing financial difficulties" Mr. Izzo cannot "say definitively that an LNG facility will ... be built." (Izzo, Tr. 6521). In fact, the Calpine representative testified that there is only a 50% chance that the facility will be built. (Izzo, Tr. 6522).

Mr. Izzo has also not experienced the vicious competition between Respondents in the United States LNG market and, therefore, admits that he would not know if CB&I had raised prices to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534). Mr. Izzo admits that he has no "firsthand knowledge about the pricing and performance capabilities of foreign firms in the U.S." (Izzo, Tr. 6520-1). Mr. Izzo has also "not received any budget or firm prices for the LNG portion of the project in California." (Izzo, Tr. 6522).

Mr. Izzo lacks experience with any of the joint ventures. According to Mr. Izzo "Whessoe is the only firm [about] which [he's] actually got firsthand knowledge about prices and construction performance." (Izzo, Tr. 6519). Mr. Izzo admits that he knows "nothing firsthand" about AT&V's capabilities, and that he has never "worked with any foreign firm on a U.S. LNG project." (Izzo, Tr.

6520, 6539).

Moreover, Mr. Izzo testified that he had discussions with Kellogg Brown & Root and Black & Veatch regarding the Calpine project, but neither of these firms construct LNG tanks. (Izzo, Tr. 6524). Both “Black & Veatch and Kellogg Brown & Root [will] have to go out and find another firm to build the LNG tank” according to Mr. Izzo. (Izzo, Tr. 6524-5). Mr. Izzo further conceded that he had not talked to Skanska/Whessoe, Technigaz/Zachry, or TKK/ATV about the Calpine project. In fact, the only firm with which Mr. Izzo had discussed the project was CB&I. (Izzo, Tr. 6524-5). Mr. Izzo therefore has no foundation to testify regarding the competitiveness of these foreign firms or joint ventures in the U.S. LNG market.

Mr. Izzo’s lack of knowledge regarding foreign firms extends to a lack of knowledge regarding the pricing of foreign firms. Because Mr. Izzo has not spoken to any of the tank suppliers, other than CB&I, he would have “to guess at this point ... as to who and who will not bid” on Calpine’s project. (Izzo, Tr. 6525). Mr. Izzo also admits that he has no idea “what kind of prices [he] will get for the LNG tank portion of the project” or how those prices “will compare to CB&I’s prices” (Izzo, Tr. 6525). For the reasons listed above, Mr. Izzo lacks foundation to assess competition or pricing in the U.S. LNG market post-acquisition.

3.588 Mr. Izzo is personally familiar with LNG facilities, including peak-shavers, built in the United States. (Izzo, Tr. 6474, 6540). Prior to working at Calpine, Mr. Izzo worked for Enron for 11 years. (Izzo, Tr. 6475). While at Enron, Mr. Izzo was involved in several LNG projects including the Dabhol, India and Penuelas, Puerto Rico LNG projects. (Izzo, Tr. 6476).

#### Response to RFOF 3.588

Considering Mr. Izzo’s lack of knowledge regarding competition and pricing for LNG projects in the United States, the Calpine representative’s “familiarity” with “LNG facilities ... built in the United States” is suspect. CCRFF 3.587. Mr. Izzo testified he has never seen a competitive bidding procurement of an LNG tank in the U.S. (Izzo, Tr. 6514). Mr. Izzo’s experience with the “Dabhol, India and Penuelas, Puerto Rico LNG projects” has no bearing competition in the U.S. market for LNG tanks. Mr. Izzo himself agrees that “if a particular LNG tank firm is competitive in one part of the world, it does not necessarily mean the firm will be competitive in another part of the world.” (Izzo, Tr. 6521).

Moreover, Mr. Izzo testified that his experience with bidding out the Dabhol project was limited. Mr. Izzo testified that on a “day-to-day basis in terms of negotiating the price and the terms of the contract” on the Dabhol project, he “relied on [his] staff ... until [Enron] came to a short list.” (Izzo, Tr. 6516).

Further, the “decision to go to a sole-source arrangement with PDM was made prior to [Mr. Izzo’s] arrival on the [Penuelas] project.” (Izzo, Tr. 6516-7). Because of Mr. Izzo’s limited involvement with the Dabhol project and the Penuelas project, and for the reasons listed above, Mr. Izzo has no foundation to discuss the competitive environment in or pricing for the United States LNG market and little foundation to discuss the topic of LNG tanks in other contexts. Furthermore, Mr. Izzo lacks the foundation necessary to assess the competitiveness of foreign firms in the United States or in

other parts of the world.



“I don’t know anything about PDM when they were just PDM, as far as their ability to do the [ ] project.” (JX 26 at 57 ([ ])). As CB&I and PDM have constructed all of the last seven LNG tanks in the United States (CCFF 136), it seems strange that Mr. Kelly would have no knowledge of the firm, unless he lacked knowledge regarding the industry.

3.591 Mr. Kelly is currently the project manager for the CMS Lake Charles LNG expansion project. (J. Kelly, Tr. 6258). The total expansion will cost approximately \$177 million. (J. Kelly, Tr. 6260).

Response to RFOF 3.591

As shown in CCRFF 3.590, Mr. Kelly’s involvement with the procurement of LNG tanks and general knowledge about the U.S. LNG market is limited.

3.592 Mr. Kelly has played a very large role in selecting a tank vendor for the Lake Charles expansion project. (J. Kelly, Tr. 6260). To ensure that CMS obtained a competitive price on the Lake Charles expansion, Mr. Kelly received a budget price from Skanska, [ ] ([ ]). Other consultants, such as PTL, also have access to historical pricing information. (Scorsone, Tr. 4941.)

Response to RFOF 3.592

Respondents’ finding is disingenuous because it implies that CMS “obtained a competitive price” from CB&I for the Lake Charles expansion. RFOF 3.592 is misleading because it assumes that 1) that CMS was able to ensure it received a “competitive” price based on Mr. Kelly’s comparison of CBI’s price with a budget price from Skanska, a foreign firm with higher costs than CB&I; 2) [ ]

] and 3) [ ]

[ ]. As shown in CCRFF 3.474-3.476, none of the three assumptions made by Respondents are valid.

Further, this finding ignores the fact that prior to his involvement in the Lake Charles project, Mr. Kelly had no experience with the procurement of LNG tanks, and even since the involvement the experience is limited to a non-competitive bidding situation. Further, Mr. Kelly was [ ]

[ ] ([ ]), *in camera*)).

3.593 Jean Pierre Jolly has been employed by Technigaz for 35 years and is currently in charge of marketing and commercial activities and selling LNG tanks and terminals. (Jolly, Tr. 4434, 4436).

Response to RFOF 3.593

Respondents’ finding is misleading because it implies Mr. Jolly’s experience in “marketing” and “selling” LNG tanks internationally gives him foundation to testify regarding the state of the LNG

market in the U.S. That implication, however, is false: [

] ([ ]).

Mr. Jolly’s lack of knowledge with respect to the U.S. LNG market is apparent from factually inaccurate statements made by the Technigaz employee during the trial. According to Mr. Jolly, [ ] Mr. Jolly also testified that [ ] ([ ]), *in camera*).

Finally, Mr. Jolly admits that has [ ] ([ ]), *in camera*). Because a firm’s pricing and costs are both important factors in gauging its competitiveness, Mr. Jolly lacks the necessary foundation to testify regarding the competitiveness of the Technigaz/Zachry joint venture in the U.S. LNG market.

3.594 Mr. Jolly traveled all the way from France, voluntarily, to testify in the instant proceedings. (Jolly, Tr. 4435-36). Mr. Jolly wanted to testify to give some precision, as a courtesy, to his former declarations. (Jolly, Tr. 4436).

#### Response to RFOF 3.594

Respondents’ finding is incomplete, as it ignores [ ] Mr. Jolly admitted in testimony that [

] ([ ]), *in camera*)].

3.595 Mr. Jolly’s experience working with LNG projects extends back to 1975. (Jolly, Tr. 4437). Mr. Jolly has worked on LNG projects in Korea, Turkey, Qatar, Spain, Egypt and India. (Jolly, Tr. 4437). [ ] ([ ]).

#### Response to RFOF 3.595

Respondents’ finding is misleading, because it suggests that Mr. Jolly’s experience in “Korea, Turkey, Qatar, Spain, Egypt, and India” is relevant to competition in the United States for LNG tanks. In reality, Mr. Jolly’s [

] ([ ]), *in camera*). Further, it ignores the fact that [ ] ([ ]), *in camera*). Also, see CCRFF 9.593.

3.596 Aside from his international experience, Jolly has also been involved in the LNG market domestically. [ ] ([ ]).

).

### Response to RFOF 3.596

Respondents' finding is irrelevant and misleading because it implies that [ ] gives Mr. Jolly foundation to testify regarding competition in the United States LNG market. [ ] ([ ], *in camera*).

Moreover, the fact that Technigaz has [ ] does not mean that Mr. Jolly is qualified to testify regarding the competitive environment of the U.S. LNG market. On the contrary, the fact that [ ] was eliminated from the field of bidders because its price was substantially higher than Whessoe and TKK shows how [ ] ([ ], *in camera*), ([ ] ([ ])).

3.597 A firm, fixed-price contract is an agreement containing a defined scope of work. (Glenn, Tr. 4125). When a firm, final price is prepared, CB&I will develop an actual tank design that is specific to the site location of the project. (Scorsone, Tr. 5003). CB&I will accurately estimate the cost of materials. (Scorsone, Tr. 5003). "A very exhaustive effort is done to firm fixed-price projects that [CB&I] bid." (Scorsone, Tr. 5003). If an owner accepts a contractor's firm fixed price offer, the contractor is responsible for delivering the scope of work for that price. (Glenn, Tr. 4125). The contractor bears the burden of any cost overruns. (Glen, Tr. 4125).

### Response to RFOF 3.597

Messrs. Glenn and Scorsone's testimony is self-serving and uncorroborated by any documents produced in the ordinary course of business. Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.598 In contrast to a firm, fixed-price bid, a budget estimate is prepared from a general description of the work, using far less documentation and information. (Glenn, Tr. 4126). Budget pricing is "more conservative" and not very precise. (Price, Tr. 604).

### Response to RFOF 5.98

Respondents' proposed finding is misleading because it implies that budget pricing is unreliable. Customers rely on budget prices and expect them to be accurate. CCRFF 3.599. As Mr. Price noted in his testimony, Black & Veatch relied upon tank budget pricing to create a total budget for the Dynegey project. (Price, Tr. 603-04). Mr. Glenn's testimony is self-serving and uncorroborated by any documents produced in the ordinary course of business. Also, for the reasons discussed in CCRFF 7.1

to 7.38, this finding is contradicted by the evidence and misleading.

3.599 Brian Price from Black & Veatch described budget pricing as follows: "At that point we're not looking for the lowest number we could conceive of. We're really doing a budget and so we wouldn't expect -- it's not yet based on engineering information from the site, for example, so it can't be a very precise price at that point." (Price, Tr. 604). In other words, a budget estimate is a SWAG -- a "scientific wild assed guess." (Hall, Tr. 1865-66). In some cases, a budget price is a "guesstimate". (Carling, Tr. 4472). Budget prices are numbers used by an owner to set up an investment budget. (Kistenmacher, Tr. 925).

Response to RFOF 3.599

This finding is contradicted by the evidence. Customers expect budget prices to be as accurate as possible and do not regard budget prices to be inflated. Customers rely on budget prices to determine whether to accept a price offered by CB&I. John Kelly explained: [

] ([ ], *in camera*). Mr. Hall rejected the suggestion by Respondents' counsel that MLGW wanted CB&I to provide an inaccurate number: "I think I asked him to give me prices as he felt like he would quote them. I don't – I didn't – I don't recall asking him to inflate them, okay, or give – the numbers we assumed would be conservative." (Hall, Tr. 1868-69).

Respondents' characterization of budget prices as a SWAG misstates the record and confuses a budget price with Mr. Hall's attempt to extrapolate long-range budget expectations, with an accuracy of +/-40%, from a current budget price provided by CB&I. (Hall, Tr. 1866-67). Mr. Hall did not testify that budget prices are "scientific wild ass guesses." Rather, Mr. Hall testified that he asked Mr. Frey of CB&I for a SWAG ("scientific wild ass guess"). (Hall, Tr. 1865). Mr. Hall testified that an ROM price is a type of budgetary estimate that is less accurate than a good budgetary estimate. (Hall, Tr. 1867-68). He testified, "I am not sure that I know the exact percentages. I know approximately where they lie. I think a good budgetary formal estimate should run somewhere around 20 percent. An order of magnitude, it seems like to me I've seen it defined as 30, but I don't know, 25 maybe." (Hall, Tr. 1867-68). Mr. Scorsone also confirmed that a budget price is more precise than a rough order of magnitude price. (Scorsone, Tr. 4999).

Mr. Hall explained that the SWAG uncertainty of +/-40% arose when Mr. Hall took the price quoted by CB&I and extrapolated it into the future for Memphis Light Gas & Water's internal planning purposes: "Well, essentially what we do is take those figures, we're going to apply what we think inflation is going to do and all this kind of stuff to try to come up with a number into the future. We asked him for prices based on today, so we had to extrapolate those numbers. There is so much doubt in the process that your input, Even though you may have extremely accurate input, doesn't necessarily mean you are going to have an accurate output for that kind of study." (Hall, Tr. 1867 (emphasis supplied)).

Budget prices are often very close to firm bid prices. PDM's firm fixed bid to Williams for the Cove Point LNG tank in March 2000 was exactly equal to PDM's budget price line for the 750,000 barrel tank. (CCFF 781; CX 1058 at PDM - HOU017465 (bid \$21,450,000); RX 157 at [ ] 02 004, *in camera* ([

])). Mr. Marine proposed that CB&I counter PDM's bid to Williams by dropping CB&I's price to [ ] a price exactly equal to CB&I's budget price line for that size tank. (CCFF 895; CX 226 at CBI-PL 044979, *in camera* ([

); RX 157 at [ ] 02 004, *in camera* ([ ]).

Budget prices may be +/- 10% of the final price. (Stetzler, Tr. 6352 (“Budgetary to me means plus or minus 10 percent type of a bid”). When CB&I and PDM competed for a TRW TVC project, CB&I’s final price to TRW was within 5 to 10% of the original budgetary price. (Neary, Tr. 1440-410). A ROM (rough order of magnitude) value may have a wider variance than a budget price. According to one customer, a ROM value is “a set point with a variable, usually 10-20 percent, depending on the magnitude for pricing.” ([ ], *in camera*). Mr. Fan has analyzed LIN/LOX prices over many years and has found that final prices are generally very close to initial estimates. (Fan, Tr. 952-953, 986-987). Mr. Hall provided to Mr. Frey “enough detail for us to get it within several million.” (Hall, Tr. 1866).

Finally, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.600 Because years may elapse between the time budget prices are submitted and the time a firm final bid is requested, material costs, labor rates, and other costs are likely to change. (Scorsone, Tr. 5004). Accordingly, budgetary estimates typically have an accuracy of plus or minus 40%. (Hall, Tr. 1863-64).

#### Response to RFOF 3.600

Budget prices are often very close to firm bid prices. PDM’s firm fixed bid to Williams for the Cove Point LNG tank in March 2000 was exactly equal to PDM’s budget price line for the 750,000 barrel tank. (CCFF 781; CX 1058 at PDM - HOU017465, (bid \$21,450,000); RX 157 at [ ] 02 004, *in camera* ([ ])). Mr. Marine proposed that CB&I counter PDM’s bid to Williams by dropping CB&I’s price to [ ], a price exactly equal to CB&I’s budget price line for that size tank. (CCFF 895; CX 226 at CBI-PL 044979, *in camera* ([ ])); RX 157 at [ ] 02 004, *in camera* ([ ])).

Budget prices may be +/- 10% of the final price. Stetzler, Tr. 6352 (“Budgetary to me means plus or minus 10 percent type of a bid”). When CB&I and PDM competed for a TRW TVC project, CB&I’s final price to TRW was within 5 to 10% of the original budgetary price. (Neary, Tr. 1440-410). A ROM (rough order of magnitude) value may have a wider variance than a budget price. According to one customer, a ROM value is “a set point with a variable, usually 10-20 percent, depending on the magnitude for pricing.” ([ ], *in camera*). Mr. Fan has analyzed LIN/LOX prices over many years and has found that final prices are generally very close to initial estimates. (Fan, Tr. 952-953, 986-987).

Further, this finding is unreliable because Mr. Scorsone’s testimony is self-serving and uncorroborated by any documents produced in the ordinary course of business. Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.601 A rough order of magnitude ("ROM") price is "more imprecise than a budget price or a budget estimate." (Scorsone, Tr. 4999). A ROM price is "a very rough estimate as to what that type of project could cost for that customer. It's a very high-level first-cut-type price." (Scorsone, Tr. 4999). When CB&I develops a ROM or budget price, it does not: (1) do an actual tank design; (2) call material suppliers for quotes; (3) call subcontractors for quotes; (4) estimate engineering hours for the project; (5) calibrate the hours that will be required for field erection; or (6) consider current fabrication rates. (Scorsone, Tr. 4999-5000).

#### Response to RFOF 3.601

Mr. Scorsone's self-serving testimony is in fact contradicted by the record. Contrary to RFOF 3.601, estimators frequently use an actual tank design to prepare a budget price estimate. Mr. Fan explained: "Many time the vendor I understand select the tank if they have something built already, they want to use the existing design to save money, and that will dictate the shape of the tank." (Fan, Tr. 1078). Mr. Scorsone confirmed that CB&I uses "representative designs for similar size volumes to help develop a budget price." (Scorsone, Tr. 4999).

Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.602 CB&I does not know what the construction schedule will be when it submits a ROM or budget estimate. (Scorsone, Tr. 5000). CB&I cannot determine what its equipment and tool costs, or its mobilization and demobilization costs are at the time it submits a budgetary estimate or a ROM price. (Scorsone, Tr. 5000-01).

#### Response to RFOF 3.602

Mr. Scorsone's testimony is self-serving and uncorroborated by any documents produced in the ordinary course of business. Respondents' finding is misleading because it implies that CB&I has no basis to estimate the number of manhours it will take to complete a project. For the purpose of estimating bids, CB&I has compiled information on the average number of manhours for each step, and the expected costs for each step. (See CX 1294 (provides pre-contract manhours, reduction factors for multiple tanks, for use by CB&I's estimating staff for projects to be executed by CB&I Industrial); CX 1302 (CB&I Industrial's 2002 estimating rates); CX 1556 (CB&I's estimating guide for its standard products provides estimated manhours for each step in the construction process)).

For the reasons discussed in CCRFF 7.1 to 7.38, this finding is also contradicted by the evidence and misleading.

3.603 CB&I does not know what time of year a project will be constructed in when it submits a budgetary estimate or a ROM price. (Scorsone, Tr. 5001). CB&I's labor productivity is impacted depending on the weather in which it constructs; this impact will affect CB&I's price. (Scorsone, Tr. 5001).

#### Response to RFOF 3.603

Mr. Scorsone's self-serving testimony is contradicted by the evidence. The time of year during which a tank is constructed has minimal impact on cost. In testimony relied on by Respondents, Mr. Fan observes that the time of year a tank would be constructed could impact price only "[t]o a small

degree.” (Fan, Tr. 1076). Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.604 CB&I often does not know the precise location for a project when it prepares a budgetary estimate or a ROM price. (Scorsone, Tr. 5001). This can impact the price of a project because CB&I cannot account for the movement of materials, accommodations for the field labor, storage, and access to roads. (Scorsone, Tr. 5001).

#### Response to RFOF 3.604

Mr. Scorsone’s testimony is self-serving and uncorroborated by any documents produced in the ordinary course of business. Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.605 CB&I does not know if it will use traveling labor or local labor for a project when it submits a budgetary estimate or ROM pricing. (Scorsone, Tr. 5002).

#### Response to RFOF 3.605

Mr. Scorsone’s self-serving testimony is contradicted by the evidence. CB&I generally uses its own traveling labor for tank projects. In testimony relied on by Respondents, Mr. Fan observes that the usual practice of CB&I and PDM is to use their own crews. (Fan, Tr. 1076 (“I understand that usually is the practice of PDM and CB&I, is they use their own crew; therefore, I believe the location has an impact but minimum”)). Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.606 CB&I does not send line items of budget estimates to the customer; CB&I only sends a letter with a price to the customer. (Scorsone, Tr. 5002). CB&I’s internal budget documentation does not contain a line item for contingency in a budget estimate or ROM pricing. (Scorsone, Tr. 5002-03). When there are unknowns in a given project, CB&I accounts for these contingencies in the margin line calculation of a budget estimate or ROM pricing. (Scorsone, Tr. 5003). 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 a firm, final bid is submitted. (Scorsone, Tr. 5003).

#### Response to RFOF 3.606

Mr. Scorsone testified that CB&I assumes “competition at the time it provides a ROM or a budget price.” (Scorsone, Tr. 5002). CB&I sets its margin level on jobs based on its assessment of the competition it faces. (Harris, Tr. 7618). CB&I determines how much to “fatten” up its price based on its competitive strategy on each project. (CX 1528 at CBI 071381 (“our strategy would be to not ‘fatten’ up the budget but to make it ‘close’ instead. They would probably like to have the number for ‘calibration’ purposes and we might be able to make things more difficult for our ‘friends’.”)).

Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

3.607 Customers do not purchase LNG tanks based on a budget price. (Carling, Tr. 4472-73).



Response to RFOF 3.607

This finding is contradicted by the evidence. [

] ([ ], *in camera*). CMS is one example of six occasions in which CB&I was selected as a sole-source LNG tank supplier based on the customers' review of budget prices. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [ ], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI 010191-HOU).

Frequently, Respondents negotiate a price with the customer through a sole-source contract. (Glenn, Tr. 4123). In a sole-source contract the price is negotiated following receipt of an initial price quote from the supplier. (Glenn, Tr. 4123; Neary, Tr. 1440). The initial price quote is frequently referred to as a "budget price." Budget prices are provided to customers for the relevant products to "meet their requirements that they have some sort of competition before they select someone to move forward with." (Glenn, Tr. 4126). In sole-source negotiations, budget prices are the most important round of prices because that is the only stage at which customers have an opportunity to compare competitors' prices.

Also, for the reasons discussed in CCRFF 7.1 to 7.38, this finding is contradicted by the evidence and misleading.

**G. ANTICOMPETITIVE EFFECTS HAVE OCCURRED IN THE LNG MARKET**

3.608 In 2002, CB&I submitted a "very coarse budgetary number" to Memphis Light Gas and Water ("MLGW") for a long range planning study that MLGW was conducting. (Scorsone, Tr. 5250). 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 MLGW in conducting a long-term planning exercise. (Hall, Tr. 1864-65; Scorsone, Tr. 5251). There was no actual work at stake in connection with this estimate, and was given to MLGW as a matter of courtesy -- to assist MLGW. (Hall, Tr. 1864-65; Scorsone, Tr. 5251). Budgetary estimates of this type typically have an accuracy of plus or minus 40%. (Hall, Tr. 1863-64).

Response to RFOF 3.608

Respondents' finding is misleading. The idea that CB&I's budget price to Memphis in 2002 was "coarse" is contradicted by the fact that the price provided to MLGW was [ ] (RX 732 at CBI 071501, *in camera*).

When the initial budgetary number was calculated by Mr. Frey, his superior, Mr. Smith (CBI's Vice President of Global LNG Sales) instructed Mr. Frey to increase the price to [

] higher than what Mr. Frey had originally prepared. (RX 732 at CBI 071502, *in camera*; CX 422 at CBI-E 009500, *in camera*; [ ], Tr. 5323, *in camera*). Mr. Smith explained that Mr. Frey's original estimate was [

] (RX 732 at CBI 071501, *in camera*) (emphasis supplied).

Respondents' claim that budgetary prices are imprecise is contradicted by, inter alia, the testimony of John Kelly of CMS, who [ ] ([ ], J. Kelly), *in camera*). There is substantial evidence that business decisions are regularly made on the basis of budgetary numbers. See CCRFF 7.106.

Mr. Scorsone's assessment of CB&I's price as a "very coarse budgetary number" is suspect because it is inherently self-serving.

3.609 The budget price CB&I provided "was not a buying offer." (Scorsone, Tr. 5250). Rather, the estimate that CB&I provided to MLGW was a SWAG -- a "scientific wild assed guess." (Hall, Tr. 1865-66). MLGW did not provide CB&I nearly enough information to receive an accurate price on a proposed LNG tank. In fact, Mr. Hall of MLGW agreed that "volumes more" information would be required for this purpose. (Hall, Tr. 1865-66). Because MLGW was asking CB&I to "extrapolate" into the future, and because it did not provide detailed information (such as drawings) he was not expecting a number of more than plus or minus 40% accuracy. (Hall, Tr. 1866-68).

### Response to RFOF 3.609

As shown in Complaint Counsel's Response to RFOF 7.1-7.26, there are numerous reasons why budgetary numbers are reliable ways for a customer to gauge pricing in the industry. Moreover, as stated in CCRFF 3.608, CB&I based its price to MLGW on "actuals" [ ] (RX 732 at CBI 071501, *in camera*). See CCRFF 3.608.

As explained in CCRFF 7.7, Mr. Hall expected CB&I's budgetary price to be accurate within a range of pricing. He testified "I am not sure that I know the exact percentages. I know approximately where they lie. I think a good budgetary formal estimate should run somewhere around 20 percent. An order of magnitude, it seems like to me I've seen it defined as 30, but I don't know, 25 maybe." (Hall, Tr. 1867-68). Mr. Scorsone confirmed that a budget price is more precise than a rough order of magnitude price. (Scorsone, Tr. 4999).

Mr. Hall provided to Mr. Frey "enough detail for us to get it within several million" (Hall, Tr. 1866). Mr. Hall asked Mr. Frey "to give me prices as he felt like he would quote them." (Hall, Tr. 1868-69). Mr. Hall explained that the SWAG uncertainty of +/-40% arose when Mr. Hall took the price quoted by CB&I and extrapolated it into the future for Memphis Light Gas & Water's internal planning purposes: "Well, essentially what we do is take those figures, we're going to apply what we think inflation is going to do and all this kind of stuff to try to come up with a number into the future. **We asked him for prices based on today**, so we had to extrapolate those numbers. There is so much doubt in the process that your input, even though you may have extremely accurate input, doesn't necessarily mean you are going to have an accurate output for that kind of study." (Hall, Tr. 1867 (emphasis supplied)).

3.610 MLGW expected the SWAG from CB&I to be higher than it otherwise might be for two reasons: First, MLGW assumed that CB&I would assume that MLGW was planning on making its budget based on the numbers. (Hall, Tr. 1869). Second, 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). Moreover, MLGW is at least five or six years away from entering into such a process. (Hall, Tr. 1869-70).

### Response to RFOF 3.610

Complaint Counsel agrees that without “competitive conditions,” a customer in the LNG industry will pay a higher price.

Complaint Counsel also agrees with Respondents’ finding that customers develop “budgets” based on” budget pricing. This was the case for John Kelly of CMS, [ ] ( [ ] ), *in camera*).

As explained in CCRFF 7.1-7.26, projects can be awarded (or lost completely) based upon budget estimates. Customers, such as Mr. Hall, use the figures submitted by CB&I to plan budgets for projects. Budget estimates are not meaningless. On the contrary, budget estimates are relied upon by industry participants.

Mr. Cutts explained that awards can be made based on budget estimates. When asked whether he considers budget pricing to be a bid, Mr. Cutts responded: “Yes and no. . . . it’s very difficult to define whether that’s really just a budget or a bid. Could it be awarded on that bid? Yes. Therefore, it’s more than just a budget.” (JX 23 at 27-28 (Cutts Tr.)).

Budget estimates are taken seriously by CB&I and by its customers. Atlanta Gas Light Company selected PDM over CB&I, in 1998, based on budget price bids submitted by CB&I and PDM. (CX 161 at CBI-PL006113-114).

CB&I provided budget estimates to CMS for the Lake Charles LNG project. ([ ] *in camera*). CMS agreed to CB&I’s LNG tank price [ ] (J. Kelly, Tr. 6260; [ ] *in camera*) [ ] ([ ] *in camera*)

[ ] selected CB&I as the sole source supplier for its LNG tanks in the United States after examining budget prices submitted by CB&I, PDM and Whessoe. (RX 157 at [ ] 02 001-004, *in camera*; Scorsone, Tr. 4995). [ ] variously referred to these budget prices as price quotations or “bids”. (RX 157 at [ ] 02 002, 4 *in camera*).

BOC selected ATV for its Oregon LIN/LOX tank after receiving a budget price from CB&I. (Harris, Tr. 7632, 7598-7600; Scorsone, Tr. 5017). CB&I’s budget price to BOC was CB&I’s last and only chance to get the Oregon LIN/LOX job. (Harris, Tr. 7600).

In putting together a proposal for an LNG peak shaving facility, Praxair decided to work with

another contractor to develop the project based on CB&I's budget price being substantially higher than the other supplier's price. (Harris, Tr. 7634). Dr. Harris concluded that Praxair compared CB&I's budget price to another supplier's firm bid. (Harris, Tr. 7635-36).

Budget estimates are not merely "SWAG[s]," as Respondents claim. The figure submitted by CB&I to MLGW and other customers reflects its perceived market power and position in the competitive landscape.

3.611 The budgetary price CB&I submitted to MLGW cannot be likened to a firm, fixed-price bid because: (1) CB&I does not know what the price of materials will be in five to seven years; (2) it does not know what engineering rates will be in five to seven years; (3) it does not know what fabrication rates will be in five to seven years; (4) it does not know if material will be imported from Europe in five to seven years; and (5) it does not know what the field engineering rates will be in five to seven years. (Scorsone, Tr. 5251).

### Response to RFOF 3.611

Respondents' sole support for this finding is the self-serving testimony of Mr. Scorsone and should be disregarded as unreliable. There are no documents or testimony to confirm what Mr. Scorsone "claims" CB&I's business practices are. There is no documents indicating that budget prices are prepared to account for escalations in costs and rates; budget prices may simply be prepared using CB&I's most current information regarding costs and rates for projects today.

As noted in CCRFF 7.1-7.26, CB&I's budget estimates are prepared by experienced estimators who base pricing submitted to customers on their knowledge of the industry.

3.612 CB&I will not seek a 30% margin if it submits a fixed, firm offer to sell the tank to Memphis. (Scorsone, Tr. 5251). The 30% margin included in the budget estimate contained a number of contingencies. (Scorsone, Tr. 5252).

### Response to RFOF 3.612

Mr. Scorsone's self-serving post-merger rationalization is belied by Mr. Frey's e-mail to Mr. Smith, in which Mr. Frey (CBI's Vice President of Global LNG Sales) noted the quote to Memphis would reflect about a [ ] margin after Total Internal Cost. (RX 732 at CBI 071501, *in camera*).

When questioned about the margin in his deposition, Mr. Frey could only account for Mr. Scorsone's "contingencies" with 15% of the overall margin: "after total internal cost ... [the margin represented] about 15 percent of what you want to call margin on this other estimate and about [15 percent of cushion.]." (CX 417 at 71 (Frey, Dep.)). Even if CB&I's budget price only included a [15 percent margin], the increase in margin post-acquisition would still be [ ] than what CB&I earned on the Memphis project in 1994. (CX 906 at CBI 031074-HOU, *in camera*).

CB&I has imposed large price increases on multiple LNG projects since the acquisition. These price increases are not always detectable by looking at margin figures. As shown in CCF 944-954, CB&I has used PDM's "fat" and "excessive" cost estimates on Cove Point as a benchmark to

implement higher prices and margins on projects in Fairbanks, Alaska (CCFF 955-967), Lake Charles, Louisiana (CCRFF 3.473-3.475), and Waterbury, Connecticut (CCFF 1007-1026). Indeed, CB&I has raised prices and padded costs since the merger so that it can earn margins ranging from [ ] to above [ ], whereas before the merger, CB&I's margins on LNG projects averaged as little as [ ]. CCFF 1027-1052.

Mr. Scorsone's promises not to "seek a 30% margin" in the future would be more credible if PDM existed to restrain CB&I.

3.613 When MLGW purchased a field-erected LNG tank in 1994, it did so only after receiving firm, fixed-price bids. (Hall, Tr. 1861-63). Mr. Hall of MLGW spoke with the FTC in September of 2002. (Hall, Tr. 1873). During that conversation, Hall was asked whether he had made any effort to compare the SWAG that he received to the firm, fixed-price bid received by MLGW in 1994. Hall told them that he had made no such comparison. (Hall, Tr. 1873-74). Further, to Hall's recollection, no one from the FTC asked him whether he believed it was proper to compare these numbers. (Hall, Tr. 1874).

### Response to RFOF 3.613

Regardless of whether Mr. Hall felt the need to compare the pre-acquisition with the post-acquisition pricing, the evidence now available makes such a comparison possible. When CB&I was competing with PDM, its firm fixed price on Memphis included an [ ] profit margin. (Hall, Tr. 1876; CCFF 937, 942). Post-acquisition, CB&I quoted Memphis an LNG facility that included a [ ] margin. (RX 732 at CBI 071501, *in camera*).

The numbers speak for themselves.

3.615 A budget price for a project in Alaska will be "very rough" unless the customer provides very specific information. (Scorsone, Tr. 5006). Fairbanks, Alaska is in a very remote location, and is a very difficult area to work. (Scorsone, Tr. 5004-05). It is also more expensive to work in Alaska than in the lower 48 contingent states. (Scorsone, Tr. 5005). For example, it is difficult to ship construction materials to Alaska. (Scorsone, Tr. 5005). Additionally, due to the climate CB&I will encounter safety issues and productivity problems working in Alaska. (Scorsone, Tr. 5006).

3.616 Therefore, there are more unknowns when CB&I submits budget estimates or ROM prices for projects in Alaska than there are for projects in the United States. (Scorsone, Tr. 5006).

### Response to RFOF 3.615 and 3.616

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents' assertions are also incomplete and misleading.

Contrary to Mr. Scorsone's assertion, the internal CB&I estimate for the project shows that Fairbanks Natural Gas did submit specific information to CB&I relating to the project. (RX 407 at CB&I 066666). Moreover, CB&I's internal bid worksheet shows that CB&I factored in the difficult working conditions in Alaska by **adding 30%** to the price to account for the location. (RX 407 at CBI 066666). This is on top of the [ ] margin that CB&I anticipated earning on the project. (RX 407 at

CBI 066666).

The internal CB&I worksheet shows the price of the one-million gallon tank for the Fairbanks project was \$3.6 million (RX 407 at CB&I 066666). In 1996, PDM submitted an estimate to BC Gas for a similarly remote area and for a similarly sized LNG tank of about \$2.2 million. (Simpson, Tr. 3108-3110; CX 791 at PDM-HOU 2015258). The internal CB&I worksheet shows the price of the one-million gallon tank to Fairbanks was about **50% higher** than the price submitted in 1996 by PDM to BC Gas for a similarly sized LNG tank. (Simpson, Tr. 3108-3110; CX 791 at PDM-HOU 2015258; RX 407 at CB&I 066666).

## 1. The Cove Point Project

3.618 Prior to the acquisition, PDM submitted a bid for the construction of a fourth LNG tank at the Cove Point facility. (Scorsone, Tr. 4962-63). Columbia was the owner of the Cove Point facility at the time of the bid. (Scorsone, Tr. 4962-63). The Cove Point facility was subsequently sold to Williams during the bidding process. (Scorsone, Tr. 4963).

### Response to RFOF 3.618

Respondents' finding is misleading because it fails to note that competition between CB&I and PDM in the first phase of bidding for the Cove Point tank brought the price down [ ]. (CX 226 at CBI-PL044978; CCF 779-788). CB&I's initial price was so close to PDM's that the customer thought that it seemed as if the two firms "were looking over each other's shoulder." (CX 226 at CBI-PL044978 (PDM originally bid approximately [ ])); CX 1058 at PDM-HOU017465 (PDM reduced its bid to [ ]); RX 127 at CBI-H008204 (CBI bid [ ])).

3.619 The size of the Cove Point tank was 750,000 barrels when PDM first submitted a bid for the project. (Scorsone, Tr. 4963-64). Subsequently, Williams modified the project's specifications, increasing the tank size from 750,000 barrels to 850,000 barrels. (Scorsone, Tr. 4964). As a result, PDM needed to re-design, and re-price, the tank to account for the specification change. (Scorsone, Tr. 4964). The re-design took approximately 200 hours, and the follow-up estimating for the project took between 100 and 200 hours. (Scorsone, Tr. 4964).

### Response to RFOF 3.619

RFOF 3.619 is incomplete due to Respondents' omission of one important point: Respondents neglect to mention that while PDM re-evaluated its bid for the 850,000 barrel tank, the letter of intent to merge was signed, eliminating CB&I and PDM's incentive to compete against each other.

3.620 PDM ultimately submitted a new price for the 850,000 barrel tank. (Scorsone, Tr. 4965). At the time PDM submitted a new price, Mr. Scorsone believed that CB&I was competing against PDM for this project. (Scorsone, Tr. 4965). Mr. Scorsone subsequently discovered that CB&I did not submit a new price for the 850,000 barrel tank. (Scorsone, Tr. 4965).

### Response to RFOF 3.620

Mr. Scorsone's self-serving testimony is uncorroborated. Moreover, Respondents present an incomplete picture of the price increases for the Cove Point tank by not including the amounts of the price increases, and by not revealing the fact that PDM's new prices were not submitted until **after the signing of the letter of intent in August 2000**. CCRFF 3.619. In fact, at this point in the bidding process, **CB&I dropped out of the bidding process completely**, leaving PDM with no competition. The new prices submitted by PDM on September 8, 2000 were [ ] for the 850,000 barrel tank and [ ] for the 750,000 barrel tank. (CX 1388 at CBI/PDM-H 4015363). The new price for the 750,000 barrel tank represented a price increase of anywhere from [ ] to [ ] from previous prices submitted by both

CB&I and PDM. CCFF 793.

3.621 PDM prepared a "brand-new estimate" for the 850,000 barrel tank because the "tank geometry changed". (Scorsone, Tr. 4966).

#### Response to RFOF 3.621

Mr. Scorsone's self-serving testimony is uncorroborated. There is no documentation of any "tank geometry" changes.

Moreover, Respondents' finding is misleading because it implies that the tank geometry changed again after PDM submitted its new pricing on September 8, 2000. The specifications for the Cove Point tank only changed once, from 750,000 barrels to 850,000 barrels, and the size change was accounted for in the [ ] difference between the September 8, 2000 prices for the 750,000 barrel tank and the 850,000 barrel tank. (CX 1388 at CBI/PDM-H 4015363 (The new prices submitted by PDM on September 8, 2000 were [ ] for the 850,000 barrel tank and [ ] for the 750,000 barrel tank.)).

3.622 Before tank estimates were submitted to a customer, PDM typically held bid review meetings to analyze "on a line-by-line basis" each of the components, risks, and scope of the bid. (Scorsone, Tr. 4966-67). PDM's department managers, vice presidents, sales personnel, estimators, and project managers attended bid review meetings. (Scorsone, Tr. 4967). Particular line items of an estimate are sometimes increased as a result of discussions at a bid review meeting. (Scorsone, Tr. 4967).

#### Response to RFOF 3.622

Respondents' finding is misleading. It might have been common practice for PDM to hold its bid review meetings "before tank estimates were submitted to a customer." In the case of the Cove Point tank bid review meeting, however, PDM had already submitted its renewed tank estimate to the customer in September 2000, long before PDM executives met in November 2000 to discuss new ways to pad the costs of the bid. CCFF 792-798.

3.623 PDM held a bid review meeting to discuss the re-estimated cost of the 850,000 barrel tank for the Cove Point facility. (Scorsone, Tr. 4967-68). The participants at the meeting included Luke Scorsone, acting as the chair of the meeting; Steve Owens, the vice president of operations for PDM; Jeff Steimer, the sales representative for the project; Mike Wilson, manager of PDM's estimating group; Kurt Schneider, a manager of the engineering group; and Ron Blum, who was the head of sales. (Scorsone, Tr. 4968).

#### Response to RFOF 3.623

Respondents finding is misleading. Respondents imply that PDM executives met to review the price based upon a new tank size change. There is no documentation to suggest that PDM's meeting on November 1, 2000 had anything to do with the tank size change. Moreover, PDM had already accounted for the increased tank size in its September 8, 2000 bid to Williams. (CX 1388 at CBI/PDM-H 4015363).

3.624 A consensus was reached at the bid review meeting to set the price that was submitted to Williams. (Scorsone, Tr. 4968-69). The members of the group, however, were not in complete agreement. (Scorsone, Tr. 4969). A complete agreement is "rarely" reached among the participants at a bid review meeting. (Scorsone, Tr. 4969).

#### Response to RFOF 3.624

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents' finding is incomplete. Respondents' fail to note that by the end of the bid review meeting, **PDM had increased its price to Williams twice more for the 850,000 barrel tank**. The price for the tank as revisited by the bid review team on November 1, 2000 was [ ], a price almost [ ] **more** than the September 8, 2000 price for the 850,000 barrel tank. After the meeting, the team had reached a consensus to **increase the price another** [ ] to [ ].

3.626 CX-1160 contains a series of prices in two columns labeled "as reviewed" and "as submitted". (Scorsone, Tr. 4971). The "as reviewed" column represented the pricing that was submitted at the beginning of the bid review meeting. (Scorsone, Tr. 4971). The "as submitted" column reflects the actual price, on a summary level, that was submitted to Williams for the 850,000 barrel tank. (Scorsone, Tr. 4971).

#### Response to RFOF 3.626

Respondents' finding is misleading. PDM submitted its first price to Williams for the 850,000 barrel tank in September 2000. (CX 1388 at CBI/PDM-H 4015363). The price reflected in the "as submitted" column of CX 1160 reflects the second price submitted to Williams, one of the many price increases imposed by PDM after the letter of intent was signed and CB&I dropped out of contention for the project. (CX 1160, *in camera*).

3.628 The materials estimate was revised by the bid review meeting. (Scorsone, Tr. 4973). While Mr. Steimer did not agree with the revised material estimate, he did not hold a majority view. (Scorsone, Tr. 4973). 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). Mr. Steimer does not have any experience in estimating the amount of materials for an LNG tank, and does not have the basis of knowledge to hold a valid opinion on this subject. (Scorsone, Tr. 4974).

#### Response to RFOF 3.628

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called Mr. Steimer to corroborate Mr. Scorsone's testimony, but they chose not to and instead seek to diminish his stature at the company.

Respondents understate Jeff Steimer's former position at PDM. Mr. Steimer worked at PDM for 25 years prior to the Cove Point bid review meeting. (CX 849 at 10 (Steimer, IHT)). He is not, as Mr. Scorsone refers to him, a PDM "salesperson." He was PDM's **Vice President of LNG/Aerospace Sales**, and entrusted with taking a leading role in representing the company in front of customers. CCF 805 (emphasis supplied). Mr. Steimer had extensive experience in dealing with

PDM's bid review meetings because his job was to "manag[e] the worldwide sales of LNG, LPG, and aerospace facilities" (CX 849 at 9 (Steimer, IHT)).

3.629 Mr. Scorsone also did not agree with Mr. Steimer's comments made in connection with the project's revised engineering estimates. (Scorsone, Tr. 4974). The engineering estimate was increased for this project because PDM's "engineering group was struggling" and Mr. Scorsone was "uncomfortable with the level of engineering effort . . . ." (Scorsone, Tr. 4975).

#### Response to RFOF 3.629

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called Mr. Steimer to corroborate Mr. Scorsone's testimony, but they chose not to call him.

Respondents' finding is false. Respondents' uncorroborated assertion that PDM's engineering group was struggling makes no sense because CB&I would not have wanted to acquire PDM if it had a "struggling" engineering group. Furthermore, PDM's engineering group was adequate earlier that same year, when PDM was "sharpening its pencil" to reduce its price to compete with CB&I. Mr. Steimer would not have said that [**"the engineering estimate was fat already"**] if the engineering group was "struggling." As the point man on the Cove Point project, Mr. Steimer would be in a better position to assess the excess behind the line-items.

3.630 Neither Mr. Scorsone nor the bid review group agreed with Mr. Steimer's comments with respect to the revised estimates for fabrication, field erection, subcontracting, and project management. (Scorsone, Tr. 4976-80). Mr. Steimer has never been involved in the engineering, fabrication, field erection, or estimating of an LNG tank. (Scorsone, Tr. 4982). Mr. Scorsone and PDM's management team believed it was "prudent" to increase the fabrication cost. (Scorsone, Tr. 4976). Further, all cost increases were estimated because there was "a very uncertain date for this project . . . ." (Scorsone, Tr. 4978).

#### Response to RFOF 3.630

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called Mr. Steimer to corroborate Mr. Scorsone's testimony, but they chose not to call him.

Respondents' assertion is unsupported by the record. No emails between the bid review team and Mr. Steimer exist to corroborate Mr. Scorsone's testimony regarding any disagreement or further explanation from members of the bid review team. Furthermore, as explained in CCRFF 3.628, Mr. Steimer did not achieve the position of Vice President of LNG/Aerospace Sales at PDM through inexperience and lack of knowledge.

3.631 Neither Mr. Scorsone nor the bid review group agreed with Mr. Steimer's comment regarding the final bid submitted to Williams. (Scorsone, Tr. 4981-82). 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). At the time PDM submitted the price for the 850,000 barrel tank to Williams, PDM perceived that it was competing against CB&I for the project. (Scorsone, Tr. 4983)

#### Response to RFOF 3.631

Mr. Scorsone’s self-serving testimony is uncorroborated. Respondents could have easily called Mr. Steimer to corroborate Mr. Scorsone’s testimony, but they chose not to call him. PDM would not have imposed multiple price increases of millions of dollars and risked losing the project if it [“perceived that it was competing against CB&I for the project.”]

3.632 PDM entered into sole-source negotiations with, and was granted a letter of intent by, Williams to construct the expansion of the Cove Point facility. (Scorsone, Tr. 4963). The letter of intent was ultimately transferred into a negotiated contract after PDM was acquired by CB&I in February 2001. (Scorsone, Tr. 4963).

Response to RFOF 3.632

Mr. Scorsone’s self-serving testimony is uncorroborated. Respondents’ finding is misleading because it implies that there was never a competitive bidding situation for the Cove Point project. As CB&I participated in the competitive bidding for the 750,000 barrel tank and then declined to bid for the 850,000 barrel tank, PDM, the only other viable domestic supplier, was the sole-source provider by default. (Scorsone, Tr. 4965; CX 226; CX 863; CCRFF 3.618).

3.633 [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

Response to RFOF 3.633

Complaint Counsel agrees that the price for Cove Point has risen from [ ] to [ ] since [ ]

The balance of Respondents’ finding is incomplete and misleading. Mr. Scorsone’s self-serving testimony is uncorroborated. There is no documentation or testimony supporting Mr. Scorsone’s assertion that the price increases for the Cove Point tank were a result of [ ] Mr. Scorsone is the sole source of evidence to explain the price increases. Moreover, Mr. Scorsone testified [ ] ([ ]), *in camera*).

3.634 [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

Response to RFOF 3.634

Respondents drastically understate CB&I’s profit margin for the Cove Point tank. As Mr. Scorsone testified, CB&I will earn [ ] as profit, not including SG&A, and [ million], including SG&A, on a [ ] project. ([ ]). Dividing the [ ] profit by the [ ] total price, the Tribunal would find that CB&I’s



margin of 10% at \$25,191,660. (Scorsone, Tr. 4985). PDM's initial price for the Cove Point project was \$28.6 million. (Scorsone, Tr. 4985).

### Response to RFOF 3.637

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents' finding also misstates the record. "PDM's initial price" to Williams was not [ ]; two months earlier, PDM had quoted a price of [ ]. (CX 1388 at CBI/PDM-H 4015363; CX 1160 at CBI/PDM-H 4007485, *in camera*; [ ], *in camera*). Today, the price is up to [ ].

3.638 CB&I's estimator did not have any experience estimating PDM's tank designs. (Scorsone, Tr. 4987). Only A "few hours" of work was put into this re-estimate. (Scorsone, Tr. 4985). Further, there are various inaccuracies contained in this re-estimate. (Scorsone, Tr. 4985-86).

### Response to RFOF 3.638

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called the purported "inexperienced" estimator to corroborate Mr. Scorsone's version of the story, but they did not call him. Mr. Scorsone is Respondents' sole source of evidence for this story.

It is impossible to know when Mr. Scorsone is telling "a funny joke" or being serious. (Scorsone, Tr. 5111 (Sharing competitively sensitive information regarding the Spectrum Astro project was "a funny joke" to Mr. Scorsone)).

3.639 First, the estimate did not properly account for the erection method that PDM used for the tank roof. PDM used "a complete[ly] different method" than the one used by CB&I. (Scorsone, Tr. 4986). "PDM and CB&I had totally different designs for the roof structure." (Scorsone, Tr. 4987).

### Response to RFOF 3.639

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called the purported "inexperienced" estimator to corroborate Mr. Scorsone's version of the story, but they did not call him. Mr. Scorsone is Respondents' sole source of evidence for this story.

3.640 Second, the estimator did not add in certain subcontractor costs, and failed to add in man-hours associated with the work. (Scorsone, Tr. 4986). If these two errors were taken into account, the difference in the two costs would be approximately \$500,000. (Scorsone, Tr. 4986).

### Response to RFOF 3.640

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called the purported "inexperienced" estimator to corroborate Mr. Scorsone's version of the story, but they did not call him. Mr. Scorsone is Respondents' sole source of evidence for this story.

3.641 It is not appropriate to use the re-estimate contained in CX-906 as an accurate basis for performing budget estimates when customers are looking for pricing on comparable projects. (Scorsone, Tr. 4987). Because the price of an LNG tank depends on the size, location, the foundation, labor rates, labor efficiencies, material costs, and owner specification, it is difficult to compare prices of LNG tanks that sit in different locations. (Eyermaun, Tr. 7071-72).

### Response to RFOF 3.641

Mr. Scorsone's self-serving testimony is uncorroborated. Respondents could have easily called the purported "inexperienced" estimator to corroborate Mr. Scorsone's version of the story, but they did not call him. Mr. Scorsone is Respondents' sole source of evidence for this story.

Moreover, Respondents' finding is simply wrong because CB&I's estimate was for Cove Point, the exact same location as PDM's inflated bid quote.

## **H. COMPLAINT COUNSEL'S WITNESSES ARE HIGHLY KNOWLEDGEABLE ABOUT COMPETITION IN THE LNG MARKET**

### **1. Eckhard Blaumueller**

3.642 During Mr. Blaumueller's thirty-six year and four month career at People's Gas, Mr. Blaumueller was personally involved with the construction of only one LNG facility in 1973. (Blaumueller, Tr. 325). That one facility, in Champaign, Illinois was built more than 30 years ago before the industry "switched over to stainless steel." (Blaumueller, Tr. 286). The inner tank of the Champaign LNG tank was made of aluminum not 9% nickel steel. (Blaumueller, Tr. 286). CB&I gave People's Gas a good price for the 1973 Champaign facility. (Blaumueller, Tr. 288).

### Response to RFOF 3.642

Respondents' assertion that Mr. Blaumueller was only involved in the construction of one LNG facility is incomplete and misleading. In his final position prior to his retirement on December 31, 2001, Mr. Blaumueller was director of pipeline and peaking services for the Peoples Energy Resource Corporation, a subsidiary which constructs new facilities and improves the utilization of existing facilities for Peoples Gas, Light & Coke Company. (Blaumueller, Tr. 279-80). Mr. Blaumueller was personally involved in a People's Gas endeavor to construct a LNG storage facility designed to separate refinery gas into its constituents, including methane. (Blaumueller, Tr. 281). The facility was to be located near Joliet, Illinois. (Blaumueller, Tr. 290). Mr. Blaumueller worked on the project from 1996-2001 (Blaumueller, Tr. 283). Mr. Blaumueller was responsible for the overall design and implementation of the Joliet facility. (Blaumueller, Tr. 283) The facility was estimated to cost around \$150 million (Blaumueller, Tr. 292). Mr. Blaumueller received preliminary pricing from both CB&I and PDM relating to the Joliet project. (Blaumueller, Tr. 289).

3.643 Mr. Blaumueller has been retired since December 1, 2001. (Blaumueller, Tr. 279). Since his retirement, Mr. Blaumueller has not done any research regarding the LNG tank market in the United States. (Blaumueller, Tr. 329). Mr. Blaumueller has not done any consulting in the LNG industry since his retirement either. (Blaumueller, Tr. 329).

### Response to RFOF 3.643

Respondents' finding is incorrect. Since his retirement, Mr. Blaumueller has engaged in some consulting work and one of his clients, the Citgo Refinery, is in fact one of the companies that would have supplied refinery gas to the Joliet LNG facility had it been constructed. (Blaumueller, Tr. 329).

Respondents' proposed finding is misleading because it implies that Mr. Blaumueller has no knowledge of the post-acquisition LNG tank market. Mr. Blaumueller, having over 30 years of experience at Peoples Gas, was able to observe the dynamics in the LNG tank market before and after the merger by his involvement in the Champaign LNG project in 1973 and in the Joliet LNG project, which remains pending. (Blaumueller, Tr. 289). Mr. Blaumueller was knowledgeable about the state of competition in the U.S. LNG market up until his retirement in Dec. 2001. (CCRFF 3.642; Blaumueller, Tr. 314-15).

3.644 Mr. Blaumueller lacks knowledge about the current state of competition in the United States LNG market. Mr. Blaumueller is not familiar with any foreign tank suppliers. (Blaumueller, Tr. 321). Mr. Blaumueller has no direct knowledge of whether foreign companies have positioned themselves to now compete and construct LNG products in the United States. (Blaumueller, Tr. 332). Mr. Blaumueller has not seen any experience lists of any foreign tank vendors. (Blaumueller, Tr. 315). Mr. Blaumueller never had a reason to study foreign suppliers; he does not claim to be an expert about foreign vendors. (Blaumueller, Tr. 309). In fact, Mr. Blaumueller does not even have direct knowledge about whether Technigaz makes LNG tanks. (Blaumueller, Tr. 330).

### Response to RFOF 3.644

Respondents' assertion that Mr. Blaumueller lacks knowledge about the current state of competition in the United States LNG market is misleading. Mr. Blaumueller had significant involvement in the LNG industry during his 36 year career at Peoples' Gas and was knowledgeable about the state of competition in the U.S. LNG market until his retirement in December 2001. (CCRFF 3.642; Blaumueller, Tr. 314-15).

Respondents misstate Mr. Blaumueller's testimony. Mr. Blaumueller, correctly, testified that he knows of no foreign tank company that has built LNG tanks in the United States. This testimony is based on conversations with people in the industry and based on his study of industry literature. (Blaumueller, Tr. 312). As Mr. Blaumueller has over 36 years of experience in the LNG tank market, he is familiar with the historical trend of who has won bids. (Blaumueller, Tr. 291 ("historically, CB&I was the party who did most of the projects.")); and is familiar with PDM's capabilities. (Blaumueller, Tr. 291 ("... in recent history, they had been doing more projects than CB&I . . .")).

Respondents' assertion that Mr. Blaumueller is not familiar with any foreign tank supplier is false. Contrary to Respondent's assertions, Mr. Blaumueller had heard about the Technigaz-Zachry joint venture and the Daewoo-SB joint venture to supply LNG tanks in the U.S. (Blaumueller, Tr. 330-31). He was also aware that Skanska/Whessoe had been chosen as EPC contractor for Dynegey's planned LNG import terminal in Hackberry, Louisiana. (Blaumueller, Tr. 332).

Respondents' erroneous assertion that Mr. Blaumueller never had a reason to study foreign suppliers is misleading because it implies that there is enough competition in the LNG tank market. In his testimony, Mr. Blaumueller explained that Peoples' Gas would not have chosen foreign LNG tank suppliers regardless of what his research discovered "because they had no experience in the U.S." (Blaumueller, Tr. 310). Peoples Gas would not have chosen a foreign supplier for the Joliet project, because Peoples felt it imprudent to take the risk that a foreign supplier could complete the \$150 million Joliet facility in a timely manner with as much certainty as either CB&I or PDM. (Blaumueller, Tr. 292, 310).

3.645 Mr. Blaumueller lacks knowledge about current project in the United States LNG market. Mr. Blaumueller has not read about Yankee Gas' peak-shaving project in Connecticut. (Blaumueller, Tr. 332). Mr. Blaumueller has no knowledge of Williams Energy's, El Paso's, Cheniere Energy's, Calpine's, [ ], CMS's, or the former Enron's view of foreign tank constructors. (Blaumueller, Tr. 334-35).

### Response to RFOF 3.645

Respondents' assertion that Mr. Blaumueller lacks knowledge about current U.S. LNG projects is false. Mr. Blaumueller is aware of Dynegy's planned LNG import terminal in Hackberry, and is aware that Skanska/Whessoe had been chosen as EPC contractor for the project. (Blaumueller, Tr. 332). Mr. Blaumueller's company, Peoples Gas, Light & Coke Company, is the natural gas distribution utility for Chicago. (Blaumueller, Tr. 276). It is not in the LNG import terminal business; consequently, there would be no reason for Mr. Blaumueller to have any knowledge of "Williams Energy's, El Paso's, Cheniere Energy's, Calpine's, [ ], CMS's, or the former Enron's" view of foreign tank constructors. Peoples' Gas does, however, own an LNG peak shaving plant, which is a relevant product, and considered constructing a major LNG facility at Joliet. (Blaumueller, Tr. 277-78, 281). The Joliet facility was under active consideration until sometime in 2001 (Blaumueller, Tr. 283).

Moreover, Respondents' proposed finding erroneously implies that information on these projects is publicly available. As shown in Respondents' motions for *in camera* treatment of its documents, the information on some projects is not widely known. For example, Mr. Steve Knott, in a sworn declaration, stated that the [ ] project is not publicly known; information on the project is not even widely known within CB&I. (CX 393 at 5).

3.646 The Joliet methane facility is not an LNG facility. The term "methane" is not used interchangeably with the term "LNG". (Kistenmacher, Tr. 889). The source of the gas to be put in the Joliet methane facility would be local oil refineries. (Blaumueller, Tr. 328). The refinery gas was created as a by-product from making gasoline and other products. (Blaumueller, Tr. 328). The source of the refinery gas for the Joliet facility is different from the direct natural gas, from the Gulf, that would be pumped directly to the Champaign facility. (Blaumueller, Tr. 328). Thus, the Joliet facility was based on refinery gas, not natural gas. (Blaumueller, Tr. 327). Methane derived from cracking petroleum is not a natural gas. (Blaumueller, Tr. 282).

3.647 The physical composition of the methane gas to be stored in the Joliet methane facility is "very similar", but not identical, to LNG. (Blaumueller, Tr. 282). In the Joliet facility, the methane portion of the refinery gas would be stored "in the equivalent of LNG tanks". (Blaumueller, Tr. 281).

### Response to RFOF 3.646 and 3.647

Respondents' first assertion is false. Respondents' own documents show that the Joliet facility is an LNG facility. A CB&I strategic document states "CB&I's selling strategy for the People's Gas **LNG Storage Facility** should include . . ." (emphasis added) (CX 602 at CBI-H003002). A PDM strategic document states "The project includes the liquefaction/splitter section, two-600,000 barrel **LNG tanks . . .**" (emphasis added) (CX 112 at PDM-HOU011513). "There would be no difference at all" between the tanks for the Joliet facility and LNG tanks. (Blaumueller, Tr. 282, 289). The Joliet facility would store the methane gas in "the equivalent of LNG tanks that would operate very, very much like a peak shaving plant such as the facility that the People's Gas, Light & Coke Company owns near Champaign." (Blaumueller, Tr. 281).

Respondents' other assertions are misleading. "On the practical side, LNG is basically liquid methane." (Blaumueller, Tr. 306). The distinction that Respondents draw between LNG and methane

is artificial and meaningless. This is hardly surprising, since LNG typically has a very high proportion of methane, 96-98%. (Blaumueller, Tr. 282). The methane derived from the refinery gas “. . . would have a similiar methane content and would in many ways be very similar to liquified natural gas.” (Blaumueller, Tr. 282).

3.648 The pricing Mr. Blaumueller received from CB&I and PDM, in 1998 or 1999, were only preliminary estimates, not firm price quotes. (Blaumueller, Tr. 328-29).

#### Response to RFOF 3.648

Respondents’ proposed finding is misleading because it implies that Mr. Blaumueller is less familiar with pricing in the LNG tank market than other LNG witnesses in this matter. In fact, Mr. Blaumueller has as much, if not more experience with LNG tank prices than Respondents’ witnesses, Messrs. Carling, Eyermann, and Izzo. Mr. Carling is not currently working on LNG projects. (Carling, Tr. 4445-46). Mr. Izzo has received no pricing on his project for Calpine. (Izzo, Tr. 6522). Mr. Eyermann has received only “budgetary pricing unofficially” for his project for Cheniere (Eyermann, Tr. 7030).

3.649 Mr. Blaumueller believes it will take a foreign company "decades" to learn how to complete a successful regulatory filing. (Blaumueller, Tr. 311-12).

#### Response to RFOF 3.649

Respondents’ finding mischaracterizes Blaumueller’s testimony. Mr. Blaumueller testified that it would take decades for a company to amass experience comparable to that possessed by CB&I: “. . . since it is very time consuming and you’ve got to contact the right people with all the information that they require, presumably you need to structure it in a format that is acceptable, and you go through a learning curve over decades until you get to know all of that.” (Blaumueller, Tr. 311-12). A foreign tank vendor could make a successful regulatory filing, but there would be a heightened risk of delays. (Blaumueller, Tr. 310). The FERC approval process can add approximately twelve months to the process of building an LNG tank. (Blaumueller, Tr. 316).

## **2. Clay Hall**

3.650 Clay Hall is an engineer employed by Memphis Light, Water & Gas ("MLGW"). (Hall, Tr. 1771-73). MLGW is not a current participant in the market for field-erected LNG tanks. (Hall, Tr. 1832-33). MLGW has not received firm bids on an LNG tank since 1994, and does not plan to procure an LNG tank until at least 2006. (Hall, Tr. 1832-33)

#### Response to RFOF 3.650

Respondents’ assertions are misleading and erroneously dismiss Mr. Hall’s experience. Mr. Hall is Chief Project Engineer, LNG, for Memphis Light, Gas & Water Division in Memphis, Tennessee. (Hall, Tr. 1771). Mr. Hall’s current responsibilities include long-term LNG planning,

strategic gas supply planning and project management, and large capital project management involving LNG and other gas suppliers. (Hall, Tr. 1771). Among all the customer witnesses who testified at trial, Mr. Hall was one of only two witnesses that had direct, first-hand knowledge of pre-merger competition between Respondents and foreign LNG tank suppliers (the other witness being Mr. Price of Black & Veatch). MLGW plans to purchase an additional LNG tank for the Capleville peak shaver. (Hall, Tr. 1824-5). Thus, Mr. Hall is uniquely situated and qualified to compare pre-merger competition with post-merger competition.

Respondents' finding, implying that MLGW has no knowledge of post-merger prices, is wrong. In 2002, MLGW requested budgetary estimates from CB&I in furtherance of its plans to procure a LNG tank. (Hall, Tr. 1825). Contrary to Respondents' assertion that MLGW is "not a current participant in the market," Respondents' sent MLGW a budget quote (with a 30% margin anticipation).

Respondents' proposed finding is inaccurate because it implies that MLGW will not request pricing information for its LNG tank until 2006. Procurement of the tank would probably occur three years from now, in 2006, to allow the peak shaving plant to be completed by 2008. (Hall, Tr. 1833). However, as recognized by Respondents, LNG projects take a long time to plan, develop, and construct; it states that LNG projects are "large projects (in cost and schedule)" and "complex projects" that have a "long gestation period." (CX 238 at CBI-PL1001852). Consequently, MLGW is currently soliciting pricing information.

3.652 Mr. Hall has limited knowledge regarding the LNG market; he is not familiar with projects relating to import terminals. (Hall, Tr. 1854-56). While Mr. Hall is generally aware of the Yankee Gas peak-shaving project, he is not familiar with any of the bidders that have been working on that project. (Hall, Tr. 1856-57).

#### Response to RFOF 3.652

Respondents' assertion relating to Mr. Hall's knowledge of the U.S. LNG market is misleading. Mr. Hall was project manager for the Capleville LNG peak shaving plant, one of two such plants constructed in the U.S. since 1998. (Hall, Tr. 1777). Mr. Hall is not familiar with projects relating to import terminals because MLGW is a municipal utility and does not utilize import terminals. (Hall, Tr. 1855). MLGW does however utilize LNG peak shaving plants, a relevant product in this litigation, and in fact owns two of them. (Hall, Tr. 1772). Mr. Hall is familiar with the Yankee Gas LNG project, which involves an LNG peak shaving plant. (Hall, Tr. 1857). The LNG tanks for LNG import terminals and LNG peak shaving plants are essentially the same. (Hall, Tr. 1857).

3.654 In 1994-95, Mr. Hall was familiar with Whessoe; he knew that Whessoe had significant international experience in building field-erected LNG tanks, and that it had the capability to engineer the Capleville tank. (Hall, Tr. 1805:1-15, 1845:2-17). Mr. Hall, however, is not familiar with the fact that Skanska recently purchased Whessoe, nor is he familiar with any of Skanska/Whessoe's activities in the U.S. LNG market in the past couple of years, their current LNG abilities, or its cost structure in building field-erected LNG tanks in the U.S. (Hall, Tr. 1845:18-1846:17).

3.655 Mr. Hall admitted that in order to determine whether Skanska/Whessoe was a viable competitor to CB&I in

the U.S., he would need a lot of additional information, including resumes of key employees, experience lists, and references. (Hall, Tr. 1846-48). Hall has not seen any of this information. (Hall, Tr. 1846:18-1848:5). When MLGW solicits bids for field-erected LNG tanks in the future, Mr. Hall would consider soliciting a bid from Skanska/Whessoe. (Hall, Tr. 1848-49).

### Response to RFOF 3.654 and 3.655

Respondents' proposed finding is incorrect. Mr. Hall did **not** say that he would consider soliciting a bid from Skanska/Whessoe. He said that he would consider only tank vendors that "we felt was qualified to bid" (Hall, Tr. 1848); Skanska/Whessoe is not one of those vendors. (Hall, Tr. 1849).

Respondents' findings relating to the viability of Skanska/Whessoe are misleading. Mr. Hall is concerned as to Whessoe's viability as a competitor in the U.S. LNG market. (Hall, Tr. 1830-31). In soliciting budget estimates for the additional LNG tank for the Capleville peak shaving plant, Mr. Hall did not solicit an estimate from Whessoe because "I'm not sure I would trust their number, number one." (Hall, Tr. 1828). Mr. Hall only requested budgetary estimates from CB&I because "I do believe that they're the only one who can give a reliable answer to the question, how much that would cost." (Hall, Tr. 1828). Whessoe's price for the LNG tank for the Capleville peak shaving plant was "... quite a bit higher than those in the CB&I and Pitt-Des Moines proposals." (Hall, Tr. 1810).

Despite Skanska/Whessoe's effort to enter the U.S. LNG market, Mr. Hall doesn't "... see anyone out there with experience that could come into the market and compete with CB&I/PDM ... in the United States." (Hall, Tr. 1830). Whessoe's LNG tank price in 1994 on the Memphis project was 43% higher than CB&I' or PDM's price. CCF 937.

3.656 In 1994-95, Mr. Hall was familiar with TTK, and allowed TTK to bid on the Capleville facility because he believed it was capable of building field-erected LNG tanks at that time. (Hall, Tr. 1805, 1849-50). Moreover, he believed they were a viable competitor. (Hall, Tr. 1805, 1849-50). Mr. Hall is generally familiar with AT&V, but does not know whether a combination of TTK/AT&V would be able to build LNG tanks in the U.S. (Hall, Tr. 1850-53).

3.657 In order for Mr. Hall to determine whether TTK/AT&V was a viable competitor to CB&I in the U.S., Hall would need a lot of additional information, including resumes of key employees, experience lists, and references. (Hall, Tr. 1853-54). Mr. Hall has not seen any of this information. (Hall, Tr. 1853-54). When MLGW solicits bids for field-erected LNG tanks in the future, Mr. Hall would consider soliciting a bid from TTK/AT&V. (Hall, Tr. 1854). He does not know one way or the other whether that entity would be qualified to build such a tank from MLGW. (Hall, Tr. 1854).

### Response to RFOF 3.656 and 3.657

Respondents' assertion to the viability of TTK as a competitor is incomplete and misleading. Mr. Hall is concerned as to TTK's viability as a competitor in the U.S. LNG market. (Hall, Tr. 1830-31). Despite TTK/ATV's effort to enter the U.S. LNG market, Mr. Hall doesn't "... see anyone out there with experience that could come into the market and compete with CB&I/PDM ... in the United States." (Hall, Tr. 1830). TTK's price for the LNG tank for the Capleville peak shaving plant was "... considerably higher, probably double the price ... of the CB&I and PDM tanks. (Hall, Tr. 1810).

TKK's LNG tank price price in 1994 on the Memphis project was 59% higher than CB&I's or PDM's price. CCF 937.

### 3. Brian Price

3.658 Mr. Price, a Black & Veatch employee, works with salesmen in presenting Black & Veatch's credentials and capabilities to clients. (Price, Tr. 510-11).

#### Response to RFOF 3.658

Respondents' assertion is incomplete and misleading. Mr. Price is vice president, LNG Technology at Black & Veatch. (Price, Tr. 510). Mr. Price is the chief technical person for Black & Veatch in the LNG area. (Price, Tr. 510). According to his testimony, he "starts out all the projects." (Price, Tr. 511). He works on the studies in the up-front development of the project, developing preliminary cost estimates and working with clients on selecting a company to build the client's facility. (Price, Tr. 511-13).

Mr. Price is the only other customer witness at trial who had first-hand knowledge and experience with pre-merger competition (Black & Veatch partnered with TTK on the Memphis project) and post-merger competition (Black & Veatch is a consultant to Dynegy). He is uniquely qualified to talk about pre-merger and post-merger LNG tank prices, the prices of foreign LNG tank suppliers versus Respondents and the difficulties of entering the United States LNG market.

3.659 Black & Veatch is a head-to-head competitor of CB&I on peak-shaving facilities. (Price, Tr. 641). Black & Veatch owns proprietary liquefaction technology called PRICO that it sells to customers for use at peak-shaving plants. (Price, Tr. 520). CB&I's liquefaction process competes with a liquefaction process that Mr. Price personally patented. (Price, Tr. 642).

#### Response to RFOF 3.659

Although CB&I and Black & Veatch are competitors on LNG liquefaction units, Black & Veatch has approached CB&I in prior years about working together on U.S. LNG import terminal projects. (Price, Tr. 592-93). CB&I told Black & Veatch it was not interested in doing this. (Price, Tr. 593-94).

3.660 Black & Veatch has a team that is analyzing the firm fixed prices that have been bid for the Dynegy tanks. (Price, Tr. 609). Mr. Price has not seen these bids. (Price, Tr. 610). Price has not seen the details of the budget pricing Black & Veatch received for the Dynegy project. (Price, Tr. 629).

#### Response to RFOF 3.660

Respondents' assertion relating to Mr. Price's knowledge of the Dynegy tank bids is incomplete and misleading. Mr. Price testified that he is familiar with the budget pricing on the Dynegy project because Black & Veatch assisted in the preparation of budget pricing for Dynegy and requested budget pricing from Skanska/Whessoe in connection therewith. (Price, Tr. 629). Mr. Price testified that the tank budget price from Whessoe was \$55 million. (Price, Tr. 602-03).

3.661 Black & Veatch did not request budget pricing from CB&I for the Dynegy project because it was working

with Skanska, who owns Whessoe. (Price, Tr. 603-04). Thus, "it was natural" for Black & Veatch to request a budget price from Whessoe for the Dynegy project. (Price, Tr. 603-04).

### Response to RFOF 3.661

Respondents' assertions are erroneous. Dynegy and Black & Veatch requested budget prices for the LNG tank portion of the Dynegy project, but CB&I refused unless Dynegy agreed to restructure the bidding to allow CB&I to be the EPC contractor and the supplier of the LNG tank. CCF 984.

Respondents' suggestion that Black & Veatch was somehow biased in favor of Skanska/Whessoe is also false. Mr. Puckett of Dynegy testified that Black & Veatch was very much acting in the best interests of Dynegy rather than Skanska/Whessoe: "Black & Veatch had every reason to do exactly what we asked for because Black & Veatch was also a major contractor to us on the power side of our business. So they had quite a relationship with Dynegy that they had no desire to do anything that would cause that to be put in jeopardy." (Puckett, Tr. 4576).

In the 1997-98 time frame, Black & Veatch approached CB&I about supplying them with LNG tanks for U.S. terminals. (Price, Tr. 592-3) CB&I told Black & Veatch it was not interested in doing this. (Price, Tr. 593-94) PDM, however, responded favorably to Black & Veatch's proposal. (Price, Tr. 594-95) Consequently, Black & Veatch considered PDM and Whessoe as potential suppliers of LNG tanks or partners for U.S. LNG terminal projects. (Price, Tr. 593).

## **4. Robert Davis**

3.666 Robert Davis is the director of HYCO services for Air Products. (Davis, Tr. 3174). Mr. Davis does not have any current responsibility relating to LNG projects. (Davis, Tr. 3175). Mr. Davis does not have any firsthand experience with the construction of LNG tanks since he worked for CB&I in 1974. (Davis, Tr. 3177-79).

### Response to RFOF 3.666

Respondents' assertions are incorrect. Mr. Davis has extensive experience in the field of LNG facilities. Mr. Davis has held various positions at relating to the LNG facilities at Air Products since 1980 until his current position, which he has held since June 2002. (Davis, Tr. 3175-3177). Mr. Davis began his career at CB&I, where he worked on LNG projects from 1968-1974. (Davis, Tr. 3178). During that time, Mr. Davis worked as a field engineer on the construction of an LNG peak shaving plant. (Davis, Tr. 3178). Of his 34 years of work experience, Mr. Davis has had between 25 and 30 years of experience with LNG facilities. (Davis, Tr. 3178). Mr. Davis was ". . . running the business unit, and I had the most experience in LNG in our company . . ." and chose PDM as Air Products' partner for LNG tank construction in 1992. (Davis, Tr. 3189).

3.668 Mr. Davis' sole basis for his concern over the acquisition comes from the Memphis project in 1994. (Davis, Tr. 3204). Mr. Davis has not personally kept up with companies that are constructing LNG tanks in the U.S. or worldwide. (Davis, Tr. 3204). Mr. Davis does not have specific knowledge of the LNG import terminal

market, and does not focus on that area. (Davis, Tr. 3187-88).

### Response to RFOF 3.668

Respondents' assertion is incorrect. Mr. Davis worked on LNG projects until June 2002, when he switched jobs. Contrary to Respondents' assertion, Mr. Davis did not say that he has not "personally kept up with companies that are constructing LNG tank." The question addressed to him was qualified "As of today..." (Davis, Tr. 3204). The "today" in the transcript was December 3, 2002. Thus, the period in which Mr. Davis has not personally "kept up with companies" in the LNG business was all of **six months**, versus **25-30 years** of work experience in the LNG tank business.

Respondents' finding misrepresents and understates the basis for Mr. Davis' concern. Mr. Davis, as a part of the PDM/Air Product partnership, worked not only on the Memphis project in 1994, but also on a peakshaving facility for Atlanta Gas. (Davis, Tr. 3194). PDM and Air Products had an alliance in which both companies bid together on LNG tank projects. (CX 186 at CBI-PL012446 ("two horse race" for LNG facility between CB&I and PDM/Air Products)). Much like any customer of LNG tanks, Mr. Davis' concerns are based on Air Products' loss of PDM, an essential tank supplier for LNG facilities. CB&I's acquisition of PDM raised concerns at Air Products because ". . . without PDM, I would not have a domestic tank building partner. . . . my data was Memphis, and we saw that the overseas tank suppliers weren't as competitive and were not a presence, a market presence, with the LNG community." (Davis, Tr. 3199-3200). Mr. Davis' testimony reflects the importance of the Memphis project as a data point showing that foreign LNG tank constructors have not been not price competitive with CB&I and PDM on U.S. projects. (Davis, Tr. 3199).

## **5. Hans Kistenmacher**

3.669 Respondents assert that Mr. Kistenmacher admits he is only "somewhat" familiar with LNG tanks. (Kistenmacher, Tr. 879). Mr. Kistenmacher has been involved with "very, very few LNG tanks", and his experience is limited to the bidding phase of those tanks. (Kistenmacher, Tr. 888). Mr. Kistenmacher believes CB&I is the only company offering LNG tanks in the United States today. (Kistenmacher, Tr. 902).

### Response to RFOF 3.669

Respondents' first two assertions are incomplete and misleading. Dr. Kistenmacher has familiarity with the LNG market in the U.S. Dr. Kistenmacher was President of Lotepro, a predecessor of his current firm Linde BOC Process Plants LLC, from 1994 to 2001. (Kistenmacher, Tr. 823). As president of Lotepro, Dr. Kistenmacher was responsible for the whole operation, including sales and marketing, engineering, as well as project execution. (Kistenmacher, Tr. 823)

Lotepro formerly, and Linde BOC Process Plants currently, is in the business of selling LNG peak shaving plants in the U.S. (Kistenmacher, Tr. 909-910) Lotepro was involved in bidding an LNG peak shaving plant in Memphis in 1994-95 (Kistenmacher, Tr. 892-93) Linde BOC's parent company Linde AG competes in the LNG terminal market. (Kistenmacher, Tr. 907).

Respondents' third assertion is misleading. Dr. Kistenmacher does not believe that CB&I is the only company offering LNG tanks in the U.S. today; he believes that CB&I is the only *viable* supplier offering LNG tanks in the U.S. today. Dr. Kistenmacher stated that he had also been approached by AT&V as a potential supplier of LNG tanks, but Linde BOC Process Plants did not want to joint venture with ATV because ATV has never constructed an LNG tank before. (Kistenmacher, Tr. 904-05).

3.670 Mr. Kistenmacher's company, Linde BOC does not compete in LNG import terminals. (Kistenmacher, Tr. 883). Therefore, Mr. Kistenmacher does not directly follow the LNG import terminal market. (Kistenmacher, Tr. 883).

### Response to RFOF 3.670

Respondents' first assertion is misleading. While Linde BOC does not compete in LNG import terminals, Linde BOC's parent company Linde AG does. Linde AG is currently building a large LNG facility in Norway. (Kistenmacher, Tr. 907). Dr. Kistenmacher's company, Linde BOC Process Plants LLC, is 30 percent owned by BOC and 70 percent owned by Linde AG Germany. (Fan, Tr. 946). Linde participated in the bidding for the Memphis LNG peak shaving project in 1994 (Kistenmacher, Tr. 890) and has recently been approached by a consultant about a potential LNG peak shaving project in the U.S. (Kistenmacher, Tr. 908-09).

3.671 Although Linde BOC competes for peak-shaving plants in the U.S., it is a very sporadic business. (Kistenmacher, Tr. 884). In fact, Linde BOC has not bid on a peak-shaving plant in the United States since the acquisition. (Kistenmacher, Tr. 918). Kistenmacher is not aware of the Pine Needle peak-shaving facility. (Kistenmacher, Tr. 910-11). Even before the acquisition, Linde BOC only competed for and bid on one LNG peak-shaving facility, that included storage tanks, since 1994: Memphis Gas. (Kistenmacher, Tr. 890). Mr. Kistenmacher is "somewhat" familiar with the construction of LNG peak-shaving plants; much less familiar than with LIN/LOX tanks. (Kistenmacher, Tr. 887-88).

### Response to RFOF 3.671

Respondents' finding is misleading. There have only been two LNG peak shaving plants constructed in the U.S. since 1998, the Memphis peak shaving plant and the Pine Needle, North Carolina plant. (Hall, Tr. 1777). Dr. Kistenmacher's firm participated in the bidding of the Memphis plant. (Kistenmacher, Tr. 890). Respondents' proposed finding mistakenly implies that Linde could have competed for the Pine Needle LNG facility. [

] so Dr. Kistenmacher's firm had no opportunity to participate in that project. ([ ], *in camera*).

3.672 Mr. Kistenmacher is not familiar with current competitors in the United States LNG market. Mr. Kistenmacher is not familiar with the TKK/AT&V joint venture to enter into LNG projects in the United States. (Kistenmacher, Tr. 937). Besides information gained during his deposition, Mr. Kistenmacher has no knowledge of the Technigaz/Zachry venture formed in the United States to pursue LNG projects. (Kistenmacher, Tr. 941). Besides information gained during his deposition, Mr. Kistenmacher has no knowledge of the Daewoo/S&B Engineering venture formed in the United States to pursue LNG projects. (Kistenmacher, Tr. 941). Mr. Kistenmacher does not know of any investments Skanska made to pursue LNG work in the United States. (Kistenmacher, Tr. 942).



### Response to RFOF 3.672

Respondents' proposed finding is misleading. Dr. Kistenmacher is aware of the TKK/ATV joint venture to construct LNG facilities in the U.S. W.T. Cutts, ATV's vice president, personally approached Dr. Kistenmacher and solicited him about participating with TKK/ATV on LNG projects in the U.S. (Kistenmacher, Tr. 902-03, 905-06). What Dr. Kistenmacher is not familiar with is the precise legal structure of the relationship; i.e., whether it is a partnership. (Kistenmacher, Tr. 937). Dr. Kistenmacher testified that he was enthusiastic to hear about ATV as a possible constructor of LNG tanks in the U.S., "but when I looked at their track record, it didn't look very good for me." (Kistenmacher, Tr. 913).

3.673 Linde BOC competes against CB&I for the sale of liquefaction units in the United States. (Kistenmacher, Tr. 884, 935). Linde BOC competed against CB&I for a peak-shaving project for Memphis Gas and a liquefaction project, that did not include an LNG tank, in Baltimore. (Kistenmacher, Tr. 886, 934).

### Response to RFOF 3.673

Respondents' finding is incomplete and misleading. Following the Memphis project, a Lotepro employee approached CB&I about working together on LNG peak shaving projects in the U.S. (CX 186 at CBI-PL012447). He informed CB&I that "[h]e felt that their bid was really strained by not being able to include a CBI or PDM tank, and his current market study prompted his call to discuss whether our position may have changed at all since MLGW." (CX 186 at CBI-PL012447). CB&I employees unanimously agreed that "[w]e should bid turnkey total facility without tank only prices to our competitors." (CX 186 at CBI-PL012447)

3.674 Since 1994, Linde has never bid with CB&I for an LNG project. (Kistenmacher, Tr. 935). From January 1, 1994 to February 7, 2001, Linde never bid with PDM on an LNG project. (Kistenmacher, Tr. 936).

### Response to RFOF 3.674

Respondents' proposed finding is misleading because it implies that Linde has never tried to bid with CB&I on an LNG project. Linde, and its predecessor Lotepro, tried to bid with CB&I for an LNG project several times, but have been unsuccessful, because CB&I bids these projects turnkey, and by not quoting Lotepro a price for the LNG tank, CB&I thwarts Lotepro's efforts to compete for the LNG project. (Kistenmacher, Tr. 893-94). In an e-mail written after the Memphis project, CB&I reiterated that "it is in CBI's best interest NOT to quote separate tank price [to Lotepro]." (CX 186 at CBI-PL012446). CB&I reasoned that quoting "a separate tank price will only serve to make the process-only contractors [such as Lotepro] 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...Lotepero's total facility bid using Whessoe tank and Pritchard's bid using TKK tank did not turn out to be very competitive." (CX 186 at CBI-PL012446).

3.675 Linde was upset it lost the Memphis bid. (Kistenmacher, Tr. 899-900). Linde thought it had a fantastic process and should have won the bid "hands down". (Kistenmacher, Tr. 900).



Response to RFOF 3.675

Respondents’ proposed finding is misleading in that it implies that Linde’s bid, in conjunction with Whessoe, was competitive. Dr. Kistenmacher testified that it was Whessoe’s high tank price that prevented Linde from providing a competitive bid for the project. (Kistenmacher, Tr. 899). As Respondents’ noted, CB&I’s tank bid was almost \$5 million less than Whessoe’s. RFOF 6.180. Consequently, the customer would have received a better overall package had CB&I provided a price for its LNG tank only, to be bid in conjunction with Lotepro’s process technology. As CB&I itself acknowledges: “If we had quoted a tank only price, the combination of Lotepro process and CBI tank would have been a serious threat to CBI total facility price.” (CX 186 at CBI-PL012446).

3.681 Whessoe had no arrangement with Skanska at the time it submitted a quote to Lotepro for the engineering portion of the Memphis tank. (Kistenmacher, Tr. 939). Whessoe had no office in the United States at the time of the Memphis bid. (Kistenmacher, Tr. 939).

Response to RFOF 3.681

Respondents’ proposed finding erroneously implies that Skanska/Whessoe’s price will be more competitive now. Respondents have made no showing why a Skanska/Whessoe partnership would be any more price competitive than Titan/Whessoe on LNG projects in the U.S. (Kistenmacher, Tr. 906).

3.682 Mr. Kistenmacher believes TKK could probably, based on its experience, supply a good engineering package; Kistenmacher has concerns about TKK’s ability to fabricate and build an LNG tank in the U.S. (Kistenmacher, Tr. 906).

Response to RFOF 3.682

Respondents’ finding is misleading because it implies that TKK could provide LNG tanks at a competitive price. Dr. Kistenmacher testified that he does not trust TKK’s ability to fabricate and build a tank here in the United States. (Kistenmacher, Tr. 906). In Dr. Kistenmacher’s experience, foreign LNG tank constructors, even when partnering with U.S. tank builders, have not been price competitive on U.S. LNG projects. (Kistenmacher, Tr. 901, 906)

6. [ ]

3.683 [ ] ([ ] D. [ ] )  
([ ] D).

Response to RFOF 3.683

Respondents’ assertion is misleading and mischaracterizes the evidence in this matter.  
[ ] ([ ]), *in camera*). [ ] ([ ]), *in*

camera). [ ] ([ ], *in camera*). [ ] ([ ], *in camera*).

Respondents' proposed finding also misstates that reason [ ] [ ]

] The Cryocrete technology is "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). [ ] ([ ], *in camera*).

The real reason that CB&I did not want to provide this pricing information to PTL was because [ ] ([ ], *in camera*). One of the services that [ ] ([ ], *in camera*). [ ] ([ ], *in camera*).

3.684 [ ] ([ ]).

Response to RFOF 3.684

Respondents' assertion is misleading. [ ] ([ ], *in camera*). As explained in CCRFF 3.685, [ ] ([ ], *in camera*). [ ]

3.685 [ ] ([ ]). [ ] ([ ]). [ ] ([ ]).

Response to RFOF 3.685

Complaint counsel agrees with Respondents' first assertion. Respondents' second assertion is incomplete and misleading. CB&I's may have stated that [ ]

unwarranted. [

] but that concern is

]

[redacted], *in camera*). [redacted]  
[redacted] ([redacted], *in camera*). [redacted]  
[redacted], *in camera*). ]

3.686 [redacted] ([redacted]). [redacted]  
[redacted] ([redacted]). [redacted] ([redacted]). [redacted]  
[redacted] ([redacted]). [redacted] ([redacted]). [redacted]

Response to RFOF 3.686

Respondents' assertions are misleading. [redacted] ([redacted], *in camera*),  
[redacted] [redacted]  
[redacted] ([redacted], *in camera*). [redacted]  
[redacted] ([redacted], *in camera*). [redacted]  
[redacted] ([redacted], *in camera*). Preload last built an LNG  
tank in the United States in 1971. (CX 125 at PDM-HOU2017164). The Cyrocrete technology  
is a very costly design and not a competitive design to the tanks that the other people could build.  
(Price, Tr. 550; Hall, Tr. 1817).

3.689 [redacted] ([redacted]). [redacted]  
[redacted] ([redacted]). [redacted]  
[redacted] (*in camera*). [redacted] ([redacted]).

Response to RFOF 3.689

Respondents' assertion is incomplete and misleading. [redacted]  
[redacted] CCRFF 3.686. [redacted]  
[redacted], *in camera*). ]

3.690 [redacted] ([redacted]). [redacted]  
[redacted] ([redacted]). [redacted]  
[redacted] ([redacted]). [redacted]

Response to RFOF 3.690

Respondents' first assertion is incomplete and misleading. [redacted] testified that  
[redacted]



3.695 [

] ([ ], Tr. 753).

Response to RFOF 3.695

Respondents' finding is misleading because it implies that PTL, like Lotepro or Air Products, is providing construction services on the project. [

] [ JX 30 at 55-56 ([ ]), *in camera*).

3.696 [ ] ([ ] ( [ ])). [ ] ([ ] ( [ ])). [ ] ([ ] ( [ ])).

Response to RFOF 3.696

Respondents' proposed finding is misleading. [ ] testified: [

] ([ ]), *in camera*).

**II. LPG FINDINGS OF FACT**

**A. THE LPG INDUSTRY**

4.1 The term LPG refers to field erected tanks that are used to store liquefied petroleum gases at low temperatures of approximately minus 50 degrees Fahrenheit. (RX 79 at 3, & 14; N. Kelley, Tr. 7096-97)

Response to RFOF 4.1

Complaint counsel agrees with Respondents' proposed finding.

4.2 LPG means liquefied petroleum gas, which is an umbrella term of butanes and propanes. (Cutts, Tr. 2436). The purpose of an LPG terminal is to store liquid petroleum gases, such as propanes, butanes, and possibly some others, that would have been stripped out of natural gas and may be sold as independent gases. (G. Glenn, Tr. 4072-73). Anything that exists naturally as a gas can be liquefied. For example, liquefied propylene, propane, butene, butane and isobutane can be liquefied. (N. Kelley, Tr. 7080-81).

Response to RFOF 4.2

Petroleum gases may be stored in a liquid form in refrigerated storage tanks or in pressurized storage tanks. (JX 37 at 18-19 (Newmeister, Dep.)); (N. Kelley, Tr. 7094). As stated in both

Respondents and Complaint counsel's findings of fact, LPG Tanks refer only to refrigerated tanks which store petroleum gases in liquid form. CCF 76; RFOF 4.1. They do not include tanks which store gases that are liquefied using pressure and stored at ambient temperatures.

- 4.4 LPG tanks are also pressure vessels. (N. Kelley, Tr. 7080). API 650 tanks are field erected tanks with no more than 2 pounds of pressure. API 620 tanks, typical LPG tanks are refrigerated tanks or (sic?) more than 2 pounds of pressure. (N. Kelley, Tr. 7103).

#### Response to RFOF 4.4

Respondents' proposed finding is misleading. The LPG Tank product, as defined by both parties, is for field-erected, refrigerated tanks that store liquid petroleum gasses and does not include pressure vessels, *i.e.* tanks that use pressure to liquefy gases. CCF 76; RFOF 4.1.

There are two types of high pressure storage tanks used to store liquid petroleum gasses – bullets and field-erected pressure spheres. Bullets are **ambient** temperature, low pressure spheres or storage vessels that are usually built in a shop. Pressure spheres are **ambient** temperature pressure vessels supported by columns or plate skirts. (JX 37 at 19 (Newmeister, Dep.)). These two types of storage tanks are not in the LPG market as defined in this proceeding because they are not economic substitutes for field-erected, **refrigerated** tanks built (which comply with the API 620, Appendix R standard). (JX 27 at 39-39, 141-42 (N. Kelley, Dep.); Crider, Tr. 6720). CCF 81.

LPG Tanks are a subset of API 620 tanks. The API 620 standard covers all flatbottom tanks, which includes water tanks and other industrial tanks. The refrigerated tanks contained in the LPG Tank product market are covered by Appendix R of API 620. API 620 Appendix R is not used for water tanks, industrial tanks, or other types of flatbottom tanks. API 620 Appendix R is not used for tanks that store liquefied gases using pressure, which are not contained in the relevant product market. CCF 76; RFOF 4.1.

API 650 tanks are not included in the LPG Tank product market. API 650 is the standard for **ambient** temperature, low pressure tanks; it does not govern the relevant product market, *i.e.* **refrigerated** LPG tanks. (N. Kelley, Tr. 7103 (emphasis supplied)).

- 4.5 LPG tanks store material brought in by ship and held before being sold from the facilities by truck. (Warren, Tr. 2280-81).

#### Response to RFOF 4.5

Respondents' proposed finding is misleading because it describes an LPG import terminal, which is only one type of facility that uses LPG Tanks.

- 4.8 Typically, LPG tanks are manufactured the same way as LNG tanks, but for storage at a lower temperature. (G. Glenn, Tr. 4073).

#### Response to RFOF 4.8

Complaint Counsel agrees with Respondents' proposed finding.

- 4.9 LPG tank construction usually takes 8 to 10 weeks of fabrication in the shop -- from buying steel, fabricating, and preparing to send out the pieces. Then, the tank construction process usually lasts 16 weeks in the field. Finally, the remaining site work and piping systems occur after the tank is completed. (N. Kelley, Tr. 7109-10).

#### Response to RFOF 4.9

Respondents' proposed finding is misleading because it describes the time needed to fabricate and construct a very small LPG Tank. In the cited testimony, Mr. Kelley of ITC described the time needed to fabricate and construct ITC's 35,000 barrel LPG Tank. (N. Kelley, Tr. 7120); Morse scheduled 60 weeks just to field-erect the 400,000 barrel LPG Tank that it supplied to Texaco. (Maw, Tr. 6634).

### **B. CB&I IS THE DOMINANT FIRM AND FOREIGN FIRMS HAVE NOT RESTRAINED CB&I'S MARKET POWER**

- 4.10 Competition in the LPG market is extraordinarily thin, and the market is almost nonexistent. (Harris, Tr. 7281-82).

#### Response to RFOF 4.10

Respondents' proposed finding exaggerates the existing evidence and is unsupported by the record. There is no evidence that the LPG market is almost nonexistent, nor is there is any evidence that competition is extraordinarily thin. Demand for LPG in the U.S. as an energy supply and as a motor fuel is expected to increase due to environmental regulations such as the 1990 Clean Air Act Amendments which lists propane as a clean-burning fuel. (CX 112 at PDM-HOU011534-61).

Respondents' proposed finding is also misleading, in that it implies that the LPG market is undesirable. Both CB&I and PDM's business documents recognize that low temperature and cryogenic projects, which include LPG Tanks, are "lucrative" projects, as they are projects which earn Respondents the "highest margin." (CX 88 at PDM-CH006400 (PDM's involvement with cryogenics continues to keep the PDM exposure high in the **lucrative** markets of vacuum, LNG and other low temperature and cryogenic fields") (emphasis supplied); CX 202 at CBI-PL031026 (CB&I's low temperature tank business (contained in a category titled "Unique Structure") is "Good business when you can get it" and is "**Highest margin work**") (emphasis supplied)).

- 4.11 Since 1992, only 8 LPG tanks have been constructed in the United States. (Harris, Tr. 7284-85; RX 947).

#### Response to RFOF 4.11

Since 1992, only 8 LPG Tanks have been **awarded** in the United States. CCF 172; (RX 947 (demonstrative)). Dr. Harris' testimony and accompanying demonstrative exhibit reflect only those LPG Tanks that were sold between 1992 and 2002, not those LPG Tanks that were

constructed. (Harris, Tr. 7284; RX 947). There were five LPG Tanks awarded in 1991.

CCFF 172. There is no evidence in the record that these tanks awarded in 1991 were constructed prior to 1992.

4.12 From 1993 to the date of the acquisition, CB&I did not build an LPG tank. (Harris, Tr. 7286; RX 947).

#### Response to RFOF 4.12

Respondents' finding is incorrect. CB&I built two LPG Tanks in 1993. (Harris, Tr. 7285).

4.13 PDM constructed 3 of the 4 LPG tanks in the United States between 1994 and 2001. The other LPG tank was constructed by American Tank & Vessel (AT&V). (Harris, Tr. 7285; RX 947).

#### Response to RFOF 4.13

Respondents' proposed finding is incorrect. Between the beginning of 1994 and the end of 2001, there were six LPG Tanks awarded. CCFF 172. PDM was awarded three LPG Tanks, in 1995, 1996, and 1998, respectively. CCFF 172. Morse was awarded one LPG Tank in 1994. CCFF 172. AT&V was awarded one LPG Tank in 2000, and CB&I was awarded one LPG Tank in 2001. (Harris, Tr. 7285); CCFF 172.

4.14 Since the PDM acquisition, CB&I has only been involved in one LPG project in the United States. That project was valued at \$1-3 million. (G. Glenn, Tr. 4088-89, 4156). Gerald Glenn, CB&I's CEO, ("Glenn") [sic] is not actively involved in the decision making process for LPG tanks. (G. Glenn, Tr. 4156).

#### Response to RFOF 4.14

Respondents' proposed finding is misleading to the extent it implies that PDM and AT&V were leaders in the LPG market. The evidence shows that PDM and CB&I dominated the LPG market, and were each other's primary competitors. In a 1997 Strategic Plan, PDM described itself as "**a definer** of the state-of-the-art low temperature and cryogenic storage." (CX 234 at CBI-PL058908). (See also CX 111 at PDM-HOU008396 (PDM has "core competencies" in its workforce, its engineering, its contracting expertise and its project execution, among other things, that "differentiate PDM from certain competitors. . . Particular skill exists in low temperature and cryogenic storage systems")). Likewise, CB&I characterized itself as "the global industry leader in the design and construction of bulk liquid terminals, storage tanks, process vessels, refrigerated storage facilities and other steel plate structures and their associated systems." (CX 206 at CBI-PL031450).

Respondents' proposed finding understates the value of CB&I's recent LPG project contract. That project, which was awarded by BASF, is valued at \$1.654 million. (RX 757); CCFF 172.

4.15 Historically, the price of an LPG project is less than \$5 million. Current LPG sales reflect even smaller values. The last two LPG projects, constructed by AT&V and CB&I were \$300,000 and \$1.2-1.3 million respectively. (Harris, Tr. 7281; RX 947).

#### Response to RFOF 4.15

Respondents' proposed finding is misleading. Historical data shows that the price of the LPG projects since 1990 have reached values as high as [ ] million. In 1993, CB&I was awarded a contract for one LPG Tank for Koch Refining, valued at [ ] million. CX 824; CCFF 172. There is no evidence that there is a trend towards smaller contract values. In 1998, PDM was awarded a contract for one LPG Tank valued at [ ] million. CX 1210, *in camera*; CCFF 172. Further, the LPG project awarded to CB&I in 2001 is valued at [ ] million. CCRFF 4.14; CCFF 172.

4.17 AT&V is technically capable of building, and has built, field-erected LPG tanks. (N. Kelley, Tr. 7088-89, 7130; [ ], Tr. 2261). AT&V has already developed the skills, procedures, and obtained the necessary equipment. (Cutts, Tr. 2495).

#### Response to RFOF 4.17

Respondents' proposed finding is inaccurate. AT&V has built **one** LPG Tank in the United States. (CX 397 at 1). This LPG Tank which has a capacity of 35,000 barrels is quite small relative the large LPG Tanks supplied by CB&I or companies purchased by CB&I. (N. Kelley, Tr. 7120; Crider, Tr. 6706-07 (LPG Tank stored 400,000 barrels of propane)). CCFF 173.

4.18 AT&V is a key player successfully competing in the LPG market for a number of years. Not only has AT&V constructed an LPG tank for Intercontinental Terminals Co. (AITC) in 2000 (Cutts, Tr. 2334), but AT&V has also built the following LPG tanks: an LPG tank in 1996 for CMS Nomeco in Equatorial Guinea; and an LPG storage tank in 1994 for Project Services in Port of Houston, Texas. (CX 396 at 2; CX 397 at 1).

#### Response to RFOF 4.18

Respondents' proposed finding misrepresents the evidence and is incorrect. AT&V did not build an LPG storage tank for Project Services in Port of Houston, Texas. AT&V bid on the project, but Project Services decided not to build it. (CX 396 at 2; JX 23 at 105 (Cutts, Dep.)). AT&V has bid on several LPG projects in the United States within the last five years; of those bids, it has been successful once. (CX 397; CX 396); CCRFF 4.14; CCFF 172.

4.19 Moreover, AT&V has built other LPG products, such as 3 LPG sphere projects in 2001 alone. AT&V built 3 LPG spheres for Westlake in Sulphur, LA in June 2001 (CX 396 at 1); 2 LPG ASME pressure spheres for Black & Veatch in Reno, NV in January 2001 (CX 397 at 1); and 8 spheres for International Matex in Avondale, LA in January 2001 (CX 397 at 4). Further, AT&V has built numerous API 620 tanks and ASME spheres. (CX 396; CX 397).

#### Response to RFOF 4.19

Respondents' proposed finding is misleading because it implies that AT&V has built several LPG Tanks. AT&V has built one tank in the relevant product market. *See* CCFF 76; RFOF 4.1; CCRFF 4.13.

4.21 LPG customers commonly evaluate the substitution alternative of refrigerated storage (LPG tanks) versus

pressure storage (pressure spheres). (Scorsone, Tr. 5170-71). As such, AT&V has built both refrigerated and pressurized spheres and tanks or a combination of both. (Cutts, Tr. at 2495-96; CX 396; CX 397).

#### Response to RFOF 4.21

Respondents' finding is based on the self-serving and uncorroborated testimony of Mr. Scorsone. As described in CCRFF 4.4 and CCFF 76, pressure spheres are not an economic substitute for LPG Tanks. Large volumes of LPG can only be economically stored in LPG Tanks. (JX 10 at 46-48, 75, 77-78 (Crider, Dep.)). Moreover, certain petroleum gases must be stored in a LPG Tank because they must be refrigerated. (JX 27 at 38-39 (N. Kelley, Dep.) (need to store butadiene under refrigeration to prevent it from polymerizing)).

4.22 LPG customers have expressed satisfaction to AT&V with the work that AT&V has performed, and AT&V intends to pursue LPG projects in the future. (Cutts, Tr. 2455-56; N. Kelley, Tr. 7130-31).

#### Response to RFOF 4.22

Respondents' finding is misleading. The evidence shows that, in the U.S., AT&V has only sold one, very small LPG Tank (35,000 barrels) to Mr. Kelley of ITC.

Moreover, the evidence of AT&V's questionable performance on LIN/LOX projects suggests that AT&V has a reputation for poor safety and quality. CCFF 452-54; 464-40; CCFF 473-480 (Air Liquide has problems with AT&V on its project); CX 41 at 7336, *in camera* (customer thinks that company that purchased cryogenic tank from AT&V is "insane"); CX 606 at PDM-CH 002617; CX 263 at CBI-HOU-004606; JX 28 at 43-46 (V. Kelly, Dep.); V. Kelly, Tr. 5269, 5273-74; RX 290 at CBI 04 6596-NEW; Kistenmacher, Tr. 861-62; [

], *in camera*; [ ], *in camera*). Mr. [ ] acknowledges that AT&V has reputational and marketing disadvantages relative to CB&I and PDM. CCFF 454; ([ ], *in camera*).

4.25 The ITC facility contains the following: seven similar semi-refrigerated spheres (three 35,000 barrel spheres and four 25,000 barrel spheres) and one 50,000 barrel low-pressure tank for butadiene, two full pressure spheres for isobutane, and three fully refrigerated propylene tanks. All of these structures were built by CB&I, with the exception of the 50,000 barrel low-pressure tank for butadiene that was built by PDM. (N. Kelley, Tr. 7088, 7097, 7099-7100, 7101, 7102).

#### Response to RFOF 4.25

Respondents' finding is inaccurate because it describes the 50,000 barrel tank for butadiene as a low-pressure tank. Mr. Kelley testified that this tank is "fully refrigerated." (N. Kelley, Tr. 7101-02).

Respondents' finding is misleading because it implies that PDM is not a major supplier for LPG Tanks. Mr. Kelley testified that PDM and CB&I have the "best reputations" for supplying cryogenic tanks. (N. Kelley, Tr. 7143-44). ITC primarily uses CB&I and PDM for its refrigerated tanks

because, as Mr. Kelley testified, ITC does not want to be “a guinea pig” or procure these tanks from a supplier with no previous experience. (N. Kelley, Tr. 7104-05, 7141).

4.26 In the past 4-5 years, ITC has purchased one LPG tank (2000) at its facility in Deer Park, Texas. This LPG tank contains butene-1, which is similar to butane or isobutane. Currently, the tank is being stored at 20 degrees. (N. Kelley, Tr. 7081-82).

#### Response to RFOF 4.26

The LPG purchased by ITC for butene-1 storage is very small. It only stores 35,000 barrels of butene. (N. Kelley, Tr. 7120). It is “designed for minus 20 degrees [Fahrenheit]” and cannot store chemicals at temperatures lower than negative 20 degrees. (JX 27 at 37 (N. Kelley, Dep.)).

4.29 ITC always subcontracts all the work themselves. ITC does not bid projects turnkey. ITC provides a foundation, then a contractor builds the tank, ITC tests the tanks, and finally completes all the piping themselves. (N. Kelley, Tr. 7086-87).

#### Response to RFOF 4.29

Respondents’ proposed finding is misleading because it implies that ITC is a sophisticated buyer. ITC has very little experience as a purchaser of LPG Tanks. ITC has purchased 178 field-erected storage tanks from a variety of local suppliers. Of these about 166 are ambient temperature tanks, i.e. API 650 tanks. (N. Kelley, Tr. 7091, 7093). The only LPG Tank ITC purchased was relatively small; it only stores 35,000 barrels of butene. (N. Kelley, Tr. 7120).

Complaint counsel agrees that Mr. Kelley testified that ITC saved money by not procuring tanks on a turnkey basis. (N. Kelley, Tr. 7087).

4.30 Serving as the general contractor is cheaper by eliminating subcontractors' mark ups. (N. Kelley, Tr. 7087). By executing a project turnkey itself, LPG customers save 10-15 percent of the total cost of the project. (N. Kelley, Tr. 7116-17).

#### Response to RFOF 4.30

Respondents’ finding is confusing. Mr. Kelley testified that by hiring the contractors working on its projects directly, rather than through a turnkey contractor, ITC saves the mark-up added by a turnkey contractor on all the project’s subcontracts. (N. Kelley, Tr. 7087).

Mr. Kelley does not know which contractors can compete for LPG Tanks. Although Mr. Kelley named Wyatt Field Services as a LPG Tank supplier, Mr. Kelley acknowledged, upon further questioning, that he did not know whether Wyatt Field Services had the capability to build LPG Tanks. (JX 27 at 71, 72 (N. Kelley, Dep.)). He also acknowledged that he does not know whether other tank suppliers such as Southwest Tank have ever built cryogenic tanks. (JX 27 at 88-89 (N. Kelley, Dep.)). Mr. Kelley does not know how long AT&V has been in business or “all their doings

elsewhere.” (N. Kelley, Tr. 7088, 7108).

- 4.32 Without experience, complete confidence in the contractor can overcome any hurdle. ITC has complete confidence in AT&V and its engineers. (N. Kelley, Tr. 7104-05). AT&V used experienced field crews and welders, and ITC had complete confidence in AT&V's contact person. (N. Kelley, Tr. 7106-07).

#### Response to RFOF 4.32

In order to compete successfully, a tank company needs to have experience. When it comes to buying these more specialty tanks, pressure spheres, and refrigerated tanks, "I would want [the supplier] to have built one before" and "I don't want to be a guinea pig." (JX 27 at 58 (N. Kelley, Dep.); N. Kelley, Tr. 7104-05, 7144; *see* Warren, Tr. 2290-91; CX 415 at 2). He further testified that he would not consider AT&V qualified to supply a cryogenic tank or one with a temperature of minus 200 degrees Fahrenheit if it did not have past experience building these tanks. Mr. Kelley admitted that he "would have to have the confidence that the company that was doing it knew what they were doing and had the good quality assurance program. I mean, these are real particular tanks we're talking about. They're not your everyday variety of tanks." (N. Kelley, Tr. 7145-46).

Respondents' finding is misleading; Mr. Kelley cannot verify whether AT&V used experienced field crews and cannot recall whether Mr. Bailey told him that AT&V's crews, welders and engineers had past experience on LPG projects. (N. Kelley, Tr. 7107). Respondents' finding is also misleading because it implies that ITC awarded AT&V its LPG project without prior knowledge of AT&V. ITC had an working relationship with AT&V that has spanned over eight or 10 years and during that time, AT&V has built API 650 tanks for ITC. (RFOF 4.36; JX 27 at 62 (N. Kelley, Dep.)).

- 4.33 As part of the purchasing process, ITC bid the LPG tank project. ITC sent out a specification containing the scope of work, specifications, and boilerplate terms. ITC utilizes a minimum of three bidders, and depending on the scope of the project and classification of work, may send out 4-5 bid packages. The contractors review the specification and send back bid proposals. ITC then evaluates these bids to determine if they comply with the project specifications and whether the contractor is capable of completing the job as desired. (N. Kelley, Tr. 7082-83).

#### Response to RFOF 4.33

Respondents' proposed finding is misleading. ITC sends its specifications to more than three bidders "if there's a lot of good contractors in that classification of work that we're sending out, we may send out four or five bid packages." (N. Kelley, Tr. 7082-83). If there are not enough good contractors in that area, then ITC will send its specification to fewer bidders. (*Id.*)

- 4.34 On the Deer Park LPG project, CB&I, AT&V and Matrix bid on the project. PDM was not a bidder. These companies were selected to bid on the project because they are "good reputable contractors that have the capability of building the tank." (N. Kelley, Tr. 7083-84).

#### Response to RFOF 4.34

Respondents' proposed finding is misleading in that it suggests that PDM is not a reputable contractor capable of building an LPG Tank. Mr. Kelley testified that PDM and CB&I have the "best reputations" for supplying cryogenic tanks. (N. Kelley, Tr. 7143-44). ITC primarily uses CB&I and

PDM for its refrigerated tanks because, as Mr. Kelley testified, ITC does not want to be “a guinea pig” or procure these tanks from a supplier with no previous experience. (N. Kelley, Tr. 7104-05, 7141).

As stated in CCRFF 4.31, Mr. Kelley is not familiar with Matrix’s experience building LPG Tanks. Mr. Kelley does not know how long AT&V has been in business or “all their doings elsewhere.” (N. Kelley, Tr. 7088, 7108).

4.36 AT&V has built several tanks for ITC for about 8-10 years: some regular stainless steel tanks and some API 650 tanks. On those projects, AT&V performed well. These previously built tanks by AT&V for ITC are similar to the LPG tank in 2000. (N. Kelley, Tr. 7085-86, 7107-08).

#### Response to RFOF 4.36

Respondents’ proposed finding mischaracterizes Mr. Kelley’s testimony. Mr. Kelley testified that there are significant differences between API 650 and LPG Tanks, including differences in “the material, what kind of material you use and your welding specifications.” (N. Kelley, Tr. 7086). Moreover, he testified that CB&I won multiple LPG Tanks awards from ITC because it had “a superior insulation system.” (N. Kelley, Tr. 7139).

Respondents’ proposed finding is also inaccurate. There are substantial differences between API 650 and LPG Tanks which are governed by a different standard, API 620, Appendix R. (Cutts, Tr. 2353-54 (significant differences in standards even among API 620 tanks)). (*See also* CX 1473 at CBI/ PDM H 4000422-427 (technical proposal for API 620, Appendix R LPG Tank); *compare with* CX 258 at CBI-H001836-1859 (description of API 650 tanks); *see* Maw, Tr. 6584, 6585 (there are “many more components” in building an LPG Tank than a API 650 or another type of API 620 tank)).

As Respondents note, LPG Tanks are manufactured similar to LNG tanks. RFOF 4.8. The manufacture of an LPG Tank, therefore, is “highly specialized”; “you don’t want some amateur putting it together. The results can be catastrophic.” (Hall, Tr. 1789, 1831). “It’s an entire system of components that must be done correctly,” because “there’s tremendous safety considerations” (Price, Tr. 565). “You don’t just weld them up any old way...” (Cutts, Tr. 2379). LPG Tanks store gas at a much higher temperature (50 degrees below zero Fahrenheit) than LNG tanks (approximately 260 degrees below zero Fahrenheit). (Warren, Tr. 2306; Kistenmacher, Tr. 879).

Respondents’ proposed finding is also misleading in that it implies that AT&V has been building tanks for ITC throughout the last decade. According to AT&V’s bid history reports, ITC awarded one project to AT&V between 1994 and 2001: the LPG project in Deer Park, Texas. (CX 396; CX 397). Prior to the Deer Park project, ITC’s previous experience with AT&V occurred eight to 10 years ago, when AT&V had built stainless steel tanks for ITC. (N. Kelley, Tr. 7112).

4.37 Despite CB&I’s constructing all but one existing structure at the Deer Park facility, ITC selected AT&V to construct the new LPG tank because it felt confident that AT&V could do the job and AT&V’s price was the best price. (N. Kelley, Tr. 7088).

Response to RFOF 4.37

Respondents' proposed finding is misleading in its implication that the single sale of a small LPG Tank establishes AT&V as an effective competitor for LPG projects. (N. Kelley, Tr. 7120). AT&V is much smaller than CB&I, with substantially lower revenues and far fewer engineers. (CX 460 at 7235; JX 23 at Exh. 1 ([ ]), *in camera*; Simpson, Tr. 3293-3315; CX 1033 at 28).

Respondents' proposed finding misrepresents Mr. Kelley's rationale for selecting AT&V as its LPG Tank supplier for the Deer Park facility. Mr. Kelley selected AT&V because he has a personal relationship with his main AT&V contact, Ron Bailey. (N. Kelley, Tr. 7108-09), and because he has had a working relationship with AT&V for the last 8-10 years. (N. Kelley, Tr. 7107-08). Mr. Kelley's alleged "confidence" in AT&V is not uniform throughout the LPG industry. (Warren, Tr. 2309 (Fluor has not considered anyone other than CB&I or PDM)).

4.38 ITC was satisfied with AT&V's price. AT&V completed construction of the field erected LPG tank in Deer Park. AT&V properly designed the tank and completed it on time, according to the customer's plans, and without any major defects or problems. (N. Kelley, Tr. 7088-89)

Response to RFOF 4.38

Respondents' finding is misleading to the extent that it implies that AT&V's price was competitive. Since the acquisition, AT&V has lost an LPG Tank project located in Trinidad to CB&I. (Cutts, Tr. 2430-32). This indicates that AT&V may not have competitive pricing on larger LPG Tanks.

Other than AT&V, the two bidders for ITC's butene-1 LPG Tank, was CB&I and Matrix. RFOF 4.34; (N. Kelley, Tr. 7083-84; JX 37 at 18 (Newmeister, Dep.)). Matrix is a high cost supplier of LPG Tanks; since the sale of its Brown Steel division in 2000, Matrix has lost its in-house fabrication capabilities and has higher costs because it must subcontract fabrication work. (Newmeister, Tr. 1589-90; 2158-60). The evidence in the record suggests that AT&V's pricing is not competitive. Customers have found that any initial savings are often offset or exceeded by oversight costs and costs related to change orders. (Kistenmacher, Tr. 931-32 ("the price was low in the beginning but they had many change orders, that in the end the price was higher than of the conventional vendors."); [ ], *in camera*) ([ ]

])).

4.39 In hiring AT&V, ITC looked at AT&V's capabilities and resources to complete the project, reviewed its price, and examined its ability to deliver the project on time. (N. Kelley, Tr. 7111-12). AT&V had built stainless steel tanks for ITC in the past and did an excellent job. (N. Kelley, Tr. 7112).

#### Response to RFOF 4.39

Respondents' proposed finding is misleading. ITC primarily based its decision to hire AT&V on an ambient temperature, stainless steel tank project that AT&V performed for ITC ten years ago. (N. Kelley, Tr. 7112-13). Mr. Kelley admitted that "he did not go through any review of [AT&V's] financials or safety record" and that he was basically "relying on [his] previous experience with them [AT&V] and the fact that [he] had historically looked at those records" ten years ago. (JX 27 at 140-41 (N. Kelley, Dep.)).

ITC did not prequalify AT&V as a supplier of LPG Tanks. (N. Kelley, Tr. 7117). Rather, Mr. Kelley hired AT&V based on his relationship with AT&V and the knowledge that they had constructed some ambient temperature stainless steel tanks for ITC ten years ago. (N. Kelley, Tr. 7117).

4.40 AT&V was able to meet the initial construction schedule in terms of fabricating, purchasing, and constructing the tank. (N. Kelley, Tr. 7111). ITC knew it wanted a safe field erected tank, built on time, by people with experience, from a supplier able to pay its bills, on solid financial ground, and with a good reputation. (N. Kelley, Tr. 7127-30). AT&V also has a good safety record and its insurance rating was good. (N. Kelley, Tr. 7133). AT&V met and satisfied all of these requirements. (N. Kelley, Tr. 7127-30).

#### Response to RFOF 4.40

Respondents' proposed finding is misleading in its implication that the single sale of a small LPG Tank establishes AT&V as an effective competitor for LPG projects. (N. Kelley, Tr. 7120). AT&V is much smaller than CB&I, with substantially lower revenues and far fewer engineers. (CX 460 at 7235; JX 23 at Exh. 1 ([ ]), *in camera*; Simpson, Tr. 3293-3315; CX 1033 at 28).

Mr. Kelley did not formally qualify AT&V as a LPG Tank supplier for the Deer Park project; he relied on a past qualification process that only reviewed AT&V's capability for supplying ambient temperature API 650 tanks. (N. Kelley, Tr. 7117). Mr. Kelley admitted that he did not review AT&V's financials or safety record when considering AT&V's bid for the LPG Tank in 2000. (JX 27 at 140-41 (N. Kelley, Dep.)). There is no evidence in the record that Mr. Kelley either requested or called references from AT&V to verify that it had the capability to supply LPG Tanks.

There is no evidence in the record that Mr. Kelley either requested or called any references from AT&V to verify that it had the capability to supply LPG Tanks. Evidence in the record shows that AT&V has had financial difficulties and performance problems on specialty tank projects. CCFF 452-53; 455, 467, 473.

Respondents' finding misrepresents Mr. Kelley's willingness to purchase LPG Tanks from an inexperienced supplier. When it comes to buying these more specialty tanks, pressure spheres, and refrigerated tanks, "I would want [the supplier] to have built one before" and "I don't want to be a guinea pig." (JX 27 at 58 (N. Kelley, Dep.); N. Kelley, Tr. 7104-05, 7144; *see* Warren, Tr. 2290-91; CX 415 at 2).

4.42 AT&V has an excellent reputation and ITC is satisfied with AT&V's performance. (N. Kelley, Tr. 7130-31).

#### Response to RFOF 4.42

Respondents' finding is misleading. Mr. Kelley testified that he has limited knowledge of AT&V outside his own dealings with this supplier; he does not know how long AT&V has been in business or "all their doings elsewhere." (N. Kelley, Tr. 7088, 7108). Mr. Kelley has not investigated AT&V's qualifications for over ten years. (JX 27 at 140-41 (N. Kelley, Dep.)).

The evidence in the record describes AT&V as having a "poor track record." (Kistenmacher, Tr. 862). AT&V has a reputation for having performance problems, based on its work with other customers on low temperature and cryogenic tanks. CCF 467-469 (Linde BOC will not purchase tanks from AT&V because of issues relating to the tank design and the change orders); CCF 473-480, *in camera* ([ ]); CX 41 at 7336, *in camera* ([ ]); CCF 452-54; 464-40; CX 606 at PDM-CH 002617; CX 263 at CBI-HOU-004606; JX 28 at 43-46 (V. Kelly Dep.); (V. Kelly, Tr. 5269, 5273-74); RX 290 at CBI 04 6596-NEW; [ ], *in camera*; [ ], *in camera*).

4.43 Matrix is capable of building LPG tanks, and intends to pursue LPG opportunities in the future. (Newmeister, Tr. 2180-82).

#### Response to RFOF 4.43

Respondents' finding is misleading. Mr. Newmeister testified that Matrix has never bid on a LPG Tank (Newmeister, Tr. 2180-82) or built a LPG Tank (JX 37 at 18 (Newmeister Dep.)). Mr. Newmeister's testimony, as relied upon by Respondents, relates to pressure spheres, which are not in the relevant market. When asked whether Matrix had bid on a refrigerated LPG Tank, Mr. Newmeister answered "no." (Newmeister, Tr. 2181).

Moreover, Mr. Newmeister testified that entry into the LPG market would be similar to entry into the LNG market with "pretty much the same barriers and the same learning curves and expenses." (Newmeister, Tr. 1609; *see* JX 37 at 110-111 (Newmeister, Dep.) (describing resources Matrix needs to enter LNG market); *see also* CCF 307-91 (findings on entry barriers)).

Although Mr. Kelley claims Matrix is a capable supplier, ITC has never awarded a LPG Tank project to Matrix. (N. Kelley, Tr. 7085).

4.44 Matrix has bid API 650 tanks for ITC. (N. Kelley, Tr. 7085). Matrix is "a large contractor, and quite capable." (N. Kelley, Tr. 7085).

#### Response to RFOF 4.44

Respondent's finding is incomplete, unfounded and misleading. Respondents imply that Matrix is capable of supplying LPG Tanks. Mr. Kelley's testimony indicates that he is not well informed about Matrix's capabilities. When asked whether Matrix had supplied a field-erected LPG Tank prior to ITC's Deer Park facility project, Mr. Kelley responded, "I don't know. They may have bid on the propylene tanks." (N. Kelley, Tr. 7085).

Most of the bids that ITC receives from Matrix are for API 650 tanks, which is the bulk of what ITC buys (N. Kelley, Tr. 7085). An API 650 tank is not the same as an LPG Tank and not in any of the relevant markets in this proceeding. CCF 50-51, 76; RFOF 4.1.

Although Mr. Kelley claims to have received a bid from Matrix for its butene-1 LPG Tank, Mr. Newmeister of Matrix testified that Matrix has never bid on refrigerated LPG Tanks. RFOF 4.34; (Newmeister, Tr. 2180-82).

Although Mr. Kelley claims Matrix is capable, ITC has never awarded a tank project to Matrix. (N. Kelley, Tr. 7085). In fact, Mr. Kelley testified that ITC would not purchase LPG Tanks from Matrix unless Matrix could demonstrate that it had built LPG Tanks in the past. (JX 27 at 95 (N. Kelley, Dep.)) ("Q. And similarly, you would want to see that they [Matrix] had built these cryogenic tanks prior to hiring them to build one for you? / A. Correct.")).

*See also* CCRFF 4.46.

4.45 Matrix is gaining LPG customer confidence. (N. Kelley, Tr. 7090). According to ITC, Matrix runs a professional shop and promptly responds to customer requests. Matrix is able to meet customer requirements, as quickly as overnight, and performs good work. Matrix has performed repair work, replaced some tank bottoms, floating roof repairs, and seal repairs. (N. Kelley, Tr. 7109).

#### Response to RFOF 4.45

Respondents' finding is unfounded and misleading. Mr. Kelley testified only about ITC's confidence in Matrix as a supplier, not the confidence of other LPG customers. (N. Kelley, Tr. 7090).

Moreover, as described in CCRFF 4.43 and 4.46, Mr. Kelley is not well informed about Matrix's capabilities. ITC has hired Matrix only to do tank repair work. (N. Kelley, Tr. 7109). Beyond its abilities to provide tank repair services, Mr. Kelley has no direct experience with Matrix as a supplier of new LPG Tanks. *Id.*

Mr. Kelley's testimony indicates that he is misinformed or unaware of the qualifications and experience level of Matrix. (N. Kelley, Tr. 7085, 7091). He testified that he believes that Matrix has past experience supplying LPG Tanks (JX 27 at 142 (N. Kelley, Dep.)), although the evidence in the record indicates that Matrix has no past experience building LPG Tanks. (JX 37 at 18 (Newmeister, Dep.)) (Matrix has not supplied an LPG Tank)).



4.46 Since the Deer Park LPG project in 2000, Matrix has completed several tank repairs for ITC. Matrix is quite capable of building the tank. (N. Kelley, Tr. 7090).

#### Response to RFOF 4.46

Respondents' proposed finding is misleading because it implies that Matrix can be a competitive supplier of LPG Tanks based on its experience repairing tanks. Matrix had no past experience building LPG Tanks at the time Mr. Kelley sought bids for ITC's LPG project. (JX 37 at 18 (Newmeister, Dep.)) (Matrix has not supplied an LPG Tank). Moreover, at his deposition in this matter, Mr. Newmeister testified that Matrix has not bid on any LPG Tanks. (Newmeister, Tr.2180-82).

Most of the bids that ITC receives from Matrix are for repairs of API 650 tanks, which is the bulk of what ITC buys (N. Kelley, Tr. 7085). An API 650 tank is not the same as an LPG Tank and not in any of the relevant markets in this proceeding. CCFF 50-51, 76; RFOF 4.1. An LPG Tank is "particular type of tank" that is "not your everyday type of tank." (N. Kelley, Tr. 7145, 7146).

Mr. Kelley does not know whether Matrix is capable of building a LPG Tank. In the testimony cited by Respondents for this finding, Mr. Kelley has responded to a question as to whether Matrix had supplied a field-erected LPG Tank prior to winning the contract for ITC's butene-1 LPG Tank. Mr. Kelley responded, "I don't know. They may have bid on the propylene tanks." (N. Kelley, Tr. 7085).

Even if Matrix were to bid on LPG Tanks in the future, the evidence in the record suggests that Matrix's prices would not be competitive. Since the sale of its Brown Steel division in 2000, Matrix has lost its in-house fabrication capabilities and Matrix believes its costs for low temperature and cryogenic tanks have increased because it must subcontract fabrication work. (Newmeister, Tr. 1589-90, 2158-60).

4.47 Chattanooga Boiler & Tank (CB&T) has the capability to construct field erected LPG tanks. (Stetzler, Tr. 6355). CB&T is familiar with how to construct LPG tanks. (Stetzler, Tr. 6354-55). CB&T builds similar API 650 storage tanks, API 620 storage tanks, and ASME pressure vessels. These tanks are both shop and field erected. (Stetzler, Tr. 6356-59, 6308-09; RX 181 at 1-10).

#### Response to RFOF 4.47

Respondents' proposed finding is misleading to the extent that it implies that CB&T is familiar with constructing LPG Tanks. Mr. Stetzler was baffled about the definition of LPG Tanks. (Stetzler, Tr. 6400-01). He did not know what LPG Tanks contained. (Stetzler, Tr. 6387-88, 6399-6402) ("Maybe I'm confused . . . I'm not familiar with what that is . . . I don't know. Maybe I don't know."). Consequently, in response to the FTC's Civil Investigative Demand, Mr. Stetzler mistakenly reported sales of pressurized shop-built tanks as LPG Tanks. (JX 35 at 59-62 (Stetzler, Dep.)). Midway through his deposition, Mr. Stetzler testified that he was confused about the questioning regarding LPG Tanks and thought the questions related to "low pressure gas" tanks rather than "liquid petroleum gas" tanks. (JX 35 at 78-79 (Stetzler, Dep.)).

In JX 2, Respondents and Complaint counsel stipulated that CB&T has never built any LPG Tanks, as defined in this proceeding.

Chattanooga's alleged "familiarity" with LPG Tanks does not provide it with the ability to enter the LPG market and replace PDM. The average LPG project is valued at several million, CCF 172, while the value of CB&T's typical contract is in the "few hundred thousand" dollar range. (Stetzler, Tr. 6364). Mr. Newmeister of Matrix testified that entry into the LPG market would be similar to entry into the LNG market with "pretty much the same barriers and the same learning curves and expenses." (Newmeister, Tr. 1609). (*See* JX 37 at 110-111 (Newmeister, Dep.) (describing resources Matrix needs to enter LNG market)); *see also* CCF 307-91 (findings on entry barriers).

4.48 CB&T has all the necessary equipment to design and construct a field erected LPG tank, such as burning, welding, and forming equipment as well as cranes, experienced labor crews and engineers, and equipment in the field. (Stetzler, Tr. 6355-56). Constructing a field-erected LPG tank is essentially the same process as LNG and LIN/LOX tanks. (Stetzler, Tr. 6354-55).

#### Response to RFOF 4.48

Respondents' finding is misleading to the extent that it implies that CB&T is familiar with constructing LPG Tanks. Mr. Stetzler's uncorroborated testimony relating to LPG Tanks is unreliable. Mr. Stetzler was baffled about the definition of LPG Tanks. (Stetzler, Tr. 6400-01). He did not know what LPG Tanks contained. (Stetzler, Tr. 6387-88, 6399-6402) ("Maybe I'm confused . . . I'm not familiar with what that is . . . I don't know. Maybe I don't know."). Consequently, in response to the FTC's Civil Investigative Demand, Mr. Stetzler mistakenly reported sales of pressurized shop-built tanks as LPG Tanks. (JX 35 at 59-62 (Stetzler, Dep.)).

Moreover, Respondents' finding that "constructing a field-erected LPG Tank is essentially the same process as LNG and LIN/LOX tanks" relies on testimony from Mr. Stetzler that provides a very generalized, basic description of the tank building process for a non-engineer audience. In response to the request to "discuss how [LPG Tanks are built]," Mr. Stetzler testified that "A. Well, it's basically the same I told you with the LNG. You have to design the -- the customer sends you a specification; you go through the API 620 code; you design it; you purchase the materials, which is plate materials primarily; you cut the plate materials; you roll it; you form it; you weld nozzles; ship it to the field; and you put the bottom up and erect the shell with cranes, and just the same way you do any other tank." (Stetzler, Tr. 6354).

4.49 CB&T is interested and continues to pursue future LPG tank projects. (Stetzler, Tr. 6365).

#### Response to RFOF 4.49

Respondent's finding is based on unreliable testimony from Mr. Stetzler, and is misleading to the extent that it implies that CB&T is familiar with constructing LPG Tanks. Mr. Stetzler was baffled about the definition of LPG Tanks. (Stetzler, Tr. 6400-01). He did not know what LPG Tanks contained. (Stetzler, Tr. 6387-88, 6399-6402) ("Maybe I'm confused . . . I'm not familiar with what

that is . . . I don't know. Maybe I don't know.”). Consequently, in

response to the FTC's Civil Investigative Demand, Mr. Stetzler mistakenly reported sales of pressurized shop-built tanks as LPG Tanks. (JX 35 at 59-62 (Stetzler, Dep.)).

Respondents' finding is inaccurate. Mr. Stetzler's testimony that CB&T continues to pursue LPG Tank projects relates to pressure tanks that are not in the relevant product market. The cited testimony was elicited immediately after Mr. Stetzler referred to a tank supplied to Felix Equities as an LPG Tank. (Stetzler, Tr. 6364-65). Mr. Stetzler described this tank as ambient temperature pressure tank. (Stetzler, Tr. 6361-62).

Moreover, the fact that there is no evidence in the record to corroborate the testimony from Mr. Stetzler that CB&T has bid on or won any LPG Tank project confirms that Mr. Stetzler's testimony relates to ambient temperature pressure tanks rather than LPG Tanks as defined in this proceeding. *See* CCF 172.

4.50 If a company has the capability to build a standard API 650 or a standard API 620 tank, they would also have the capability to build a field erected LPG tank: the same skills are used to build an API 650 as an API 620 tank. All you have to do is read the code, find out the differences, use the right metal and welding rods, the right welding procedures, and anybody can build either tank. (N. Kelley, Tr. 7103, 7086).

#### Response to RFOF 4.50

Respondents' finding is unfounded. Mr. Kelley has never worked for a tank supplier or designed and constructed an LNG or LPG Tank. (N. Kelley, Tr. 7078-79). ITC is not a supplier of LPG Tanks. (N. Kelley, Tr. 7076-77).

Respondents' finding is misleading because it implies that any builder of API 620 or API 650 tanks can build an LPG Tank using the same resources. As stated in CCRFF 4.4, LPG Tanks are a subset of API 620 tanks. The API 620 standard covers all flatbottom tanks, which includes water tanks and other industrial tanks. The refrigerated tanks contained in the LPG Tank product market are covered by Appendix R of API 620. API 620 Appendix R is not used for tanks that liquefy gases using pressure, which are not contained in the relevant product market. CCF 76; RFOF 4.1.

API 650 tanks are not included in the LPG Tank product market. API 650 governs ambient low pressure temperature tanks used to store oil; it does not govern the relevant product market, i.e. **refrigerated** LPG tanks. (N. Kelley, Tr. 7103 (emphasis supplied)).

The witness that Respondents rely upon for its proposed finding, Mr. Kelley, testified that the welding techniques required for LPG Tanks are unique. (JX 27 at 59 (N. Kelley, Dep.)). Depending on the temperature, the materials are also unique. *Id.* Both Mr. Glenn and Mr. Newmeister of Matrix describe LPG Tanks as very specialized and similar to LNG tanks. (Newmeister, Tr. 1609-10; Glenn, Tr. 4073); RFOF 4.8.

Respondents' witness, Mr. Kelley of ITC, made clear in his testimony that, "When it comes to buying these more specialty tanks, pressure spheres, spheres and refrigerated tanks," Mr. Kelley

testified that, “I would want [the supplier] to have built one before,” and “I don’t

want to be a guinea pig.” (JX 27 at 58 (N. Kelley, Dep.); N. Kelley, Tr. 7104-05; *see* Warren, Tr. 2290-91; CX 415 at 2); CCF 339-341.

“Any time you use a new contractor, somebody you’re not familiar with and haven’t used before, there’s a risk of that contractor not performing like he should or not paying the bills.” (JX 27 at 69 (N. Kelley, Dep.)). Without experience, a new LPG tank supplier would be likely to operate at a higher cost level than an experienced supplier (like CB&I) while the new tank supplier learned from its mistakes. (Newmeister, Tr. 1605-06).

4.51 Numerous other capable tank manufacturers exist: Matrix, Southwest Tank, and Pasadena Tank have also built tanks for ITC (N. Kelley, Tr. 7103-05, 7137); Bay Limited, Pat Tank, Wyatt Field Services, and several others that have been around a long time (N. Kelley, Tr. 7104); and Puget Sound Fabricators,

Advanced Tank and some 40-50 companies that work locally are capable of building LPG tanks. (Stetzler, Tr. 6367).

#### Response to RFOF 4.51

Respondents finding is misleading. Many of the tank suppliers in Respondents’ finding were identified by Mr. Kelley of ITC as suppliers of API 650, ambient temperature tanks, not LPG Tanks. API 650 tanks are not in the relevant product market. *See* CCF 76, RFOF 4.1.

Mr. Stetzler’s testimony relating to LPG Tanks is unreliable. Mr. Stetzler was baffled about the definition of LPG Tanks. (Stetzler, Tr. 6400-01). He did not know what LPG Tanks contained. (Stetzler, Tr. 6387-88, 6399-6402) (“Maybe I’m confused . . . I’m not familiar with what that is . . . I don’t know. Maybe I don’t know.”). Consequently, in response to the FTC’s Civil Investigative Demand, Mr. Stetzler mistakenly reported sales of pressurized shop-built tanks as LPG Tanks. (JX 35 at 59-62 (Stetzler, Dep.)).

As described in CCRFF 4.43, Matrix has never bid on a refrigerated LPG Tank. (Newmeister, Tr. 2180-82). The preponderance of the evidence in the record indicates that Matrix had no past experience building LPG Tanks. (JX 37 at 18 (Newmeister Dep.)) (Matrix has not supplied an LPG Tank). As described in CCRFF 4.44-46, the evidence suggests that Matrix’s prices

are not competitive for specialty tanks. CCRFF 4.44, 4.46.

There is no evidence that Southwest Tank has built or bid on an LPG Tank. *See* CCFF 172. Mr. Kelley does not remember ever receiving a bid from Southwest Tank for an LPG Tank (N. Kelley, 7105-06, 7133). Mr. Kelley admitted that he has “not done any investigation with the folks over at Southwest Tank to determine whether or not they are able to build API 620 tanks.” (N. Kelley, Tr. 7134).

Wyatt Field Services has not won an LPG Tank contract. (Harris, Tr. 7286); *see also* CCFF 172. Wyatt Field Services has built only API 650 tanks for ITC, which are not in the LPG Tank market. (N. Kelley, Tr. 6103-04). According to Mr. Kelley, Wyatt Field Services “do[es]n’t pursue my business,” and have not pursued ITC’s business for “many years.” (JX 27 at 71 (N. Kelley, Dep.)). Even though Mr. Kelley is “sure they can build LPG tanks,” Mr. Kelley would still want to see that Wyatt Field Services “have already built an LPG plant for someone else” before he used them as an LPG supplier. (*Id.* at 72).

Pasadena Tank has built API 650 tanks for ITC. (N. Kelley, Tr. 7103). There is no evidence in the record that Pasadena Tank has built LPG Tanks. *Id.*; *see also* CCF 172.

Bay Limited and Pat Tank also have built only API 650 tanks for ITC, which are outside the relevant market. (N. Kelley, Tr. 7103-04). There is no evidence that Bay Limited and Pat Tank have built LPG Tanks. *Id.* *See also* CCF 172.

Respondents' course-of-business documents do not note these companies or the alleged "40 or 50" unnamed companies as competitors. Rather, Respondents' business documents refer else" before he used them as an LPG supplier. (*Id.* at 72).

Pasadena Tank has built API 650 tanks for ITC. (N. Kelley, Tr. 7103). There is no evidence in the record that Pasadena Tank has built LPG Tanks. *Id.*; *see also* CCF 172.

Bay Limited and Pat Tank also have built only API 650 tanks for ITC, which are outside the relevant market. (N. Kelley, Tr. 7103-04). There is no evidence that Bay Limited and Pat Tank have built LPG Tanks. *Id.* *See also* CCF 172.

Respondents' course-of-business documents do not note these companies or the alleged "40 or 50" unnamed companies as competitors. Rather, Respondents' business documents refer to each other as the "major" competitor in the LPG market. (CX 116 at PDM-HOU-019181; CX 94 at PDM-HOU017580; *see* CX 216 at CBI-PL-0033886).

4.52 LPG tanks are built around the world by companies other than CB&I, AT&V and Matrix. (N. Kelley, Tr. 7091; Harris, Tr. 7288-89, 7293-95).

#### Response to RFOF 4.52

Respondents' proposed finding lacks foundation. Mr. Kelley testified that he only deals with local U.S. tank contractors. Moreover, he could not name any offshore or foreign firms that build LPG Tanks. (N. Kelley, Tr. 7091). Dr. Harris' testimony is unreliable because it is simply based on reviewing Internet sites. (Harris, Tr. 7293-95).

4.53 Foreign tank suppliers currently advertise in U.S. trade journals. (N. Kelley, Tr. 7126).

#### Response to RFOF 4.53

Respondents' proposed finding mischaracterizes Mr. Kelley's testimony. Mr. Kelley agreed he had never seen an "off-shore tank supplier or pressure sphere supplier advertise in any journals." (JX 27 at 118 (N. Kelley, Dep.)). Moreover, Mr. Kelley testified that he has never sought a bid from a foreign tank supplier because he "[d]idn't know who to go to, I guess. Went to the local boys." (JX 27 at 118 (N. Kelley, Dep.)).

Respondents' proposed finding is misleading. The fact that other companies build LPG

Tanks overseas does not imply that these other companies can compete on an equal footing with either CB&I or the pre-acquisition PDM. In fact, Respondents' economic expert Dr. Harris conceded that he had no evidence that any foreign firms have chosen to produce LPG Tanks in the U.S. (Harris, Tr. 7778-79).

Mr. Kelley testified that he has never considered an off-shore supplier for the tanks he purchases. (JX 27 at 118-19 (N. Kelley, Dep.)). Moreover, his experience buying capital equipment is that he gets better pricing from buying equipment locally in the U.S. rather than from another country. (JX 27 at 74-75 (N. Kelley, Dep.)).

Foreign tank suppliers do not participate in the U.S. LPG market and are not entering that market. There is no evidence that foreign tank suppliers have bid on U.S. LPG projects. (JX 27 at 114 (N. Kelley, Dep.) (ITC has never had an offshore supplier bid on its tank projects)). Nor is there evidence that foreign tank suppliers have won any U.S. LPG projects. (JX 27 at 113-14 (N. Kelley, Dep.) (ITC has never awarded a tank project to an offshore supplier)); CCF 172.

[ ] testified at trial and in his affidavit that “[ ] could not successfully compete against CB&I for single-containment LNG or LPG tank projects” in the U.S. ([ ], *in camera*; RX 738).

TKK has never built an LPG tank in the United States. (Cutts, Tr. 2351). Moreover, TKK is not interested in bidding on LPG Tank projects in the United States. (Cutts, Tr. 2431).

4.54 Domestic LPG customers would consider foreign suppliers of LPG tanks. In fact, some domestic LPG customers are foreign owned, such as ITC's Japanese ownership. (N. Kelley, Tr. 7111).

#### Response to RFOF 4.54

Respondents' proposed finding is speculative and is misleading with respect to Mr. Kelley's testimony.

Mr. Kelley has never considered an offshore firm to supply tanks to ITC. (JX 27 at 118-19 (N. Kelley, Dep.)). Mr. Kelley further testified that he does not know whether he would consider a foreign supplier, and that it would depend on their background, among other things. (N. Kelley, Tr. 7111). *See* CCRFF 4.53.

Respondents' finding cites no evidence that any customers other than Mr. Kelley would consider foreign suppliers of LPG tanks.

Moreover, Mr. Kelley prefers local suppliers. (JX 27 at 90-91 (N. Kelley, Dep.); N. Kelley, Tr. 7091). He testified that “it would be hard for a foreign supplier” with no local presence “to get business to start out with. It would be hard. ... [I]f they don't have anything in the states 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.)).

Mr. Kelley is skeptical that an offshore tank supplier would offer competitive pricing. His experience buying capital equipment for ITC is that he gets better pricing from buying

equipment locally in the U.S. rather than from another country. (JX 27 at 74-75 (N. Kelley, Dep.)).

**C. THE U.S. LPG MARKET HAS NOT SEEN ENTRY BY INDEPENDENT FIRMS**

4.55 LPG customers are satisfied with current price levels in the LPG market, and do not believe prices for LPG tanks will increase as a result of the Acquisition. (N. Kelley, Tr. 7090-7091; Stetzler, Tr. 6367).

Response to RFOF 4.55

Respondents' proposed finding is misguided and is uncorroborated by the record. Mr. Stetzler, whom Respondents cite as the basis for its proposed finding, is not an LPG customer, but a supplier of field-erected tanks. (Stetzler, Tr. 6308). Mr. Stetzler is not familiar with LPG Tanks. At his deposition, Mr. Stetzler was unsure what LPG Tanks were and what they contained. (Stetzler, Tr. 6387-88, 6399-402 ("Maybe I'm confused . . . I'm not familiar with what that is . . . I don't know. Maybe I don't know.")).

Mr. Stetzler's opinion that LPG Tank prices will not increase is unfounded and at best, speculative. Mr. Stetzler assumes that customers will procure LPG Tanks from companies such as PSF, Advanced Tank, Matrix and his own company even though these companies have no experience supplying LPG Tanks. (Stetzler, Tr. 6367). Contrary to Mr. Stetzler's speculations is factual testimony from Mr. Kelley of ITC and Ms. Warren of Fluor, as well as other evidence, which indicates that customers only want to hire an experienced LPG Tank supplier. (JX 27 at 58 (N. Kelley, Dep.); N. Kelley, Tr. 7104-05; *see* Warren, Tr. 2288, 2290-92; CX 415 at 2); *see also* CCFF 339-340 (LPG Tank customers require past experience).

The other person who Respondents' proposed finding relies upon, Mr. Kelley, is misinformed about the qualifications and experience level of Matrix and AT&V which are the companies he believes compete with CB&I in the LPG market. (N. Kelley, Tr. 7091). He believes that Matrix and AT&V have past experience supplying LPG Tanks (JX 27 at 142 (N. Kelley, Dep.)) even though the preponderance of the evidence in the record indicates that Matrix has no past experience building LPG Tanks and AT&V's past experience is limited to ITC's butene-1 LPG Tank. (JX 37 at 18 (Newmeister, Dep.) (Matrix has not supplied an LPG Tank)); CCFF 172 (no evidence that AT&V built any LPG Tanks before it supplied ITC with its butene-1 LPG Tank).

Although Mr. Kelley testified that there are other contractors who supply LPG Tanks around the world, he couldn't name them. (N. Kelley, Tr. 7091). He conceded that the only suppliers he knew of that he believed had experience supplying LPG Tanks were CB&I, Matrix and AT&V (N. Kelley, Tr. 7137). Mr. Kelley also conceded that prior to his procurement of ITC's butene-1 LPG Tank, he did not undertake an investigation to determine which tank companies supplied LPG Tanks. (N. Kelley, Tr. 7133-34).

Mr. Newmeister testified that the acquisition is likely to lead to increased prices for 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).

4.56 ITC believes that there is enough competition for field erected LPG tanks in the U.S. such that ITC will be able to procure those tanks at a reasonable price because AT&V beat the socks off of CB&I and can definitely do it cheaper. (N. Kelley, Tr. 7092, 7137).

#### Response to RFOF 4.56

Mr. Kelley lacks foundation for his testimony relating to competitive effects from the acquisition because he has no knowledge of the prices in the LPG market post-acquisition. (N. Kelley, Tr. 7081); RFOF 4.26. Mr. Kelley has never investigated the LPG market to determine what companies participate in that market and have experience. (N. Kelley, Tr. 7133-34) (agreeing that he “didn’t engage in any search for other bidders [besides CB&I, Matrix and AT&V]”); *id.* (agreeing that he has not done any investigation with the folks over at Southwest Tank to determine whether or not they are able to build API 620 tanks)).

Mr. Kelley is misinformed about the qualifications and experience level of Matrix and AT&V which are the companies he believes compete with CB&I in the LPG market. (N. Kelley, Tr. 7091). He believes that Matrix and AT&V have past experience supplying LPG Tanks (JX 27 at 142 (N. Kelley, Dep.)), even though the preponderance of the evidence in the record indicates that Matrix has no past experience building LPG Tanks and AT&V’s past experience is limited to ITC’s butene-1 LPG Tank. (JX 37 at 18 (Newmeister, Dep.) (Matrix has not supplied an LPG Tank)); CCF 172 (no evidence that AT&V built any LPG Tanks before it supplied ITC with its butene-1 LPG Tank).

Mr. Kelley is unfamiliar with the level of competition for LPG Tanks in the United States. Mr. Kelley could not name any suppliers, other than CB&I, Matrix and AT&V that he knew of that he believed had experience supplying LPG Tanks. (N. Kelley, Tr. 7091, 7137). In preparation for bidding the Deer Park facility, Mr. Kelley did not undertake an investigation to determine which tank companies supplied LPG Tanks. (N. Kelley, Tr. 7133-34).

The evidence in the record suggests that AT&V cannot “beat the socks off” CB&I because AT&V is a higher-cost tank supplier. In 2002, AT&V lost an LPG Tank project located in Trinidad to CB&I. (Cutts, Tr. 2430-32). In dealing with AT&V in other markets, **customers have found that any initial savings are often offset or exceeded by oversight costs and costs related to change orders. (Kistenmacher, Tr. 931-32 (“the price was low in the beginning but they had many change orders, that in the end the price was higher than of the conventional vendors.”); [ ] , in camera) (“We anticipated spending between [ ] to [ ] in the due diligence and the development of AT&V as a supplier. . . . we’ve easily spent the full [ ] difference in pricing [ ] now. . . . [a]t the end of this, I would expect that this is going to cost us another [ ] beyond the**

[ ] already sunk.”).

4.58 Tank customers do not believe that the Acquisition has hindered their ability to obtain a competitive price on any tanks in any way. (N. Kelley, Tr. 7135, 7137).

#### Response to RFOF 4.58

Respondents’ finding is misleading. Mr. Kelley testimony relates only to ITC and not to other LPG customers. (N. Kelley, Tr. 7135, 7137).

Mr. Kelley lacks foundation for his testimony relating to competitive effects from the acquisition because he has no knowledge of the prices in the LPG market post-acquisition. (N. Kelley, Tr. 7081); RFOF 4.26. Since the acquisition, Mr. Kelley has done no research to determine what companies are present in the market. (N. Kelley, Tr. 7081). Moreover, Mr. Kelley never investigated the LPG market prior to the acquisition to determine what companies participate in that market and have experience. (N. Kelley, Tr. 7133-34) (agreeing that he “didn’t engage in any search for other bidders [besides CB&I, Matrix and AT&V]”); *id.* (agreeing that he has not done any investigation with the folks over at Southwest Tank to determine whether or not they are able to build API 620 tanks).

Mr. Kelley’s basis for his lack of concern over price increases is unreliable. Matrix has higher costs because it sold its in-house fabrication capabilities and it must now subcontract fabrication work. (Newmeister, Tr. 1589-90; 2158-60). Matrix testified that CB&I’s acquisition of PDM will lead to higher prices for LPG Tanks. (Newmeister, Tr. 2203).

Not only is Respondents’ finding misleading, it also ignores the substantial evidence in the record that the acquisition has harmed competition in the LNG and LIN/LOX tank markets. *See generally* CCF 749-1107.

LNG tank customers believe that the Acquisition has hindered their ability to obtain a competitive price on LNG tanks. Mr. Blaumueller testified that by eliminating one of the qualified U.S. LNG tank suppliers, the acquisition negatively impacted customers — “What makes a vendor bid a lower price is not altruism but a fear that if you do not bid that lower price, you won’t get the job, and on the other hand, if there is nobody else to be qualified, then there is no longer that reason to bid the lower price.” (Blaumueller, Tr. 323-324). Mr. Hall of Memphis Light, Gas & Water expressed a similar concern that his company lost the ability to competitive bids for an LNG tank. He testified that MLGW doesn’t “see anyone out there with experience that could come into the market and compete with CB&I/PDM.” (Hall, Tr. 1830).

Likewise, Mr. Hilgar of Air Products believes the acquisition will lead to price increases for field-erected cryogenic tanks “because one of the low-cost, preferred bidders will be removed from the market.” (JX 25 at Exh. 1 ¶ 14 (Hilgar, Dep.)). *See also* CCF 717. Other LIN/LOX

customers believe that the Acquisition has hindered their ability to obtain a competitive price on LIN/LOX tanks. Mr. Cleve Fontenot of Air Liquide is concerned that the acquisition will lead to increased prices for LIN/LOX tanks. In his experience, on similar types of major equipment, his company saw price increases when there was a constriction in the market, *i.e.* reduced competition. (Fontenot, Tr. 2031). Mr. Fontenot's boss, David Kamrath, also testified that he was concerned prices of LIN/LOX tanks would rise post-acquisition: "A. 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 also* CCF 718.

4.59 LPG customers are satisfied with the current level of competition in the LPG market. (N. Kelley, Tr. 7092, 7137).

#### Response to RFOF 4.59

Respondents' finding is essentially a duplicate of RFOF 4.56. Like RFOF 4.56, it relies on the uncorroborated and speculative testimony of Mr. Kelley of ITC and is misleading. As described in RFOF 4.56, Mr. Kelley lacks foundation for his testimony on the competitive effects from the acquisition on the LPG Tank market. *See* CCRFF 4.56 and CCRFF 4.58.

Mr. Kelly's cited testimony related only to ITC and not other LPG customers. (N. Kelley, Tr. 7092, 7137).

4.60 At this point, customers have enough competitors on LPG tanks that they do not need to research additional tank suppliers. (N. Kelley, Tr. 7134). The only contractors that ITC deals with are local, not located all over the country. The three contractors that bid on the 2000 Deer Park project (Matrix, AT&V and CB&I) give ITC the competition that it needs to obtain a competitive price. (N. Kelley, Tr. 7091).

#### Response to RFOF 4.60

Respondents' finding duplicates RFOF 4.56 and RFOF 4.58; it relies on Mr. Kelley's uncorroborated and speculative testimony and is misleading. As described in RFOF 4.56 and RFOF 4.58, Mr. Kelley lacks foundation for his testimony on the competitive effects from the acquisition on the LPG Tank market. *See* CCRFF 4.56 and CCRFF 4.58.

Moreover, as described in CCRFF 4.57, Mr. Kelley is misinformed about the qualifications and experience level of Matrix and AT&V which are the companies he believes compete with CB&I in the LPG market. (N. Kelley, Tr. 7091). He believes that Matrix and AT&V have past experience supplying LPG Tanks (JX 27 at 142 (N. Kelley, Dep.)), even though the preponderance of the evidence in the record indicates that Matrix has no past experience building LPG Tanks and AT&V's past experience is limited to ITC's tiny butene-1 LPG Tank. (JX 37 at 18 (Newmeister, Dep.)) (Matrix has not supplied an LPG Tank); CCF 172 (no evidence that AT&V built any LPG Tanks before it supplied ITC with its tiny butene-1 LPG Tank). The evidence also suggests that AT&V's price was not competitive. PDM was not a

bidder and one of the bidders, Matrix, has higher costs because it must subcontract fabrication work. (Newmeister, Tr. 1589-90; 2158-60).

4.62 LPG customers believe that the merger between CB&I and PDM has not hindered its ability to obtain any of the types of tanks or structures that customers have purchased in the past or plan on purchasing in the future because there are other competitors in the LPG market. (N. Kelley, Tr. 7137-38).

#### Response to RFOF 4.62

Respondents' finding is misleading and speculative because it reflects the opinion only of ITC and not other tank customers. (N. Kelley, Tr. 7137-38). As stated in CCRFF 4.58-4.60, Mr. Kelley's testimony lacks foundation and is unsupported by the record.

4.64 Mr. Scorsone perceived competition in the LPG market from AT&V, Matrix, TKK/ATV, Skanaska Whessoe (sic), Technigz/Zachry (sic), and any other flatbottom tank manufacturer. (Scorsone, Tr. 4850). LPG tanks are an easy extension from the flatbottom tank market. (Scorsone, Tr. 5043).

#### Response to RFOF 4.64

Respondents' finding is based on Mr. Scorsone's self-serving and uncorroborated "state of mind" testimony. Moreover, Mr. Scorsone's cited testimony is contradicted by Mr. Scorsone himself, and by Respondents' course-of-business documents. On cross-examination, Mr. Scorsone testified that he has not in fact seen AT&V, Matrix, TKK/AT&V, Whessoe or Technigaz build any LPG Tanks in the U.S. (Scorsone, Tr. 5169-70):

Q. ...Now, you've never seen ATV building any LPG tanks in the U.S.?

A. I've not observed ATV building LPG tanks in the U.S.

Q. You've never seen Matrix, right, sir, building LPG tanks in the U.S.?

A. I've never observed them constructing LPG tanks in the U.S., no.

Q. Technigaz?

A. No.

Q. Whessoe?

A. No.

In his President's Report to PDM's Board, Mr. Scorsone reported that "CBI is PDM EC's **only competitor** on domestic cryogenic, LNG, LPG, Ammonia [spheres] and thermal vacuum projects." (CX 660 at PDM-HOU005016) (emphasis supplied).

Flatbottom tank manufacturers cannot easily extend their product line from flatbottom tanks to LPG Tanks. Both Mr. Glenn of CB&I and Mr. Newmeister of Matrix describe LPG Tanks as very specialized and similar to LNG tanks. (Newmeister, Tr. 1609-10; Glenn, Tr. 4073); RFOF 4.8.

Entry into the LPG market would be similar to entry into the LNG market with "pretty

much the same barriers and the same learning curves and expenses.” (Newmeister, Tr. 1609). (*See* JX 37 at 110-111 (Newmeister, Dep.) (describing resources Matrix needs to enter LNG market)); *see also* CCF 307-91 (findings on entry barriers).

There is no evidence in the record that any foreign suppliers have built an LPG Tank in the U.S. (JX 27 at 113-14 (N. Kelley, Dep.)) (ITC has never awarded a tank project to an offshore supplier); CCF 172; *See also* CCRFF 4.53.

4.65      LPG customers also evaluate pressure spheres as an alternative to refrigerated storage tanks. (Scorsone, Tr. 5170-71).

#### Response to RFOF 4.65

Respondents’ finding is solely based on Mr. Scorsone’s self-serving testimony, which is contradicted by Mr. Scorsone’s admission under cross-examination that during his years in the

tank industry, he never saw a customer switch from field erected LPG tanks to shop-built pressurized tanks to obtain a lower price. (Scorsone, Tr. 5170-71).

The preponderance of the evidence shows that pressure spheres are not economic substitutes for refrigerated storage tanks when large volumes of LPG are stored. Mr. Crider of Texaco testified that the pressure sphere alternative was too expensive for Texaco's Ferndale LPG import terminal. Texaco bought a 400,000 barrel LPG Tank for about \$5 million because buying multiple pressure spheres to store the equivalent volume would be three times more expensive. (Crider, Tr. 6720). *See also* CX 1096 at CBI-H4003300 (storage of 900,000,000 bcf of natural gas is ten times cheaper in an LNG tank than in multiple pressure spheres).

Moreover, for some petrochemicals such as butadiene, storage tanks must be refrigerated to keep the chemical from polymerizing. For such chemicals, an unrefrigerated pressure sphere (or bullet) is not a substitute for an LPG Tank. (JX 27 at 38-39 (N. Kelley, Dep.)).

Dr. Simpson and Dr. Harris agreed that refrigerated LPG Tanks constitute a relevant antitrust market. Simpson, Tr. 3356-57 (LPG); Harris, Tr. 7280 (LPG). This market definition excludes pressure spheres and bullets, which are not an economic substitute for LPG Tanks. CCF 76. 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. (JX 27 at 32 (N. Kelley, Dep.)). *See* CCF 76-83.

4.66 CB&I's last LPG project was awarded by ABB Lummus in Port Arthur, TX. The project included four ambient-temperature LPG spheres, one low-temperature LPG tank for butadiene and one flatbottom conventional storage tank. The total value of the project was \$8.5 million. The LPG tank alone was \$1.5 million. (Scorsone, Tr. 5039-40).

#### Response to RFOF 4.66

Respondents' finding describes a project that involved many tanks that are not in the LPG market, as defined in this proceeding. CCF 76; RFOF 4.1. The value of the LPG Tank constituted only 17.6% of the project's total value.

4.67 On the project, CB&I competed against Wyatt and AT&V. On this project, CB&I initially bid a little above a 4 percent margin. ABB came back to CB&I after the initial round of bidding and informed CB&I that it was 3rd out of 3 bidders. (Scorsone, Tr. 5040).

#### Response to RFOF 4.67

Respondents' finding is misleading and based solely on Mr. Scorsone's self-serving and uncorroborated testimony.

Mr. Scorsone did not testify that Wyatt and AT&V competed for the LPG Tank procured from CB&I by ABB Lummus. (Scorsone, Tr. 5040). As asserted in RFOF 4.68 and RFOF 4.69, Mr. Scorsone testified that CB&I adjusted its design for the pressure spheres in order to lower its

pricing in response to other competitive bids. (Scorsone, Tr. 5040-41). This testimony indicates that the competition CB&I alleges was related to the pressure spheres, not the LPG Tank.

4.68 As a result, CB&I "sharpened its pencils" and developed an innovation whereby CB&I eliminated the need for one additional support column on each sphere. This innovation lowered the overall cost of the project. (Scorsone, Tr. 5040-41).

#### Response to RFOF 4.68

Respondents' finding is based solely on Mr. Scorsone's uncorroborated and self-serving testimony.

Respondents' finding is irrelevant because it relates to pricing and innovation competition for pressure spheres which are not in any of the relevant markets in this proceeding. *See also* RFOF 4.66-67.

4.69 In response to other competitive bids, CB&I lowered its profit margin from 4 percent to 2.5 percent. Without competition, CB&I would never have redesigned the spheres or worked to reduce costs. The ABB project occurred post-acquisition. Scorsone was not surprised to see AT&V competing on the front line on the ABB project. (Scorsone, Tr. 5041-42).

#### Response to RFOF 4.69

Respondents' finding is inaccurate. At no time did Mr. Scorsone testify that he was "not surprised" to see AT&V competing on the ABB project. (Scorsone, Tr. 5041-42).

Respondents' finding is based solely on Mr. Scorsone's self-serving testimony which is uncorroborated.

Respondents' finding is irrelevant because it relates to pricing and innovation competition for pressure spheres which are not in any of the relevant markets in this proceeding.

*See also* RFOF 4.66-68.

4.70 Based on his observations and experiences, CB&I cannot impose a price increase in the future, and if it does, CB&I will lose work to competitors. (Scorsone, Tr. 5043).

#### Response to RFOF 4.70

Respondents' finding is based solely on Mr. Scorsone's self-serving and speculative testimony which is uncorroborated.

Moreover, there is evidence that CB&I has indeed increased its prices for relevant products post-acquisition. *See* CCF 20-26.

## **D. THE U.S. LPG MARKET HAS SUBSTANTIAL BARRIERS TO ENTRY**

4.71 Morse Construction Group ("Morse") constructs AWA, API, pulp, paper, chemical, petroleum, and flatbottom tanks. These tanks are atmospheric or ambient, not refrigerated. (Maw, Tr. 6546-47).

### Response to RFOF 4.71

Morse was a regional tank supplier before CB&I acquired it on November 30, 2001. RFOF 4.75; (CX 660 at PDM HOU005015). It supplied tanks primarily to the Pacific Northwest and Hawaii. (Maw, Tr. 6592, 6614). The small size of Morse's fabrication facility Morse's ability to compete exclusively to the Northwest. (CX 1484 at 3746).

Morse's market share in the tank market was 10%. (CX 660 at PDM HOU005015). CB&I considered Morse to be a "niche player" in the tank business. (CX 1485 at 3741).

4.73 Prior to 1994, Morse had never constructed a low-temperature tank. Morse has not constructed a cryogenic tank since 1994. (Maw, Tr. 6547-48). The Ferndale LPG tank is the only LPG tank ever constructed by Morse. (Maw, Tr. 6546).

### Response to RFOF 4.73

Respondents' proposed finding is incorrect. Morse has never constructed a cryogenic tank (API 620 Appendix Q). (*See* CX 1615 at 3 ("cryogenic storage is for temperatures less than - 150 F"); Maw, Tr. 6580 (Ferndale LPG Tank was designed for minus 55 degrees Fahrenheit)). Mr. Maw testified that with the exception of the LPG Tank for Texaco's Ferndale terminal, Morse only supplies ambient temperature tanks. (Maw, Tr. 6547).

Complaint counsel agrees that the LPG Tank for Texaco's Ferndale terminal is the only LPG Tank ever constructed by Morse.

4.75 Morse became an independent subsidiary of CB&I on November 30, 2001. CB&I purchased Morse for \$3 million. (Maw, Tr. 6545). Mr. Maw has never owned stock in Morse nor did he receive a portion of the purchase price. (Maw, Tr. 6545-46).

### Response to RFOF 4.75

Respondents' proposed finding incorrectly suggests that Morse, being "independent," would compete against CB&I. Although an independent subsidiary of CB&I, "Morse would not compete against another arm of CB&I for an LPG tank." (Maw, Tr. 6661-62).

Mr. Maw is an employee of Morse which is owned by Respondents. Four or five months after Respondents bought Morse, Mr. Maw was promoted to President of Morse. (Maw, Tr. 6545). As an employee of CB&I, it is in Mr. Maw's self-interest to support Respondents' positions in this proceeding.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.76 Texaco sought an LPG tank at its Ferndale import facility in Ferndale, Washington, some 80 miles from Seattle. Morse is located in Everett, Washington, some 40 miles from Seattle. Morse's facilities are approximately 85 miles from Ferndale. (Maw, Tr. 6549).

#### Response to RFOF 4.76

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545). With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG Tank market. CCFF 180.

4.82 Mr. Crider suggested to Texaco management in Tulsa that Morse be considered. He suggested Morse based on a professional relationship with a salesman at Morse who had been inquiring about potential business for years. When Jim Offutt from Texaco asked if anyone else should be considered on the Ferndale project, Mr. Crider suggested Morse based on its flatbottom tank experience. (Crider, Tr. 6710-11; Maw, Tr. 6549-50).

#### Response to RFOF 4.82

Respondents' finding is misleading; Mr. Crider suggested Morse based on a personal relationship, not Morse's "flatbottom tank experience." Mr. Crider, who managed the Ferndale LPG terminal at the time of the LPG project, testified that he had a personal relationship with Bruce Fabert, a Morse salesman, for many years before Texaco awarded the Ferndale LPG Tank. (Crider, Tr. 6711); (JX 10 at 50-51, 60, 72 (Crider, Dep)). Mr. Crider recommended Morse to Jim Offut for the Ferndale LPG Tank project because "[j]ust relationship with Bruce Fabert. Just that, you know, he'd helped me out over the years . . ." (JX 10 at 60 (Crider, Dep.)).

4.83 Morse was selected to bid on the Ferndale project by Texaco corporate management, not by Mr. Crider or any local Texaco employees in the Washington area. (Maw, Tr. 6550, 6558, 6560, 6673). The Texaco employees at the Ferndale facility were not involved in the bidding or procurement process for the Ferndale LPG project. (Crider, Tr. 6714).

#### Response to RFOF 4.83

Respondents finding is a misstatement of the evidence. Mr. Crider testified that "To me [the Ferndale LPG project] didn't seem like it was highly visible [to upper management] . . ." (JX 10 at 67-69 (Crider, Dep.)).

Morse's past participation in the LPG market is irrelevant because shortly after the

complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG Tank market. CCF 180.

4.84 Morse submitted a bid on the Ferndale project at Texaco's request. Morse bid against CB&I, PDM, and San Luis Tank (owned by Matrix). (Maw, Tr. 6549-50). Morse attended a meeting with Texaco management in Tulsa, Oklahoma. At this meeting, the parties discussed Morse's ability to complete the job on time. (RX 30). Morse and San Luis Tank were brought to Tulsa as the two finalists on the project. Texaco expressed the importance of the Ferndale project and its high-profile nature. (Maw, Tr. 6560-63).

#### Response to RFOF 4.84

Respondents' finding is not well-founded. As an employee of CB&I, Mr. Maw's testimony is self-serving and uncorroborated. Moreover, Mr. Maw testified that he was not certain that San Luis Tank was bidding against Morse until after the Ferndale LPG project was completed. (Maw, Tr. 6627).

Moreover, Mr. Crider's testimony is not consistent with Mr. Maw's testimony on several points in Respondents' finding. First, Mr. Crider testified that he was given the names and other information on the bidders. However, he can only remember CB&I and Morse bidding on the project. (JX 10 at 30 (Crider, Dep.)) ("talking with the people in Tulsa that was — taking care of the actual bidding, and they would give me names and things like that [related to the bidding for the LPG project]). Second, Mr. Crider, who managed the Ferndale LPG terminal for Texaco at the time, testified that "To me [the Ferndale LPG project] didn't seem like it was highly visible [to upper management] . . . (JX 10 at 67-69 (Crider, Dep.)).

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse and obtained a monopoly in the LPG market. (Maw, Tr. 6545); RFOF 4.75, 4.80.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.86 Morse timely completed the Ferndale project, as planned, without any major defects, and no delays. (Crider, Tr. 6714, 6715-16; Maw, Tr. 6585). Texaco imposed time constraints on the project by accelerating the delivery schedule due to increased demand and the need for additional storage as a result of an advanced maintenance schedule on the existing LPG tank. Morse was pressed by Texaco's conditions, but met those demands. (Crider, Tr. 6714-15).

#### Response to RFOF 4.86

As an employee of CB&I and President of Morse, Mr. Maw's testimony is self-serving. Mr. Crider acknowledged that the Morse-supplied tank had "the one weight problem on the relief valve." (Crider, Tr. 6715-16). However, Mr. Crider's testimony is generally biased due to his personal relationship with Bruce Fabert of Morse and his active role in the selection of Morse as the supplier of the LPG tank.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse and obtained a monopoly in the LPG

market. (Maw, Tr. 6545); RFOF 4.75, 4.80.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.87 The Ferndale LPG project was a "highly visible" tank project. (RX 30). On this project, Texaco and Mr. Crider were very satisfied with Morse's performance. In fact, once the tanks were placed into service, Texaco personnel from Tulsa to Houston expressed their satisfaction with Morse's performance. (Crider, Tr. 6716; Maw, Tr. 6585-86) As a result, Texaco awarded Morse additional work on-site. This work included the renovation of an existing 350,000 barrel LPG tank. (Maw, Tr. 6586; Crider, Tr. 6707, 6708).

#### Response to RFOF 4.87

Respondents' finding regarding the Ferndale LPG project is not supported by testimony from Mr. Crider. Mr. Crider, who managed the Ferndale LPG terminal for Texaco at the time, testified that "To me [the Ferndale LPG project] didn't seem like it was highly visible [to upper management] . . ." (JX 10 at 67-69 (Crider, Dep.)).

As stated in previous reply findings, both Mr. Maw's testimony is unreliable due to his employment by CB&I. (Maw, Tr. 6545); RFOF 4.75.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.88 Morse made \$1,007,556 in profit on the Ferndale LPG project. (Maw, Tr. 6586, 6690; RX 677 at 1). This profit was greater than Morse anticipated because of its performance and the opportunity for change orders. Change orders allow an opportunity to increase margins. (Maw, Tr. 6587).

#### Response to RFOF 4.88

As an employee of CB&I, Mr. Maw's testimony is self-serving and unreliable. CCRFF 4.108.

Moreover, in his deposition for this proceeding, on May 23, 2002, Mr. Maw testified that Morse's profits from the Ferndale LPG Tank project were \$750,000. (Maw, Tr. 6650). Later, at trial, he testified that Morse's profits were substantially greater, *i.e.* \$1,007,556. (Maw Tr. 6690).

The profit figures described by Mr. Maw at his deposition and at trial represent profits before overhead costs are allocated to the project. (Maw, Tr. 6657). Mr. Maw testified that he does not know whether the Ferndale LPG project was profitable after Morse allocated its overhead costs to the project. (Maw, Tr. 6660). These overhead costs are likely substantial because they accumulated over the three year period of time when Morse performed work on the Ferndale LPG project. A full accounting of the total project costs for the Ferndale LPG project could very well show that Morse lost money on the project. Such a loss would explain why Morse never bid on any LPG projects in the U.S. between the Ferndale LPG project and its acquisition by CB&I. (Maw, Tr. 6589).

4.89 Mr. Maw was responsible as project manager in 1994 for bringing the Ferndale LPG project in at a profit. Whenever a project is not profitable, project managers are scrutinized. On the Ferndale project, Mr. Maw never heard from Morse's finance personnel that the project was not profitable. In fact, Morse's finance department always discussed the profitability of the Ferndale project. (Maw, Tr. 6691-92).

#### Response to RFOF 4.89

As an employee of CB&I and President of Morse, Mr. Maw's testimony is self-serving and is uncorroborated. CCRFF 4.108.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.90 At the time the Ferndale LPG project was bid, Morse had never constructed an LPG tank. In fact, Morse told Texaco that it had no LPG experience. Nonetheless, Texaco asked Morse to bid the Ferndale project. (Maw, Tr. 6550-51).

#### Response to RFOF 4.90

As an employee of CB&I and President of Morse, Mr. Maw's testimony is self-serving. Mr. Maw's testimony is uncorroborated.

Moreover, Mr. Crider testified that when he recommended Morse as a supplier of the LPG Tank, he did not know whether or not Morse had ever built a refrigerated tank, Mr. Crider suggested that Mr. Offut "give [Morse] a shot" at the project — "here's somebody I know, They build tanks. Why don't — why don't you look at them." (Crider, Tr. 6711; JX 10 at 61 (Crider,

Dep.)).

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.91 Morse's never having built an LPG tank before was not a concern to Texaco because companies hire people to do the job. Morse's personnel sold the project. (Crider, Tr. 6713-14).

#### Response to RFOF 4.91

Complaint Counsel agrees that Mr. Crider's personal relationship with Morse's salesman and Ferndale's location were a significant factor in Texaco's award of the project to Morse. (Crider, Tr. 6721; JX 10 at 30, 33 (Crider, Dep.)).

Mr. Crider testified that the fact that Morse was headquartered within 85 miles of the site "definitely" gave Morse a competitive advantage. (Crider, Tr. 6721).

Morse was able to offer a lower price than CB&I because its proximity to the project site gave it a competitive advantage. Mr. Crider of Texaco testified that the fact that Morse was headquartered within 85 miles of the site "definitely" gave Morse a competitive advantage (Crider, Tr. 6721).

Mr. Maw of Morse was aware of this locational advantage and emphasized it with Texaco. (Maw, Tr. 6599-600 (Morse marketed its proximity to the job site as an advantage); RX 700, MCG 000118 (one of the advantages Morse offers is "location")). Because Morse was headquartered near the job site, Morse was able to offer home office support, promptly respond to customer concerns and implement a quick turnaround, and support the project from its nearby fabrication facility." (Maw, Tr. 6596).

CB&I may not have bid aggressively on the Ferndale LPG Tank because it was more interested in a turn-key contract for Texaco's entire LPG project rather than simply a contract for the LPG Tank. *See* CCRFF 4.85.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

4.92 On June 4, 1993, Texaco requested Morse to submit a bid on the Ferndale LPG project. (Maw, Tr. 6558; RX 681 at 1-3). Morse submitted a bid package. In so doing, Morse did not incur any additional expenses

than it does on any other tank project. No additional salaried employees were hired to prepare the bid. (Maw, Tr. 6556-57).

#### Response to RFOF 4.92

Respondents' finding is misleading. Morse hired an outside consultant to develop the tank's preliminary design that was submitted with the bid package. (Maw, Tr. 6557).

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

4.93 As part of that bid package, Morse submitted a preliminary design. Duane McMahan ("McMahan"), a professional engineering consultant, was hired to perform the design work. Morse had less than one month to complete its bid package. (RX 130). Prior to this project, Mr. McMahan had never worked on an LPG project before. Texaco was satisfied with Mr. McMahan's designs. After submitting its bid, Morse hired Pressure Sciences, Inc. ("PSI") to consult in the final design. Morse paid PSI about \$250,000 for its services. (Maw, Tr. 6557-60; RX 131 at 1-2).

#### Response to RFOF 4.93

Mr. Maw's testimony is self serving, uncorroborated and unreliable. Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.94 The Ferndale LPG tank was welded under the supervision of Morse. Morse developed in-house special procedures required for the LPG tank. These procedures cost Morse about \$2,000 to develop by running and testing the coupon. Texaco approved Morse's procedures. (Maw, Tr. 6569-70). Morse then trained its welders individually on these procedures, requiring about one-half hour per person over the course of two days. (Maw, Tr. 6570-72).

#### Response to RFOF 4.94

Respondents' proposed finding is inaccurate and misleading. The in-house procedures developed by Morse cost "around \$2,000 for **each** procedure," not \$2,000 for all the procedures. (Maw, Tr. 6570). It is unclear in the record as to the number of procedures that Morse developed.



Mr. Maw's testimony is self serving, uncorroborated and unreliable. CCRFF 4.108. Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.95 Each welder on the Ferndale project received a certificate of completion, which expires 90 days after the welder has completed use of that process on the project. Therefore, the Ferndale welders would have had to complete another LPG tank within 90 days in order not to be re-qualified. (Maw, Tr. 6572).

#### Response to RFOF 4.95

Respondents' proposed finding mischaracterizes the record. Ferndale welders would have to begin, not complete, another LPG Tank within 90 days to avoid the requalification procedure. (Maw, Tr. 6572 (welders would have to be requalified "if [Morse] hadn't started another tank, construction of another tank using the same procedures within 90 days")). As Texaco had already planned an expansion which required work on a second LPG Tank, Morse had no need to requalify its welders.

Mr. Maw's testimony is self serving, uncorroborated and unreliable. Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse, and obtained a monopoly in the LPG Tank market. (Maw, Tr. 6545); RFOF 4.75.

4.96 Morse hired no additional salaried employees to fabricate the LPG tank. (Maw, Tr. 6557). Morse did not have to acquire special equipment, methods, personnel, or procedures for fabricating the LPG tank. (Maw, Tr. 6567).

#### Response to RFOF 4.96

Respondents' proposed finding is misleading. Mr. Maw testified that Morse hired several consulting firms for the Ferndale LPG project. One consultant, Pressure Sciences was paid \$250,000. (Maw, Tr. 6559-60).

Mr. Maw's testimony is self serving, uncorroborated and unreliable. Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse, and obtained a monopoly in the LPG Tank market. (Maw, Tr. 6545); RFOF 4.75.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.98 Morse hired no additional salaried employees to construct the LPG tank. (Maw, Tr. 6557, 6572). The tank is built in rings. Each ring is a layer of steel plates eight feet high connected by vertical welding seams. (Maw, Tr. 6574). The bottom floor of the tank contains heaters to prevent the soil from freezing around the tank, covered with insulation, sealed with a vapor barrier, and topped off with a steel floor. (Maw, Tr. 6575-76, 6580-81). The roof of the tank is constructed on the floor of the tank, then it is air-raised. (Maw, Tr. 6578). Finally, the tank is insulated and painted. (Maw, Tr. 6579-80; RX 676).

#### Response to RFOF 4.98

Respondents' proposed finding is misleading. At the time of the Ferndale LPG project, Morse hired union hourly employees for its field crew positions rather than salaried employees. (Maw, Tr. 6551-52). Mr. Maw testified that Morse assigned between 10 and 14 field-erection employees on the Ferndale LPG project. (Maw, Tr. 6632).

Mr. Maw's testimony is self serving, uncorroborated and unreliable. Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse, and obtained a monopoly in the LPG Tank market. (Maw, Tr. 6545); RFOF 4.75.

Mr. Maw's testimony should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.99 Morse had a competitive cost disadvantage on the Ferndale project by adhering to the obligations under its union collective bargaining agreement, such as increased wages, benefits, and subsistence costs to all field personnel. (Maw, Tr. 6563-64, 6566, 6680).

#### Response to RFOF 4.99

For the reasons stated in CCRFF 4.90 and 4.91, Morse had the overall competitive advantage over other bidders on the Ferndale project, due to its proximity to the project site. Texaco's representative, Mr. Crider, testified that the fact that Morse was headquartered within 85 miles of the site "definitely" gave Morse a competitive advantage (Crider, Tr. 6721). Mr.

Maw marketed its location as a competitive advantage in its communications with Texaco. (Maw, Tr. 6599-600 (Morse marketed its proximity to the job site as an advantage); RX 700, MCG 000118 (one of the advantages Morse offers is “location”). Because Morse was headquartered near the job site, Morse was able “to offer home office support” (Maw, Tr. 6596), to “provide a prompt response to any questions [Texaco] might have” (Maw, Tr. 6596), and to use its own fabrication facility (Maw, Tr. 6596). Any alleged cost disadvantage due to the use of union labor was offset by the overall and unique competitive advantage that Morse enjoyed due to its location.

Complaint counsel agrees that Morse’s obligation to use union labor raises Morse’s labor costs, as compared to other bidders who use non-union labor. If Morse were still competing in the LPG market, then these higher labor costs would hinder Morse’s ability to compete on future LPG bids outside of the Seattle, Washington area: Morse would either pass along the higher labor costs to the customer in the price, resulting in a higher, less-competitive bid, or Morse would absorb the higher costs and realize lower profits. In fact, Mr. Maw testified that he kept track of the cost difference between union and nonunion labor because “[o]ver the years, competing against nonunion companies has been very difficult, and we have a competitive disadvantage by doing that...” (Maw, Tr. 6688).

Mr. Maw’s testimony is self serving, uncorroborated and unreliable. At his deposition in this matter, Mr. Maw testified that local Pacific Northwest tank suppliers, such as Morse, had an overall advantage over competitors from other regions of the U.S. (Maw, Tr. 6631). After his deposition in this matter and before trial, Mr. Maw changed his testimony.

Morse’s past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

Respondents’ finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse’s competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw’s testimony relating to Morse’s competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse’s competitive disadvantage in labor costs.

4.100 In 1994 and today, Morse uses union field crew personnel hired from a union hall. (Maw, Tr. 6552). Morse is obligated to hire such union employees pursuant to a collective bargaining agreement. This agreement does not give Morse a choice as to whether to use union or non union employees. (Maw, Tr. 6552).

#### Response to RFOF 4.100

For the reasons stated in CCRFF 4.90, 4.91, and 4.99, Morse’s location provided a competitive advantage that offset any higher labor costs that Morse may have incurred.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75.

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.101 This obligation to use union labor applies to any Morse project, whether or not in the local area. (Maw, Tr. 6552). In fact, Morse did not have the option of selecting its preferred union laborers, but rather was assigned to field personnel directly of the union list. (Maw, Tr. 6687).

#### Response to RFOF 4.101

Respondents' finding is misleading and overstates Mr. Maw's testimony. Mr. Maw testified that Morse was free to select its own foremen and one or two other members of its field crews. (Maw, Tr. 6687).

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.102 The Ferndale project was not required to be a union project. CB&I, PDM, and San Luis Tank are nonunion employers, and thus were not subject to these same obligations under a collective bargaining agreement. (Maw, Tr. 6565)

#### Response to RFOF 4.102

Respondents' proposed finding is incomplete and misleading. CB&I employs both union and nonunion employees. (Maw, Tr. 6565). The record does not state whether CB&I planned to use union or nonunion employees on this project.

Mr. Maw's testimony is self-serving and uncorroborated. For the reasons stated in CCRFF 4.90, 4.91, and 4.99, Morse's location provided a competitive advantage that offset any higher labor costs that Morse may have incurred.

Respondents' finding should not be considered by this Tribunal because it relates to Mr.

Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

- 4.105 Union labor is more expensive than nonunion labor. Union labor pays about \$26-27/hour and nonunion laborers receive about \$21/hour. There are also fringe benefits required for union employees, such as annuity, health and welfare, and vacation pay that equates to an additional \$11/hour for each union employee, as opposed to \$5-6/hour for nonunion employees. (Maw, Tr. 6553). On the benefits side, union labor is almost twice as expensive as nonunion labor. (Maw, Tr. 6553). Union labor is about 25 percent more expensive than nonunion labor. (Maw, Tr. 6554).
- 4.106 Subsistence costs are applicable to Morse's collective bargaining agreement. (Maw, Tr. 6554). On the Ferndale project, all but one laborer received subsistence pay. (Maw, Tr. 6556).
- 4.107 Subsistence costs apply based on the distance the union laborer lives from the job site, even if they live in state. (Maw, Tr. 6556). Subsistence costs, also known as per diem, are intended to cover costs of food, room and board, and other incidentals. (Maw, Tr. 6555; 6885-87). The actual costs incurred by the worker has nothing to do with the level of subsistence payment specified in Morse's collective bargaining agreement. (Maw, Tr. 6555). Whether or not the worker actually uses the money for its intended purpose does not impact the amount of the subsistence obligation. (Maw, Tr. 6555-56).

#### Response to RFOF 4.105, 4.106 and 4.107

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

For the reasons stated in CCRFF 4.90, 4.91, and 4.99, Morse's location provided a competitive advantage that offset any higher labor costs that Morse may have incurred.

- 4.108 Morse had a competitive disadvantage by adhering to its obligations under the union collective bargaining agreement. (Maw, Tr. 6564, 6566, 6680). Morse has made efforts to quantify this competitive disadvantage as a result of employing union labor. (Maw, Tr. 6566). This disadvantage amounted to about \$180,000, which is about 3.5 percent of the project. (Maw, Tr. 6565-66).

#### Response to RFOF 4.108

Respondents' proposed finding is misleading, unreliable and speculative. Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

Mr. Maw's testimony quantifying of Morse's competitive cost position vis-a-vis other competitors is essentially an expert opinion. It is improper to consider his testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a

fact witness, not as an expert. Mr. Maw did not submit Complaint counsel with an expert report

describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

The \$180,000 competitive disadvantage described by Mr. Maw in his testimony is based on calculations done by Mr. Maw and other CB&I employees for litigation purposes at Mr. Leon's request. (Maw, Tr. 6610, 6641). Mr. Leon was involved in developing Mr. Maw's analysis of Morse's cost position relative to competing tank suppliers. (Maw, Tr. 6610). The \$180,000 competitive disadvantage is expert opinion and highly speculative because it is based on calculating labor cost differences between Morse and a hypothetical competing tank supplier that is a non-union employer. Mr. Maw admitted that his competitive disadvantage calculation is based on "a lot of assumptions." (Maw, Tr. 6646).

Several key assumptions made by CB&I and Mr. Maw are unreliable. Mr. Maw testified that he made assumptions about the hourly wage rate that a hypothetical non-union competitor would pay to its field crew employees by looking at want ads in the local newspaper. (Maw, Tr. 6639). Additionally, he assumed that the fringe benefits that this hypothetical non-union competitor pays are equal to \$5/hour per employee. Mr. Maw admitted that he did not know for certain the amount of fringe benefits paid by Morse's non-union competitors. (Maw, Tr. 6641).

4.109 In calculating this cost disadvantage, Morse estimated 180,000 man hours to perform the difference, utilizing the sum of \$10/hour for the difference of union versus nonunion labor, for a total of \$180,000 cost difference. (Maw, Tr. 6566).

#### Response to RFOF 4.109

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

4.110 Morse's transportation cost advantage on the Ferndale LPG project, if any, was minimal. (Maw, Tr. 6563-64). Morse's labor cost disadvantage more than offset any slight transportation cost advantage Morse realized on the Ferndale project. (Maw, Tr. 6566).

#### Response to RFOF 4.110

As stated in CCRFF 4.99, Morse's unique proximity to the Ferndale LPG terminal site provided it with competitive advantages over other bidders, including savings in transportation

costs.

Mr. Maw's testimony is self-serving, unreliable and contradicted by his earlier testimony at his deposition. At his deposition in this matter, Mr. Maw testified that local Pacific Northwest tank suppliers, such as Morse, had an overall cost advantage over competitors from other regions of the U.S. (Maw, Tr. 6631). After his deposition in this matter and before trial, Mr. Maw changed his testimony. *Id.*

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.111 Morse made efforts to quantify this potential transportation cost advantage as a result of being 70-80 miles from the Ferndale job site. (Maw, Tr. 6564). Morse's cost advantage as a result of its location to the job site was about \$70,000, which was a little over 1 percent of the approximately \$5 million price of the LPG tank. (Maw, Tr. 6564-65).

#### Response to RFOF 4.111

Respondents' proposed finding is misleading, unreliable and speculative.

As described in CCRFF 4.108, Mr. Maw's testimony relating to quantifying of Morse's competitive cost position vis-a-vis other competitors is essentially an expert opinion. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying Morse's competitive advantage in transportation costs.

The \$70,000 competitive advantage described by Mr. Maw in his testimony is based on calculations done by Mr. Maw and other CB&I employees for litigation purposes at Mr. Leon's request. (Maw, Tr. 6610, 6641). Mr. Leon was involved in developing Mr. Maw's analysis of Morse's cost position relative to competing tank suppliers. (Maw, Tr. 6610). The \$70,000 competitive advantage is expert opinion and highly speculative because it is based on calculating transportation cost differences between Morse and a hypothetical competing tank supplier that is located outside the Pacific Northwest. Mr. Maw admitted that his calculation is based on "a lot of assumptions." (Maw, Tr. 6646). The \$70,000 figure is highly speculative because it assumes that the hypothetical competitor would ship steel plate and other materials for the Ferndale LPG project from a facility in Fontana, California by rail. (Maw, Tr. 6606, 6609). The selection of Fontana, California as the location of the hypothetical competitor is arbitrary. (Maw, Tr. 6606, 6609). Mr. Maw testified that although Morse does not normally ship steel plate by rail (Maw, Tr. 6614), CB&I assumed rail transport in its calculation because rail freight rates are lower than truck freight rates. (Maw, Tr. 6606-07).

Moreover, at Mr. Maw's deposition in this matter, he testified that local Pacific Northwest tank suppliers, such as Morse, had an overall cost advantage over competitors from other regions of the U.S. (Maw, Tr. 6631). *See also* CCRFF 4.99, 4.108.

- 4.112 In calculating this slight advantage, railroad transportation was a realistic alternative to truck and freight transportation. (Maw, Tr. 6682). Morse has experience in transporting materials by railroad on prior tank projects. (Maw, Tr. 6681). Rail transportation is more cost-effective than freight transportation. (Maw, Tr. 6606). The Ferndale site had a rail spur to make it easier to transport via rail. (Maw, Tr. 6681).
- 4.113 In addition, Texaco scheduled sufficient time on the project to utilize rail transportation as a practical alternative to freight transportation on the Ferndale project. (Maw, Tr. 6681-82).
- 4.114 As part of his normal job responsibilities, Mr. Maw does not call himself for rail rates. Instead, he calls someone with that responsibility and specialized knowledge and contacts to do so. Mr. Maw then relies on that person's knowledge. (Maw, Tr. 6682-83). This practice occurs in Mr. Maw's normal course of his job responsibilities. (Maw, Tr. 6682-83).
- 4.116 San Luis Tank's fabrication in San Luis Obispo, CA and PDM's Provo, UT facility were closer to Ferndale, WA than Fontana, CA. (Maw, Tr. 6685).

#### Response to RFOF 4.112-4.114, 4.116

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. *See* CCRFF 4.108. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

- 4.117 Morse, however never quantified any of these potential locational advantages in any correspondences to Texaco. In a letter to Texaco discussing the proximity advantage, Morse never indicated its disadvantage of using union labor force or that Morse had never built an LPG tank before. (Maw, Tr. 6679, 6680-81; CX 1482 at 1-2).

#### Response to RFOF 4.117

Morse did not discuss its cost disadvantages from using a union labor force because these disadvantages are not substantial. As Mr. Maw testified, Morse earned healthy profits from the Ferndale LPG project despite its union labor costs.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse. (Maw, Tr. 6545); RFOF 4.75. With the purchase of PDM and Morse, CB&I obtained a monopoly in the LPG tank market. CCF 180.

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs. RFOF 4.117.

4.118 Morse had constructed similar sized water and flatbottom tanks, namely a 190 foot water tank for the Rose Hill Water District. (Maw, Tr. 6581). On the Rose Hill project, the same amount of steel was used, but the project only cost \$2 million due to less structural components as required on a cryogenic tank. (Maw, Tr. 6584-85). Therefore, the transportation advantage Morse had of \$70,000 would have been 3.5 percent of the total cost of the Rose Hill project, as compared to 1 percent on the Ferndale LPG project. (Maw, Tr. 6583-84).

#### Response to RFOF 4.118

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. *See* CCRFF 4.108. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

4.119 Transportation costs are a larger percentage of the total cost of a flatbottom tank project, projects on which Morse predominantly competes, then (sic) a low-temperature, cryogenic tank project. (Maw, Tr. 6584-85).

#### Response to RFOF 4.119

Mr. Maw is a CB&I employee. His testimony relating to Morse's competitive cost position vis-a-vis other competitors is highly speculative and self-serving. *See* CCRFF 4.108.

Morse's past participation in the LPG market is irrelevant because shortly after the complaint issued in this matter, CB&I acquired Morse, and a monopoly in the LPG Tank market. (Maw, Tr. 6545); RFOF 4.75.

Respondents' finding should not be considered by this Tribunal because it relates to Mr. Maw quantifying Morse's competitive cost position vis-a-vis other competitors and is essentially an expert opinion. It is improper to consider Mr. Maw's testimony relating to Morse's competitive disadvantage in this proceeding because Respondents called Mr. Maw as a fact witness, not an expert. Mr. Maw did not submit Complaint counsel with an expert report

describing the methodology, assumptions, and calculations underlying his quantifying of Morse's competitive disadvantage in labor costs.

4.120 The same skills are used to build an API 650 tank as an API 620 tank. All you have to do is read the code, find out the differences, use the right metal and welding rods, the right welding procedures and any body can build either tank. (N. Kelley, Tr. 7103).

## Response to RFOF 4.120

Respondents' finding is not well-founded. Mr. Kelley has never worked for a tank supplier or designed and constructed an LNG or LPG Tank. (N. Kelley, Tr. 7078-79). He is a customer of these tanks, not a supplier. (N. Kelley, Tr. 7076-77). His testimony is uncorroborated.

As described in CCRFF 4.36, API 650 tanks and API 620 tanks are substantially different types of tanks.

Mr. Kelley described some of the substantial differences between API 650 tanks, ambient temperature tanks, and API 620 tanks which include LPG Tanks and cryogenic tanks. These differences include differences in "the material, what kind of material you use and your welding specifications." (N. Kelley, Tr. 7086). Moreover, he testified that CB&I won multiple LPG Tanks awards from ITC because it had "a superior insulation system." (N. Kelley, Tr. 7139).

Mr. Kelley described cryogenic tanks which are a subset of API 620 as "a real critical particular tank." (N. Kelley, 7144-46). He explained the substantial differences as due to "metallurgy." "When things get cold, they get brittle. You can make that card real cold, and it would just snap rather than bend. The same thing happens to steel, and if you don't use the right steel and you don't use the right welding methods, your welds are the most critical thing on the whole tank. It's stuck together, and a lot of things can affect that." Due to these issues related to metallurgy and temperature, Mr. Kelley testified that ". . . for me, personally, I would have to have the confidence that the company that was [supplying the cryogenic tank] knew what they were doing and had the good quality assurance program. I mean, these are real particular tanks we're talking about. They're not your everyday variety of tanks." (N. Kelley, Tr. 7145-46).

Mr. Newmeister testified that entry into the LPG market would be similar to entry into the LNG market with "pretty much the same barriers and the same learning curves and expenses." (Newmeister, Tr. 1609). (*See* JX 37 at 110-111 (Newmeister, Dep.) (describing resources Matrix needs to enter LNG market); *see also* CCF 307-91 (findings on entry barriers).

Reputational barriers in the LPG market make entry very difficult. Customers, competitors, and even Mr. Kelley agree that customers will not purchase an LPG Tank from just anyone. Rather, customers procure LPG Tanks and cryogenic tanks from suppliers with a good reputation and experience supplying these products. (Cutts, Tr. 2397-98; JX 27 at 58 (N. Kelley, Dep.); N. Kelley, Tr. 7104-05 ("I don't want to be a guinea pig"); *see* Warren, Tr. 2290-92; CX 415 at 2); *see also* CCF 339-340 (LPG tank customers require past experience).

Mr. Newmeister testified that the acquisition is likely to lead to increased prices for 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).

4.121 A tank supplier would be considered to bid on an ITC project if it had built an API 620 tank. But, such cryogenic tank experience is not required. (N. Kelley, Tr. 7117-18). If a company had never built a cryogenic tank before, but had experienced personnel who had, then that company would get a chance to prove it could build a tank. (N. Kelley, Tr. 7131-32).

#### Response to RFOF 4.121

Respondents' finding is speculative and mischaracterizes Mr. Kelley's testimony. At (N. Kelley, Tr. 7117-18), Mr. Kelley testified that he would consider a supplier who had previously supplied an LPG Tank, or API 620 Appendix R tank, to supply a cryogenic tank, i.e. API 620 Appendix Q tank, even if the supplier had no previous experience supplying cryogenic tanks.

Respondents' finding is misleading because Mr. Kelley's testimony only relates to ITC and Mr. Kelley, not other customers of cryogenic tanks. (N. Kelley, Tr. 7117-18, 7131-32).

This finding is contradicted by the testimony of Amy Warren, an LPG customer who follows a formal, detailed pre-qualification process before it entertains a bid for an LPG Tank. (Warren, Tr. 2284-88).

As described in other findings, Mr. Kelley's subjective approach is at odds with his other testimony that ITC only hires experienced tank suppliers for LPG and cryogenic tanks. *See*, CCRFF 4.34, 4.39.

Respondents' proposed finding mischaracterizes Ms. Warren's testimony. Ms. Warren testified that Fluor and its client, Sea-3, would want a potential bidder that had experience building tanks of similar type, quality, size and construction. (Warren, Tr. 2288, 2290-91). If a company had not performed the construction portion of a LPG Tank project, then Fluor would not qualify the company to bid. (Warren, Tr. 2290-91).

4.122 Tank construction is simply welding shell plates together and putting a roof on it. (N. Kelley, Tr. 7086).

#### Response to RFOF 4.122

Respondents' finding is essentially a duplicate of RFOF 4.50, which relies on the same testimony from Mr. Kelley. Please refer to CCRFF 4.50 for the reply to this finding.

4.123 Tank companies are really the people that you deal with, not the number of years in the business. The people you deal with everyday are the company, the ones to believe. (N. Kelley, Tr. 7108-09).

#### Response to RFOF 4.123

Little weight should be given to Mr. Kelley's opinions on how he qualifies suppliers of LNG and LPG Tanks. Unlike other LPG customers such as Fluor which have formal pre-qualification procedures, Mr. Kelley has a subjective, personal approach when awarding tank

contracts. He testified that “. . . So the people that I deal with every day is the company as far as I'm concerned. They're the ones that I'm believing. They're the ones I'm dealing with. They're the ones that get the job done, so I don't know about ATV and all their doings elsewhere. All I know is Ron Bailey and what ATV has done for me.” (N. Kelley, Tr. 7108). In stark contrast to Mr. Kelley’s personal, subjective approach to selecting an LPG Tank supplier, Fluor, another LPG customer follows a formal, detailed pre-qualification process before it entertains a bid for an LPG Tank. (Warren, Tr. 2284-88).

4.125 No customers or competitors complain that CB&I receives volume discounts for steel or purchases directly from the steel mill. (N. Kelley, Tr. 7122). Labor prices are where there is a lot of difference on tank bids, not steel. (N. Kelley, Tr. 7122-23).

#### Response to RFOF 4.125

This finding is misleading. Mr. Kelley testified that the fact that CB&I purchases directly from the steel mill gives it a cost advantage over other competitors, such as Southwest Tank, that do not purchase from the steel mill direct. (JX 27 at 103 (N. Kelley, Dep.)).

4.126 The safety risks with LPG tanks are no different then LNG tanks. In fact, the difference is in the temperature at which the product is stored. (N. Kelley, Tr. 7132).

#### Response to RFOF 4.126

There have been several catastrophic accidents involving LNG and LPG Tanks. (CX 1074 at CBI 001245-PLA). The safety risks of LPG Tanks are very high. Mr. Crider who managed Texaco’s Ferndale LPG terminal testified that if a 400,000 barrel LPG Tank erupted, “Mount St. Helens would sound like a fire cracker.” (Crider, Tr. 6721).

4.127 Generally, the same type of equipment is needed to construct an LPG tank as any field-erected tank – welding machines, cranes, and rigging equipment. Further, the same people that build API 650 tanks also build API 620 tanks. If a company has the capability to build a standard API 650 or standard API 620 tank, they would also have the capability to build a field erected LPG tank. (N. Kelley, Tr. 7091-92).

#### Response to RFOF 4.127

Respondents finding lacks foundation because it relies on Mr. Kelley, a one-time customer of a very small LPG Tank. Mr. Kelley has never worked for a tank supplier or designed and constructed an LNG or LPG Tank. (N. Kelley, Tr. 7078-79). He is a customer of these tanks, not a supplier. (N. Kelley, Tr. 7076-77). *See also* CCRFF 4.50.

4.128 AT&V performed the engineering design of the ITC Deer Park LPG tank in-house, without the help of consultants. (N. Kelley, Tr. 7120).

#### Response to RFOF 4.128

Respondents' finding is misleading and lacks foundation. Mr. Kelley testified that he did not know whether AT&V used consultants or contractors to design ITC's small LPG Tank. (N. Kelley, Tr. 7120).

4.129 CB&I has to cut its jobs to the very minimum because they have so much overhead and so many engineers that it is hard for them to be competitive on all jobs. (N. Kelley, Tr. 7122).

#### Response to RFOF 4.129

Respondents' finding lacks foundation and is speculative. There is no evidence in the record that Mr. Kelley of ITC has access to CB&I's internal overhead rates and information on CB&I's job cutbacks.

- 4.130 A local contractor does not hold a competitive advantage as compared to another domestic supplier. For instance, AT&V is ITC's most competitive supplier and it is located in Alabama, and that includes shipping steel plates from Alabama to Texas. (N. Kelley, Tr. 7121).

#### Response to RFOF 4.130

Respondents finding is not correct. The evidence shows that local tank suppliers have cost and marketing advantages over more geographically distant tank suppliers. *See* CCFF 377. Moreover, Respondents' finding is not well founded because Mr. Kelley testified that he only deals with local U.S. tank contractors. (N. Kelley, Tr. 7091).

- 4.131 Tank construction is only guaranteed for one year after completion, so using a local contractor is not a preference. (N. Kelley, Tr. 7114-15).

#### Response to RFOF 4.131

Respondents' finding is not correct. Mr. Kelley has a preference for local tank suppliers. (N. Kelley, Tr. 7091). Respondents' finding is based on his testimony that this preference is not related to concern about a tank failure after a newly constructed tank becomes operational. (N. Kelley, Tr. 7114-15).

- 4.132 CB&I notoriously did not meet their schedules on time for LPG customers. AT&V's scheduled delivery is much more accurate than CB&I. (Cutts, Tr. 2510-11). In one instance, CB&I was significantly late on multiple API 650 tanks for ITC where scheduling and timing were very important. (Cutts, Tr. 2512).

#### Response to RFOF 4.132

Respondents' finding is unreliable because it is based on self-serving testimony from a competitor, AT&V, who does not have a good reputation in the tank business. *See* CCFF 464-470 (performance problems of AT&V).

- 4.134 Over time, CB&I has had flaws. For example, CB&I misdesigned vents on some 160,000 barrel tanks for ITC. To correct the mistakes, ITC used a small, local tank roofing company that did a great job fixing CB&I's antiquated designs. (N. Kelley, Tr. 7124). Moreover, CB&I used the wrong steel on the propylene tank. (N. Kelley, Tr. 7125).

#### Response to RFOF 4.134

Respondents' finding mischaracterizes Mr. Kelley's testimony. Mr. Kelley testified that he did not like the way CB&I designed some vents for some tanks that ITC purchased. (N.

Kelley, Tr. 7124). He therefore bought some scoop vents from a small roofing company which

he likes better because they are easier to use. He did not testify that this small roofing company fixed CB&I's vents or vent designs.

4.135 Mistakes on other projects can be a selling point by demonstrating how readily and capably the company corrects its mistakes and handles the situation. An error on a project can really become a benefit. (Cutts, Tr. 2506-10).

#### Response to RFOF 4.135

Respondents' finding is speculative and not well founded because it solely relies on testimony from Mr. Cutts of AT&V. As described in CCF 464-470, AT&V has had problems winning projects because it has made mistakes on past jobs that have led to its poor reputation.

4.136 Despite a supplier's flaws, LPG customers would be willing to accept bids in the future once the problems have been corrected. (N. Kelley, Tr. 7126-27).

#### Response to RFOF 4.136

Respondents' proposed finding is misleading, and misstates Mr. Kelley's testimony. From ITC's standpoint, performance is "very key" in terms of who ITC selects to build its LPG Tanks. (JX 27 at 53 (N. Kelley, Dep.)).

4.137 Fluor had problems with PDM's performance on the Tampa Sea-3 project related to schedule and resources available to PDM and the costs associated with those delays. (Warren, Tr. 2308).

#### Response to RFOF 4.137

Respondents' proposed finding is misleading in that it implies that PDM was not the preferred supplier in the industry. Sea-3 awarded PDM the Tampa project, in part because Sea-3 was pleased with PDM's performance on the New Hampshire LPG project. (Warren, Tr. 2306). The problems on the Tampa Sea-3 project were resolved. (Warren, Tr. 2308-09). These "problems" were sufficiently minor that they did not damage Sea-3's relationship with PDM; Sea-3 still informed PDM of upcoming LPG projects, which helped PDM to be "well-positioned" to win the award. (CX 94 at PDM-HOU017571, 017582). Sea-3 also permitted PDM to provide support for an upcoming LPG import terminal in Brazil. (CX 119 at PDM-HOU019013).

### **E. COMPLAINT COUNSEL'S LPG WITNESSES HAVE FOUNDATION**

4.144 Amy Warren is a contracts administrator with Fluor. (Warren, Tr. 2274). She has been with Fluor for the past 7 years, and has held the position of project manager on two separate LPG projects. (Warren, Tr. 2274-75). Ms. Warren graduated from Texas A&M and holds an MBA as well as a Masters in Accounting from St. Thomas University in Houston, TX. (Warren, Tr. 2279).

#### Response to RFOF 4.144

Respondents' proposed finding misrepresents Ms. Warren's experience. Prior to her position as contracts administrator, Ms. Warren was a project engineer on the Tampa and the New Hampshire LPG project. (Warren, Tr. 2274-75). In the Newington, NH project, Ms. Warren was on site as the client's representative, overseeing the installation of the foundation. (Warren, Tr. 2277). For the Tampa LPG project, Ms. Warren was on site during the construction of the facility, overseeing construction and inspection efforts. (Warren, Tr. 2277).

4.145 Fluor does not build LPG tanks, but provides supervision and construction management services. (Warren, Tr. 2276, 2279-80). Fluor was responsible for preliminary design and management of tanks and all associated control systems on the Sea-3 Newington, NH (1998) and Tampa, FL (2000) LPG projects. (Warren, Tr. 2275-76, 2298). Fluor's prequalification process was not utilized on the Sea-3 projects because CB&I and PDM were already pre-qualified. (Warren, Tr. 2281).

#### Response to RFOF 4.145

Respondents' proposed finding erroneously misstates Ms. Warren's testimony. Fluor was not satisfied with having CB&I and PDM as the only two bidders; Fluor wants multiple bidders in order to create a competitive environment. (Warren, Tr. 2302). In fact, Fluor attempted to utilize its prequalification process, seeking and considering a bidder who was not yet prequalified. (Warren, Tr. 2289). Fluor approached the potential bidder, apprised the potential bidder of the scope of the work and asked if they were interested in submitting a bid. (Warren, Tr. 2289). The potential bidder declined to submit a bid. (Warren, Tr. 2290). As a result, CB&I and PDM were the only two bidders on both the Newington and the Tampa LPG projects. (Warren, Tr. 2298, 2303).

4.146 On the Tampa project, Ms. Warren was involved in coordinating Fluor's technical review of the bid proposals. (Warren, Tr. 2281).

#### Response to RFOF 4.146

As stated in Complaint Counsel's Response to RFOF 4.144, Ms. Warren's duties on the Tampa project were more expansive than Respondents' proposed finding implies. Ms. Warren was part of the group that developed the bid proposals. (Warren, Tr. 2276-78). Ms. Warren reviewed the bid proposals, negotiated and reviewed the terms and conditions of the proposals, negotiated and reviewed the prices submitted by both bidders, and answered bidder's questions regarding the proposal. (Warren, Tr. 2276-78). Ms. Warren's role on these LPG projects extended beyond the bidding phase; Ms. Warren was on site during the construction period of the Tampa LPG facility, and on site for the installation of the foundation for the Newington LPG facility. (Warren, Tr. 2277).

4.148 Ms. Warren's current knowledge of field-erected LPG tanks is based on her involvement in the bidding process for Sea-3 in 1998, the last time Ms. Warren had any involvement in the procurement of an LPG tank. (Warren, Tr. 2284, 2318).

#### Response to RFOF 4.148

Respondents' finding is incorrect. Ms. Warren's knowledge of field-erected LPG Tanks is based on her involvement in the bidding and construction of LPG Tanks for two LPG facilities. Ms. Warren was on site during the construction of the Tampa LPG facility, which was finished in late 2000. (Warren, Tr. 2303). Ms. Warren helped to prepare the specifications that were sent to potential bidders for both LPG projects. (Warren, Tr. 2277). Ms. Warren evaluated the bid proposals that Fluor received. (Warren, Tr. 2277). Ms. Warren negotiated and reviewed the pricing from both bidders. (Warren, Tr. 2278).

4.149 On the Sea-3 project, the client for both projects was Sea-3 and not Fluor. (Warren, Tr. 2275, 2280). Sea-3 was actually responsible for selecting a contractor to build the LPG tanks. (Warren, Tr. 2316).

#### Response to RFOF 4.149

Respondents' proposed finding minimizes the important role Fluor plays in the selection of a LPG tank supplier for each project, and mischaracterizes Ms. Warren's testimony. Fluor was responsible for evaluating the bid proposals for both LPG projects on behalf of Sea-3. (Warren, Tr. 2277). Ms. Warren herself evaluated the bid proposals, went through the bidders' qualifications, verified that the companies were technically competent to perform the work, and negotiated the final price for both projects. (Warren, Tr. 2277). Fluor was responsible for selecting a LPG Tank supplier, in conjunction with Sea-3. (Warren, Tr. 2317-18). Sea-3 is ultimately responsible for selecting the LPG Tank supplier, but its selection is based "on the recommendation submitted by Fluor." (Warren, Tr. 2316).

4.150 The individual responsible for selecting an LPG contractor was Bill Cornell, the president of Sea-3, not Ms. Warren or Fluor. (Warren, Tr. 2316, 2317). At Fluor, the person responsible for determining which companies would bid on the Sea-3 projects was George King, not Ms. Warren. (Warren, Tr. 2317-18).

#### Response to RFOF 4.150

Ms. Warren assisted her boss, George King, in determining which companies would bid on the Sea-3 projects. As stated in Complaint Counsel's Response to RFOF 4.148 and RFOF 4.149, Ms. Warren took part in evaluating the bid proposals, and in putting together Fluor's recommendation of which company should be awarded the project. The customer, Sea-3, relied on Fluor's input in making its determination of who should be awarded the project. (Warren, Tr. 2316).

4.152 Ms. Warren is not aware of any company other than PDM and CB&I that has built a field-erected LPG tank anywhere in the world. (Warren, Tr. 2309).

#### Response to RFOF 4.152

Complaint counsel agrees with Respondents' proposed finding.

4.153 Ms. Warren is not familiar with Graver, Iteq, BSL, CB&T or AT&V, and only knows that Matrix constructs tanks. (Warren, Tr. 2311-13).

Response to RFOF 4.153

Ms. Warren is not familiar with the track record of these companies, and for good reason. With the exception of AT&V, none of these companies have built an LPG Tank in the United

States. (See JX 2 (Chattanooga has not built an LPG Tank); Scorsone, Tr. 5169 (Matrix has not built an LPG Tank, to CB&I's knowledge).

Ms. Warren is not familiar with Matrix's capabilities. (Warren, Tr. 2313). Fluor has been told that CB&T is not a competitor in the LIN/LOX market. (Warren, Tr. 2333).

Graver, Iteq, BSL, and CB&T have not won any bids for LPG projects. These companies compete in other markets, particularly LIN/LOX. Graver, and its successor, Iteq, competed in the market for LIN/LOX tanks, not LPG. Graver has since exited the market.

BSL is a European company that once competed solely for LIN/LOX projects; BSL has never built a tank in any of the relevant markets in the United States. (Hilgar, Tr. 1380). Since the Acquisition, BSL has withdrawn from competing in the LIN/LOX market. (Harris, Tr. 7323). CCF 483-489.

4.156 Ms. Warren has no current knowledge of companies that have the ability to construct LPG tanks. (Warren, Tr. 2318).

#### Response to RFOF 4.156

As Fluor has no current plans to procure LPG Tanks, Ms. Warren has not done any research since June 2000 to determine which companies would be able to build an LPG Tank at a competitive price. (Warren, Tr. 2313). Likewise, Mr. Kelley has no current knowledge of companies that have the ability to construct LPG Tanks. CCRFF 4.58. In fact, unlike Ms. Warren, Mr. Kelley has never done any research to determine which companies would be able to build an LPG Tank at a competitive price. CCRFF 4.58.

4.157 Ms. Warren has no knowledge of companies Fluor would qualify to build LPG tanks. (Warren, Tr. 2318).

#### Response to RFOF 4.157

Respondents' proposed finding is misleading. Ms. Warren testified that Fluor has not qualified anyone, other than CB&I or PDM, to build LPG Tanks. (Warren, Tr. 2318).

4.158 Ms. Warren did not know why Fluor and Sea-3 received a lower price as a result of the bidding process and cannot truly say if the price was competitive. (Warren, Tr. 2299-2300, 2302, 2303-04, 2307).

#### Response to RFOF 4.158

Respondents' proposed finding mischaracterizes the record. Ms. Warren was never asked why Fluor and Sea-3 received a lower price as a result of a bidding process, and was never asked whether the price Fluor and Sea-3 received (which she negotiated) was lower than the price she would have received if there were no competition.



### III. LIN/LOX FINDINGS OF FACT

#### A. THE LIN/LOX/LAR INDUSTRY

##### 1. Definition And Characteristics Of LIN/LOX/LAR Tanks

5.1 LIN is an industry expression for liquid nitrogen. A LIN tank is a special tank that stores liquid nitrogen at atmospheric pressure. Similarly, LOX is the industry expression for liquid oxygen. A LOX tank stores liquid oxygen. (Kamrath Tr. 1982-83); (V. Kelley Tr. 4596). LAR is the industry expression for liquid argon and a LAR tank stores liquefied argon. (Patterson, Tr. 340-41). Tanks to hold LIN, LOX or LAR are commonly referred to as LIN/LOX tanks.

#### Response to RFOF 5.1

Respondents' proposed finding is incomplete. LIN/LOX tanks are used in cryogenic air separation plants; the air is passed through a liquefaction unit where it is cooled to temperatures around minus 300 degrees Fahrenheit, then distilled and separated into its separate components which are stored in liquid form in cryogenic tanks. (Kistenmacher, Tr. 824-26). While LIN/LOX tanks store LIN, LOX and LAR at atmospheric pressure, they are not ambient temperature tanks; they are designed to store LIN, LOX, and LAR at cryogenic temperatures. (CX 650 at CBI/PDM H4019758; Kistenmacher, Tr. 833 (liquid nitrogen stored at minus 320 Fahrenheit); [ ], *in camera* ([ ])).

5.2 LIN/LOX tanks are double-walled tanks made of stainless steel which store liquid oxygen and nitrogen at very low, even cryogenic, temperatures which allows them to be stored in a liquid form. (Stetzler, Tr. 6312).

#### Response to RFOF 5.2

Respondents' proposed finding is based upon the testimony of a person who has no experience building LIN/LOX tanks. Stetzler, Tr. 6330 (his company, Chattanooga Boiler & Tank has never built a LIN/LOX tank); JX 2 (Respondents stipulate that Chattanooga Boiler & Tank has never built a LIN/LOX tank); JX 35 at 8-10 (Stetzler, Dep.) (Mr. Stetzler's description of his experience does not include LIN/LOX tanks)). Mr. Stetzler is unfamiliar with the temperature requirements of LIN/LOX tanks; he does not know at which temperature liquid nitrogen or liquid oxygen must be stored. (Stetzler, Tr. 6312).

LIN/LOX tanks consist of an inner tank and an outer shell. The inner tank is a double-walled tank. (Kistenmacher, Tr. 833). The inner tank must be built using a steel that will not become brittle at low temperatures, so more expensive steel, such as stainless steel, is often used. (*Id.* 835). CB&I also has used 9 percent nickel steel for the inner tank, as with LNG tanks. (CX 1146 at CBI-HWH-062525).

5.3 LIN/LOX tanks are constructed in a specified manner. A LIN/LOX tank consists of an outer carbon steel shell and an inner tank, most commonly made out of stainless steel. There is insulation in between the two

shells to keep the temperature at minus 320 degrees. (Stetzler, Tr. 6312); (Kistenmacher Tr. 833-34).

### Response to RFOF 5.3

Mr. Stetzler has no personal knowledge of the materials and construction of a LIN/LOX tank. Respondents' reliance on Mr. Stetzler as an authority on the construction of LIN/LOX tanks is misplaced. There is no evidence that Mr. Stetzler has built or worked on a LIN/LOX tank. Mr. Stetzler's company, Chattanooga, has never built a LIN/LOX tank. JX 2; CCRFF 5.2. In the testimony that Respondents rely upon, Mr. Stetzler reveals that he is unfamiliar with the temperature requirements of LIN/LOX, thinking that the requirement is minus 250, not minus 320. (Stetzler, Tr. 6312).

Respondents' proposed finding is also incomplete. Because of the cryogenic temperatures at which LIN/LOX/LAR is stored, carbon steel cannot be used for the inner tank. Carbon steel becomes brittle and easily breakable at temperatures below minus 40 degrees Fahrenheit. (Kistenmacher, Tr. 835).

5.4 The outer shell of a LIN/LOX/LAR tank is generally made from A-36 carbon steel. (Stetzler, Tr. 6315). The inner shell of a LIN/LOX/LAR tank is generally made from 304 stainless steel. (Stetzler, Tr. 6315). The inner tank of some LIN/LOX/LAR tanks have been be constructed from aluminum, however, most are made out of stainless steel because aluminum is not very economical today. (Stetzler, Tr. 6312).

### Response to RFOF 5.4

As stated in CCRFF 5.2 and 5.3, there is no evidence that Mr. Stetzler or Chattanooga Boiler & Tank have built any LIN/LOX tanks. As such, Mr. Stetzler has no basis to state what a LIN/LOX tank is "generally" made from.

5.5 Other than what substance is stored in a LIN/LOX/LAR tank, there are no differences in the structures. (Patterson, Tr. 340-41).

### Response to RFOF 5.5

Complaint counsel agrees.

## **2. LIN/LOX/LAR Tanks Are Used For Air Separation Facilities**

5.6 LIN/LOX/LAR tanks are most commonly incorporated into the infrastructure of a functioning air separation facility. There are no viable substitutes for storing liquid oxygen or nitrogen produced by such a plant. (Hilgar, Tr. 1386).

### Response to RFOF 5.6

Complaint counsel agrees.

- 5.7 An air separation plant is a plant that liquefies ambient air, then distills the air into its component parts/ The component parts of air are the industrial gases oxygen, nitrogen, and argon. The liquefied gases are later cooled and stored in cryogenic storage tanks. Subsequently, the gases are delivered to the marketplace either in a gaseous form or liquid form. (Kamrath Tr. 1980); (V. Kelley Tr. 4592); (Kistenmacher Tr. 824-25).

#### Response to RFOF 5.7

Complaint counsel agrees.

- 5.8 When air is distilled into component parts it is cooled to temperatures in the order of minus 300 degrees Fahrenheit. Once the ambient air is cooled, pressure is used as a driving force to separate the different components that comprise air. (Kistenmacher Tr. 824-26).

#### Response to RFOF 5.8

Complaint counsel agrees.

### **3. The Design And Construction Process for LIN/LOX Tanks Differs from the Design and Construction Process for Ambient Temperature Flat Bottomed Tanks**

- 5.9 The cost to design and fabricate LIN/LOX tanks typically represents five to ten percent of the total cost of an air separation facility. (Hilgar, Tr. 1507). Construction of an air separation facility may cost \$18 million. LIN/LOX/LAR tanks used at such a facility may cost from \$1 to \$1.5 million. (Kistenmacher Tr. 836); (Hilgar, Tr. 1507-08).

#### Response to RFOF 5.9

Complaint counsel agree with the first two sentences of Respondents' proposed finding. Respondents' third statement includes a numerical inaccuracy. According to the sources cited, LIN/LOX/LAR tanks may cost from \$0.5 million to \$1.5 million. (Kistenmacher, Tr. 836; Hilgar, Tr. 1507-08).

- 5.10 CB&I uses the same construction steps when it builds LIN/LOX tanks as it does when it builds any ambient-temperature flat-bottom tank. (Scorsone, Tr. 4885).

#### Response to RFOF 5.10

Respondents' proposition is misleading. LIN/LOX tanks and other cryogenic tanks involve unique and difficult challenges, in engineering, design, construction and materials, because of the extreme temperature conditions that the tank must withstand. CCRFF 5.13-5.15, 5.17, 5.18.

Mr. Scorsone states that the steps involved in building LIN/LOX tanks (as well as LNG and LPG tanks) and ambient temperature flat-bottom tanks are the same only "in a general

sense.” (Scorsone, Tr. 4884-85). Ambient flat-bottom tanks are not the same as LIN/LOX tanks. The similarities that Mr. Scorsone lists between the two types of tanks are vague and too generalized to be of any value, *i.e.* both types of tanks need to have drawings made, both types of tanks require materials to be procured and fabricated and both types of tanks need some type of tools and equipment to be constructed. RFOF 5.11; (Scorsone, Tr. 4885-86). The “similarities” end there.

LIN/LOX tanks are more complex to design and manufacture than a “run-of-the-mill flat-bottom industrial tank.” (Newmeister, Tr. 1566). According to Matrix, LIN/LOX tanks are more complex than ambient temperature API 620 tanks or API 650 tanks:

They require much more sophisticated engineering analysis. They require some probably finite element analysis. It takes into account expansion and contraction because the differences in temperatures. They’re supported internally on insulation systems.

You have to be able to design or perform heat loss calculations for both bottom insulations, sidewall insulations. They have a lot of pressure vacuum and instrumentation requirements. They are built to the API 620 Appendix Q code which is a more stringent – excuse me – standard. It’s not a code. It’s a standard.

(Newmeister, Tr. 1566-67).

LIN/LOX tanks require specialized know-how to design and construct; the construction of LIN/LOX tanks is similar to LNG tanks. (Kistenmacher, Tr. 881; Newmeister, Tr. 1595). When building a LIN/LOX tank, tank suppliers need to accommodate for shrinkage or expansion that can result from extreme temperature changes, from ambient to cryogenic:

Q. And what type of know-how is required for the construction of LIN/LOX tanks?

A. For me, it’s a very specialized know-how because, as I said before, you have two tanks, the inner tank and the outer tank. The outer tank is usually at ambient temperature, whereas the inner one is at very low temperature. Because of that, since materials shrink at low temperature, you have to have know-how about how material behave through that shrinking process, how you pipe that up. You have to have know-how how you weld that, how you avoid that you have cracks when this system shrinks, and also it’s a differential shrinking between the outer and the inner tank, so for me it’s a lot of specialized know-how that you need.”

(Kistenmacher, Tr. 842; *see also* CX 1146 at CBI-HWH-062525 (On a LIN/LOX tank built for BOC, moisture crept into the pressure safety valve (PSV) and froze the mechanism; the resulting vacuum collapsed the inner tank roof and a small portion of the outer tank roof.)). Mr. Newmeister confirmed Mr. Kistenmacher’s testimony that the extreme temperature changes that LIN/LOX tanks undergo require a more complex design than an ambient temperature tank:

They have piping which goes from outer tank, which might be as warm as 100 degrees to inner tank that might be as low as minus 100 – excuse me – minus 320 degrees Fahrenheit. So you have a lot of expansion and contractions and the design is rather complex for the tank industry.

(Newmeister, Tr. 1566; *see* Hilgar, Tr. 1377 (extreme temperature changes cause the metal surfaces of tank to shrink, causing stress on any defects in the tank)).

Linde BOC Process Plants, a current LIN/LOX tank customer, constructs ambient temperature flat-bottom tanks (Kistenmacher, Tr. 821), as well as shop-fabricated LIN/LOX tanks, (*id.*, 841). However, because of the “large amount of labor involved to put that together, also a sizeable investment and **specialized know-how...**,” Linde does not construct LIN/LOX tanks (Kistenmacher, Tr. 841) (emphasis supplied).

The finding is contradicted by Respondents’ public representation that LIN/LOX tanks require “special expertise” to design, engineer, fabricate, erect and repair. In its SEC 10-K filing for 1999, CB&I flaunted its “special expertise” in building low temperature and cryogenic tanks, which includes LIN/LOX tanks: “CBI has a special expertise in the design and engineering, fabrication, field erection and repair of steel plate structures including. . . low temperature and cryogenic storage facilities.” (CX 1032 at 6 of 56).

That there is a “special expertise” to design and construct LIN/LOX tanks which is not gained by building ambient temperature tanks is confirmed by Matrix’s efforts to enter the LIN/LOX market. Although Matrix has been building ambient temperature flat-bottom tanks for years, “it took a long time to develop the engineering expertise to have a quality product to offer” in the LIN/LOX market. (Newmeister, Tr. 1567).

Mr. Scorsone’s testimony and Respondents’ proposed finding also ignores the evidence that the consequences of constructing a LIN/LOX tank poorly are far greater than for a flat bottom tank. If a LIN tank is constructed improperly, liquid nitrogen, as it leaks and evaporates “can cause severe burns and even death of people. Also you might, because you need oxygen to breathe, you might die from asphyxiation. ...” (Kistenmacher, Tr. 848). If a LOX tank is constructed improperly, a leak can create an explosion. (*Id.*). Because improper construction can lead to severe hazards, LIN/LOX customers will not hire “any old construction company” to construct a LIN/LOX tank. (Hilgar, Tr. 1523; *see* [ ], *in camera*). [

] testified that it is essential for an experienced supplier to provide a LIN/LOX tank because “the failure of this tank . . . storing either fluid would be disastrous.”)).

5.13 CB&I does not have an engineering staff that solely works on LIN/LOX projects. CB&I uses its engineers across several product lines. Engineers who design flat-bottom tanks also have the capability to design LIN/LOX tanks. CB&I’s engineers are located in Pittsburgh, Pennsylvania; Plainfield, Illinois; Houston, Texas; Canada, the Middle East, Philippines, and Australia.” (Scorsone, Tr. 4887-88).

### Response to RFOF 5.13

Respondents' statement that "[e]ngineers who design flat-bottom tanks also have the capability to design LIN/LOX tanks" is misleading. Not all engineers who design flat-bottom tanks have the capability to design LIN/LOX tanks. As stated in CCRFF 5.10, LIN/LOX tanks require a specialized know-how and expertise to design, engineer, and construct. LIN/LOX tanks "require much more sophisticated engineering analysis. ... You have to be able to design or perform heat loss calculations for both bottom insulations, sidewall insulations. They have a lot of pressure vacuum and instrumentation requirements. They are built to the API 620 Appendix Q [standard]." (Newmeister, Tr. 1566-67).

The engineering of a LIN/LOX tank entails special engineering challenges. CCRFF 5.10. The inner tank of a LIN/LOX tank holds cryogenic fluid at a very low temperature while the outer tank is at ambient temperature. (Kistenmacher, Tr. 842). The inner tank shrinks when it comes into contact with the cryogenic fluid. (Kistenmacher, Tr. 842; Hilgar Tr. 1377). Consequently, a LIN/LOX tank engineer must have very specialized knowledge relating to how tank materials behave during the shrinking process; how to design piping for the tank; and how to avoid cracking of the tank components. (Kistenmacher, Tr. 842; Hilgar, Tr. 1375). There are also additional trade secrets relating to LIN/LOX tanks that require sophisticated engineering analysis and previous experience to utilize. “There are some analysis that bottom insulation systems, piping loops and systems that are difficult to analyze and – and require, you know, sophisticated engineering, previous experience.” (Newmeister, Tr. 1568).

As in CCRFF 5.10, the evidence of Matrix’s efforts to penetrate the LIN/LOX market refutes Respondents’ self-serving statement. Even though Matrix has engineers proficient with flat-bottom tank design, the company had to hire a consulting engineer with specific LIN/LOX experience and incur several hundreds of thousands of dollars in testing insulation systems and other expenses to develop a commercial LIN/LOX tank design and win its first contract. (Newmeister, Tr. 1580-81, 1583-85). Mr. Newmeister testified: “Well, I was involved with Matrix Service as they penetrated in that market, and it took **a long time to develop the engineering expertise** to have a quality product to offer and it takes a long time to be accepted by the customer base.” (Newmeister, Tr. 1567) (emphasis supplied). In fact, it took Matrix a year and a half to two years to develop the engineering expertise for doing finite element analysis work, to develop design sketches, to talk to suppliers and pipe fabricators, and to perform construction and fabrication planning. (Newmeister, Tr. 1585-86).

5.14 The bill of materials contains a list of materials that are sent to the procurement group. The procurement group then procures these materials from a wide variety of vendors. (Scorsone, Tr. 4889-90).

#### Response to RFOF 5.14

Respondents’ proposed finding is misleading. The fact that the materials for LIN/LOX tanks are procured from the same department as ambient temperature tanks does not make these two types of tanks identical. As stated in CCRFF 5.10, LIN/LOX tanks are not the same as ambient temperature flat-bottom tanks. In fact, LIN/LOX tanks require a more sophisticated engineering analysis and design.

The materials used for LIN/LOX tanks are different from those used for ambient temperature tanks. Mr. Scorsone admitted that distinct types of steel are used in the relevant products. (Scorsone, Tr. 4890). Stainless steel and aluminum, for example, are used in LIN/LOX tanks and TVCs; 9% nickel steel and stainless steel are used in LNG tanks, and enhanced, special grades of carbon steel are used in LPG tanks. (*Id.*). Because of the cryogenic temperatures at which LIN/LOX/LAR is stored, carbon steel, which is used in ambient temperature tanks, cannot be used for the inner tank of an LNG tank or a LIN/LOX/LAR tank. CCRFF 5.3. Carbon steel becomes brittle and easily breakable at temperatures below minus 40

degrees Fahrenheit. (Kistenmacher, Tr. 835).

5.15 The metal materials are fabricated in a fabrication shop by the same personnel and using the same equipment that is used to fabricate other types of tanks. (Scorsone, Tr. 4885; 4892-93).

#### Response to RFOF 5.15

The cited testimony does not support the statement. While the relevant products are fabricated in the same shops in which Respondents fabricate water tanks and flat-bottom tanks, additional specialized equipment is required for the relevant products. Special equipment is needed in order to fabricate LIN/LOX tanks. Mr. Cutts of AT&V testified that the equipment for LIN/LOX tanks is expensive and unique:

“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 go build procedures around it. So it’s not like you can go buy an automobile. It’s unique equipment and the procedures that go with it make it very unique and then the training that goes with the men that run the equipment.”

(Cutts, Tr. 2379). Mr. Newmeister testified that Matrix would need to spend about \$2 million for a large press and a large number of dyes and \$2-3 million for the automated blast and paint system to replace the equipment it lost with the sale of Brown Steel that it used to fabricate LIN/LOX tanks. (Newmeister, Tr. 1590-91). Matrix does not require this equipment to build other API 620 tanks or API 650 tanks. (Newmeister, Tr. 1592-93).

Respondents acknowledge that a separate “clean bay” area within a plant is used for fabrication of stainless steel for cryogenic projects. RFOF 5.29 (“AT&V has also dedicated a clean bay in Lucedale, Mississippi, to the fabrication of stainless steel for cryogenic projects. (Cutts, Tr. 2331-32).”).

5.17 The field construction process used to field erect a LIN/LOX tank is exactly the same process that is used to erect any type of ambient-temperature flat-bottom tank. (Scorsone, Tr. 4885).

#### Response to RFOF 5.17

Respondents’ assertion is incorrect and mischaracterizes the record. Mr. Scorsone’s testimony does not specify how the field-erection process for a LIN/LOX tank is similar to that for an ambient-temperature flat bottom tank. Mr. Scorsone only states that both types of tanks require that “the structure is erected.” (Scorsone, Tr. 4885). LIN/LOX tanks require specialized know-how to design and construct; the construction of LIN/LOX tanks is similar to LNG tanks. (Kistenmacher, Tr. 881; Newmeister, Tr. 1595). When building a LIN/LOX tank, tank suppliers need to accommodate for shrinkage or expansion that can result from extreme temperature changes, from ambient to cryogenic. *See* response to RFOF 5.10.

5.18 The welding processes used on a cryogenic tank are precisely the same as the processes used for an

ambient temperature tank. (Scorsone, Tr. 4899) The welding methods used for cryogenic tanks are an open art. (Scorsone, Tr. 4899)

## Response to RFOF 5.18

Respondents' assertions are incorrect and mischaracterize the record. There are "special welding skills related to the construction of LIN/LOX tanks." (Newmeister, Tr. 1582). The welding procedures for LIN/LOX tanks "are qualified with impacts to very low temperatures, temperatures which are lower than the actual steel is going to be subjected to. And the processes are very carefully controlled in terms of what they call heat input to achieve those impacts. There's very specific welding electrodes that are used in combinations of electrode and flux for parts of the automated process." (*Id.*).

The welding processes for a LIN/LOX tank require very specialized know-how. (Kistenmacher, Tr. 842). Construction of LIN/LOX tanks requires knowledge of stainless steel welding procedures; "You have to be able to qualify welding procedures to – you know, cryogenic minus 320, maybe 340 degrees temperatures, which require impact testing of weld procedures and production conditions." (Newmeister, Tr. 1568). Stainless steel welding uses different machines and different materials, requires more training than welding carbon steel, is more difficult to weld than ordinary carbon steel, and requires specially trained welders. (Hilgar, Tr. 1347-48).

Welding methods for cryogenic tanks are far from open art. Every company spends time and money developing welding procedure specifications. (Rano, Tr. 6028). In fact, CB&I regards its welding procedures as proprietary and does not give them to competitors. (Rano, Tr. 6028-29).

### **B. CB&I'S ACQUISITION OF PDM HAS, BY ALL MEASURES, SUBSTANTIALLY LESSENED COMPETITION FOR THE SALE OF LIN/LOX/LAR TANKS**

#### **1. Demand for LIN/LOX/LAR Tanks**

5.19 Currently, there is overcapacity in the LIN/LOX market. Moreover, there will not be air separation plants requiring LIN/LOX tanks constructed in the next few years. (Hilgar, Tr. 1541-43). Demand for field-erected LIN/LOX tanks is not high. (Stetzler, Tr. 6382-83).

## Response to RFOF 5.19

Respondents' proposed finding is misleading and incomplete. Mr. Hilgar, of Air Products, believes that the pace of construction of air separation plants in the United States over the past 10 years has resulted in sufficient air separation plants so that in the short term, *i.e.*, several years, new air separation plants will not be needed. (Hilgar, Tr. 1542). However, this does not mean that new LIN/LOX tanks are not being purchased, and other firms, such as Linde BOC Process Plants, Air Liquide, Praxair and MG Industries are actively bidding on and building air separation plants. Since the acquisition, five LIN/LOX projects have been awarded in the U.S. (RFOF 5.77; Scorsone, Tr. 5017; RX 949 (demonstrative)). During the period 1990 to the

time of the acquisition, about 109 LIN/LOX tanks were awarded in the U.S. (CCFF 152; CX 1664 (demonstrative); Simpson, Tr. 3429). Respondents note that AT&V is bidding on “numerous LIN/LOX projects in the United States.” RFOF 5.35. See RFOF 5.52 (“Matrix currently has three bids outstanding on LIN/LOX tanks for two different customers.”). While this matter was ongoing, CB&I bid [ \_\_\_\_\_ ], ([ \_\_\_\_\_ ], *in camera*).

PDM regarded low temperature and cryogenic tanks, which includes LIN/LOX tanks, as “lucrative markets”: “Even though this product line may not be the ‘high profit level’ project, PDM’s involvement with cryogenics continues to keep the PDM exposure high in the lucrative markets of vacuum, LNG, and other low temperature and cryogenic fields.... This market warrants continued interest.” (CX 88 at PDM-CH 006400).

Moreover, low growth in demand in the LIN/LOX market is a barrier to entry because it increases the risk of entry. (Stetzler, Tr. 6382-83). Though Chattanooga makes written strategic plans once a year, Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426). In fact, Mr. Stetzler admits that the supply of LIN/LOX tanks is “not really a business that we’ve been participating in.” (Stetzler, Tr. 6422).

## **2. LIN/LOX/LAR Tanks Are Significant**

5.20 CB&I does not regard LIN/LOX/LAR work as an important part of its business because it is so small. (Scorsone, Tr. 5016). The total revenue realized in the LIN/LOX market in the last two years for all construction vendors amounted to only approximately \$5 million. (Glenn, Tr. 4088).

### Response to RFOF 5.20

Respondents’ assertions are incorrect and mischaracterize the record. Contrary to Respondents’ assertion, PDM regarded LIN/LOX tanks as a strategically important product. A PDM document states: “Even though this product line may not be the ‘high profit level’ project, PDM’s involvement with cryogenics continues to keep the PDM exposure high in the lucrative markets of vacuum, LNG, and other low temperature and cryogenic fields.... This market warrants continued interest.” (CX 88 at PDM-CH 006400). Respondents’ assertions that the LIN/LOX market is unimportant is belied by Respondents’ aggressive competition for LIN/LOX projects. According to PDM, “Since the fall of 1996, CBI has been the most aggressive competitor in increasing market share....” (CX 1194 at 5014; CX 108 at PDM-HOU 005018).

Mr. Glenn testified that the total revenue realized by CB&I, and not by all construction vendors, was about \$5 million over the last two years. (Glenn, Tr. 4088). Between 1990 and the time of the acquisition, PDM was awarded 44 LIN/LOX tanks with a total value of \$41.8 million, and CB&I was awarded 25 LIN/LOX tanks with a total value of \$36.3 million. (CCFF 153, 154; Simpson Tr. 3422, 3429-30; CX 1664 (demonstrative); CX 1665 (demonstrative)).

5.21 CB&I's CEO does not generally become involved in the LIN/LOX portion of CB&I's business due to the small size and infrequency of the projects. (Glenn, Tr. 4155). CB&I does not have any salespersons dedicated to the LIN/LOX market. (Scorsone, Tr. 5017).

### Response to RFOF 5.21

Respondents' assertions are misleading and self-serving. CB&I's CEO's personal involvement in one portion of CB&I's business is irrelevant. CB&I does not have dedicated salespersons for any products--CB&I's salespersons have responsibility for multiple products. (Scorsone, 4847). See response to RFOF 5.19-20.

### **3. There Has Been No New Entry in the LIN/LOX/LAR Market**

5.22 CB&I's believes that it competes for LIN/LOX projects against Matrix, AT&V, and CB&T. (Scorsone, Tr. 4849-50) (state of mind).

### Response to RFOF 5.22

Respondents' state of mind assertion is misleading in that it implies that Matrix, AT&V and Chattanooga can effectively compete against CB&I. The record in this matter shows that neither Matrix nor Chattanooga are as cost-competitive as CB&I, and that AT&V's reputation hinders its ability to compete effectively against CB&I. Matrix is a diminished competitor in the LIN/LOX tank market that has not won a LIN/LOX project since December 1998. CCRFF 5.51. AT&V is a weak competitor in the LIN/LOX market. CCRFF 5.39, 5.131, 5.143. Chattanooga has never constructed a LIN/LOX tank and therefore is not a new entrant into the LIN/LOX tank market. CCRFF 5.58.

5.23 [ ] was a long-time competitor in the LIN/LOX market, however [ ] was acquired by [ ]. ([ ], Tr. 458). CB&I's state of mind is that Graver/ITEQ went out of business due to poor management by ITEQ and an overall lack of demand in the market. (Scorsone, Tr. 4876-77) (state of mind). Moreover, the view that Graver, after it was acquired by ITEQ, exited the market due to deteriorating performance is also held by Air Liquide. (Kamrath, Tr. 1988-1989; 2004-2005).

### Response to RFOF 5.23

Respondents' proposed finding misrepresents Mr. Scorsone's state of mind testimony. Respondents have no basis to assert that Graver/Iteq went out of business due to "an overall lack of demand in the market." Mr. Scorsone testified that Graver/Iteq did not run their business well, and squandered their business until it failed. (Scorsone, Tr. 4876). The testimony cited by Respondents does not mention a lack of demand. (*Id.*).

5.24 CB&I believes that AT&V and CB&T have hired experienced personnel that previously worked for Brown Minneapolis Tank and Graver Tank. As a result, CB&I perceives that Brown Minneapolis Tank's and Graver Tank's "know-how" moved on to AT&V and CB&T. Matrix is another recent player in the LIN LOX market, so there are three competitors now in addition to CB&I. (RX 208) (Scorsone, Tr. 5029-30) (state of mind).

### Response to RFOF 5.24

Respondents' proposed finding is based upon Mr. Scorsone's state of mind testimony, and is not offered for the truth of the matter asserted. Respondents' proposed finding erroneously implies that Matrix, AT&V and CB&T are effective competitors in the LIN/LOX market. This finding, and Mr. Scorsone's self-serving testimony is contradicted by Respondents' business documents in this matter. [ ] an acquisition of PDM [ ] create competition void for 1-3 years.[ ] (CX 213 at CBI-PL033084, *in camera*). 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 CBI 057941).

Respondents' business documents, noting AT&V's reputation for poor safety and poor quality, contradict Mr. Scorsone's self-serving testimony implying that AT&V is an effective competitor in the LIN/LOX market. In their competitive profile of AT&V, Respondents state that AT&V's "quality" and "safety" are "poor." (CX 86 at PDM-CH 002617). Another 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). Respondents describe AT&V's safety practices as "severely lacking ... and are being labeled as an undesirable risk by many." (CX 263 at CBI-HOU-004606).

Respondents' business documents contradict Mr. Scorsone's self-serving statement describing CB&T as a competitor. Based on its discussions with industry members, Respondents believed that CB&T would have trouble gaining customer confidence. In an e-mail after the acquisition, CB&I questioned whether the customer will "trust a 'newbie' firm like CBT to do cryo tanks." (CX 40 at CBI-E007246). An August 2001 report from a CB&I salesman reports that MG Industries "has doubts" of Chattanooga's "abilities." (CX 41 at CBI-E007336).

Respondents' proposed finding is erroneous in that it implies that Matrix, AT&V or CB&T will be effective competitors, or that competition will be intense. As stated in CCRFF 5.22, Matrix, AT&V and CB&T are weak competitors that are unable to restrain CB&I's ability to raise prices.

Even though Matrix is in the LIN/LOX market, Matrix's high pricing levels render it unable to effectively compete against CB&I. Since December 1998, Matrix has bid on six LIN/LOX projects and has not won any of them. (CX 705 at 8; Kamrath, Tr. 1987 (Longview, TX in 2001); [ ], *in camera* ([ ]); Fan, Tr. 960-962, 1018 (Farmington, NM in 2002, and "many" other pricing proposals to Linde)).

Matrix's 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); [ ], *in camera* (Matrix's price for LIN/LOX tank was

[ ] higher than CB&I on most recent project)). 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 (Matrix's prices have "never been below what we'd seen from any of the other competitors"); Fontenot, Tr. 2021-2022 ("didn't feel comfortable with Matrix"); Hilgar, Tr. 1354, 1382-83 (Matrix has "more limited capacity to produce field-erected cryogenic storage tanks," as compared to CB&I or PDM)).

Respondents' proposed finding is incorrect in that it implies that Matrix just entered the LIN/LOX market. Matrix is not a new entrant into the market; the company began developing the necessary technology to enter the market around 1995, and was awarded its first contract in 1997. (Newmeister, Tr. 1585). Matrix was awarded four LIN/LOX tanks prior to the acquisition. (JX 37 at Exh. 3 (Newmeister, Dep.)). Mr. Scorsone conceded that ". . . Matrix entered the market a while back . . ." (Scorsone, Tr. 4878).

AT&V does not compete on an equal footing with CB&I in the LIN/LOX market. CCF 438-439. AT&V is much smaller than CBI. (CX 460 at CBI-E 007235; JX 23 at Exh. 1 ([ ]); Simpson, Tr. 3292-3315). AT&V's annual revenues are only [ ] percent those of CB&I. (CX 460 at CBI-E 007235; JX 23 at Exh. 1, *in camera* ([ ]); CX 1033 at 28). [ ] (Simpson, Tr. 3315 (citing JX 23a at 44, *in camera* (Cutts Dep.)). AT&V lacks the field capacity to handle more than [ ] at a time or [ ] at a time. (Cutts, Tr. 2376). Recently, AT&V had to refuse to bid on two cryogenic tank projects in the United States because of its limited field capacity. (Cutts, Tr. 2375).

CB&T has made minimal efforts to enter, let alone effectively compete, in the LIN/LOX market. Chattanooga has never built a LIN/LOX tank. (JX 2 (Respondents stipulate that CB&T has never built a LIN/LOX tank); CX 623 at FTC0000399; Stetzler, Tr. 6413-15). 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." (Stetzler, Tr. 6422).

On the one occasion when it recently bid on a LIN/LOX project, Chattanooga's price was higher than any other competitor. (CX 189 at CBI-PL015105; [ ], *in camera* (Chattanooga's price was [ ] higher than [ ]).

5.25 Some of the companies that CB&I perceives as competitors in the LIN/LOX market today are new entrants and were not competitors until shortly before the Acquisition. (Scorsone, Tr. 4877) (state of mind). Scorsone's perceptions of the LIN/LOX market have changed over time due to entry that has occurred from Matrix, AT&V, and CB&T. (Scorsone, Tr. 4878) (state of mind).

#### Response to RFOF 5.25

Respondents' proposed finding is seriously misguided; its implication that Matrix, AT&V

and CB&T are new entrants ignores the evidence that Matrix and AT&V have been trying to compete in the LIN/LOX market for several years and that apart from submitting one high bid on a project, CB&T has made no real effort to enter the market.

Matrix is not a new entrant into the LIN/LOX tank market. CCRFF 5.24. The company began developing the necessary technology to enter the market around 1995, and was awarded its first contract in 1997. (Newmeister, Tr. 1585). Matrix was awarded four LIN/LOX tanks prior to the acquisition. (JX 37 at Exh. 3 (Newmeister, Dep.)). Mr. Scorsone conceded that “. . . Matrix entered the market a while back . . .” (Scorsone, Tr. 4878), and that he perceived Matrix to be a competitor in the LIN/LOX market since 1997. (Scorsone, Tr. 4877).

AT&V is not a new entrant into the market. AT&V has been bidding on LIN/LOX projects in the United States since 1997. (CX 397 at 3). [ ], a LIN/LOX customer, testified that AT&V began aggressively marketing itself as a LIN/LOX tank builder around 1999. ([ ], *in camera* (began marketing “three years or so ago”)). It was not until early 2001 that AT&V won its first LIN/LOX project, for BOC in Midland, NC. (CX 397 at 1).

Respondents do not perceive CB&T as an entrant into the LIN/LOX market. CCRFF 5.24. According to Mr. Scorsone, CB&T was never “on the radar screen for competing for LOX/LIN projects.” (Scorsone, Tr. 4877). Mr. Stetzler, Chattanooga’s president, testified that the supply of LIN/LOX tanks is “not really a business that we’ve been participating in.” (Stetzler, Tr. 6422). Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426).

5.26 AT&V is a tank contractor which had primarily constructed ambient-temperature, flat-bottom storage tanks. (Cutts, Tr. 2458-59). Cryogenic tank sales used to make up 0 percent of AT&V’s sales, today they have increased substantially to 3-10 percent of its total sales. (Cutts, Tr. 2393).

#### Response to RFOF 5.26

Respondents’ proposed finding is misleading in that it implies that AT&V gained cryogenic tank sales almost immediately. AT&V’s bidding history shows that AT&V has been bidding on LIN/LOX projects in the United States since 1997. (CX 397 at 3); CCRFF 5.25. Four years passed before AT&V was awarded a LIN/LOX project for [ ]. (CX 397 at 1). AT&V also aggressively marketed itself for [ ] years before it won the BOC project. ([ ], *in camera*). AT&V spent [ ] in marketing alone to develop the relationship with BOC that helped AT&V land its first LIN/LOX contract. (JX 23a at 54 (Cutts, Dep.)).

5.27 AT&V spent approximately \$100,000 on research and development that went into AT&V’s efforts to build cryogenic tanks. (Cutts, Tr. 2336; 2405-06).

#### Response to RFOF 5.27

Respondents' proposed finding misstates Mr. Cutts' testimony. Mr. Cutts did not testify that the company spent \$100,000 on research and development expenses. AT&V **lost** about \$100,000 on the BOC Midland project, after factoring in all its costs, including the research and development costs incurred on its first LIN/LOX project. (Cutts, Tr. 2336; 2405-06).

Respondents' proposed finding is also misleading; it implies that a company that has never built a cryogenic tank need only spend \$100,000 in research and development to win a LIN/LOX tank project. AT&V's testimony of its experience demonstrates otherwise. [ admits that to win LIN/LOX customers is "an expensive, slow process." (JX 23a at 53 (Cutts,

Dep.)). Advertising alone would require almost \$1.5 million in a three year time frame, and AT&V does not have the resources to match CB&I's capabilities in that area. (Cutts, Tr. 2382).

5.30 AT&V worked to build customer confidence in AT&V's cryogenic capabilities by answering numerous questions, giving tours of their facilities, and showing customers AT&V's capabilities and achievements in other product lines. (Cutts, Tr. 2506-07). AT&V believes LIN/LOX contracts are very difficult to win because "customers are demanding." (Cutts, Tr. 2398).

### Response to RFOF 5.30

Respondents' proposed finding erroneously implies that AT&V has built customer confidence and is considered a reputable tank supplier in the LIN/LOX industry. Even though AT&V has been competing in the LIN/LOX industry for about six years, LIN/LOX customers do not blindly accept AT&V as a LIN/LOX supplier, and in fact, are still wary of AT&V's ability to build LIN/LOX tanks. 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); CCF 480. Another LIN/LOX customer, [redacted], thinks that [redacted] was "insane for buying a tank from an inexperienced tankee," and testified that it is concerned about working with AT&V, based on word of mouth reports of AT&V's performance on its LIN/LOX projects for BOC. (CX 41 at CBI-E 007336, *in camera*; [redacted], *in camera*).

Respondents' proposed finding is also misleading in that it implies that AT&V was able to secure customer confidence in a short period of time. Earning customer confidence is a slow and expensive process. *See* CCRFF 5.27. It took AT&V at least four years to earn enough customer confidence to win one contract after it began competing in the market. *See* CCRFF 5.24-5.26.

5.32 After the construction of the Midland project, BOC told AT&V that their "quality was exceptional, the schedule was good, and that the safety was exceptional." (Cutts, Tr. 2453). BOC "was satisfied with the price" it received on the field erected LIN/LOX tanks at Midland and "BOC is satisfied with the work that AT&V did at Midland." (V. Kelley, Tr. 5285). BOC "was quite satisfied [with AT&V] in all aspects." (V. Kelley, Tr. 5287). The turnover package, which was provided at the conclusion of the Midland contract, by AT&V was good. (V. Kelley, Tr. 5283-84). AT&V's "turnover package was quite good." (V. Kelley, Tr. 5289).

### Response to RFOF 5.32

Respondents' proposed finding is misleading in its implication that BOC experienced no problems on the Midland LIN/LOX project; testimony from BOC employees state that there were several problems on the Midland project. Dr. Kistenmacher, vice president of BOC's successor, Linde BOC Process Plants, was told by his direct partner at BOC ". . . that the price was low in the beginning, but they [AT&V] had many change orders, that in the end the price was higher than of the conventional vendors." (Kistenmacher, Tr. 931-32).

Respondents' reliance on Mr. Victor Kelley's testimony is misguided. 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).

Respondents’ base their finding on the self-interested testimony of Mr. Cutts, an AT&V vice president, that the quality of his work for BOC was exceptional. (Cutts, Tr. 2453). In spite of Mr. Cutts’ self-serving statement, LIN/LOX customers have negative assessments of AT&V’s performance on the BOC LIN/LOX tanks in the Midland project. For example, [ ] visited the site and inspected the tanks at issue. ([ ], *in camera*). Based on its inspection, [ ] concluded that “the tanks as built for BOC did not meet the safety criteria that [ ] specifies for our tanks.” ([ ], *in camera*).

According to [ ], BOC had to provide AT&V with a lot of design help on their LIN/LOX project: “[ ] the project manager at BOC who worked with AT&V on that project. He confirmed what the other engineer at BOC told me, that their design team spent a lot of time with AT&V working on design details for this tank project that they had done together.” ([ ], *in camera*).

Although Mr. Cutts alleges that BOC was satisfied with AT&V’s performance, Mr. Cutts admits that customers in the LIN/LOX industry have expressed concern about AT&V’s performance, based upon word-of-mouth regarding the BOC Midland project: “I’ve had a customer and some concerns of people calling me telling me, asking me what went wrong with the piping on the LIN/LOX tank for BOC.” (Cutts, Tr. 2380). These concerns, Mr. Cutts admits, have impacted the possibility of a future contract with other companies. (Cutts, Tr. 2381).

5.36 AT&V believes it is making a long-term investment in entering the LIN/LOX market and did not expect to recoup all of its expenditures on its first LIN/LOX project. AT&V believes that future work from BOC will enable them to recoup their initial expenditures in the LIN/LOX market. (Cutts, Tr. 2429-30). AT&V has not had a net income loss on any of its cryogenic projects to date. (Cutts, Tr. 2462).

### Response to RFOF 5.36

Respondents’ assertion that it has not had a net income loss on any of its cryogenic projects is misleading, as it implies that AT&V has not lost any money on a cryogenic tank project. As stated in CCRFF 5.27, AT&V lost about \$100,000 on the BOC Midland project, after factoring in all its costs, including the research and development costs incurred on its first LIN/LOX project. (Cutts, Tr. 2336; 2405-06)

5.38 Although AT&V believes that CB&I’s reputation exceeds AT&V’s reputation and marketing abilities, AT&V believes that in a “detailed battle of the facts” AT&V would come out in front. AT&V believes that its quality in construction, as illustrated by AT&V’s extremely low x-ray weld rejection rate, is far superior to CB&I and other tank vendors in the industry. (Cutts, Tr. 2491-93).

### Response to RFOF 5.38

Respondents’ proposed finding mischaracterizes Mr. Cutts’ statements and erroneously

ignores Mr. Cutts' testimony that CB&I has a competitive advantage over AT&V. When asked

whether CB&I had any advantages over AT&V, Mr. Cutts mentioned four areas where CB&I possessed an advantage:

“We’ve talked about some of the technical things and I gave you a list. Outside the list and the fact that they’ve got a jump on us of 80 years or something, they’ve got a much bigger staff, and they’ve obviously got a budget for advertising that grossly surpasses ours. After that, no.”

(Cutts, Tr. 2491-92). Mr. Cutts also admitted that CB&I will outperform AT&V on future projects for years to come:

“There would still probably be a few years to catch up. You’ve got to – these things are not that simple. It’s like a piece of software or something. You get it, somebody trains you on it, the day you go to use it, you’re not as good at it as the guy who has been using it for three, four, five years. So they would still probably be able to outperform us a little bit until we had a few years under our belt.”

(Cutts, Tr. 2380). Mr. Cutts qualified his assertion that AT&V could compete with CB&I to such an extent that his assertion is rendered meaningless; Mr. Cutts stated that AT&V could compete with CB&I only “on certain fronts, on certain scale projects, okay, with certain assistance, if the customers are willing.” (Cutts, Tr. 2374).

Contrary to Mr. Cutts’ assertion that AT&V’s construction quality is superior to CB&I’s, [ ] has concerns about AT&V’s construction quality and is turning to CB&I for assistance. AT&V’s performance on the [ ] LIN/LOX project in [ ] has been so poor that [ ] is considering buying out the project, terminating the relationship with AT&V, and turning to CB&I to complete the project. [( ), *in camera*]. [ ] testified “[t]he only people that 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.” ([ ], *in camera*). [ ] asked CB&I to complete the project, but CB&I refused. [( )].

5.39 AT&V believes it has the best project completion schedule in the industry due to the fact that last year they completed 163 of 164 projects on time. AT&V believes that its scheduling is much better than CB&I on non-cryogenic applications. AT&V believes that whenever schedule is a critical component of a project, it can and will deliver the project on time (Cutts, Tr. 2510-12)

### Response to RFOF 5.39

Respondents cite the self-serving testimony of AT&V that whenever schedule is a critical component of a project, AT&V can and will deliver the project on time (Cutts, Tr. 2510-12). Experience proves otherwise. AT&V is three months behind schedule on the LIN/LOX tank project [ ]. ([ ], *in camera*). [ ]

], stated “. . . [a]fter three months working on this project, including design, foundation completion, purchasing materials, AT&V claimed a three-month delay, essentially saying that there had been no work accomplished.” ([ ], *in camera*). Moreover, Mr. Cutts admits that CB&I can outperform AT&V’s employees on cryogenic projects, and will for years to come. CCRFF 5.38.

5.40 AT&V believes it has an advantage over CB&I and can sell LIN/LOX tanks at a lower price. (Cutts, Tr. 2572). As has been demonstrated on recent projects, AT&V has offered pricing that “is below [ ] flat cost.” (RX 273).

#### Response to RFOF 5.40

Respondents’ reliance on the self-interested testimony of Mr. Cutts, an AT&V vice president, for the proposition that AT&V can sell LIN/LOX tanks at a lower price than CB&I, is misguided. (Cutts, Tr. 2572). Respondents’ assertion, moreover, is misleading. Customers that have done business with AT&V have found that any initial savings are often offset or exceeded by oversight costs and costs related to change orders. (Kistenmacher, Tr. 931-32; [ ], *in camera*). [ ] testified “We anticipated spending between [ ] to [ ] in the due diligence and the development of AT&V as a supplier. . . . we’ve easily spent the full [ ] difference in pricing [ ] now. . . . [a]t the end of this, I would expect that this is going to cost us another [ ] beyond the [ ] already sunk.” ([ ], *in camera*). Mr. Kistenmacher’s testimony regarding BOC’s experience mirrors [ ]: “the price was low in the beginning but they had many change orders, that in the end the price was higher than of the conventional vendors.” (Kistenmacher, Tr. 932).

5.41 AT&V believes that its past difficulties on a few projects, such as pressure spheres, are actually positive selling points for the company. AT&V encountered a few difficulties on a pressure sphere project for Black & Veatch but was able to correct the problems and deliver a successful product. AT&V believes these examples show AT&V’s strength as a company, not its weaknesses. (Cutts, Tr. 2508-10).

#### Response to RFOF 5.41

Respondents’ proposed finding, which relies on Mr. Cutts’ self-interested testimony, is misleading in that it implies that AT&V’s performance problems have helped, not damaged, AT&V’s reputation. The record demonstrates that the problems on the Westlake pressure sphere project damaged AT&V’s reputation by destroying customer confidence in its abilities. *See* CCRFF 5.30. As a result of these problems, AT&V has had to spend time and resources answering questions from potential customers about its past LIN/LOX projects, and explaining its performance. CCRFF 5.32. 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 CBI-HOU-004606). *See* CCF 452.

5.42 AT&V received very high ratings on the Black & Vetch pressure sphere project and has used that project as a reference for future projects. There were numerous issues that occurred on the project, but Cutts believes that AT&V ultimately performed well since Black & Vetch gave AT&V many other projects after its completion of the Westlake project. (Cutts, Tr. 2535-50).

#### Response to RFOF 5.42

Respondents’ proposed finding, which again relies on Mr. Cutts’ self-interested testimony, is misleading in that it implies that AT&V’s performance problems have helped, not damaged, AT&V’s reputation. The record demonstrates that the problems on the Westlake pressure sphere project damaged AT&V’s reputation by destroying customer confidence in its abilities. *See* CCRFF 5.30. As a result of these problems, AT&V has had to spend time and resources answering questions from potential customers about its past LIN/LOX projects, and explaining its performance. CCRFF 5.32. *See* CCF 452.

5.43 Matrix has hired employees who have experience building cryogenic storage tanks. Specifically, a project manager, foreman, and a crew. (Newmeister, Tr. 2188). This has allowed Matrix to increase customer confidence in its qualifications and demonstrate to buyers that it can meet the requisite API specifications. (Newmeister, Tr. 2189-90).

#### Response to RFOF 5.43

Respondents’ proposed finding mischaracterizes the record in that it implies that Matrix required only a few people to enter the LIN/LOX market and nothing more. Mr. Newmeister testified that Matrix had to hire a consultant, an ex-Graver employee, to train its engineering staff. (Newmeister, Tr. 2187). Matrix also had to perform construction planning and fabrication planning, to review its insulation products, to develop a relationship with a pipe fabricator, and to work out the procedures for estimating jobs and developing proposals. (Newmeister, Tr. 1585-86). This process, of getting Matrix in a position to compete for LIN/LOX projects, took Matrix almost a year and a half to two years. (Newmeister, Tr. 1586).

5.49 In 2000, Matrix 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).

#### Response to RFOF 5.49

Respondents’ assertion is incorrect. Matrix was not awarded a LAR tank contract in 2000. Matrix submitted a proposal for a LAR tank for Praxair in East Chicago in February 1998,

five years ago, and won the contract shortly thereafter. (JX 37 at Exh. 3 (Newmeister, Dep.)).

5.50 Also in 2000, Matrix was awarded a LIN tank 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).

### Response to RFOF 5.50

Respondents' assertion is incorrect. Matrix was not awarded a LIN tank contract in 2000. Matrix submitted a proposal for a LIN tank for Air Products in Kingsport, Tennessee in December 1998, over four years ago, and won the contract shortly thereafter. (JX 37 at Exh. 3 (Newmeister, Dep.)). Matrix has not won another LIN/LOX project since that time.

5.51 Matrix is a competitive force in the LIN/LOX market and has current work experience with Praxair and Air Products. With experience and good recommendations from its customers Matrix believes it can become an even stronger competitor in the market. (Newmeister, Tr. 2166-67).

### Response to RFOF 5.51

Respondents' proposed finding erroneously implies that Matrix can effectively compete against CB&I. Matrix is not currently a competitive force in the LIN/LOX tank market. Since December 1998, Matrix has attempted to win six LIN/LOX projects and has failed. CCRFF 5.24.

Matrix is a diminished competitor in the LIN/LOX tank market as a result of the sale of its Brown Steel subsidiary, which owned the fabrication facility where Matrix fabricated LIN/LOX tanks (Newmeister, Tr. 1590-91, 1595). LIN/LOX customers, such as Air Liquide, MG Industries, and Lotepro have told Matrix that its pricing is high, and Matrix has examined its costs to determine a way to lower them. (Newmeister, Tr. 2156-57, 2158). Based on its review of its costs, Matrix determined that **"once we sold Brown Steel Company, we lost some competitive advantage** in the two primary areas, one of which – one of being able to do internal blasting and priming, and the other, impressing." (Newmeister, Tr. 2158-59) (emphasis supplied). By losing its fabrication capability, Matrix is required to subcontract the fabrication work for these tanks, and subcontracting increases Matrix's costs. (Newmeister, Tr. 1569-70, 1590 (As a result of subcontracting its fabrication work, Matrix's "costs will be higher. They won't be as competitive."))).

Matrix has been a high bidder, and consequently non-competitive, on recent LIN/LOX tank projects for several competitors, including Air Liquide and Linde. (Newmeister, Tr. 2156-58). (See Fan, Tr. 960-62 (on 2002 project, Matrix bid over \$900,000, while CB&I bid \$814,000); Kistenmacher, Tr. 860 (on preliminary bids, Matrix was eliminated from consideration because its pricing was high); Fontenot, Tr. 2029 (CB&I was at least 5% below Matrix on Air Liquide's recent Longview, Texas project).

Matrix has been told that Matrix 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 (Matrix's prices have "never been below what we'd seen from any of the other competitors"); Fontenot, Tr. 2021-22 ("didn't feel comfortable with Matrix"); Hilgar, Tr. 1354, 1382-83 (Matrix has "more limited capacity to produce field-erected cryogenic storage tanks," as compared to CB&I or PDM)).



5.53 Air Liquide has solicited bids from Matrix on at least two projects, Freeport and Longview, Texas. Air Liquide is unaware of any failure or problems in LIN/LOX tanks constructed by Matrix. (Kamrath, Tr. 2005-06).

Response to RFOF 5.53

Respondents' proposed finding mischaracterizes Air Liquide's sworn opinion of Matrix's competitive viability. Matrix is not a viable competitor because its prices are non-competitive. Air Liquide has never chosen Matrix for a LIN/LOX tank project. (Kamrath, Tr. 2000-01). Matrix's "price has typically been high. They've never been certainly below what we'd see from any of the other competitors." (Kamrath, Tr. 2000-01). Mr. Fontenot, who was responsible for bids on the two Air Liquide LIN/LOX tank projects that Matrix bid on (Fontenot, Tr. 2010; Kamrath, Tr. 2005-06), testified that Air Liquide was not comfortable with Matrix because it lacked a sufficient track record: "we want to go to a supplier that has a proven record of performance and of safety in the field and we know will be in the business at least through that project." (Fontenot, Tr. 2017).

5.54 Air Products has informed CB&I that they consider Matrix to be "a player in the [ ] market" and certainly consider them to be a "viable competitor." (RX 273).

Response to RFOF 5.54

Respondents' proposed finding misstates the evidence in this matter. Air Products 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). Although Matrix has built a LIN tank for Air Products, Mr. Hilgar testified that Air Products would require Matrix to become re-qualified if they sold off their fabrication facility. (Hilgar, Tr. 1381-82).

5.55 [ ]

Response to RFOF 5.55

Respondents' assertion is misleading in that it implies that [ ] is satisfied with all aspects of Matrix's bidding. [ ] does not have a positive assessment of Matrix's pricing for LIN/LOX tanks. Matrix's price for a LIN/LOX tank was [ ] higher than [ ] on the most recent project for [ ]. ([ ], *in camera*). Matrix's pricing was so much higher than [ ] that it was non-competitive; [ ] did not bother to further negotiate with Matrix for the [ ] project. ([ ], *in camera*).

Even if Matrix had lowered its price by [ ], [ ] would not have awarded

the project to Matrix because it would be concerned that such dramatic pricing concessions would cause Matrix to cut corners and be detrimental to project quality. ([redacted]), *in camera*). Based upon his experience bidding large capital equipment, [redacted] anticipates that Matrix's high pricing will continue on future LIN/LOX projects. ([redacted]), *in camera*).

- 5.56 CB&T has constructed tanks and structures significantly more difficult to build 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. 6337-39). CB&T builds flat bottom, API 650 storage tanks, API 620 storage tanks, and low pressure tanks. They also build ASME pressure spheres which are vacuum tanks. (Stetzler, Tr. 6308-09). CB&T has built smaller LNG tanks for customers such as Lotepro and Nikkiso. (Stetzler, Tr. 6331-34). CB&T has also been awarded a contract to build an entire hydrogen plant by BOC. (Stetzler, Tr. 6347-49).
- 5.57 CB&T's experience building LNG tanks translates to CB&T's ability to build LIN/LOX tanks. For example, the ability to fabricate components in a clean environment and the ability to weld materials of certain quality are skills used in the fabrication of both types of tanks. (Stetzler, Tr. 6336-37).

#### Response to RFOF 5.56 and 5.57

Respondents' proposed finding is speculation and is based solely upon the testimony of a person who has no experience building LIN/LOX tanks. CCRFF 5.2; (Stetzler, Tr. 6330 (his company, Chattanooga Boiler & Tank has never built a LIN/LOX tank); JX 2 (Respondents' stipulate that Chattanooga Boiler & Tank has never built a LIN/LOX tank); JX 35 at 8-10 (Stetzler, Dep.) (Mr. Stetzler's description of his experience does not include LIN/LOX tanks)). Mr. Stetzler is unfamiliar with the temperature requirements of LIN/LOX tanks; he does not know at which temperature liquid nitrogen or liquid oxygen must be stored. (Stetzler, Tr. 6312). Mr. Stetzler is unfamiliar with the cleanliness issue dealing with LIN/LOX tanks, i.e. if you do not remove all hydrocarbons from the LIN/LOX tank properly, it will result in an explosion. (Stetzler, Tr. 6336-37).

Respondents' proposed finding is misleading by implying that CB&T's experience building small LNG tanks translates into an ability to effectively compete in the market for LIN/LOX tanks. The small, shop-built LNG tanks that CB&T constructed (as opposed to the large, field-erected tanks at issue in this litigation) (Stetzler, Tr. 6375), were single wall construction tanks; they were not the double-wall construction tanks that are used for LIN/LOX tanks and that, as Mr. Newmeister testified, requires "much more sophisticated engineering analysis." (Stetzler, Tr. 6332; Newmeister, Tr. 1566).

Respondents' proposed finding is erroneous; it implies that flat bottom, API 650 storage tanks, API 620 storage tanks, low pressure tanks, and ASME pressure spheres are 20 times more difficult to build than a LIN/LOX tank. As stated in CCRFF 5.2-5.3, Mr. Stetzler's assertion is unfounded, as he has never built a LIN/LOX tank. (JX 2). LIN/LOX tanks are more complex to design and manufacture than a "run-of-the-mill flat-bottom industrial tank," including ambient temperature API 620 tanks or API 650 tanks. (Newmeister, Tr. 1566).

5.58 There is no question CB&T has the ability to design and build a field-erected LIN/LOX tank because constructing a field-erected LIN/LOX tank is not particularly difficult (Stetzler, Tr. 6312-13).

### Response to RFOF 5.58

Respondents' assertion is pure speculation and relies solely on the self-serving testimony of CB&T's president, Mr. Stetzler, as to CB&T's ability to design and construct a LIN/LOX tank. (Stetzler, Tr. 6312-13). CB&T has never built a LIN/LOX tank. (RX 273 at CBI-E 005528; JX 35 at Exh. 1 (Stetzler, Dep.)).

LIN/LOX tanks are particularly difficult and complex to build. There is ample evidence, including that in Respondents' own business documents, that refute Respondents' erroneous assertion. CCRFF 5.10-5.17. In order to construct a LIN/LOX tank, Respondents aver to its shareholders, CB&I possesses "special expertise" to design, engineer, fabricate, erect and repair LIN/LOX tanks. CCRFF 5.10. LIN/LOX tanks require sophisticated engineering analysis, expensive equipment that must be specially modified, specialized procedures that must be developed, and employees trained in cryogenic tank construction. CCRFF 5.10, 5.13, 5.15, 5.17.

LIN/LOX industry participants question CB&T's ability to build a LIN/LOX tank. MG Industries "has doubts" of Chattanooga's "abilities." (CX 41 at CBI-E007336). Mr. Cutts testified that AT&V does not consider CB&T to be a competitor for LIN/LOX tanks in the United States. (Cutts, Tr. 2333). Even Mr. Scorsone admitted that CB&T was never "on the radar screen for competing for LOX/LIN projects." (Scorsone, Tr. 4877).

5.65 CB&T's employees are knowledgeable about how to build tanks to withstand low temperatures and involve insulation. (Stetzler, Tr. 6388-90). CB&T has sufficient equipment and technical expertise to compete for jobs involving field-erected LIN/LOX tanks, vacuum chambers, or field-erected LPG tanks. (Stetzler, Tr. 6393).

### Response to RFOF 5.65

Respondents' assertion is speculative and relies solely on the self-serving testimony of CB&T's president, Mr. Stetzler. CB&T has never built a LIN/LOX tank. (RX 273 at CBI-E 005528; JX 35 at Exh. 1 (Stetzler, Dep.)).

5.67 CB&T has competitive advantages over CB&I. CB&T is a smaller company better able to respond to certain jobs, CB&T has a lower overhead structure, and CB&T can respond to immediate market conditions more quickly and efficiently than CB&I. Moreover, CB&T may be able to purchase materials closer to market price than CB&I. (Stetzler, Tr. 6369). Further, CB&T has more experienced personnel than CB&I. (Stetzler, Tr. 6370-73).

### Response to RFOF 5.67

Respondents' proposed finding is erroneous, mischaracterizes the record, and relies solely on the self-promoting testimony of CB&T's president. The record shows that CB&T cannot compete with CB&I on pricing for LIN/LOX tanks. On a recent bid for a LIN/LOX tank for [ ] for a LIN/LOX tank project in [ ], CB&T's price was [ ] percent higher than [ ]. ([ ], *in camera*). [ ]

] ([ ], *in camera*). [

] ([ ], *in camera*). [

] ([ ] *in camera*).

CB&T's pricing was so high that [ ] didn't even bother to try to negotiate with CB&T about the price, because it feared that any cost cutting would be detrimental to the quality of the project. ([ ], *in camera*).

Respondents' proposed finding contradicts the unmatched competitive advantage mentioned in Respondents' documents. As stated in Respondents' documents, there are no LIN/LOX tank suppliers in the United States that can match CB&I's track record. CCFF 412; (*See* CX 244 at CBI-PL-4005377 ("CB&I has built over 600 field erected cryogenic storage tanks of all types.")). In an e-mail after the acquisition, CB&I questioned whether the customer will "trust a 'newbie' firm like CBT to do cryo tanks." (CX 40 at CBI-E007246). An August 2001 report from a CB&I salesman reports that MG Industries "has doubts" of Chattanooga's "abilities." (CX 41 at CBI-E007336).

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). In another document, Respondents state that "CB&I is the world leader in designing and building spherical storage vessels . . . none compare to CB&I's ability and experience record of providing spheres worldwide." (CX 1173 at 7562)

Respondents' proposed finding also misstates Mr. Stetzler's testimony with respect to experienced personnel. Mr. Stetzler qualified his testimony, saying that CB&T had more experienced boilermakers than CB&I. (Stetzler, Tr. 6370-71). Mr. Stetzler did not represent that his personnel, as a whole, were more experienced than CB&I's. (Stetzler, Tr. 6370-71).

5.69 CB&T bid on LIN/LOX tanks for BOC in Midland, North Carolina, because CB&T is interested in winning contracts in the LIN/LOX market and it saw a potential opportunity in light of the Acquisition. (Stetzler, Tr. 6347; 6350-51; 6368).

5.70 CB&T also submitted a budgetary proposal to MG for a field-erected LIN/LOX tank in Johnsonville, TN. (Stetzler, Tr. 6351). The bid submitted to MG for Johnsonville was a budgetary figure or an estimate in the range of plus or minus 10 percent. (Stetzler, Tr. 6351-52). In order to give a firm fixed price a supplier would have to be familiar with site conditions, site access, soil conditions, etc. CB&T did not review these factors for the Johnsonville bid. (Stetzler, Tr. 6352-53)

#### Response to RFOF 5.69 and 5.70

Complaint counsel agree with Respondents that a budgetary price is “an estimate in the range of plus or minus 10 percent.” RFOF 570. In other respects, however, Respondents’ proposed findings are misleading in that they imply that CB&T is aggressively competing for LIN/LOX tanks. CB&T has made minimal, if any, efforts to compete in the LIN/LOX market. CCRFF 5.24, 5.26. Mr. Stetzler, Chattanooga’s president, testified that the supply of LIN/LOX tanks is “not really a business that we’ve been participating in.” (Stetzler, Tr. 6422). Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426).

There is no evidence that the pricing on the BOC project was competitive. However, using the MG Industries project as a indicator, the evidence suggests that the pricing was not competitive. [ ]

Respondents’ assertion regarding the price CB&T submitted to MG Industries is misleading. [ ] Even if the bid submitted to MG Industries was an estimate in the range of plus or minus 10 percent, CB&T would still have submitted a price that is at least [ ] percent higher than [ ]. [ ]

#### **4. AT&V, Matrix, and CB&I Are Not Formidable LIN/LOX Competitors**

5.72 CB&I believes that AT&V, Matrix, and CB&T are all capable of designing, executing, and offering competitive pricing on LIN/LOX projects. CB&I takes this into account when it prices LIN/LOX projects. (Scorsone, Tr. 4878-79) (state of mind). CB&I believes that CB&T, Matrix, and AT&V are competitors because LIN/LOX customers believe that these companies are "viable competitors in the LOX/LIN market." (RX 273).

#### **Response to RFOF 5.72**

Respondents’ assertion misstates the evidence in this matter, is misleading in its implication that AT&V, Matrix and CB&T are effective competitors in the LIN/LOX market, and is misguided in its reliance on self-serving testimony and unfounded conclusory statements.

Respondents’ proposed finding relies on Mr. Scorsone’s self-serving statements and an email summarizing the conclusions of a CB&I salesperson, not those of LIN/LOX customers, as Respondents allege. CB&I’s state of mind relating to Matrix, AT&V and CB&T is revealed in documents prepared by Dan Knight, a CB&I business development manager. Mr. Knight noted 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 CBI.” (CX 459 at CBI-E 007218).

As stated in CCRFF 5.24, LIN/LOX customers are skeptical of the viability of AT&V, Matrix and CB&T. Past experience demonstrates that Matrix and CB&T are high cost suppliers, and AT&V has a reputation among LIN/LOX customers of poor performance. CCRFF 5.24. As price, quality, and reputation are among the criteria used to determine competition in the LIN/LOX market (CX 1033 at 7), Matrix, CB&T and AT&V’s problems in these areas diminish

their strength as competitors in the LIN/LOX market.

Respondents are aware that LIN/LOX customers have doubts about the viability of these competitors. For example, a CB&I salesman reporting on [ ] analysis of potential constructors for the [ ] project stated, "With Graver gone [ ] is looking to us to be his supplier. Note, however, he is aware that some of the Graver gang went over to CBT, though I believe he has doubts of their abilities. He also was aware that ATV is building a LOX tank for BOC in NC, but told me [ ]." (CX 41 at CBI-E 007336, *in camera*).

5.73 CB&I believes that CB&T is very capable of building LIN/LOX tanks as a result of their ability to work with stainless steel. (Scorsone, Tr. 4877-78) (state of mind). CB&T has picked up enough experienced LIN/LOX personnel from Graver to give them "credibility" in the LIN/LOX market. (RX 273).

#### Response to RFOF 5.73

Respondents' proposed finding repeats the inaccurate and misleading statements represented in RFOF 5.24. As stated in CCRFF 5.24, Respondents' documents show that Respondents believed that CB&T would have difficulty gaining customer confidence, and that Respondents are aware of CB&T's lack of experience.

5.74 CB&I first became aware that AT&V had entered the LIN/LOX market and was a competitor when AT&V was awarded a LIN/LOX project by BOC in Midland, North Carolina. (Scorsone, Tr. 4878) (state of mind).

#### Response to RFOF 5.74

Respondents attribute to CB&I the state of mind of one CB&I employee, Mr. Scorsone. The state of mind of CB&I's mid level management, CB&I's Business Development Managers, is also properly attributable to CB&I. However, Mr. Scorsone's representation regarding when he became aware that AT&V was competing in the LIN/LOX market is not consistent with CB&I's bidding history against AT&V. On [ ], AT&V bid against CB&I for LIN/LOX tanks for [ ]. (CX 397 at 2/4 *in camera*). On [ ], AT&V bid against CB&I for a LOX tank for [ ]. (CX 397 at 2/4 *in camera*). On [ ], AT&V bid against CB&I for LIN/LOX tanks for [ ]. (CX 397 at 1/4 *in camera*). On [ ], AT&V bid against CB&I for LIN/LOX tanks for [ ]. (CX 397 at 1/4 *in camera*). Despite all these competitive encounters with AT&V since June 1997, Mr. Scorsone did not consider AT&V to have entered the market until it actually was awarded a project. (Scorsone, Tr. 4878 (state of mind)).

On December 8, 1997, Air Liquide indicated to CB&I that CB&I would have to drop its price by more than \$200,000 to get in the range of PDM's or Graver's bids on the Geismar, Louisiana LIN/LOX tanks. (CX 221 at CBI-PL037110). Air Liquide informed CB&I that CB&I did not make the cut to the final selection process, which was currently underway with PDM and

Graver. (CX 221 at CBI-PL037110). AT&V was not even in the running. However, Air Liquide's "Project Mgr agreed to let [CB&I] have a final shot" and informed CB&I that PDM and Graver were "pretty close together" and that they had specified stainless steel inner tanks vs. CB&I's 9% nickel design. (CX 221 at CBI-PL037110). CB&I had bid a margin of negative 6% and considered lowering its margin to negative 8% to win the award.

When CB&I was competing against PDM and Graver, CB&I was forced to bid negative margins, which ate into CB&I's gross margin including SG&A charges. In that competitive environment AT&V was not competitive. AT&V only began to win awards after Graver exited, CB&I announced it was acquiring PDM, and Respondents drew a line against offering to LIN/LOX customers prices with negative margins.

5.75 Matrix has already performed well for LIN/LOX customers and is definitely "a player in the [LIN/LOX] market." (RX 273).

#### Response to RFOF 5.75

Respondents' proposed finding re-asserts the erroneous statements noted in RFOF 5.24 and 5.51. As stated in both CCRFF 5.24 and CCRFF 5.51, Matrix's strength as a "player" in the LIN/LOX market has been weakened since the sale of its fabrication and pressing capabilities. Matrix has not won a LIN/LOX project in the last four years, and its high pricing levels continue to discourage LIN/LOX customers from considering Matrix for future projects. CCRFF 5.24, 5.51.

5.76 CB&I 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. Every time CB&I has gone up against AT&V for a LIN/LOX project, it has lost. (Scorsone, Tr. 5018).

5.78 Only four of the five post-Acquisition LIN/LOX projects were competitively bid. (Scorsone, Tr. 5017). Of the four competitively bid projects, AT&V bid on three and won all three. (Scorsone, Tr. 5018).

#### Response to RFOF 5.76 and 5.78

Respondents' proposed finding is misleading in that it implies that AT&V is an effective competitor against CB&I and will continue to beat CB&I in future LIN/LOX projects. Based on AT&V's performance on the LIN/LOX projects, AT&V may have increased difficulty winning future projects, even if AT&V offers a lower price. On one of these projects, AT&V has performed so poorly, reporting problems in its schedule, and in the quality of its work, that the customer has asked CB&I to take over and complete the project. CCRFF 5.38-5.40.

On the [ ] project, AT&V was not selected as the most competitive bid, as Respondents' proposed findings suggests. AT&V was selected [ ] to develop another supplier [ ] ([ ], *in camera*). At the time, [ ] believed that "with the Graver/Iteq bankruptcy and PDM's acquisition, that there was only one viable supplier in North America, and that was

affecting -- that could affect the competitive position." ([redacted], *in camera*). [redacted] would not have selected AT&V if the acquisition had not occurred: "If PDM was 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." ([redacted], *in camera*).

## **5. LIN/LOX Customers Actively Involved in the the LIN/LOX Market Today Are Not Satisfied With The Prices Received And Available Competitive Options**

5.79 There are six customers that purchase LIN/LOX tanks: Air Liquide, Air Products, BOC, Linde, MG Industries and Praxair. (V. Kelley, Tr. 4591; Patterson, Tr. 342-43).

5.80 Air Liquide, BOC, MG Industries and Praxair have been active in the post-Acquisition LIN/LOX market and have each awarded a project. (Scorsone, Tr. 5015-16). Air Products and Linde have not awarded a LIN/LOX project since 1998 and 1999 respectively, do not have any current plans for LIN/LOX projects and do not foresee any in the near future. (Kistenmacher, Tr. 827-28; Hilgar, Tr. 1505-07; 1532-33).

### Response to RFOF 5.79 and 5.80

Respondents' assertion relating to Linde is incorrect. Linde is actively involved in competing for LIN/LOX tank projects and requested pricing information for a LIN/LOX tank project in October 2002 from CB&I, AT&V, and Matrix. (Kistenmacher, Tr. 857).

Respondents also misstate the number of LIN/LOX customers in the market. There are now five customers in the LIN/LOX market; since September 2002, Linde, now Linde BOC Process Plants, manages the procurement of LIN/LOX tanks for BOC. (Kistenmacher, Tr. 822-23).

5.81 LIN/LOX tank customers are sophisticated consumers. BOC is an experienced purchaser of LIN/LOX tanks and has the expertise to help develop new suppliers of LIN/LOX tanks. For example, BOC hired engineering consultants to assist it and AT&V in working through the Midland project. (V. Kelley, Tr. 4619-20).

### Response to RFOF 5.81

Respondents' assertions are incomplete and misleading. BOC no longer does its own procurement of LIN/LOX tanks. Since September 2002, Linde BOC Process Plants manages the procurement of LIN/LOX tanks for BOC. ((Kelley, Tr. 4648-51; Kistenmacher, Tr. 822-23). Dr. Kistenmacher, vice president of Linde BOC Process Plants, testified that "choices of qualified vendors has been drastically limited to one vendor [CB&I], and relative to my experience in the industry, that means we have less competition, and less competition to my experience always leads to higher prices." (Kistenmacher, Tr. 878); CCRFF 5.113, 5.114. BOC used no permanent engineers on staff when it hired AT&V to build the Midland project. (V. Kelley, Tr. 4657-58, 4672). While it is true, as Respondents' state, that "BOC hired engineering consultants to assist it and AT&V in working through the Midland project," BOC hired those engineers from a temporary agency. (V. Kelley, Tr. 4652-53). BOC's testifying witness, Mr. Kelley, had no direct contacts with the sales representatives of LIN/LOX tanks. (V. Kelley, Tr. 4657-58, 4672). Mr.

Kelley had little direct knowledge of either the procurement or the construction of BOC's Midland, North Carolina LIN/LOX tanks. CCRFF 5.95, 5.96.

5.82 [ ]. MG also uses aggressive negotiation tactics in order to manipulate vendors into dropping tank prices. For example, during the 1990s, MG would often drive tank costs down by informing vendors that they were higher-priced (even though they were not). (See Patterson, Tr. 350).

### Response to RFOF 5.82

Respondents' proposed finding erroneously implies that MG Industries can use these "aggressive negotiation tactics" to obtain lower prices today. Prior to the acquisition, MG Industries used PDM's presence as a negotiating leverage to secure lower prices: [ ] so not having a PDM bid took away – took away what could have been the lower – lower price to [ ]. We use them as a negotiating tactic frequently to get better prices from other suppliers." ([ ], *in camera*).

Now that PDM is gone, MG Industries does not have a similar bargaining chip in place. The effect of PDM's absence on MG Industries' ability to use its negotiating skills are demonstrated in the LIN/LOX project for [ ]. There, MG Industries [ ], but were unsuccessful. ([ ], *in camera*). "Our negotiations were limited [ ]" ([ ], *in camera*), [ ] ([ ], *in camera*). The acquisition [ ] takes away a very aggressive competitive bidder for LOX and LIN tank, [ ] ([ ], *in camera*).

5.83 Air Liquide is also a sophisticated customer. As the U.S. subsidiary of a large French corporation, Air Liquide is experienced at purchasing LIN/LOX tanks both domestically and overseas. (See Kamrath, Tr. 1979-80, 1983-85). [ ]

### Response to RFOF 5.83

Respondents' assertions are incomplete and misleading to the extent they are offered to support the proposition that Air Liquide is satisfied with the state of competition in the LIN/LOX market today. [ ] CCRFF 131, 135, 143. Air Liquide was concerned about CB&I's acquisition of PDM, because "... 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). Air Liquide asked CB&I to complete the

Freeport, Texas, project, but CB&I refused. Scorson, Tr. 5036.

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

#### Response to RFOF 5.84

Respondents' assertions are incomplete and misleading to the extent they are offered to support the proposition that Air Products is satisfied with the state of competition in the LIN/LOX market today. Air Products testified that the CB&I's acquisition had a negative effect on competition. CCRFF 5.169.

5.85 Linde is a sophisticated customer, although not currently active in the LIN/LOX market. Linde is a U.S. subsidiary of a large German corporation and has extensive experience with LIN/LOX tanks in the U.S. and overseas. (*See* Kistenmacher, Tr. 822-23; 830).

#### Response to RFOF 5.85

Respondents' proposed finding is misleading. Linde is actively involved in competing for LIN/LOX tank projects and requested pricing information for a LIN/LOX tank project in October 2002 from CB&I, AT&V, and Matrix. (Kistenmacher, Tr. 857); CCRFF 5.80.

Respondents' proposed finding also erroneously implies that Linde is satisfied with the level of competition that exists in the LIN/LOX market today. Dr. Kistenmacher testified that Linde's "choices of qualified vendors has been drastically limited to one vendor [CB&I], and relative to my experience in the industry, that means we have less competition, and less competition to my experience always leads to higher prices." (Kistenmacher, Tr. 878); CCRFF 5.113, 5.114.

5.86 Praxair is a sophisticated customer. At one time, Praxair owned CB&I in its entirety. (*See* Glenn, Tr. 4062-63). Praxair negotiated a sole-source partnership agreement with PDM which was renewed by CB&I prior to the Acquisition. (*See* Scorson, Tr. 5018-19).

#### Response to RFOF 5.86

Respondents' proposed finding regarding the sole-source arrangement is misleading in that it implies that Praxair had bargaining power in negotiating its sole-source arrangement with CB&I. As explained by CB&I business development manager Dan Knight, Praxair sought to have the alliance agreement (originally signed with PDM) renewed by CB&I, and "came to us [CB&I] knowing that the merger was about to occur – then probably with hopes of getting the agreement extended so that they wouldn't get "screwed" by a sole source situation . . ." (CX 445 at CBI-E 007169; *see also* CX 442 at 71-73 (Knight, Dep)).

5.90 Victor Kelley was the manager of construction contracts for the Midland project. Kelley directed the project manager, Scott Colby, to solicit bids for the LIN/LOX tanks. (V. Kelley, Tr. 4597-98).

### Response to RFOF 5.90

Respondents' assertions relating to the procurement phase of this project are based on the testimony of Victor Kelley. Kelley had very limited knowledge of the procurement of the LIN/LOX tanks from AT&V. He managed one member of the team involved with the procurement, namely, Mr. Joe Jeffries, who was a contract employee responsible for the commercial rather than technical aspects of the procurement. (V. Kelley, Tr. 4615-17). With the exception of Scott Colby, the project manager, Mr. Kelley did not know the Technical Group and Engineering members of the procurement team nor the nature of any technical qualification process followed by the team in selecting AT&V. (V. Kelley, Tr. 4645, 4651, 4656-57, 4666-67). Mr. Kelley did not know if Mr. Colby had any past experience procuring LIN/LOX tanks. (V. Kelley, Tr. 4667).

5.94 BOC believes that it can get a competitive price for a LIN/LOX tank with two bidders. (V. Kelley, Tr. 5285). It does not want as many as practical because it would flood the bid process and some contractors would chose not to bid because there were too many bidders. BOC believes that the four bids it had on the Midland project was a good number of bidders. (V. Kelley, Tr. 4674-75).

### Response to RFOF 5.94

This finding is misleading. Mr. Kelley merely defined competition as having two bidders. (V. Kelley, Tr. 5285 ("By definition, two"). This is not what the Merger Guidelines have in mind. Moreover, future BOC LIN/LOX tank projects will be managed by Linde BOC Process Plants LLC. (V. Kelley, Tr. 4648-51).

5.97 BOC was satisfied with AT&V's performance in correcting problems on the Midland project in a timely manner. (V. Kelley, Tr. 5287). BOC's project manager on the Midland project specifically mentioned that he was satisfied with AT&V's efforts in correcting a problem that occurred during the project. (V. Kelley, Tr. 5268).

### Response to RFOF 5.97

Respondents' assertions relating to whether BOC was satisfied with the performance of AT&V on the contract are based solely on the testimony of Victor Kelley. Mr. Kelley had very limited knowledge of the actual construction of the LIN/LOX tanks at Midland. After the LIN/LOX tanks were awarded to AT&V, Mr. Kelley's responsibility for the project ended. (V. Kelley, Tr. 4624). In order to answer questions about AT&V's performance on the Midland project, prior to his depositions, Mr. Kelley contacted Scott Colby, the project manager of the Midland project, to obtain information on AT&V's performance. (V. Kelley, Tr. 4625). He first contacted Mr. Colby by e-mail after being contacted by CB&I about the litigation. (V. Kelley, Tr. 4625). He again contacted Mr. Colby a week before his second deposition for a 20-30 minute conversation about the Midland project. (V. Kelley, Tr. 4267-68).

Mr. Kelley did not know whether AT&V used any experienced personnel to engineer, fabricate and construct the LIN/LOX tanks at Midland. (V. Kelley, Tr. 4668). He did not know

whether AT&V personnel at the construction site in Midland had the equipment and materials they needed each day to perform their work. (V. Kelley, Tr. 4669). He did not know whether AT&V was able to identify potential construction problems in advance during the project. (V. Kelley, Tr. 4669). He did not know whether AT&V met the deadlines in its initial construction schedule. (V. Kelley, Tr. 4668-69).

Future BOC LIN/LOX tank projects will be managed by Linde BOC Process Plants LLC. (V. Kelley, Tr. 4648-51).

5.101 BOC was satisfied with AT&V's performance of the pipe looping. (V. Kelley, Tr. 5290-91). BOC does not know who was responsible for the pipe looping difficulties, BOC or AT&V, but cited the problems as an example of how the project team worked together to solve the problems. (V. Kelley, Tr. 5269-71; 5293-94). 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. 5293-94).

#### Response to RFOF 5.101

Respondents' assertions relating to the pipe looping error in the oxygen tank are incomplete and misleading. This was a major error that could have lead to a very serious accident. Essentially, "there was a design run of pipe that could have caused liquid oxygen to settle and then dissipate, creating a hazardous atmosphere in that location." (V. Kelley, Tr. 5269). This piping was in "the space between the cryogenic liquid storage tank and your outer shell." (V. Kelley, Tr. 5276-77). Although Mr. Kelley could not comment specifically on the safety hazards from an oxygen tank with this design error, he stated that the "hydrocarbon build-up" in the LOX tank in the space near the problematic piping "could cause an issue" resulting in "something of uncontrolled release." (V. Kelley, Tr. 5277-78). This design error was corrected by BOC and AT&V engineers.

Future BOC LIN/LOX tank projects will be managed by Linde BOC Process Plants LLC. (V. Kelley, Tr. 4648-51).

5.102 AT&V believes that someone began a rumor that there were problems with the AT&V's piping in Midland, North Carolina. AT&V testified that BOC changed its mind during the process and AT&V had to redesign a few things but when it was done the piping was "flawless." (Cutts, Tr. 2380; 2490-91). AT&V believes that the rumors about its alleged difficulty with pipe looping began as a result of questions that were being asked by the FTC in depositions with its customers and competitors. (Cutts, Tr. 2526-28).

5.103 AT&V does not believe that the rumors about problems with its piping on the BOC project are true due to the fact that the rumor began very recently, did not come from BOC, and since BOC has not requested that AT&V perform any repair or modifications on the tanks. Additionally, BOC has asked AT&V to replicate its piping on a future project, so AT&V does not believe there were any problems with its piping. (Cutts, Tr. 2553-55).

5.104 AT&V believes that the piping the BOC project was flawlessly performed. There were a few problems with the insulation that BOC installed that had to be corrected by AT&V. (Cutts, Tr. 2529-30).

5.105 At the conclusion of the project, BOC did not tell AT&V that there were any problems with the pipe

looping. There were no safety issues, no leaks and no problems on the BOC project that have caused other customers to not consider AT&V for LIN/LOX construction. (Cutts, Tr. 2532-33).

- 5.106 AT&V successfully re-engineered the LIN tank during the project because BOC had changed the pressure requirements. AT&V had to go back to the early calculations and perform some adjustments. BOC gave AT&V \$70,000 in order to cover the additional cost as a result of the pressure change. (Cutts, Tr. 2409; 2515-16; 2531-32). Other than accommodating the change in pressure, AT&V did not need to re-engineer any other specific portion of the project. (Cutts, Tr. 2409-10).

#### Response to RFOF 5.102-106

These findings are speculative and attempt to dismiss AR&V's poor reputation as "rumor". The findings are based solely on the self-interested testimony of AT&V's Mr. Cutts. It is understandable that he would perceive BOC's difficulties with AT&V as insignificant. Notwithstanding Mr. Cutts's optimistic assessment, AT&V's reputation has been adversely affected.

Future BOC LIN/LOX tank procurements will be managed by Linde BOC Process Plants LLC, which does not not have a favorable opinion of AT&V based on its performance. (V. Kelley, Tr. 4648-51). *See* Response to RFOF 5.113-114.

- 5.108 BOC "was satisfied with the price" it received on the field erected LIN/LOX tanks at Midland and "BOC is satisfied with the work that AT&V did at Midland." (V. Kelley, Tr. 5285). BOC "was quite satisfied [ ] in all aspects." (V. Kelley, Tr. 5287).

#### Response to RFOF 5.108

Respondents' assertions relating to whether BOC was satisfied with the performance of AT&V on the contract are based on the testimony of Victor Kelley. Mr. Kelley had very limited knowledge of the procurement or actual construction of the LIN/LOX tanks at Midland. CCRFF 5.90, 5.97. Future BOC LIN/LOX tank procurements will be managed by Linde BOC Process Plants LLC. ((V. Kelley, Tr. 4648-51; Kistenmacher, Tr. 822-23).

- 5.110 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).

#### Response to RFOF 5.110

Respondents' assertions relating to whether BOC was satisfied with the performance of AT&V on the contract are based on the testimony of Victor Kelley. Mr. Kelley had very limited knowledge of the actual construction of the LIN/LOX tanks at Midland. CCRFF 5.97. Future BOC LIN/LOX tank procurements will be managed by Linde BOC Process Plants LLC, which does not not have a favorable opinion of AT&V's performance. (V. Kelley, Tr. 4648-51; Kistenmacher, Tr. 822-23). *See* Response to RFOF 5.113-114.

- 5.113 Based upon AT&V's performance on the Midland project, BOC would hire AT&V again on its next LIN/LOX project. (V. Kelley, Tr. 4601). BOC would certainly use AT&V again and testified that "[i]n terms of another job if BOC was going to procure a LIN/LOX tank, certainly they [ ] have distinguished themselves as being capable LIN/LOX tank providers." (V. Kelley, Tr. 5281-82). BOC did not place any conditions or restrictions on its opinion that it would certainly use AT&V again. (V. Kelley, Tr. 5292-93).
- 5.114 BOC Process Plant provided a reference for AT&V to Tony Bradshaw from BOC Edwards and "stated that [ ] would use AT&V again." (V. Kelley, Tr. 5289-90).

#### Response to RFOF 5.113 and 5.114

Respondents' assertions are incomplete and misleading. Future BOC LIN/LOX tank projects will be managed by Linde BOC Process Plants LLC. (V. Kelley, Tr. 4648-51). Linde BOC Process Plants is 70% owned by Linde AG. (Fan, Tr. 946). Linde BOC process Plants does not have a positive assessment of AT&V. (Kistenmacher, Tr. 862, 913). Mr. Kistenmacher, Vice President of Marketing and Sales for Linde BOC Process Plants, testified that AT&V has "a very poor track record." (Kistenmacher, Tr. 862).

Given AT&V's track record, it is unlikely that BOC's successor, Linde BOC Process Plants will purchase LIN/LOX tanks from AT&V in the future; AT&V has done one plant for BOC, "one for an undisclosed client, and that's not sufficient for me." (Kistenmacher, Tr. 862). Linde's "choices of qualified vendors has been drastically limited to one vendor [CB&I], and relative to my experience in the industry, that means we have less competition, and less competition to my experience always leads to higher prices." (Kistenmacher, Tr. 878).

- 5.118 BOC Edwards has selected AT&V to construct a LIN tank in Hillsboro, Oregon. (V. Kelley, Tr. 5291-92; RX 813). BOC Edwards signed a letter of intent with AT&V for the construction of a LIN tank in Hillsboro, Oregon. (V. Kelley, Tr. 4603-04; RX 813). BOC Edwards signed the letter of intent with AT&V for the Hillsboro LIN tank because "AT&V had the low bid." (V. Kelley, Tr. 5292; RX 813).
- 5.119 AT&V believes that BOC will request that AT&V perform the Hillsboro project on more of a turnkey basis because BOC managed certain aspects of the Midland project which had problems or caused delays. (Cutts, Tr. 2407).

Response to RFOF 5.118 and 5.119

Respondents' proposed finding is misleading in that it implies that AT&V is likely to win future LIN/LOX projects from BOC. As stated in CCRFF 5.113 and 5.114, it is unlikely that AT&V will be awarded future LIN/LOX projects for BOC, because Linde BOC Process Plants, BOC's successor and the company that now manages LIN/LOX projects for BOC, does not consider AT&V to be sufficiently qualified to be awarded future projects.

- 5.120 CB&I never had an opportunity to submit a firm fixed bid to BOC for the Hillsboro job because BOC decided to award the project to AT&V. (Scorsone, Tr. 5031). CB&I believes that CB&I was not solicited additional pricing for the Hillsboro BOC project because AT&V and BOC negotiated some type of deal between themselves. (Scorsone, Tr. 5032) (state of mind).

Response to RFOF 5.120

Respondents' proposed finding misstates the record and implies that CB&I never submitted any pricing to BOC for the Hillsboro job. CB&I submitted budget pricing to BOC for the Hillsboro LIN/LOX project. (Scorsone, Tr. 5031). BOC reviewed the budget prices submitted for the project and determined that AT&V had the low bid. (V. Kelley, Tr. 5292). Based on these budget prices, BOC awarded the project to AT&V. (V. Kelley, Tr. 5292).

5.125 [

]

Response to RFOF 5.125

Respondents' assertions are incomplete to the extent that they suggest that [ ] has no concerns relating to CB&I's acquisition of PDM. [ ] has such concerns. CCRFF 5.83.

- 5.130 Scorsone was informed that "in order to get both jobs, it may be necessary to go to 0% margin" on the project. (RX 627 at 2). As a result of the email, Scorsone authorized Knott to drop the margin on the Freeport project to 0%. (Scorsone, Tr. 5033-35) (RX 627 at 2). Despite going to a 0% margin on the Freeport project, CB&I lost the job to AT&V. (Scorsone, Tr. 5034-35).

Response to RFOF 5.130

This finding is incomplete. When CB&I was competing against PDM and Graver, CB&I was forced to bid negative margins, which ate into CB&I's gross margin including SG&A charges. See response to RFOF 5.74. Now that Graver has exited the market and CB&I has acquired PDM, CB&I is unwilling to bid a price below the level that gives CB&I its full margin for SG&A charges, *i.e.*, 0% "profit."

5.131 CB&I learned that Air Liquide is dissatisfied with AT&V's performance on the Freeport project thus far. (Scorsone, Tr. 5036) (state of mind). Scorsone believes that AT&V is dealing with the contractual issues with Air Liquide and may in the end decide that this is a project they do not want to pursue. (Scorsone, Tr. 5038) (state of mind).

Response to RFOF 5.131

Respondents' assertions are incomplete and misleading. The problems between Air Liquide and AT&V were not merely businesses disputes relating to interpretations over contractual provisions. AT&V wanted to construct the LIN/LOX tanks in a manner that may be unsafe. Air Liquide has specific [ ] designs for [ ]. ([ ], *in camera*). Air Liquide developed these specifications [ ]. ([ ], *in camera*). Air Liquide uses the [ ] design it developed [ ] for safety reasons. ([ ], *in camera*). [ ] included these [ ] in their bid and [ ], but ignored them in the designs [ ]. ([ ], *in camera*).

AT&V also wanted to [ ] in a manner that was inconsistent [ ]. ([ ], *in camera*). [ ]

[ ], ([ ], *in camera*)). [ ] decided to do neither. ([ ], *in camera*). [ ] concerned that if AT&V ignored [ ], which might lead to a tank rupture. ([ ], *in camera*).

Air Liquide also testified that AT&V had performed poorly on project management: [ ]

[ ], *in camera*).

5.135 [ ]

]



### Response to RFOF 5.135

Respondents' assertion mischaracterize the dispute between [ ] as a minor, incidental problem. The problems between [ ] were not merely business disputes [ ], but were substantive disputes [ ]. CCRFF 5.131. This dispute between [ ] has reached a level where [ ] ([ ] *in camera*). [ ] asked CB&I to complete the project, but CB&I refused. Scorsone, Tr. 5036.

- 5.136 CB&I believes that Air Liquide is a very difficult and demanding customer, therefore, if they awarded a project to AT&V, it certainly adds credence and credibility to the fact that AT&V is a capable LIN/LOX tank supplier. (Scorsone, Tr. 5035-36) (state of mind).
- 5.137 CB&I believes that in comparison to other LIN/LOX customers, Air Liquide is a difficult company to work with because they ask for more appurtenances, they require specific standards for their piping systems, and at times have difficulty defining exactly what they want and therefore make changes during the project. (Scorsone, Tr. 5037) (state of mind).
- 5.139 CB&I's salespeople were frustrated with the specifications provided by Air Liquide during the bidding process on the Freeport project due to Air Liquide's inability to define exactly what they wanted to be priced. (Scorsone, Tr. 5037). CB&I's salespeople requested a meeting with Air Liquide to discuss the details of the Freeport project to insure that CB&I was bidding the appropriate scope of the project. (Scorsone, Tr. 5038). Scorsone does not believe that Air Liquide ever met with CB&I to discuss the details of the project. (Scorsone, Tr. 5038).

### Response to RFOF 5.136, 5.137 and 5.139

These findings are unreliable because they are based solely on the self-serving, rehearsed claims by Mr. Scorsone.

- 5.143 The current business dispute between AT&V and Air Liquide will not inhibit Air Liquide from accepting bids from AT&V in the future because Air Liquide allowed Graver/ITEQ to continue to bid on LIN/LOX projects despite its deteriorating track record and performance. (Kamrath, Tr. 2004-05).

### Response to RFOF 5.143

Respondents' assertion is completely false. Air Liquide specifically stated that it will not use AT&V again on a LIN/LOX tank project based on [ ] ([ ] *in camera*). At the pages cited by Respondent, Mr. Kamrath makes no mention whatsoever of accepting future bids from AT&V. (Kamrath, Tr. 2004-05).

- 5.144 Fontenot left Air Liquide on July 1, 2001. (Fontenot, Tr. 2012). Fontenot has not kept up to date current or potential suppliers on LIN/LOX tanks in the United States. (Fontenot, Tr. 2032). Fontenot is not aware of current market conditions. (Fontenot, Tr. 2032). 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).

Response to RFOF 5.144

Respondents’ finding is incomplete and misleading. Fontenot was vice president of procurement for Air Liquide Process & Construction from 1996 until his retirement in July 2001. (Fontenot, Tr. 2008-09). This includes a period of one year after CB&I and PDM commenced acquisition discussions. Air Liquide designs, engineers, and constructs air separation plants, which utilize LIN/LOX tanks (Fontenot, Tr. 2009; RFOF 5.6). In his position, Mr. Fontenot was responsible for sourcing LIN/LOX tanks for Air Liquide. (Fontenot, Tr. 2009). Mr. Fontenot is knowledgeable about U.S. suppliers of LIN/LOX tanks in the U.S. and their capabilities for the period of five years preceding CB&I’s acquisition of PDM on February 7, 2001 and the period thereafter. (Fontenot, Tr. 2021-22). In Fontenot and Air Liquide’s opinion, the acquisition reduced the number of qualified suppliers of LIN/LOX tanks to Air Liquide to “CB&I plus potentially one more at that time, Matrix:” and “. . . would result potentially in a cost increase to us.” (Fontenot, Tr. 2023, 2025).

5.151 CB&I originally bid the MG Industries project at a 4 percent profit margin. (Scorsone, Tr. 5023). After discussions with the MG Industries where CB&I was informed that its price was too high, CB&I reduced their margin on their price submission. (Scorsone, Tr. 5023). CB&I lowered its price on the MG Industries project in response to their perception of the competition on the project as well as the customers comments made during negotiation. (Scorsone, Tr. 5023-24).

Response to RFOF 5.151

This finding is incomplete. When CB&I was competing against PDM and Graver, CB&I was forced to bid negative margins, which ate into CB&I’s gross margin including SG&A charges. See response to RFOF 5.74. Now that Graver has exited the market and CB&I has acquired PDM, CB&I is unwilling to bid a price below the level that gives CB&I its full margin for SG&A charges, *i.e.*, 0% “profit.”

5.154 [

]

Response to RFOF 5.154

This finding is incomplete. CB&I could increase its bid [ ] ([ ], *in camera*). CB&I is aware [ ] ([ ], *in camera*). 47; [ ], *in camera*). ] (Leon, Tr. 3846-

5.155 [

1

Response to RFOF 5.155

[  
  
( , *in camera*).  
  
( , *in camera*).]  
  
[  
  
( , *in camera*)]. CCRFF  
5.55.  
  
[  
  
( , *in camera*).  
  
] CCRFF 5.82.

5.157 [

]

Response to RFOF 5.157

This finding mischaracterizes the record. [ ] was not satisfied with the price [ ] competition by PDM would have enabled him to get a lower price. [ ] and competition has been diminished: [ ], *in camera*). [ ] testified that [his] company was [“]worse off[”] with PDM removed from the market. ([ ], *in camera*). The acquisition [“]takes away a very aggressive competitive bidder for LOX and LIN tank, [ ( ], *in camera*). [ ] PDM had given the lowest price in the last three or four inquiries [



( [redacted] ], *in camera*) (emphasis supplied).

[redacted]  
[redacted] ( [redacted] , *in camera*).  
[redacted] (  
*in camera*).]

5.158 [redacted]  
[redacted]

Response to RFOF 5.158

This finding is incomplete and mischaracterizes the record. [redacted]  
PDM's lower price for LIN/LOX tanks is no longer available [redacted] ] and competition  
has been diminished: [redacted]  
[redacted] ( [redacted] ], *in camera*). [redacted] ] testified that [redacted] ]  
company was [redacted] ]worse off[redacted] ] with PDM removed from the market. ([redacted] ], *in  
camera*). The acquisition [redacted] ]takes away a very aggressive competitive bidder for LOX and LIN  
tank, [redacted]

[redacted] ], *in camera*). [redacted]

[redacted] ( [redacted] , *in  
camera*) (emphasis supplied).]

[redacted]  
[redacted] ] ( [redacted] , *in camera*). CB&I is aware [redacted]  
*in camera*).]

5.160 [redacted]  
[redacted]

Response to RFOF 5.160

[redacted]  
[redacted] ( [redacted] ], *in camera*).]  
[redacted]

( [redacted] , *in camera*).

( [redacted] , *in camera*).

( [redacted] , *in camera*) (emphasis supplied).]

5.162 [

]

Response to RFOF 5.162

This is speculation. PDM's lower price for LIN/LOX tanks is no longer available [redacted] and competition has been diminished: [

( [redacted] , *in camera*).

( [redacted] , *in camera*).

( [redacted] , *in camera*).

( [redacted] , *in camera*) (emphasis supplied).]

5.163 [

]

5.164 [

]

Response to RFOF 5.163 and 5.164

Respondents' proposed finding is misleading in that it implies that [redacted] considers AT&V to be a viable competitor. It is unlikely that [redacted] would award a LIN/LOX project to AT&V. [redacted] had to give AT&V a lot of design help [redacted]. [redacted]

[redacted] their design team spent a lot of time with AT&V [redacted] ([redacted] , *in camera*). [redacted] difficulties with AT&V [redacted]

[ ] raises concerns. ([ ], *in camera*).

That AT&V requires design help and customer assistance would negatively impact AT&V's chances of [ ] awarding it a LIN/LOX project, [

[ ] experience is what we count on. [ ] ( [ ], *in camera*). As AT&V needs a lot of customer assistance to design and construct a LIN/LOX tank, it is unlikely that [ ] would award a LIN/LOX project to AT&V.

5.169 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 can obtain 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).

#### Response to RFOF 5.169

Respondents' proposed finding is mischaracterizes the record and is misleading in that it implies that Air Products has several companies available that can bid on a LIN/LOX project immediately. The testimony cited by Respondents refers to unqualified LIN/LOX tank companies, that is, companies that are not qualified to bid on a LIN/LOX tank project for Air Products. Prior to the acquisition, Air Products had four qualified bidders for LIN/LOX projects (CB&I, PDM, Graver, and Matrix); now it only has two (CB&I and Matrix). (Hilgar, Tr. 1383-84). Air Products believes that the price of LIN/LOX tanks will increase as a result of the acquisition. (Hilgar, Tr. 1353; *see also* JX 25 at Exh. 1 ¶14 (Hilgar, Dep.)).

Respondents' proposed findings is also misleading because it suggests that Air Products is satisfied with two bidders on a LIN/LOX project. In the testimony cited by Respondents for this proposition, Mr. Hilgar testified, "I would much rather have three bids in this market." (Hilgar, Tr. 1531). Mr. Hilgar 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 Exh. 1 ¶ 14 (Hilgar, Dep.)) ("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.")). 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).

Respondents' proposed finding also mischaracterizes Mr. Hilgar's testimony by stating

that Air Products has several more potential bidders after the acquisition. In fact, Mr. Hilgar testified that there is only one additional bidder. (Hilgar, Tr. 1540).

5.170 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).

#### Response to RFOF 5.170

Air Products does not believe that entry into the LIN/LOX market is easy. Air Products believes that replicating either CB&I or PDM would require substantial investments over a long period of time. (Hilgar, Tr. 1364-65).

5.172 Air Products has not sought to pre-qualify AT&V because it currently does not have any need for a LIN/LOX tank. (Hilgar, Tr. 1509-11). If it needed a LIN/LOX tank, Air Products would consider calling BOC for a reference on AT&V and would seek to pre-qualify AT&V. However, Air Products has no reason to believe that AT&V would not qualify under its pre-qualification process and it would likely solicit a bid from AT&V. (Hilgar, Tr. 1509-11).

#### Response to RFOF 5.172

Respondents' assertion relating to Air Products is incomplete and misleading. 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).

5.173 Air Products awarded Matrix a LIN/LOX project in 1997 as the low bidder. Matrix successfully completed the project and Air Products would seek a bid from them if they had another project. (Hilgar, Tr. 1511-13).

#### Response to RFOF 5.173

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 Exh. 1 ¶ 14 (Hilgar, Dep.)).

5.175 Air Products has also commented that if the FTC were to break up CB&I it "would inhibit -- that would be bad for Air Products in the industrial gas business in general." (Hilgar, Tr. 1539-40). Hilgar believes there is some benefit to CB&I and PDM being combined. (Hilgar, Tr. 1540).

#### Response to RFOF 5.175

Air Products does not believe that divestiture would harm competition. Mr. Hilgar is concerned that competition would be harmed if both CB&I and PDM were eliminated: "To the extent that there was nothing left [of] either of the two companies after any FTC action, yes I

think that would inhibit – that would be bad for Air Products and the industrial gas business in general.” (Hilgar, Tr. 1540). Mr. Hilgar admitted that he had no knowledge of what the FTC’s remedy would be and had not really considered whether it would or would not be beneficial to Air Products. (JX 25 at 67, 69 (Hilgar, Dep.)).

5.181 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). 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, Kistenmacher was unaware of the fact that BOC has awarded AT&V two LIN/LOX tanks projects in Midland, NC and Hillsboro, OR. (Kistenmacher, Tr. 922).

Response to RFOF 5.181

Respondents' assertion relating to Dr. Kistenmacher's belief as to whether the acquisition has had a negative affect on competition in incorrect. Dr. Kistenmacher testified: "As I said before, our choices of qualified vendors has been drastically limited to one vendor, and relative to my experience in the industry, that means we have less competition, and less competition to my experience always lead to higher prices." (Kistenmacher, Tr. 878).

Respondents' assertion relating to Linde being part of BOC is false. Linde is not part of BOC. As part of the formation of Linde BOC Process Plants LLC, BOC has a financial participation in the company and BOC has transfered a handful of employees to Linde BOC Process Plants LLC. (Kistenmacher, Tr. 921). Linde BOC Process Plants LLC, is 30 percent owned by BOC and 70 percent owned by Linde AG Germany. (Fan, Tr. 946). Under the arrangement, BOC will now source its air separation plants from Linde BOC Process Plants. (Kistenmacher, Tr, 921-22).

**6. There Is Evidence Of Post-Acquisition Price Increases On LIN/LOX Tanks**

5.182 [

]

Response to RFOF 5.182

RFOF 5.182 is inaccurate, incomplete, misleading and, in part, irrelevant. [

. ( [redacted], *in camera*).

( [redacted] *in camera*). [redacted] failed to get CB&I to bargain its price down from the initial budget price offering, [redacted] ( [redacted] *in camera*).

( [redacted], *in camera*).]

The relevant antitrust inquiry is whether [redacted] received as competitive a price after the acquisition as it would have received prior to the acquisition. In fact, [redacted] was not satisfied with the price he received for the LIN/LOX tank because he believes that competition by PDM would have enabled him to get a lower price. [

( [redacted], *in camera*). [redacted] ( [redacted], *in camera*). The acquisition [redacted] takes away a very aggressive competitive bidder for LOX and LIN tank, [

camera). [ ( ), in

( , in camera) (emphasis supplied).]

Further, CB&I could increase its bid [ ] ([ ], in camera). CB&I is aware [ ] (Leon, Tr. 3846-47; [ ], in camera).

5.183 [ ]

Response to 5.183

RFOF 5.183 mischaracterizes the record. As illustrated by the testimony of Chung Fan, *inter alia*, LIN/LOX tank customers suffer an anticompetitive price increase where CBI fails to continue to provide PDM's traditionally lower price and instead provides its traditionally higher price. Competition by PDM would have enabled [ ] to get a lower price. [ ] PDM's lower price for LIN/LOX tanks is no longer available [ ] and competition has been diminished: [ ] ([ ], in camera). [ ] his company was [ ] worse off [ ] with PDM removed from the market. ([ ], in camera). The acquisition [ ] takes away a very aggressive competitive bidder for LOX and LIN tank, [

] ([ ], in camera). [

] ([ ], in camera) (emphasis supplied).

Further, CB&I could increase its bid [ ] ([ ], in camera). CB&I is aware [ ] (Leon, Tr. 3846-47; [ ], in camera).

5.184 Respondents say [ ]

### Response to RFOF 5.184

RFOF 5.184 is incomplete and misleading. [ ] The mere fact that bid prices in [ ] may not yet have been affected by the acquisition does not mean that there has not already been actual anticompetitive effect – as shown by the additional costs that AT&V incurred during construction and the additional costs [ ]. CCF 470-479. [Mr. Kamrath] expects that if AT&V [ ], the total cost of using AT&V will exceed CB&I's bid. CCRFF 5.40.

Indeed, the remaining testimony of [ ] details the clear anticompetitive effect illustrated at [ ]. CCRFF 5.131. [ ] that [ ] selected [ ] for the [ ] LIN/LOX project, in part, because it wanted “to develop another supplier so that there would be a viable competitor to CB&I, which it “would have been far less likely” to do if PDM were in existence. CCF 471-472. [ ] experience corroborates BOC's experience with AT&V. Dr. Kistenmacher of Linde BOC testified that although AT&V originally quoted low prices to BOC, “they had many change orders, that in the end the price was higher than of the conventional vendors.” (Kistenmacher, Tr. 931-32).

5.185 Chung Fan 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).

### Response to RFOF 5.185

RFOF 5.185 is misleading and, in part, patently false. Upon comparing CBI's 2002 LIN/LOX tank price with a recent PDM price, Mr. Fan found that “Wow, it went up.” (Fan, Tr. 1004). While Chung Fan originally told the FTC that he thought that the price went up, but that he wasn't sure, Chung Fan later concluded “quite confidently” that CBI's pricing was 8.7% higher than Linde BOC would have paid to PDM. (Fan, Tr. 1009-10). After making an initial determination that pricing had increased, Mr. Fan “revised his model,” and found, to a 95% to 97.9% “confidence” level, that CBI's price increased by 8.7% above PDM's prior levels. (Fan, Tr. 1005, 1010-11; CX 1584; Fan, Tr. 966, 1024).

5.186 Fan agreed that CB&I provided him with a budget price. (Fan, Tr. 1063). Fan asked for pricing that was +/- 5% and assumed that CB&I's quotation met his requirements, but he was “not sure” and in fact doubts that CB&I's budget price was within 5 percent of what the actual price for the project would be. (Fan, Tr. 987-88; 1002-03; 1046-47).

### Response to RFOF 5.186

RFOF 5.186 is incomplete and misleading. Fan testified that he hopes, and assumed, that CBI's pricing was within 5 percent, but he is not sure. (Fan, Tr. 988, 1003).

RFOF 5.186 provides another example of the anticompetitive effect of the Acquisition. When Fan requested precise pricing from PDM in the past, he received it. (Fan, Tr. 1023, 1064; CX 182 at CBI-PL012354). As Respondents admit in RFOF 5.186, CBI provided Fan with less precise pricing than what he requested. CBI provided Linde BOC with less precise pricing not just in New Mexico in early 2002, but also in late 2002. (Fan, Tr. 1063-64). Fan testified that Linde BOC “submit[ted] a firm bid request last month to CB&I and we also get budgeted, so their response is budget regardless what we ask.” (Fan, Tr. 1063-64). Customers having to accept less precise pricing is an anticompetitive effect.

5.187 Although 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 price he requested. (Fan, Tr. 1064). Since Fan never spoke with CB&I, the budget price that Fan 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).

#### Response to RFOF 5.187

RFOF 5.187 is misleading, in that it implies that Linde may have obtained a lower price by negotiating. The evidence in the record is to the contrary: Especially after Graver’s departure, CB&I does not get “involved in these bidding wars” on LIN/LOX tanks like PDM did. (Patterson, Tr. 363; CX 182 at CBI-PL012354).

5.188 Fan agreed that in submitting a price for a proposed future project CB&I is required to guess at possible material price fluctuations that may occur between the time it submits its price until the project is awarded. (Fan, Tr. 1052).

#### Response to RFOF 5.188

Complaint Counsel agrees.

5.189 Fan stated that approximately 5 months time passes between the time that he requests pricing until a project is awarded. (Fan, Tr. 1051). Fan agreed that materials prices can fluctuate during the time period between when he first receives prices to when he would award a project. (Fan, Tr. 1051). However, Fan stated that it is CB&I’s job, not his, to speculate forward on the prices of materials. (Fan, Tr. 1055). Fan stated that it is not his responsibility to account for future fluctuation in materials prices, but rather the job of the vendor and stated “that’s their job.” (Fan, Tr. 1052).

#### Response to RFOF 5.189

RFOF 5.189 is incomplete and misleading. Mr. Fan actually did account for fluctuations in material prices when inputting prices into his model. (Fan, Tr 1042). However, complaint counsel agrees that it is the LIN/LOX tank supplier’s job, not the customer’s, to account for materials pricing fluctuations in their pricing. PDM apparently did an excellent job in doing so; their LIN/LOX tank pricing to Linde BOC was reliable. (Fan, Tr. 1023, 1062; CX 1584). According to Mr. Fan, “they gave me the quotation during the proposal stage and later when we bought it they did not increase the price.” (Fan, Tr. 1023). To the extent CBI might have

difficulty providing such an accurate price to LIN/LOX tank customers, as Respondents seem to be implying, those customers may suffer an additional anticompetitive effect of the acquisition.

5.190 Fan does not possess the requisite knowledge, skill, experience, training or education to conduct an analysis of LIN/LOX tank prices. Fan has "never [been] in charge or had responsibility to purchase the LIN/LOX tanks." (Fan, Tr. 951).

5.191 Fan has a masters degree in food technology and chemical engineering. (Fan, Tr. 949; 1028). Fan does not have a degree in statistics or economics. (Fan, Tr. 1028). Although Fan does not have a degree in statistics,

Fan determined the statistical significance of his analysis using a statistical method found in a statistics book published by the U.S. Government. (Fan, Tr. 1031).

### Response to RFOF 5.190 and 5.191

RFOF 5.190 is erroneous and incorrect. Mr. Fan is a proposal manager at Linde BOC Process Plants. (Fan, Tr. 947-48). Mr. Fan explicitly testified that one of his responsibilities as proposal manager is calculating the price of the air separation unit Linde BOC proposes to build. (Fan, Tr. 948). A major component of the price of any air separation unit is the price of the LIN, LOX and/or LAR tanks to be used within the unit. (Fan, Tr. 948). Indeed, as Mr. Fan assembles the proposed pricing of Linde BOC's product, he solicits pricing on the LIN, LOX and/or LAR tanks. (Fan, Tr. 948). In forming the air separation unit price, Mr. Fan relies on budget prices to make an estimate of the expected cost of the LIN, LOX and/or LAR tanks, or alternatively, he inserts the firm, fixed price into his calculation. (Fan, Tr. 948).

Mr. Fan has reviewed the pricing for more LIN, LOX and/or LAR tanks that he can count for over twenty years. (Fan, Tr. 953; CCF 1059). Mr. Fan has been estimating the expected cost of LIN, LOX, and/or LAR tanks for over ten years. (Fan, Tr. 952; CCF 1059).

5.192 Fan's analysis was not the product of 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). Fan stated that he uses the year 1998 as a baseline for his spreadsheet. Fan agreed that the further away from his baseline year of 1998 he gets, the less accurate his estimating attempts become. (Fan, Tr. 1069). Fan 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).

### Response to RFOF 5.192

RFOF is false and misleading. Fan's analysis was as reliable as possible, and more than reliable enough for his business purposes. Fan also testified that the two years of omission cited by Respondents corresponded with a period in which Linde BOC solicited no bids for LIN/LOX tanks. (Fan, Tr. 974).

Chung Fan constantly refines his estimating processes and models. (Fan, Tr. 952-53). Mr. Fan testified that he has not made any changes to his spreadsheet since his deposition because he did not want to confuse anybody, but in the future he will revise his spreadsheet because he uses it regularly as part of his job. (Fan, Tr. 953). Mr. Fan's analysis is not outdated; 17 of the 19 LIN/LOX pricing he estimated within 7% were for projects proposed during or after 1998. (CX 1584).

5.193 Fan admitted that he is primarily comparing CB&I's New Mexico budget price to a firm fixed price submitted in 1999 by PDM on a tank in Bozarah, Connecticut. (Fan, Tr. 1069-70). 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).

### Response to RFOF 5.193

RFOF 5.193 is misleading. As they did in RFOF 5.187, Respondents appear to be assuming that CBI might have negotiated their LIN/LOX prices down after providing the initial price to Linde BOC. The evidence in the record is to the contrary: Especially after Graver's departure, CB&I does not get "involved in these bidding wars" in LIN/LOX tanks like PDM did. (Patterson, Tr. 363).

5.194 Fan did not tell CB&I where in the state of New Mexico the project was going to be constructed. (Fan, Tr. 1061). Fan did not provide CB&I with the construction schedule. (Fan, Tr. 1073). Fan did not tell CB&I what city the project would be constructed in. (Fan, Tr. 1075). Fan did not tell CB&I the time of the year that the tank would be constructed. (Fan, Tr. 1076). Fan did provide CB&I with any details about the conditions of the project site. (Fan, Tr. 1077). Fan did not provide CB&I with the identity of the end-user. (Fan, Tr. 1078). Fan only provided CB&I with a preliminary nozzle list. (Fan, Tr. 1060). Fan also requested that the pricing for the New Mexico project be submitted within two weeks time. (Fan, Tr. 1062).

### Response to RFOF 5.194

RFOF 5.194 is incomplete and misleading. None of the facts Respondents cite are required to form a more accurate price than what CB&I provided to Linde for the Farmington, New Mexico bid, as PDM had done for Linde and Mr. Fan for five years. (Fan, Tr. 1023, 1062; CX 182 at CBI-PL012354). PDM provided the more accurate pricing during the same two week interval between the initial request and the price delivery that CBI experienced on the 2002 New Mexico project. (Fan, Tr. 1062).

In fact, Mr. Fan's testimony explains precisely how little impact many of these factors have. Knowing the city within New Mexico would have "very little" impact on price. (Fan, Tr. 1075-76). Knowing the time of year would impact price only to a "small degree." (Fan, Tr. 1076). Mr. Fan testified that CBI has been "in the business long enough" that he shouldn't "need to tell" CBI the schedule. (Fan, Tr. 1073). Further, Mr. Fan testified that Linde BOC tries to "avoid" an accelerated schedule "unless absolutely necessary." (Fan, Tr. 1074). Mr. Fan provided CB&I with the elevation required at the site. (Fan, Tr. 1078). Mr. Fan was unaware that CB&I ever had a problem with the end user in New Mexico. (Fan, Tr. 1078-79). Indeed, CB&I separately agreed to provide a LIN/LOX tank to Praxair near Farmington, New Mexico shortly after receiving the inquiry from Linde BOC regarding a tank in that same area. (CX 1508 at CB&I 059657). Respondents have submitted no evidence to the contrary of Mr. Fan's testimony on any of these factors.

Despite these imperfections which may have been on previous tank projects, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

5.195 Fan admitted that he did not give CB&I as much information as he would provide during a firm final bid stage. (Fan, Tr. 1078). As a result, the CB&I budget price submission did not contain the following: CB&I's material prices, CB&I's labor prices, the number of estimated labor hours that would be required, their proposed construction schedule, the time of year the tank would be constructed, what city the tank was being built in. (Fan, Tr. 1064-65).



### Response to RFOF 5.195

RFOF 5.195 is incomplete and misleading, and redundant. As noted in the above response to RFOF 5.194, none of the information respondents cite is required to submit a more accurate price than CBI provided, as PDM had done for Linde and Mr. Fan for five years. (Fan, Tr. 1023, 1062; CX 182 at CBI-PL012354).

5.196 Fan admitted that other than the final lump-sum prices, there are no actual numbers in his spreadsheet. (Fan, Tr. 1071-72).

### Response to RFOF 5.196

RFOF 5.196 is incomplete and misleading. Mr. Fan is a purchaser, not a supplier, of LIN/LOX tanks. As such, there would be no reason for him to have access to his suppliers' *actual* cost information. Mr. Fan's lack of knowledge of suppliers' actual pricing is more compelling evidence of the lack of sophistication of LIN/LOX customers than Respondents' baseless, conclusory findings to the contrary. (CX 1584); RFOF 5.81-5.86.

Despite these imperfections, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

5.197 For all of the other projects listed in his spreadsheet, Fan stated that he has never received LIN/LOX tank drawings that detail the actual quantities of perlite or foamglass. (Fan, Tr. 1034). The drawing provided to Fan by PDM for the Bozrah, Connecticut, project did not include quantities of perlite, foamglass, or concrete. (Fan, Tr. 1036-37). CB&I did not provide Fan with a drawing when it submitted its budget price for the New Mexico LIN/LOX project. (Fan, Tr. 1043-44).

5.198 In order to perform his analysis when a LIN/LOX tank supplier submits a drawing with its estimate, 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).

### Response to RFOF 5.197 and 5.198

RFOF 5.197 is incomplete and misleading. Mr. Fan is a purchaser, not a supplier, of LIN/LOX tanks. As such, there would be no reason for him to have access to his suppliers' *actual* foamglass and perlite cost information. Mr. Fan's lack of knowledge of suppliers' actual pricing is more compelling evidence of the lack of sophistication of LIN/LOX customers than Respondents' baseless, conclusory findings to the contrary. (CX 1584); RFOF 5.81-5.86.

Further, perlite and foamglass are small components of the overall cost of any LIN/LOX tank. In his spreadsheet, Mr. Fan estimated perlite costs as less than 4%, and foamglass costs as less than 6% of the overall costs of the LIN/LOX tanks. (CX 1584). No project had estimated perlite costs totalling more than \$38,000, and no project had estimated foamglass costs totalling more than \$57,000. Despite these imperfections, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

- 5.199 Fan does not know the quantity of perlite used for any of the tanks in his spreadsheet. (Fan, Tr. 1045). Fan stated that it is very difficult to calculate the amount of Perlite required for a project because it shrinks when the tank is filled with cryogenic fluid. (Fan, Tr. 1045). Fan also stated that it is difficult to geometrically calculate the space between the inner and outer tank and therefore difficult to accurately estimate the amount of perlite insulation required. (Fan, Tr. 1045). In addition to calculating the actual amount, Fan also had to calculate the thickness of the perlite needed for the New Mexico tank. (Fan, Tr. 1047). Despite all of the difficulties in calculation the quantity of perlite, Fan attempts to calculate the quantity of perlite. (Fan, Tr. 1045).
- 5.200 In order to analyze CB&I's budget price for the New Mexico LIN/LOX project, Fan also had to calculate the thickness of the perlite required for the dome. (Fan, Tr. 1044). However, Fan did not know how to calculate the top radius of the outer tank. (Fan, Tr. 1046).
- 5.201 Although he attempted to estimate, Fan did not know the actual amount of perlite that CB&I estimated it would need to purchase for the project. (Fan, Tr. 1045).

#### Response to RFOF 5.199-5.201

RFOF 5.199-5.201 are incomplete and misleading. Mr. Fan testified that he normally contacts perlite suppliers for the cold box of an air separation unit, and that he had an idea of what the pricing for perlite was from those contacts. (Fan, Tr. 1049-50).

Further, perlite is a small component of the overall cost of any LIN/LOX tank. In his spreadsheet, Mr. Fan estimated perlite costs as less than 4% of the overall costs of the LIN/LOX tanks. (CX 1584). No project had estimated perlite costs totalling more than \$38,000. (CX 1584). Despite these imperfections, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

- 5.202 Respondents state that 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 perlite suppliers to determine the current rate for perlite. (Fan, Tr. 1049). Fan did not call the foamglass supplier to determine the current rate for foamglass. (Fan, Tr. 1050). Fan did not call the concrete supplier to determine the current rate for concrete. (Fan, Tr. 1050).

#### Response to RFOF 5.202

RFOF 5.202 is incomplete and misleading. Mr. Fan is a purchaser, not a supplier, of LIN/LOX tanks. As such, there would be no reason for him to have access to his suppliers' *actual* foamglass and perlite cost information. Mr. Fan's lack of knowledge of suppliers' actual pricing is more compelling evidence of the lack of sophistication of LIN/LOX customers than Respondents' baseless, conclusory findings to the contrary. (CX 1584); RFOF 5.81-5.86.

Further, perlite and foamglass are small components of the overall cost of any LIN/LOX tank. In his spreadsheet, Mr. Fan estimated perlite costs as less than 4%, and foamglass costs as less than 6% of the overall costs of the LIN/LOX tanks. (CX 1584). No project had estimated perlite costs totalling more than \$38,000, and no project had estimated foamglass costs totalling more than \$57,000. (CX 1584). Despite these imperfections, Mr. Fan estimated the actual

pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

5.203 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). In order to calculate the thickness of the metal CB&I planned on using for the New Mexico project, Fan used non-CB&I drawings from a past 300,000 gallon tank and a 400,000 gallon tank and used a number that fell in between because the New Mexico tank was 350,000 gallons. (Fan, Tr. 1047). Fan agreed that not all 400,000 gallon tanks have the same annular space between the inner and outer tanks, therefore he used an old drawing which claimed to have a similar boil-off rate as the tank design quoted by CB&I. (Fan, Tr. 1048).

#### Response to RFOF 5.203

RFOF 5.203 is incomplete and misleading. Mr. Fan is a purchaser, not a supplier, of LIN/LOX tanks. As such, there would be no reason for him to have access to his suppliers' *actual* plans for metal thickness they intend to use on a LIN/LOX tank project. In fact, Mr. Fan's lack of knowledge of suppliers' actual plans for metal thickness is more compelling evidence of the lack of sophistication of LIN/LOX customers than Respondents' baseless, conclusory findings to the contrary. (CX 1584); RFOF 5.81-5.86.

Further, metal supply is a small component of the overall cost of any LIN/LOX tank. In his spreadsheet, Mr. Fan estimated metal supply costs as less than 25% of the overall costs of the LIN/LOX tanks. (CX 1584). Despite these imperfections, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

5.204 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).

#### Response to RFOF 5.204

RFOF 5.204 is incomplete and misleading. Mr. Fan is a purchaser, not a supplier, of LIN/LOX tanks. As such, there would be no reason for him to have access to his suppliers' *actual* steel supply cost information. In fact, Mr. Fan's lack of knowledge of suppliers' actual cost information is more compelling evidence of the lack of sophistication of LIN/LOX customers than Respondents' baseless, conclusory findings to the contrary. (CX 1584); RFOF 5.81-5.86.

Further, steel supply is a small component of the overall cost of any LIN/LOX tank. In his spreadsheet, Mr. Fan estimated metal supply costs as less than 25% of the overall costs of the LIN/LOX tanks. (CX 1584). Despite these imperfections, Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584).

5.205 Fan stated that Linde is not very successful in being awarded air separation facilities. (Fan, Tr. 1040-41). One possible reason why Linde has not been successful for air separation facilities is because Fan may be providing incorrect prices when creating a budget for the project. (Fan, Tr. 1042).

### Response to RFOF 5.205

Respondents' proposed finding is self-serving and misleading. Linde has recently acquired a 70% interest in Linde BOC Process Plants LLC and will be responsible for constructing future air separation plants for BOC. (V. Kelley, Tr. 4650-51; Kistenmacher, Tr. 862, 913). BOC personnel have only a minimal participation in Linde BOC Process Plants LLC; Mr. Fan and Linde will be making the LIN/LOX purchasing decisions for BOC in the future. (Kistenmacher, Tr. 921). Thus, BOC, the "experienced" purchaser according to Respondents, sold its business to Linde, the allegedly "not very successful company," according to Respondents. RFOF 5.205, 5.81.

Respondents' second assertion contradicts their previous finding that "Linde is a sophisticated customer." RFOF 5.85. Respondents' contention that Fan was providing incorrect prices when creating a budget ignores the evidence already in the record. Mr. Fan estimated the actual pricing of 19 LIN/LOX tanks within 7% accuracy. (CX 1584). If Fan was providing prices that were leading to Linde being unsuccessful, one would expect the estimates in his spreadsheet to error consistently on the high side. Instead, over half of his estimates were lower than the actual prices. (CX 1584).

A more likely reason why Linde has had limited success in winning air separation facilities is that Linde has no alliance with a tank builder. The New Mexico tank project is a prime example. In April 2002, CB&I offered less precise pricing than Linde requested. Later in 2002, CB&I offered highly precise pricing to Praxair on a slightly different New Mexico project. CB&I has a sole source arrangement with Praxair. (Scorsone, Tr. 5018-19).

5.207 CB&I submitted a budget price to Linde for the construction of a LIN/LOX project at the same location as the Praxair project, although CB&I did not know where the Linde project was located when it submitted the budget price. (Scorsone, Tr. 5020). The price that CB&I submitted to Praxair for the LIN/LOX project in Kirkland New Mexico was a firm fixed price. (Scorsone, Tr. 5020).

### Response to RFOF 5.207

RFOF 5.207 is accurate in part. Scorsone testified that he did not know where the Linde project was located when CB&I submitted the budget price. (Scorsone, Tr. 5020). However, he cannot testify for the entire company.

5.208 It is impossible to compare 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 for the Kirkland project because the budget price did not include significant details for the project including the actual location of the project. (Scorsone, Tr. 5020-21).

### Response to RFOF 5.208

RFOF 5.208 is inaccurate. CCRFF 5.194-5.204.

5.209 There are numerous differences between the proposed Linde New Mexico project and the actual Praxair New Mexico project which makes it unable to compare the two prices. (Scorsone, Tr. 5020-21). In contrast to the Linde budget request, Praxair requesting pricing on a more slender tank which resulted in an additional horizontal weld seam as well as required thicker steel throughout the tank. (Scorsone, Tr. 5021).

#### Response to RFOF 5.209

RFOF 5.209 is of questionable accuracy, and Mr. Scorsone's testimony, upon which Respondents' proposed finding relies, is uncorroborated. CCRFF 5.194-5.204. Respondents provided no documentation of any of the cost items for the Praxair New Mexico project in Mr. Scorsone's testimony.

5.210 The Praxair pricing request also included a full-time welding supervisor, a 50 hour work week, additional subsistence in order to attract field labor, and a more complex nozzle structure. (Scorsone, Tr. 5021-22). As opposed to Praxair who specifically defined the complex nozzle structure they wanted for their tank, Linde did not request pricing on their nozzles to the degree of Praxair. (Scorsone, Tr. 5022).

#### Response to RFOF 5.210

RFOF 5.210 is of questionable accuracy. *See* CCRFF 5.194-5.204. Mr. Scorsone's testimony is uncorroborated. Respondents provided no documentation of any of the cost items for the Praxair New Mexico project in Mr. Scorsone's testimony.

5.211 Respondents state that although there are some items, such as perlite insulation, that are not included in the Praxair pricing that are included in the New Mexico, there is 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).

#### Response to RFOF 5.211

RFOF 5.211 is incomplete and of questionable accuracy. *See* CCRFF 5.194-5.204. Mr. Scorsone's testimony is uncorroborated. Respondents provided no documentation of any of the cost items for the Praxair New Mexico project in Mr. Scorsone's testimony.

Respondents claim that CBI submitted a firm fixed price to Praxair, but cite no exhibit of that pricing outside Mr. Scorsone's testimony. On April 30, 2002, CBI submitted a "tight budget" price on the New Mexico project. (CX 449 at CBI-E 007411).

Furthermore, Mr. Scorsone admitted to a price increase in the Praxair budget price relative to the Linde BOC budget price. Mr. Scorsone claims the price difference is \$60,000, which still does not account for \$14,000 of a price increase from the Linde budget (\$850,000) to the Praxair budget (\$924,000).

### **C. DIMINISHED COMPETITION ON POST ACQUISITION PROJECTS HAS INFLUENCED CB&I'S STATE OF MIND REGARDING COMPETITION**

## 1. The Acquisition Has Diminished Competition In The LIN/LOX Market

- 5.212 Scorsone state of mind regarding the competition in the LIN/LOX market is that it 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 believes that it has "a very hard time competing on [LIN/LOX] tanks." (RX 208) (state of mind).
- 5.213 The information that Scorsone has received in various emails from his personnel has made Scorsone perceive that the competition in the LIN/LOX market is "intense." (Scorsone, Tr. 5029-30; RX 208; RX 273 at 2) (state of mind).

### Response to RFOF 5.212, 5.213

CB&I's actual post-merger conduct demonstrates not that competition is intense in the LIN/LOX market, but that Matrix, AT&V, and CB&T do not pose a competitive threat to CB&I's ability to exercise market power. The post-merger evidence consists of higher prices and margins on LIN/LOX tank bids on the Linde-New Mexico project; the Praxair-New Mexico project 1; and the Praxair-New Mexico Project 2. CCRFF 1070, 1076, 1085.

As stated in CCRFF 5.22 and 5.24, Respondents' proposed finding is erroneous in that it implies that Matrix, AT&V or CB&T will be effective competitors, or that competition will be intense. Respondents' assertions that competition in the post-acquisition LIN/LOX tank market due to the activities of Matrix, AT&V and CB&T is "intense" is contrary to the record.. CB&I's state of mind relating to these smaller competitors is best-revealed in a CB&I analysis of the U.S. tank market which characterizes CB&I as the "big dog" in the industry and shows AT&V and CB&T to have about 2 percent of the total revenue of CB&I. (CX 459 at CBI-E 007218, 007243).

Matrix, AT&V and CB&T are weak competitors that are unable to restrain CB&I's ability to raise prices. Even though Matrix is in the LIN/LOX market, Matrix's high pricing levels render it unable to effectively compete against CB&I. Since December 1998, Matrix has bid on six LIN/LOX projects and has not won any of them. (CX 705 at 8; Kamrath, Tr. 1987 (Longview, TX in 2001); [redacted], *in camera* ( [redacted] )); Fan, Tr. 960-962, 1018 (Farmington, NM in 2002, and "many" other pricing proposals to Linde)). CB&I is aware that Matrix has not won a LIN/LOX tank project since December 1998. CCRFF 5.51.

Matrix's 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); [redacted], *in camera* (Matrix's price for LIN/LOX tank was [redacted] higher than CB&I on most recent project)). 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 (Matrix's prices have "never been below what we'd seen from any of the other competitors")); Fontenot, Tr.

2021-22 (“didn’t feel comfortable with Matrix”); Hilgar, Tr. 1354, 1382-83 (Matrix has “more limited capacity to produce field-erected cryogenic storage tanks,” as compared to CB&I or PDM)).

Respondents’ proposed finding is incorrect in that it implies that Matrix just entered the LIN/LOX market. Matrix is not a new entrant into the market; the company began developing the necessary technology to enter the market around 1995, and was awarded its first contract in 1997. (Newmeister, Tr. 1585). Matrix was awarded four LIN/LOX tanks prior to the acquisition. (JX 37 at Exh. 3 (Newmeister, Dep.)). Mr. Scorsone conceded that “. . . Matrix entered the market a while back . . .” (Scorsone, Tr. 4878).

AT&V does not compete on an equal footing with CB&I or the former PDM in the LIN/LOX market. CCRFF 438-439. AT&V is much smaller than CBI. (CX 460 at CBI-E 007235; JX 23 at Exh. 1 ([redacted]); Simpson, Tr. 3292-3315). AT&V's annual revenues are only [redacted] percent those of CB&I. (CX 460 at CBI-E 007235; JX 23 at Exh. 1, *in camera* ([redacted]); CX 1033 at 28). [redacted] (Simpson, Tr. 3315 (citing JX 23a at 44, *in camera* ([redacted])). AT&V lacks the field capacity to handle more than four LIN tanks at a time or one small LNG project at a time. (Cutts, Tr. 2376). During discovery, AT&V had to refuse to bid on two cryogenic tank projects in the United States because of its limited field capacity. (Cutts, Tr. 2375).

CB&I is also aware that AT&V has performed so poorly on a recent LIN/LOX project that the customer has turned to CB&I to complete the project. (Scorsonse, Tr. 5036).

CB&T has made minimal efforts to enter, let alone effectively compete, in the LIN/LOX market. Chattanooga has never built a LIN/LOX tank. (JX 2 (Respondents' stipulate that CB&T has never built a LIN/LOX tank); CX 623 at FTC0000399; Stetzler, Tr. 6413-15). 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." (Stetzler, Tr. 6422). CB&I is aware that CB&T has never won a LIN/LOX tank project. CCRFF 5.58.

On the one occasion when it recently bid on a LIN/LOX project, Chattanooga's price was higher than any other competitor. (CX 189 at CBI-PL015105; [redacted], *in camera* (Chattanooga's price was [redacted] higher than [redacted])).

5.214 "Apparently, these competitors [AT&V and CB&T] 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; Scorsonse, Tr. 5029-30) (state of mind).

#### Response to RFOF 5.214

Respondents' proposed finding repeats the misleading statements in an earlier finding, RFOF 5.24. As stated in CCRFF 5.24, these companies, Matrix, AT&V and CB&T, are not strong competitors. Though CB&T has obtained some of Graver's know-how, it is an ineffective competitor. CCRFF 5.24. Finally, Matrix is not a recent player or a new entrant; it has been in the market for several years. CCRFF 5.24.

5.215 Chattanooga Boiler and Tank also believes there are an adequate number of suppliers to ensure competitive prices for LIN/LOX tanks. (Stetzler, Tr. 6366).

#### Response to RFOF 5.215

Mr. Stetzler's conclusory opinion regarding the state of competition in LIN/LOX tanks is unfounded. The supply of LIN/LOX tanks is "not really a business that we've [CB&T] been participating in." (Stetzler, Tr. 6422). CB&T has never constructed a LIN/LOX tank. CCRFF 5.19, 5.58. Mr. Stetzler has never been solicited or approached by any LIN/LOX suppliers for the purpose of purchasing LIN/LOX tanks. (JX 35 at 153-54 (Stetzler, Dep.)).

Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426). In its most recent bid to [ ], CB&T's price was not competitive – it was [ ]. CCRFF 5.58.

## **2. CB&I Has Increased Prices On LIN/LOX Tanks**

5.216 CB&I does not believe that its Acquisition of PDM has enabled it to increase prices in the LIN/LOX market because it continues to be a "robust competitive environment." (Scorsone, Tr. 4881-82; 5030) (state of mind).

5.217 CB&I believes that if it increases its prices on LIN/LOX tank, 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).

### Response to RFOF 5.216 and 5.217

Respondents' proposed findings contradict the evidence of price increases on the record. There is evidence that Respondents have increased prices in the LIN/LOX market. For example, Respondents implemented an 8.7% price increase on a LIN/LOX project for Linde BOC Process Plants. CCF 1052-1070. Respondents raised prices by the same amount, 8.7%, for a project for Praxair in 2002. CCF 1077-1086.

Moreover, Respondents' state of mind testimony is not offered for the truth of the matter asserted. Respondents' self-serving statements contradict CB&I's representations to its shareholders. In a conference call with CB&I shareholders, Mr. Glenn shared CB&I's belief, "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).

5.218 Chattanooga Boiler and Tank believes that the prices for field-erected LIN/LOX tanks will not be affected by the Acquisition of PDM by CB&I. (Stetzler, Tr. 6366).

### Response to RFOF 5.218

As stated in CCRFF 5.215, Mr. Stetzler's conclusory opinions relating to LIN/LOX tanks are unfounded. The supply of LIN/LOX tanks is "not really a business that we've [CB&T] been participating in." (Stetzler, Tr. 6422). CB&T has never constructed a LIN/LOX tank. CCRFF

5.19, 5.58. Mr. Stetzler has never been solicited or approached by any LIN/LOX suppliers for the purpose of purchasing LIN/LOX tanks. (JX 35 at 153-54 (Stetzler, Dep.)).

Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426). In its most recent bid to [ ], CB&T's price was not competitive – it was [ ]. CCRFF 5.58.

## **D. THE U.S. LIN/LOX/LAR MARKET HAS SUBSTANTIAL BARRIERS TO ENTRY**

### **1. Subcontracting Is A Barrier**

5.220 The engineering, fabrication and field erection of a LIN/LOX tank can be easily subcontracted to an outside company and supervised by a field supervisor. (Hilgar, Tr. 1526-27). A contractor providing turnkey services does not itself build every phase of the project. Many portions can be subcontracted out to other companies for economical reasons and still be categorized as a turnkey project. A turnkey contractor can subcontract parts of the construction process. Subcontracting is often more economical. (Hilgar, Tr. 1537-38).

#### Response to RFOF 5.220

Respondents' assertion relative to the ease of subcontracting the engineering, fabrication and field erection of a LIN/LOX tank to third party is misleading and misrepresents the evidence in the record. Subcontracting components of a LIN/LOX tank project increases risk of error, raises costs, and increases the likelihood of delay in performance. (Hilgar, Tr. 1538; Newmeister, Tr. 1575).

Respondents' base their assertion that subcontracting is easier and more economical on the testimony of Mr. Hilgar, who actually testified the exact opposite. Mr. Hilgar admitted that subcontracting components of LIN/LOX tank construction, in fact, increases their risk of error. (Hilgar, Tr. 1538). In fact, Mr. Hilgar testified that CB&I and PDM had an advantage over other competitors because both could execute turn-key LIN/LOX jobs, without having to subcontract engineering, fabrication, or field erection. (Hilgar, Tr. 1371-72). The fabrication process for a LIN/LOX tanks is a "particularly complex process." (Hilgar, Tr. 1343-44). The customer will have a major problem on its hands if the pieces get to the field and they don't fit. (Hilgar, Tr. 1343-44). Air Products would want to prequalify a fabrication subcontractor on a LIN/LOX project. (Hilgar, Tr. 1368). It is more economical for Air Products to subcontract the construction of a LIN/LOX tank, only because it is not Air Products' core business; Air Products is not a LIN/LOX tank builder. (Hilgar, Tr. 1537).

According to Mr. Newmeister, "when you subcontract out, you know, any work, you somewhat lose control of schedule and quality, and those are two key important things the customers are looking for." (Newmeister, Tr. 1570). Matrix loses control over its schedule if it subcontracts its fabrication of a LIN/LOX tank, as "fabrication is critical to making construction start and completion dates." (Newmeister, Tr. 1570).

Based on its experience, Matrix does not think that a company can be a viable competitor in LIN/LOX tanks by subcontracting the LIN/LOX metal fabrication to a third party. (Newmeister, Tr. 1569). Matrix does not believe that a company could be a viable competitor in the LIN/LOX tank market if it subcontracted out field-erection of the tank. (Newmeister, Tr. 1574-75). Customers want turn-key contractors who can engineer, fabricate, and field erect the entire project. (Newmeister, Tr. 1575). Subcontracting the field erection of a LIN/LOX tank to a third party is likely to raise a tank contractor's costs; the tank contractor would "have to provide oversight quality assurance, and schedule assurance, procedures, [that] seem to add administrative overhead and duplication of some of the efforts." (Newmeister, Tr. 1575-76).

## 2. Welding Is A Barrier

5.221 People who are able to weld standard flat bottom storage tanks are capable of building LIN/LOX tanks. (Hilgar, Tr. 1520-21). AT&V was able to hire experienced welders merely by placing newspaper ads. (Cutts, Tr. 2427-28).

### Response to RFOF 5.221

Respondents' proposed finding mischaracterizes Mr. Cutts' testimony by implying that welding LIN/LOX tanks is not difficult or specialized. Mr. Cutts testified that the welding of LIN/LOX tanks is specialized: "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." (Cutts, Tr. 2379).

Respondents' proposed finding is similar to misleading statements reflected in RFOF 5.18. There are "special welding skills related to the construction of LIN/LOX tanks." (Newmeister, Tr. 1582). The welding procedures for LIN/LOX tanks "are qualified with impacts to very low temperatures, temperatures which are lower than the actual steel is going to be subjected to. And the processes are very carefully controlled in terms of what they call heat input to achieve those impacts. There's very specific welding electrodes that are used in combinations of electrode and flux for parts of the automated process." (*Id.*).

The welding processes for a LIN/LOX tank require very specialized know-how. (Kistenmacher, Tr. 842). LIN/LOX tanks requires knowledge of stainless steel welding procedures; "You have to be able to qualify welding procedures to – you know, cryogenic minus 320, maybe 340 degrees temperatures, which require impact testing of weld procedures and production conditions." (Newmeister, Tr. 1568). Stainless steel welding uses different machines and different materials, requires more training than welding carbon steel, is more difficult to weld than ordinary carbon steel, and requires specially trained welders. (Hilgar, Tr. 1347-48).

Welding methods for cryogenic tanks are far from open art. Every company spends time and money developing welding procedure specifications. (Rano, Tr. 6028). In fact, CB&I regards its welding procedures as proprietary and does not give them to competitors. (Rano, Tr. 6028-29).

### 3. Engineering Is A Barrier

5.223 AT&V was able to successfully engineer its first LIN/LOX tank for BOC and has engineers on its staff that have experience designing LIN/LOX tanks. (Cutts, Tr. 2454). AT&V stated that it currently employs some former Graver employees who have experience working on LIN/LOX tanks. (Cutts, Tr. 2454).

#### Response to RFOF 5.223

Respondents' assertion is misleading in that it implies that any ambient temperature flat-bottom tank manufacturer can build a LIN/LOX tank without making any additional investments. As stated in CCRFF 5.10 and 5.13, LIN/LOX tanks require a specialized know-how and expertise to design, engineer, and construct. LIN/LOX tanks "require much more sophisticated engineering analysis. ... You have to be able to design or perform heat loss calculations for both bottom insulations, sidewall insulations. They have a lot of pressure vacuum and instrumentation requirements. They are built to the API 620 Appendix Q [standard]." (Newmeister, Tr. 1566-67).

The evidence of Matrix's efforts to penetrate the LIN/LOX market, described in CCRFF 5.10, demonstrates that a flat-bottom tank manufacturer cannot immediately enter into the LIN/LOX market. Even though Matrix has engineers proficient with flat-bottom tank design, the company had to hire a consulting engineer with specific LIN/LOX experience and incur several hundreds of thousands of dollars in testing insulation systems and other expenses to develop a commercial LIN/LOX tank design and win its first contract. (Newmeister, Tr. 1580-81, 1583-85). Mr. Newmeister testified: "Well, I was involved with Matrix Service as they penetrated in that market, and it took **a long time to develop the engineering expertise** to have a quality product to offer and it takes a long time to be accepted by the customer base." (Newmeister, Tr. 1567) (emphasis supplied). In fact, it took Matrix a year and a half to two years to develop the engineering expertise for doing finite element analysis work, to develop design sketches, to talk to suppliers and pipe fabricators, and to perform construction and fabrication planning. (Newmeister, Tr. 1585-86).

#### **E. DOCUMENT AUTHORED BY DAN KNIGHT ENTITLED "THE BENEFITS OF COMBINING PDM WITH CB&I" IS AN ACCURATE ASSESSMENT OF THE ACQUISITION AND REPRESENTS THE THOUGHTS AND IDEAS OF CB&I AND PDM MANAGEMENT**

##### **1. Dan Knight Is A Knowledgeable Individual**

5.224 Dan Knight is not an executive at CB&I nor was he an executive at PDM. (Scorsone, Tr. 4774). No one at CB&I currently reports to Dan Knight and during his time at PDM, Dan Knight did not have any one reporting to him. (Scorsone, Tr. 4775).

#### Response to RFOF 5.224

Respondents and Mr. Scorsone belittle Mr. Knight and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents' documents. Mr. Scorsone testified that Dan Knight merely "was a salesman, a first-level salesman at Chicago Bridge" (Scorsone, Tr. 5143; *see* CX 615 at 10 (Dan Knight, Business Development Manager)). Mr. Scorsone made similar disparaging remarks about each of CB&I's Business Development Managers who recorded their candid observations and recommendations in their communications to their superiors. (Scorsone, Tr. 5045 ("Dave Lacey is a first-level entry-level salesperson at Chicago Bridge & Iron"), 5061 ("Mike Miles is a first-level salesperson for CB&I"); *see* CX 516 at CBI 0019868-HOU (Miles a Business Development Manager); CX 615 at 10 (Knight a Business Development Manager)).

Respondents argue that no weight should be given to the recommendations and observations of Mr. Knight and their other Business Development Managers, including Mr. Lacey and Mr. Miles. However, Respondents chose not to call Mr. Knight as a witness, although Respondents identified him on their final witness list and represented that he would testify regarding "his prior statements made in produced documents." Respondents' Final Witness List at 3, September 19, 2002 ("Dan Knight currently serves as a Business Development Manager for CB&I"). Respondents' failure to call Mr. Knight as a witness "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

Respondents' counsel berated Dr. Simpson for referring to Mr. Knight as an executive: "Q: Do you know that a business development manager is the lowest-level sales title within the CBI organization? / A: I did not know that." (Simpson, Tr. 3942). Respondents repeat the claim in RFOF 5.224-5.225. The facts are otherwise. Mr. Scully identified Mr. Lacey and other Business Development Managers as CB&I's "middle management." (Scully, Tr. 1127. Moreover, in a sworn statement to the Tribunal, CB&I's Vice President of Sales for North America revealed that CB&I's Business Development Managers, and the e-mail they generate, have direct input in CB&I's pricing decisions and play an important role in CB&I's sales strategies: "Documents discussing sales strategies are highly confidential in nature. . . . e-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott)).

5.225 Dan Knight is approximately 50 years old and works for CB&I in an entry level position as a first level salesperson. Knight does not manage or supervise anyone at CB&I and did not have any supervision or management authority at PDM. (Scorsone, Tr. 4809). Knight is a "big talker" and not a "very deep thinker." He is a salesmen focused on selling his products. (Scorsone, Tr. 4809-10).

## Response to RFOF 5.225

Respondents' assertion is false in all respects, except perhaps with respect to the reference to Mr. Knight's age. Dan Knight is a knowledgeable individual. Prior to moving to PDM in January 1999, Mr. Knight worked at CB&I for 16 years, from 1984 to 1999. (CX 615 at 14 (Knight, IHT); Scorsone, Tr. 5143). While at CB&I, Mr. Knight held such positions as field engineer, business development manager, and territory manager for Hawaii and the South Pacific. (CX 615 at 14-17 (Knight, IHT)). Mr. Knight earned an engineering degree from University of Delaware in 1984. (CX 615 at 17 (Knight, IHT)).

Respondents' proposed finding contradicts Respondents' sworn statement that its business development managers and entry-level salespeople are important to CB&I's day-to-day business and strategic operations. Respondents disparage the actions and e-mail communications of their business development managers by asserting that these are entry-level sales people with no significant responsibility. However, in a sworn statement to the Tribunal, CB&I's Vice President of Sales for North America revealed that CB&I's business development managers, and the e-mail they generate, have direct input in CB&I's pricing decisions and play an important role in CB&I's sales strategies:

"Documents discussing sales strategies are highly confidential in nature. ... e-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. ... Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I."

(CX 393 at 9-10 (Declaration of Steven Knott)). *See* response to RFOF 5.224.

- 5.226 Scorsone did not request that Dan Knight prepare his thoughts on the benefits of CB&I's Acquisition of PDM. (Scorsone, Tr. 4799-4800; CX 652).
- 5.227 After the Acquisition was publicly announced, Scorsone was walking around his offices at PDM to talk to his employees and hopefully relieve some of the anxiety that some employees may have been feeling. (Scorsone, Tr. 4799). Scorsone stopped into the office of Sean Doyle, a project manager employed at PDM. Mr. Doyle was on speakerphone with Dan Knight discussing some issue. (Scorsone, Tr. 4799).
- 5.228 Mr. Scorsone said hello to Dan Knight who inquired about the Acquisition and commented that he had a few ideas. Mr. Knight asked if Mr. Scorsone would like to see some of his ideas. (Scorsone, Tr. 4799-4800). Mr. Scorsone agreed to accept Mr. Knight's ideas merely in order to indulge Mr. Knight who was is a low level, first-line sales person. (Scorsone, Tr. 4800).
- 5.229 Mr. Scorsone did not believe that Dan Knight's opinions on the Acquisition would have any great insight on the Acquisition, but he agreed to look at them so as to not insult Dan Knight. (Scorsone, Tr. 4800). A few days after Mr. Scorsone spoke with Mr. Knight in Mr. Doyle's office, Mr. Knight sent his opinions to Mr. Scorsone via email. (Scorsone, Tr. 4800; CX 651-52).

## Response to RFOF 5.226-5.229

These findings are supported only by the the self-serving testimony that is insulting to Mr. Knight. Respondents chose not to call Mr. Knight as a witness, so that he could provide his account and confront Mr. Scorsone's defamatory assertion that Mr. Knight lied when he referenced a prior communication by Mr. Scorsone: "Q: And at the bottom, Mr. Knight says on the subject CBI merger benefits: 'Luke, as you requested during our phone call today in Shawn's office, here is a list of benefits that will occur with the CB&I merger.' Do you see that, sir? / A: Yes. / Q: And in fact you requested Mr. Knight to put this together, didn't you, sir? / A: No, I did not. / Q: He's not telling the truth? / A: No, he is not. / . . . Q: Are you saying he's not telling the truth? / A: Yes." (Scorsone, Tr. 5145-46). This is remarkable, since Respondents identified Mr. Knight on their final witness list and represented that he would testify regarding "his prior statements made in produced documents." Respondents' Final Witness List at 3, September 19, 2002 ("Dan Knight currently serves as a Business Development Manager for CB&I"). Respondents' failure to call Mr. Knight as a witness "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

Mr. Scorsone testified that he only agreed to look at Mr. Knight's insights "so as to not insult Dan Knight. (Scorsone, Tr. 4800)." RFOF 5.229. Yet, Mr. Scorsone went out of his way to insult Mr. Knight as well as other long-standing middle management of CB&I. In fact, CB&I relies on the insights of Mr. Knight and other Business Development Managers in formulating CB&I's strategies: "Documents discussing sales strategies are highly confidential in nature. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott)).

*See* response to RFOF 5.224.

## **2. Scorsone and CB&I Management Agree with Dan Knight's Opinions**

5.230 Mr. Scorsone did not agree with any of the opinions that Mr. Knight expressed in his email. In fact, most of Mr. Knight's opinions were completely inaccurate. (Scorsone, Tr. 4801-10).

## Response to RFOF 5.230

Respondents assertion is incorrect. In the document at issue, Dan Knight stated that the acquisition would allow CB&I to gain "Dominance of the cryogenic (LNG/LOX/LIN) markets."; (2) "Allows CBI to have a low cost USA tank producer."; and (3) that PDM had "been beating CBI 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).

In fact, Mr. Knight's observations echoed what Mr. Scorsone had been saying for years. Mr. Knight's statements were corroborated by Mr. Scorsone in a document presented to PDM's board that assessed the benefits of PDM acquiring CB&I in 1999. Mr. Scorsone 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).

[

(CX 213 at CBI-PL033084, *in camera*)]. 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 CBI-PL 4004707). 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 CBI-PL 4004707).

5.231 Knight was incorrect in his opinion that "both firms benefit from additional field crews and equipment" because as a result of the Acquisition the combined organization had too much equipment and had to auction off some of the equipment. (Scorsone, Tr. 4803; CX 652).

#### Response to RFOF 5.231

The combined field crews and equipment of CB&I and PDM will need to be restored as part of divestiture relief.

5.232 After reviewing Knight's opinions, Scorsone believes that Knight mistakenly was under the impression that PDM was acquiring CB&I when in fact it was the exact opposite. (Scorsone, Tr. 4801-10; CX 652).

#### Response to RFOF 5.232

This gratuitous comment by Mr. Scorsone is yet another attempt by Mr. Scorsone to ridicule his middle level manager. In antitrust terms, it makes little difference whether CB&I acquired PDM or PDM acquired CB&I, as Mr. Scorsone had himself recommended a year earlier. The result is the same—market power. In professing to be at a loss regarding what Mr. Knight was talking about, can Mr. Scorsone have forgotten that he and PDM's other former managers are now running the combined operations of the merged company in the relevant markets?

5.233 Dan Knight had absolutely no role in CB&I's Acquisition of PDM. (Scorsone, Tr. 4800). Dan Knight has no responsibility for selling LNG tanks. (Scorsone, Tr. 4804-05). Knight does not have an overall knowledge of the LIN/LOX market. While at PDM he focused on a few regional customers around the New Jersey area. (Scorsone, Tr. 4805).

### Response to RFOF 5.233

Respondents' proposed finding is misleading in that it implies that Mr. Knight had no knowledge of LIN/LOX tanks. Mr. Knight "focused on a few regional customers around the New Jersey area" is misleading. At PDM, Mr. Knight was responsible for managing the alliance with Praxair relating to LIN/LOX tanks. (CX 615 at 13-14 (Knight, IHT)). Praxair is a major industrial gas competitor; at one time, Praxair owned CB&I in its entirety. (Glenn, Tr. 4062-63). Prior to the acquisition, Mr. Knight also knew what factors PDM takes into consideration when submitting a bid, and understood how PDM's price was affected by the number of bidders on a LIN/LOX project. (CX 615 at 56 (Knight, IHT)). *See* response to RFOF 5.224.

5.234 Mr. Knight is not a person that PDM or CB&I management consulted with in order to determine the benefits of the CB&I/PDM Acquisition. (Scorsone, Tr. 4808). Mr. Knight does not have basic knowledge

required to provide accurate and meaningful opinions regarding CB&I's Acquisition of PDM. (Scorsone, Tr. 4808).

#### Response to RFOF 5.234

This finding is also based on Mr. Scorsone's self-serving and defamatory testimony regarding Mr. Knight. In fact, CB&I relies on the insights of Mr. Knight and other Business Development Managers in formulating CB&I's strategies: "Documents discussing sales strategies are highly confidential in nature. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott)).

### **IV. THERMAL VACUUM CHAMBER FINDINGS OF FACT**

#### **A. THERE IS DEMAND FOR TVCs**

6.11 Demand in the TVC market is extraordinarily thin. (Harris, Tr. 7325).

#### Response to RFOF 6.11

Demand in the TVC Market is not extraordinarily thin. Dr. Harris is simply wrong. In any event, Respondents' expert witness is not an appropriate authority for this factual assertion. Respondents cite no other authority.

Since the 1950's, government organizations and satellite manufacturers have purchased many TVCs. Respondents' documents indicated that there are over 100 TVCs in the U.S. (CX 144 at PDM-S 000097 (PDM has built over 80 chambers); CX 274 at CBI-H011457 (CB&I has built over 30 TVCs); CX 1078 at CBI 037633-PLA (XL and CB&I have built more than 120 major thermal vacuum chambers and turnkey vacuum facilities for government agencies and aerospace contractors)).

A strategic plan drafted by CB&I in 1999 described demand as growing in "the commercial satellite market" and in "military and NASA programs" which drive TVC sales. (CX 212 at CBI-PL031716; *see also* CX 1196 at PDM-HOU011519 ("good market for thermal vacuum and test facilities for the next 5 years")). This demand stems from "new communications and remote sensing (earth observation) satellite constellations as well as upgrades to and new satellites for defense command and control space systems." (CX 212 at CBI-PL031716; *see also* CX 265 at CBI-H007058 (\$10-40 million annual sales potential in overall space market)).

There are several military programs that will generate demand for new TVCs. One program is the Space Based Infrared System (SBIRS), which further develops the current U.S. early missile warning system. (Neary, Tr. 1474; Thompson, Tr. 2040). Another is known as the Space Based Laser-Integrated Flight Experiment project, which is related to the development of an anti-ballistic missile defense system. (CX 246 at CBI-PL 4006734). This system will ultimately include a constellation of optical satellites and high power laser systems capable of detecting missile launches, tracking, targeting and laser firing. (CX 369 at CBI-RXL000397). CB&I estimates that the potential contract value for the thermal vacuum chamber and related equipment needed by the Flight Experiment program will be 100 million. (CX 245 at CBI-PL4006559-560; *see also* CX 246 at CBI-PL 4006763 (missile defense system could generate \$30-50 million in thermal vacuum projects)). In August 2000, the Air Force awarded contracts to CB&I and PDM for “trade studies” related to thermal vacuum chambers for space-based lasers. Id.

NASA programs likely to generate demand for new TVCs include the Space Station and the “Next Generation Space Telescope,” which will be several times larger than the Hubble telescope. (CX 212 at CBI-PL031717). Engineering work on this new telescope has already started and prime contractors are preparing proposal specifications. (CX 212 at CBI-PL031717). Additionally, NASA has plans for extensive satellite developments that will require new test facilities. (CX 212 at CBI-PL031716).

At trial, Mr. Gill of Howard Fabrication testified that “[t]here is a growing market for large, thermal vacuum chambers now.” (Gill, Tr. 185). “[T]he Department of Defense is allotting large amounts of money to major aerospace companies for systems that are going to be required by the military in the future.” (Gill, Tr. 212). For example, TRW, a defense contractor, plans to procure a large, field-erected thermal vacuum chamber in the next several years for the NPOAS program. (Neary, Tr. 1425, 1474).

Demand for large, field-erected thermal vacuum chambers is additionally driven by the award of satellite programs to small satellite manufacturers, such as Spectrum Astro, and the trend toward mothballing “older vertical top loading test chambers . . . in favor of horizontal chambers” such as the mailbox shaped chamber. (CX 1052 at PDM-HOU 2013205-06; *see also* CX 934 at CBI-PL069168 (listing of programs driving satellite market)).

CB&I and PDM documents report many planned procurements of large, field-erected thermal vacuum chambers. CB&I’s Opportunity Management System (“OMS”) reported prospective customers of large thermal vacuum chambers as including Spectrum Astro (January 2001), NASA Marshall (August 2001), Hughes Space and Communications Group (January 2002), Scandia National Lab (January 2002), Orbital Sciences Corp. (June 2002), Harris Corporation (August 2002), TRW (Sept. 2001), Lockheed Martin (November 2002), and Ball Aerospace System (December 2002). Additionally, it reported an enlargement of an existing thermal vacuum chamber for Boeing (September 2001), which was priced at \$8,000,000. Finally, CB&I’s OMS report included a test facility for TRW, priced at \$15,000,000, for the

Space-based Laser Program. (CX 614 at CBI-PL039363-390; *see also* CX 112 at PDM-HOU11526-530, CX 112 at PDM-HOU011585, CX 1052 at PDM-HOU 2013205-06; CX 855 at PDM-HOU017460 (listing high probability TVC jobs); CX 265 at CBI-H007053-59 (annual market potential \$10-40 MM); CX 934 at CBI -PL069168 (CB&I will probably build 10 more chambers in the next ten years); CX 1196 at PDM-HOU011524-25)).

Indeed, in January 2001, Luke Scorsone, the President of PDM-EC, told his staff that there would be new business relating to thermal vacuum chambers in the U.S. (Scorsone, Tr. 5125-26).

6.12 Already thin demand is decreasing for large, field-erected TVC's as the result of consolidation in the aerospace business, the miniaturization of electronic components in satellites, and the change in the economy since the 1990's. (Scully, Tr. 1199-1204; RX-204 (state of mind)).

### Response to RFOF 6.12

As described in the reply to 6.11, recent demand is increasing for TVCs.

There is no credible evidence that demand for TVCs is decreasing due to the miniaturization of electronic components in satellites. Respondents cite Mr. Scully for this proposition even though he testified that he and other suppliers of thermal vacuum chambers are not generally aware of the sizes or types of satellites under development by satellite manufacturers. (Scully, Tr. 1161-62). Jeffrey Steimer, formerly PDM's Vice-president of sales for LNG/Aerospace, also testified that he had no knowledge of the sizes of new satellites. (CX 849 at 128 (Steimer IHT)).

Respondents also cite a press article relating to Boeing's satellite programs. This article discusses reliability problems with Boeing's 702 satellites and the planned development of a hybrid satellite model based on Boeing's 601 satellites. The article does not mention a trend toward smaller satellites due to the miniaturization of electronic components. (RX 204). Moreover, Respondents cite this article as "state of mind" evidence but fail to identify the person(s) whose state(s) of mind were affected by this article. Moreover, the article cannot be cited as support for the factual proposition asserted by Respondents.

Witnesses from satellite manufacturers, including [ ], testified that they continue to manufacture large satellites that require testing in TVCs. ([ ], *in camera*). Moreover, Mr. Neary of TRW describes satellites built for government customers as actually growing in size. (Neary, Tr. 1425-26, 1474). Mr. Scully conceded that manufacturers will continue to produce large satellites. (Scully Tr. 1203-04).

As recently as 1999 and 2000, suppliers of TVCs such as CB&I viewed demand for TVCs as substantially increasing. (CX 369 at CBI-RXL000396; *see also* CX 1196 at PDM-HOU011519); CCRFF 6.11. As acknowledged by Mr. Scully, a shift in the satellite industry back to the plans and activities existing as recently as 1999-2000 would increase demand for TVCs.

(Scully, Tr. 1200).

6.13 The decline in demand for satellites is expected to last at least for a few years into the future. (Scully, Tr. 1205-06).

#### Response to RFOF 6.13

For several reasons, little weight should be given to Mr. Scully's forecast that there will be a decline in demand for satellites in the next few years. First, Mr. Scully testified that satellite manufacturers only share limited information about future satellite programs with him and other suppliers of thermal vacuum chambers. (Scully, Tr. 1161-62, 1251). Secondly, as documented in the CB&I/XL Business Plan for 2001, Mr. Scully recently anticipated substantial demand for satellites and TVCs, the opposite of his forecast at trial. (CX 212; *see* Scully, Tr. 1128-29).

6.14 Only one new field-erected TVC is projected to be built in the next 4-5 years. (Neary, Tr. 1471-73; Thompson, Tr. 2103-04). [ ]

#### Response to RFOF 6.14

Respondents' finding is not supported by the record. TRW currently plans to purchase a TVC. This does not mean that no other satellite manufacturers project a need for a TVC in the next 4-5 years. TRW began its procurement process for this TVC in 1999 by obtaining ROM pricing from CB&I and PDM. TRW plans to award the contract for this TVC in late 2003 and begin building it in 2004. (Neary, Tr. 1431, 1471-73, 1501). Respondents' finding does not account for Mr. Thompson's testimony that Spectrum Astro will likely procure a new TVC in the next 3-4 years. (Thompson, Tr. 2104).

[ ] testified that if "all circumstances" today at [ ] remain the same into the future, it is unlikely to purchase a new TVC. However, if a testing schedule conflict for a TVC developed in the future (*i.e.* two tests scheduled for the same TVC at the same time), [ ] would consider purchasing another TVC, among other options. ([ ], *in camera*).

Finally, Respondents' finding contrasts starkly with CB&I's recent OMS projection of TVC sales. (CX 614 at CBI-PL039363-390; *see also* CX 112 at PDM-HOU11526-530; CX 112 at PDM-HOU011585; CX 1052 at PDM-HOU 2013205-06) and CCRFF 6.11.

6.15 Satellite programs that require new TVC's are frequently delayed or canceled. (Neary, Tr. 1471-73; Gill, Tr. 262). Thus, TVC projects that are planned for the future are unlikely because of frequent delays and cancellations. (*See* Neary, Tr. 1472-73; *see also* Thompson, Tr. 2104). For example, the Spectrum Astro project has been canceled due to "government action." (Thompson, Tr. 2097; 2103).

#### Response to RFOF 6.15

The proposed finding is unsupported by the record. The testimony cited by Respondents does not indicate that there are “frequent” delays and cancellations of TVC projects. Mr. Neary of TRW testified that the government satellite program (NPOAS) for which it is currently procuring a new TVC is on schedule (Neary, Tr. 1472-73). The second sentence of the proposed finding is mere speculation. Although Spectrum Astro expects to delay its procurement of its TVC for 3-4 years, there is no evidence in the record that it has permanently abandoned its plan to procure a new TVC for its new factory near Pheonix. (Thompson, Tr. 2104).

6.16 VC projects are speculative and long range in nature. Customers and vendors are generally not personally involved in the discussions at the Department of Defense concerning their satellites appropriation plans for five years into the future. (See Neary, Tr. 1473-74; Gill, Tr. 261-62).

#### Response to RFOF 6.16

Respondents cite no evidence that TVC projects are speculative. Complaint Counsel agrees that thermal vacuum chamber projects can take [ ] to complete from the time the contract is awarded. (Scully, Tr. 1123); (CX 969 at CBI-PL014690-95); ([ ], *in camera*).

6.17 The satellite industry has excess capacity in its existing TVC's. (See Scully, Tr. 1203-04).

#### Response to RFOF 6.17

Respondents' finding is not well supported. For several reasons, little weight should be given to Mr. Scully's opinion that the satellite industry has excess capacity in its existing TVCs. (Scully, Tr. 1203-04).

First, Mr. Scully bases this opinion on his belief that most of the satellites manufactured in the future will be small enough to test in shop-fabricated thermal vacuum chambers. However, his belief that satellites are getting smaller is not well founded because satellite manufacturers only share limited information about future satellite programs with him and other suppliers of thermal vacuum chambers. (Scully, Tr. 1161-62). Moreover, as detailed in CCRFF 6.12, witnesses from satellite manufacturers anticipate that they will continue to manufacture large satellites in the future.

Second, from time to time, manufacturers develop a satellite that is too big to fit in their existing TVCs and they must procure a new TVC. (Neary, Tr. 1425 (NPOAS satellite is too big for existing TVCs at TRW); [ ], *in camera*) ([ ]).

Third, in recent years, there is a trend among satellite manufacturers to mothball “older vertical top loading test chambers . . . in favor of horizontal chambers” such as the mailbox shaped chamber. (CX 1052 at PDM-HOU 2013205-06).

Fourth, relatively new satellite manufacturers, such as Spectrum Astro and Orbital Sciences, do not own TVCs at their manufacturing facilities. (Thompson, Tr. 2037; CX 235 at CBI-PL060194 (new facility near Dulles airport). For several reasons, sending satellites out to other TVC facilities for testing is generally undesirable in the long term. Because satellites are “very light” structures and “can’t take a whole lot of shaking or vibration,” manufacturers prefer to transport a satellite only one time, from the manufacturing facility to the launch site. (Gill, Tr. 190). Additionally, using someone else’s TVC facility is a “very high-risk item” because the owners typically “put a caveat in the contract that . . . in-house [ ] program[s] will get priority . . . “ over any outside manufacturer’s TVC testing needs. ([ ], *in camera*; see also CCRFF 6.65.

6.18 Most satellite manufacturers already have one or more of these chambers, which have long lifespans and can be reconditioned. (Gill, Tr. 263-64).

#### Response to RFOF 6.18

Respondents’ finding is not well supported and mischaracterizes Mr. Gill’s testimony. Mr. Gill only testified that several California-based satellite manufacturers, namely TRW, [Boeing] and Raytheon, have more than one thermal vacuum chamber. (Gill Tr. 263-64). There is no evidence that Mr. Gill is familiar with the facilities of other satellite manufacturers, such as Spectrum Astro and Orbital Sciences.

Mr. Gill testified that TVCs have a long “but limited” life. (Gill Tr. 264). Mr. Gill did not testify that TVCs can be reconditioned. To the contrary, he described TRW’s current TVC project as involving the replacement of an old TVC. (Gill Tr. 264).

The evidence shows that Spectrum Astro and Orbital Science’s Dulles manufacturing facility do not have TVCs. (Thompson, Tr. 2037-39); (CX 235 at CBI-PL060194 (new Orbital facility near Dulles airport).

6.20 [ ]

#### Response to RFOF 6.20

Respondents’ finding mischaracterizes [ ] testimony. [ ] testified that [ ] existing TVCs are sufficient to test its large satellites assuming “all circumstances remaining the same.” ([ ], *in camera*). Further, [ ] testified that these circumstances would change if [ ] had a “direct internal program conflict where [ ] trying to use the same chamber at the same time.” ([ ], *in camera*). This change in circumstances could cause [ ] to procure a new TVC. ([ ], *in camera*).

6.21 TRW currently owns and operates five field-erected TVC’s and approximately 15 shop-erected TVC’s.

(Neary, Tr. 1422). Of the five existing field-erected TVC's at TRW, two were built in the 1960's and the other three were built in the 1980s. (Neary, Tr. 1423).

### Response to RFOF 6.21

Of TRW's five TVCs, CB&I built two and PDM built three. (Neary, Tr. 1423).

6.22 The predominant number of satellites built in the future will be small enough to be tested in existing TVC's. (Scully, Tr. 1203-04).

### Response to RFOF 6.22

This finding is speculative and irrelevant. New TVC will be required to test satellites that cannot be tested in existing TVCs. Respondents rely solely on Mr. Scully for the forecast that most satellites built in the future will be smaller than those built today. Little weight should be given to Mr. Scully's forecast because he also testified that he and other suppliers of thermal vacuum chambers are not generally aware of the sizes or types of satellites under development by satellite manufacturers. (Scully, Tr. 1161-62, 1251). Additionally, Jeffrey Steimer, formerly PDM's Vice-president of sales for LNG/Aerospace, testified that he had no knowledge of the sizes of new satellites. (CX 849 at 128 (Steimer IH)). *See also* CCRFF 6.12 and 6.17.

Finally, there is contrary testimony from witnesses representing satellite manufacturers. Mr. Neary of TRW testified that satellites built for government customers are growing in size. (Neary, Tr. 1425-26, 1474). Additionally, [ ] of [ ] testified that [ ] continues to manufacture large satellites that require testing in TVCs. ([ ], *in camera*).

6.23 Satellite sizes are shrinking, rendering the large, field-erected TVC's obsolete, because smaller satellites can be tested in smaller shop-erected chambers. (*See* RX 204 (state of mind)).

### Response to RFOF 6.23

Respondents' finding is incorrect. RX 204, the only cite for this finding, does not support the finding, (*i.e.* "[s]atellite sizes are shrinking, rendering the large, field-erected TVC's obsolete . . ."). Rather, this press article discusses reliability problems with Boeing's 702 satellites and Boeing's planned development of a hybrid satellite model based on Boeing's 601 satellites. The article does not even mention a trend toward smaller satellites, field-erected thermal vacuum chambers (or their obsolescence), or shop-erected thermal vacuum chambers. *See also*, CCRF 6.12. Moreover, Respondents cite this article as "state of mind" evidence but fail to identify the person(s) whose state(s) of mind were affected by this article. The article cannot be cited as support for the asserted fact.

6.24 These smaller satellites that are built as the result of miniaturization are just as expensive as their larger predecessors. (Scully, Tr. 1204). Existing large, field-erected TVC's and smaller shop-erected TVC's should be adequate to test these satellites in the future. (*See* Scully, Tr. 1203-04).

### Response to RFOF 6.24

The second sentence of the proposed finding is speculation. Respondents again rely solely on Mr. Scully's forecast that most future satellites will be smaller than those produced today and that current TVC facilities are adequate for testing these future satellites. (Scully, Tr. 1203-04). As stated in the prior reply findings, little weight should be given to Mr. Scully's forecasts because there is contrary testimony from witnesses who represent satellite manufacturers. *See* CCRF 6.12, 6.17, 6.22.

6.25 Neither CB&I nor ex-PDM made shop-erected TVC's. (Thompson, Tr. 2105).

### Response to RFOF 6.25

Respondents' finding is incorrect. Just prior to the acquisition, CB&I/XL submitted a bid for shop-erected TVCs for Raytheon Corporation. (CX 730) (CB&I/XL proposal to Raytheon for shop-fabricated thermal vacuum chambers); (JX 24 at 14 (Hart, Dep.)). Additionally, as noted by Respondent in RFOF 6.32, CB&I supplied shop-fabricated thermal vacuum chambers to Grumman. Finally, CB&I's OMS report shows that CB&I was pursuing a variety of thermal vacuum chamber opportunities, including both shop-fabricated and field-erected chambers. (CX 614 at CBI-PL039367-77).

PDM competed with CB&I for the supply of large, shop-fabricated thermal vacuum chambers. Recently, PDM supplied such a chamber to Gencorp Aerojet Corporation after competing in 1998 with CB&I for the project. (Gill, Tr. 231, 235); (CX 827 at 5); (CX 849 at 67-78 (Steimer, IH)); (CX 535 at 102-03 (Scorsone, Dep.)). As a result of the competition between CB&I and PDM for this project, Gencorp Aerojet obtained lower pricing for its shop-fabricated chambers. (Gill, Tr. 233-34).

## **B. CB&I IS THE DOMINANT FIRM IN THE PRODUCTION OF TVCs**

6.26 CB&I has not built a TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77).

### Response to RFOF 6.26

CB&I has the "skill set" needed to supply TVCs because because of its experience in TVCs and because the design and construction of TVCs involves some of the same skills used to build "tanks," "process control equipment" and "vessels." (Neary, Tr. 1491). Since 1984, CB&I has built a variety of steel testing structures used by the aerospace industry. These include the J-6 large rocket test facility located at Tullahoma, TN (an Air Force facility), The LCC Large Cavitation Channel at Memphis, TN (a test facility for the U.S. Navy), the Moffett Field Wind Tunnel near San Jose, CA (a NASA facility), the Savannah River Process Vessels (a DOE facility), and the Laser Interferometer Gravitational Wave Observatory ("LIGO") for Caltech. (CX 274 at CBI-H011458-59); see also CCRFF . As described in a CB&I document describing

its experience for supplying TVCs, the design and construction of these other structures uses same “skill set” needed to supply TVCs. (CX 274 at CBI-H011457-69). In August 1998, CB&I informed Orbital Sciences: “The CB&I - XL team has the strongest experience, both long term and current, of any large thermal vacuum supplier. . . . CB&I’s most recent vacuum contract is the nearly completed vacuum modules for Cal Tech on the LOGO project.” (CX 1220 at CBI-PL013372).

Additionally, during the 1990's, CB&I upgraded existing TVCs for TRW, Orbital Sciences and others. (Neary, Tr. 1433-34; (CX 614 at CBI-PL039367, 382) (M4 Chamber upgrade cost \$1.4 million). Mr. Neary testified that CB&I’s performance on TRW’s upgrade projects indicated that it “could perform a turnkey operation of a field-erected chamber.” (Neary, Tr. 1492).

CB&I told TRW that it could build the large, mailbox-shaped thermal vacuum chamber which TRW plans to construct beginning in 2004. (Neary, Tr. 1452, 1500-01). As described in Complaint Counsel’s findings (CCFF 290; 1108-110; 1166; 1207-09), CB&I has recently bid on new TVC projects. Mr. Scully, who was employed by CB&I at the time of the acquisition, testified that since CB&I “came back into the market there was a tendency for the pricing [of large, field-erected thermal vacuum chambers] to go down because of [CB&I’s] desire to get back into the market.” (Scully, Tr. 1176).

6.27 CB&I has never built a mailbox-shaped field-erected TVC. (Scully, Tr. 1193; Neary, Tr. 1467; Scorsone, Tr. 5056; Higgins, Tr. 1277-78).

#### Response to RFOF 6.27

This finding is inconsistent with the record. In August 1998, CB&I informed Orbital Sciences: “CB&I built a mailbox-shaped vacuum chamber for Grumman Aerospace in Bethpage Long Island which included a complete gaseous nitrogen shroud similar to Orbital’s baseline requirement.” (CX 1220 at CBI-PL013372). CB&I’s CEO, Gerald Glenn, testified that he did not know this. (Glenn, Tr. 4203).

CB&I has the capability to build mailbox TVCs. Mr. Scorsone testified that CB&I could build a field-erected, mailbox-shaped thermal vacuum chamber “very easily.” (Scorsone, Tr. 5058); *see also*, (Scully, Tr. 1247) (CB&I has capability to supply mailbox-shaped thermal vacuum chambers).

CB&I has bid on mailbox-shaped TVCs for [ ], Spectrum Astro, Orbital Sciences, TRW and ITT Industries. (Neary, Tr. 1500-01; [ ], *in camera*; [ ], *in camera*; Thompson, Tr. 2048-49; Scully, Tr. 1277; CX 969 at CBI-PL014695; CX 1073 at CBI 037933-PLA; CBI 037964-PLA-66 PLA (ITT); CX 235 (Orbital)).

Customers purchasing this type of TVC qualified CB&I as a supplier of mailbox-shaped TVCs. (Neary, Tr. 1428, 1431; Thompson, Tr. 2061; CX 235). For example, [

] CB&I's lack of experience building a mailbox-shaped TVC was a "nonissue". ([ ], *in camera*).

6.28 Customers today are demanding mailbox-shaped TVC's, which are more complex structures than non-mailbox-shaped TVC's. (Higgins, Tr. 1277; Scully, Tr. 1106-07). It is more difficult to build a mailbox-shaped TVC than it is to build a horseshoe-shaped TVC. (Neary, Tr. 1467; Scully, Tr. 1107).

#### Response to RFOF 6.28

Complaint Counsel agrees that customers today are demanding mailbox-shaped TVCs. Demand for this new type of TVC will likely increase demand for new TVCs. (CX 1052 at PDM-HOU 2013205-06).

Respondents' finding mischaracterizes the testimony by Mr. Scully and Mr. Neary. Mr. Scully testified that the mailbox shaped TVCs are more difficult to design than traditional shaped chambers. (Scully, Tr. 1107). Mr. Neary testified that it was more difficult to make a mailbox chamber than a partial cylinder. (Neary, Tr. 1467).

6.30 The Hughes Seal Beach field-erected TVC is horseshoe-shaped, and not a mailbox-shaped chamber. (Neary, Tr. 1464-66; CX-153).

### Response to RFOF 6.30

The Seal Beach TVC depicted in CX-153, which was shown to witnesses such as Mr. Neary during trial, was built for Rockwell International by CB&I. Boeing now owns the facility. (Neary, Tr. 1464-66; CX 153 at CBI PL002700-2701).

After viewing CX-153, Mr. Neary described the TVC as a mailbox-shaped chamber. (Neary, 1428-29). However, on cross-examination, Mr. Neary described the shape of the Seal Beach TVC more specifically as probably “a cylinder with a truncated ball” or partial cylinder. (Neary, Tr. 1465).

From a user standpoint, a mailbox chamber is one that has a swinging or sliding door that allows users to access the chamber horizontally rather than vertically. (Neary, Tr. 1430). The key advantage of these chambers is that the door allows the user to “roll in from what we call the integration floor the satellite without craning it or lifting it” into the chamber. (Neary, Tr. 1429). Older cylinder shaped chambers required users to “hoist the satellite from the integration area through a hole in the top of the chamber and then plant it in the chamber, or you have to hoist it down a pit and use an elevator to go up in a cylinder. You're not allowed to just roll it in the chamber.” (Neary, Tr. 1430).

Mr. Neary’s descriptions of the shape of the Seal Beach TVC indicate that mailbox-shaped chambers are very similar to chambers CB&I has built in the past.

6.31 CB&I's current marketing materials refer to and advertise TVC's constructed by PDM. For example, the picture of a mailbox-shaped TVC on the CB&I website, the Hughes chamber, was built by PDM prior to the Acquisition and placed on the CB&I website after the Acquisition. (Scorsone, Tr. 5057).

### Response to RFOF 6.31

Mr. Scorsone’s testimony is self-serving. CB&I’s current marketing materials additionally refer to TVCs constructed by CB&I. (CX 153 at CBI PL002700-2701).

6.32 The Grumman TVC at Beth Page, Long Island was neither mailbox-shaped nor field-erected. The Beth Page chamber was horseshoe-shaped, which is distinct from a mailbox-shaped chamber. (Scorsone, Tr. 5056-57). CB&I actually subcontracted the fabrication of that shop-fabricated chamber to another company. (Scorsone, Tr. 5056-57).

### Response to RFOF 6.32

Mr. Scorsone’s testimony is self-serving and is not corroborated by other evidence.

From a user standpoint, a mailbox-shaped chamber is one that has a swinging door that allows user to access the chamber horizontally rather than vertically. (Neary, Tr. 1430). Users would thus consider a horseshoe-shaped chamber with a door that swings out or slides so that users can move satellites in and out of the chamber with ease (as compared to a top-loaded

cylinder chamber) as a mailbox-shaped chamber. Mr. Neary described the advantage of chambers with doors that swing open to allow the user to “roll in from what we call the integration floor the satellite without craning it or lifting it” into the chamber. (Neary, Tr. 1429-30); *see* CCRFF 6.30.

As described in CCRFF 6.30, Mr. Neary, a user of these chambers at first described the partial cylinder-shaped chamber built by CB&I for Rockwell International as a mailbox-shaped chamber because it has a swinging door allowing horizontal access to the chamber. (Neary, Tr. 1428-29, 1465-66); (CX 153).

Although Mr. Scorsone did not describe the door on the Beth Page TVC, his description of the shape of the chamber suggests that it has a swinging door that provides for horizontal access to the chamber. Given that it has such a door, Mr. Neary would consider the Beth Page TVC to be a mailbox-shaped chamber.

6.33 CB&I's promotional document that trumpeted its "proven performance in space-related structures and systems" is carefully worded to include more than just field-erected TVC's, because CB&I builds other non-relevant structures, such as acoustical chambers. (Scully, Tr. 1208).

#### Response to RFOF 6.33

Complaint counsel agrees that CB&I builds other space-related structures, which are frequently one of a kind structures, such as the Beam Tube Modules for the Ligo Laser Interferometer Gravitational Wave Observatory (CX 1078 at CBI 037644-PLA), a Process Technology Facility for the Space Station (CX 1078 at CBI 037636-PLA), a Target Chamber for the National Ignition Facility (CX 1078 at CBI 037635-PLA), a Vacuum chamber for Ion Thrust Engine Testing (CX 1078 at CBI 037635-PLA), a Mirror Fusion Test Facility for Lawrence Livermore National Laboratory (CX 1078 at CBI 037637-PLA), and many other structures. *See also* CCRFF 6.26.

PDM and CB&I were the two predominant suppliers of these one-of-a kind structures. CB&I and PDM relied on their unique expertise in these one-of-a-kind structures to maintain and enhance the skills required to design, engineer, fabricate and construct TVCs. CB&I and PDM also promoted their unique expertise in these one-of-a-kind structures to induce customers to rely on them for TVCs. (*see generally* CX 1078).

6.34 CB&I's welders have not welded a field-erected TVC since 1984. (Scully, Tr. 1198). There is a great deal of turnover in welders in the industry. (Scully, Tr. 1198). If CB&I had to use their welders today to build a field-erected TVC, the welders would need to be completely re-trained if any with experience even remain, because the welders have not done this type of work in a long time if at all. (Scully, Tr. 1199).

#### Response to RFOF 6.34

Since 1984, CB&I's welders have worked on a variety of stainless steel testing structures for the aerospace industry and government. A document describing CB&I's experience for Lawrence Livermore National Laboratory, shows that CB&I's and PDM's skill set for supplying

TVCs is very similar to the skill set used by CB&I and PDM to supply these one-of-a-kind testing facilities. (CX 274 at CBI-H011457-69). This skill set includes expertise in the fabrication and welding of stainless steel, which is used in TVCs, the Beam Tube Modules for the Ligo Laser Interferometer Gravitational Wave Observatory (“Ligo”), and other testing structures. (CX 274 at CBI-H011457-69).

Specific procedures used by CB&I on the Ligo project included “automated welding, stiffener assembly, automated component leak testing, material treating for low outgassing rates, material handling, inspection and tracking, welder qualifications, [and] tube cleaning and inspection.” (CX 274 at CBI-H011460). These procedures are similar to those needed to supply TVCs. ([redacted], *in camera*) (describing [redacted]); (Scully, Tr. 1103-05) (describing field erection of thermal vacuum chambers).

6.35 A large number of CB&I's TVC-experienced personnel are currently retired or have left the company. (Scully, Tr. 1208-14). Only seven out of the nineteen names listed on the experience list contained in RX-301 are still CB&I employees. (Scully, Tr. 1208-14; RX-301 at CB&I 036925).

#### Response to RFOF 6.35

Respondents’ finding mischaracterizes Mr. Scully’s testimony. In response to questions about whether particular individuals continued to work at CB&I, Mr. Scully testified that seven continued to work at CB&I and seven had retired or left CB&I. Additionally, Mr. Scully testified that six individuals that are part of XL Technologies were CB&I employees when it was owned by CB&I. (Scully, Tr. 1208-14).

Additionally, Mr. Scully testified that he does not know all the employees at CB&I today who have past experience engineering, fabricating and constructing TVCs. (Scully, Tr. 1248-49). Further, he testified that he did not know if the people listed in RX 301 represent all employees at CB&I today that have past experience relating to TVCs. (Scully, Tr. 1250).

6.36 The combined experience level of CB&I-PDM today is not as high in TVC's as it was for each of the two independent companies prior to the merger because of the number of employees that opted for early retirement at PDM. (Scully, Tr. 1214).

#### Response to RFOF 6.36

Respondents’ finding mischaracterizes Mr. Scully’s testimony. Mr. Scully testified that the combined experience level today “might” not be as high as prior to the acquisition. (Scully, Tr. 1214). However, Mr. Scully also testified that there are enough CB&I employees with experience in TVCs to create two effective TVC competitors in the event that the Commission orders a divestiture. (Scully, Tr. 1239-40); *see* CCRFF 6.96.

The early retirement was offered to CB&I employees not PDM employees. (Scully, Tr. 1209).

6.37 Mr. Dave Lacey had no role in CB&I's last TVC project in 1984. (Scully, Tr. 1245-46).

Response to RFOF 6.37

Respondents' finding is irrelevant.

6.38 The only revenue that CB&I has had in the TVC market has been from small study projects or front-end work since the Acquisition. (Glenn, Tr. 4089). CB&I has not earned any revenue from project awards since 1984. (Glenn, Tr. 4089).

Response to RFOF 6.38

Mr. Glenn's testimony is self-serving.

CB&I's recent revenues from the TVC market have been substantial. RFOF 6.66 and response thereto.

6.39 CB&I has generated "very close to zero" revenue in the TVC business in 2002. (Glenn, Tr. 4404-05).

Response to RFOF 6.39

Respondents did not present any documents to corroborate Mr. Glenn's testimony which is self-serving. Because of the discovery cutoff in this matter, Complaint counsel does not have access to documents that can refute or corroborate Mr. Glenn's statement.

6.40 CB&I had already exited from the TVC market in 1984, which left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997. (Scully, Tr. 1189). [  
]

Response to RFOF 6.40

Prior to its exit from the TVC market, "CB&I has built more than 30 field-erected vacuum vessels and 15 shop fabricated vessels for various government agencies and aerospace contractors." (CX 274 at CBI-H011457). In the 1980's alone, CB&I built ten thermal vacuum chambers. (CX 934 at CBI-PL069168). CB&I was also the constructor of the largest TVC in the U.S. *Id.*

After CB&I reentered the TVC market in the 1990's, the competition between PDM and CB&I reduced the prices of TVCs. (Scully, Tr. 1181); *see also*, CCF 290, 1194-1205.

6.41 CB&I lost the capability it had developed to build thermal vacuum systems when it left the marketplace in 1984. (Scully, Tr. 1189-90).

Response to RFOF 6.41

Respondents' finding is misleading and requires clarification to avoid confusion. Mr. Scully testified that when it left the market in the mid-1980's, CB&I lost its capability to supply thermal shrouds, pumps, and the other equipment supplied by thermal systems suppliers, such as XL Systems and Chart. He did not testify that CB&I lost its capability to supply chambers. (Scully, Tr. 1189-90).

After re-entering the market in 1997, CB&I formed an alliance with XL Technologies to obtain thermal shrouds, etc. for TVCs. (Scully, Tr. 1117-18); (Higgins, Tr. 1269). Later, from September 1999 to February 2002, CB&I owned XL Technologies and thus had in-house resources to supply all the major components of a TVC. (Scully, Tr. 1113, 1129).

6.42 When CB&I attempted to re-enter the market in 1997, it did not have the same capability that it had in 1984. (Scully, Tr. 1189-90).

#### Response to RFOF 6.42

Respondents' finding is misleading. Mr. Scully testified that sometime after leaving the market in 1984, CB&I lost its capability to supply thermal shrouds, pumps and the other equipment supplied by thermal systems suppliers such as XL Systems and Chart. (Scully, Tr. 1189-90); *see* CCRFF 6.41.

6.43 Due to CB&I's lack of experience, Lockheed refused to do business with CB&I prior to the Acquisition. Mr. Ron Scully made sales calls to Lockheed on behalf of CB&I and XL Systems ("XL Systems") in 1997 in an attempt to solicit TVC business. (Scully, Tr. 1190). Lockheed employees refused to work with CB&I, because Lockheed believed PDM to be dominant in the industry and the technological leader. (Scully, Tr. 1190-91).

#### Response to RFOF 6.43

Respondents' finding mischaracterizes Mr. Scully's testimony.

Mr. Scully testified that he advised Lockheed ". . . that we were -- had this alliance with CBI and was looking forward to bidding on [a new TVC] job, and we were pretty much told that Lockheed Martin is a PDM company, we probably would have no interest in you and CBI. Q. And is that because it had been such a long time since CBI had built a thermal vacuum chamber? A. I think they're -- I'm not sure that's the reason, but the statement gave me the impression with the words that PDM was dominant in the industry and was the technological leader." (Scully, Tr. 1190-91).

6.45 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).

#### Response to RFOF 6.45

Respondents' finding states "Windsor, Long Island" should be Windsor, New Jersey.

Respondents' finding that "CB&I has an uneven track record in its TVC work" is not supported by the testimony of Mr. Thompson and Mr. Scully. Additionally, neither Mr. Thompson nor Mr. Scully testified that the TVC in Windsor "never went into operation" or that it was the "second-to-last" TVC built by CB&I. (Thompson, Tr. 2113); (Scully, Tr. 1188).

Finally, although both Mr. Thompson and Mr. Scully were aware of problems or defects with the Windsor TVC, both consider CB&I as a qualified supplier of TVCs. (Thompson, Tr. 2113); (Scully, Tr. 1246-47).

6.46 CB&I purchased XL on September 30, 1999 with the hope that XL's technology would help CB&I re-enter the field-erected TVC market. (Scully, Tr. 1123-30, 1178, 1189; *see also* Glenn, Tr. 4161).

#### Response to RFOF 6.46

Respondents' finding incorrectly implies that CB&I had not re-entered the TVC market prior to 1999. As indicated by the evidence, CB&I began bidding on TVC projects as early as 1997. *See* CCF 290. (Scully, Tr. 1189, 1130).

Respondents' finding mischaracterizes the testimony of Mr. Scully. Mr. Scully testified that CB&I purchased XL "to enhance their position" by adding "the thermal vacuum system portion, that capability, to the field-erected chamber capability so they would have a total in-house capability similar to what PDM enjoyed in the years that they owned CVI." (Scully, Tr. 1124, 1178).

Respondents' finding incompletely reflects Mr. Glenn's testimony as to why CB&I purchased XL. Mr. Glenn testified that CB&I purchased XL because XL was "struggling a bit" and "had some technical capability . . . that might be useful to us in the future. . ." (Glenn, Tr. 4161).

6.48 The purchase of XL in 1999 improved CB&I's competitiveness in the TVC market. (Gill, Tr. 257). Spectrum Astro's decision to award their TVC project was based almost entirely on the differences between XL's and Chart's thermal systems technology. (Scully, Tr. 1169, 1177-78; *see also* Thompson, Tr. 2083-84). As part of the competitive bidding process for the Spectrum Astro TVC, several innovations were designed by XL (not CB&I). (Thompson, Tr. 2100-01). Spectrum Astro's source selection document mentions the exceptional thermal control systems expertise as one of CB&I/XL's strengths. (*See* CX-317 at 5/7). CB&I's partnership with XL was a significant factor in CB&I's winning the source selection for this project. (Thompson, Tr. 2103; Scully Tr. 1226).

#### Response to RFOF 6.48

Respondents' finding is misleading and mischaracterizes the testimony of Mr. Gill and Mr. Thompson. Mr. Gill did not testify that CB&I's ownership of XL improved its competitiveness. He simply testified that by purchasing XL, CB&I "added something" to its

portfolio. (Gill Tr. 257).

Mr. Thompson did not testify that Spectrum Astro awarded its TVC project “based almost entirely on the differences between XL’s and Chart’s thermal systems technology.” Rather, he testified that he was concerned about CB&I’s decision to spin off its XL Division and asked CB&I for assurances that the CB&I/XL team to whom Spectrum Astro had awarded its TVC project were still available for that project. (Thompson, Tr. 2083-84).

Mr. Scully testified that based on his conversations with Spectrum Astro, its decisions and concerns “related almost entirely as a function of XL and PSI technology . . .” However, in light of Mr. Scully’s responsibilities for the systems technology, rather than the chamber portion of the project, his discussions with Spectrum Astro are likely, in any event, to have focused on issues relating to the systems technology. *See, e.g.*, (CX 1098 at CBI-HWH 008007-09) (chart showing responsibilities of XL and CB&I for Spectrum Astro Chamber). If Respondents’ interpretation of this testimony is accepted, it simply means that Spectrum Astro regarded CB&I and PDM as equivalent with respect to other aspects of the TVC.

Spectrum Astro’s source selection document, which describes the reasons CB&I won the Spectrum Astro TVC project, mentions “creative in production flow in/about TV facility” and “creative use of allowable space around the chamber” as CB&I strengths. (CX 317 at CBI-ATL000823). These strengths do not relate to the systems supplied by XL Technologies. *See, e.g.*, (CX 1098 at CBI-HWH 008007-09).

6.50 CB&I sold XL because it was losing money. (Scully, Tr. 1195, 1130-31; Glenn, Tr. 4162). This financial loss was the result of a total lack of TVC work in the marketplace. (Scully, Tr. 1195).

#### Response to RFOF 6.50

Respondents’ finding mischaracterizes Mr. Scully’s testimony as to why CB&I sold XL Technologies to Mr. Scully. Mr. Scully testified that the CB&I managers with whom he negotiated for the repurchase of XL Technologies did not tell him why CB&I was selling XL. (Scully, Tr. 1132). However, he assumed that “one reason” CB&I sold XL was because it lost money on some contracts. (Scully, Tr. 1131, 1195).

A document authored by Luke Scorsone states that CB&I’s decision to keep or sell its XL division depended on whether 1) “a market exists, other than new large thermal vacuum chambers, for XL’s systems and components that is sustainable and profitable”; and 2) whether “CBI’s management and board believe that XL’s line of services and products are in line with the overall strategic direction of the corporation and are synergistic with the balance of the business lines.” (CX 1046 at PDM-HOU011594).

Mr. Scully did not testify that there was a “total lack of TVC work in the marketplace”. (Scully, Tr. 1195).

6.51 CB&I determined that it would be more profitable to subcontract out thermal systems work as needed in the future. (Scully, Tr. 1195-96).

### Response to RFOF 6.51

The proposed finding is mere speculation. Mr. Scully testified that the CB&I managers with whom he negotiated the repurchase of XL Technologies did not tell him why CB&I was selling XL. (Scully, Tr. 1132). *See also* CCRFF 6.50.

6.53 After the sale of XL, CB&I did not retain any technical knowledge, licenses or rights to the technology owned by XL, and XL is not required to work with CB&I in the future, nor is CB&I required to use XL's technology in the future if CB&I bids for a TVC. (Scully, Tr. 1227). In short, selling XL returned CB&I to its pre-Acquisition capability level in terms of thermal vacuum systems. (Scully, Tr. 1225).

### Response to RFOF 6.53

Respondents' finding requires clarification to avoid confusion. Mr. Scully testified that after the sale of XL, CB&I gave up in-house capability to supply thermal shrouds. (Scully, Tr. 1224-25). As in the past, CB&I can continue to obtain thermal shrouds and other TVC equipment from a subcontractor such as XL Technologies or Chart. (Scully, Tr. 1114, 1122-23); (Higgins, Tr. 1269). In fact, after the sale of XL, CB&I continued to work with XL Technologies on Spectrum Astro's thermal vacuum chamber project. (Thompson, Tr. 2084).

6.55 The stainless steel chamber is the lower-tech portion of a field-erected TVC. (Scully, Tr. 1224).

### Response to RFOF 6.55

The proposed finding is not supported by the record. Mr. Scully, who makes the thermal shroud, merely acknowledged that this is his opinion. Mr. Hart of Raytheon Company disagreed: "No, I wouldn't say it's the lowest tech, no." (Hart, Tr. 394).

In explaining the differences between shop-fabricated and field-erected TVCs, Mr. Scully described the engineering challenges and complexities in supplying TVCs. He testified that the design and construction of a large, field-erected thermal vacuum chamber is "markedly more complex and costly" than what is required for a shop-fabricated thermal vacuum chamber. (Scully, Tr. 1103). "It's a vastly different technology than what a shop-built chamber requires." *Id.* The supplier of field-erected thermal vacuum chambers uses a larger group of design, engineering and construction personnel. The design and engineering personnel must have the ability to "perceive the problems that are going to exist in the field and design the system so that the components are manufactured in the shop properly so that when they go to the field that they all fit together." (Scully, Tr. 1104). Because large, field-erected thermal vacuum chambers are often integrated into a building built specifically for the chamber, the supplier must work with the building architects and ensure that the chamber and the building comply with local building codes. (Scully, Tr. 1105). Finally, because the building and chamber are often built in parallel, managing the schedule for constructing both the thermal vacuum chamber and the building is more challenging than managing the project schedule for a shop-fabricated thermal vacuum chamber. *Id.*

6.56 CB&I currently has no ability to design or make the higher-tech thermal system components that XL produces. (Scully, Tr. 1225).

### Response to RFOF 6.56

Respondents' finding is misleading and requires clarification to avoid confusion. Mr. Scully testified that after the sale of XL, CB&I does not have the ability to make the higher-tech things that XL makes. (Scully, Tr. 1225). As in the past, CB&I can continue to obtain thermal shrouds and other TVC equipment from a subcontractor such as XL Technologies or Chart. (Scully, Tr. 1114, 1118, 1122-23); (Higgins, Tr. 1269). In fact, after the sale of XL, CB&I

continued to work with XL Technologies on Spectrum Astro's thermal vacuum chamber project. (Thompson, Tr. 2084); *see, also*, (CX 261 at CBI-H004029) (XL seeking to align with CB&I to expand its thermal vacuum systems business); (CX 262 at CBI-H004037-38) (XL does not have "a way to build large chambers right now as PDM has a cozy relationship with XL's competitor, PSI").

6.57 CB&I planned to exit the field-erected TVC business entirely. (Thompson, Tr. 2075-76).

#### Response to RFOF 6.57

Respondents' finding is unsupported by the record and mischaracterizes Mr. Thompson's testimony. Mr. Thompson testified that during a heated conversation with Jeff Steimer about CB&I's price increase for Spectrum Astro's TVC, following the acquisition, Mr. Steimer "did make some noise about they were thinking about getting out of the business and, you know, this kind of thing, and I kind of considered that blustering, you know, you get that from subs, contractors. He kind of blustered a little bit . . ." (Thompson, Tr. 2075-76).

Mr. Thompson also testified that no one from CB&I ever told him that "they don't want to be in the business at all for large field-erected thermal vacuum chambers?" (Thompson, Tr. 2052-53). In fact, CB&I affirmed its interest in the TVC market in a letter to Spectrum Astro on May 16, 2002, after the sale of XL Technologies:

The FTC investigation should not affect CB&I's future interest in the design and construction of thermal vacuum test facilities in general, nor our ability to perform work for your facility. (CX 1570 at 63); *see* RFOF 6.64.

6.58 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). [

]

#### Response to RFOF 6.58

The record does not support Respondents' assertion that PDM bid the C-1 project in 1997 at below cost. Mr. Scully was partnering with CB&I rather than PDM for this project and did not have direct access to PDM's pricing. Mr. Scully testified that prior to the acquisition, competition between CB&I and PDM was fractious. (Scully, Tr. 1194). Mr. Scully testified that he learned from PDM that they lowered the price of the TVC by \$2 million in order to keep CB&I from winning the job. (Scully, Tr. 1165-1167). When asked if "PDM may have actually bid [the C-1] project at below cost to try to keep CBI out." he responded: "There was comments made in that direction, yes." (Scully, Tr. 1193-94, 1166). He did not identify who made these comments or the context for these comments. (Scully, Tr. 1193-94, 1166). This does not constitute evidence that PDM's bid was below cost.

Mr. Scorsone, who should be familiar with PDM's pricing on the C-1 project, did not testify that PDM's price was below cost.

6.59 Preparing TVC bids is expensive and these projects often do not end up being built. (Scorsone, Tr. 5054).

#### Response to RFOF 6.59

Mr. Scorsone's testimony was offered for state of mind only. (Scorsone, Tr. 5054).

6.60 CB&I's employees with relevant TVC experience are dwindling as they age, and they will not be replaced as they retire. (Scorsone, Tr. 5054-55). Likewise, PDM did not replace aging employees with TVC experience. (Scorsone, Tr. 5055).

#### Response to RFOF 6.60

Mr. Scorsone's testimony was presented for state of mind only, is self-serving and is not corroborated by other evidence. (Scorsone, Tr. 5054-55).

6.62 In the future, CB&I will not continue to invest in marketing for TVC opportunities, nor will CB&I actively engage and pursue these projects. (Scorsone, Tr. 5053).

#### Response to RFOF 6.62

Mr. Scorsone's testimony is self-serving and speculative. However, this is an admission that after eliminating its only competitor in the TVC market, CB&I no longer puts marketing money behind pursuing opportunities. (Scorsone, Tr. 5053). This is an anticompetitive effect of the acquisition because TVC customers will no longer benefit from the pre-contract design services and customer support that CB&I and PDM provided to customers, at CB&I's and PDM's expense as a marketing investment, when they competed for TVC awards.

Respondents did not present any documents to corroborate Mr. Scorsone's statement. Because of the discovery cutoff in this matter, Complaint counsel does not have access to documents that can refute or corroborate Mr. Scorsone's statement.

Despite Mr. Scorsone's testimony in December, several months earlier, in October 2002, Mike Miles of CB&I called on TRW to present pricing for a new TVC. (Gill, Tr. 243-46); (Neary, Tr. 1445).

6.63 CB&I has taken steps to cut spending on its marketing in the TVC business, including reassigning Dave Lacey to a project construction role. (Scorsone, Tr. 5053-54).

#### Response to RFOF 6.63

Mr. Scorsone's testimony is self-serving and uncorroborated by other evidence. This is an anticompetitive effect of the acquisition because TVC customers will no longer benefit from

the pre-contract design services and customer support that CB&I and PDM provided to customers, at CB&I's and PDM's expense as a marketing investment, when they competed for TVC awards.

Up until at least May 16, 2001, Dave Lacey was marketing TVCs for CB&I. (CX 1573).

Because of the discovery cutoff in this matter, Complaint counsel does not have access to documents that can refute or corroborate Mr. Scorsone's statement.

6.65 [ ]

**C. THERE ARE NO ECONOMIC SUBSTITUTES FOR TVCs**

Response to RFOF 6.65

Respondents' finding mischaracterizes [ ] cited testimony. [ ] described a trade study involving the construction of a new TVC at [ ] or "the expansion of the [ ] facility to handle the production workload." [ ]

[ ]. It contains manufacturing and satellite testing facilities, as well as TVCs. ([ ], *in camera*).

From time to time, satellite manufacturers, including [ ], require new TVCs because the satellite manufacturer's existing TVC facilities are not sufficient for testing larger satellites or are inadequate to handle the volume of satellites projected to be manufactured, and a new TVC is purchased. [ ] procured the [ ], a TVC, because [ ] ([ ])  
(*in camera*).

Currently, TRW plans to procure another large TVC for its Redondo Beach facility because its existing chambers are not large enough to test satellites under development for a government program. (Neary, Tr. 1425).

At trial, [ ] described the costly risks faced by satellite manufacturers if there is a delay in the thermal vacuum testing of a satellite. At [ ], "a sizeable marching army . . . follows the test validation, the integration and the sell-off of the satellite to the customer." During the thermal vacuum test, "essentially all of these people are put on hold until the test is completed. You have a captive vehicle. No one on the program can do anything else during -- while that vehicle is in the chamber under test." ([ ], *in camera*). Because these tests, which run around the clock from two weeks to two months, are a bottleneck in satellite development programs, insufficient TVC testing resources can lead to expensive delays in satellite programs. ([ ], *in camera*). Because the thermal vacuum test occurs late in the development program schedule, "it's very costly for any delays . . . [and] typically at that phase of the program, they've used up most of the float or margin they have in their schedule. So, even more pressing might be the potential penalties that might be incurred for delaying spacecraft launch." ([ ], *in camera*).

6.66 [ ]

Response to RFOF 6.66

Respondents' proposed finding is an incomplete and misleading account of CB&I's price increase to [ ] following the acquisition. Prior to the acquisition, PDM gave [ ] a firm fixed price of [ ] for a TVC at [ ] facility. CCFF 1208. Following the acquisition, [ ] asked CB&I to renew the price PDM had bid for the TVC and to provide the price for modification on an existing [ ] TVC. CCFF 1209-13. CB&I responded by informing [ ] that for [ ], CB&I would only modify the existing TVC and that the price of the TVC specified and bid by PDM for [ ] would now be [ ] (CX 1573 at 3 *in camera*). CB&I's price increase forced [ ] to settle for modification of an existing [ ] TVC while paying the full price bid by PDM for a new TVC.

[ ] and other TVC customers engage CB&I, and prior to the acquisition engaged PDM, for modifications for existing TVCs, as well as for supplying new TVCs. (CX 1573, *in camera*; [ ], *in camera*); (Neary, Tr. 1434, 1440-42). Anti-competitive effects from the acquisition, including increases in prices, have harmed TVC customers both by increasing the price of TVCs and by increasing the price of modifications to TVCs.

6.67 Spectrum Astro has been able to survive for years by finding alternatives to testing its satellites in its own field-erected TVC. (Thompson, Tr. 2131-32).

Response to RFOF 6.67

Spectrum Astro is a small and relatively new satellite manufacturer. (Thompson, Tr. 2130). However, as it wins contracts such as the SBIRS contract, it will need to purchase its own TVC to test satellites, rather than send its satellites off-site for testing. (Thompson, Tr. 2040, 2129-30).

Most companies prefer to test their satellites as close as possible to the location where they are manufactured because it is risky to send fragile satellites off-site to be tested in thermal vacuum chambers. (Gill, Tr. 190-91); *see also* CX 238 at CBI-PL1001834 ("growing concern on shipping satellites to the facilities for testing"). [ ], who has used off-site testing facilities for satellites, testified that [ ] considers sending satellites off-site for thermal vacuum tests as a "very high-risk item" because the tests last from two weeks to two or three months:

[



( ).]

**D. TVC CUSTOMERS REQUIRE A RELIABLE SUPPLY OF TVCs**

6.76 [ ]

Response to RFOF 6.76

Respondents' finding is not supported by [ ] testimony. He described [ ] procurement of the [ ] as "complicated" and "a competitive procurement." ([ ], *in camera*).

6.82 TRW has been able to competitively bid their TVC projects in the past, even without PDM. (Neary, Tr. 1442-43).

Response to RFOF 6.82

Respondents' finding mischaracterizes Mr. Neary's testimony and is incomplete. Mr. Neary testified that since the acquisition, TRW has requested pricing for a new TVC from CB&I and Howard Fabrication because company policy requires them to use competitive bidding practices. However, Mr. Neary testified that, at the end of the day, TRW was unlikely to award the project to Howard Fabrication because "[w]e don't quite see the technical competence nor the financial backing of the company as a viable competitor to Chicago Bridge & Iron at this time." (Neary, Tr. 1442-43). CCF 1168-72. Mr. Scorsone, who is familiar with Howard Fabrication's plant facility, also testified that it "would be a real stretch for Howard" to supply TRW with its new TVC. (Scorsone, Tr. 5061).

As described in Complaint counsel's findings, through the actions of Mr. Miles, a CB&I sales representative, CB&I has interfered with TRW's attempt to competitively bid this new TVC project. *See* CCF 1173-79. Mr. Neary testified that as a result of CB&I's proposal to Howard Fabrication to coordinate on making a bid or a price quote to TRW "we're basically hosed." (Neary, Tr. 1451). CCF 1177-78.

TRW's sophistication as an aerospace company does not protect it from price increases by CB&I. Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481).

6.86 Spectrum Astro is more sophisticated today than in 2000. (Thompson, Tr. 2062).

Response to RFOF 6.86

Respondents' finding is misleading and based on a casual remark by Mr. Thompson at trial. Mr. Thompson simply remarked that a letter, dated December 7, 2000 (*see* CX 317) was unsigned because Spectrum Astro was less sophisticated back then. (Thompson, Tr. 2062).

6.88 Mr. DeVon Hart is the subcontracts manager at Raytheon Systems who selects vendors to supply Raytheon with its TVC's. (Hart, Tr. 380-81, 400).

#### Response to 6.88

Respondents' finding is correct but at the time of his deposition, Mr. Hart had only worked in his position at Raytheon for nine months. (Hart, Tr. 381).

6.90 Raytheon was able to generate competition in the procurement of its new TVC's. (Hart, Tr. 383-84, 401-02).

#### Response to RFOF 6.90

Respondents' finding is misleading because Raytheon procured shop-fabricated thermal vacuum chambers that had a diameter of 18 feet, not a TVC as defined in this matter. (Hart, Tr. 401-02); (Scully, 1154-55). The competitors for this Raytheon project included suppliers of shop-fabricated thermal vacuum chambers, as well as CB&I/XL. (Hart, Tr. 401, 413).

### **E. CB&I'S REMEDY PACKAGE IGNORES THE LAW AND DOES NOT ADDRESS THE COMPETITIVE CONCERNS POSED BY CB&I'S ACQUISITION OF PDM**

6.91 The customers do not know whether a divested PDM would be allowed to bid on TVC projects because of its unknown financial circumstances. (Neary, Tr. 1471, 1498-99).

#### Response to RFOF 6.91

Respondents' finding mischaracterizes the record. Only one customer did not know. Mr. Neary's testimony related to TRW only, not other customers of TVCs. (Neary, Tr. 1471, 1498-99).

6.92 Customers do not know whether an independent PDM with \$150 million in sales would be allowed to bid on TRW's jobs if it were in existence today. (Neary, Tr. 1471, 1498-99).

#### Response to RFOF 6.92

Respondents' finding mischaracterizes the record. Only one customer did not know. Mr. Neary's testimony related to TRW only, not other customers of TVCs. (Neary, Tr. 1471, 1498-99).

6.93 Even if PDM had been sold to a foreign competitor, it is doubtful that the resulting company would have been allowed to bid on U.S. projects. (Scully, Tr. 1197; Neary, Tr. 1470).

#### Response to RFOF 6.93

This finding is speculative and misleading. CB&I is incorporated in the Netherlands, but its management are headquartered in the United States. PDM could remain a United States company even if its parent company is foreign. Mr. Neary, cited by respondents as support for this finding said simply, “I don’t know how that would have worked.” TRW’s criteria and facilities simply “require that vendors and contractors all be United States citizens or U.S. residents.” (Neary, Tr. 1469). There is no reason to speculate that if PDM had been acquired by a foreign company, the acquirer would have required PDM’s personnel to give up their United States citizenship or United States residency.

6.94 If PDM had been sold to a smaller firm than CB&I, the resulting company would not have been able to compete as effectively in TVC’s as PDM did, because of a lack of financial strength and engineering capability that such an acquisition would have created. (Scully, Tr. 1196-97).

#### Response to RFOF 6.94

This finding is speculative and irrelevant. It asserts nothing more than that as separate, competing company, PDM would have substantially less market power than the combined firm enjoys today.

6.95 If a company other than CB&I had acquired PDM, and that purchaser had needed to take out debt to finance the transaction, that debt could impact on the resulting company’s ability to obtain a bond to perform work for a large field-erected TVC. (Gill, Tr. 271; Neary, Tr. 1471).

#### Response to RFOF 6.95

This finding is speculative and irrelevant.

6.96 A breakup would result in two smaller companies that would each be substantially weaker than the current CB&I-PDM. (Scully, Tr. 1239-40).

#### Response to RFOF 6.96

This finding is speculative. PDM could be divested to a company larger than CB&I, and with the proceeds realized from the divestiture of PDM, CB&I could expand into other businesses thereby increasing its corporate aggregate sales volume. Respondents’ finding is incomplete as it does not reflect Mr. Scully’s full answer: “Q. . . . do you believe that there is enough experienced employees with experience in thermal vacuum chamber work to create two effective competitors in the field-erected thermal vacuum chamber industry? A. I think you could do that, but I think you would end up with two entities that are substantially weaker than what exists today and as CBI-PDM.” (Scully, Tr. 1239-40). Mr. Scully’s testimony is speculative and signifies nothing more than that as separate, competing companies, CB&I and PDM would have substantially less market power than the combined firm enjoys today.

6.97 The market for TVC’s is not large enough to support the existence of two suppliers in the U.S. (Scully, Tr. 1226-27).

### Response to RFOF 6.97

As a partner to CB&I in TVC projects, Mr. Scully prefers that CB&I maintain its monopoly in the TVC market and continue to work with XL on TVC projects. Mr. Scully's opinion is not consistent with the evidence that the resources that PDM and CB&I use to supply TVCs are also deployed to supply LNG tanks, water tanks and other field-erected products. *See, e.g.*, CCRFF 1291-96.

Additionally, as described in CCRFF 6.11, there is evidence that demand for TVCs is growing.

6.98 In the end, customers benefit from having a merged CB&I-PDM because it combined the wisdom of CB&I and PDM employees. (*See* Scully, Tr. 1240).

### Response to RFOF 6.98

This proposed finding mischaracterizes the record. Mr. Scully stated only that there are some benefits from the combined wisdom and experience of CB&I and PDM. (Scully, Tr. 1240). The combination of PDM and CB&I technologies and practices would be preserved through a divestiture order that licenses the combined technologies and practices to both CB&I and the divested entity.

6.99 Respondents have proposed a package of behavioral constraints in the form of a proposed Consent Decree in an effort to alleviate any competitive concerns created by its acquisition of PDM assets on the TVC market. (Glenn, Tr. 4162-66). There are several components:

### Response to RFOF 6.99

Respondents' proposed "Consent Decree" is irrelevant and anticompetitive. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). CB&I's CEO explained that CB&I proposes to eliminate all competition in the TVC market: "We would offer today that CB&I would be perfectly happy not to participate in the thermal vacuum chamber solicitations and bidding, not to participate in that market at all." (Glenn, Tr. 4165). Respondents simply don't get it. Relief must restore competition in the markets, not stamp it out entirely. The acquisition reduced TVC customers' choices from two to one; Respondents propose to reduce that choice to zero.

6.100 First, this offer includes CB&I's promise to build TVC's for the government at cost. (Glenn, Tr. 4165).

### Response to RFOF 6.100

The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). CB&I's manipulation of "costs" on the Cove Point LNG tank to inflate its actual margin demonstrates that a commitment by CB&I to perform work "at cost" is meaningless. CCF 799-815.

Mr. Neary explained that notwithstanding a promise by CB&I to limit its margin, CB&I could increase TVC prices substantially by manipulating its costs. (Neary, Tr. 1481-82). Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481). Neither does this Tribunal nor the Commission have the time, resources or ability to monitor CB&I's costs as a substitute to restoring competition to the market.

6.101 Additionally, if a commercial customer would like CB&I to build a TVC, CB&I is willing to build it on a cost plus 4 percent profit basis, or at any other profit that is deemed reasonable by the court. (Glenn, Tr. 4165).

#### Response to RFOF 6.101

The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). CB&I's manipulation of "costs" on the Cove Point LNG tank to inflate its actual margin demonstrates that a commitment by CB&I to perform work "on a cost plus 4 percent profit basis" is meaningless. CCFF 799-815. Mr. Neary explained that CB&I could increase TVC prices by 50% consistent with its proposal to offer a firm fixed price and a 4-percent margin depending on how CB&I manipulates costs: "I guess I go right back to my question is I don't know . . . how they developed the bottom – how do they develop the number before they put 4 percent on it. I don't have that. I don't have that data." (Neary, Tr. 1481-82). Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481).

6.102 CB&I will license its Red Book engineering standards for building a TVC and any additional necessary licenses on a royalty-free basis, as well as provide specific training for the fabrication process, procurement, design, field installation, and welding. (Glenn, Tr. 4165-67).

#### Response to RFOF 6.102

Licensing of CB&I's intellectual property is an important part of a divestiture order, but is not sufficient without divestiture. Licensing, to the acquirer of the divested entity, CB&I's intellectual property, including its Red Book engineering standards, is part of the proposed Order submitted by Complaint counsel. However, the remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734).

Mr. Gill, President of Howard Fabrication, testified, "It would take more than mentoring [by CB&I]" to give his company the ability to compete for TVCs. (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I's offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I's offer to provide mentoring or training to Howard Fabrication's employees be sufficient to transform Howard Fabrication into "a real viable competitor" in the TVC market. (Neary, Tr. 1458).

6.103 CB&I will joint venture with another tank company on its next TVC project and mentor it through each phase of development and construction. (Glenn, Tr. 4165-67).

### Response to RFOF 6.103

The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring [by CB&I]” to give his company the ability to compete for TVCs. (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458).

6.104 The door seal and the flat walls are the most complicated parts of a TVC in terms of design and construction. (Scully, Tr. 1192). CB&I will assist third party vendors in their design of these TVC features on a royalty-free, perpetual basis. (Glenn, Tr. 4165-67).

### Response to RFOF 6.104

The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring [by CB&I]” to give his company the ability to compete for TVCs. (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458).

6.105 CB&I would agree to not act as an EPC contractor for any TVC project for a period of seven years, as well as committing to not purchase any company that has thermal shroud technology. (Glenn, Tr. 4166).

### Response to RFOF 6.105

Respondents’ proposal is anticompetitive and is not a proper substitute for competition. (Simpson, Tr. 5734). Relief must restore competition in the TVC market, not stamp it out entirely. The acquisition reduced TVC customers’ choices from two to one; Respondents propose to reduce to zero the choice of EPC contractor for TVC projects.

6.106 Divestiture of CB&I’s Red Book engineering standards would benefit competition. (Scully, Tr. 1228-30; Higgins, Tr. 1275-76; Proulx, Tr. 1755; Cutts, Tr. 2391-92).

### Response to RFOF 6.106

Respondents’ proposed finding is speculative. Divestiture of CB&I’s intellectual property is an important part of a divestiture order, but is not sufficient without divestiture. Licensing, to the acquirer of the divested entity, CB&I’s intellectual property, including its Red Book engineering standards, is part of the proposed Order submitted by Complaint counsel.

However, the remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734).

Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring [by CB&I]” to give his company the ability to compete for TVCs. (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458).

6.107 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).

#### Response to RFOF 6.107

Respondents’ proposed finding is speculative. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring” (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW’s Mr. Neary said “I’ve never heard of them.” (Neary, Tr. 1486).

6.108 There are 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).

#### Response to RFOF 6.108

Respondents’ finding is speculative. Mr. Scully, a partner of CB&I in TVC projects, testified that it may not be easy. (Scully, Tr. 1230-31). The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring” (Gill, Tr. 202). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW’s Mr. Neary said “I’ve never heard of them.” (Neary, Tr. 1486).

6.109 Boeing 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).

### Response to RFOF 6.109

Respondents' finding mischaracterizes the record. Mr. Proulx did not say that Boeing would consider using such a supplier. (Proulx, Tr. 1756-57). He testified that Boeing desires builders with experience in constructing TVCs. (Proulx, Tr. 1756). He also stated that depending on the company's actual involvement, he would consider a company to be experienced if it had been a joint venture partner of CB&I or PDM on each phase of the construction process of a TVC. (Proulx, Tr. 1756-57).

6.110 If CB&I were to offer customers in this market a firm fixed bid price with a 4% profit margin on any project that arose for the next 7-10 years, these customers would be receiving a good price. (Scully, Tr. 1231-32; Gill, Tr. 261; Neary, Tr. 1482). Howard Fabrication, for example, normally attempts to bid out at a 7-10 profit margin, which is still a good value for the customer. (Gill, Tr. 260-61).

### Response to RFOF 6.110

Respondents' finding is speculative. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). CB&I's manipulation of "costs" on the Cove Point LNG tank to inflate its actual margin demonstrates that a commitment by CB&I to perform work "on a cost plus 4 percent profit basis" is meaningless. CCF 799-815. Mr. Neary testified that whether the price is good or not depends on CB&I's costs or "how do [CB&I] develop the number before they put 4 percent on it." (Neary, Tr. 1481-82). Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481).

6.111 CB&I is acting responsibly in offering the 4% deal. (Neary, Tr. 1482).

### Response to RFOF 6.111

Respondents' finding is self-serving, unsupported by the record, and mischaracterizes Mr. Neary's testimony. Mr. Neary explained that CB&I could increase TVC prices by 50% consistent with its proposal to offer a firm fixed price and a 4-percent margin depending on how CB&I manipulates costs: "I guess I go right back to my question is I don't know . . . how they developed the bottom – how do they develop the number before they put 4 percent on it. I don't have that. I don't have that data." (Neary, Tr. 1481-82). Mr. Neary acknowledged that CB&I is behaving responsibly in not increasing by 50% the TVC price to TRW. (Neary, Tr. 1482). Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481).

6.112 CB&I's sale of XL benefits competition in the TVC market. (Proulx, Tr. 1757-58; Gill, Tr. 258).

### Response to RFOF 6.112

This finding is unsupported by the record. CB&I's sale of Xcel only affects competition

in thermal vacuum systems, *i.e.*, the temperature control systems used in TVCs. It does not restore competition in the TVC market. The testimony cited by Respondents does not support the finding. Mr. Proulx testified that it is beneficial to Boeing that CB&I no longer owns XL. (Proulx, Tr. 1757-58). He did not testify that it benefits competition in the TVC market. (*Id.*) Mr. Gill testified that he has “no idea” whether CB&I has retained any relationship with Xcel following CB&I’s sale of XL. (Gill, Tr. 258). Mr. Gill further testified that it is “better for business, *i.e.*, Howard Fabrication’s shop-built thermal vacuum chamber business, that XL is free to work with whomever they want to work. (Gill, Tr. 258). Since there is only one TVC supplier for XL to work with in the TVC market, CB&I’s sale of Xcel does not benefit competition in the TVC market.

6.113 CB&I was planning to exit the field-erected TVC market just prior to the Acquisition. (Scully, Tr. 1227; 1256-59). The sale of XL was one part of that plan. (Scully, Tr. 1227).

### Response to 6.113

The finding is unsupported by the record. Respondents do not cite any internal documents reflecting CB&I's alleged plan. Mr. Scully testified only regarding his state of mind and his statements are sheer speculation. (Scully, Tr. 1227). His speculative opinion is self-serving and should be given little weight because he was employed by CB&I at the time of the acquisition. Moreover, Mr. Scully's speculation regarding the direction CB&I was moving prior to the acquisition is based on CB&I's decision, a year after the acquisition, to sell Xcel and his purchase of that division from CB&I. (Scully, Tr. 1257, 1227 ("Q: And their desire to sell XL was based on that desire to exit? A: I believe that's true.")). Mr. Scully's testimony at pages 1256-59, cited by Respondents, does not relate to CB&I's plans prior to the acquisition. (Scully, Tr. 1256-59). Instead it relates to conversations he had with others at CB&I regarding CB&I's plans following the acquisition. (*Id.*)

Mr. Scully testified that no one at CB&I actually told him that CB&I was planning to exit the TVC market. Moreover, the CB&I managers who negotiated with Mr. Scully for the sale of XL Technologies did not tell Mr. Scully why CB&I wanted to sell XL. (Scully, Tr. 1245).

*See also CCRFF 6.57.*

6.114 Because CB&I no longer owns XL, XL and other thermal system vendors are free to compete for business, and CB&I can force these thermal systems companies to compete against each other as subcontractors for future TVC jobs. (Neary, Tr. 1490). This competition would benefit customers like TRW, since the thermal systems are an expensive part of a TVC. (Neary, Tr. 1490-91).

### Response to RFOF 6.114

Whether TVC customers would benefit from competition at the subcontractor level depends on whether CB&I passes through cost savings (Neary, Tr. 1481-82, 1490-91). In the past, rather than competitively bidding the thermal systems components to a subcontractor, PDM and CB&I formed alliances with a specific supplier of these products. (*See* Scully, Tr. 1118; CX 261 at CBI-H004029 (XL seeking to align with CB&I to expand its thermal vacuum systems business); CX 262 at CBI-H004037-38 (XL does not have "a way to build large chambers right now as PDM has a cozy relationship with XL's competitor, PSI")).

Mr. Scully testified that the supplier of the field-erected chamber determines whether it forms an alliance with one systems supplier or allows systems suppliers, such as XL Technologies and Chart, to compete for the systems portion of the project. (Scully, Tr. 1255-56); *see also* (Neary, Tr. 1490) ("up to [the chamber builder] to come forward with a thermal systems company").

6.115 It would also help competition in the TVC market if CB&I were to promise not to purchase another company such as XL for a period of 5-7 years. (Gill, Tr. 259-60).



### Response to RFOF 6.115

This finding is not supported by the record. Respondents cite only the testimony of Mr. Gill of Howard Fabrication. Howard Fabrication is a manufacturer of small thermal vacuum chambers. Mr. Gill believes it is beneficial to competition in thermal vacuum chambers if CB&I does not acquire a manufacturer of thermal systems. (Gill, Tr. 259-60). This has limited effect in the TVC market because there is only one TVC supplier with whom manufacturers of thermal systems can work. Therefore, CB&I refraining from acquiring a thermal system supplier does not benefit competition in the TVC market.

6.116 Boeing 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, Tr. 1756-57).

### Response to RFOF 6.116

Respondents' finding, which duplicates 6.109, mischaracterizes the record. Mr. Proulx did not say that Boeing would consider using such a supplier. (Proulx, Tr. 1756-57). He testified that Boeing desires builders with experience in constructing TVCs. (Proulx, Tr. 1756). He also stated that depending on the company's actual involvement, he would consider a company to be experienced if it had been a joint venture partner of CB&I or PDM on each phase of the construction process of a TVC. (Proulx, Tr. 1756-57).

6.117 There are companies in the marketplace that can build field-erected TVC's if they are given some training and instruction (Scully, Tr. 1229). Those companies include Matrix, Nooter, and Puget Sound Fabricators. (Scully, Tr. 1229-30).

### Response to RFOF 6.117

Respondents' finding, which essentially duplicates 6.108, is speculative. Mr. Scully, a partner of CB&I in TVC projects, testified that it may not be easy. (Scully, Tr. 1230). The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, "It would take more than mentoring" (Gill, Tr. 202). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW's Mr. Neary said "I've never heard of them." (Neary, Tr. 1486).

6.118 Matrix is a cryogenic tank fabricator in the U.S. (*See* Higgins, Tr. 1273-75; *see also* Newmeister, Tr. 2182-83; RX-273). Matrix has a substantial field-fabricated tank capability. (Higgins, Tr. 1274-75). This capability includes significant numbers of people who can weld and build field-erected structures. (Higgins, Tr. 1275).

### Response to RFOF 6.118

Respondents' finding mischaracterizes Mr. Higgins' testimony. Mr. Higgins did not testify that Matrix has a "substantial" field-fabricated tank capability; he simply testified that he

is aware “that they have a field-fabricated tank capability.” (Higgins, Tr. 1274). He further testified that he does not “know the depth of [Matrix’s] engineering capability.” (Higgins, Tr. 1275). Moreover, Mr. Higgins testified that he “would not consider Matrix as a partner for a large field-fabricated thermal vacuum chamber job at this time . . . .” (Higgins, Tr. 1273).

6.119 It would benefit competition if CB&I were to mentor a company like Matrix, Nooter or PSF on CB&I’s next field-erected TVC project by integrating that company’s engineering, fabrication and field-erection crews into the entire process. (Scully, Tr. 1230-31). The newly mentored company would possibly have more current experience in constructing a field-erected TVC than CB&I, since CB&I has not actually built one since 1984. (Scully, Tr. 1231).

#### Response to RFOF 6.119

Respondents’ proposed finding, which essentially duplicates Finding 107, is speculative. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring” (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW’s Mr. Neary said “I’ve never heard of them.” (Neary, Tr. 1486).

6.120 If CB&I were to mentor Matrix on a future field-erected TVC project, at the end of the mentored project Matrix could possibly be in a position to compete for field-erected TVC jobs, and this remedy is something that could help competition in the market. (Higgins, Tr. 1276).

#### Response to RFOF 6.120

Respondents’ proposed finding is speculation. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, “It would take more than mentoring” (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I’s offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I’s offer to provide mentoring or training to Howard Fabrication’s employees be sufficient to transform Howard Fabrication into “a real viable competitor” in the TVC market. (Neary, Tr. 1458). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW’s Mr. Neary said “I’ve never heard of them.” (Neary, Tr. 1486).

6.121 If Matrix were given a cost-free license to the combined technological know-how of CB&I and PDM as it relates to TVC’s, this transfer of knowledge would help Matrix become a properly qualified field fabricator of TVC’s. (Higgins, Tr. 1275). Furthermore, if CB&I offered to train the welders at Matrix on the particular methods for welding a field-erected TVC, it would help Matrix compete for these projects. (Higgins, Tr. 1275-76).



### Response to RFOF 6.121

Respondents' proposed finding is speculation. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). Mr. Gill, President of Howard Fabrication, testified, "It would take more than mentoring" (Gill, Tr. 202). Mr. Neary of TRW testified that CB&I's offer to provide Howard Fabrication with engineering information on how to design and build TVCs would not be sufficient for TRW to qualify Howard Fabrication as a TVC supplier. Nor would CB&I's offer to provide mentoring or training to Howard Fabrication's employees be sufficient to transform Howard Fabrication into "a real viable competitor" in the TVC market. (Neary, Tr. 1458). Even if they somehow gained some capability to build a TVC, these companies have no reputation in the TVC market. When asked about Matrix, TRW's Mr. Neary said "I've never heard of them." (Neary, Tr. 1486).

### **F. ANTICOMPETITIVE EFFECTS HAVE OCCURRED**

6.122 CB&I has not raised its prices above pre-acquisition levels since the Acquisition. (Scorsone, Tr. 5062).

### Response to RFOF 6.122

Mr. Scorsone's testimony is self-serving and is contradicted repeatedly by the record evidence. Further, Mr. Scorsone testified only regarding his state of mind, *i.e.*, his belief. (Scorsone, Tr. 5062). Notwithstanding Mr. Scorsone's statement regarding what he believes, the factual evidence in the record shows that CB&I raised its TVC price to Spectrum Astro and [Boeing] above pre-acquisition levels. CCF 1150-1151, 1154 (Spectrum Astro TVC price increase of 11%); CCF 1213-1216 ([ ] price increase of 35%).

The disconnect between Mr. Scorsone's sworn statements regarding his state of mind and the facts is highlighted by Mr. Scorsone's sworn statement that there is "ample competition" in the TVC market, a proposition abandoned by Respondents following the opening statements in this case. (Scorsone, Tr. 5063-64 (state of mind)). Mr. Scorsone could not even keep a straight face when he testified to his state of mind belief that the acquisition has not given him any greater freedom to increase his price in the TVC market. (Scorsone, Tr. 4882-88 (state of mind) ("Q: Sir, I was just noticing that you're smiling at the question. A: Yes.")).

6.123 CB&I will not be able to raise its prices after the Acquisition. (Scorsone, Tr. 5062). For example, since the Acquisition, CB&I has offered to the Court to sell the TVC to Spectrum Astro at a 4% margin. (Scorsone, Tr. 5064).

### Response to RFOF 6.123

Mr. Scorsone's testimony is self-serving and is contradicted repeatedly by the record evidence. Further, Mr. Scorsone testified only regarding his state of mind, *i.e.*, his belief. (Scorsone, Tr. 5062). Notwithstanding Mr. Scorsone's disavowals regarding what he believes, the factual evidence in the record shows that CB&I raised its TVC price to Spectrum Astro and

[ ] above pre-acquisition levels. CCF 1150-1151, 1154 (Spectrum Astro TVC price increase of 11%); CCF 1213-1216 ([ ] price increase of 35%).

The second sentence in Respondents' finding contradicts the first. If CB&I did not recognize that it is able to increase the TVC price following the acquisition, it would have no reason to propose a limit on its price increase. The remedy proposed by CB&I is not a proper substitute for competition. (Simpson, Tr. 5734). CB&I's manipulation of "costs" on the Cove Point LNG tank to inflate its actual margin demonstrates that a commitment by CB&I to sell the TVC to Spectrum Astro at a 4% margin is meaningless. CCF 799-815. Mr. Neary explained that CB&I could increase TVC prices by 50% consistent with its proposal to offer a firm fixed price and a 4-percent margin depending on how CB&I manipulates costs: "I guess I go right back to my question is I don't know . . . how they developed the bottom – how do they develop the number before they put 4 percent on it. I don't have that. I don't have that data." (Neary, Tr. 1481-82). Mr. Neary testified that TRW does not have the time, resources or ability to verify CB&I's claims regarding how many hours are required to manufacture a TVC. (Neary, Tr. 1481). Spectrum Astro is unlikely to have greater time, resources or ability than TRW to police CB&I.

6.124 The Acquisition has not given CB&I any greater freedom to increase prices on TVC's. (Scorsone, Tr. 4881-82).

#### Response to RFOF 6.124

Mr. Scorsone's testimony is self-serving and is contradicted repeatedly by the record evidence. Further, Mr. Scorsone testified only regarding his state of mind, *i.e.*, his belief. (Scorsone, Tr. 5062-64). Mr. Scorsone could not keep a straight face when he testified to his state of mind belief that the acquisition has not given him any greater freedom to increase his price in the TVC market. (Scorsone, Tr. 4882-88 (state of mind) ("Q: Sir, I was just noticing that you're smiling at the question. A: Yes.")). Notwithstanding Mr. Scorsone's denial regarding what he believes, the factual evidence in the record shows that CB&I has exercised its freedom to increase price by increasing TVC prices to Spectrum Astro and [ ]. CCF 1150-1151, 1154 (Spectrum Astro TVC price increase of 11%); CCF 1213-1216 ([ ] price increase of 35%). Additionally, the acquisition has enhanced CB&I's ability to collude with potential entrants such as Howard Fabrication on TVC projects. *See* CCF 1173-1178.

6.125 Pre-Acquisition, extremely low prices (e.g. below margin) that result from vigorous competition were a problem for an industry with such low demand. (Scully, Tr. 1179-81).

#### Response to RFOF 6.125

Respondents admit in this finding that "vigorous competition" in the TVC market prior to the acquisition kept TVC prices low. RFOF 6.125. TVC customers benefit from competition that reduces prices and keeps suppliers' margins below their desired level. Mr. Scully testified

that the low pre-acquisition pricing for TVCs resulted from competition between PDM and CB&I and that this pricing would likely increase due to the acquisition. (Scully, Tr. 1181).

Mr. Scully attributed his concerns about the low pre-acquisition prices for TVCs to “the self-serving interests of my company.” (Scully, Tr.1179-80). As President of XL Technologies, Mr. Scully will likely benefit personally from higher post-acquisition prices for TVCs.

6.126 The mere presence of Howard Fabrication in a bidding situation provides competition in pricing, and thus, lower prices. (Neary, Tr. 1444, 1478-79).

#### Response to RFOF 6.126

Respondents’ finding mischaracterizes Mr. Neary’s testimony. He described Howard Fabrication as helping in maintaining “the competitiveness within costs within the marketplace” and as “a check on CB&I’s budget price or CBI’s prices.” (Neary, Tr. 1444, 1478-79). Further, Mr. Neary explained, “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).

Additionally, as described in CCRFF 6.82, Mr. Neary testified that, at the end of the day, TRW was unlikely to award a TVC project to Howard Fabrication because “[w]e don’t quite see the technical competence nor the financial backing of the company as a viable competitor to Chicago Bridge & Iron at this time.” (Neary, Tr. 1442-43).

6.127 A CB&I salesman, Mr. Mike Miles, called Mr. John Gill of Howard Fabrication in mid-October, 2002 to set up a meeting to discuss a new opportunity to work together. (Gill, Tr. 242-44). Mr. Miles did not indicate the nature of the opportunity during the initial phone call. (Gill, Tr. 242-44, 251-52).

#### Response to RFOF 6.127

This finding mischaracterizes the record. Respondents characterize Mr. Michael Niles as merely “[a] CB&I salesman.” Mr. Miles is not a mere salesman. In fact, he is [

]. (CX 516 at CBI 019868-HOU *in camera*; CX 517 at CBI 019785-HOU *in camera*). The cover story that Mr. Miles contacted Mr. Gill to discuss an opportunity to work together is refuted by Mr. Scorsone who testified that 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). CCF 1174. Mr. Scorsone did not authorize Mr. Miles to contact Howard Fabrication regarding working together on any project. (Scorsone, Tr. 5059).

6.128 Neither man knew at the beginning of their meeting that they had both provided very rough order of magnitude pricing on the TRW project separately. (Gill, Tr. 252-53, 274; Scorsone, Tr. 5059-60).

### Response to RFOF 6.128

The finding is unsupported by the record and mischaracterizes the testimony of Mr. Gill and Mr. Scorsone. Mr. Gill testified only to his state of mind that he does not believe that Mr. Miles knew before the visit that Howard Fabrication had made a presentation to TRW about the TVC project. (Gill, Tr. 252). Mr. Scorsone testified only that Mr. Scorsone did not know Howard Fabrication had provided pricing to TRW until he learned of Mr. Miles' clandestine meeting with Mr. Gill. (Scorsone, Tr. 5060). Respondents chose not to call Mr. Miles as a witness, so the Tribunal must infer from the circumstances what Mr. Miles had in mind when he arranged the meeting with Mr. Gill. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). In any event, it is clear that his visit had nothing to do with partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62).

Further, even after Mr. Gill told Mr. Miles that Howard Fabrication was bidding on TRW's TVC project, Mr. Miles continued to discuss arrangements for coordinating CB&I's bid with Howard. (Gill, Tr. 274).

Respondents' characterization of the pricing provided by CB&I and Howard Fabrication as "very rough order of magnitude pricing" is misleading and mischaracterizes the record. Mr. Scorsone testified that CB&I "provided a ROM price." (Scorsone, Tr. 5059). Respondents' addition of the word "very" is unsupported even by Mr. Scorsone's testimony and minimizes CB&I's involvement in the TRW bid. In fact, Mr. Miles had been out to TRW prior to his meeting with Mr. Miles and had been provided a drawing of the proposed TVC by TRW. (Gill, Tr. 245). Mr. Gill explained that his involvement with TRW, prior to his meeting with Mr. Miles, involved far more than simply submitting a ROM price: "I was contacted by TRW and asked to give a company proposal to them about my ability to design and construct a large thermal vacuum system. I went to a meeting at TRW in front of a group of their engineers and gave a proposal on my ability to build a large thermal vacuum chamber. They asked me back with pricing for three options, and I gave a presentation to their financial group and their facilities engineering group considering design of a large thermal vacuum chamber." (Gill, Tr. 241).

6.129 During the meeting, Mr. Miles mentioned the possibility of Howard serving as a partner or subcontractor with CB&I for purposes of an unnamed proposed TVC project, since Howard Fabrication has worked with PDM as a subcontractor in the past. (See Gill, Tr. 246-248, 251-56; see also Scorsone, Tr. 5059-60). In the middle of the meeting, Mr. Miles slid an engineering diagram of the TRW TVC across the table to Mr. Gill. (Gill, Tr. 244-45).

### Response to RFOF 6.129

The finding is inaccurate and mischaracterizes the testimony of Mr. Gill and Mr. Scorsone. Mr. Gill testified that after discussing business in general, Mr. Miles raised the

possibility of working together on a project identified in a TRW document, which Mr. Miles showed to Mr. Gill. (Gill, Tr. 245). After Mr. Gill disclosed to Mr. Miles that this was the TRW TVC job, Mr. Miles asked Mr. Gill, “would you like to possibly work together on giving TRW a price on this job?” (Gill, Tr. 245). Respondents’ assertion that Mr. Miles made this proposal “since Howard Fabrication has worked with PDM as a subcontractor in the past” is unsupported by the record. Mr. Scorsone made clear that Mr. Miles is only involved in sales, not subcontracting or partnering and that Mr. Miles would have no familiarity with Howard’s fabrication capability. (Scorsone, Tr. 5059-62). Respondents chose not to call Mr. Miles as a witness, and there is no evidence that Mr. Miles was even aware that Howard Fabrication had worked with PDM as a subcontractor in the past. Respondents’ failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given,

would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

Further, even after Mr. Gill told Mr. Miles that Howard Fabrication was bidding on TRW's TVC project, Mr. Miles continued to discuss the possibility of coordinating CB&I's bid with Howard. (Gill, Tr. 274).

6.130 At that point, Mr. Gill told Mr. Miles that he had submitted rough pricing for the work. (Gill, Tr. 274). Thus, Mr. Miles and Mr. Gill were not aware until mid-way through the meeting that both CB&I and Howard Fabrication were already in the process of submitting separate budget pricing on the TRW project. (Gill, Tr. 252-53; Scorsone, Tr. 5059-60).

#### Response to RFOF 6.130

The finding is unsupported by the record and mischaracterizes the testimony of Mr. Gill and Mr. Scorsone. In his testimony cited by Respondents, Mr. Gill does not refer to "rough pricing." Instead, he testified that he told Mr. Miles that he had been out to TRW and that he was bidding on the TRW project. (Gill, Tr. 274, 252-53). Mr. Gill testified only to his state of mind that he does not believe that Mr. Miles knew before the visit that Howard Fabrication had made a presentation to TRW about the TVC project. (Gill, Tr. 252). Mr. Scorsone testified only that Mr. Scorsone did not know Howard Fabrication had provided pricing to TRW until he learned of Mr. Miles' clandestine meeting with Mr. Gill. (Scorsone, Tr. 5060). Respondents chose not to call Mr. Miles as a witness, so the Tribunal must infer from the circumstances what Mr. Miles had in mind when he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Mr. Scorsone made clear that Mr. Miles had a sales responsibility only and would not be involved in discussions concerning partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62). Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

Further, even after Mr. Gill told Mr. Miles that Howard Fabrication was bidding on TRW's TVC project, Mr. Miles continued to discuss arrangements for coordinating CB&I's bid with Howard. (Gill, Tr. 274).

6.131 Mr. Miles did not make this offer with the consent or knowledge of management at CB&I. (Scorsone, Tr. 5059-62).

#### Response to RFOF 6.131

Mr. Scorsone's testimony is self-serving and uncorroborated. Respondents chose not to call Mr. Miles as a witness, so the Tribunal must infer from the circumstances Mr. Miles' actions on behalf of CB&I in inviting Howard Fabrication to coordinate on making a bid or a price quote to TRW. (Gill, Tr. 247). Respondents' failure, under these circumstances, to call Mr. Miles as a

witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.132 Mr. Miles is an entry-level salesperson, and not a CB&I executive. (Scorsone, Tr. 5061-62). Mr. Miles does not have the authority to set contract prices, set bidding strategy, or determine who subcontractors are on a project of that size. (Scorsone, Tr. 5062).

### Response to RFOF 6.132

This finding mischaracterizes the record and creates the false impression that Mr. Miles has little responsibility within CB&I. Mr. Scorsone testified that Mr. Miles was “a first-level salesperson” rather than an “entry-level salesperson.” (Scorsone, Tr. 5061). Mr. Scorsone’s testimony is self-serving. Mr. Miles is [

]. (CX 516 at CBI 019868-HOU *in camera*; CX 517 at CBI 019785-HOU *in camera*).

Respondents and Mr. Scorsone belittle Mr. Miles and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents’ documents. Mr. Scorsone’s characterization is contradicted by Mr. Scully, who identified Mr. Lacey and other Business Development Managers, such as Mr. Miles, as CB&I’s “middle management.” (Scully, Tr. 1127). Moreover, respondents concede that pricing recommendations and sales strategies proposed by Mr. Miles and by other Business Development Managers are an important input in CB&I’s sales strategy: “[E]-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I.” (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott, CB&I Vice President of Sales for North America)).

Respondents chose not to call Mr. Miles as a witness. Respondents’ failure to call, as a witness, Mr. Miles and other Business Development Managers, such as Mr. Lacey and Mr. Knight “is itself persuasive that their testimony, if given, would have been unfavorable” to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”).

6.133 CB&I was unaware that Howard Fabrication had submitted budget pricing on the TRW project prior to Mr. Miles’ meeting. (Scorsone, Tr. 5060).

### Response to RFOF 6.133

The finding is unsupported by the record and mischaracterizes Mr. Scorsone's testimony. Mr. Scorsone testified only that Mr. Scorsone did not know Howard Fabrication had provided pricing to TRW until he learned of Mr. Miles' clandestine meeting with Mr. Gill. (Scorsone, Tr. 5060). Respondents chose not to call Mr. Miles as a witness, so the Tribunal must infer from the circumstances what Mr. Miles had in mind when he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

Further, even after Mr. Gill told Mr. Miles that Howard Fabrication was bidding on TRW's TVC project, Mr. Miles continued to discuss arrangements for coordinating CB&I's bid with Howard. (Gill, Tr. 274).

6.134 A subcontracting arrangement between Howard Fabrication and CB&I could provide TRW with lower costs, and ultimately with a lower price. (See Neary, Tr. 1480). There could be cost advantages with using Howard Fabrication as a subcontractor because Howard Fabrication has lower overhead than CB&I. (Neary, Tr. 1480).

### Response to RFOF 6.134

This finding is sheer speculation. Mr. Neary simply acknowledged that these are possibilities. (Neary, Tr. 1480). This speculation is contrary to the customer's opinion regarding the effect on TRW of CB&I's proposal to Howard Fabrication that the two companies coordinate on making a bid or a price quote to TRW. Mr. Neary testified that it is not proper that after making a presentation to TRW, one of the bidders went to the other bidder and asked it to coordinate on making a bid or a price quote to TRW. (Neary, Tr. 1451). Mr. Neary explained why CB&I's actions are improper: "One, because we're not going to get a competitive bid from two independent companies. . . . We'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." (Neary, Tr. 1451).

Further, this finding is irrelevant because there is no evidence that CB&I's proposal to Howard Fabrication to coordinate on making a bid or a price quote to TRW had anything to do with subcontracting. Mr. Scorsone made clear that Mr. Miles had a sales responsibility only and would not be involved in discussions concerning partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62). Respondents chose not to call Mr. Miles as a witness to explain why he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.135 At the end of the day, TRW could benefit by both having Howard Fabrication as a competitive bidder and then using Howard Fabrication as a low-cost subcontractor with CB&I. (Neary, Tr. 1480).

#### Response to RFOF 6.135

This finding is sheer speculation. Mr. Neary simply acknowledged that this is a possibility. (Neary, Tr. 1480). This speculation is contrary to the customer's opinion regarding the effect on TRW of CB&I's proposal to Howard Fabrication that the two companies coordinate on making a bid or a price quote to TRW. Mr. Neary testified that it is not proper that after making a presentation to TRW, one of the bidders went to the other bidder and asked it to coordinate on making a bid or a price quote to TRW. (Neary, Tr. 1451). Mr. Neary explained why CB&I's actions are improper: "One, because we're not going to get a competitive bid from two independent companies. . . . We'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." (Neary, Tr. 1451).

Further, this finding is irrelevant because there is no evidence that CB&I's proposal to Howard Fabrication to coordinate on making a bid or a price quote to TRW had anything to do with subcontracting. Mr. Scorsone made clear that Mr. Miles had a sales responsibility only and would not be involved in discussions concerning partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62). Respondents chose not to call Mr. Miles as a witness to explain why he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.136 If Howard Fabrication acts as a subcontractor for field-erected TVC jobs with CB&I or PDM, it allows those companies to save the customer money with lower costs. (Gill, Tr. 254-55). PDM has used Howard Fabrication as a subcontractor on TVC projects in the past.

#### Response to RFOF 6.136

This finding is sheer speculation and irrelevant because there is no evidence that CB&I's proposal to Howard Fabrication to coordinate on making a bid or a price quote to TRW had anything to do with subcontracting. Mr. Scorsone made clear that Mr. Miles had a sales responsibility only and would not be involved in discussions concerning partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62). Respondents chose not to call Mr. Miles as a witness to explain why he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.137 CB&I is still considering using Howard Fabrication as a subcontractor, but would seek the prior approval of the customer before doing so. (Scorsone, Tr. 5060).

### Response to RFOF 6.137

This finding is irrelevant because there is no evidence that CB&I's proposal to Howard Fabrication to coordinate on making a bid or a price quote to TRW had anything to do with subcontracting. Mr. Scorsone made clear that Mr. Miles had a sales responsibility only and would not be involved in discussions concerning partnering or subcontracting with Howard Fabrication. (Scorsone, Tr. 5059-62). Respondents chose not to call Mr. Miles as a witness to explain why he proposed to Mr. Gill that Howard Fabrication coordinate with CB&I on making a bid or a price quote to TRW. Respondents' failure, under these circumstances, to call Mr. Miles as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Mr. Scorsone's testimony is self-serving and uncorroborated by other evidence. Even after Mr. Scorsone learned that Mr. Miles had invited Mr. Gill to coordinate with CB&I on making a bid or a price quote to TRW, CB&I never communicated this to TRW. (Neary, Tr. 1479); *See also* (Gill, Tr. 247); (Scorsone, Tr. 5060).

6.139 Steps were taken to ensure that sensitive or confidential information was not exchanged at the meeting. (Scorsone, Tr. 4795).

### Response to RFOF 6.139

This finding is contrary to the record. Mr. Scorsone's statement is self-serving and is contradicted by his own admission that CB&I and PDM discussed, during the meeting, the Spectrum Astro TVC project for which CB&I and PDM were competing. (Scorsone, Tr. 4795). CCF 1120-22. Indeed, [ ] testified that it would be "inappropriate" for CB&I and PDM to discuss [ ] bidding prior to the acquisition. ([ ], *in camera*).

Mr. Scorsone's account of the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro's request for competing bids from CB&I and PDM, "that was the last [he] ever did with that" information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan's comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I's contract file on Spectrum Astro. (CX 1705).

6.140 During the course of the meeting, a joke was made by CB&I executive Mr. Bob Jordan that the Spectrum Astro job would probably be "DOA." (Scorsone, Tr. 4796). This joke referred to Spectrum Astro's financial condition. (Scorsone, Tr. 4796). The Spectrum Astro project was not on the agenda for the meeting -- the joke was a mere off-the-cuff comment. (Scorsone, Tr. 4798). The joke "lightened the tone of the meeting." (Scorsone, Tr. 4798).

### Response to RFOF 6.140

This finding is self-serving and contrary to the record. Mr. Scorsone’s testimony is self-serving and uncorroborated by other evidence. [ ] testified that it would be “inappropriate” for CB&I and PDM to discuss [ ] bidding prior to the acquisition. ([ ], *in camera*). Mr. Scorsone’s account of the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro’s request for competing bids from CB&I and PDM, “that was the last [he] ever did with that” information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan’s comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I’s contract file on Spectrum Astro. (CX 1705).

As described in Complaint counsel’s findings, CCF 1119-37, other evidence in the record indicates that the “DOA” comment was not a joke and was made during a discussion of the Spectrum Astro bids by CB&I and PDM. Mr. Scorsone later described this discussion to others at PDM and the comment was noted in the Spectrum Astro contract file. (Scorsone, Tr. 5113; CX 1705 at PDM-HOU009169).

6.141 No price discussion or bidding coordination occurred at the August meeting between CB&I and PDM representatives. (Scorsone, Tr. 4797). Pricing information, bidding strategy, and coordinated bidding were not discussed at any time. (Scorsone, Tr. 4796-97, 5045-46; Scully, Tr. 1221-22).

#### Response to RFOF 6.141

Mr. Scorsone’s testimony is self-serving and contradicted by Respondents’ actions following the meeting. Mr. Scorsone’s account of the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro’s request for competing bids from CB&I and PDM, “that was the last [he] ever did with that” information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan’s comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I’s contract file on Spectrum Astro. (CX 1705).

As described in Complaint counsel’s findings, CCF 1119-36, other evidence in the record indicates that CB&I and PDM coordinated pricing for the Spectrum Astro TVC. [ ], testified that it would be “inappropriate” for CB&I and PDM to discuss [ ] bidding prior to the acquisition. ([ ], *in camera*). Mr. Scully was not at the meeting and cannot corroborate Mr. Scorsone’s disavowals regarding the meeting. Mr. Scully’s testimony, cited by Respondents, does not refer to the meeting.

In fact, following the August 2000 meeting, CB&I and PDM throttled the aggressive price competition in TVC that they had engaged in prior to the meeting. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194).

6.142 Indeed, PDM wanted to win the Spectrum Astro project bidding, and used it's best efforts to win it. (Scorsone, Tr. 4797).

#### Response to RFOF 6.142

This finding is unsupported by the record. Mr. Scorsone's testimony is self-serving and unreliable. Mr. Scorsone's account of his actions with respect to Spectrum Astro following the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro's request for competing bids from CB&I and PDM, "that was the last [he] ever did with that" information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan's comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I's contract file on Spectrum Astro. (CX 1705).

As described in Complaint counsel's findings, CCF 1127-38, other evidence in the record indicates that PDM did not use its best efforts to win the Spectrum Astro project but rather coordinated its pricing strategy with CB&I. In fact, following the August 2000 meeting, CB&I and PDM tempered the aggressive price competition in TVC that they had engaged in prior to the meeting. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194).

6.143 PDM pursued this bid vigorously, but ultimately failed to win the letter of intent. (Scorsone, Tr. 5044, 5046).

#### Response to RFOF 6.143

Respondents' assertion that "PDM pursued this bid vigorously" is not supported by the record. Mr. Scorsone's testimony is self-serving, unreliable, and contrary to the record. Mr. Scorsone's account of PDM's actions with respect to Spectrum Astro following the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro's request for competing bids from CB&I and PDM, "that was the last [he] ever did with that" information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan's comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by

Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I's contract file on Spectrum Astro. (CX 1705).

As described in Complaint counsel's findings, CCF 1127-38, other evidence in the record indicates that PDM did not use its best efforts to win the Spectrum Astro project but rather coordinated its pricing strategy with CB&I. In fact, following the August 2000 meeting, CB&I and PDM tempered the aggressive price competition in TVC that they had engaged in prior to the meeting. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194).

6.144 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. (Scorsone, Tr. 5044). The work was needed for PDM to cover its overhead costs. (Scorsone, Tr. 5046).

#### Response to RFOF 6.144

Respondents' assertion that "PDM pursued this bid vigorously" is not supported by the record. Mr. Scorsone's testimony is self-serving, unreliable, and contrary to the record. Mr. Scorsone's account of PDM's actions with respect to Spectrum Astro following the meeting is not reliable because he gave incorrect testimony regarding his actions with respect to the information exchanged at the meeting. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro's request for competing bids from CB&I and PDM, "that was the last [he] ever did with that" information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan's comments regarding Spectrum Astro. (Scorsone, Tr. 5114). The information communicated by Mr. Jordan to Mr. Scorsone and then related by Mr. Scorsone to Mr. Steimer was considered by CB&I to be of sufficient significance that it was recorded in CB&I's contract file on Spectrum Astro. (CX 1705).

As described in Complaint counsel's findings, CCF 1127-38, other evidence in the record indicates that PDM did not use its best efforts to win the Spectrum Astro project but rather coordinated its pricing strategy with CB&I. In fact, following the August 2000 meeting, CB&I and PDM tempered the aggressive price competition in TVC that they had engaged in prior to the meeting. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194). Mr. Scully testified that he learned that PDM's margin on the Spectrum Astro project was higher than CB&I's initial margin of 8%. (Scully, Tr. 1194).

CB&I's manipulation of "costs" on the Cove Point LNG tank to inflate its actual margin demonstrates that even if the Tribunal accepted at face value Mr. Scorsone's claim that PDM bid a zero margin on the Spectrum Astro job, that does not mean that PDM bid aggressively. CCF

799-815. Mr. Neary explained that CB&I could increase TVC prices by 50% consistent with little or no margin depending on how CB&I manipulates costs. (Neary, Tr. 1481-82).

6.145 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).

#### Response to RFOF 6.145

This finding is unsupported by the record and attempts, without foundation, to shift blame to Chart Industries for PDM's pricing actions. Mr. Scorsone stated that he was concerned that in his view PDM's technology partner's "price was fairly high." (Scorsone, Tr. 5044). This simply affects how CB&I and Chart Industries would split the price paid by Spectrum Astro. Even a monopolist seeks to minimize its costs. Mr. Scorsone's testimony, cited by Respondents, does not support Respondents' assertion that this is the reason CB&I's price was high.

There are other reasons why CB&I's price may have been high. Mr. Lacey proposed that CB&I and PDM both bid high. CCF 1129. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed

on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194). Mr. Scully testified that he learned that PDM's margin on the Spectrum Astro project was higher than CB&I's initial margin of 8%. (Scully, Tr. 1194).

6.146 CB&I lowered its original price in order to win the job, and the price came in under Spectrum Astro's budget estimates. (Thompson, Tr. 2119-21).

#### Response to RFOF 6.146

The finding is unsupported by the record. Mr. Thompson's testimony, cited by Respondents, is only his state of mind opinion that CB&I wanted the work. (Thompson, Tr. 2119-21). Further, Respondents' finding mischaracterizes Mr. Thompson's testimony. He did not testify that CB&I lowered its original price in order to win the Spectrum Astro TVC project. (Thompson, Tr. 2119-21). In fact, CB&I's price to Spectrum Astro following the August 2000 meeting between CB&I and PDM was 8.4% above the price CB&I had quoted to Spectrum Astro prior to the meeting. CCF 1134. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194). Mr. Scully testified that he learned that PDM's margin on the Spectrum Astro project was higher than CB&I's margin. (Scully, Tr. 1194).

6.147 One of the lower level employees involved in the Spectrum Astro re-pricing effort was Mr. Lacey. (Scully, Tr. 1216-18).

#### Response to RFOF 6.147

The assertion in the finding that Mr. Lacey was "[o]ne of the lower level employees" involved with Spectrum Astro is incorrect and is misleading in its implication that Mr. Lacey did not have significant responsibility with respect to Spectrum Astro. Respondents admit that "Mr. Lacey was CB&I's contact person with Spectrum Astro." RFOF 6.150. [

]. (CX 1573 at 2/2 *in camera*). Mr. Scully identified Mr. Lacey as part of CB&I's "middle management." (Scully, Tr. 1127). In addition to his responsibilities on the Spectrum Astro project, Mr. Lacey was in charge of the proposal for [ ] and was responsible for CB&I's dealings with [ ]. ([ ] *in camera*; CX 1573 at 2/2 *in camera*).

Respondents and Mr. Scorsone belittle Mr. Lacey and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents' documents. Mr. Scorsone testified that "Dave Lacey is a first-level entry-level salesperson at Chicago Bridge & Iron." (Scorsone, Tr. 5045). Mr. Scorsone's characterization is contradicted by Mr. Scully, who identified Mr. Lacey and other Business Development Managers as CB&I's "middle management." (Scully, Tr. 1127). Moreover, respondents concede that pricing recommendations and sales strategies proposed by Mr. Lacey and by other Business Development Managers are an important input in CB&I's sales strategy: "[E]-mail discussions

regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I.” (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott, CB&I Vice President of Sales for North America)).

Respondents chose not to call Mr. Lacey as a witness. Respondents’ failure to call, as a witness, Mr. Lacey and other Business Development Managers, such as Mr. Miles and Mr. Knight “is itself persuasive that their testimony, if given, would have been unfavorable” to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”).

6.148 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).

#### Response to RFOF 6.148

The finding is incorrect. Mr. Scully identified Mr. Lacey as part of CB&I’s “middle management.” (Scully, Tr. 1127). [ ] (CX 1573 at 2/2 *in camera*). The assertion in the finding that Mr. Lacey “is a fairly lower level marketing and salesperson” is misleading in its implication that he did not have significant responsibility with respect to Spectrum Astro. Respondents admit that “Mr. Lacey was CB&I’s contact person with Spectrum Astro.” RFOF 6.150. In addition to his responsibilities on the Spectrum Astro project, Mr. Lacey was in charge of the proposal for [ ] and was responsible for CB&I’s dealings with [ ]. ([ ] *in camera*; CX 1573 at 2/2 *in camera*).

Respondents and Mr. Scorsone belittle Mr. Lacey and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents’ documents. Mr. Scorsone testified that “Dave Lacey is a first-level entry-level salesperson at Chicago Bridge & Iron.” (Scorsone, Tr. 5045). Pricing recommendations and sales strategies proposed by Mr. Lacey and by other Business Development Managers are an important input in CB&I’s sales strategy: “[E]-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the

margins to be set, the jobs to pursue, and the overall sales strategy for CB&I.” (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott, CB&I Vice President of Sales for North America)).

Respondents chose not to call Mr. Lacey as a witness. Respondents’ failure to call, as a witness, Mr. Lacey and other Business Development Managers, such as Mr. Miles and Mr. Knight “is itself persuasive that their testimony, if given, would have been unfavorable” to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”).

6.149 Mr. Scorsone and Mr. Lacey never discussed pricing on this project prior to the Acquisition. (Scorsone, Tr.5045).

#### Response to RFOF 6.149

Mr. Scorsone’s testimony is self-serving and uncorroborated by other evidence. Mr. Scorsone’s account regarding the persons with whom he discussed Spectrum Astro is not reliable because Mr. Scorsone gave incorrect testimony regarding his discussions concerning Spectrum Astro. Mr. Scorsone testified that after joining in laughter with CB&I executives regarding Spectrum Astro’s request for competing bids from CB&I and PDM, “that was the last [he] ever did with that” information. (Scorsone, Tr. 5111). Moments later, Mr. Scorsone acknowledged that after the meeting he informed Jeffrey Steimer of Mr. Jordan’s comments regarding Spectrum Astro. (Scorsone, Tr. 5114). Respondents chose not to call Mr. Lacey as a witness. Respondents’ failure, under these circumstances, to call Mr. Lacey as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

Mr. Lacey shared his pricing strategies with at least Mr. Scully, Rich Kooy, Jon Hagstrom and Carroll Davis. (CX 242 CBI-PL 4003344). Both Mr. Hagstrom and Mr. Davis hold management positions at CB&I with the title Vice-President, and Mr. Kooy was the sales representative for CB&I on the Spectrum Astro project. (Scully, Tr. 1125).

6.150 Mr. Lacey 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 CB&I’s contact person with Spectrum Astro. (Thompson, Tr. 2043). Meanwhile, Mr. Scorsone had final authority at PDM over the price offered to Spectrum Astro. (Scorsone, Tr. 5046).

#### Response to RFOF 6.150

The assertion in the finding that Mr. Lacey “is an entry-level marketing person” is incorrect and misleading in its implication that Mr. Lacey did not have significant responsibility with respect to Spectrum Astro. Mr. Scully identified Mr. Lacey as part of CB&I’s “middle management.” (Scully, Tr. 1127). [ ]  
(CX 1573 at 2/2 *in camera*). Respondents admit that “Mr. Lacey was CB&I’s contact person

with Spectrum Astro.” RFOF 6.150. In addition to his responsibilities on the Spectrum Astro project, Mr. Lacey was in charge of the proposal for [ ] and was responsible for CB&I’s dealings with [ ]. ([ ] *in camera*; CX 1573 at 2/2 *in camera*).

6.151 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).

#### Response to RFOF 6.151

Respondents’ finding mischaracterizes Mr. Scully’s testimony. Mr. Scully identified Mr. Lacey as part of CB&I’s “middle management.” (Scully, Tr. 1127). He further testified about Mr. Lacey as follows: “I think Mr. Lacey is a highly intelligent individual who did a lot of investigating and presented a lot of information to management for consideration, and because of the volume of information that he was able to extract and provide to management, only part of it was ever acted on.” (Scully, Tr. 1218). An idea of Mr. Lacey’s that was implemented by CB&I’s upper-level management was to acquire XL Systems. (Scully, Tr. 1127-28). Respondents chose not to call Mr. Lacey as a witness. Respondents’ failure, under these circumstances, to call Mr. Lacey as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.152 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).

#### Response to RFOF 6.152

Respondents’ assertion that “his extreme suggestions were ignored by his superiors” is unsupported by the record and mischaracterizes Mr. Scully’s testimony. He did not testify that Mr. Lacey’s superiors ignored his extreme suggestions. (Scully, Tr. 1219-21). An idea of Mr. Lacey’s that was implemented by CB&I’s upper-level management was to acquire XL Systems. (Scully, Tr. 1127-28). Respondents chose not to call Mr. Lacey as a witness. Respondents’ failure, under these circumstances, to call Mr. Lacey as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

6.153 Mr. Lacey’s ideas were ignored. Mr. Lacey’s proposal that both CB&I and PDM should bid high on Spectrum Astro prior to the Acquisition was never implemented. (Scorsone, Tr. 5045-46; Scully, Tr. 1221).

#### Response to RFOF 6.153

The finding is contradicted by evidence in the record. Mr. Scully confirmed that he did not see the same sort of fractious pricing behavior display itself on the Spectrum Astro project as he had observed on previous bidding competitions between CB&I and PDM. (Scully, Tr. 1194).

Mr. Scully testified that he learned that PDM's margin on the Spectrum Astro project was higher than CB&I's initial margin of 8%. (Scully, Tr. 1194). As outlined in Complaint counsel's findings, CCF 1132-36, CB&I and PDM management acted upon Mr. Lacey's ideas for bidding on the Spectrum Astro project. Respondents chose not to call Mr. Lacey as a witness. Respondents' failure, under these circumstances, to call Mr. Lacey as a witness is itself persuasive that his testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Another idea of Mr. Lacey's that was implemented by CB&I's upper-level management was to acquire XL Systems. (Scully, Tr. 1127-28).

Mr. Scorsone's testimony is self-serving.

6.154 [

]

Response to RFOF 6.154

Complaint counsel agree.

6.155 [

]

Response to RFOF 6.155

The assertion "without even considering CB&I as a potential supplier" is unsupported by the record including the testimony cited by Respondents.

6.156 [

]

Response to RFOF 6.156

Mr. Scorsone's testimony is self-serving and omits that CB&I forced [ ] to accept less for the same price PDM had offered. The project was [ ]. Following the acquisition, [ ] asked CB&I to renew the price PDM had bid for the TVC and to provide the price for modification on an existing [ ] TVC. CCF 1209-13. CB&I responded by informing [ ] that for [ ], CB&I would only modify the existing TVC and that the price of the TVC [ ] would now be [ ] (CX 1573 at 3 *in camera*). CB&I's price increase forced [ ] to settle for [ ] CCFF 1208, 1213, 1219.

6.159 [

]

Response to RFOF 6.159

Respondents' assertion that CB&I "did not have the information necessary to provide the firm fixed price" is incorrect and is based only on the self-serving testimony of Mr. Scorsone, which is contradicted by the evidence. [

] Documents submitted by Respondents in this matter included [ ] 1999 TVC proposal for [ ] (CX 1127 at CBI-HWH 052168-249). [ ] simply requested updated pricing on this [ ] proposal. ([Proulx, Tr. 1928-30], *in camera*). Prior to the acquisition, Mr. Scorsone had provided to [ ] a firm fixed price for the same project. RFOF 6.154.

6.160 [

]

6.161 [

]

6.162 [

]

Response to RFOF 6.160, 6.161, 6.162

Respondents' findings are misleading in that they suggest that [ ] did not view CB&I's updated pricing for the [ ] TVC as a firm, fixed price. Respondents cite [ ] testimony when he was simply acknowledging receiving a letter from CB&I that made the statements contained in RFOF 6.160 - 6.162.

[ ] testimony relating to his understanding of CB&I's updated pricing shows that he considered the pricing as a firm, fixed price. ([ ], *in camera*); see CCRFF 6.168. [ ] relied on the price provided by CB&I to settle for [ ] while paying the full price [ ]. CCF 1208, 1213, 1219.

6.163 [

] Such information would have been necessary for producing a firm fixed bid price. (*See Scorsone, Tr. 5000-02*).

Response to RFOF 6.163

Respondents' finding mischaracterizes [ ] testimony. [ ] did tell Mr. Lacey that the chamber would be constructed outside the building. Respondents' counsel did not give [ ] the opportunity to respond to the question about how the chamber would be moved into the building at [ ]. Contrary to Mr. Scorsone's testimony, Respondents' counsel stated that "[ ] is not that important." ([ ], *in camera*).

There is no evidence in the record that Mr. Lacey asked [ ] for information on the construction schedule in order to provide [ ] with an updated price for the [ ].

Mr. Scorsone's testimony regarding the data needed to develop a firm, fixed price is self-serving. Prior to the acquisition, Mr. Scorsone had provided to [ ] a firm fixed price for the same project. CCF 1208; RFOF 6.154.

6.164 [ ]

Response to RFOF 6.164

The finding is misleading in that it implies that CB&I only changes the price to the extent necessary to pass through changes in costs. Following the acquisition, CB&I has used expiration of prices "to stuff some extra profit into the work." (Thompson, Tr. 2119-20); (Scorsone, Tr. 5049). Confronted with a similar post-acquisition price increase by CB&I on a TVC job, Mr. Thompson was not surprised that CB&I tried "to stuff some profit in where they have an opportunity." (Thompson, Tr. 2121); (Scorsone, Tr. 5049). It was not in CB&I's interest to give the TVC customer accurate cost information that would show whether the price increase was justified by costs. (Thompson, Tr. 2123).

6.165 [ ]

Response to RFOF 6.165

Respondents' finding is contrary to the record and mischaracterizes [ ] testimony. [ ] did not testify that steel prices increased between 1999 and the Spring 2001 when he requested updated pricing [ ]. He testified that steel prices had fluctuated up and down during this time period. ([ ], *in camera*). In fact, stainless steel prices were lower when CB&I submitted its price quote to Boeing than when PDM had submitted its price. In June 1999, the month PDM submitted its bid, the stainless steel PPI was 84.3. (CX1605 at 2). In May 2001, the month CB&I submitted its price quote, the stainless steel PPI was 82.9, a drop of 1.7%. (CX1605 at 2).

[ ] testified that he did generally know the changes in labor and steel costs during the time period between the firm fixed price and updated pricing. He testified only that he did not know the specific cost changes and had not investigated the cost differences between the original PDM proposal and CB&I's updated ROM pricing. ([ ], *in camera*).

6.166 [ ]



“[w]e are not going to change the price from this point forward. We have a competitive process, price has been established . . .” (Thompson, Tr. 2065).

Mr. Thompson also testified that although execution of the contract was delayed for financial reasons, in the summer of 2001, Spectrum Astro proceeded to pay CB&I \$200,000 for engineering work on the TVC project in order to keep the project on schedule. (Thompson, Tr. 2066-67, 2107-08). Although Spectrum Astro had no credit problems, CB&I insisted that it pay CB&I up-front for this engineering work. (Thompson, Tr. 2067-68, 2107-08). Mr. Steimer told Mr. Thompson that the reason for this request was that CB&I “upper management . . . wants to make sure that we see some cash flow on this project before we put any more money into it. In other words, they would have to advance monthly payroll to work on the project.” (Thompson, Tr. 2107-08). Spectrum Astro complied because it had selected CB&I as the supplier for the project. (Thompson, Tr. 2068-69, 2108).

Spectrum Astro, a government contractor, was procuring the new TVC for a government program called SBIRS Low and had to comply with federal government contracting rules. (Thompson, Tr. 2038, 2040, 2106, 2128). Although the final contract for the new TVC had not been signed, the evidence supports a finding that CB&I and Spectrum Astro had reached a legally cognizable agreement for the supply of a TVC sometime between the source selection decision and the time CB&I began performing the engineering work for the project.

6.171 At this point, only some pre-contract engineering work had been completed on the job. (Scully, Tr. 1171). Spectrum Astro paid PDM and CB&I each \$75,000 to perform pre-contract design studies in which the information received by Spectrum Astro allowed it to prepare an RFQ (“request for quote”) for a TVC. (Scully, Tr. 1167-68; Thompson, Tr. 2066-67).

### Response to RFOF 6.171

Complaint counsel agrees that Spectrum Astro paid PDM and CB&I each \$75,000 to perform a pre-award design study that led to Spectrum Astro’s preparation of an RFQ for its TVC project. (Scully, Tr. 1167-68); (Thompson, Tr. 2044-46). Mr. Thompson described this study as determining “the proper size for this chamber . . . how many thermal zones should it have, should it be gaseous or liquid nitrogen . . . will it use a helium heat exchanger . . .” (Thompson, Tr. 2045). CB&I had a fixed price contract for this pre-award design study. Mr. Thompson testified that he knew “it was going to cost [CB&I and PDM] more to do those studies than we were paying them, and that was just part of the deal.” (Thompson, Tr. 2045-46).

Respondents incorrectly cite testimony from Mr. Scully, at (Scully, Tr. 1171), that does not support Respondents’ finding. At the cited passage, Mr. Scully describes payments by Spectrum Astro to CB&I\XL for its performance of engineering work on the awarded TVC project. Spectrum Astro paid CB&I\XL \$200,000 in the summer of 2001 in order to keep the engineering work on the TVC project moving along while it was seeking project financing. (Thompson, Tr. 2045-46, 2066-67, 2107-08); (Scully, Tr. 1171, 1253-54).

6.172 After the source selection was announced, Spectrum Astro did not proceed immediately to a contract because Spectrum Astro was having difficulty securing financing for the project. (Thompson, Tr. 2065-66).

#### Response to RFOF 6.172

Respondents' finding mischaracterizes the testimony of Mr. Thompson as described in the above reply findings. CCRFF 6.170 and 6.171. An agreement with CB&I to supply Spectrum Astro with a TVC was reached shortly after the source selection decision. (Thompson, Tr. 2065-69).

6.174 In fact, CB&I offered to provide Spectrum Astro with the financing for the Spectrum Astro project in November, 2000, but Mr. Thompson refused. (Thompson, Tr. 2106). In order for CB&I to offer financing, CB&I reviewed Spectrum Astro's financial condition. (Thompson, Tr. 2106).

#### Response to RFOF 6.174

Respondents' finding is incomplete. Mr. Thompson testified that he couldn't accept CB&I's financing offer because it did not comply with FASB Standard 13, a government contracting rule. (Thompson, Tr. 2106).

To the extent that Respondents' finding suggests that Spectrum Astro had financial problems that affected its relationship with CB&I, the finding is misleading. Mr. Thompson testified that Mr. Steimer of CB&I acknowledged that CB&I did not think Spectrum Astro had credit problems. (Thompson, Tr. 2106-08). As described in CCRFF 6.171, Mr. Steimer told Mr. Thompson that CB&I's upper management wanted advance payments for CB&I's work on the TVC project because they wanted cash flow before expending any more resources on the project. (Thompson, Tr. 2107-08).

6.175 CB&I was so concerned about Spectrum Astro's cash flow that it required Spectrum Astro to pay CB&I in advance for some post-award engineering work. (Thompson, Tr. 2107-09).

#### Response to RFOF 6.175

Respondents' finding is incorrect and mischaracterizes Mr. Thompson's testimony.

In a discussing CB&I's request for advance payments for engineering work on the TVC project, Mr. Steimer of CB&I told Mr. Thompson that CB&I had no problem with Spectrum Astro's credit. Rather, Mr. Steimer told Mr. Thompson that the reason for CB&I's request was that CB&I "upper management . . . wants to make sure that we see some cash flow on this project before we put any more money into it. In other words, they would have to advance monthly payroll to work on the project." (Thompson, Tr. 2107-08).

Mr. Steimer is a Vice-President at CB&I. (Thompson, Tr. 2079-80).

Mr. Thompson testified that Spectrum Astro had no credit problems. (Thompson, Tr. 2067-68).

6.176 CB&I's price expired 90 days after the source selection, in February, 2001, and Spectrum Astro did not request updated pricing until 10 months later in November, 2001. (Scorsone, Tr. 5047; *see also* Thompson, Tr. 2069). For almost one year, the project remained dormant. (Scorsone, Tr. 5048).

#### Response to RFOF 6.176

Respondents' finding is misleading with respect to Mr. Thompson's testimony. He testified that in November, 2001, he requested CB&I to "update for rates and factors" related to material and labor price changes. He described his request for this update of CB&I's pricing as a "very common" practice. (Thompson, Tr. 2069).

Contrary to Mr. Scorsone's self-serving testimony, the evidence indicates that Spectrum Astro's TVC project was not dormant between February, 2001 and November 2001. In the summer of 2001, Spectrum Astro proceeded to pay CB&I \$200,000 for engineering work on the TVC project in order to keep the project on schedule. (Thompson, Tr. 2066-67, 2107-08); *see also* (Scully, Tr. 1171, 1253-54) (on at least two occasions, Spectrum Astro made incremental payments to CB&I to support post-award engineering work). As described in CCFF 1143-45, CB&I insisted that Spectrum Astro provide advance payments to CB&I for this engineering work. Spectrum Astro complied with this request. (Thompson, Tr. 2068-69, 2108).

6.177 Prices expire because the materials costs and labor rates change over time. (Thompson, Tr. 2069; Scully, Tr. 1183).

### Response to RFOF 6.177

Mr. Thompson testified that he told Mr. Steimer that “. . . I'm going to allow you to update for rates and factors and material changes, design changes, but I'm going to hold your feet to the fire on the profit. . .” (Thompson, Tr. 2074); *see also*, (Thompson, Tr. 2138). However, following the acquisition, CB&I used the expiration of its price “to stuff some extra profit into the work” (Scorsone, Tr. 5049); (Thompson, Tr. 2119-20).

Despite multiple requests from Spectrum Astro, CB&I did not provide Spectrum Astro with satisfactory cost justification for its post-acquisition price increases and never informed Spectrum Astro that it had increased its profit margin on the project (Thompson, Tr. 2075-79, 2080-81, 2083, 2121); (CX 566 at 1-2). It was not in CB&I's interest to give Spectrum Astro accurate cost information which would show that its price increases were not justified by the pricing updates that Mr. Thompson had agreed to, namely “rates and factors and material changes, design changes.” (Thompson, Tr. 2074, 2123). Mr. Thompson was not surprised that CB&I tried “to stuff some profit in where they have an opportunity” (Thompson, Tr. 2121); (Scorsone, Tr. 5049).

6.178 The project was re-priced subsequently at CB&I's expense. (Scorsone, Tr. 5048). At the time of the repricing, Spectrum Astro and CB&I were negotiating. (Thompson, Tr. 2071)

### Response to RFOF 6.178

Respondents' finding mischaracterizes Mr. Thompson's testimony. He testified that Spectrum Astro and CB&I were in a negotiating position only with respect to “technical changes” to the TVC specifications which CB&I suggested as it performed engineering work on the project and found that certain technical specification changes to the TVC were appropriate. (Thompson, Tr. 2071).

Mr. Thompson did not consider himself in a negotiating position with respect to CB&I's profit margin on the TVC project. (Thompson, Tr. 2074, 2138). Mr. Thompson testified that he told Mr. Steimer that “. . . I'm going to allow you to update for rates and factors and material changes, design changes, but I'm going to hold your feet to the fire on the profit. . .” (Thompson, Tr. 2074); *see also* (Thompson, Tr. 2138). However, in repricing the TVC project after the acquisition, CB&I added “extra profit” to the total price. (Scorsone, Tr. 5049); (Thompson, Tr. 2119-20).

Despite multiple requests from Spectrum Astro, CB&I did not provide Spectrum Astro with satisfactory cost justification for its post-acquisition price increases and never informed Spectrum Astro that it had increased its profit margin on the project. (Thompson, Tr. 2075-79, 2080-81, 2083, 2121); (CX 566 at 1-2). It was not in CB&I's interest to give Spectrum Astro accurate cost information which would show that the price increases were not justified by the pricing updates that Mr. Thompson had agreed to, namely “rates and factors and material changes, design changes.” (Thompson, Tr. 2074, 2123). Mr. Thompson was not surprised that

CB&I tried “to stuff some profit in where they have an opportunity.” (Thompson, Tr. 2121); (Scorsone, Tr. 5049).

6.180 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). CB&I has not received compensation for all of the pre-contract work that it has done for Spectrum Astro. (Thompson, Tr. 2108-09).

#### Response to RFOF 6.180

Respondents finding is incorrect with respect to Mr. Thompson's testimony. The cited testimony does not support the finding that CB&I has not received compensation for all its pre-contract work.

Moreover, as described in CCRFF 6.171, CB&I agreed to receive \$75,000 from Spectrum Astro, under a fixed price contract, for a pre-award TVC design study. Mr. Thompson testified that he knew “it was going to cost [CB&I] more to do those studies than we were paying them, and that was just part of the deal.” (Thompson, Tr. 2045-46). Spectrum Astro paid CB&I \$75,000 for this study. (Scully, Tr. 1167-68); (Thompson, Tr. 2044-46).

Mr. Scorsone's testimony is self-serving.

6.181 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).

#### Response to RFOF 6.181

Mr. Scorsone's testimony is a self-serving justification for a simple post-acquisition price increase.

As described in CCRFF 6.171, CB&I agreed to provide Spectrum Astro with a pre-award design study for its TVC for \$75,000. (Scully, Tr. 1167-68); (Thompson, Tr. 2044-46). Mr. Thompson testified that he knew “it was going to cost [CB&I] more to do those studies than we were paying them, and that was just part of the deal.” (Thompson, Tr. 2045-46). Spectrum Astro paid CB&I \$75,000 for this study. (Scully, Tr. 1167-68); (Thompson, Tr. 2044-46).

Moreover, Mr. Scorsone also testified that CB&I had written off its pre-contract costs for the Spectrum Astro TVC the preceding year. (Scorsone, Tr. 5120-21). It is an unusual accounting practice to write off a cost in one year and charge a customer for that same cost in the next year.

Mr. Scully testified that most companies in the industry do not directly charge customers for pre-contract costs but simply absorb these costs in their overhead account. (Scully, Tr. 1174-75).

6.182 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). The costs on the project increased on this re-pricing, according to CB&I's documents. (Scorsone, Tr. 5116-17).

## Response to RFOF 6.182

Spectrum Astro never had access to CB&I's estimated costs for the new additions to the work scope. (Thompson, Tr. 2122). 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).

Respondents' finding is incorrect, mischaracterizes Mr. Thompson's testimony and relies on self-serving testimony by Mr. Scorsone. Mr. Thompson testified that he did not expect "a substantial increase" in price due to changes in the work scope for the TVC project. Although there were some technical changes that could have increased the price, there were also deletions that would reduce the price. For example, one technical change related to "mezzanine work that was being done in the high bay that we transferred from [CB&I] to Woods, which should have dropped the [CB&I] price." (Thompson, Tr. 2073). Mr. Thompson testified that, even with the work scope changes, he "basically thought the price would stay about the same . . . ." (Thompson, Tr. 2073).

On several occasions, Spectrum Astro requested that CB&I provide it with detail documentation as to the rationale for the price increase for the TVC project. (Thompson, Tr. 2075-76, 2080-81, 2083) (CX 566 at 1-2). However, despite these requests, CB&I did not provide Spectrum Astro with its estimated cost changes for the TVC project. (Thompson, Tr. 2122). It was not in CB&I's interest to give Spectrum Astro accurate cost information which would show that its price increases were not justified by the pricing updates that Mr. Thompson had agreed to, namely "rates and factors and material changes, design changes." (Thompson, Tr. 2074, 2123). Mr. Thompson was not surprised that CB&I tried "to stuff some profit in where they have an opportunity." (Thompson, Tr. 2121).

Finally, Mr. Thompson did not testify that his estimators had to "guess" as to why the price increased. Although CB&I refused to show Spectrum Astro its "build-up of the rates and materials and the labor that went into that" because sharing this information was not in CB&I's "best interest", Spectrum Astro's estimators were able to analyze the price increase based on information that they did have. (Thompson, Tr. 2118, 2122-23).

6.183 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). 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).

## Response to RFOF 6.183

Respondents' finding is incorrect. Mr. Scorsone's testimony is self-serving and uncorroborated by other evidence. Moreover, Mr. Scorsone's testimony that there are cost risks associated with moving a TVC into a building is inconsistent with CB&I's pricing actions for Spectrum Astro's TVC.

At the time of the November 2001 price increase, Spectrum Astro had not yet notified CB&I that it needed to build the chamber outside the building and move it by rail into the building. Spectrum Astro notified CB&I of this work scope change on June 12, 2002. (Thompson, Tr. 2081, 2091); (RX 401 at CBI 066189). After receiving notice of this work scope change, on June 28, 2002, CB&I sent Spectrum Astro a new pricing update that actually lowered the pricing to \$11,553,790. (CX 1570 at 6, 65-74). This pricing reduction suggests that it is cheaper to build the TVC outside the building and move it into the building on rails.

6.184 Additionally, the risk of delay causes prices to increase. Satellite programs awarded by the Government are sometimes delayed. (Thompson, Tr. 2129). As a result, vendors of satellites must take account of the risk that these programs might be cancelled or delayed. (Thompson, Tr. 2129). The delay of the SBIRS Low satellite program affected Spectrum Astro's need for a field-erected TVC. (Thompson, Tr. 2129-30).

#### Response to RFOF 6.184

Respondents' finding mischaracterizes Mr. Thompson's testimony. He did not testify that 1) the risk of delay of a TVC project causes prices to increase or that 2) vendors of satellites must take account of the risk that these programs might be cancelled or delayed. (Thompson, Tr. 2129-30).

6.185 The November, 2001 price increase also reflected changes in material costs and labor rates. (Scully, Tr. 1222). These costs had to be completely re-evaluated each time the project was re-priced. (Scully, Tr. 1222-23).

#### Response to RFOF 6.185

Respondents' finding mischaracterizes Mr. Scully's testimony. He did not testify that material costs and labor rates had to be completely re-evaluated each time the project was re-priced. Rather, he testified that you have to look at "your costs anew for essentially new parts of the project" related to work scope changes (*i.e.*, specification changes).

Respondents' assertion that CB&I's November 2001 price increases reflected changes in material costs is contradicted by the record. In fact, stainless steel prices were 14.3% lower in November 2001 than when CB&I and PDM submitted bids to Spectrum Astro in November 2000. The November 2000 PPI for stainless steel was 96.5; in November 2001 it was 82.7. (CX 1605 at 2).

6.186 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).

#### Response to RFOF 6.186

Mr. Scorsone's testimony is self-serving and uncorroborated by other evidence.

As described in prior reply findings, CCRFF 6.170, although the final contract had not yet

been signed, Spectrum Astro had a legally cognizable agreement with CB&I for the supply of its TVC. This agreement did not allow for an increase in CB&I's profit margin on the project. (Thompson, Tr. 2074, 2138) (Mr. Thompson did not consider himself in a negotiating position with respect to CB&I's profit margin on the TVC project.). *See* CCRFF 6.178.

However, following the acquisition, CB&I misused its right to "update for rates and factors" by stuffing "some extra profit into the work." (Thompson, Tr. 2069, 2119-20); (Scorsone, Tr. 5049). Mr. Thompson was not surprised that CB&I tried "to stuff some profit in where they have an opportunity." (Thompson, Tr. 2121).

6.187 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). 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).

#### Response to RFOF 6.187

Respondents' finding mischaracterizes Mr. Thompson's testimony. Mr. Thompson testified that Spectrum Astro was surprised that the price for the TVC project increased by \$1.2 million, a substantial amount. (Thompson, Tr. 2074, 2140). Although Mr. Thompson expected some price change, he "basically thought the price would stay about the same . . . ." (Thompson, Tr. 2073, 2140). *See* CCRFF 6.182.

Mr. Thompson did not testify that Spectrum Astro had no basis for the "hope" that the price would increase less than \$1.2 million. (Thompson, Tr. 2123). Although CB&I refused to show Spectrum Astro its build-up of the rates, materials and labor costs, Spectrum Astro's estimators were able to analyze the price increase based on information that they did have. (Thompson, Tr. 2118, 2122-23).

Spectrum Astro did not have access to CB&I's labor rates because, despite Spectrum Astro's repeated requests for detail cost data justifying the price increase, CB&I refused to provide these rates to Spectrum Astro. (Thompson, Tr. 2075-76, 2080-81, 2083; CX 566 at 1-2; Thompson, Tr. 2122). *See* CCRFF 6.182. It was not in CB&I's interest to give Spectrum Astro accurate cost information which would show that its price increases included increased profits which Mr. Thompson had not agreed to. (Thompson, Tr. 2074, 2122-23; Scorsone, Tr. 5049).

6.188 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).

#### Response to RFOF 6.188

Mr. Scorsone's testimony is self-serving and is uncorroborated by other evidence.

Mr. Scully testified that if PDM were still in existence, CB&I's managers would have

tried to recapture \$500,000 in pre-contract costs on the Spectrum Astro project. (Scully, Tr. 1223-24). Mr. Scully's speculation is inconsistent with his testimony that most companies in the industry do not directly charge customers for pre-contract costs but rather simply absorb these costs in their overhead account. (Scully, Tr. 1174-75). Mr. Scully also testified that he expected pricing of TVCs to increase as a result of the acquisition. (Scully, Tr. 1181).

Respondents' finding is inconsistent with other findings by Respondents that essentially support the proposition that, pre-acquisition, CB&I was not tied down to specific pricing and other contract terms for the Spectrum Astro project. *See, e.g.*, RFOF 6.170, 6.172, 6.176, 6.178. If CB&I was not tied down to these terms pre-acquisition, CB&I was certainly free to increase Spectrum Astro's pricing by increasing profits after the acquisition when Spectrum Astro had no alternative supplier for its TVC project.

6.189 Even if PDM was still in existence at the time of the Spectrum Astro re-pricing, CB&I's lower-level and mid-level employees working on that project would still have tried to pass on the \$500,000 in pre-contract costs to the customer. (Scully, Tr. 1223).

#### Response to RFOF 6.189

Mr. Scully's testimony is speculative. It is also inconsistent with Mr. Scully's testimony that most companies in the industry do not directly charge customers for pre-contract costs but rather simply absorb these costs in their overhead account. (Scully, Tr. 1174-75).

Respondent's finding is inconsistent with RFOF 6.190 which concedes that Mr. Scorsone personally, rather than CB&I's lower-level and mid-level employees, added extra profits into Spectrum's Astro's price. (Scorsone, Tr. 5048).

6.190 Mr. Scorsone was personally responsible for determining the new price for Spectrum Astro on its re-submitted bid and included extra profit into the new price. (Scorsone, Tr. 5048).

#### Response to RFOF 6.190

Complaint counsel agrees with Respondents' finding.

6.191 CB&I prepared a document with a cost breakdown for its own internal use. (Scorsone, Tr. 5236-37). CB&I does not disclose its costs or margin to its customers. (Thompson, Tr. 2120). Mr. Scorsone reviewed it and asked someone to add money for pre-contract costs. (Scorsone, Tr. 5236-37). Mr. Scorsone did not tell that person which line item to add money to, and as a result, that person chose to add the money to the margin. (Scorsone, Tr. 5235-37).

#### Response to RFOF 6.191

Mr. Scorsone's testimony regarding his failure to tell Mr. Lacey which line item to use for charging the precontract costs is self-serving.

The fact that Mr. Scorsone instructed Mr. Lacey to increase the price to Spectrum Astro is contrary to Respondents' assertions that Mr. Lacey is a lower-level employee whose pricing ideas for the Spectrum Astro project were ignored. (Scorsone, Tr. 5236); *see also* RFOF 6.147, 6.148 and 6.152).

Mr. Thompson did not testify that CB&I does not disclose its costs or margin to its customers. He simply testified that CB&I refused to share this information with Spectrum Astro, despite Spectrum Astro's requests. (Thompson, Tr. 2120). He also testified that in his experience, it was in a subcontractor's best interest to share this information with a customer to justify a price increase. (Thompson, Tr. 2123). In this case, however, it was not in CB&I's

interest to disclose to Spectrum Astro the facts underlying the price increases because they included an increase in CB&I's profit margin. (Scorsone, Tr. 5049).

Contrary to Respondents' finding, other evidence in the record indicates that CB&I does disclose its costs and margin with some customers. *See, e.g.* (CX 444 at PDM-H002750-002754) (Praxair - CB&I Partnering Agreement); (Bryngelson, Tr. 6136-37) (describing open book contract arrangement with CB&I).

6.192 CB&I attempted to recover pre-contract costs from Spectrum Astro that amounted to approximately \$500,000. (Scully, Tr. 1215-16, 1223). This amount accounts for the 4% increase in margin that was included in the re-pricing. (Scully, Tr. 1216).

#### Response to RFOF 6.192

As described in CCRFF 6.171, the pre-contract costs had already been bargained and paid for by Spectrum Astro.

6.193 Spectrum Astro did not like CB&I's November, 2001 price for the TVC project, but this situation was a pretty common business dispute. (Thompson, Tr. 2117). It is not unusual for a contractor to stuff more profit into a proposal when they have an opportunity as part of a negotiation. (Thompson, Tr. 2121).

#### Response to RFOF 6.193

Respondents' finding mischaracterizes Mr. Thompson's testimony. Mr. Thompson simply testified that he has been told by some of his customers that they don't like his price for a satellite. In an answer to a follow-up question, Mr. Thompson testified that this is a common dispute between suppliers and customers. (Thompson, Tr. 2121).

Other testimony from Mr. Thompson indicates that he did not view CB&I's price increase as a common business dispute. (Thompson, Tr. 2073-74, 2138, 2140); *see* CCRFF 6.182.

Mr. Thompson did not testify that "it is not unusual for a contractor to stuff more profit into a proposal when they have an opportunity . . .". He simply testified that he was not surprised that CB&I tried to increase its margin on Spectrum Astro's TVC project and that such an increase in margin was not appropriate. (Thompson, Tr. 2121, 2138).

6.194 Business disputes with customers are common occurrences. (Scorsone, Tr. 4834-36). It's also not uncommon for a situation to arise in which a customer demands that the contractor perform the work in a manner different from what was assumed when the bid was initially submitted. (Scorsone, Tr. 4836). Such changes can impact the costs of a project, and this typically result in dispute resolution elements of the contract being activated. (Scorsone, Tr. 4836-37). Such disputes have no impact on the contractor and the customer working together in the future on other projects. (Scorsone, Tr. 4837). The price changes has nothing to do with competition; rather, the change is related to change orders requested by the customer. (Scorsone, Tr. 5049; Scully, Tr. 1172-73, 1222, 1224).

### Response to RFOF 6.194

Mr. Scorsone's testimony is unreliable, self-serving, speculative and not supported by the record. Moreover, it does not directly relate to CB&I's pricing actions for Spectrum Astro's TVC.

Respondents' finding mischaracterizes Mr. Scully's testimony, which directly relates to specific pricing increases on the Spectrum Astro TVC project. Mr. Scully's cited testimony does not support the general proposition that "price changes has nothing to do with competition; rather, the change is related to change orders requested by the customer." (Scully, Tr. 1172-73, 1222, 1224).

6.195 The November, 2001 price expired again after 90 days without Spectrum Astro acting on the new price. (Scorsone, Tr. 5051). After the second price had expired, Spectrum Astro waited six or seven months before requesting an updated price from CB&I. (Scorsone, Tr. 5051). The companies did not have a contract or financing at that point. (Scorsone, Tr. 5051-53).

### Response to RFOF 6.195

Respondents' finding mischaracterizes Mr. Scorsone's testimony. Mr. Scorsone testified that after the second price had expired, Spectrum Astro waited three months, not six or seven months, before requesting an updated price from CB&I.

Mr. Scorsone's testimony mischaracterizes the actions taken by Spectrum Astro after receiving the November 2001 price increase. In response to the price increase, Spectrum Astro requested that CB&I supply it with detailed cost justification for the price increase. CB&I never responded satisfactorily to this request. *See, e.g.*, CCRFF 6.182, CCRFF 6,196. Additionally, as described in prior reply findings, *see, e.g.*, CCRFF 6.170, since the summer of 2001, CB&I was performing engineering work on the Spectrum Astro TVC project. Spectrum Astro paid CB&I for all its post-award engineering work. (Thompson, Tr. 2108-09).

6.196 In May, 2002, Spectrum Astro responded to the November, 2001 price asking CB&I to try again. (Scorsone, Tr. 5051). On June 25, 2002, CB&I provided Mr. Thompson with an updated price in the amount of \$11,553,790, a decrease of roughly \$500,000 from the previous price update. (Thompson, Tr. 2091-92).

### Response to RFOF 6.196

Respondents' finding is misleading because it does not describe all the actions taken by Spectrum Astro after receiving the November 2001 price increase.

Soon after the November 2001, Spectrum Astro complained to CB&I about the November 2001 price increase and asked CB&I to provide written cost justification for the increase. (Thompson, Tr. 2074-76). On December 19, 2001, CB&I sent Spectrum Astro a letter to justify the increase. (Thompson, Tr. 2078-90; CX 1570 at 5, 57-60). Spectrum Astro did not find this letter to be adequate justification for the November 2001 price increase and again, on

May 16, 2002, asked CB&I for written justification for the increase. (Thompson, Tr. 2080-81, 2083; CX 566 at 1-2).

6.197 CB&I lowered its price in June, 2002, because Mr. Scorsone was aware that the customer was having difficulty obtaining financing, and he wanted to assist them by making the project more viable with a lower price. (Scorsone, Tr. 5051-53).

#### Response to RFOF 6.197

The finding and Mr. Scorsone's testimony on which it is based are self-serving and uncorroborated by other evidence.

CB&I provided Spectrum Astro with no explanation for its price reduction in June 2002, which occurred a few days after Mr. Thompson's deposition in this proceeding. (Thompson, Tr. 2092).

6.198 When CB&I offered its re-pricing in June, 2002, Scorsone was completely unaware that Spectrum Astro's CEO was having his deposition taken in connection with this proceeding. (Scorsone, Tr. 5053). The price was not lowered as a result of anything that was happening in the deposition. (Scorsone, Tr. 5053). Rather, the updated pricing was provided in response to Spectrum Astro's May, 2002 request for pricing. (Thompson, Tr. 2124-25). In other words, CB&I was working on the re-pricing weeks before Mr. Thompson's deposition took place. (Thompson, Tr. 2124-25).

#### Response to RFOF 6.198

The finding and Mr. Scorsone's testimony on which it is based are self-serving and uncorroborated by other evidence.

Respondents' finding mischaracterizes Mr. Thompson's testimony. Mr. Thompson did not testify that CB&I was working on the re-pricing of Spectrum Astro's TVC weeks before his deposition took place. (Thompson, Tr. 2124-25).

The timing of CB&I's June 2002 price reduction indicates that CB&I lowered the price in order to affect the outcome of this litigation. Because this pricing action was manipulated by CB&I, it should not be considered by this Tribunal as evidence that there are no anticompetitive effects in the TVC market from the acquisition.

Spectrum Astro did not receive a response to its May 16, 2002 pricing request until June 12, 2002, which was a few days before Mr. Thompson's deposition in this matter on June 17, 2002. (Thompson, Tr. 2089; RX 401). Prior to his deposition, Mr. Thompson had a telephone conversation with Mr. Leon of Winston & Strawn about his appearance at the deposition. During this conversation, Mr. Thompson discussed CB&I's price increase for the thermal vacuum chamber. (Thompson, Tr. 2089-90).

In its June 12, 2002 letter to Spectrum Astro, CB&I promised to give Spectrum Astro an

updated proposal during the week of June 17, 2002 that would include adjustments for building the chamber outside the building. (Thompson, Tr. 2081, 2091; RX 401 at CBI 066189). However, CB&I did not send Spectrum Astro the updated proposal until June 28, 2002, after Mr. Thompson's deposition. (CX 1570 at 6, 65-74).

6.199 Spectrum Astro does not plan to proceed with the field-erected TVC project for Spectrum Astro. (Thompson, Tr. 2097, 2103-04). The decision is the result of "government action." (Thompson, Tr. 2097). The lack of financing also influenced the decision. (Thompson, Tr. 2105). It will be a long time before the Spectrum Astro job is actually built, if at all. (Scully, Tr. 1225-26).

#### Response to RFOF 6.199

Respondents' finding mischaracterizes Mr. Thompson's testimony. He testified that currently Spectrum Astro has no plans to continue with the TVC project due to government action but that in the future Spectrum Astro may proceed with the project. (Thompson, Tr. 2097, 2103-04).

Respondents' finding mischaracterizes Mr. Scully's testimony. Mr. Scully testified that the Spectrum Astro TVC may be built, but not for a long time. (Scully, Tr. 1225-26).

6.200 Instead, Spectrum Astro intends to build a smaller shop-fabricated chamber, a product which CB&I does not build. (Thompson, Tr. 2104-2105).

#### Response to RFOF 6.200

Respondents' finding is misleading to the extent that it implies that CB&I did not supply shop-fabricated thermal vacuum chambers prior to the time it sold XL Technologies to Mr. Scully. *See* CCRFF 6.25.

6.201 The current proposed price (the June, 2002 re-pricing) has expired, and Spectrum Astro does not have a currently valid price for the TVC job. (Thompson, Tr. 2103; Scully, Tr. 1186)

#### Response to RFOF 6.201

In the future, CB&I may again increase its pricing on Spectrum Astro's TVC because it faces no competition in the TVC market post-acquisition.

6.202 Two years have elapsed since the project was awarded to CB&I/XL, and the Spectrum Astro TVC job was never built, nor was CB&I ever released to begin work on that project. (Scully, Tr. 1182). [  
]

#### Response to RFOF 6.202

Respondents' finding mischaracterizes Mr. Scully's testimony. Mr. Scully simply testified that the Spectrum Astro TVC has not been built. (Scully, Tr. 1182). He did not testify

that CB&I was never released to begin work on the project. Rather, he testified that CB&I/XL performed engineering work on the project after the award and received payments for this work. (Scully, Tr. 1171, 1253-54); *see also* CCRFF 6.171.

Mr. Scorsone's testimony is self-serving and inconsistent with the evidence that Spectrum Astro paid CB&I \$200,000 for engineering work on its TVC project. (Thompson, Tr. 2066-67, 2107-08).

## **V. COMPLAINT COUNSEL CARRIED ITS BURDEN OF PROOF AND MORE**

### **A. COMPLAINT COUNSEL DEMONSTRATED ANTICOMPETITIVE EFFECTS AND THAT BUDGET PRICING IS USED IN CUSTOMERS' DECISION-MAKING PROCESSES**

#### **1. Budget Pricing and Firm Fixed Bid Pricing**

7.1 A budgetary estimate, also known as rough order of magnitude pricing ("ROM"), is different from a firm fixed bid price. (Glenn, Tr. 4126; Neary, Tr. 1432, 1438; Hall, Tr. 1867; Carling, Tr. 4472). Budget prices are more imprecise than firm fixed bid prices. (Carling, Tr. 4472; Scorsone, Tr. 4999).

#### Response to RFOF 7.1

Respondents' proposed finding is incorrect. Budget prices are not clearly distinguishable from bids. (JX 23 at 27-28 (Cutts Dep.) ("Q. . . . do you consider budget pricing to be a bid? A. Yes and no.")). [ ], described the line between a budget price and a bid for LNG tanks "as a fine line. It's a very difficult line" When the budget price is "for a client who is trying to get a certain approval of monies . . . it's very difficult to define whether that's really just a budget or a bid. Could it be awarded on that bid? Yes. Therefore, it's more than just a budget." (JX 23 at 27-28 (Cutts Dep.)).

A firm fixed bid is only one form of pricing used by Respondents to sell the relevant products. (Glenn, Tr. 4123-25). Budget prices are usually the first round of prices provided by competitors (Respondents' Post-Trial Brief at 128), and bidding may involve multiple rounds if the customer does not agree to sole-source from CB&I. During the bidding process or sole source negotiation, the supplier learns what, if any, competition it faces and adjusts its price accordingly. Respondents' Post-Trial Brief at 128. CB&I gains competitive intelligence through its customers as customers inform suppliers regarding the competition they face. Respondents' Post-Trial Brief at 128. Where competitive bidding occurs following receipt of budget prices, customers attempt to play suppliers off each other, providing further competitive intelligence to suppliers and often providing suppliers additional opportunities to adjust their prices. (Scorsone, Tr. 5040-41 ("we were told we could sharpen our pencil."); Patterson, Tr. 362-63). Respondents' Post-Trial Brief at 128.

Frequently, Respondents negotiate a price with the customer through a sole source contract. (Glenn, Tr. 4123). In a sole-source contract the price is negotiated following receipt of an initial price quote from the supplier. (Glenn, Tr. 4123; Neary, Tr. 1440). The initial price quote is frequently referred to as a "budget price." Budget prices are provided to customers for

the relevant products to “meet their requirements that they have some sort of competition before they select someone to move forward with.” (Glenn, Tr. 4126). In sole-source negotiations, budget prices are the most important round of prices because that is the only stage at which customers have an opportunity to compare competitors’ prices.

A budget price is an initial price quote that provides the basis for selecting a supplier and negotiating a final price. (Neary, Tr. 1440 (“We first receive their initial price. Then we select the vendor. Then we’ll negotiate with the vendor for a best and final offer.”)). Budget prices are initial price quotes that may be +/- 10% of the final price. (Stetzler, Tr. 6352 (“Budgetary to me means plus or minus 10 percent type of a bid.”) When CB&I and PDM competed for a TRW TVC project, CB&I’s final price to TRW was within 5 to 10% of the original budgetary price. (Neary, Tr. 1440-41). [

] ([ in camera).

7.2 Customers use budget prices for a variety of purposes. A budget price is often developed for planning purposes for a project which may or may not be built. (Hall, Tr. 1863, 1868-69; Neary, Tr. 1439; Stetzler, Tr. 6351; Carling, Tr. 4472). [ Sometimes, budget prices are numbers that are being used by a client to set up an investment budget. (Kistenmacher, Tr. 925). Budget pricing are also used by customers for forecasting. (Patterson, Tr. 373-74; Price, Tr. 601; Scorsone, Tr. 5250; Stetzler, Tr. 6351). A supplier will sometimes provide a preliminary price estimate to a customer for the purposes of verifying that the customer’s budget is within the realm of what the customer can afford. (Glenn, Tr. 4125-26; Carling, Tr. 4472).

### Response to RFOF 7.2

Respondents’ proposed finding is incomplete and therefore inaccurate. Customers request initial price quotes from tank suppliers in order to submit to their client a firm price. (Kistenmacher, Tr. 925). CB&I’s customers need accurate prices from CB&I so that they know what their costs will be when they bid on a project. (Harris, Tr. 7641-42). Customers also obtain budget prices from competing suppliers to determine that the price charged by a sole-source supplier is reasonable.

Dynegy obtained budget pricing for the Hackberry LNG tanks only from Whessoe. (Price, Tr. 602-603). Whessoe’s budget pricing for the Hackberry LNG tanks reflected the business risks Whessoe faced in its first project in the United States. (Price, Tr. 608-09; RFOF 7.26). Dynegy used Whessoe’s budget price to determine how much to budget for the tanks and to determine the expected range for tank bids on the Hackberry project. (Price, Tr. 602).

7.3 Budget prices are prepared with less detailed information provided by the customer. (Hall, Tr. 1866; Carling, Tr. 4472; Fan, Tr. 1078). By contrast, a fixed firm bid price is based on very detailed designs. (Carling, Tr. 4472; Scorsone, Tr. 5003). The company providing the firm price is expected to "stand up to their price and do the work for that price." (Carling, Tr. 4472).

### Response to RFOF 7.3

Respondents' proposed finding is incomplete and misleading. Tank suppliers do not require detailed design information from the customer in order to provide a reliable, initial price to the customer because the supplier typically quotes a price based on a tank already designed by the supplier. (Fan, Tr. 1078 ("Many time the vendor I understand select the tank if they have something built already, they want to use the existing design to save money, and that will dictate the shape of the tank.")). Prior to the acquisition, CB&I and PDM were able to pass through lower costs to their customers by utilizing standard tank designs. (CX 227 at CBI-PL 045100). Tank dimensions are specified by the tank vendor, not by the customer. (Fan, Tr. 1077 ("Dimension is always given by the tank vendor, not us. We don't dictate dimension of the tanks.")). CB&I specified the tank dimensions in the initial price quoted by CB&I to Linde BOC Process Plant LLC. (Fan, Tr. 1077). Mr. Hall, cited by Respondents, testified that he provided sufficient information for CB&I to put prudent prices together. (Hall, Tr. 1865 ("we conveyed the information somehow enough for them to get some prudent prices together. I did some of it by phone, and I believe I might have done some e-mail, but it was done informally."))

Following the acquisition, CB&I provided budget estimates or "ROM" prices in response to customer requests for a firm price to avoid "stand[ing] up to their price and do[ing] the work for that price." RFOF 7.3. Following the acquisition, CB&I gave [ ] an "ROM" price in response to [ ] request for a firm price on a TVC project for which CB&I already had detailed specifications and for which PDM had provided a firm price prior to the acquisition. (CX 1573, *in camera*); [ ], *in camera*); Harris, Tr. 7504-05, 7509). Following the acquisition, CB&I provided budget estimates in response to customer requests for a firm bid even where the customer provided to CB&I detailed specifications for the project. (Fan, Tr. 1063-64 ("Our company submit a firm bid request last month to CB&I and we also get budgeted, so their response is budget regardless what we ask, and at this time we gave them inch-thick specification. It was all the specification, all the drawings we required for us. They still call it budgetary.)); Harris, Tr. 7506-07 ("Linde made a request for a firm price, but the actual price that they received was a budget price.")).

7.4 Budget pricing for LNG tanks is "more conservative" than firm fixed bid prices. (Price, Tr. 604). In other words, customers are not expecting the lowest number that they can conceive of at that point. (Price, Tr. 604). Customers are just creating a budget, and thus would not expect that the number would be very precious at that point, since it is not based upon engineering information from the site. (Price, Tr. 604; *see also* Carling, Tr. 4472).

#### Response to RFOF 7.4

Respondents' proposed finding is incorrect. Customers expect budget prices to be as accurate as possible and do not regard budget prices to be inflated. Customers rely on budget prices to determine whether to accept a price offered by CB&I. John Kelly explained: [

[redacted] ([redacted]), *in camera*). Mr. Hall rejected the suggestion by Respondents' counsel that MLGW wanted CB&I to provide a conservative number: "I think I asked him to give me prices as he felt like he would quote them. I don't – I didn't – I don't recall asking him to inflate them, okay, or give – the numbers we assumed would be conservative." (Hall, Tr. 1868-69).

7.7 Budget prices are "scientific wild assed guesses," accurate only to plus or minus 40%. (Hall, Tr. 1863-65).

### Response to RFOF 7.7

Respondents' proposition misstates the record and confuses a budget price with Mr. Hall's attempt to extrapolate long-range budget expectations, with an accuracy of +/-40%, from a current budget price provided by CB&I. (Hall, Tr. 1866-67). Mr. Hall did not testify that budget prices are "scientific wild ass guesses." Rather, Mr. Hall testified that he asked Mr. Frey of CB&I for a SWAG ("scientific wild ass guess.") (Hall, Tr. 1865). Mr. Hall testified that an ROM price is a type of budgetary estimate that is less accurate than a good budgetary estimate. (Hall, Tr. 1867-68). He testified, "I am not sure that I know the exact percentages. I know approximately where they lie. I think a good budgetary formal estimate should run somewhere around 20 percent. An order of magnitude, it seems like to me I've seen it defined as 30, but I don't know, 25 maybe." (Hall, Tr. 1867-68). Mr. Scorsone confirmed that a budget price is more precise than a rough order of magnitude price. (Scorsone, Tr. 4999).

Mr. Hall provided to Mr. Frey "enough detail for us to get it within several million" (Hall, Tr. 1866). Mr. Hall asked Mr. Frey "to give me prices as he felt like he would quote them." (Hall, Tr. 1868-69). Mr. Hall explained that the SWAG uncertainty of +/-40% arose when Mr. Hall took the price quoted by CB&I and extrapolated it into the future for Memphis Light Gas & Water's internal planning purposes: "Well, essentially what we do is take those figures, we're going to apply what we think inflation is going to do and all this kind of stuff to try to come up with a number into the future. We asked him for prices based on today, so we had to extrapolate those numbers. There is so much doubt in the process that your input, even though you may have extremely accurate input, doesn't necessarily mean you are going to have an accurate output for that kind of study." (Hall, Tr. 1867 (emphasis added)).

Budget prices are often very close to firm bid prices. PDM's firm fixed bid to Williams for the Cove Point LNG tank in March 2000 was exactly equal to PDM's budget price line for the 750,000 barrel tank. (CCFF 781; CX 1058 at PDM - HOU017465 (bid \$21,450,000); RX 157 at [redacted] 02 004 (PDM budget price quote [redacted] cubic meter single containment tank). Mr. Marine proposed that CB&I counter PDM's bid to Williams by dropping CB&I's price to [redacted], a price exactly equal to CB&I's budget price line for that size tank. (CCFF 895; CX 226 at CBI-PL 044979, *in camera* (proposed CB&I price [redacted])); RX 157 at [redacted] 02 004 (CB&I budget price quote [redacted] cubic meter single containment tank).

Budget prices may be +/- 10% of the final price. Stetzler, Tr. 6352 (“Budgetary to me means plus or minus 10 percent type of a bid.”) When CB&I and PDM competed for a TRW TVC project, CB&I’s final price to TRW was within 5 to 10% of the original budgetary price. (Neary, Tr. 1440-41). [

] ([ , *in camera*).

Mr. Fan has analyzed LIN/LOX prices over many years and has found that final prices are generally very close to initial estimates. (Fan, Tr. 952-953, 986-987; CX 1584).

7.8 A budget price is developed under the assumption that it will eventually be negotiated down after the initial submittal, so the budget prices are generally high. (Scorsone, Tr. 5002). Once the competitive process begins, the prices will decrease from the high budget prices. (See Scorsone, Tr. 5002).

### Response to RFOF 7.8

Respondents' proposition that budget prices are intentionally high and are expected to be negotiated down or competed down mischaracterizes the record. Mr. Scorsone testified that CB&I assumes "competition at the time it provides a ROM or a budget price" (Scorsone, Tr. 5002). CB&I sets its margin level on jobs based on its assessment of the competition it faces. (Harris, Tr. 7618). CB&I determines how much to "fatten" up its price based on its competitive strategy on each project. (CX 1528 at CBI 071381 ("our strategy would be to not 'fatten' up the budget but to make it 'close' instead. They would probably like to have the number for 'calibration' purposes and we might be able to make things more difficult for our 'friends'."))

Respondents' assertion that budget prices are inflated by CB&I with the expectation that the price will subsequently be negotiated down or bid down is inconsistent with CB&I's experience of losing awards based on budget price comparisons by the customer. In the last LNG tank award before CB&I and PDM signed the acquisition letter of intent, Atlanta Gas Light Company selected PDM over CB&I, in 1998, based on budget price bids submitted by CB&I and PDM. (CX 161 at CBI-PL006113-114 ("All in all – boiled down to making a decision based on a budget price.")). CB&I's budget price to BOC was CB&I's last and only chance to get the Oregon LIN/LOX job. (Harris, Tr. 7600).

Dr. Harris acknowledged that customers sometimes use budget prices in making the decision whether to go sole source or via a bidding process. (Harris, Tr. 7631). Competitive bidding on a job may bring the final price below the initial price. (Hall, Tr. 1869-70 ("If we had competition on the floor, then we would assume – we could probably assume – we would assume we might get a little lower.")). Competition on a particular job may cause margins on that job to fall and may result in better prices. (Harris, Tr. 7622-23). Competition can force a supplier to offer a lower price than its initial price quotation. For example, competition between CB&I and PDM in early 2000, resulted in a 20% drop, from [ ], in the price of the Cove Point LNG tank. (CX 226 at CBI-PL044978, *in camera*).

However, when Respondents are able to convince a customer to negotiate a contract, instead of competitively bid the work, Respondents are able to maintain a higher margin for the work. Prior to the acquisition, CB&I observed, in a review of its North American operations, that its 1997 margin level for negotiated low temperature and cryogenic projects was [ ], three to four times CB&I's average total margin for all low temperature and cryogenic work sold that year. (CX 227 at CBI-PL045109). Dr. Harris could not identify any examples where the sole-source final price was lower than the budget price. (Harris, Tr. 7639). Further, Dr. Harris could not think of any examples where CB&I lowered the final price in a sole-source project from the budget price for that project. (Harris, Tr. 7639-40). CB&I has been selected as sole-source supplier for [ ] LNG tank projects based on the customers' review of budget prices.

(Glenn, Tr. 4148, 4177, 4180, 4234, 4399; J. Kelly, Tr. 6260; [redacted], *in camera*; Sawchuck, Tr. 6075-6076; CX 1478 at CBI 010191-HOU).

[redacted] was satisfied with the price CB&I quoted for an LNG tank at [redacted]. CB&I provided budget estimates to [redacted] LNG project. ([redacted], *in camera*) CMS agreed to CB&I's LNG tank price [redacted]

[redacted] (J. Kelly, Tr. 6260; [redacted], *in camera*) After reviewing [redacted] ([redacted], *in camera*) Negotiations between CB&I and CMS focused on [redacted]

[redacted] ([redacted], *in camera*).

Gerald Glenn explained that among the reasons why customers negotiate contracts on a sole source basis are that they may not have the in-house staff available to manage a bid process and they may wish to save the time that would be required to conduct a bidding process. (Glenn, Tr. 4123; see CX 516 at CBI 019868-HOU (“[T]he project schedule that you discussed with us is extremely tight. By selecting CB&I now as your EPC contractor, we vastly increase the chances of meeting this schedule. Time spent on preparing bid documents and obtaining and evaluating bids on the LNG tank will seriously impact the end date of the project.”)). [redacted]

[redacted] CMS awarded to CB&I the EPC contract for the Lake Charles LNG expansion because [redacted]

[redacted] ([redacted], *in camera*).

A sole source negotiated process gives CB&I substantial leverage because the customer is seeking to save time. If CB&I and the customer are unable to reach agreement on price and other terms the customer's alternative is to solicit bids, which would return the customer to the beginning of the lengthy bidding process. (Glenn, Tr. 4124 (“they always have the option if they aren't happy with the price or the terms to go out and solicit bids at that point in time.”)). Further, if the customer chooses a supplier other than CB&I to build the tank, CB&I will prevent the customer from using front-end engineering and design data supplied by CB&I for the tank. (Glenn, Tr. 4232-4233; CX 693 at [redacted] 01 026). Repeating this work will result in additional costly delays to the customer. (CX 517 at CBI 019784-HOU; CX 693 at [redacted] 01 026; CX 518 at

CBI 01977).

After signing the acquisition letter of intent, Respondents have used 'budget price' quotations to retain flexibility to increase the price further if they choose to do so. Respondents have provided such budget prices even on jobs for which CB&I or PDM had previously executed a firm price contract or had previously provided a firm bid prior to signing the acquisition letter of intent. On September 8, 2000, shortly after signing the letter of intent with CB&I, PDM submitted to Williams "Budgetary Prices" for the 750,000-barrel LNG tank and for an alternative 850,000 barrel LNG tank. (CX 1388). PDM's budgetary price for the 750,000 barrel tank was higher than the firm bids PDM and CB&I had submitted to Columbia Gas for the Cove Point tank in March 2000. (Compare CX 1388 and CX 226). PDM's final price to Williams, which Williams accepted, for the 850,000-barrel LNG tank was [ ] than PDM's September 8, 2000, budgetary price. (Compare CX 1160 at CBI/PDM-H 4007485 and CX 1388 at CBI/PDM-H 4015363, *in camera*). By quoting budgetary prices on September 8, 2000, PDM retained the flexibility to increase its price further before submitting its final bid to Williams on November 2, 2000.

7.9 Budget prices are not used to select a contractor. (Stetzler, Tr. 6380). Budget prices are not used to purchase anything; rather, budget prices are "best efforts guesstimates." (See Carling, Tr. 4472).

#### Response to RFOF 7.9

Respondents' propositions are incorrect and mischaracterize the record. [ ], explained that "for a client who is trying to get a certain approval of monies . . . it's very difficult to define whether that's really just a budget or a bid. Could it be awarded on that bid? Yes. Therefore, it's more than just a budget." (JX 23 at 27-28 (Cutts Dep.)). Customers select prospective suppliers based on budget prices and may compare one supplier's budget price against an alternative supplier's firm price in making a selection of a supplier. (Harris, Tr. 7634-36; CX 220 at CBI - PL037034 ("They may buy off budget prices."); Neary, Tr. 1440 ("We first receive their initial price. Then we select the vendor. Then we'll negotiate with the vendor for a best and final offer."))

Customers make purchase decisions based on budget prices. (CX 161 at CBI-PL006113-114). In the last LNG tank award before CB&I and PDM signed the acquisition letter of intent, Atlanta Gas Light Company selected PDM over CB&I, in 1998, based on budget price bids submitted by CB&I and PDM. (CX 161 at CBI-PL006113-114). PDM outscored CB&I in the bidding competition "on the basis of their lower budget price." (CX 161 at CBI-PL006113). Reviewing the loss, Carroll Davis reported to Sam Kumar and Steve Crain: "That budget price is the only price submitted to date. The various incentive arrangements are referenced against that budget price. . . . All in all - boiled down to making a decision based on a budget price." (CX 161 at CBI-PL006114). [ ] selected CB&I as the sole source supplier for [ ] LNG tanks in the United States after examining budget prices submitted by CB&I, PDM and Whessoe. (RX 157 at [ ] 02 002-04, *in camera*; Glenn, Tr. 4179-4180; Harris 7675). BOC selected ATV for its Oregon LIN/LOX tank after receiving a budget price from CB&I. (Harris, Tr. 7632, 7597-7600;

Scorsone, Tr. 5017). In putting together a proposal for an LNG peak shaving facility, Praxair decided to work with another contractor to develop the project based on CB&I's budget price being substantially higher than the other supplier's price. (Harris, Tr. 7634). Dr. Harris concluded that Praxair compared CB&I's budget price to another supplier's firm bid. (Harris, Tr. 7635-36).

CMS accepted CB&I's budget price for the Lake Charles LNG tank, [

] (J. Kelly, Tr. 6260; [ ], *in camera*)

After reviewing [

] ([ ], *in camera*) [

] ([ ], *in camera*).

7.10 However, suppliers and customers do not assume any competition when they provides a rough order of magnitude or budget price. (Simpson, Tr. 5379; Hall, Tr. 1869-70). Customers expect budget prices to be high. (Hall, Tr. 1869-70). However, some customers will play vendors off of one another when requesting budget pricing. (Patterson, Tr. 362-63).

#### Response to RFOF 7.10

Respondents' assertions are erroneous and mischaracterize the record. Mr. Scorsone expressly testified that CB&I assumes "competition at the time it provides a ROM or a budget price." (Scorsone, Tr. 5002). Indeed, Mr. Glenn acknowledged that budget prices are provided to customers to "meet their requirements that they have some sort of competition before they select someone to move forward with." (Glenn, Tr. 4126). Respondents incorrectly cite testimony by Dr. Simpson as supportive of their assertion. Dr. Simpson, in fact, testified "I think in some cases competition would be known when budget prices are prepared." (Simpson, Tr. 5379).

Customers do not expect budget prices to be high. Customers expect budget prices to be as accurate as possible and do not regard budget prices to be inflated. Mr. Hall rejected the suggestion by Respondents' counsel that MLGW wanted CB&I to provide a conservative number: "I think I asked him to give me prices as he felt like he would quote them. I don't – I didn't – I don't recall asking him to inflate them, okay, or give – the numbers we assumed would be conservative." (Hall, Tr. 1868-69). Customers make purchase decisions based on comparison of budget prices and rely on budget prices to determine whether to accept a price offered by CB&I. John Kelly explained: [

] ([ ], *in camera*).

7.12 A budget price is not an offer to sell. (Glenn, Tr. 4126; Simpson, Tr. 5380). LNG tanks are not awarded or purchased at a budget price estimate. (Glenn, Tr. 4126-27; Carling, Tr. 4472-73). A budget price will not be the price a customer pays for a tank. (Patterson, Tr. 374).

### Response to RFOF 7.12

Respondents' assertions are erroneous and mischaracterize the record. [redacted], explained that "for a client who is trying to get a certain approval of monies . . . it's very difficult to define whether that's really just a budget or a bid. Could it be awarded on that bid? Yes. Therefore, it's more than just a budget." (JX 23 at 27-28 (Cutts Dep.)). LNG tanks are, in fact, awarded or purchased at a budget price estimate. Atlanta Gas Light Company selected PDM over CB&I, in 1998, based on budget price bids submitted by CB&I and PDM. (CX 161 at CBI-PL006113-114). PDM outscored CB&I in the bidding competition "on the basis of their lower budget price." (CX 161 at CBI-PL006113). Reviewing the loss, Carroll Davis reported to Sam Kumar and Steve Crain: "That budget price is the only price submitted to date. The various incentive arrangements are referenced against that budget price. . . . All in all - boiled down to making a decision based on a budget price." (CX 161 at CBI-PL006114). CB&I provided budget estimates to [redacted] LNG project. ([redacted]), *in camera*) CMS agreed to CB&I's LNG tank price [redacted] (J. Kelly, Tr. 6260; [redacted]), *in camera*) After reviewing [redacted] ([redacted]), *in camera*) [redacted] selected CB&I as the sole source supplier for its LNG tanks in the United States after examining budget prices submitted by CB&I, PDM and Whessoe. (RX 157 at [redacted] 02 001-004, *in camera*; Glenn, Tr. 4179-80; Harris, Tr. 7675). BOC selected ATV for its Oregon LIN/LOX tank after receiving a budget price from CB&I. (Harris, Tr. 7632, 7598-7600; Scorsone, Tr. 5017). In putting together a proposal for an LNG peak shaving facility, Praxair decided to work with another contractor to develop the project based on CB&I's budget price being substantially higher than the other supplier's price. (Harris, Tr. 7634). Dr. Harris concluded that Praxair compared CB&I's budget price to another supplier's firm bid. (Harris, Tr. 7635-36).

Respondents incorrectly attribute to Mr. Patterson the proposition that "[a] budget price will not be the price a customer pays for a tank." This misinterprets Mr. Patterson's testimony. Mr. Patterson stated that he makes pricing forecasts for LIN/LOX tank projects two ways: first, he looks at what MG Industries paid in the past for a similar tank; and second, he asks suppliers for budget pricing for different tank sizes. (Patterson, Tr. 373-74). Mr. Patterson further noted that a supplier's budget price may simply be the price at which the supplier last built a tank similar in volume. (*Id.*) Following this approach, CB&I uses the price at which PDM sold the Cove Point LNG tank in preparing LNG tank estimates for other customers. (CX 421 at CBI 026843-HOU). CB&I increased its budget price to MLGW based on the price at which PDM sold the Cove Point LNG tank. (CX 422 at CBI-E 009500). Recently, CB&I sold the 140,000-cubic meter Lake Charles, Louisiana LNG tank to CMS for \$35 million. (J. Kelly, Tr. 6260) The price paid by CMS is the same as [redacted]

[ ] ([ ] *in camera* (Cove Point [ ])).  
[ ] ([ ] *in camera*)  
CMS agreed to CB&I's price [ ]  
[ ] (J. Kelly, Tr. 6260; [ ] *in camera*) CMS  
used [ ]  
[ ] ([ ] *in camera*) CMS did not know that following the  
acquisition CB&I had inflated the price of the Cove Point LNG tank [ ]  
[ ] ([ ] *in camera*).

Following the acquisition, CB&I provided budget estimates or “ROM” prices in response to customer requests for a firm price to avoid being obligated to sell at the quoted price. Following the acquisition, CB&I gave [ ] an “ROM” price in response to [ ] request for a firm price on a [ ] project for which PDM had provided a firm price prior to the acquisition. ([CX 1573 at 2-5], *in camera*; [ ], *in camera*). Following the acquisition, CB&I provided budget estimates in response to customer requests for a firm bid. (Fan, Tr. 1063-64 (“Our company submit a firm bid request last month to CB&I and we also get budgeted, so their response is budget regardless what we ask”); Harris, Tr. 7506-07 (“Linde made a request for a firm price, but the actual price that they received was a budget price.”)).

7.13 Budgetary estimates are not serious bid proposals. (Stetzler, Tr. 6352; Carling, Tr. 4472). In contrast, firm fixed bid prices are serious bid proposals. (See Carling, Tr. 4472).

### Response to RFOF 7.13

Respondents’ assertion that “[b]udgetary estimates are not serious bid proposals” is incorrect and mischaracterizes the record. Mr. Cutts explained that awards can be made based on budget estimates. When asked whether he considers budget pricing to be a bid, Mr. Cutts responded: “Yes and no. . . . it’s very difficult to define whether that’s really just a budget or a bid. Could it be awarded on that bid? Yes. Therefore, it’s more than just a budget.” (JX 23 at 27-28 (Cutts Dep.)). Budget estimates are taken seriously by CB&I and by its customers. Atlanta Gas Light Company selected PDM over CB&I, in 1998, based on budget price bids submitted by CB&I and PDM. (CX 161 at CBI-PL006113-114). CB&I provided budget estimates to CMS for the [ ]. ([ ], *in camera*). CMS agreed to CB&I’s LNG tank price [

] (J. Kelly, Tr. 6260; [ ], *in camera*) [

] ([ ], *in camera*) [ ] selected CB&I as the sole source supplier for its LNG tanks in the United States after examining budget prices submitted by CB&I, PDM and Whessoe. (RX 157 at [ ] 01 026, *in camera*; Glenn, Tr. 7597-7600; Scorsone, Tr. 5017). [ ] variously referred to these budget prices as price quotations or “bids”. (RX 157 at [ ] 02 002, 4 *in camera*). BOC selected ATV for its Oregon LIN/LOX tank after receiving a budget price from CB&I. (Harris, Tr. 7632, 7598-7600; Scorsone, Tr. 5017). CB&I’s budget price to BOC was CB&I’s last and only chance to get the Oregon LIN/LOX job. (Harris, Tr. 7600). In putting together a proposal for an LNG peak shaving facility, Praxair decided to work with another contractor to develop the project based on CB&I’s budget price being substantially higher than the other supplier’s price. (Harris, Tr. 7634). Dr. Harris concluded that Praxair compared CB&I’s budget price to another supplier’s firm bid. (Harris, Tr. 7635-36).

7.15 When creating budget pricing, estimators do not use an actual tank design. (Fan, Tr. 1077; Scorsone, Tr. 4999; Hall, Tr. 1868). Estimators use off-the-shelf tank designs of a similar size volume to develop a budget

price. (Scorsone, Tr. 4999; Fan, Tr. 1069-70). This practice reduces the accuracy of the final number in a budget price. (See Scorsone, Tr. 4999-5000).

### Response to RFOF 7.15

Respondents' assertion that "[w]hen creating budget pricing, estimators do not use an actual tank design" mischaracterizes the record. Estimators frequently use an actual tank design to prepare a budget price estimate. Mr. Fan explained: "Many time the vendor I understand select the tank if they have something built already, they want to use the existing design to save money, and that will dictate the shape of the tank." (Fan, Tr. 1078). Mr. Scorsone confirmed that CB&I uses "representative designs for similar size volumes to help develop a budget price." (Scorsone, Tr. 4999).

7.16 CB&I does not call dozens of materials suppliers and ask for their current, binding materials prices when developing a budget price. (Fan, Tr. 1056; Scorsone, Tr. 4999). This lack of information creates potentially inaccurate budget pricing information. (Fan, Tr. 1056; *see* Scorsone, Tr. 4999-5002).

### Response to RFOF 7.16

Mr. Fan's testimony cited by Respondents does not support their assertion. In the testimony cited by Respondents, Mr. Fan acknowledges that CB&I did not share with the customer, Linde BOC Process Plant LLC, "the actual metal pricing that CB&I had access to in April of 2002 when it submitted the pricing to [Mr. Fan.]" (Fan, Tr. 1056). CB&I's failure to share with the customer details supporting CB&I's price provides no authority for Respondents' proposed finding that CB&I lacks this information. Mr. Scorsone's testimony is uncorroborated.

7.17 Subcontractors are not consulted when developing a budget price. (Scorsone, Tr. 5000; Fan, Tr. 1065). Specifically, their current prices are not used when developing a budget price. (Scorsone, Tr. 5000).

### Response to RFOF 7.17

Mr. Fan's testimony cited by Respondents does not support their assertion that "[s]ubcontractors are not consulted when developing a budget price." In the testimony cited by Respondents, Mr. Fan simply states that CB&I did not share with him any details in support of the total lump-sum price quoted by CB&I. (Fan, Tr. 1065). CB&I's failure to share with the customer details supporting CB&I's price provides no authority for Respondents' proposed finding that CB&I does not consult with its subcontractors when developing a budget price. Mr. Scorsone's testimony is uncorroborated.

7.18 CB&I does not attempt to accurately estimate the amount of engineering labor required to design a tank when developing a budget price. (Fan, Tr. 1064; Scorsone, Tr. 5000). Those hours are not calibrated as part of the budget price. (Scorsone, Tr. 5000; *see also* Fan, Tr. 1064).

### Response to RFOF 7.18

Testimony cited by Respondents does not support their assertion that “CB&I does not attempt to accurately estimate the amount of engineering labor required to design a tank when developing a budget price.” In the testimony cited by Respondents, Mr. Fan states that CB&I provided to the customer, Linde BOC Process Plants LLC, a “total lump-sum price” and did not reveal to the customer the cost components of the price. (Fan, Tr. 1064). CB&I’s failure to share with the customer details supporting CB&I’s price provides no authority for Respondents’ proposed finding that CB&I does not attempt to accurately estimate the amount of engineering labor required. The other source cited by Respondents for this assertion does not provide intelligible authority for Respondents’ proposition and indicates, to the contrary, that CB&I’s estimating models take into account engineering hours: “Q: Does CBI try with any accuracy to estimate or with any precision to estimate the amount of engineering hours that will be required? A: It’s more estimating models that happens through this, but there’s no deliberate effort made to calibrate those hours.” (Scorsone, Tr. 5000).

7.19 When developing a budget price, a supplier does not check to see whether subcontracting fabrication of an LNG tank might be more economical than self-performing the fabrication. (Scorsone, Tr. 5000; Fan, Tr. 1065).

#### Response to RFOF 7.19

Mr. Fan’s testimony cited by Respondents does not support their assertion that “[w]hen developing a budget price, a supplier does not check to see whether subcontracting fabrication of an LNG tank might be more economical than self-performing the fabrication.” Again, in the testimony cited by Respondents, Mr. Fan simply states that CB&I did not share with the customer, Linde BOC Process Plant LLC, any details in support of the total lump-sum price quoted by CB&I. (Fan, Tr. 1065). CB&I’s failure to share with the customer details supporting CB&I’s price provides no authority for Respondents’ proposed finding that CB&I does not check to see whether subcontracting fabrication of an LNG tank might be more economical than self-performing the fabrication. Mr. Scorsone’s testimony is uncorroborated.

7.20 A project’s construction schedule is unknown when developing a budget price. (Fan, Tr. 1065, 1073; Scorsone, Tr. 5000). Knowing the construction schedule in advance is important, because it can influence the amount of indirect costs, tool and equipment costs, and mobilization and demobilization costs. (Scorsone, Tr. 5000-01; Glenn, Tr. 4126).

#### Response to RFOF 7.20

Mr. Fan’s testimony cited by Respondents does not support their assertion that “[a] project’s construction schedule is unknown when developing a budget price.” Mr. Fan testified that CB&I did not inform him what CB&I’s proposed construction schedule was. (Fan, Tr. 1065). Mr. Fan further observed that even in a firm, final bid stage the customer would not necessarily specify the construction schedule that it wanted. (Fan, Tr. 1073). Mr. Fan explained that a supplier as experienced as CB&I knows the schedule necessary to build a tank: “they’re in the business long enough, you don’t need to tell them. If they don’t know, they should not be in that business.” (Fan, Tr. 1073).

7.21 Costs can increase depending on when the work is done. (Scorsone, Tr. 5001). The time of the year of the construction is generally unknown when developing a budget price. (Fan, Tr. 1065; Scorsone, Tr. 5001). Price can be affected if productivity is impaired by weather that is either too cold or too hot. (Fan, Tr. 1076; Scorsone, Tr. 5001).

### Response to RFOF 7.21

Respondents' proposed finding is incomplete and misleading. Construction of an LNG tank extends over several years. ([redacted], *in camera*; CX 421 at CBI 026842-HOU). The time of year during which a tank is constructed has minimal impact on cost. In testimony relied on by Respondents, Mr. Fan observes that the time of year a tank would be constructed could impact price only "[t]o a small degree." (Fan, Tr. 1076).

7.22 The exact location of the project site is unknown when developing a budget price. (Fan, Tr. 1065, 1075; Scorsone, Tr. 5001). Price can be affected by the site location based upon costs associated with movement of materials, accommodations for the field craft labor, storage, access roads, limitations on bridges, and limitations on tunnels. (Fan, Tr. 1075-76; Scorsone, Tr. 5001-02).

### Response to RFOF 7.22

Respondents' proposed finding is incomplete and misleading. The precise location of a tank has little impact on cost. In testimony relied on by Respondents, Mr. Fan observes that exact location, *i.e.*, the specific city, within New Mexico, in which the tank would be constructed would have "[v]ery little" impact on price. (Fan, Tr. 1075). Mr. Fan informed CB&I that the LIN/LOX tank for which he requested a close to firm +/-5% price would be constructed in New Mexico. (Fan, Tr. 1061).

7.23 A determination as to whether traveling labor or local labor is used on a project is not included when developing a budget price. (Scorsone, Tr. 5002; Fan, Tr. 1065, 1075). The accuracy of the budget price is affected without such information. (*See* Fan, Tr. 1075).

### Response to RFOF 7.23

Respondents' proposed finding is incomplete and misleading. CB&I generally uses its own traveling labor for tank projects. In testimony relied on by Respondents, Mr. Fan observes that the usual practice of CB&I and PDM is to use their own crews. (Fan, Tr. 1076 ("I understand that usually is the practice of PDM and CB&I, is they use their own crew; therefore, I believe the location has an impact but minimum."))

7.24 Budget pricing does not require a customer to provide the supplier with information about the site conditions, as well as allowing someone from the bidding company to tour the job site to examine the access to the site and soil conditions. (*See* Stetzler, Tr. 6353; *see also* Glenn, Tr. 4126; *see also* Fan, Tr. 1065).

### Response to RFOF 7.24

Respondents' proposed finding is incomplete and misleading. Before submitting a budget price on a project, suppliers are frequently familiar with the site conditions. PDM was familiar with the Cove Point site before it submitted its budget price to Columbia Gas in January

2000. (CX 293). CB&I was familiar with the Capleville, Tennessee site before it submitted its budget price to Memphis Light Gas & Water in 2002. (Hall, Tr. 1777, 1876). (J. Kelly, Tr.

6257; [ ], *in camera*)) CB&I was familiar with the seismic conditions at [ ] site and [ ] plan to locate the TVC in a new building before it submitted its “ROM” price to [ ]. (CX 1127 at CBI-HWH 052176, CBI-HWH 052195).

Suppliers frequently do a site visit before submitting a budget price quote. (Stetzler, Tr. 6353 (“Many times, to give somebody a firm budget, you have to become familiar with the site conditions; somebody would have had to have gone to the job site, review what kind of access there was; what kind of soil conditions there was and all these issues.”)).

7.25 Relatively little time or effort is spent by a tank supplier in order to provide a budget price. (Patterson, Tr. 374; Stetzler, Tr. 6352-53; Fan, Tr. 969).

#### Response to RFOF 7.25

Respondents’ proposed finding is incomplete and misleading. Two weeks is sufficient time to prepare a close to firm +/-5% price quote. (Fan, Tr. 1062 (“I believe it’s sufficient. The reason for that assessment is made by my spreadsheet. A lot of my spreadsheet was close to firm bid and from that it’s very, very accurate, so if PDM can do it for four or five years give me a good qualities, then I don’t understand why CB&I cannot.”)) The testimony of Mr. Fan, cited by Respondents, does not support their proposition that “[r]elatively little time or effort is spent by a tank supplier in order to provide a budget price.” In the testimony cited by Respondents Mr. Fan explains that time pressures sometimes necessitate that he rely on his own calculations instead of requesting a budget price from tank suppliers. (Fan, Tr. 969).

7.26 Budget prices include assessments of risk and contingency. (Price, Tr. 608-09; Scorsone, Tr. 5252; Simpson, Tr. 5366). Projects that involve an excessive amount of risk or unknown contingencies will receive higher budget prices. (Scorsone, Tr. 5003).

#### Response to RFOF 7.26

Respondents concede that the budget pricing supplied by Whessoe to Dynegy took into account the business risks that Whessoe faced on its first project in the United States. (RFOF 7.26 citing Price, Tr. 608-09 (“Q: Based on your interactions with the Whessoe representative, is it your perception that the pricing that they offer in terms of budget pricing is likely to recognize some of the business risks that they will have on their first project in the United States? A: Yes. I think that’s certainly one of the items that they would consider.”)). Complaint counsel agrees.

7.27 Years sometimes elapse between the time when a budget price is submitted and the time when a firm fixed bid price is actually requested. (Scorsone, Tr. 5004). In the interim, material and labor costs change. (Scorsone, Tr. 5004). A budget price does not attempt to account for the changes in costs over time, and as a result, budget prices often assume a high profit margin level. (Scorsone, Tr. 5004).

### Response to RFOF 7.27

Respondents' assertion that "budget prices often assume a high profit margin level" is misleading and mischaracterizes the record. Mr. Scorsone testified that the time between submission of a budget price and a request for a final bid price "could vary from weeks to years." (Scorsone, Tr. 5004). Changes in material cost, labor rates and other costs between the time a budget price is submitted and a firm bid is submitted could cause the firm bid to differ from the budget price. (Hall, Tr. 1866-1867; Scorsone 5004; Stetzler, Tr. 6352 ("So they don't get firm proposals, because they know that we can't give them a firm proposal that might not get built for six to nine months.")). CB&I does not try to make predictions in its budget prices regarding future changes in cost items. (Scorsone, Tr. 5004 ("we do not try to project escalation of materials at that point specifically.")). Respondents acknowledge that "[a] budget price does not attempt to account for changes in costs over time" (RFOF 7.27).

Accordingly there is no reason to inflate the margin in a budget price in anticipation that materials, labor and other costs may increase by the time the work will be done. Dr. Harris acknowledged that he had no basis to agree or disagree that it is fairly common practice to use the same general range of margin levels for budget prices and for fixed, firm prices and that when looking at margin levels it does not matter whether the margin is in a budget price or in a fixed, firm price. (Harris, Tr. 7850-51).

7.29 When creating a firm fixed price, estimators use an actual tank design. (See Fan, Tr. 1077; see also Scorsone, Tr. 4999).

### Response to RFOF 7.29

Mr. Fan's testimony, cited by Respondents, does not support the distinction Respondents attempt to draw regarding use of an actual tank design in budget prices versus in a firm fixed price. In either event, Mr. Fan testified that tank dimensions are specified by the tank vendor, not by the customer. (Fan, Tr. 1077 ("Dimension is always given by the tank vendor, not us. We don't dictate dimension of the tanks.")). CB&I specified the tank dimensions in the initial price quoted by CB&I to Linde BOC Process Plant LLC. (Fan, Tr. 1077). Mr. Fan further testified, "Many time the vendor I understand select the tank if they have something built already, they want to use the existing design to save money, and that will dictate the shape of the tank." (Fan, Tr. 1078 ).

7.30 Dozens of materials suppliers are contacted and asked for their current, binding materials prices when developing a firm fixed price. (See Carling, Tr. 4472; see also Scorsone, Tr. 4999-5002).

### Response to RFOF 7.30

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition. (Carling, Tr. 4472; Scorsone, Tr. 4999-5002).

7.31 Subcontractors are consulted when developing a firm fixed price. (*See* Carling, Tr. 4472; *see also* Scorsone, Tr. 4999-5002).

### Response to RFOF 7.31

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition. (Carling, Tr. 4472; Scorsone, Tr. 4999-5002). CB&I may decide, only after a contract has been awarded, whether CB&I will subcontract or perform work itself. In May 2002, 18 months after PDM submitted its firm fixed price bid on the Cove Point LNG tank, CB&I reported that "CB&I may self perform or elect to subcontract" mechanical, perlite and paint for the Cove Point tank. (CX 1515 at CBI 060186). CB&I did not pass through to the customer savings through subcontracting. Optimizing use of subcontracts is one way CB&I increased its margin on the Cove Point LNG tank following the William's acceptance of Respondents' price. (CX 1617 at CBI 061611). Increasing the margin on a job after a price has been agreed to is an established practice at CB&I and is referred to by Mr. Scorsone as "stretch." (CX 1617 at CBI 061612 ("We need from you the amount of margin in excess sold that will be 'stretch' for you to deliver.")).

7.32 Suppliers attempt to accurately estimate the amount of engineering labor required to design a tank when developing a firm fixed price. (*See* Carling, Tr. 4472; *see also* Scorsone, Tr. 4999-5002).

### Response to RFOF 7.32

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition. (Carling, Tr. 4472; Scorsone, Tr. 4999-5002).

7.33 When developing a firm fixed price, a supplier checks to see whether subcontracting fabrication of an LNG tank might be more economical than self-performing the fabrication. (*See* Carling, Tr. 4472; *see also* Scorsone, Tr. 4999-5002).

### Response to RFOF 7.33

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition. (Carling, Tr. 4472; Scorsone, Tr. 4999-5002). CB&I may decide, only after a contract has been awarded, whether CB&I will subcontract or perform work itself. In May 2002, 18 months after PDM submitted its firm fixed price bid on the Cove Point LNG tank, CB&I reported that "CB&I may self perform or elect to subcontract" mechanical, perlite and paint for the Cove Point tank.. (CX 1515 at CBI 060186). CB&I did not pass through to the customer savings through subcontracting. Optimizing use of subcontracts is one way CB&I increased its margin on the Cove Point LNG tank following the William's acceptance of Respondents' price. (CX 1617 at CBI 061611). Increasing the margin on a job after a price has been agreed to is an established practice at CB&I and is referred to by Mr. Scorsone as "stretch." (CX 1617 at CBI 061612 ("We need from you the amount of margin in excess sold that will be 'stretch' for you to deliver.")).

7.34 A project's construction schedule is known when developing a firm fixed price. (See Fan, Tr. 1073; see also Carling, Tr. 4472; see also Scorsone, Tr. 4999-5002). Knowing the construction schedule in advance is important, because it can influence the amount of indirect costs, tool and equipment costs, and mobilization and demobilization costs. (Scorsone, Tr. 5000-01; Glenn, Tr. 4126).

#### Response to RFOF 7.34

Neither the testimony of Mr. Carling, nor the testimony of Mr. Scorsone, nor the testimony of Mr. Fan, cited by Respondents, supports Respondents' proposition that firm fixed prices are prepared differently and are more accurate than budget prices because "[a] project's construction schedule is known when developing a firm fixed price." (Fan, Tr. 1073; Carling, Tr. 4472; Scorsone, Tr. 4999-5002). In testimony cited by Respondents Mr. Fan states that Linde BOC Process Plant LLC only sometimes tells CB&I the construction schedule in a firm final bid price stage. (Fan, Tr. 1073 ("Sometime we do, but they're in the business long enough, you don't need to tell them. If they don't know, they should not be in that business.)) Half the time this customer does not know, at the final bid stage, the date the tank will be needed at the site. (Fan, Tr. 1074). Mr. Glenn's testimony does not support the proposition for which Respondents cite the testimony. (Glenn, Tr. 4126).

CB&I does not pass through to its customers cost savings resulting from the construction schedule. CB&I increased the price and CB&I's margin on the [ ] because delay [ ] an opportunity to do so. ([ ], *in camera*). In fact, the project delay enabled [ ] reduce its costs for doing the work. ([ ], *in camera*). Delay of the Cove Point LNG tank enabled CB&I to "stretch" the margin on the project by lowering its cost. (CX 1617 at CBI 061611 ("The Delay allowed the Project Team to implement Best Practices that might not have been able to implement if the schedule had been tighter.")). CB&I's Luke Scorsone presses his staff to identify ways to "stretch" CB&I's margins after a project is awarded to CB&I. (CX 1617 at CBI 061612 ("We need from you the amount of margin in excess sold that will be 'stretch' for you to deliver.")).

7.35 Costs can increase depending on when the work is done. (Scorsone, Tr. 5001). The time of the year of the construction is generally known when developing a firm fixed price. (See Carling, Tr. 4472; see also Scorsone, Tr. 4999-5002).

#### Response to RFOF 7.35

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition that "[t]he time of year of the construction is generally known when developing a firm fixed price." (Carling, Tr. 4472; Scorsone, Tr. 4999-5002). The time of year during which a tank is constructed could impact price only "[t]o a small degree." (Fan, Tr. 1076).

7.36 The exact location of the project site is known when developing a firm fixed price. (See Carling, Tr. 4472; see also Scorsone, Tr. 4999-5002). Price can be affected by the site location based upon costs associated with movement of materials, accommodations for the field craft labor, storage, access roads, limitations on

bridges, and limitations on tunnels. (Fan, Tr. 1075-76; Scorsone, Tr. 5001-02).

### Response to RFOF 7.36

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition that "[t]he exact location of the project site is known when developing a firm fixed price." (Carling, Tr. 4472; Scorsone, Tr. 4999-5002). The precise location of a tank has little impact on cost. In testimony relied on by Respondents, Mr. Fan observes that exact location, *i.e.*, the specific city, within New Mexico, in which the tank would be constructed would have "[v]ery little" impact on price. (Fan, Tr. 1075).

7.37 A determination as to whether traveling labor or local labor is used on a project is included when developing a firm fixed price. (See Carling, Tr. 4472; see also Scorsone, Tr. 4999-5002).

#### Response to RFOF 7.37

Neither the testimony of Mr. Carling nor the testimony of Mr. Scorsone, cited by Respondents, supports Respondents' proposition. (Carling, Tr. 4472; Scorsone, Tr. 4999-5002). Respondents have identified no evidence that suggests that CB&I decides, before developing a firm fixed price, whether it will use traveling labor or local labor on a project. There is no evidence that CB&I passes through to its customers savings from using traveling labor or local labor on a project. CB&I can stretch its margin on an awarded project by minimizing its costs through election to use traveling labor or local labor on a project. Mr. Scorsone presses his staff to stretch the margin on awarded jobs by identifying cost savings that are not passed through to the customer. (CX 1617 at CBI 061612 ("We need from you the amount of margin in excess sold that will be 'stretch' for you to deliver.")).

7.38 Firm fixed bid prices require that a customer give the supplier information about the site conditions, as well as allowing someone from the bidding company to tour the job site to examine the access to the site and soil conditions. (Stetzler, Tr. 6353; Glenn, Tr. 4126).

#### Response to RFOF 7.38

Mr. Stetzler's testimony, cited by Respondents, does not support the distinction Respondents attempt to draw between budget prices and firm bids. Mr. Stetzler observes that suppliers frequently do a site visit before submitting a budget price quote: "Many times, to give somebody a firm budget, you have to become familiar with the site conditions; somebody would have had to have gone to the job site, review what kind of access there was; what kind of soil conditions there was and all these issues." (Stetzler, Tr. 6353 ).

### **B. CB&I AND PDM EXCHANGED COMPETITIVE INFORMATION PRIOR TO THE ACQUISITION**

7.39 CB&I and PDM created a "clean team" of individuals who were not current employees of CB&I or PDM to perform due diligence of current projects and to present results to CB&I on an aggregated basis. (See Glenn, Tr. 4405-07; Scorsone, Tr. 5246-47).

#### Response to RFOF 7.39

Respondents finding is misleading and incomplete. Their finding suggests the creation of the "clean team" prevented the exchange of sensitive and inappropriate material during the due diligence stage of the acquisition. However, despite the creation of a "clean team," testimony, as well as Respondents' own internal documents demonstrate that both employees and management personnel from both PDM and CBI exchanged competitively sensitive information prior to the completion of the merger.

For example, management from CBI and PDM discussed the ongoing bidding for the Spectrum Astro thermal vacuum chamber project. (Scorsone, Tr. 5111). The information regarding the ongoing bidding was not confined to “clean team” individuals. Rather, this information was discussed between Bob Jordan, Chief Operating Officer for CBI, and Luke Scorsone, President of PDM EC. (Scorsone, Tr. 5111). Luke Scorsone passed the information shared by Jordan to members of PDM’s sales team, including Jeff Steimer, PDM’s main sales contact with Spectrum Astro. (Scorsone, Tr. 5113-5114). The information discussed by management was noted and maintained in the customer’s contract file on an e-mail discussing Spectrum Astro’s pending best and final offer request. (CX 1705 at PDM-HOU009169).

In addition to exchanging information on ongoing bids, management from PDM and CBI discussed bidding strategies. An e-mail from Ron Blum to Rich Goodrich illustrates that prior to the acquisition, employees not associated with the “clean team” exchanged competitively sensitive information. Ron Blum of PDM, informed Rich Goodrich of CBI, “PDM’s strategy was to only give one price in the last minute and not participate in the auction...This would do the following...In a way showing other bidders if everyone just bid one time, no need for an auction.” (CX 1675 at CBI/PDM-H 4001283).

7.40 The parties to the Acquisition made this effort to address antitrust concerns related to due diligence between the companies. (Scorsone, Tr. 5246-47). The parties did not try to exchange current sensitive information. To the contrary, they made good faith efforts to put in place procedures to avoid such an exchange of information. (Scorsone, Tr. 5246-47).

#### Response to RFOF 7.40

This finding is not accurate and is contradicted by Mr. Scorsone’s testimony. The pages to which Respondents cite do not state the “clean team” effort was made “to address antitrust concerns.” The record says the “clean team is charged with reviewing confidential information the CBI could not see under FTC due diligence regulations.” (Scorsone, Tr. 5246). Additionally, Scorsone’s testimony, that Respondents made good faith efforts to put in place procedures to avoid such an exchange of information is contradictory to his testimony depicting his actions. Despite testifying about making good faith efforts to put in place procedures to avoid such an exchange of information, as stated in Complaint Counsel’s response to RFOF 7.39, Scorsone himself debriefed his entire sales team on the inappropriate information shared by Jordan on the ongoing Spectrum Astro bidding.

In addition to exchanging information on ongoing bids, management from PDM and CBI discussed bidding strategies. Ron Blum of PDM, informed Rich Goodrich of CBI, “PDM’s strategy was to only give one price in the last minute and not participate in the auction. . . . This would do the following...In a way showing other bidders if everyone just bid one time, no need for an auction.” (CX 1675 at CBI/PDM-H 4001283).

By October 2000, PDM and CB&I shared costing methodology used to estimate price. (CX 674 at CBI-PL069308-09; Scorsone, Tr. 5211). PDM and CB&I exchanged detailed

estimating information on recent projects. (CX 674 at CBI-PL069319-337). They compared CB&I's and PDM's bids, line-item costs, and margins on the Longview, Texas, LOX tank, which was bid on August 4, 2000, and the Bozrah, Connecticut, LIN tank, which was bid on November 22, 1999. (CX 674 at CBI-PL069333-34). Exchange between competitors of this information inherently contributes to coordinated or other anticompetitive behavior. In a sworn statement to this Tribunal, CB&I's Vice President of Sales for North America explained, "were a competitor to learn the prices submitted by CB&I in the past for particular types of work (or the methods by which CB&I generated those prices), they would be able to predict what future prices CB&I might offer to its customers. This knowledge would allow CB&I's competitors to pinpoint their own prices to those offered (or to be offered) by CB&I." (CX 393 ¶ 16 at 5 (Declaration of Steven Knott)).

The comparison of CB&I's and PDM's costs, prepared on October 10, 2000, noted that PDM's cost estimates are lower than CB&I's. (CX 674 at CBI-PL069333 ("PDM appears to estimate lower manufacturing hours than CBI and at much lower cost (-33% LOX/LIN & -19% Spheres"); "The PDM estimated Construction manhours are considerably less than CBI (-30% LOX/LIN & -13% Sphere manhours"); "PDM estimates Project Management to be about 40% less manhours and 50% less cost than CBI.").

The information exchanged by CB&I and PDM, and discussed in the meetings between CB&I and PDM, had an immediate impact on the prices. Three weeks after the CB&I/PDM cost comparison was prepared, Luke Scorsone, who had personally participated in the meetings with CB&I, met with his staff for a final review of PDM's cost estimates for the Cove Point LNG tank before PDM submitted its bid to Williams. (CX 1160 at CBI/PDM-H 4007484-87). Mr. Scorsone abandoned his earlier imperative to find "the lowest price possible" and "save every dollar we can . . . ." (CX 863). Instead, over the strenuous objection of Mr. Steimer, who had been dealing with Williams on the project, Mr. Scorsone increased PDM's estimated manhours and other costs, bringing PDM's cost estimates closer in line with CB&I's approach to cost estimating. (CX 1160 at CBI/PDM-H 4007485-87; CX 674 at CBI-PL069333).

7.41 Neither CB&I nor PDM intended to have sensitive information exchanged during the due diligence process, and in fact intended to avoid such exchanges. (Glenn, Tr. 4405-07; Scorsone, Tr. 5246-47).

#### Response to RFOF 7.41

This finding is incorrect. It is uncorroborated, based on self serving testimony and is contradicted by other facts. There is no support for this finding other than the self interested testimony of Mr. Glenn and Mr. Scorsone. As stated in Complaint Counsel's response to RFOF 7.39, members of management, themselves engaged in the exchange of competitively sensitive information, passed that information to subordinates working on ongoing projects, and stored such information in customers' contract files.

Respondents knew that sharing costing methodology used in price estimates and sharing detailed estimating information on recent projects would result in coordinated or other anticompetitive

pricing. (CX 674 at CBI-PL069308-09, CBI-PL069319-337). In a sworn statement to this Tribunal, CB&I's Vice President of Sales for North America explained, "were a competitor to learn the prices submitted by CB&I in the past for particular types of work (or the methods by which CB&I generated those prices), they would be able to predict what future prices CB&I might offer to its customers. This knowledge would allow CB&I's competitors to pinpoint their own prices to those offered (or to be offered) by CB&I." (CX 393 ¶ 16 at 5 (Declaration of Steven Knott).

## **C. ECONOMIC FINDINGS OF FACT**

### **1. Dr. Harris Lacks Foundation For His Economic Opinions**

7.42 Barry Harris is employed by Economists, Inc. in Washington D.C., and has been working there since 1985, except during 1992-1993 when he was the Deputy Assistant Attorney General at the Department of Justice. (Harris, Tr. 7152-53).

#### Response to RFOF 7.42

This finding is irrelevant. Further, it is misleading. Dr. Harris held his position at the Department of Justice for only about four months. (Harris, Tr. 7412).

7.43 While in this position Dr. Harris was in charge of 80 or 90 professional economists, including financial analysts, had broad policy responsibilities, reported to the head of the Antitrust Division of the Department of Justice, and participated in decision making regarding Acquisitions and enforcements. (Harris, Tr. 7153).

#### Response to RFOF 7.43

This finding is irrelevant.

7.44 Dr. Harris has authored eight to ten articles relating to Acquisitions. (Harris, Tr. 7156-57).

#### Response to RFOF 7.44

This finding is irrelevant.

7.45 Dr. Harris has analyzed roughly 200 Acquisitions, both in private practice and for the government, and has testified in between 15 and 20 Acquisition cases, seven of which specifically involved a governmental challenge to a Acquisition, including Baker Hughes. (Harris, Tr. 7160-61, 7163).

#### Response to RFOF 7.45

This finding is irrelevant.

### **2. Dr. Harris's Methodology Is Flawed**

7.46 Dr. Harris believes that the Baker Hughes case is very similar factually, insofar as the products at issue were customized but made from a known technology, the market was very thin, shares were affected by individual jobs, other firms did the same work worldwide, and the government contended this did not mean these worldwide competitors could compete in the United States. (Harris, Tr. 7166-67).

#### Response to RFOF 7.46

This finding is irrelevant and is based on unreliable testimony by Respondents' expert. 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 have not thought about the facts – the detailed facts of that case probably in ten or fifteen years." (Harris, Tr. 7478-9). 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).

7.47 Dr. Harris analyzed the competitive effects of the Acquisition of CB&I and PDM using the Merger Guidelines and using empirical data, by reading deposition and trial testimony, by looking at publicly available information such as websites, and by talking to CB&I people. (Harris, Tr. 7171-81).

#### Response to RFOF 7.47

This finding is incomplete because it fails to include Dr. Harris's explanation regarding how empirical data is used under the Merger Guideline to analyze the competitive effects of the acquisition. Dr. Harris testified in conducting his economic analysis in this case he followed the basic steps in the Merger Guidelines. (Harris, Tr. 7173, 7696). Dr. Harris acknowledged that the first step is to define the antitrust markets. (Harris, Tr. 7175). Dr. Harris acknowledged that under the Merger Guidelines the next step is to assign market shares to the firms in the market. (Harris, Tr. 7177, 7696). Dr. Harris acknowledged that market shares are typically measured based on sales in the year or two prior to the merger. (Harris, Tr. 7178). However, "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; Harris, Tr. 7231). Dr. Harris acknowledged that the Merger Guidelines use the Herfindahl-Hirschman Index ("HHI") as the means of measuring concentration. (Harris, Tr. 7697). Dr. Harris acknowledged that "Market shares and concentration can be useful if they help you predict as you go forward." (Harris, Tr. 7227). Dr. Harris has previously testified that "[a]s a general matter, the greater the concentration, the greater possibility the firms in the market will be able to raise the price up above the competitive level." (Harris, Tr. 7426-7). As an example, Dr. Harris noted in his prior testimony that he would expect that market power would be able to be exercised in a market that consists of one company with 60 percent of the market, another company with 20 percent, and a third company with 20 percent. (Harris, Tr. 7427-8). Further, 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). Also, Dr. Harris acknowledged that the strength of competitors going forward should be considered in examining the acquisition. (Harris, Tr. 7229).

7.48 Dr. Harris reviewed the entire record in connection with this case; Dr. Simpson, by contrast, read approximately 80% of the record. (Harris, Tr. 7172; Simpson, Tr. 3624-26).

#### Response to RFOF 7.48

This finding mischaracterizes the record and creates a false impression regarding the relative knowledge of the two economic experts in this case. 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 or the testimony of witnesses. 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 point to any internal planning documents to support his 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. (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 CB&I's post-acquisition planning documents. (Harris, Tr. 7580).

By contrast, Dr. Simpson cited extensively to Respondents' documents and to the trial and deposition testimony of witnesses. Dr. Simpson reviewed the documentary evidence in the case. (Simpson, Tr. 3624). In addition, as of December 6, 2002, Dr. Simpson had reviewed 70-80 percent of the deposition testimony and 80% of the trial testimony. (Simpson, Tr. 3624-25).

In an attempt to reconcile his conclusions with PDM's inconsistent strategic planning documents, which recognized CB&I as PDM EC's only competitor in these markets, Dr. Harris speculated that the strategic plans were written "just with blinders on." (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 added)). However, 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). 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.")).

Dr. Harris testified at length regarding his perception of the competitive environment faced by CB&I following the acquisition. 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). 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). When confronted with the statements by CB&I's executives regarding the competitive environment in which CB&I operates, Dr. Harris acknowledged that CB&I's statements to investors contradict Dr. Harris's view of the market. (Harris, Tr. 7867-68 ("that's not consistent with my understanding of the market."); CX 1731).

7.49 It is economically significant that each project is designed for each customer because there is individualized bidding for each project. (Harris, Tr. 7189-90).

#### Response to RFOF 7.49

Complaint counsel agree.

7.50 Although there is individualized bidding for each project, broadly, that a customer chooses a particular supplier indicates the ability of that supplier to compete. (Harris, Tr. 7190-91).

#### Response to RFOF 7.50

This finding is incorrect. As 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. 3151-52) In fact, Dr. Harris also testified that the observation that buyers sometimes buy from new firms does not, by itself, imply that entry is sufficient. (Harris, Tr. 7792)

7.51 Dr. Harris examined the market since the Acquisition and looked to see what producers are doing and where they've bid, where they've won jobs, what they say they can do, what they've said publicly about their plans; similarly, he looked at what customers have done, what they say about the Acquisition and what they have done in terms of awarding jobs and accepting bids and qualifying producers to bid. (Harris, Tr. 7181-82, 7191).

#### Response to RFOF 7.51

This finding is inaccurate and self-serving. Dr. Harris simply represented that he did these things. In fact, he presented a highly selective and distorted view of post-acquisition developments. Dr. Harris' conclusions and analysis regarding the effects of the acquisition are unreliable because they lack support in the record and are contradicted by un rebutted evidence ignored or rejected by Dr. Harris. CCRFF 7.48. He ignored Respondents' internal and public statements, ignored projects that are being sole-sourced to CB&I, and relied on irrelevant events and inaccurate characterizations of events. CCRFF 7.48. He selected the award of an LNG tank in Trinidad as an example of developments in the United States. He cited CB&I's repeated refusal to bid on Dynegy's Hackberry LNG project as a loss by CB&I to foreign competition.

7.52 Dr. Harris' examination of the post-Acquisition activity is commonly called an analysis of the "natural market experiment" by economists. (Harris, Tr. 7182-84).

#### Response to RFOF 7.52

This finding is incorrect. As Dr. Simpson noted, what has happened since the acquisition is not a natural experiment because "CBI could control the outcome of this experiment." (Simpson, Tr. 5758).

7.53 Dr. Harris used the natural market experiment as a significant part of his analysis in this case. (Harris, Tr. 7185-86).

#### Response to RFOF 7.53

This finding is incorrect because what has happened since the acquisition is not a natural experiment. "CBI could control the outcome of this experiment." (Simpson, Tr. 5758). 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. 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 thermal vacuum chambers following the acquisition? (Harris, Tr. 7654-55).

7.54 Dr. Harris used the natural market experiment to look at what happened after the Acquisition and see if predictions regarding the effects of the Acquisition have come true; additionally Dr. Harris used past natural market experiments to make and test future predictions. (Harris, Tr. 7183).

#### Response to RFOF 7.54

This finding is incorrect because what has happened since the acquisition is not a natural experiment. "CBI could control the outcome of this experiment." (Simpson, Tr. 5758). 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. 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 thermal vacuum chambers following the acquisition? (Harris, Tr. 7654-55).

7.55 Economic testimony establishes that not all aspects of a particular natural market experiment need be identical to the features that exist in the market being analyzed. (Harris, Tr. 7183-84).

#### Response to RFOF 7.55

This finding is incomplete. The features of a natural experiment can differ so much from those that exist in the market being analyzed that the natural experiment has no predictive power. For instance, Dr. Harris argues that an award of an LNG tank project to TTK in Trinidad implies that foreign firms compete on an equal footing with CBI in the U.S. (Harris, Tr. 7241-42) Dr. Harris argues that the conditions in Trinidad are similar to those in the U.S. (Harris, Tr. 7223) However, Dr. Harris later conceded that he was ignorant about how the regulatory environment in Trinidad compared to that in the U.S. (Harris Tr. 7800-01).

7.57 However, Dr. Harris does not believe that Complaint Counsel took into account post-Acquisition markets. (Harris, Tr. 7187).

#### Response to RFOF 7.57

This finding regarding Dr. Harris's unfounded belief is irrelevant except to show that Dr. Harris's testimony is not credible. Dr. Harris's self-serving and unsupported statement that Complaint Counsel ignored post-acquisition behavior in the relevant markets is incorrect. There is nothing in the record to support Respondents' assertion that Dr. Harris actually believes what he said. In any event, Dr. Harris has no basis for believing what he said. Complaint Counsel, in fact, identified considerable evidence that CBI's acquisition of PDM has had actual anticompetitive effects. CCF 753-1220.

7.58 Economic testimony regarding the natural market experiment reveals that that domestic U.S. customers in the relevant tank markets are turning to worldwide producers who in large part were not selling in the United States prior to the Acquisition; these are not new firms but new sellers in the U.S. (Harris, Tr. 7188-89).

#### Response to RFOF 7.58

This statement is incorrect. There is no evidence in the record of buyers turning to foreign firms for U.S. LPG tank projects, U.S. LIN/LOX tank projects, or U.S. TVC projects. In the U.S. LNG tank market, CBI won the only project awarded since the acquisition, CCF 582-83, and is negotiating with buyers on a sole-source basis for five other projects. (Glenn, Tr. 4234, 4399) CCF 582, 584-86. While Dynegy is presently considering two foreign firms for a U.S. LNG tank project, CBI refused to bid on this project. (Glenn, Tr. 4242-48).

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. 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). 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.")).

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.*). 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. 7511-12).

### **3. Dr. Harris Misapplied Economic Theories**

#### **a. Critical loss**

7.59 Competitive constraint was calculated by Dr. Harris using critical loss analysis, a calculation which Dr. Harris created. (Harris, Tr. 7256, 7258). Dr. Simpson used critical loss analysis to determine relevant markets. (Simpson, Tr. 3525).

#### Response to RFOF 7.59

This finding is incorrect. The record indicates that Dr. Harris made numerous mistakes in using critical loss analysis to examine whether CBI has market power. CCFF 592-654.

7.60 Critical loss analysis is done to ascertain, either for purposes of market definition or for purposes of unilateral action, whether or not market power can be exercised. (Harris, Tr. 7256).

#### Response to RFOF 7.60

This finding is incomplete. There are differences between using a critical loss analysis for market definition and using a critical loss analysis for assessing market power within a market. (Simpson, Tr. 3525-26; CCFF 642-650) Dr. Harris failed to account for these

differences. CCF 642-650.

7.61 To calculate critical loss, the first step is to identify the entity to be tested. (Harris, Tr. 7259).

#### Response to RFOF 7.61

This finding is incomplete. In selecting the entity to be tested, i.e., a hypothetical monopolist or CB&I, Dr. Harris failed to account for important differences between using a critical loss analysis for market definition and using a critical loss analysis for assessing market power within a market. (Simpson, Tr. 3525-26; CCF 642-650). CCF 642-650.

7.63 It is then necessary to identify which costs are variable and figure out the variable contribution margin; the larger the contribution margin, the lower the critical loss, i.e. the level at which a price increase becomes unprofitable. (Harris, Tr. 7259).

#### Response to RFOF 7.63

The contribution margins in the markets in this case are low. Dr. Simpson testified that they are below [ ]. (Simpson, Tr. 3017; CX 1641, *in camera*). CCF 602, 604. Dr. Harris also estimated that the contribution margins are low -- Dr. Harris estimated the contribution margin to be approximately [ ] for LNG and [ ] for the other relevant products. (CX 1641 *in camera*; Harris, Tr. 7344). CCF 603, 613-14.

7.66 Dr. Simpson did a critical loss analysis, but came to a different conclusion with respect to contribution margin. (Harris, Tr. 7260).

### Response to RFOF 7.66

This finding is incomplete. Dr. Simpson also came to a different conclusion with respect to both the critical loss, which is the largest amount of sales that CBI could lose before a given price increase becomes unprofitable, and the amount of sales that CBI would lose if it increased price. (Simpson, Tr. 3529-31). Both economic experts agreed that the contribution margins in the markets in this case are low. Dr. Simpson testified that they are below [ ]. (Simpson, Tr. 3017; CX 1641 *in camera*). CCF 602, 604. Dr. Harris estimated the contribution margin to be approximately [ ] for LNG and [ ] for the other relevant products. (CX 1641 *in camera*; Harris, Tr. 7344). CCF 603, 613-14.

7.67 Dr. Simpson assumes that CB&I's fixed costs as a percentage are no more than 15%, and he bases this on his assumption that engineering, drafting, fabrication, project management and field erection are all entirely variable. (Simpson, Tr. 3003-17; CX-1641).

### Response to RFOF 7.67

Respondents' claim that Dr. Simpson assumes that engineering, drafting, fabrication, project management, and field erection are entirely variable misrepresents the record. When asked how he estimated the difference between the price and the variable cost in this case, Dr. Simpson testified "I applied economic theory to the facts in this case, documents and what various market participants had said." (Simpson, Tr. 2999). Specifically, Dr. Simpson noted that CX 1563 shows how the employment of construction supervisors and project managers at PDM depended on workload. (Simpson, Tr. 3004-09). Dr. Simpson further noted that CX 1033, CBI's 10K filing with the SEC, discusses a voluntary retirement offer that CBI made in part to adjust the size of its operations to its level of business going forward. (Simpson, Tr. 3009) Dr. Simpson noted that this voluntary retirement offer included project managers, engineers, and possibly draftsmen. (Simpson, Tr. 3009, 3015). Dr. Simpson noted that the testimony of Samuel Leventry, the executive at CBI who oversees engineering, suggests that CBI adjusts the size of its engineering force to meet its workload. (Simpson, Tr. 3013-15).

Among other things, Dr. Simpson based his conclusion that fabrication is a variable cost on the fact that CBI sometimes subcontracts for fabrication. (Simpson, Tr. 3010-12) In fact, Respondents' own finding 7.73 supports Dr. Simpson.

7.68 Record evidence reveals that Dr. Simpson's critical loss calculation was incorrect because he estimates an incorrect contribution margin based on his own notion of which costs at CB&I are variable and which are fixed, without finding out how CB&I actually runs its business. (Harris, Tr. 7341-42).

### Response to RFOF 7.68

This finding is incorrect. *See* CCF 7.67.

7.69 Dr. Simpson admits that CB&I is going to behave in accordance with its perceptions of the costs of the company. (Simpson, Tr. 3874).



### Response to RFOF 7.69

This finding is inaccurate. In his testimony cited by Respondents, Dr. Simpson explained that even if CB&I did not recognize its market power today, over time CB&I will optimize its behavior to profit maximize. (Simpson, Tr. 3874-75). Further, Dr. Simpson's explained: "Q: If Chicago Bridge & Iron's management perceives that their contribution margin is larger than you have estimated and that their loss of sales would be greater, would that perception keep Chicago Bridge & Iron from increasing price in your opinion? A: It might in the short term. In the long term, we would expect Chicago Bridge & Iron's management to learn what the conditions are in the marketplace. Your question, as I understand it, goes to whether Chicago Bridge & Iron's management could consistently make an incorrect decision, and I don't think they would. I think they would learn over time." (Simpson, Tr. 5781) *See* CCRFF 7.79.

7.70 Gerald Glenn, CEO of CB&I, stated that CB&I would not reduce the size of its engineering department, its project manager force, or its fabrication facilities if it lost 25 percent of its business in the relevant product markets. (Glenn, Tr. 4159-60).

### Response to RFOF 7.70

This finding is misleading because it fails to disclose that CB&I's projected business gains in the relevant products will require it to add resources, and it further fails to disclose that the reason CB&I would not reduce the size of these organizations is CB&I's ability to shift its engineering, project management, and fabrication facilities between the relevant products and other products.

Mr. Glenn's statement regarding the effect of a loss of 25% of CB&I's sales must be considered in light of his claim that based on 2001 CB&I sales, the product markets in this case affect about one to one and one half percent of CB&I's revenues. (Glenn, Tr. 4088, 4209 ("My statement was that for 2001, which is the time frame that we have audited that counts and so forth")). Sales awards to CB&I in the relevant product markets, since 2001, and expected future awards would greatly increase this figure. Mr. Glenn acknowledged that the Cove Point LNG tank will impact this figure either in 2002 or subsequently, depending on when the revenues are booked. (Glenn, Tr. 4209). Mr. Glenn had no idea whether revenues from the Cove Point LNG project will double, triple, or quadruple the percent of CB&I's sales accounted for by the relevant products. (Glenn, Tr. 4211). In addition to Cove Point project, CB&I has won the [ ] LNG tank project and is engaged in sole-source negotiations for [ ] other LNG projects in the United States. CCF 582-87. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [

], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI-010191-HOU). Mr. Glenn admits that CB&I would have to hire additional personnel as the proposed LNG projects on CB&I's plate are awarded, and in fact, he would welcome a slowdown: "I don't know that there's enough resources – if all of that gets going and LNG projects, I think we'd tax the skilled resources in our business to be able to do that. It's OK with us if it slows down a little bit, but only a small portion, as we can determine, has been awarded." (CX 1731 at 34).

In addition, Respondents' proposed finding simply means that CB&I is able to redeploy into or out of other product lines and other geographic areas as its United States workload in the markets in this case changes. CB&I's ability to redeploy assets and personnel to other markets, means that CB&I 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).

7.71 Luke Scorsone, President of CB&I Industrial, corroborated Mr. Glenn's testimony and stated that engineers are simply reassigned to different contracts when other jobs are lost, even if half of jobs are lost in the relevant product markets, that engineering and drafting are considered the same at CB&I, that salaried field erection personnel are redeployed and not fired even if half of jobs are lost in the relevant product markets, that he would not shut down a fabrication shop or fire employees if half of the jobs in the relevant product markets were lost, and that he would not sell equipment if he lost half the work in the relevant product markets. (Scorsone, Tr. 4902-11).

#### Response to RFOF 7.71

For the reasons stated in response to RFOF 7.70, this finding is misleading because it fails to disclose that CB&I's projected business gains in the relevant products will require it to add resources, and it further fails to disclose that the reason CB&I would not reduce the size of these organizations is CB&I's ability to shift its engineering, project management, and fabrication facilities between the relevant products and other products. CB&I's ability to redeploy assets and personnel to other markets means that CB&I 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). *See* response to RFOF 7.70.

7.72 Mr. Scorsone instead fires people based on performance; not based on downturns in business in the relevant product markets. (Scorsone, Tr. 4912-17).

#### Response to RFOF 7.72

For the reasons stated in response to RFOF 7.70, this finding is misleading because it fails to disclose that CB&I's projected business gains in the relevant products will require it to add resources, and it further fails to disclose that the reason CB&I would not reduce the size of these organizations is CB&I's ability to shift its engineering, project management, and fabrication facilities between the relevant products and other products. CB&I's ability to redeploy assets and personnel to other markets, means that CB&I does not lose the contribution margin earned with these assets and personnel if CB&I loses sales as a result of a price increase by CB&I in any of the markets in this case. When CB&I's total volume of work changes, CB&I adjusts its staffing accordingly. (CX 1033 at 32; Scorsone, Tr. 4910-11). *See* response to RFOF 7.70.

7.73 Mr. Scorsone also indicated that fabrication is variable since 9% nickel steel is imported pre-fabricated.

(Scorsone, Tr. 4891).

### Response to RFOF 7.73

Complaint counsel agree that fabrication costs are variable.

7.74 Mr. Glenn explained that sales in the relevant product markets are small in the scheme of CB&I's overall sales. (Glenn, Tr. 4211-12).

### Response to RFOF 7.74

Mr. Scorsone acknowledged that this statement applied only to the year 2001. (Glenn, Tr. 4209 (“My statement was that for 2001, which is the time frame that we have audited that counts and so forth”). Sales awards to CB&I in the relevant product markets, since 2001, and expected future awards would greatly increase this figure. Mr. Glenn acknowledged that the Cove Point LNG tank will significantly increase sales in the relevant markets either in 2002 or subsequently, depending on when the revenues are booked. (Glenn, Tr. 4209, 4211). Mr. Glenn had no idea whether revenues from the Cove Point LNG project will double, triple, or quadruple the percent of CB&I's sales accounted for by the relevant products. (Glenn, Tr. 4211). In addition to the Cove Point project, CB&I has won the [ ] LNG tank project and is engaged in sole-source negotiations for [ ] other LNG projects in the United States. CCF 582-87. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [ ], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI-010191-HOU). Mr. Glenn admits that CB&I would have to hire additional personnel as the proposed LNG projects on CB&I's plate are awarded, and in fact, he would welcome a slowdown: “I don't know that there's enough resources – if all of that gets going and LNG projects, I think we'd tax the skilled resources in our business to be able to do that. It's OK with us if it slows down a little bit, but only a small portion, as we can determine, has been awarded.” (CX 1731 at 34).

7.75 CB&I trains its workforce across all its products, and does not have employees who specialize in a product. (Glenn, Tr. 4058, Scorsone, Tr. 4887, CX-497 at 363-65 (Leventry deposition)).

### Response to RFOF 7.75

This statement is incomplete. CB&I enjoys an economy of scope. CB&I's ability to redeploy assets and personnel to other markets, means that CB&I 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. (Simpson, Tr. 5774-75). When CB&I's total volume of work changes, CB&I adjusts its staffing accordingly. (CX 1033 at 32; Scorsone, Tr. 4910-11).

7.76 Dr. Harris found that a five percent increase in price would be unprofitable for CB&I if it were to lose one in seven jobs. (Harris, Tr. 7342).

### Response to RFOF 7.76

This statement is incorrect. Dr. Harris's opinion that a 5-percent price increase would be unprofitable for CBI if it were to lose one in seven jobs is based on his critical loss analysis, which is badly flawed. CCF 592-654. Further, Dr. Harris failed to show that a 5% price increase above prices prior to the acquisition would cause CB&I to lose any jobs. Instead, he pointed to the Dynegy Hackberry project, on which CB&I refused to bid, and Dr. Harris called that a loss. CCF 635-36. (*See* RX 951; Puckett, Tr. 4557).

7.77 By contrast, Dr. Simpson's calculation indicates that a 5 percent price increase becomes unprofitable if CB&I loses one in four jobs. (Harris, Tr. 7342).

#### Response to RFOF 7.77

This statement is inaccurate. Dr. Simpson testified that a 5% price increase becomes unprofitable if a firm loses more than 25% of its volume of sales as a result of the 5% price increase. (Simpson, Tr. 3529).

7.78 Ultimately, however, economic testimony indicates that regardless of whose calculation is correct, CB&I has already lost 18% of the post-Acquisition dollars that were available, thus at this point any price increase and subsequent loss of sales would be unprofitable. (Harris, Tr. 7342-43).

#### Response to RFOF 7.78

This finding is incorrect. *See* CCRFF 7.80. In addition, this finding fails to take into account that CB&I has already increased by [ ] the price of LNG tanks above CB&I's price prior to the acquisition. *See* CCRFF 7.106.

7.79 CB&I's state of mind is important to critical loss, and is important across all four product markets, because the important question is whether CB&I will behave in a certain manner. (Harris, Tr. 7260-61).

#### Response to RFOF 7.79

This finding is incomplete and misleading to the extent that it suggests that buyers in the relevant markets would be protected from an anticompetitive price increase because CBI's management is unaware of its market power.

First, the record indicates that the acquisition has had actual anticompetitive effects. CCF 749-1220 Thus, the suggestion that CBI's management is unaware of its market power is inconsistent with the record.

Second, even if CBI's management was ignorant of their market power, such ignorance would not protect buyers in these markets in the long run. Dr. Simpson's testified: "Q: If Chicago Bridge & Iron's management perceives that their contribution margin is larger than you have estimated and that their loss of sales would be greater, would that perception keep Chicago Bridge & Iron from increasing price in your opinion? A: It might in the short term. In the long term, we would expect Chicago Bridge & Iron's management to learn what the conditions are in

the marketplace. Your question, as I understand it, goes to whether Chicago Bridge & Iron's management could consistently make an incorrect decision, and I don't think they would. I think they would learn over time." (Simpson, Tr. 5781)

7.80 It is economically significant that CB&I has already lost projects since the Acquisition, which means that CB&I has already lost more business than it can afford to lose under critical loss analysis. (Harris, Tr. 7261-63).

## Response to RFOF 7.80

Both parts of this statement are incorrect. First, it is not economically significant that CB&I has already lost projects since the Acquisition. Both Dr. Simpson and Dr. Harris testified that the observation that buyers sometimes buy from new firms does not, by itself, imply that entry is sufficient. Moreover, since the acquisition, CB&I has lost no projects in the LNG market, the LPG market, or the TVC market. CB&I has won the only LNG project awarded since the acquisition and has been selected as sole-source supplier for [ ] other LNG projects. CCF 582-86. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [ ], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI-010191-HOU). CB&I declined to bid for the Dynege Hackberry LNG project despite repeated invitations to do so. CCF 577. (Glenn, Tr. 4242-48).

Second, Dr. Harris bases his conclusion that CB&I has already lost more business than it can afford to lose under a critical loss analysis on a list that he and his staff prepared which purports to show that CB&I has lost six of ten post-acquisition projects in the relevant markets and has lost 82 or 83 percent of the dollars available to be won. (Harris, Tr. 7346-77, 7356-57). However, as noted elsewhere, this list is a highly inaccurate and distorted compilation of project awards. For instance, [

[ ]]. CCF 637, 640, 641, 636 (Glenn, Tr. 4238; Hart, Tr. 384-5, 402, 405; Harris, Tr. 7777-9; RX 951, *in camera*; Glenn, Tr. 4234, 4399). [ ]]. CCF 636. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [ ]], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI-010191-HOU).

7.81 This suggests that CB&I was not trying a price increase, but was rather getting out competed. (Harris, Tr. 7263).

## Response to RFOF 7.81

This finding is incorrect. Dr. Harris's claim that CB&I is not trying to increase price is contradicted by evidence of post-acquisition anticompetitive effects. CCF 753-1220. Dr. Harris's claim that CB&I is getting out-competed is contradicted by statements made by Gerald Glenn, CBI's CEO. Mr. Glenn stated: "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).

### **b. CB&I's knowledge of its competitors' costs**

7.82 Economic testimony reveals that under the FTC's theory that CB&I knows its competitors costs and is the low cost supplier, CB&I should be winning every job, but CB&I has not won every job and has instead already lost its "critical loss" as calculated by Dr. Simpson. (Harris, Tr. 7264, 7273, 7358-59).



## Response to RFOF 7.82

This finding and Dr. Harris mischaracterize Dr. Simpson's testimony. Dr. Simpson testified: "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). Dr. Simpson testified that in this type of environment, "when 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).

Dr. Simpson then testified that in some cases CBI would have information about the costs of other bidders. (Simpson, Tr. 3077-79). Dr. Simpson also testified that in some cases, buyers "would give the various bidders feedback as far as where the various bidders ranked with respect to one another, and then they would let the various bidders alter their bid in response to this information about where they rank relative to the competition." (Simpson, Tr. 3080). Dr. Simpson testified that in these two cases, where bidders are knowledgeable or become knowledgeable about their competitor's costs, the lowest cost bidder will just undercut the second lowest cost bid so that the second lowest cost bid sets the price. (Simpson, Tr. 3077, 3085). Dr. Simpson testified that in these cases, a merger of the two lowest cost (or best) bidders means that the third best bid rather than the second best bid sets the price. (Simpson, Tr. 3079, 3085).

Dr. Harris testified that the FTC's theory implies that CBI, having acquired PDM, should win every job. (Harris, Tr. 7359). However, Dr. Simpson testified that the fact that CBI does not win every job simply means that in *some* cases, CBI does not have good information about its rivals' costs and buyers do not share bid information with bidders and allow bidders to rebid. (Simpson, Tr. 3088)

The statement that CBI has already lost its critical loss is incorrect. CCFF 634-41. CCRFF 7.80.

7.83 Dr. Simpson admits that CB&I has imperfect knowledge of its competitors because products are sold through a sealed bid process; bidders must guess who the other bidders are, estimate their costs, and then predict what their bidding behavior will be. (See Simpson, Tr. 3073, 3771).

## Response to RFOF 7.83

This statement is inaccurate and incomplete. The sealed bid process describes only one of the ways products are sold in the relevant markets. See response to RFOF 7.82 for a discussion of Dr. Simpson's actual testimony on this point.

7.84 Dr. Simpson agrees that CB&I can draw the inference from the fact that foreign tank companies are winning projects that that (sic) foreign tank companies have competitive prices. (Simpson, Tr. 3784).



#### Response to RFOF 7.84

This finding misrepresents the record in at least two respects. First, foreign companies are not winning U.S. LNG projects. In the U.S. LNG tank market, CBI won the only project awarded since the acquisition, CCF 583, and is negotiating with buyers on a sole-source basis for [ ] other projects. (Glenn, Tr. 4234, 4399) CCF 582, 584-86. (Glenn, Tr. 4148, 4177, 4180, 4234, 4399; [ ], *in camera*; Sawchuck, Tr. 6075-76; CX 1478 at CBI-010191-HOU). While Dynegy is presently considering two foreign firms for a U.S. LNG tank project, CBI refused to bid on this project. (Glenn, Tr. 4242-48).

Second, Dr. Simpson did not agree that CB&I can draw the inference from the fact that foreign tank companies are winning projects that that (sic) foreign tank companies have competitive prices.” Rather, when asked a hypothetical question, Dr. Simpson gave the following response: “Q: Let’s assume CBI thought what they said was true at the time of that letter, okay? A: Okay. Q: But they’re told by the customer that you can’t bid because we’re satisfied with the other prices that we’ve got, and you’re late in the process. CBI can draw conclusions from that that the foreign tank companies must have pretty competitive prices, couldn’t they? . . . A: That would be one piece of information that they could evaluate. In looking at that one piece of information in isolation, they could draw that inference.” (Simpson, Tr. 3783-4)

In fact, Dr. Simpson testified elsewhere that he believes that foreign LNG tank builders are “much weaker” competitors than CBI. (*e.g.*, Simpson, Tr. 3050).

7.85 Dr. Simpson admits that the knowledge that AT&V beat CB&I twice would have an effect on CB&I’s pricing in the LIN/LOX tank market. (Simpson, Tr. 3829).

#### Response to RFOF 7.85

This finding is incomplete. Dr. Simpson also testified “In the long run, I think the acquisition gives CBI the ability to increase price by 5 percent in the LIN/LOX/LAR market.” (Simpson, Tr. 3828).

7.86 Dr. Simpson believes that the level of information available to CB&I will determine whether it is likely CB&I would impose a price increase. (Simpson, Tr. 3844-47).

#### Response to RFOF 7.86

This finding is inaccurate. In his testimony, cited by Respondents, Dr. Simpson said that he thinks CB&I can increase price (Simpson, Tr. 3844) and that “I don’t think that information would constrain CB&I.” (Simpson, Tr. 3846). Further, Dr. Simpson explained that even if CB&I did not recognize its market power today, over time CB&I will optimize its behavior to profit maximize. (Simpson, Tr. 3874-75, 5781). *See* CCRFF 7.69 and 7.79.

7.87 Record evidence indicates that competitors may know the rankings of competitors who submitted bids on a project, but in the industry the actual prices submitted are almost never disclosed. ([redacted]); Patterson, Tr. 350-60).

### Response to RFOF 7.87

Documents contradict respondents' claim. For example, "CBI's price of \$910,550 is the high of four bidders and is \$50,000 to \$100,000 higher than the other three. We can look our hand over if we want to adjust our price." (CX 147). "Dave and I received information through XL systems that our price is very high compared with PDM's." (CX 272). "In talking this afternoon with Ed Spellman of [Air Liquide], Ron got the impression that we must drop more than \$200,000 to get in the range of PDM or Graver." (CX 221).

Similarly, in e-mail from Rich J. Kooy of CB&I to members of his team, Mr. Kooy related that "[Lud Seufert of Air Products] confidentially confirmed that BSL's bid was in the range of \$2,700,000!" (CX 609 at CBI-PL023628; *see also* CX 1318 at CBI-PL030368 (Detailed pricing of CB&I, Bouygues and TKK/Dumez/Entrepose on the Bonny Island LNG/LPG project); CX 776 at CBI-PL023623 ("The evaluation of the three bids of CBI, PDM and Graver was very close . . . in the end the evaluation mostly came down to price. Graver's price was between \$25,000-\$50,000 lower than CBI's."); CX 748 at CBI-PL006838 (LIN/LOX tanks "will be awarded to Graver at a price of roughly \$3,100,000 or -6% below our price"); CX 774 ("I got a call from BM local # 549 in Pittsburgh stating that Graver filled out their 'Job Information Sheet' that showed a contract price of \$2,076,000 [for an Air Liquide LIN/LOX job]").

7.88 A rare instance of actual bids being made available to the competitors is where the customer is a public utility required to eventually make the bids public. (*See* Scorsone, Tr. 5010).

### Response to RFOF 7.88

This statement is misleading. It is not rare that firms in the market obtain information about the bids of their competitors. *See* CCRFF 7.87. [redacted] was able to determine the price of the Cove Point LNG tank by reviewing Williams' filing with the FERC. ([redacted] *in camera*). The same information is available to competitors in the LNG market.

## **4. Economic Opinions In LNG Market**

### **a. General conclusions**

7.89 Economic testimony supports the view that there has not been any harm to competition in the U.S. LNG market as a result of CB&I's Acquisition of PDM. (Harris, Tr. 7194).

### Response to RFOF 7.89

This finding is contradicted by numerous instances of post-acquisition anticompetitive harm. CCFF 753-1220; Response to RFOF 7.106.

7.90 Further, economic testimony supports the view that the level of competition in the U.S. LNG market is robust; there are numerous bidders and prices have not risen. (Harris, Tr. 7195).

### Response to RFOF 7.90

This finding is incorrect for two reasons. First, the fact that there are bidders does not imply that the level of competition in the U.S. LNG tank market is robust. 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. 3151-52; Harris, Tr. 7438). Both economic experts also testified that the observation that new firms submit bids in a market does not always imply that entry is sufficient. (Simpson, Tr. 3282-84, Harris, Tr. 7790-91).

Second, the claim that prices have not risen as a result of this acquisition is contradicted by evidence of post-acquisition anticompetitive harm. CCFF 753-1220; Response to RFOF 7.106.

7.91 In addition, economic testimony supports the conclusion that entry in the LNG domestic tank market is easy. (Harris, Tr. 7248).

### Response to RFOF 7.91

This finding is incorrect. Dr. Harris's testimony that entry into the U.S. LNG market is easy is contradicted by the record. CCFF 291-403, 581-591.

7.92 Further, economic testimony supports the conclusion that under the Merger Guidelines, entry is competitively significant in the LNG market in the U.S.. (Harris, Tr. 7254-56).

### Response to RFOF 7.92

This finding is incorrect. Dr. Harris elsewhere concedes that entry by firms who can only profitably enter at prices above the competitive level would not restore competition. (Harris, Tr. 7438). Dr. Harris further acknowledges that 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). The record in this case makes clear that entry sufficient to restore the premerger competitive environment has not occurred and is unlikely to occur. CCFF 291-403, 581-591.

7.93 Finally, economic testimony supports the conclusion that there are entrants who are serious, qualified international producers and that they either already compete in the United States or have the ability to compete in the United States. (Harris, Tr. 7213).

### Response to RFOF 7.93

This finding is irrelevant. Dr. Harris concedes that entry by firms who can only profitably enter at prices above the competitive level would not restore competition. (Harris, Tr. 7438). Dr. Harris further acknowledges that 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). The record in this case makes clear that entry sufficient to

restore the premerger competitive environment has not occurred and is unlikely to occur. CCFF 291-403, 581-591.

## **5. Dr. Harris Lacked Support For His Conclusions**

7.94 These economic conclusions are supported by the fact that customers in the U.S. LNG tank market are large, sophisticated energy companies, and are often assisted by construction or consulting firms. (Harris, Tr. 7206-07).

### Response to RFOF 7.94

This finding is incorrect. While Dr. Harris does say that customers in the U.S. LNG tank market are large, sophisticated energy companies who are often assisted by construction or consulting firms, Dr. Harris fails to explain why this fact implies that CBI's acquisition of PDM did not harm competition. (Harris, Tr. 7206-07). Indeed, the evidence that CBI has increased price following its acquisition of PDM suggests that the alleged size and sophistication of U.S. LNG tank customers has not protected them from anticompetitive harm. CCFF 777-882, 955-977. In addition, Dr. Simpson testified that the Respondents "request for in camera treatment of the costs and the prices for these projects indicates that they believe that customers are not particularly knowledgeable about what the costs and the prices are." (Simpson, Tr. 3146-47)

7.95 Additionally, these economic conclusions are supported by customer testimony indicating a belief that there is sufficient competition and that the competition in the U.S. LNG tank market is not harmed by the Acquisition. (Harris, Tr. 7297-7308).

### Response to RFOF 7.95

This finding is incorrect for at least two reasons. First, the Harris testimony cited by respondents describes the LIN/LOX market and LPG market, not the LNG market. (Harris, Tr. 7297-7308). Second, the customers who testified that there is sufficient competition in the U.S. LNG tank market are ignorant of U.S. LNG tank prices. (Carling, Tr. 4514 ("Q. And so to the extent that the foreign suppliers have made these proposals, you don't have any experience evaluating how competitive they have been compared to CB&I and PDM? A. No. No. Not in the U.S."); Izzo, Tr. 6514 ("Q. You've never been involved in a competitive bidding situation for an LNG or a LIN/LOX tank or an LPG tank in the United States. Is that correct? A. That's correct"); Eyerman, Tr. 7063-64 ("Q. You never worked with PDM prior to their acquisition by CBI. Is that correct?/ A. No, I did not./ Q. You have never seen any pricing on a PDM LNG tank. Is that right?"/ A. That's right)).

7.96 That there are presently numerous suppliers, i.e. TTK with AT&V, Technigaz with Zachry, Daewoo with S&B, and Tractebel/Entrepose, available supports these economic conclusions. (Harris, Tr. 7209-13).

### Response to RFOF 7.96

This finding is incorrect. 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. 3151-52; Harris, Tr. 7438). The record in this case indicates that the foreign firms listed above lack the tangible and intangible resources necessary to restore the competition that existed between CBI and PDM. (Simpson, Tr. 3155-56, 3214, 3278). CCFF 420-82, 530-566. Even Gerald Glenn acknowledges this point in a statement to investors. According to Mr. Glenn: "We can win the work every time technically. . . . 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).

7.97 An economic evaluation of Skanska Whessoe indicates that because it now has both "brains and brawn", has been accepted as a bidder and the EPC for Dynegy, and is viewed by customers as a good supplier, it is a good competitor. (Harris, Tr. 7239-7240).

#### Response to RFOF 7.97

This finding is incorrect. The record indicates that Skanska Whessoe cannot restore the competition lost through CBI's acquisition of PDM. CCFF 530-41.

7.98 An economic evaluation of the TKK/AT&V alliance indicates that because customers have said good things about TKK, because of TKK's reputation, and because TKK won the Trinidad job, TKK is a viable entrant. (Harris, Tr. 7241-42).

#### Response to RFOF 7.98

This finding is incorrect. The record indicates that TKK/ATV cannot restore the competition lost through CBI's acquisition of PDM. CCFF 448-482, 557-66.

7.99 An economic evaluation of the Technigaz/Zachry alliance indicates that because of its worldwide experience, its clear intent to enter the market, its experience in concrete, customer testimony, and Zachry's strength as a construction firm, it is a viable potential entrant (Harris, Tr. 7242-43).

#### Response to RFOF 7.99

This finding is incorrect. The record indicates that the Technigaz/Zachry alliance cannot restore the competition lost through CBI's acquisition of PDM. CCFF 542-556.

7.100 An economic evaluation of competition in LNG market indicates that there are also potential entrants, which include Daewoo/S&B, Tractebel/Entrepose, MHI and IHI. (Harris, Tr. 7245-47).

#### Response to RFOF 7.100

This finding is misleading. 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).

7.101 The economic conclusions reached by Dr. Harris are supported by natural market experiments, including Dynegy and Trinidad. (Harris, Tr. 7263-64, 7267-73).

## Response to RFOF 7.101

The “natural experiments” relied on by Dr. Harris are nothing of the sort. *See* response to RFOF 7.102 and 7.103. The results of observed by Dr. Harris are under CB&I’s control and influence, and Dr. Harris misinterpreted the facts in examining the results. 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 exercise increased price discipline following the acquisition? (Harris, Tr. 7860). 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 the CMS Lake Charles LNG tank after the acquisition? Response to RFOF 6.106. Would CB&I increase the price of large, field-erected thermal vacuum chambers following the acquisition? (Harris, Tr. 7654-55).

7.102 Dynegy represents a natural market experiment indicating that the FTC’s theory that CB&I has market power and can successfully exert market power is wrong. (Harris, Tr. 7263-64).

## Response to RFOF 7.102

The proposed finding is wrong. Dr. Harris’s 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. Explaining his conclusion that competitors in the United States LNG market have changed since 2001 (Harris, Tr. 7220), 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). Dr. Harris 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.”)). (Harris, Tr. 7511-12).

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. Dr. Harris had stretched the facts, and later had to acknowledge 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. (Harris, Tr. 7347-48). 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.”

Further, Dr. Harris failed to account for CB&I’s willingness to see a slowdown in the

pace of its LNG projects. (Harris, Tr. 7864-65). Dr. Harris acknowledged that he did not factor into his analysis of LNG jobs not taken by CB&I the statement by CB&I's CEO that CB&I would not object to some slowdown in the pace of new LNG projects. (Harris, Tr. 7862-63; CX 1731 at 34 (Gerald Glenn, Transcript)).

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 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; Harris, Tr. 7796; CX 138 at CBI 019913-HOU). 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).

7.103 Trinidad represents a natural market experiment indicating that CB&I's competitors can offer the same prices as CB&I did pre-Acquisition and that they may have similar cost structures since 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 to Dr. Harris that if CB&I was 5 percent higher than they had been earlier in Trinidad, if they were 5 percent higher, but the winning bid was 5 percent lower, what that means is within a small margin of error that the winning bid in Trinidad post-Acquisition was almost identical to the winning bid in Trinidad pre-Acquisition. (Harris, Tr. 7351).

### Response to RFOF 7.103

The proposed finding is wrong and relies on testimony recanted by Dr. Harris.

The Trinidad "natural market experiment" relied on by Dr. Harris to support his conclusions with respect to the U.S. LNG tank market is 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). Over and above increased charges by CB&I for materials and other costs, CB&I increased the price of the Trinidad LNG tank by 5-6 percent. (*Id.*) Dr. Harris erroneously treats this increase in CB&I's margin on the project as the total price increase by CB&I. (Harris, Tr. 7351). Respondents' success in increasing the price and margin of the Cove Point LNG tank, by increasing costs charged to the project in excess of actual costs demonstrates how Respondents can manipulate costs to increase profit. CCF 805-11. Even when CB&I's costs for completing the work fell, as a result of delay of the Cove Point project, CB&I increased the price to the customer, claiming additional cost. CCF 813.

CB&I is likely to have increased its margin on the fourth tank, at Trinidad, by more than the 5-6 percent price increase attributable to the margin increase, because CB&I's actual costs in performing the work would be reduced 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).

Dr. Harris recanted the testimony relied on by Respondents for the proposed finding. 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 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.”)). Despite Dr. Harris’s recantation, Respondents repeat, in their proposed finding, Dr. Harris’s misstatement that CB&I increased its price by only 5%.

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).

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. 4233-34).

7.104 The economic conclusions are supported by the fact that there are no examples of post-Acquisition price increases; Memphis is not an example of a post Acquisition price increase because the comparison is between an old price and a budget estimate nearly a decade later; such a comparison is not appropriate. (Harris, Tr. 7274-7275).

#### Response to RFOF 7.104

The proposed finding is wrong. Memphis is an example of a post-acquisition price increase. CCF 944-54. One internal justification by CB&I for increasing the price of the proposed Memphis LNG tank, in 2002, was the high price at which Respondents had sold the Cove Point LNG tank. CCF 948.

7.105 [ ] ( )

#### Response to RFOF 7.105

The proposed finding is wrong. Cove Point is an example of two, successive price increases resulting from suspension of competition between CB&I and PDM following signing





[

*IN CAMERA*



As shown in the graph, CB&I's [ ] price to [ ] for the [ ] LNG tank is far above the price CB&I and PDM quoted for that size tank prior to the acquisition. Yet, CB&I's price remains sufficiently below Skanska Whessoe's price for the tank so that CB&I does not risk a loss of sales to Skanska Whessoe.

7.107 Economic testimony indicates that Fairbanks does not represent a price increase because it was a budget estimate for a tiny job. (Harris, Tr. 7278-79).

#### Response to RFOF 7.107

The proposed finding is wrong. Fairbanks is an example of a post-acquisition price increase. CCF 955-977.

7.108 That the LNG tank market has changed in the last decade insofar as demand has changed, that there is a shift to double and full containment tanks, and that the competitors have changed supports the economic conclusions reached in this case. (Harris, Tr. 7219-21).

#### Response to RFOF 7.108

Leaving aside the problems with sentence construction, this finding incorrectly suggests that a shift in the marketplace from single containment LNG tanks to double or full containment LNG tanks would mean that the acquisition did not reduce competition. *See* CCF 571-580. Dr. Simpson testified that his conclusion that CBI and PDM EC were far and away the strongest competitors in the U.S. LNG tank market also applies to double and full-containment tanks. (Simpson, Tr. 3068). According to Dr. Simpson, "Both CBI and PDM EC had built full-containment tanks in other parts of the world, so in other parts of the world they were able to compete with companies such as Whesoe and Technigaz and TKK on an equal footing for building full-containment tanks. In the U.S., CBI and PDM EC would have a number of advantages. Their fabrication plants are in the U.S. They know the U.S. regulations. They know the U.S. work force. They know the vendors in the U.S. (Simpson, Tr. 3068). Dr. Simpson also noted that CB&I documents indicate that CBI believes that it has a competitive advantage in the construction of full-containment tanks. (Simpson, Tr. 3069-72).

At least in the passage cited by respondents, Dr. Harris offers no explanation for why a shift from single containment tanks to double or full containment tanks would imply that CBI's acquisition of PDM did not harm competition. (Harris, Tr. 7219-21).

The only change in the competitors in the LNG tank market is the elimination of PDM through its acquisition by CB&I. The acquisition has forced LNG tank customers to consider less cost effective suppliers as the only alternative to CB&I. 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. 3151-52; Harris, Tr. 7438).

7.109 The economic conclusions reached in this case are supported by the fact that CB&I has won only 17-18% of the dollar amounts available, which means that CB&I is not able to profitably increase prices if that is

what it is doing, and likely does not have better costs than its competitors. (Harris, Tr. 7223, 7264, 7358).

### Response to RFOF 7.109

This finding is incorrect. *See* CCRFF 7.80 and 7.81.

7.110 Dr. Harris' expert economic conclusions are supported by the Merger Guidelines, which state that a structural analysis is only valid if it is predictive (§§ 1.41 & 1.32). (Harris, Tr. 7227-32).

### Response to RFOF 7.110

This finding is incorrect. The Merger Guidelines indicate that "Market shares will be calculated using the best indicator of firms' future competitive significance." The record indicates that CBI and PDM were far and away the two strongest competitors at the time of the acquisition. e.g. CCFF 399-419 The record further indicates that, absent the acquisition, CBI and PDM would have been the two strongest competitors in the future. *E.g.*, CCFF 420-447. Thus, any application of the Merger Guidelines methodology to the record would yield very high market shares for CBI and PDM. Dr. Harris's opinion that other firms have the competitive strength of CBI or the pre-acquisition PDM is not supported by the record.

7.111 Economic analysis of the record indicates that entry is easy; which is supported by the fact that entrants already have sufficient engineering staffs and skills, it is not necessary to own a fabrication plant since often steel is prefabricated and imported anyhow, field labor can be hired easily, and subcontracting is not a competitive disadvantage. (Harris, Tr. 7249-54).

### Response to RFOF 7.111

This finding is incorrect. Dr. Harris's testimony that entry is easy is contradicted by abundant evidence in the record showing that entry sufficient to restore the pre-merger competitive environment is difficult and time consuming. CCFF 291-570. 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. 3151-52; Harris, Tr. 7438).

7.112 Further, that entry is easy is supported by the fact that the entrants are worldwide tank producers who can and have competed in the U.S. (*See* Harris, Tr. 7249, 7251-52).

### Response to RFOF 7.112

This finding is incorrect. Please see responses to RFOF 7.91-7.93.

7.113 Expert testimony indicates that the omission of market changes affects Dr. Simpson's HHI analysis. (Harris, Tr. 7221-22).

### Response to RFOF 7.113

This finding is incorrect. Dr. Simpson testified elsewhere that he assigned market shares, and thus calculated HHIs, by looking at the period immediately prior to CBI's acquisition of PDM EC and using documents, opinions of market participants, and a history of past sales to assign market shares to companies based on their future competitive strength. (Simpson, Tr. 3050-51, 3709). In fact, for LNG tanks, Dr. Simpson presented both HHI calculations based on assigning both CBI and PDM 50 percent market shares as well as HHI calculations based on either sales or awards since 1990. (Simpson, Tr. 3055; 3494).

The record indicates that CBI and PDM were far and away the two strongest competitors at the time of the acquisition. *E.g.*, CCF 399-403. The record further indicates that, absent the acquisition, CBI and PDM would have been the two strongest competitors in the future. *E.g.*, CCF 420-447. Thus, any application of the Merger Guidelines methodology to the record would yield very high market shares for CBI and PDM. Dr. Harris's opinion that other firms have the competitive strength of CBI or the pre-acquisition PDM is not supported by the record.

7.114 Dr. Simpson, however, does not account for these changes in his structural analysis. (Harris, Tr. 7221).

### Response to RFOF 7.114

This finding is incorrect. Please see response to RFOF 7.113.

7.115 For this reason, as well as due to Dr. Simpson's failure to consider changes in the market, Dr. Simpson's structural analysis is not useful. (Harris, Tr. 7227-29).

### Response to RFOF 7.115

This finding is incorrect. Please see response to RFOF 7.113.

7.116 Economic testimony indicates that the 1994 Memphis project says nothing about the ability of those entrants to bid today because circumstances have changed; namely joint alliances have been formed and Skanska now owns Whessoe. (Harris, Tr. 7233-34).

### Response to RFOF 7.116

This finding is incorrect. The bidding for the 1994 Memphis project demonstrated that foreign firms were at a competitive disadvantage with respect to CBI and PDM. CCF 929-943. Statements by Gerald Glenn, CBI's CEO indicate that this is still the case. (CX 1731 at 44, Glenn, Tr. 4380 ("we can win the work every time technically")).

## **6. Dr. Harris Lacks a Basis for his Opinions in the LPG Market**

7.117 Economic testimony supports the view that the Acquisition of PDM by CB&I has not harmed competition or reduced competition in the U.S. LPG tank market. (Harris, Tr. 7281).

### Response to RFOF 7.117

This finding is incorrect. Dr. Harris's claim that CBI's acquisition of PDM has not reduced competition in the U.S. LPG tank market is contradicted by the record. CCFF 273-275, 404-411.

7.118 This economic testimony is supported by the fact that there are additional firms who could enter the LPG market; any of the worldwide LNG tank suppliers. (Harris, Tr. 7287-94).

### Response to RFOF 7.118

This claim is incorrect. [ ] of [ ] stated "Technigaz/Zachry has no plans to compete for constructing LIN/LOX tanks, single containment LNG and LPG tanks, or thermal vacuum chambers within the U.S." (RX 738 at ¶ 10). Mr. Cutts testified in his deposition that TKK was not interested in pursuing LPG tank projects in the United States in partnership with ATV. (Cutts, Tr. 2430-2431).

7.119 Economic testimony indicates that Dr. Simpson's structural analysis in the LPG market fails to reflect the current level of competition because it fails to consider that CB&I had not won a job between 1993 and the Acquisition, and it fails to consider entry. (Harris, Tr. 7286-87).

### Response to RFOF 7.119

This finding is wrong. Dr. Harris uses the term structural analysis to refer to the calculation of market shares. (Harris, Tr. 7221, 7286-87). Thus, Dr. Harris argues that Dr. Simpson's calculation of market shares fails to reflect the current level of competition in the LPG tank market. (Harris, Tr. 7286-87). In calculating market shares, Dr. Simpson assigned CBI a 56.7 percent market share and assigned PDM a 34.5 percent market share. (Simpson, Tr. 3403-04). These market shares are consistent with PDM's 2000 business plan which states under the heading Refrigerated Hydrocarbons, which are LPGs, "CBI is PDM EC's major competitor for both storage tanks and turnkey facilities in the U.S. and on international projects." (CX 94 at PDM-HOU017582) Given this, Respondents' own documents indicate that Dr. Simpson's calculation of market shares accurately reflect the effect on competition of CBI's acquisition of PDM.

7.121 That entry is easy is supported by the Morse tank story, which represents a natural market experiment. (Harris, Tr. 7295-97).

### Response to RFOF 7.121

This finding is incorrect. The fact that Morse was awarded a contract in 1994 to build an LPG tank does not imply that entry is easy. Dr. Simpson testified: ". . . Morse Tank had a large advantage in competing for this project because of its geographic location. . . . what the map shows is that the project for this LPG tank was very close to Morse Tank's headquarters and fabrication plant . . ." (Simpson, Tr. 3386-87). Dr. Simpson noted that a Morse Tank document

states: “As a local contractor, we have an advantage of minimal shipping, familiarity with local WISHA requirements, familiarity with the permitting process for tank erection and can provide home office support and prompt response with our office and fabrication facilities located approximately 75 miles from the project site.” (Simpson, Tr. 3387-88; CX 1482 at MCG 000786). Dr. Simpson also noted that PDM’s 2000 business plan does not list Morse Tank as a competitor in the LPG tank market. (Simpson, Tr. 3389; CX 94 at PDM-HOU017582).

7.122 The economic conclusion that competition has not been harmed in the LPG market is supported by customer views that prices have not risen since the Acquisition. (Harris, Tr. 7299-7300).

## Response to RFOF 7.122

Dr. Harris' actually testified: "And my memory is that – I'm forgetting the man's name. I think – but it's the company – I think that the tank was built by ATV. His testimony is that he believes that prices have not risen after the merger." (Harris, Tr. 7300). The only LPG tank that ATV has built in the U.S. is a \$300,000 35,000 barrel LPG tank sold to ITC in 2000. (Simpson, Tr. 3375; CX 1657). CCFF 172. (JX 27 at 99 (V. Kelley, Dep.)). This is the only LPG tank that ITC has purchased in the last four years. (N. Kelley, Tr. 7081). In his deposition, Mr. Kelley of ITC testified that ITC did not currently have any plans to construct additional field-erected LPG tanks. (N. Kelley, Tr. 7089). Given this, Dr. Harris is mistaken in his belief that this buyer has observed LPG tank prices after the merger.

### **7. Dr. Harris Lacks a Basis for his Opinions in the LIN/LOX Market**

7.123 Economic testimony indicates that it is inappropriate to include spheres in the LIN/LOX market. (Harris, Tr. 7301-02).

## Response to RFOF 7.123

This finding is incorrect. The Federal Trade Commission's complaint includes in the LIN/LOX market spheres that store liquid hydrogen and liquid helium at very low temperatures. Dr. Simpson testified: "if one were to think of . . . the tanks that store the liquid nitrogen, liquid oxygen, and liquid argon, as one market and the . . . spheres that store hydrogen and helium at extremely cold temperatures as another market, I don't think the analysis would change in any significant degree." (Simpson, Tr. 3420).

7.124 Economic testimony supports the view that the Acquisition will not harm competition in the LIN/LOX market. (Harris, Tr. 7302).

## Response to RFOF 7.124

Dr. Harris' claim that CBI's acquisition of PDM will not harm competition in the LIN/LOX market is contradicted by the record. Buyers of LIN/LOX tanks viewed CBI's acquisition of PDM as reducing the number of suppliers of LIN/LOX tanks from two to one. (Fan, Tr. 1023, 1026-27; Kamrath, Tr. 1990-91; CX 136 at CBI 014195-HOU; Kistenmacher, Tr. 876-7). Competition between CBI and PDM resulted in lower prices for LIN/LOX tanks. (CX 193 at CBI-PL020339; Kistenmacher, Tr. 867-68; Patterson, Tr. 356-59, 362-64; CX 222 at CBI-PL037594 (PDM beat CB&I for a LIN/LOX tank for Linde in Louisiana by reducing the price in the last round of bidding)).

7.125 That the skills needed to make an LNG tank are the same to make a LIN/LOX tank supports this view. (Harris, Tr. 7303).

Response to RFOF 7.125

This finding is not correct. An LNG tank is much larger than a LIN/LOX tank. (CCFF 55,68). So, a builder of an LNG tank would need experience engineering and managing a larger project.

7.126 [

] ( [ ]).

Response to RFOF 7.126

This finding is incorrect. The evidence that Dr. Harris cites does not support his inference. First, a firm can be the lowest bidder on one project and the highest bidder on another project simply because its costs for completing those two projects relative to its competitors differ. Second, a firm may be the lowest cost bidder on one project and the highest cost bidder on another project because it has imperfect information about its competitors' costs. However, this does not imply that the firm is trying to be competitive.

7.127 That AT&V has won three of the five post Acquisition LIN/LOX projects supports the view that competition has not been harmed by the Acquisition in the LIN/LOX market. (Harris, Tr. 7308).

Response to RFOF 7.127

This finding is incorrect for several reasons. First, as Dr. Harris notes, BOC awarded ATV one of its three projects before the acquisition. (Harris, Tr. 7307-08). Second, although [ ] to ATV in part to develop another supplier so that there would be a viable competitor to CB&I, [ ] has been very dissatisfied with ATV's performance. ([ ], *in camera*). [ ] recently asked CB&I to take over the project, but CB&I refused. (Scorsone, Tr. 5036). Third, as Dr. Harris concedes, the observation that buyers sometimes buy from new firms does not, by itself, imply that entry is sufficient. (Harris, Tr. 7792).

7.128 An economic analysis of Matrix indicates that its sale of Brown Steel will not affect its ability to compete in the LIN/LOX market. (Harris, Tr. 7308-10).

Response to RFOF 7.128

This finding is incorrect. 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 1569-70, 1602 (no company has been a viable LIN/LOX competitor while subcontracting out its fabrication)). Therefore, the sale of Brown Steel could have the effect of diminishing Matrix's competitive strength. (Newmeister, Tr. 1590-91, 1595). The results of recent bids indicate that Matrix has higher costs than CB&I. (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); [ ], *in camera* (Matrix's price for LIN/LOX tank was [ ] higher than CB&I on most recent project)).

7.129 [ ]

[ ] ([ ]).

### Response to RFOF 7.129

This finding is incorrect. Dr. Harris dismissed [ ] between Air Liquide and ATV as common. ([ ], *in camera*). However, [ ] testified:

[ ]

[ ] ([ ], *in camera*).

7.130 An economic analysis of the LIN/LOX market indicates that Dr. Simpson's structural analysis in LIN/LOX is not useful because it does not reflect the current competitive situation and fails to consider entry and changes in the market since 1990 since such as Praxair spinning off CB&I and Graver. (Harris, Tr. 7311-13).

### Response to RFOF 7.130

This finding is incorrect. Dr. Simpson testified that CBI and PDM were the two strongest competitors for LIN/LOX tanks immediately prior to CBI's acquisition of PDM. (Simpson, Tr. 3450). Dr. Simpson based his conclusion that PDM was the strongest competitor in the LIN/LOX tank market immediately prior to the acquisition on PDM's 38.9 percent share of dollar sales from 1990 to the time of the acquisition and on his review of documents. (Simpson, Tr. 3430). Dr. Simpson based his conclusion that CBI was the second strongest competitor on CBI's 33.8 percent market share of dollar sales from 1990 to the time of the acquisition, CBI's position as a stronger company since being spun off from Praxair in the mid 1990s, and CBI's efforts to lower its costs. (Simpson, Tr. 3430-39). Dr. Simpson also noted that Graver had exited the market at the time of the acquisition and that Matrix's costs had increased after selling its Brown Steel subsidiary. (Simpson, Tr. 3439). [ ]

[ ] (Fan, Tr. 1023, 1026-27; [ ], *in camera*; CX 136 at CBI 014195-HOU; Kistenmacher, Tr. 876-77)

7.132 An economic analysis of market behavior in the LIN/LOX market indicates that competition has not been harmed. (Harris, Tr. 7314-15).

Response to RFOF 7.132

This finding is incorrect. Dr. Harris’s claim that CBI’s acquisition of PDM has not reduced competition in the U.S. LIN/LOX market is contradicted by the record. CCF 1053-1107.

7.133 Economic testimony supports the view that recent entrants constrain CB&I’s pricing, as illustrated by the Freeport job. (Harris, Tr. 7315-17).

Response to RFOF 7.133

The finding and Dr. Harris are incorrect in claiming that Air Liquide’s experience in contracting for the construction of a LIN tank in Freeport, Texas indicates that recent entrants constrain CB&I’s pricing. When Air Liquide solicited bids for this project, AT&V’s bid was about [ ] ([ ], *in camera*) Air Liquide selected AT&V for the project [ ] ([ ], *in camera*). [ ] ([ ], *in camera*).

[ ] ([ ], *in camera*).

7.134 [ ] ([ ], *in camera*).

Response to RFOF 7.134

This finding is wrong and is refuted by the record. There are three instances of identical price increases of 8.7% by CB&I in the LIN/LOX market following the acquisition. CCF 1053-54, 1070, 1076, 1085-86. Mr. Fan observed that following the acquisition, CB&I increased the price to Linde BOC Process Plant LLC (“Linde”) by 8.7% above what this customer believes it would have paid to PDM. CCF 1070. Mr. Fan’s opinion is supported by his extensive experience in accurately estimating and observing costs and prices for LIN/LOX tanks. CCF 1059-70. Moreover, the 8.7% price increase observed by Linde is corroborated by the 8.7% price increases imposed by CB&I on two Praxair LIN/LOX projects following the acquisition. (CCF 1071-76 and CCF 1077-86).

7.135 [ ]

Response to RFOF 7.135

This finding is wrong and is contradicted by the record. Dr. Harris had only a selective and hazy recollection of what witnesses said. As discussed in response to RFOF 7.134, CB&I has increased price in the LIN/LOX market on at least three jobs since the acquisition.

[ ] said that CB&I's acquisition of PDM left [ ] without means to negotiate for a better price from CB&I. CCF 1102-1107. Further, CB&I could increase its bid [ ]. ([ ] *in camera*). CB&I is aware that it could increase its price substantially [ ] (Leon, Tr. 3846-47; [ ] *in camera*). CCF 1101. Accordingly, CB&I is likely to increase its price in the future.

[ ] said that he believed that because of Graver/Iteq's bankruptcy and CB&I's acquisition of PDM there was only one viable supplier in North America and that could affect [ ] competitive position. ([ ] *in camera*). Further, if PDM had not been acquired by CB&I, [ ] far less likely to take the risk of developing a new supplier. [ ] ([ ] *in camera*). On August 4, 2000, shortly before signing the acquisition letter of intent, CB&I and PDM submitted competing bids to Air Products for a LOX tank in Longview, Texas. (CX 764 at CBI-PL069334; Kamrath, Tr. 1987). CB&I won the award after submitting a bid that included administrative charges of [ ] and a negative margin of [ ]. (CX 764 at CBI-PL069334; Kamrath, Tr. 1987). The negative margin more than offset CB&I's administrative charges on the project. Following the acquisition, CB&I declined to lower its bid for [ ] below a 0% margin, *i.e.*, a price that covered CB&I's full cost plus CB&I's full administrative charges. (Scorson, Tr. 5035; *see* CX 764 at CBI-PL069334). *See* RFOF 5.130. By setting its minimum bid at a level that covered all of CB&I's administrative charges for the Freeport project, CB&I had increased its price by [ ] compared to what CB&I had bid for the Longview LOX tank. ([ ]).

Mr. Hilgar 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 Exh. 1 ¶ 14 (Hilgar, Dep.) ("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.")). 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).

**8. Dr. Harris Lacks a Basis for his Opinions in the TVC Market**

7.136 Economic testimony supports the view that the Acquisition will not harm competition in this market because there is no business to speak of in this market, and the offer made by CB&I could remedy any problems created by the Acquisition. (Harris, Tr. 7325-28).

#### Response to RFOF 7.136

This finding is incorrect in two respects. First, buyers of TVCs testified that CBI's acquisition of PDM would reduce competition. TRW is currently in the process of purchasing a large field-erected TVC. (Neary, Tr. 1423). Patrick Neary of TRW testified that TRW estimates, that as a result of CBI's acquisition of PDM, "the chamber price would grow, the costs would grow 50 percent." (Neary, Tr. 1456-57)

Second, Gerald Glenn, CEO of CBI, did propose that CBI could remedy the anticompetitive harm in the TVC market by committing to sell TVCs at any profit that the Court would establish, (Glenn, Tr. 4165). However, given CBI's ability to pad its costs as shown in CX 1160, this offer is not a substitute for competition. Mr. Glenn also proposed that CBI could create a competitor by mentoring an entrant. (Glenn, Tr. 4165). But, witnesses have testified that such mentoring would not be sufficient to create a viable competitor. (*See, e.g.*, Gill, Tr. 202 ("It would take more than mentoring"); Neary, Tr. 1458 (Mentoring wouldn't make Howard a "real viable competitor"))).

### **9. Dr. Harris Lacks a Basis for his Testimony Regarding Vertical Effects**

7.137 Economic testimony indicates that CB&I's Acquisition of PDM did not result in vertical anticompetitive effects because CB&I does not have market power in the tank markets, and the EPC market is very competitive, as evidenced by Skanska/Whessoe at Dynegy and Black & Veatch and KBR. (Harris, Tr. 7329-30).

#### Response to RFOF 7.137

This finding is incorrect. The record indicates that CBI, having acquired PDM, has market power in the LNG tank market. *E.g.*, CCF 399-403, 571-580, 777-1052. The record further indicates that CBI tries to leverage its market power in LNG tanks into related markets. (CX 186 at CBI-PL012446).

7.138 That CB&I sometimes tries to supply the entire facility is irrelevant to an economic analysis of the Acquisition since it is a business decision predating the Acquisition. (Harris, Tr. 7330-31).

#### Response to RFOF 7.138

This finding is incorrect. CBI's policy of selling LNG tanks only as part of a larger package may have predated the acquisition. (*See, e.g.*, CX 186 at CBI-PL012446). Nevertheless, since PDM did not have this policy, CBI's acquisition of PDM has vertical anticompetitive effects.

## **10. Dr. Harris Lacks a Basis for his Testimony Relating to Exiting Assets**

7.139 Economic testimony indicates that it is important for an economist to consider whether the acquired firm would have remained in the market but for the Acquisition. (Harris, Tr. 7331-32).

### Response to RFOF 7.139

This finding misrepresents the record. Specifically, Dr. Harris distinguished between the acquired firm and its assets. (Harris, Tr. 7331-32 (Well, again, we have to distinguish between the firm and the assets.”)) Dr. Harris testified “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, well, then the result is that it [an acquisition of the assets] could not possibly harm competition.” (Harris, Tr. 7332). Even if PDM had liquidated PDM EC, its assets would have remained in the market because that is their highest value use.

7.140 This economic testimony is supported by record evidence that PDM was going to liquidate its EC division absent the Acquisition, Matrix was not a viable purchaser, and Dr. Simpson ignores this entirely. (Harris, Tr. 7332-38).

### Response to RFOF 7.140

This statement is incorrect for three reasons. First, the record does not support the claim that PDM would have liquidated its EC division absent the acquisition. PDM EC was a profitable division in PDM. CCF 1229-1237 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. (CX 1590 at PDM-C1006065). Second, even if PDM EC was liquidated, its assets may have remained in the market. (Harris, Tr. 7964-66). Third, Dr. Simpson addresses at length the issue of whether PDM EC’s assets would have left the market but for CBI’s acquisition of PDM EC. (Simpson, Tr. 3575-84).

## **11. Dr. Harris Lacks a Basis for his Testimony Regarding Relief**

7.141 Economic testimony supports the position that relief requested by the FTC is unnecessary because there is no anticompetitive result from the Acquisition and the requested remedy may actually harm competition. (Harris, Tr. 7366).

### Response to RFOF 7.141

This finding is incorrect. Dr. Harris’ unsupported opinion that there is no anticompetitive result from the acquisition is contradicted by the record. CCF 749-1220 Dr. Harris’ view that the requested remedy may harm competition is unsupported by the record.

7.142 This is supported by the fact that the FTC failed to consider whether two new companies would meet the same level of viability Dr. Simpson requires of entrants. (Harris, Tr. 7367-68).

### Response to RFOF 7.142

This finding misrepresents the record. Dr. Harris testified: “In order for it [the proposed remedy] to solve problems, it has to recreate the two low-cost producers that the FTC says existed before the acquisition.” (Harris, Tr. 7367). Complaint counsel agrees. Complaint

Counsel's post trial brief states: "The divestiture ordered in this case should be both complete

and broad enough to restore the competition that existed before the unlawful acquisition.”  
Complaint Counsel’s post trial brief at 48.

7.143 There is support for the view that a break up is unsupported and unnecessary in the customer testimony regarding a break-up of CB&I and testimony of Gerald Glenn which indicates that remedy is not desired by customers and would be disruptive. (Harris, Tr. 7368-72).

#### Response to RFOF 7.143

This is contradicted by the record. Full divestiture is appropriate and necessary to restore competition to the relevant markets. CCFF 1282-1374.

7.144 Economic testimony indicates that in LNG bonding is an issue to be considered since it may be impossible for a break-up to restore any loss of competition. (Harris, Tr. 7372-73).

#### Response to RFOF 7.144

Complaint counsel agree that the divested business must have a revenue base comparable to CB&I’s and PDM’s Prior to the Acquisition. CCFF 1297-1309.

7.145 Economic testimony indicates that Dr. Simpson failed to do a thorough analysis with regards to remedy. (Harris, Tr. 7373-75).

#### Response to RFOF 7.145

This finding is false. Dr. Simpson carefully analyzed and testified regarding the relief necessary to restore competition.

Dr. Simpson testified that complete divestiture is necessary and appropriate relief: “Q. . . . [D]o you know what the complaint in this proceeding proposes as relief in the notice of contemplated relief? A. To reconstitute the assets that had been . . . acquired. Q. Do you think that this is required in order to restore the competition lost through CB&I’s acquisition of PDM EC? A. Yes, I do. PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets. For a reconstituted firm to be as strong a competitor, it, too, would have to possess these tangible and intangible assets. Q. Why? A. Things such as the fabrication plants that PDM EC had, its work force, its engineering staff and its intangible assets, such as its learning by doing, enabled it to compete as a very strong competitor in this marketplace.” (Simpson, Tr. 3606-07).

Dr. Simpson testified that divestiture to an appropriate acquirer of the reconstituted assets of PDM EC and PDM Water would be effective in restoring competition: “I believe that if Chicago Bridge & Iron is required to reconstitute the assets of PDM EC and PDM Water and then sell this to another buyer that that would restore the competition that existed prior to the acquisition.” (Simpson, Tr. 3608-09).

Dr. Simpson testified that in order to replace the competition that was eliminated by the acquisition, the divested entity would need the economies of scope that PDM obtained from the shared operations of its EC and Water divisions: “

Q.  
And  
what  
would  
the  
diveste  
d entity  
need to

provide to buyers in order to replace the competition that was eliminated? A. PDM EC and PDM Water shared fabrication plants and shared construction crews, so an entity that would be divested would have to include assets that would enable the divested firm to compete not just in the markets in this case but also in markets such as flat bottom tanks, egg-shaped digesters and water tanks.” (Simpson, Tr. 3607).

Dr. Simpson testified that a divested entity would need a fabrication facility in order to replace PDM: “Q. What tangible assets would an entrant need to acquire that allowed CB&I and PDM EC to compete so effectively? A. Both CBI and PDM EC had fabrication facilities in the U. S . . . .” (Simpson, Tr. 3155-56).

Dr. Simpson testified that restoration of competition requires divestiture of intangible as well as tangible assets: “The two companies possessed various tangible and intangible assets that enabled them to offer customers the best deal relating to dimensions of competition such as price, quality, timeliness of completion, reputation and safety.” (Simpson, Tr. 3608).

Dr. Simpson testified that in order to assure that the acquirer will be able to compete on an equal footing with CB&I, the combined intellectual property of CB&I and PDM must be shared with the divested entity: “Q. Prior to Chicago Bridge & Iron's acquisition of PDM EC and PDM Water, both CB&I and PDM possessed proprietary information about bidding strategies and construction techniques. . . . How should that proprietary information be treated in formulating relief in this proceeding? A. In order to have two firms that would -- that could compete on an equal footing, both firms should have access to that proprietary information.” (Simpson, Tr. 3609).

Dr. Simpson testified that the divestiture will require the appointment of a monitor trustee to oversee its effective implementation. (Simpson, Tr. 5715).

Dr. Simpson testified that customers would benefit from reconstituting and divesting the acquired businesses: “Q. Do you believe that customers would benefit by reconstituting a competitive company? A. Yes, I do.” (Simpson, Tr. 3611).

## **12. Dr. Simpson's Foundation**

**a. Generally**

7.146 Dr. Simpson has never, in his professional career as an economist, had a job outside of an antitrust enforcement agency. (Simpson, Tr. 3616).

Response to RFOF 7.146

This finding is not relevant.

7.147 Dr. Simpson has never testified on behalf of a private business as an economist. (Simpson, Tr. 3616).

Response to RFOF 7.147

This finding is not relevant.

7.148 Dr. Simpson had not read approximately 20 percent of the trial testimony at the time he gave his expert opinions, and did not know whether that trial testimony would have influenced his opinion. (Simpson, Tr. 3626).

Response to RFOF 7.148

This finding is irrelevant. Dr. Simpson's testimony extended from December 2, 2002 through December 24, 2002, during which time Dr. Simpson continued to listen to the testimony of witnesses, who were taken out of turn for the convenience of Respondents' witnesses, and continued to read trial testimony. (Simpson, Tr. 5359).

**b. LNG**

7.149 [ ] ([ ]).

Response to RFOF 7.149

Respondents' assertion is wrong. Dr. Simpson testified that he knew that CB&I [ ] ([ ], Tr. 5639, *in camera*). When asked if he looked at the price, Dr. Simpson responded, [ ] ([ ], Tr. 5639). Respondents' counsel chose not to refresh Dr. Simpson's recollection regarding the price of the tank, although Dr. Simpson testified regarding [ ] deposition testimony concerning CB&I's and Whessoe's prices for the [ ] LNG tank (Simpson, Tr. 3093-94), and Respondents could have refreshed Dr. Simpson's recollection regarding the price of the tank by showing him the transcript of [ ] deposition. (JX 26 at 11 [( ]) *in camera*).

Dr. Simpson observed that CB&I may have increased its price for the CMS Lake Charles LNG tank after it acquired its strongest competitor. (Simpson, Tr. 3093-94). Respondents

concede that “knowing the price that CMS was sold at [ ] opinion as to whether there have been price increases post-acquisition[.]” ([ ], *in camera*). Further, Respondents argue that the actual transaction price for the [ ] LNG tank is a “basis to look at whether there’s been post-acquisition price increases.” ([ ], *in camera*). The record confirms Dr. Simpson’s observation that CB&I has increased the price and shows that following the acquisition, CB&I increased its price for the 140,000-cubic meter single containment LNG tank by [ ] above the price CB&I quoted for that size tank prior to the acquisition ((\\$35 million/[ ] - 1). (CCRF 1.06; compare J. Kelley, Tr. 6260 and RX 157 at [ ] 02 004 *in camera*).

7.150 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).

#### Response to RFOF 7.150

This finding is misleading. Dr. Simpson does not need to have such detailed cost information to examine whether foreign firms would have higher costs than CBI. (Simpson, Tr. 5765). Dr. Simpson testified: “I think there’s other pieces of information that one can use, and this would include information found in the company’s documents, information found in statements to investors . . .” (Simpson, Tr. 5765) Company documents indicate that CB&I and PDM viewed each other as the only competitors in the U.S. LNG tank market. CCF 212-217. In a presentation to investors, Gerald Glenn, CB&I’s CEO, said that for LNG tanks “we can win the work every time technically.” (CX 1731 at 44, Glenn, Tr. 4380). Mr. Glenn elaborated: “[I]f [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).

Dr. Simpson also testified that the history of projects won in the United States is another piece of information that one could use to examine whether foreign firms have higher costs than CB&I, or the pre-acquisition PDM. (Simpson, Tr. 5765, 3046-49, CX 1645).

7.151 Dr. Simpson does not know whether CB&I decided to import the steel for the Cove Point project fully fabricated because it was cheaper than fabricating it itself. (Simpson, Tr. 3924-25). However, Dr. Simpson believes this information would be useful to developing his opinions. (Simpson, Tr. 3925).

#### Response to RFOF 7.151

This finding is false, mischaracterizes the record, and is remarkable for its duplicity. Respondents’ counsel asked Dr. Simpson, on December 13, “did you know that Chicago Bridge & Iron decided to import the tank for the Cove Point project fully fabricated from Europe” (Leon, Tr. 3924), implying that CB&I had somehow accomplished the impossible – importing the tank from Europe. Appropriately, Dr. Simpson responded, “I did not know that.” (Simpson, Tr.

3924). Respondents' question to Dr. Simpson mischaracterized the record. In fact, the evidence in the record, as of December 13, which was discussed by Dr. Simpson in his direct testimony, *i.e.*, Mr. Scorsone's analysis of the November 1, 2000 "as reviewed" estimate, and the November 2, 2000, "as submitted" estimate for the Williams Cove Point LNG tank, shows that fabrication would be performed at PDM's Warren, Pennsylvania, facility. (CX 1160 at CBI/PDM-H 4007 486, *in camera* ([ ])) (emphasis added)). Notwithstanding Mr. Steimer's concerns that CB&I was overcharging Williams, Mr. Scorsone increased the fabrication charge to Williams by [ ]. (CX 1160 at CBI/PDM-H 4007 485, *in camera*). Nor did subsequent testimony by Respondents' executives support Respondents' erroneous assertion to Dr. Simpson that CB&I "decided to import the tank for the Cove Point project fully fabricated from Europe." On December 16, CB&I's CEO testified: "For the Cove Point, Maryland, project . . . we procured that 9 percent nickel in Europe I believe on a square beveled and rolled basis." (Glenn, Tr. 4118). Other components of the Cove Point tank, including the carbon steel outer wall and roof continued to be fabricated at Warren, Pennsylvania. CB&I did not pass through to the customer any cost savings it realized with respect to fabrication of the 9% nickel components for the Cove Point tank. Instead, CB&I increased its profit margin and increased the price to the customer to [ ]. ([ ], *in camera*).

7.152 Dr. Simpson could not quantify the cost advantage CB&I has over its competitors in terms of fabrication. (Simpson, Tr. 3929-30).

#### Response to RFOF 7.152

This finding is incorrect. Dr. Simpson testified that the evidence suggests that CB&I's fabrication cost advantage is significant and would be of the magnitude of 10%. (Simpson, Tr. 3929-30). *See* response to RFOF 7.150.

7.153 Dr. Simpson does not know whether CB&I has a cost advantage or disadvantage based on its engineering rates, charges for project management staff, drafting rates, field erection rates, or hourly wages. (Simpson, Tr. 3930-31).

#### Response to RFOF 7.153

This finding is misleading. *See* response to RFOF 7.150

7.154 Dr. Simpson has not studied the economics of owning field construction equipment rather than renting it for the construction of a single LNG job. (Simpson, Tr. 3931).

#### Response to RFOF 7.154

This finding is incorrect. Dr. Simpson testified that he has knowledge regarding whether the costs of owning and operating equipment are higher than the costs of renting it. (Simpson, Tr. 3932). Further, Dr. Simpson testified that if CB&I determined that it is more cost effective to rent equipment rather than own it, CB&I could sell the equipment. (Simpson, Tr. 3932). *See*

response to RFOF 7.150.

7.155 Dr. Simpson does not know whether CB&I's foreign competitors have better materials Acquisition contracts with suppliers than CB&I. (Simpson, Tr. 3933).

Response to RFOF 7.155

This finding is misleading and speculative. *See* response to RFOF 7.150.

7.156 Dr. Simpson does not know whether the selling, general and administrative overhead of CB&I is higher or lower than CB&I's foreign competitors. (Simpson, Tr. 3937).

Response to RFOF 7.156

This finding is misleading. Charges by CB&I for selling, general and administrative overhead are simply part of CB&I's margin charged to customers. (CX 764 at CBI-PL069308-309; [ ], *in camera* ([ ])).

To the extent CB&I is able to charge customers a higher SG&A than that charged by foreign firms, it simply means that CB&I is able to maintain higher margins.

7.157 Dr. Simpson admits that foreign companies can build or engineer to API standards. (Simpson, Tr. 3954; 3955).

#### Response to RFOF 7.157

This finding is misleading and irrelevant. *See* response to RFOF 7.150

7.158 Dr. Simpson would not concede that hourly workers are free to work for companies other than CB&I because he “does not know the behavior of CB&I’s hourly work force in intimate detail.” (Simpson, Tr. 3964).

#### Response to RFOF 7.158

This finding is misleading and irrelevant. *See* response to 7.150

7.159 Dr. Simpson does not know whether Brian Price ever saw any bids for Dynegy. (Simpson, Tr. 5484).

#### Response to RFOF 7.159

This finding is irrelevant.

7.160 Even if Dr. Simpson knew that Brian Price had never seen pricing for Dynegy, that would not change his view of Mr. Price’s qualifications to testify about CB&I’s pricing for Dynegy. (Simpson, Tr. 5485).

#### Response to RFOF 7.160

This finding misrepresents Dr. Simpson’s testimony: “Q: Okay. Mr Price. If Mr. Price – if you’re wrong about Mr. Price seeing the Dynegy bids, the actual pricing, would that impact your opinion that Mr. Price has a better basis to comment on competition after the acquisition than the other customers we talked about? A: No, it would not.” (Simpson, Tr. 5485 (emphasis added)).

In fact, Mr. Price saw the \$55 million per tank price quote from Whessoe that Dynegy used to satisfy itself that the bids for the Hackberry project were within the “expected price range.” (Puckett, Tr. 4540, 4557; Price, Tr. 602-3). However, Mr. Price testified that Black & Veatch “had concerns that if we do not have a domestic tank price for that project that the price that the client would receive for those tanks would be higher.” (Price, Tr. 622). Mr. Price’s concern is well founded as is Dr. Simpson’s view that Mr. Price knows what he is talking about. In fact, the price quoted by Whessoe to Dynegy is 33% higher than the [ ] price Whessoe quoted to [ ], prior to CB&I’s acquisition of PDM, for the same size and type (160,000 cubic meter, full containment) LNG tank. (CX 691 at [ ] 02 004, *in camera*).



7.161 Dr. Simpson admitted that it was his “belief” that Mr. Carling cannot give an opinion about the effects of the Acquisition without having seen the Dynegy bids, but that Mr. Price and Dr. Simpson could give opinions regarding the effects of the Acquisition without having seen the Dynegy bids. (Simpson, Tr. 5498-99).

### Response to RFOF 7.161

This finding is incomplete and misleading. In his deposition, Mr. Carling stated that he believed that competition would remain healthy despite CBI’s acquisition of PDM because of “the current Dynegy bidding there where you’ve got three people bidding that work, none of which is CBI.” (Simpson, Tr. 3134). However, Mr. Carling did not know what the three bids for the Dynegy project were. (Simpson, Tr. 3134). Dr. Simpson testified: “[s]o I discounted what he said because . . . without knowing what the bids are for the Dynegy project, I don’t see how Mr. Carling can draw the inference that he draws. (Simpson, Tr. 3134-35).

In his trial testimony, Mr. Carling conceded that he doesn’t have any experience in evaluating how competitive foreign suppliers have been compared to CB&I and PDM in the U.S. (Carling, Tr. 4514). In contrast, Mr. Price was able to compare the competitiveness of foreign suppliers with CB&I and PDM through his involvement in a bid to build a peak-shaving LNG plant for Memphis Light Gas & Water. (Price, Tr. 517 (“we’ve had some experience bidding tanks in the U.S. and also receiving budget quotations on new facilities.”), 545 (bid Memphis Gas project with TKK/Graver), 548-53 (Black & Veatch surveyed LNG tank suppliers to determine who could provide an LNG tank in the U.S.), 555-64 (Memphis bid experience)).

Dr. Simpson testified that he developed his opinions about CBI’s acquisition of PDM by reviewing “publicly available information, interviews with market participants, declarations signed by market participants, investigational hearings of market participants, documents submitted by the merging parties and by third parties, and the trial transcript in this case.” (Simpson, Tr. 2983-84).

### **c. LIN/LOX**

7.163 Dr. Simpson admittedly did not study Chung Fan’s analysis in great detail. (Simpson, Tr. 5592).

### Response to RFOF 7.163

This finding is incomplete. Dr. Simpson confirmed that Mr. Chung Fan performed his analysis of CB&I’s price in the regular course of his business and that he has experience purchasing LIN/LOX tanks. (Simpson, Tr. 5592-93).

7.164 Dr. Simpson would not vouch for Chung Fan’s analysis. (Simpson, Tr. 5593).

### Response to RFOF 7.164

This finding is misleading and mischaracterizes the testimony in that it incorrectly suggests that Dr. Simpson believed Mr. Fan's analysis was flawed. Since Dr. Simpson had not

examined Mr. Fan's analysis in detail, Dr. Simpson was not in a position to vouch for Mr. Fan's analysis. (Simpson, Tr. 5592-93).

**d. LPG**

7.167 Dr. Simpson could not recall whether Amy Warren, whose testimony he relied upon, was actually the person at Fluor who determined who the bidders would be for the SEA3 project. (Simpson, Tr. 5573).

Response to RFOF 7.167

This finding is belied by Dr. Simpson's actual testimony. Dr. Simpson testified: "[M]y recollection is that the final decision was the customer, but she [Ms. Warren] was involved in the selection process." (Simpson, Tr. 5573). Ms. Warren testified: "On the first project in Newington, my role was limited and not as active. On the project in Tampa, I was more involved in actually coordinating our technical review of the proposals as well as working with the client to evaluate the commercial portion and our legal department to negotiate the terms and conditions of the project. (Warren, Tr. 2277) Ms. Warren also testified: "They [SEA3] made the ultimate decision, yes, based on a recommendation submitted by Fluor." (Warren, Tr. 2316).

**e. TVCs**

7.168 Dr. Simpson does not know that CB&I has not built a thermal vacuum chamber since 1980. (Simpson, Tr. 5609).

Response to RFOF 7.168

This finding is false and improperly criticizes Dr. Simpson for not "know[ing]." Respondents' false proposition. Mr. Scorsone provided ambiguous and conflicting testimony regarding CB&I's last TVC: "It was in 1984 for Grumman at Beth Page Long Island." (Scorsone, Tr. 5055-56). "I'm sorry. It was a 1984 Grumman – I'm sorry. At – it's for Rock – Rockwell at Seal Beach. I'm sorry. I got confused." (Scorsone, Tr. 5056). Respondents' counsel was similarly confused: "Q: Sir, you know CBI hasn't built a field-erected thermal vacuum chamber since 1984; correct? A: I know that they have not built a large field-erected thermal vacuum chamber since the mid-'80s. Q: Sir, they haven't built a single vacuum chamber, field-erected thermal vacuum chamber, since 1980, have they? A: I don't know. . . . Q: So CBI, sir, they haven't build (sic) a field-erected thermal vacuum chamber in 18 years; correct? A: I know that their last large field-erected thermal vacuum chamber was in the mid 1980s. (Simpson, Tr. 5609-10 (emphasis added)). Respondents could not get their story straight, yet propose a finding blaming Dr. Simpson for not buying into a false story.

7.169 Dr. Simpson was not aware that the second to last thermal vacuum chamber CB&I built in Windsor, New Jersey, failed and can never be used. (Simpson, Tr. 5609).

Response to RFOF 7.169

This finding improperly faults Dr. Simpson for not being aware of an assertion that is not supported by the record. The underlying assertion, i.e, the TVC “failed and can never be used” is apocryphal and is not supported by the record. Respondents cite only the representation to Dr. Simpson by Respondents’ counsel. (Leon, Tr. 5609). Respondents presented no documents to support this allegation. In RFOF 6.45 make a similar allegation regarding a TVC erected in East Windsor, Long Island (New York), asserting that the TVC “was defective and never went into operation.” RFOF 6.45 (emphasis added). The evidence cited in RFOF 6.45 does not support the allegation that the TVC failed and contradicts the allegation that it never went into operation. Mr. Thompson testified only “I know they had problems with it” (Thompson, Tr. 2113) and Mr. Scully testified only that there was a defect in the chamber and that the chamber is no longer in operation. (Scully, Tr. 1188 (emphasis added)).

7.170 Dr. Simpson does not know whether CB&I ever built a field-erected mailbox-shaped thermal vacuum chamber. (Simpson, Tr. 5610).

Response to RFOF 7.170

Again, Respondents fault Dr. Simpson for not buying into Respondents’ false assertion. In its presentation to Orbital Sciences, CB&I admitted: “CB&I built a mailbox-shaped vacuum chamber for Grumman Aerospace in Bethpage, Long Island, which included a complete gaseous nitrogen shroud similar to Orbital’s baseline requirement.” (CX 1220 at 13372 (emphasis added); Glenn, Tr. 4203). At trial, Mr. Scorsone asserted that the Bethpage thermal vacuum chamber is “technically” not a mailbox shape, but rather a “horseshoe” shape. (Scorsone, Tr. 5056-57). Mr. Scorsone failed to explain why, in his view, a horseshoe profile is materially different from a mailbox profile. (Scorsone, Tr. 5057). Further, neither Mr. Glenn nor Mr. Scorsone offered any explanation why “mailbox shaped” was an apt description for CB&I to use when it was competing with PDM for a TVC project, but is not appropriate for this proceeding.

**f. Dr. Simpson Relied on Respondents’ Contemporaneous Documents, which Were Unexplained by Respondents’ Expert**

7.171 [ ]  
( [ ] ).

Response to RFOF 7.171

This finding has at least two deficiencies. First, the document in question is not CX 981 but rather CX 921. Dr. Simpson interpreted a statement in this document, [ ],” (CX 921 at CBI003613-HOU, *in camera*) as suggesting that [ ]. (Simpson, Tr. 3097-98). Dr. Simpson also noted that this document describes [ ]. (Simpson, Tr. 3100; CX 921 at CBI003609-HOU, *in camera*).

Second, Dr. Simpson properly relied on contemporaneous, internal documents from Respondents' files. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents. The Commission's Rules recognize that "respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files" 16 C.F.R. § 3.43(b)(2). *See Lenox, Inc.*, 73 F.T.C. 578, 603-04 (1968) ("respondent is in the best position to determine the character of the documents . . . . Clearly documents coming from a respondent's files can be regarded as reasonably reliable absent some countervailing evidence demonstrating their unreliability.") At the commencement of this proceeding, Respondents represented to this Tribunal, "We will bring witnesses . . . to take the time to explain many of the CB&I documents" (V. Kelley, Tr. 105). Respondents have failed to do so. Respondents chose not to call the authors of the documents and instead relied on uncorroborated and self-serving testimony by Mr. Scorsone who laughed off the clear and plain meaning of documents and claimed that the authors of the documents got it wrong or had fabricated the statements in the documents. Respondents' failure to call as witnesses the authors of the documents "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.172 [ ] ([ ]).

#### Response to RFOF 7.172

This statement misrepresents the record. Dr. Simpson was asked whether two particular projects listed in CX 921 involve any relevant products. Dr. Simpson was not asked whether any of the projects listed in CX 921 involve any relevant products. ([ ], Tr. 4037, *in camera*).

7.173 [ ] ([ ]).

#### Response to RFOF 7.173

This finding is misleading. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents.

7.174 [ ] ([ ])

#### Response to RFOF 7.174

This finding is misleading. The document in question, which is CX 921 not CX 981, indicates that CBI plans to increase its bids for two projects after the acquisition. Irrespective of

whether these projects are in the relevant markets, the document indicates CBI's intention to increase price. To the extent that CBI can do this for projects in markets not identified in the FTC's complaint, then CBI's acquisition of PDM has harmed competition in markets beyond those identified in this case.

7.175 [

] ([ ]).

### Response to RFOF 7.175

This finding has at least two deficiencies. First, the document in question is CX 921, not CX 981. Second, CX 921 indicates that CBI added [ ] not [ ] to the price of a project. (CX 921 at CBI003609-HOU, *in camera*).

7.176 Despite testifying regarding a chart based on CX-460, a chart which Dr. Simpson admittedly did not prepare or ask to be prepared, Dr. Simpson does not know whether the information contained in the underlying document was accurate, and despite having access to the actual underlying information (i.e. AT&V's financial statements), Dr. Simpson chose to rely on Dan Knight's assessment of AT&V rather than AT&V's own data. (Simpson, Tr. 3944-49).

### Response to RFOF 7.176

This finding has two deficiencies. First, this finding appears to be discussing CX 1652, a chart showing annual sales data for CBI, Matrix, ATV, and Chattanooga Boiler and Tank. (Simpson, Tr. 3944-49). Dr. Simpson did suggest that this chart be prepared. (Simpson, Tr. 3946 ("I looked at that underlying document [CX 460] and indicated that the document would be useful to show a bar chart showing the revenues of the companies.")) Second, Dr. Simpson did not say that he did not know whether the information in the underlying document was accurate. (Simpson, Tr. 3944-49). The author of the underlying document wrote: "Not all the info is up-to-date or correct, but it's close." (Simpson, Tr. 3947; CX 460). Moreover, Dr. Simpson had other information with which to corroborate the relative sizes of CBI and ATV as depicted in the chart. (Simpson, TR. 3948-49).

7.177 On this chart, Dr. Simpson does not know whether the engineering capability is global or domestic. (Simpson, Tr. 3949).

### Response to RFOF 7.177

This finding is highly misleading and irrelevant, and again attempts to fault Dr. Simpson for not buying into Respondents' misinterpretation of the evidence. This finding refers to a different chart, CX 1653, than the chart referred to in RFOF 7.176. CX 1653, which is based on CX 460, shows that CBI has the engineering capability to build tanks greater than 300 feet in diameter. (CX 1653). Respondents' counsel asked Dr. Simpson how many of the 300 engineers are based in the U.S. (Simpson, Tr. 3949). This question makes no sense in reference to the chart. (Simpson, Tr. 3949, CX 1653). Complaint counsel objected to a subsequent question that also misread this chart as implying that CBI employs 300 engineers as mischaracterizing the document. (Simpson, Tr. 3949-50).

7.178 On another chart based on the same underlying Dan Knight document (CX-460), Dr. Simpson does not know how many of the crews of U.S. tank companies are involved in the United States. (Simpson, Tr. 3951).

### Response to RFOF 7.178

This finding misrepresents Dr. Simpson's testimony: "Q: Do you know how many of these 80-plus [CBI] crews are based in the U.S.? A: I have an opinion. I don't know it for a fact." (Simpson, Tr. 3951-52). Respondents failed to ask Dr. Simpson about his opinion.

7.179 Dr. Simpson does not know how many of CB&I's crews are part of Howe Baker. (Simpson, Tr. 3952).

### Response to RFOF 7.179

This finding is irrelevant. Respondents' documents speak for themselves. Respondents chose not to present any evidence regarding the assigned responsibilities of CB&I's crews. See response to RFOF 7.171.

7.180 Dr. Simpson believes Dan Knight is a CB&I executive, however Dr. Simpson does not know where Mr. Knight falls on the CB&I organizational chart. (Simpson, Tr. 3941-43).

### Response to RFOF 7.180

The first part of the finding is correct; the second part of the finding is irrelevant and is simply an inappropriate attack on Dr. Simpson. Dr. Simpson is correct that as a Business Development Manager, Mr. Knight is a middle level executive.

Respondents and Mr. Scorsone belittle Mr. Knight and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents' documents. Mr. Scorsone testified that Dan Knight merely "was a salesman, a first-level salesman at Chicago Bridge." (Scorsone, Tr. 5143; see CX 615 at 10 (Dan Knight, Business Development Manager)). Mr. Scorsone made similar disparaging remarks about each of CB&I's Business Development Managers who recorded their candid observations and recommendations in their communications to their superiors. (Scorsone, Tr. 5045 ("Dave Lacey is a first-level entry-level salesperson at Chicago Bridge & Iron"), 5061 ("Mike Miles is a first-level salesperson for CB&I"); see CX 516 at CBI 0019868-HOU (Miles a Business Development Manager); CX 615 at 10 (Knight a Business Development Manager)).

Respondents argue that no weight should be given to the recommendations and observations of their Business Development Managers, including Mr. Knight, Mr. Lacey and Mr. Miles. However, Respondents chose not to call Mr. Knight as a witness, although Respondents identified him on their final witness list and represented that he would testify regarding "his prior statements made in produced documents." Respondents' Final Witness List at 3, September 19, 2002 ("Dan Knight currently serves as a Business Development Manager for CB&I"). Respondents' failure to call Mr. Knight as a witness "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead

only to the conclusion that the strong would have been adverse.”).

Respondents' counsel berated Dr. Simpson for referring to Mr. Knight as an executive: "Q: Do you know that a business development manager is the lowest-level sales title within the CBI organization? A: I did not know that." (Simpson, Tr. 3942). Respondents repeat the attack in RFOF 7.180. Instead, Respondents should have checked their facts. Mr. Scully identified Mr. Lacey and other Business Development Managers as CB&I's "middle management." (Scully, Tr. 1127). Moreover, in a sworn statement to the Tribunal, CB&I's Vice President of Sales for North America revealed that CB&I's Business Development Managers, and the e-mail they generate, have direct input in CB&I's pricing decisions and play an important role in CB&I's sales strategies: "Documents discussing sales strategies are highly confidential in nature. . . . e-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott)).

7.181 Dr. Simpson does not know whether Dan Knight had any responsibilities with respect to the Acquisition. (Simpson, Tr. 3952).

#### Response to RFOF 7.181

This finding is irrelevant. Dr. Simpson properly relied on contemporaneous, internal documents from Respondents' files. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents. Respondents chose not to call Mr. Knight as a witness, although Respondents identified him on their final witness list and represented that he would testify regarding "his prior statements made in produced documents." Respondents' Final Witness List at 3, September 19, 2002. Mr. Knight's strategic observations are, in fact, regarded by CB&I's top management as valuable input in CB&I's competitive strategy: "Documents discussing sales strategies are highly confidential in nature. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott, CB&I Vice President of Sales for North America)).

7.182 Dr. Simpson bases his view that steel prices have not changed between 1996 and 2002 based on the Producer Price Index (PPI), even though the PPI does not indicate the price for nine percent nickel steel. (Simpson, Tr. 5399).

#### Response to RFOF 7.182

This finding is incomplete and misrepresents the record. In analyzing whether the budget prices offered to Fairbanks Natural Gas represented an anticompetitive price increase, Dr. Simpson testified that the price of steel decreased between 1996 and 2002. (Simpson, Tr. 3110). Dr. Simpson testified that he based his opinion on data in the Producer Price Index (PPI). (Simpson, Tr. 5399). And, in fact, the PPI shows that the price of steel has declined between 1996 and 2002. (CX 1589).

When asked “So, sir, can we use the PPI to determine how 9 percent nickel prices have changed over time?” Dr. Simpson responded “I think that the prices for steel, the various types of steel, would be correlated, so yes, I do think it contains information.” (Simpson, Tr. 5405).

7.183 Dr. Simpson relied on the PPI for “plates and structurals” but did not know what “plates and structurals” referred to. (Simpson, Tr. 5400-01).

#### Response to RFOF 7.183

This finding is misleading. Dr. Simpson testified that the stainless steel prices reported in the PPI would be predictive of the stainless steel prices for LIN/LOX/LAR tanks. (Simpson, Tr. 5401).

7.184 Even though Dr. Simpson thought it would be more accurate to use CB&I’s actual Acquisition costs than the PPI, and even though Dr. Simpson could have asked for this information, Dr. Simpson relied on the PPI. (Simpson, Tr. 5407).

#### Response to RFOF 7.184

The statement “Dr. Simpson relied on the PPI.” is accurate. The rest of the finding is misleading and irrelevant. Dr. Simpson testified that he believed that the steel prices recorded in the Producer Price Indices (CX 1589, CX 1605) are an accurate predictor of the types of steel purchased by CBI. (Simpson, Tr. 5402, 5405). Respondents chose not to present evidence regarding their actual materials acquisition costs. “They probably didn’t think that was in their best interests here, that’s right.” (Thompson, Tr. 2123). Dr. Simpson is an expert witness, not a fact witness. It is not Dr. Simpson’s role to document Respondents’ unsupported cost justification claims for them.

7.185 With regards to CX-1160, a document from Jeff Steimer to Luke Scorsone regarding the Williams estimate, Dr. Simpson does not know what Mr. Steimer’s foundation was for his comments. (Simpson, Tr. 5427).

#### Response to RFOF 7.185

Dr. Simpson testified that he believed that Jeff Steimer was “vice president of sales for LNG tanks and for thermal vacuum chambers [at PDM EC].” (Simpson, Tr. 3103). And, in fact, Jeffrey Steimer was vice president of sales, LNG/Aerospace at PDM. (CX 849 at 9 (Steimer IHT); *see also* CX 214). In any case, as Dr. Simpson noted, CX 1160 indicates that Luke Scorsone asked Jeff Steimer for comments. (Simpson, Tr. 5425-26; CX 1160). Thus, Luke Scorsone evidently

believed that Jeff Steimer had sufficient foundation for making his comments.

Respondents chose not to call Mr. Steimer as a witness. Respondents' failure to call Mr. Steimer as a witness "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.186 Dr. Simpson did not know that CX-1160 was in the context of a bid review meeting. (Simpson, Tr. 5429).

#### Response to RFOF 7.186

This finding is misleading and irrelevant. Dr. Simpson properly relied on contemporaneous, internal documents from Respondents' files. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents. Respondents' failure to call Mr. Steimer as a witness "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

7.187 Dr. Simpson did not know why CX-364, a sales document claiming that CB&I was a leader in building full containment tanks, was prepared. (Simpson, Tr. 3742).

#### Response to RFOF 7.187

This finding is misleading. Dr. Simpson properly relied on contemporaneous, internal documents from Respondents' files. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents. Respondents chose not to call the authors of the document and instead attack Dr. Simpson for relying on Respondents' own statements in their documents. Respondents' failure to call as witnesses the authors of the documents "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

### **g. Budget pricing**

7.188 Dr. Simpson admitted that he does not know the details about all of the budget prices that CB&I prepared. (Simpson, Tr. 5368-69).

#### Response to RFOF 7.188

This finding is irrelevant and misleading. Dr. Simpson knows details about the bids, price quotations and price estimates that are analyzed or discussed in Respondents' documents in evidence in this case and that Dr. Simpson discussed in his testimony or were discussed in

testimony by fact witnesses. Dr. Simpson disagreed with Respondents' counsel's representation that budget prices are known to be conservative. (Simpson, Tr. 5368). Again, Respondents' counsel attacked Dr. Simpson for not knowing what CB&I "was intending" in preparing budget prices. (Leon, Tr. 5368).

The pricing documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present credible evidence to refute the plain meaning of the documents. Respondents called neither the authors of the documents nor their designated expert on CB&I's pricing and cost estimates. Respondents' failure to call as witnesses the authors of the documents "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.189 Dr. Simpson admitted that despite having used the word "bid" on CX-1648 to describe the estimates given to Fairbanks Natural Gas and BC Gas, he knew that both were budget estimates. (Simpson, Tr. 5380-82).

#### Response to RFOF 7.189

This finding is incomplete and misleading. Market participants refer to budget prices as "bids". [ ] interchangeably called the prices it obtained from [ ] "budget quotes," "LNG tank costs," "quotations," and "Bids." (RX 157 at [ ] 02 001, 002, 003, *in camera*). So, Dr. Simpson is not alone in using the term bid to refer to budget prices. Moreover, both the chart and Dr. Simpson's direct testimony clearly indicate that the budget prices, or bids, shown in CX 1648 have a range of accuracy. (Simpson, Tr. 3109-10, CX 1648).

7.190 Dr. Simpson does not know how the BC Gas budget estimate was derived. (Simpson, Tr. 5385).

#### Response to RFOF 7.190

This finding is irrelevant and misleading. Dr. Simpson appropriately relied on Respondents' pricing documents. These documents speak for themselves and Respondents have failed to present credible evidence to refute the plain meaning of the documents. Respondents called neither the authors of the documents nor their designated expert on CB&I's pricing and cost estimates. Respondents' failure to call as witnesses the authors of the documents "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.191 Dr. Simpson did not recall having read the deposition of Lee Presley, and did not know whether having read Mr. Presley's deposition would have given him an understanding of how estimating is done. (Simpson, Tr. 5387).

### Response to RFOF 7.191

This finding is irrelevant and speculative.

7.192 Dr. Simpson does not know what the budget estimate given to Memphis Light and Gas was in 1994. (Simpson, Tr. 5452).

### Response to RFOF 7.192

This finding is irrelevant and speculative. Respondents have not produced the budget estimate given to Memphis Light, Gas & Water in 1994. Dr. Simpson appropriately relied on Respondents' pricing documents. These documents speak for themselves and Respondents have failed to present credible evidence to refute the plain meaning of the documents. Respondents' speculation regarding the contents of their own budget estimate does not rebut the record evidence *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.193 [ ] ([ ]).

### Response to RFOF 7.193

This finding contradicts RFOF 7.1, in which Respondents state: "A budgetary estimate, also known as rough order of magnitude pricing ("ROM") . . . ." (RFOF 7.1).

7.194 Dr. Simpson does not know that a margin put on a budget estimate is for internal purposes only. (Simpson, Tr. 5631).

### Response to RFOF 7.194

Dr. Simpson's knowledge regarding CB&I's unwillingness to share cost information with its customers is irrelevant. CB&I discloses to its customers only such information as CB&I believes is in its interest to disclose, even where customers ask CB&I to provide justification for its price increases. (Thompson, Tr. 2123 ("They probably didn't think that [disclosing cost information to the customer] was in their best interests here, that's right.")). In a sworn statement to this Tribunal, CB&I's Vice President of Sales for North America explained how withholding this information from CB&I's customers helps CB&I maintain higher margins: "Were a customer to learn . . . that CB&I has included a 10% profit margin in a bid on a pending project, the customer could use that document to argue that CB&I should lower its price to a 5% margin. Similarly, if a customer were to learn that CB&I earned a healthy profit on a particular job in the past, they could use that fact to force CB&I to lower its prices on future projects. Because many of CB&I's customers – including for the relevant products -- are repeat customers, this is a likely outcome of the disclosure of pricing documents." (CX 393 ¶ 19 at 6).

## **h. Remedy**

7.195 Dr. Simpson had not considered the issue of whether the remedy of a company break up would be appropriate if the Court found a violation in only one small market of the four, and that the issue “would actually require quite a bit of thought.” (Simpson, Tr. 5586).

### Response to RFOF 7.195

Dr. Simpson analyzed and testified regarding the relief necessary to restore competition in the markets in this case. *See* response to RFOF 7.145.

**i. Critical loss**

7.196 Dr. Simpson does not know whether PDM and CB&I had differences in the way they calculated variable versus fixed costs. (Simpson, Tr. 3875-76).

Response to RFOF 7.196

This finding is irrelevant. Dr. Simpson testified that for the purposes for which he was using variable cost, variable cost is an economic concept, not an accounting concept. (Simpson, Tr. 3876). Thus, the exact details of how CBI and PDM did their accounting would not be relevant. (Simpson, Tr. 3876).

7.197 Dr. Simpson believes CB&I would vary its field erection costs if it lost 25% of its domestic LNG sales based, in part, on a 10-K talking about VROs, even though Dr. Simpson admittedly does not know anything about a VRO or how it is structured. (Simpson, Tr. 3880-81).

Response to RFOF 7.197

This finding is misleading. The record is unclear because Dr. Simpson was asked two questions at the same time: “Q: Do you know anything about a VRO, sir? Do you know how they’re structured? / A: No, I do not.” (Simpson, Tr. 3880). It is unclear from this passage whether Dr. Simpson’s answer applies to the first or second question. However, Dr. Simpson’s prior testimony indicates that he does have information about CBI’s VRO. Specifically, Dr. Simpson knew that CBI’s VRO was designed in part to adjust the size of CBI’s workforce to its workload. (Simpson, Tr. 3009). Dr. Simpson also knew that CBI’s VRO covered engineers and project managers. (Simpson, Tr. 3009, 3015).

7.198 Dr. Simpson relied on testimony from Sam Leventry to support his theory that CB&I fires engineering personnel when work decreases in the relevant markets, yet Dr. Simpson does not know whether Mr. Leventry was talking about people being fired based on performance or a downturn in work. (Simpson, Tr. 3905).

Response to RFOF 7.198

This finding misrepresents the record. Dr. Simpson cited two passages from Mr. Leventry’s deposition. In the first, Mr. Leventry was asked: “And if there were a reduction in workload, you might let go of some engineers?” And, Mr. Leventry responds, “Yes, that will definitely be the case.” (Simpson, Tr. 3013-14; CX 497 at 63 (Leventry, Dep.)). In the second, Mr. Leventry says, “People [engineers] get terminated all the time.” (Simpson, Tr. 3014; CX 497 at 38 (Leventry, Dep.)). The question asked of Dr. Simpson in his cross-examination only related to Mr. Leventry’s statement that “People get terminated all the time.” Mr. Leventry’s first statement that CBI would let go of some engineers if there were a reduction in workload clearly indicates that employees would be laid off if there were a downturn in work.

7.199 Dr. relied on a document from Steve Owens to Luke Scorsone, attachment 6 to his expert report, to support

his argument that field manager personnel is fired if work slows in the relevant product markets, but Dr. Simpson does not know if the people listed in the document upon which he relies were ever fired. (Simpson, Tr. 3905-09). Dr. Simpson admitted that this would be relevant information to know. (Simpson, Tr. 3909).

### Response to RFOF 7.199

The first statement in this finding is misleading. Dr. Simpson properly relied on contemporaneous, internal documents from Respondents' files. The documents relied on by Dr. Simpson speak for themselves and Respondents have failed to present evidence to refute the plain meaning of the documents.

The second statement in this finding misrepresents Dr. Simpson's testimony. The transcript reads: "Q: Wouldn't that be relevant to your opinion as to whether they [the reductions in force discussed in the document (CX 1563)] actually occurred rather than whether one employee suggested that maybe they should? A: It would be additional information." (Simpson, Tr. 3909). Dr. Simpson does not admit that he would need to know whether the specific reductions in force described in this document ever occurred to reach his conclusions.

7.200 Dr. Simpson does not know what foreign entrants are going (sic) in terms of training or in terms of money spent on entry. (Simpson, Tr. 3909-10).

### Response to RFOF 7.200

This finding mischaracterizes Dr. Simpson's testimony. Respondents' counsel never asked Dr. Simpson what information he had about the money that entrants are currently spending: "Q: Many of these companies are already making many of the investments that you characterize as entry barriers, correct? / A: No. / Q: You don't know if there's any training going on? / A: I don't know – I don't know what those companies are doing in the way of training. / Q: You don't know what money they're currently spending do you? / A: I have some information. / Q: Sir, do you know what money the companies are currently spending in connection with their entry into the U.S. LNG market? / A: I cannot give you an exact figure." (Simpson, Tr. 3909-10).

7.201 Dr. Simpson does not know how long a period critical loss is measured over. (Simpson, Tr. 3868-69).

### Response to RFOF 7.201

This finding misrepresents Dr. Simpson's actual testimony. Dr. Simpson testified as follows: "Q: Okay, in a yes or no answer, do you have an opinion as to how long a, quote, long run, close quote, is? / A: Yes. / Q: Okay. Is it one year, a long run? / A: I can't – I can't answer that question. / Q: Okay. Is the long run two years? / A: Two years would be more what I was thinking of. When I used the term "long run," I meant over a period exceeding two years. / Q: So five years, would that be the long run? / A: I would consider five years long run." (Simpson, Tr. 3868-69).

7.202 Dr. Simpson relies on Dr. Harris' notes from an interview with Luke Scorsone to determine fixed versus variable costs, however Dr. Simpson does not know whether the "significant decline" referred to in the notes was for more than 25% of U.S. LNG work or less than 25% of U.S. LNG work. (Simpson, Tr. 3887).

### Response to RFOF 7.202

This finding is misleading because Dr. Simpson cited Dr. Harris's notes of Dr. Harris's interview with Luke Scorsone as one piece of evidence indicating that the fabrication cost is a variable cost. (Simpson, Tr. 3886-87). This finding is irrelevant because Respondents concede that the fabrication cost for LNG tanks is a variable cost. Please see RFOF 7.73.

7.203 Dr. Simpson does not know what the current or past capacities of CB&I's fabrication facilities are. (Simpson, Tr. 3889).

### Response to RFOF 7.203

This finding is irrelevant because Respondents concede that the fabrication cost for LNG tanks is a variable cost. Please see RFOF 7.73.

7.204 Dr. Simpson does not know whether CB&I subcontracted the inner tank for the Salley, South Carolina peak-shaving plant because it was at capacity or because it got a better price in Japan for pre-fabricated material. (Simpson, Tr. 3889).

### Response to RFOF 7.204

This finding is irrelevant. Respondents' acknowledge that the fabrication cost for LNG tanks is a variable cost in RFOF 7.73.

7.205 Dr. Simpson does not know whether they varied the employees in its fabrication shops as a result of subcontracting. (Simpson, Tr. 3889-90).

### Response to RFOF 7.205

This finding is irrelevant because Respondents concede that the fabrication cost for LNG tanks is a variable cost. Please see RFOF 7.73. Moreover, the fact that Respondents sometimes find it more economical to subcontract fabrication of the relevant products, even though Respondents have their own fabrication facilities, shows that fabrication is a variable cost to CB&I. CCF 609.

7.206 Dr. Simpson uses auction theory, but did not read all of the articles he relied on or test the mathematics contained therein. (Simpson, Tr. 3077, 3085-90, 3831-38).

### Response to RFOF 7.206

Respondents' statement is irrelevant and highly misleading. Dr. Simpson cited an article by Dalkir et al for two very general propositions. "The first [proposition] was that in an environment where projects are sold in a sealed bidding process that an acquisition – or that a merger that combined two bidders would lead to less favorable pricing for the buyer." (Simpson, Tr. 5762-63). "[T]he second proposition for which I cited that article was that if you had a

merger in this type of environment, that when the merged firm increased its price, the other firms in the market would increase their prices.” (Simpson, Tr. 5763). Dr. Simpson further testified that the article does not “. . . address a scenario similar to the scenario in this case, and that would be where the two lowest-cost producers merge and there are other firms with higher cost.” (Simpson, Tr. 5764).

Respondents’ claim that Dr. Simpson “did not read all of the articles he relied on” is based on Dr. Simpson’s testimony that he read parts of the Dalkir et al. article but did not do the math to check whether the results of their simulations were correct. (Simpson, Tr. 3831, 3834). As noted above, Dr. Simpson did not rely on the results of their simulations.

### **13. Dr. Simpson Cited Extensively to Record Evidence**

7.207 Dr. Simpson cited to Mr. Yowell’s declaration in support of his assertion that buyers think that the Acquisition is likely to reduce competition, but failed to mention Mr. Yowell’s deposition where he explicitly stated that he no longer believed the statement in his affidavit regarding reduced competition was true. (Simpson, Tr. 3633-38).

#### Response to RFOF 7.207

Please see response to RFOF 7.208.

7.208 Dr. Simpson nonetheless testified that he was objective when he identified Mr. Yowell as supporting the conclusion that buyers believed that the Acquisition reduced competition. (Simpson, Tr. 3639).

#### Response to RFOF 7.208

Respondents criticize Dr. Simpson for citing Mr. Yowell of Williams Companies as a buyer who believed that CBI’s acquisition of PDM EC would reduce competition (*also see* RFOF 7.207). Specifically, respondents fault Dr. Simpson for failing to note what Mr. Yowell said in a later deposition. Explaining why he did this, Dr. Simpson testified: “I put more weight on the declaration. The declaration was written by Mr. Yowell himself. In his deposition, he was asked a number of questions and he did not seem to have a foundation for some of the opinions that he offered.” (Simpson, Tr. 5746).

In his declaration, Mr. Yowell wrote: “If CB&I is allowed to acquire PDM, there will be only one supplier in the U.S. of LNG storage tanks. If the number of competitors in LNG storage tanks in the U.S. is reduced from two to one, Williams will have less leverage in its pricing negotiations with the remaining supplier. As a result, the company may pay a higher price for the new Cove Point LNG storage tank and other LNG tanks that the company may construct in the future.” (Simpson, Tr. 3632). Mr. Yowell was right. CCF 777-830, 883-928. In his deposition, Mr. Yowell speculated that the presence of foreign LNG tank builders meant that this statement was no longer true. (Simpson, Tr. 3635-37). However, in his deposition, Mr. Yowell admitted that he was not aware whether Whessoe or Technigaz had built a number of field

erected LNG tanks throughout the world and that he had never even heard of TKK. (Simpson, Tr. 5746-47).

7.209 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 Dhabol, 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). Nonetheless, Dr. Simpson did not tell the court that Mr. Carling actually views Whessoe as having a good reputation (Simpson, Tr. 3648-49).

#### Response to RFOF 7.209

This finding is incorrect. The transcript indicates that Enron had problems with both Kvaerner and Whessoe. (Simpson, Tr. 3641-42). The transcript later quotes Mr. Carling as saying: "Q. Okay. And how has Whessoe's capabilities changed today? A. I think in working through the Dabhol job we demonstrated to them that they had lost some of their expertise. They had got sloppy and really – they were just not a very good group of people at the time. They were all over the place." (Simpson, Tr. 3647).

7.210 Dr. Simpson testified that he did not think Mr. Carling's statement that Whessoe is now a "very professional organization" was relevant. (Simpson, Tr. 3650).

#### Response to RFOF 7.210

This finding is irrelevant. Timely, likely and sufficient entry is not established just because a customer believes that Whessoe is a "very professional organization."

7.211 Dr. Simpson testified that the only piece of evidence that he could think of that was inconsistent with his theories regarding the Acquisition of PDM-EC was Mr. Izzo's statement that he was not concerned about the Acquisition. (Simpson, Tr. 3656). Dr. Simpson simply did not "agree" with Mr. Izzo. (Simpson, Tr. 3656).

#### Response to RFOF 7.211

This finding is incomplete. As further discussed in CCRFF 3.587, Mr. Izzo of Calpine has not experienced the vicious competition between Respondents in the United States LNG market and, therefore, admits that he would not know if CB&I had raised prices to Calpine by 5% above pre-merger levels. (Izzo, Tr. 6534).

7.212 Dr. Simpson believes Cove Point represents an attempt to exercise market power even though it was awarded before the Acquisition and was awarded to PDM not CB&I. (Simpson, Tr. 5468-69).

#### Response to RFOF 7.212

Dr. Simpson correctly concluded that Cove Point is an example of Respondents exercising market power after signing the acquisition letter of intent. (Simpson, Tr. 5468-69). CCF

789-811, 816-830, 898-909. 912-25, 928. In addition, Cove Point is an example of CB&I exercising market power following the acquisition. CCF 812-15, 825-30, 910-13, 926-28.

7.213 Dr. Simpson used bid model 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).

### Response to RFOF 7.213

This finding mischaracterizes Dr. Simpson’s testimony. Dr. Simpson actually testified: “Q: Did you take into account in conducting your probability analysis with respect to the LNG tank awards that firms other than CB&I and PDM did not bid on projects other than Memphis? / A: Yes, I took that into account. Specifically, if a company doesn’t bid for the project, the fact that they don’t bid contains information. / Q: And what information does it contain? / A: . . . [i]t would depend on the circumstances. But the inference that I drew from the fact here is that these companies were not bidding because they didn’t believe that they were competitive with PDM EC and CBI and that was – that was the inference that I was drawing here and I believe that inference is consistent with other evidence. . . . / Q: And if foreign firms did not participate in that sole-source negotiation, how did you take that into account in doing your probability analysis? / A: That, too, contains information. If the buyers for these projects thought that these foreign firms were as strong a competitor as CBI and PDM EC . . . one of the buyers in the sole-source thing would have tried approaching one of the foreign companies. (Simpson, Tr. 5757-58).

## **14. Respondents Mischaracterize Dr. Simpson’s Testimony**

### **a. General**

7.214 Dr. Simpson believes that he knows better than the management of the foreign competitors how successful they will be in their entry. (Simpson, Tr. 4016).

### Response to RFOF 7.214

This finding is misleading and incomplete. Dr. Simpson testified: “I think that I’ve had access to more information than they have.” (Simpson, Tr. 4016-17). For example, Dr. Simpson has examined Respondents’ internal pricing documents, including Respondents’ margins, which confirm Mr. Glenn’s view 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).

### **b. LNG**

7.215 Dr. Simpson admittedly only knows a “little bit” about the regulations in the United States that govern LNG tanks. (Simpson, Tr. 3854).

### Response to RFOF 7.215

This finding is misleading. Dr. Simpson is not a fact witness. Other witnesses have testified about regulations in the U.S. *See, e.g.*, CCF 381-83.

7.216 Dr. Simpson admits that he believes that “the majority of customers believe that Whessoe can build an LNG

tank in the U.S.” (Simpson, Tr. 3993).

### Response to RFOF 7.216

This statement is misleading. Dr. Simpson elsewhere testified that while he attaches some significance to the fact that foreign LNG tank builders have the technical capability to build LNG tanks in the U.S., by itself, possessing this technical capability does not allow them to compete on an equal footing with CB&I. (Simpson, Tr. 5786-88). Specifically, Dr. Simpson testified: “I attach some significance to it [customer testimony that foreign LNG builders have the technical capability to construct and execute an LNG import terminal], but LNG tank builders compete on a number of different dimensions, one of them being quality, a second being safety, a third being timeliness of delivery, and this only talks about technical capability.” (Simpson, Tr. 5788).

7.217 Dr. Simpson admits that even if the attempt by CB&I to get the Dynegy job in its entirety was an attempt to exercise market power, it failed. (Simpson, Tr. 5466-67).

### Response to RFOF 7.217

CB&I exercised market power on the Dynegy job in several ways. In addition to its attempt to eliminate competition in bidding, CB&I exercised market power on the Dynegy job by maintaining barriers to entry. CB&I declined to bid to be the EPC contractor because the “project as structured does not fit our corporate strategy.” (CX 139 at CBI 019779-HOU). Gerald Glenn confirmed that this was a true statement. (Glenn, Tr. 4242). CB&I concluded that maintaining barriers to entry, through CB&I’s technological advantage in LNG tanks, outweighed the profits CB&I could earn as EPC contractor for the Hackberry LNG project. CB&I’s CEO acknowledged, “we, at the time of the FEED study proposal, elected not to participate because we didn’t want to send out our information on the tanks for others to bid on” (Glenn, Tr. 4244). CB&I reaffirmed this stance when Dynegy asked CB&I to bid to be the EPC contractor. CB&I’s CEO acknowledged: “What we said was that if we were selected as the EPC contractor, we would not use our documentation to send out to others for them to bid on our documentation for the tanks.” (Glenn, Tr. 4242).

CB&I’s refusal to bid on Dynegy’s Hackberry LNG project, either for FEED contractor, for EPC contractor, or for the LNG tanks, demonstrates CB&I’s ability to discipline a customer who believes it can obtain lower prices by insisting that CB&I competitively bid the work. Black & Veatch, Dynegy’s engineering consultant for the LNG tank bids, has concluded that Dynegy will pay more and incur greater risks because Dynegy is unable to source the LNG tanks from CB&I or PDM. (Price, Tr. 622, 626-28). The lesson CB&I taught Dynegy has benefitted CB&I by encouraging other customers to accept CB&I’s terms. CMS, [ ], El Paso, and Poten & Partners have lined up to sole-source their U.S. LNG projects through CB&I. CCF 582-586.

7.218 Dr. Simpson admits that CB&I had a labor advantage in Trinidad. (Simpson, Tr. 3851).

### Response to RFOF 7.218

This statement is incorrect. The portion of the transcript cited by respondents refers to [ ] views not Dr. Simpson's. The transcript states: "Q: Okay. So he's [ ] saying even before CBI was awarded the current tank they're working on CBI had a strong following amongst the local labor in Trinidad and that they had worked in Trinidad before; correct? / A: That is my understanding."

7.221 Dr. Simpson believed that the Yankee Gas tank will be full containment. (Simpson, Tr. 3729-30).

### Response to RFOF 7.221

This finding is irrelevant. Dr. Simpson is not a fact witness.

7.222 Dr. Simpson believed that the Cove Point phase two expansion was leaning towards being a full containment tank. (Simpson, Tr. 3732).

### Response to RFOF 7.222

This finding is irrelevant. Dr. Simpson is not a fact witness.

7.224 Dr. Simpson believes that the concrete represents 30-40% of the cost in these tanks, which is a sizeable percentage of the job. (Simpson, Tr. 3737; 3738).

### Response to RFOF 7.224

This statement is misleading for two reasons. First, Dr. Simpson is not a fact witness. Second, Dr. Simpson's statement only referenced double containment tanks. Dr. Simpson testified: "My belief is it [the concrete outer wall] may be 30 percent to 40 percent of the cost of the double-containment tank." (Simpson, Tr. 3737-38).

7.225 Nonetheless, Dr. Simpson believed CB&I had an advantage in building these tanks based on a single sales document, CX-364. (Simpson, Tr. 3741-42).

### Response to RFOF 7.225

This finding misrepresents Dr. Simpson's testimony. Dr. Simpson testified: "Both CBI and PDM EC had built full-containment tanks in other parts of the world, so in other parts of the world they were able to compete with companies such as Whessoe and Technigaz and TKK on an equal footing for building the full-containment tanks. In the U.S., CBI and PDM EC would have a number of advantages. Their fabrication plants are in the U.S. They know the U.S. regulations. They know the U.S. work force. They know the vendors in the U.S." (Simpson, Tr. 3068). Dr. Simpson also cited two CBI documents, CX-364 and CX-428, which state that CBI has a competitive advantage over other firms in building full-containment LNG tanks. (Simpson, Tr. 3069-72).

7.226 Dr. Simpson stated that we would take the fact that there would be more full containment tanks in the future into account in computing market shares. (Simpson, Tr. 3743).

Response to RFOF 7.226

This finding is misleading. Dr. Simpson did take the fact that there would be more full containment tanks in the future into account in computing market shares. (Simpson, Tr. 3068-72). Dr. Simpson testified that his conclusion that CBI and PDM EC were far and away the strongest competitors in the U.S. LNG tank market also applies to double and full-containment tanks. (Simpson, Tr. 3068).

**c. LIN/LOX**

7.227 Dr. Simpson concedes that Matrix has been able to enter and successfully engineer LIN/LOX tanks in the United States. (Simpson, Tr. 3952-53, 5605).

Response to RFOF 7.227

This finding is incomplete. Dr. Simpson elsewhere noted that Matrix now has higher costs because it divested its Brown Steel subsidiary, which possessed its most versatile fabrication facility. (Simpson, Tr. 3439-40).

7.228 [

] ([ ]). [ ] ([ ]).

Response to RFOF 7.228

This finding is misleading. Matrix recently sold its Brown Steel subsidiary. (Simpson, Tr. 3439). As a result its costs have increased. (Simpson, Tr. 3439). Thus, CBI has not had five or six years to observe Matrix, with its present cost structure, bid on LIN/LOX tanks. [ ] testified that CBI's [ ] ([ ], Tr. 4034) As CBI gets more information, CBI will likely increase its price.

7.229 Dr. Simpson admits that the knowledge that AT&V beat CB&I twice would have an effect on CB&I's pricing in the LIN/LOX tank market. (Simpson, Tr. 3829).

Response to RFOF 7.229

This finding is identical to RFOF 7.85. Like RFOF 7.85 it is incomplete. Dr. Simpson also testified "In the long run, I think the acquisition gives CBI the ability to increase price by 5 percent in the LIN/LOX/LAR market." (Simpson, Tr. 3828)

**d. LPG**

7.230 Dr. Simpson admitted that he relied on the testimony of Amy Warren, even though she did not even know who AT&V was and did not select the bidders on the projects she worked on, rather than Norman Kelly

who had greater experience in this area. (Simpson, Tr. 5578-80).

### Response to RFOF 7.230

This finding is both misleading and incomplete. Ms. Warren worked on two of the larger LPG tank projects in the 1990s. (Warren, Tr. 2274-75, CX 1657). Dr. Simpson testified that he gave more weight to Ms. Warren's testimony than to Mr. Kelly's testimony because Ms. Warren's testimony was consistent with other evidence. (Simpson, Tr. 5579). This other evidence includes respondents' documents. (CX 216 at CBI-PL-033886; CX 116 at PDM-HOU019181; CX 94 at PDM-HOU017582).

#### **e. TVCs**

7.231 Dr. Simpson admitted that "there is probably some level at which the amount of commerce affected would be *de minimis*, and if you're asking me would it make sense to get a remedy to preserve some *de minimis* level of competition, I can see instances where it would not be." (Simpson, Tr. 5585-86).

### Response to RFOF 7.231

This finding is irrelevant. Dr. Simpson never suggested that the amount of commerce in this case is *de minimis*.

7.232 Dr. Simpson could not "emphatically say" that CB&I and PDM coordinated their bids on the Spectrum Astro job. (Simpson, Tr. 5617).

### Response to RFOF 7.232

This statement is misleading. Dr. Simpson does not rely on evidence of collusion for his opinion that CBI's acquisition of PDM will harm competition. The record, however, includes evidence indicating that CBI and PDM colluded to raise prices to Spectrum Astro. CCFF 1119-1164.

7.233 Dr. Simpson agrees that the fact that somebody says something "stupid" like what Dave Lacey said does not mean that management has acted on the stupid idea. (Simpson, Tr. 5619).

### Response to RFOF 7.233

This finding mischaracterizes Dr. Simpson's actual testimony: Q: You know that lower-level employees sometimes say very stupid things in their documents; correct? / A: I can think of an instance where someone at a company said something that we thought was wrong. / Q: Sir, you've seen a lot of documents from a lot of companies where lower-level employees just say things that are just down right dumb, reflecting poor judgement? You've seen a lot of that, haven't you? / A: I've seen some. / Q: But the fact that somebody says something stupid like that doesn't mean that management has acted on it, does it? / A: That is correct. (Simpson, Tr. 5619). Nowhere in this exchange does Dr. Simpson say that Mr. Lacey's statements were stupid or reflected poor judgement.

Respondents and Mr. Scorsone belittle Mr. Lacey and other CB&I Business Development Managers, and disparage their observations and recommendations, which are recorded in Respondents' documents. Mr. Scorsone testified that "Dave Lacey is a first-level entry-level salesperson at Chicago Bridge & Iron." (Scorsone, Tr. 5045). Mr. Scorsone's characterization is contradicted by Mr. Scully, who identified Mr. Lacey and other Business Development Managers as CB&I's "middle management." (Scully, Tr. 1127).

Moreover, respondents concede that pricing recommendations and sales strategies proposed by Mr. Lacey and by other Business Development Managers are an important input in CB&I's sales strategy: "[E]-mail discussions regarding the appropriate profit margin for a particular job would be exchanged only between myself and one of the CB&I business development managers or sales managers. Access to this information is restricted in this way precisely because the information is highly sensitive. . . . Documents regarding sales strategies are valuable to CB&I, because they permit employees to share their views of the marketplace with their superiors. Using information of this type provided by business development managers, senior salespeople – such as myself – can make decisions regarding the margins to be set, the jobs to pursue, and the overall sales strategy for CB&I." (CX 393 ¶¶ 29-30, at 9-10 (Declaration of Steven Knott, CB&I Vice President of Sales for North America)).

Nevertheless, Respondents assert that Mr. Lacey's recommendations to price high and suspend fractious competition with PDM were not acted upon by CB&I, but the evidence is to the contrary, and Respondents chose not to call Mr. Lacey as a witness. Respondents' failure to call, as a witness, Mr. Lacey and other Business Development Managers, such as Mr. Miles and Mr. Knight "is itself persuasive that their testimony, if given, would have been unfavorable" to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.").

7.234 Dr. Simpson testified that with regards to whether CB&I and PDM coordinated bids in the thermal vacuum chamber market, the "evidence is mixed" and that it is hard to draw a strong inference from the mixed evidence. (Simpson, Tr. 5619-20).

#### Response to RFOF 7.234

This statement mischaracterizes Dr. Simpson's testimony. When asked whether CBI and PDM coordinated their bids on a project for Spectrum Astro, Dr. Simpson testified: "I think the evidence is mixed. It's hard for me to draw a strong inference from the evidence being mixed." (Simpson, Tr. 5620). Dr. Simpson noted that Mr. Scully, of XL, testified that the pricing on the Spectrum Astro bid was not as fractious as the pricing on an earlier TVC project. (Simpson, Tr. 5620). Dr. Simpson further testified, "the inference that I would draw is maybe there was some coordination of pricing. I'm not concluding that there was." (Simpson, Tr. 5622). Dr. Simpson is not the finder of fact.

**f. HHI**

7.235 Dr. Simpson did not know whether there would be a change in the HHIs in any of the markets if he went back to 1989 rather than 1990. (Simpson, Tr. 3705-06). Dr. Simpson admitted that in LIN/LOX, CB&I being spun off of Praxair changed CB&I's competitive strength. (Simpson, Tr. 3753).

#### Response to RFOF 7.235

The first statement in this finding mischaracterizes Dr. Simpson's testimony. Dr. Simpson testified elsewhere that he assigned market shares, and thus calculated HHIs, by looking at the period immediately prior to CBI's acquisition of PDM EC and using documents, opinions of market participants, and a history of past sales to assign market shares to companies based on their future competitive strength. (Simpson, Tr. 2980-81, 3050-51, 3708-09). In fact, for both LNG tanks and TVCs, Dr. Simpson presented both HHI calculations based on assigning both CBI and PDM 50 percent market shares as well as HHI calculations based on either sales or awards since 1990. (Simpson, Tr. 3055; 3494). For LIN/LOX tanks, Dr. Simpson noted that he believed that HHI statistics calculated based on sales accurately reflected the position of PDM and CBI in that market and how the acquisition would affect competition. (Simpson, Tr. 3443-44).

The second statement in this finding is misleading. Dr. Simpson testified that he believed that CB&I being spun off from Praxair made CBI more competitive in the LIN/LOX market. (Simpson, Tr. 3753). Dr. Simpson had earlier cited a Respondents' document as support for his conclusion. (Simpson, Tr. 3437; CX 1040).

7.236 Dr. Simpson agreed that for LNG if you calculated HHIs from 1996 to 2001, the change would be zero. (Simpson, Tr. 3744).

#### Response to RFOF 7.236

The finding is misleading for two reasons. First, Dr. Simpson's statement only referred to calculating HHIs based on dollar sales during the period 1996 to 2001. (Simpson, Tr. 3744). Dr. Simpson testified elsewhere that he assigned market shares, and thus calculated HHIs, by looking at the period immediately prior to CBI's acquisition of PDM EC and using documents, opinions of market participants, and a history of past sales to assign market shares to companies based on their future competitive strength. (Simpson, Tr. 3050-51, 3709).

Second, Dr. Simpson likely mispoke when he stated that CBI had no LNG tank sales in 1996. CBI was working on two LNG projects in 1996, the Memphis Light Gas and Water project and the Pine Needle project. Gerald Glenn, CBI's CEO, testified that CBI receives payments for its projects when it reaches certain milestones. (Glenn, Tr. 4209-10). Given this, CBI almost certainly would have received some revenue for LNG projects in 1996.

7.237 Dr. Simpson admitted that he chose 1990 as the beginning date for his HHI analysis because 1990 was the cut-off date for discovery and thus his information only dated to 1990. (Simpson, Tr. 3704-05).

#### Response to RFOF 7.237

This finding mischaracterizes Dr. Simpson's testimony. Dr. Simpson testified elsewhere that he assigned market shares, and thus calculated HHIs, by looking at the period immediately prior to CBI's acquisition of PDM EC and using documents, opinions of market participants, and a history of past sales to assign market shares to companies based on their future competitive strength. (Simpson, Tr. 3050-51, 3709). In fact, for both LNG tanks and TVCs, Dr. Simpson presented HHI calculations based both on assigning both CBI and PDM 50 percent market shares and based on awards since 1990. (Simpson, Tr. 3055; 3494). For LIN/LOX tanks, Dr. Simpson noted that he believed that HHI statistics calculated based on sales accurately reflected the position of PDM and CBI in that market and how the acquisition would affect competition. (Simpson, Tr. 3443-44).

As far as using a history of past sales as one type of evidence for assigning market shares, Dr. Simpson testified: "[T]he reason . . . why I stopped at 1990 was that the information that was requested from the various companies went back to 1990. It did not go to 1989 or 1985. So consistent with the idea of looking at all of the information that I had available to me, I went back to 1990." (Simpson, Tr. 3704-05).

#### **g. Natural market experiments**

7.239 Dr. Simpson admits that for a natural experiment to be used it does not have to be exactly a twin to the hypothesis being tested. (Simpson, Tr. 3855).

#### Response to RFOF 7.239

This finding is incomplete. The features of a natural experiment can differ so much from those that exist in the market being analyzed that the natural experiment has no predictive power. For instance, Dr. Harris argues that an award of an LNG tank project to TKK in Trinidad implies that foreign firms compete on an equal footing with CBI in the U.S. (Harris, Tr. 7241-42). Dr. Harris argues that the conditions in Trinidad are similar to those in the U.S. (Harris, Tr. 7223). However, Dr. Harris later conceded that he was ignorant about how the regulatory environment in Trinidad compared to that in the U.S. (Harris Tr. 7800-01). Moreover, in the mid 1990s, Whessoe was awarded a project to construct two LNG tanks in Trinidad. Winning an LNG tank award in Trinidad was a poor indicator of Whessoe's ability to compete in the United States. Whessoe and its United States partners were not competitive in the mid 1990's when the bid for the Memphis Light Gas and Water LNG project. CCF 935, 939.

#### **h. CB&I's state of mind**

7.240 Dr. Simpson believes that firms try to choose their best bidding strategy with less than complete information. (Simpson, Tr. 3771).

#### Response to RFOF 7.240

This statement is misleading. Dr. Simpson's testimony was made in response to

questions about an environment in which firms have less than complete information. (Simpson, Tr. 3765-71).

7.241 Dr. Simpson admits that “CB&I’s beliefs about its competitors will guide its behavior.” (Simpson, Tr. 3771).

### Response to RFOF 7.241

This finding is misleading and incomplete. Please see response to RFOF 7.79.

- 7.242 In the case of CB&I and PDM, Dr. Simpson believes that CB&I perceived PDM EC as an equally capable competitors (sic) and therefore had to price accordingly. (Simpson, Tr. 3773).

### Response to RFOF 7.242

Complaint counsel agrees.

- 7.243 Dr. Simpson agrees that CB&I can draw the inference that that foreign tank companies have competitive prices. (Simpson, Tr. 3784).

### Response to RFOF 7.243

This finding mischaracterizes Dr. Simpson's testimony as explained in the response to RFOF 7.84.

- 7.244 Dr. Simpson believes that the level of information available to CB&I will determine whether it is likely CB&I would impose a price increase, but does not believe the knowledge that Dynegey was satisfied with the bids it received from foreign competitors would matter to whether CB&I is likely to impose a price increase. (Simpson, Tr. 3844-47).

### Response to RFOF 7.244

This finding is incomplete. Dr. Simpson testified that at least "some individuals at CB&I believe that Dynegey did not have the expertise to analyze bids." (Simpson, Tr. 3143-44). Dr. Simpson noted that a CBI document states: "Ron said that Dynegey is not willing to take bids directly themselves since they do not have the staff, experience and knowledge to analyze the bids and make an informed decision." (Simpson, Tr. 3143, CX 138) Moreover, statements by Dynegey regarding their satisfaction with the bids they received apply only to their first review of the bids and the fact that the bids were consistent with the \$55 million budget estimate that Dynegey had obtained from Skanska Whessoe. (Puckett, Tr. 4540, 4557; Price, Tr. 602-03). Mr. Puckett testified: "At first review of these bids, did the bids meet your expectations, meaning Dynegey's expectations, for the bids on this project for the tank work?" (emphasis added) / A: They met our technical expectations, and they were in the expected price range." (Simpson, Tr. 3139; JX-31 at 27). However, Whessoe's budget price reflected its higher risks in attempting for the first time, to build an LNG tank in the United States. (Price, Tr. 604-05, 608-09). Black & Veatch, Dynegey's engineering consultant for the LNG tank bids, has concluded that Dynegey will pay more and incur greater risks because Dynegey is unable to source the LNG tanks from CB&I or PDM. (Price, Tr. 622 ("We had concerns that if we do not have a domestic tank price for that project that the prices that the client would receive for those tanks would be higher."), 626-28).

Mr. Price's concerns are justified. Whessoe's \$55 million budget price to Dynegey for

each of the 160,000 cubic meter, full containment Hackberry LNG tanks is [ ] higher than the

budget price of [ ] Whessoe quoted to [ ], prior to the acquisition, for the same size and type LNG tank. (CX 691 at [ ] 02 004 *in camera*).

**i. Critical loss**

7.245 Dr. Simpson admits that state of mind is important in determining critical loss. (Simpson, Tr. 3865).

Response to RFOF 7.245

This finding is misleading and incomplete. Please see response to 7.79.

7.246 Dr. Simpson agrees that the ultimate point of critical loss is to predict behavior, and that ultimately whether the company views costs as variable or fixed determines whether they should be treated as such. (Simpson, Tr. 3872-74).

Response to RFOF 7.246

This finding is misleading and incomplete. Please see response to 7.79.

7.247 Dr. Simpson admits that there is a threshold for variability which is whether that cost would be varied in response to a loss of the amount of sales equal to the critical loss. (Simpson, Tr. 3870-71). Thus if analyzing a 5% price increase within a 15% contribution margin, costs must be considered fixed if they would not be varied if 25% of the business is lost. (Simpson, Tr. 3871-72).

Response to RFOF 7.247

This finding is incomplete and misleading because it fails to take into account CB&I's ability to shift costs between relevant products and other products, thereby reducing CB&I's costs for the relevant products in the event of a downturn in sales for the relevant products. CCF 624-30. 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).

7.248 Dr. Simpson admitted that the critical loss is essentially the same before and after the Acquisition. (Simpson, Tr. 3820).

Response to RFOF 7.248

This statement is a gross misrepresentation of Dr. Simpson's actual testimony. The transcript states: "Q: And that contribution margin is more or less the same before the acquisition and (sic) as it is after the acquisition; correct? / A: I was calculating it before the acquisition. If there's a price increase after the acquisition, the contribution margin would be

higher. / Q: So it would change some? / A: Yes. / Q: Okay. But it's more or less the same; correct, unless the price increase is massive? / A: It would depend on how big the price increase is." (Simpson, Tr. 3820).

7.249 Dr. Simpson agreed that if CB&I had no LNG work for several years it would deploy its engineering force to other projects. (Simpson, Tr. 3900-01).

#### Response to RFOF 7.249

This finding misrepresents Dr. Simpson's testimony. Dr. Simpson testified: "I think they would either be redeployed to other projects or if there were not other projects that CB&I would adjust the size of its work force either through attrition or through laying off workers." (Simpson, Tr. 3901).

7.250 Dr. Simpson does not know what percent of the engineering department's time is spent on LNG in the U.S.. (Simpson, Tr. 3901; 3902).

#### Response to RFOF 7.250

This statement is misleading. Since CBI's sales of LNG tanks in the U.S. would vary from year to year, the percent of its engineering department's time spent on LNG tanks in the U.S. would obviously vary from year to year. In fact, Dr. Simpson suggests this in his testimony: "Q: Sir, do you know what percent of the engineering department's time is spent on LNG in the U.S.? / A: No, I do not. / Q: You have no idea, do you? / A: The – what would form my opinion would be just the number of projects that are on the horizon." (Simpson, Tr. 3901-02).

### **j. Entry**

7.251 Dr. Simpson agrees that to the extent that foreign competitors have submitted bids for projects, they have chosen to pursue work in the U.S. despite Dr. Simpson's purported barriers to entry. (Simpson, Tr. 3913-19).

#### Response to RFOF 7.251

This finding is misleading. Both Dr. Simpson and Dr. Harris agree that entry by new firms would restore the competition lost through an anticompetitive merger only if it is sufficient to restore the pre-merger competitive environment. (Simpson, Tr. 3151-52; Harris, Tr. 7436, 7438). Both Dr. Simpson and Dr. Harris agree that the observation that new firms submit bids in a market does not always imply that entry is sufficient. (Simpson, Tr. 3282-84; Harris, Tr. 7790-91).

7.252 Dr. Simpson does not know whether entry is profitable for foreign entrants. (Simpson, Tr. 3919).

#### Response to RFOF 7.252

This finding is misleading. The fact that entry might be profitable does not imply that

entry would be sufficient to restore the pre-acquisition competitive environment. Even Dr. Harris acknowledges that entry will not keep prices from rising above the pre-acquisition level if entry is only profitable at higher prices. (Harris, Tr. 7451). Entry by firms who can only profitably enter at prices above the competitive level would not restore competition. (Harris, Tr. 7438).

7.253 Dr. Simpson admits that the fact that the executives of these foreign firms are entering the market suggests they believe doing so will be profitable. (Simpson, Tr. 3919).

#### Response to RFOF 7.253

This finding is misleading. The fact that entry might be profitable does not imply that entry would be sufficient to restore the pre-acquisition competitive environment. Even Dr. Harris acknowledges that entry will not keep prices from rising above the pre-acquisition level if entry is only profitable at higher prices. (Harris, Tr. 7451). Entry by firms who can only profitably enter at prices above the competitive level would not restore competition. (Harris, Tr. 7438).

### **k. Exiting assets**

7.254 Dr. Simpson agreed that as an economist, whether a business would be liquidated is something to be taken into account. (Simpson, Tr. 5680).

#### Response to RFOF 7.254

This statement cannot be found at Simpson, Tr. 5680.

## **VI. EXITING ASSETS FINDINGS OF FACT**

### **A. PDM WAS CB&I'S ONLY LOW-COST COMPETITOR IN THE RELEVANT PRODUCT MARKETS**

8.2 PDM operated four lines of business with five divisions -- PDM Strocal, Water, EC, Bridge, and Steel Distribution. PDM was very decentralized with operations in the fabrication business, steel buildings, steel bridges, water tanks, and miscellaneous tanks like LOX/LIN, LNG, and petrochemical tanks. (Byers, Tr. 6731; Scorsone, Tr. 4778-79; G. Glenn, Tr. 4075-76)

#### Response to RFOF 8.2

Respondents' assertion that "PDM was very decentralized" is incomplete and misleading. Pitt-Des Moines, Inc.'s EC and Water Divisions were "intertwined" and "meshed together." (Scheman, Tr. 2929-2930). PDM's management believed separating EC and Water would be costly and difficult. (Scheman, Tr. 2929). The EC and Water Divisions shared human resources, physical plant, and it was considered impossible to split the two. (Byers, Tr. 6780-6781). The EC and

Water Divisions shared human resource departments, fabrication plants, and construction crews. (Byers, Tr. 6800-6801). Finally, the EC and Water Presidents reported directly to the CEO Bill McKee, rather than exercising complete control over their organizations. (Byers, Tr. 6734).

- 8.3 PDM stock was thinly traded, meaning that there was very little activity on any given day -- some days no stock was traded, other days 100-200 shares moved. Being thinly traded, shareholders had difficulty selling large blocks of shares because the demand was not visible on the public market. (Byers, Tr. 6732-33; Scorsone, Tr. 4791-92).

### Response to RFOF 8.3

Respondents' assertions are irrelevant. Difficulties in selling PDM stock are irrelevant to the Respondents' exiting asset defense.

- 8.4 PDM was very decentralized. Each business unit or division had a president who reported to the CEO of PDM, Bill McKee ("McKee"). Each operating unit had its own accounting staff. (Byers, Tr. 6734).

### Response to RFOF 8.4

Respondents' assertions are incomplete and misleading. CCRFF 8.2.

- 8.5 PDM EC shared resources with PDM Water, such as equipment, tools and fabrication facilities. (Scorsone, Tr. 4779; Byers, Tr. 6780).

### Response to RFOF 8.5

Complaint Counsel agrees with this finding.

- 8.7 The EC Division benefited from being part of an aggregate division structure because PDM could use the aggregate revenues of all operating units to obtain larger insurance values and bonding capabilities. If PDM EC had tried to obtain funding on its own, it would have had to provide letters of credit or personal guarantees, as evidenced by the difficulties PDM Bridge has experienced in attempting to bond projects on its own. (Byers, Tr. 6734-38).

### Response to RFOF 8.7

The finding that the Bridge Division's difficulty in getting bonding for projects demonstrates that the EC Division would have to provide letters of credit or personal guarantees to obtain funding is not supported by the evidence. Byers testified that the EC Division on its own would have probably had to provide letters of credit or someone's personal guarantee. (Byers, Tr. 6735). Byers noted independently that the Bridge Division's ability to get bonding was reduced by the Bridge Division's standing on its own. (Byers, Tr. 6738). However, this does not mean, as RFOF 8.7 contends, that the Bridge Division's reduction in ability to obtain bonding is evidence that a stand-alone EC Division would have had to provide letters of credit or someone's personal guarantee. The premise that the Bridge Division's ability to get bonding

was reduced does not necessitate the speculative conclusion that therefore a stand-alone EC Division would have had to provide letters of credit or someone's personal guarantee.

8.8 Richard A. Byers ("Byers") is retired as the former Vice-President of Finance at PDM. Mr. Byers was with PDM for 23 years. (Byers, Tr. 6727-28). Mr. Byers graduated from Geneva College in 1969 with a BS in accounting. Mr. Byers then spent 2 years as a sergeant in the U.S. Army. Next, Mr. Byers spent 10 years with Ernst & Young on its audit staff. (Byers, Tr. 6728-29).

8.9 Mr. Byers joined PDM in 1979. At PDM, Mr. Byers was manager of financial reporting, assistant controller, controller, and VP of Finance (equivalent of CFO). As VP of Finance, Mr. Byers was responsible for all accounting functions, treasury functions, mergers and acquisitions, and credit functions. (Byers, Tr. 6729-30).

#### Response to RFOF 8.8 and 8.9

Respondents' assertions relating to Byers' background are irrelevant. He was not offered as an expert witness in acquisitions and mergers.

8.10 Mr. Byers was actively involved in the purchase or sale of business units while at PDM at least 12 times. (Byers, Tr. 6730). While not an investment banker, Mr. Byers has worked extensively with them and is familiar with the lending environment for purposes of selling a business both in 2000 and today. (Byers, Tr. 6730-31).

#### Response to RFOF 8.10

Respondents' assertions relating to Mr. Byers' knowledge of selling businesses, investment banking practices, and the lending environment as it relates to selling a business in 2000 and today are self-serving and uncorroborated by other sources.

### **B. PDM COULD HAVE SUCCESSFULLY COMPETED WITH CB&I OR BEEN SOLD TO AN ALTERNATIVE ACQUIRER**

8.11 Reducing or eliminating the Jackson Family stock was a goal of PDM. The Jackson family owned 2.8 million shares throughout their family, roughly 29-30 percent of the company. A fear in the marketplace was that W.R. Jackson, the patriarch of the family and founder of the company was 92 years old at the time -- the fear being that when he died, the family might liquidate its stock and 2.8 million shares would hit the market at the same time. That would have a pretty significant negative impact on PDM's stock price. (Scheman, Tr. 6909-10, 2916-17; Scorsone, Tr. 4791; RX 158 at 18).

#### Response to RFOF 8.11

Respondents' finding is incomplete and misleading to the extent that it suggests that the Jackson family goals were the sole or even primary motivators for PDM's actions. The Jackson family only owned 29-30% of the company's stock. (Scheman, Tr. 6909-10). PDM's board members had a fiduciary duty to all of its shareholders and could not take action detrimental to PDM to satisfy the personal desires of the Jackson family. There is absolutely no evidence in the record suggesting that at the time of the acquisition W.R. Jackson, Sr. was in ill-health or in

imminent danger of dying. (Scheman, Tr. 6910).

- 8.17 Tanner is an investment banking boutique, started in 1987, focusing on middle-market mergers and acquisition anywhere from \$25 million to \$400 million. (Scheman, Tr. 2910, 6906).
- 8.18 Peter Scheman ("Scheman") is a principal at Tanner. He has been at Tanner for 14 years, starting in 1988. (Scheman, Tr. 2910, 6906). Mr. Scheman has been an investment banker for 14 years. He graduated from Stanford University in 1988. Mr. Scheman has done over 100 deals, ranging in size from \$5 million to \$6 billion. He started with Tanner as a financial analyst, and now is the youngest principal with the firm. (Scheman, Tr. 6941-43).

#### Response to RFOF 8.17 and 8.18

Respondents' assertions as to Tanner's and Scheman's backgrounds are irrelevant. Whether Tanner's course of action was within the mode of accepted investment banking practice in seeking the best price for the PDM assets is irrelevant as to the issue of whether the requirements for the so-called "exiting asset" defense have been met.

- 8.20 The decision to take PDM private was ultimately changed. In May 2000, Mr. Jackson, Sr. announced that the company were sellers, not buyers. This meant that PDM was for sale. (Byers, Tr. 6742).

#### Response to RFOF 8.20

Respondents' assertion is incorrect. Mr Byers testified that Mr. Jackson, Sr. announced in May 2000 that *the family*, and not the company, were sellers. (Byers, Tr. 6742).

- 8.21 Mr. Scorsone first learned that PDM's Board was intending to sell his EC Division in early May 2000. At that time, Mr. Scorsone learned that the Board had decided to sell the entire corporation. (Scorsone, Tr. 4790-91). Mr. Scorsone was told about the Board's decision to sell by Bill McKee. Mr. Scorsone was also told that he would have nothing to do with selling PDM EC or negotiating the sale. (Scorsone, Tr. 4792-93).

#### Response to RFOF 8.21

This entire finding is irrelevant. The evidence in this finding was admitted solely for the purpose of establishing Mr. Scorsone's state of mind vis-a-vis the board's decision to sell PDM. (Leon, Tr. 4792). Mr. Scorsone's state of mind is irrelevant to the Respondents' exiting asset defense as Mr. Scorsone was not responsible for the decision of whether and how Pitt-Des Moines, Inc. would dispose of PDM. (Scorsone, Tr. 4793).

- 8.22 Investment bankers were interviewed in a "beauty-contest." The participants were Goldman Sachs and Tanner. Both firms made presentations to the Board. (Byers, Tr. 6742-43; Scheman, Tr. 2912, 6908).

#### Response to RFOF 8.22

Respondents' assertions are irrelevant.

- 8.23 The PDM Board and the Jackson Family wanted to create liquidity in PDM stock. That decision placed additional constraints on the ability to sell PDM because it eliminated an alternative form of consideration: stock. (Scheman, Tr. 6948-49).

#### Response to RFOF 8.23

Contrary to Respondents' assertion, Pitt-Des Moines, Inc.'s board in fact ultimately authorized PDM to be sold for consideration including \$44 million worth of CBI's stock. (Byers, Tr. 6791). The Jackson family desires are not necessarily synonymous with PDM board desires. Finally, the Jackson family's desire for liquidity cannot justify choosing CB&I over other purchasers, nor can it justify failing to meet the requirements of the so-called "exiting asset" defense.

- 8.24 The PDM Board gave PDM Management a directive that the consideration for such a deal had to be cash. Cash was important to increase shareholder value and be as liquid as possible. With the help of an investment banker, PDM felt that value would be returned to shareholders through a tender offer at the time the last division was sold, so as to avoid any assets being left in the company. (Byers, Tr. 6759-61).

#### Response to RFOF 8.24

Respondents' assertion as to what "PDM felt" is speculation on Mr. Byers part and should be disregarded. Mr. Byers may testify only to his state of mind and not speculate as to the state of mind of others. Moreover, the board's directive that cash was the only consideration allowed was in fact abrogated and PDM ultimately accepted CB&I stock as partial consideration for the acquisition. (Byers, Tr. 6791).

- 8.25 PDM's Board also imposed a directive on PDM Management to complete a sale as quickly as possible to prevent the public viewing PDM as being in play and shopping the various divisions as part of a desperate "fire sale." (Byers, Tr. 6762-63).

#### Response to RFOF 8.25

Mr. Byers's claim that it was necessary to prevent the public from viewing PDM as in play is belied by Respondents' claim that just two months after the owners decided to sell PDM (and seven months before the acquisition), Pitt-Des Moines, Inc. issued a press release announcing its intention to sell PDM. (Byers, Tr. 6884; Scheman, Tr. 2921).

PDM's interest in selling the EC and Water divisions as quickly as possible is irrelevant as to whether the requirements of the so-called "exiting asset" defense have been met.

### **C. GOLDMAN SACHS VALUED PDM'S EC DIVISION AT \$51 MILLION**

- 8.26 Goldman Sachs ("Goldman") made a presentation to the PDM Board in June 2000. (RX 23 at 4). Goldman's ultimate advice was that PDM should be sold entirely to a private equity group, and done relatively quickly. In other words, PDM should not be sold as individual units. Goldman expected that such a sale would earn \$28 per share. PDM management was concerned and felt that Goldman's estimate was too low. (Byers,

Tr. 6743-45; RX 23 at 13).

### Response to RFOF 8.26

Respondents' assertion that PDM felt that Goldman's estimate of \$28 per share was too low is irrelevant to meeting the requirements of Respondents' "existing asset" defense. The only relevant inquiry under that proposed defense is whether the assets could be sold for a price above liquidation value. Kwoka & Warren-Boulton, Efficiencies, Failing Firms, and Alternatives to Merger: a Policy Synthesis, 31 ANTITRUST BULL. 431 (1986); Merger Guidelines § 5.1 fn. 39.

8.27 Book value is a mathematical calculation of simply total assets less total liabilities, based on historical information. Goldman estimated that the book values of EC was \$51.2 million and Water was \$17.4. Book values, however, are not accurate estimates of what businesses would be sold on the open market because book values are not used for valuation purposes. (Byers, Tr. 6745-46; RX 23).

### Response to RFOF 8.27

Book value is an alternative measure of valuation. RFOF 8.28.

8.28 Goldman predicted that the EC Division would sell for a range of \$51.2-\$26 million based on different valuation methods. Goldman's figures were based on book value calculations. In Mr. Byers' experience with similar transactions, EBITDA is a more likely basis for determining the value of a business on the open market. (Byers, Tr. 6746-48).

#### Response to RFOF 8.28

The finding that Goldman's valuations were based on book value is inaccurate. Of the five valuations of EC that Mr. Byers is referring to in his testimony at 6746 to 6748, only one was based on book value, and four were based on EBITDA. (RX 23 at PDM-C 1004030). Moreover, Byer's opinion is not fact; Byers' simply disagrees with Goldman Sach's valuation.

8.29 A month after Goldman's presentation, the lending market became tighter and it became more difficult to borrow money. Thus, Goldman's multiples and assumptions were not accurate reflectors of lending conditions at the time. (Byers, Tr. 6750-51; RX 23 at 12).

#### Response to RFOF 8.29

First, this finding incorporates Mr. Byers's conclusory, vague, and uncorroborated claim that "the banking industry became very tight." (Byers, Tr. 6764). Second, this finding makes the spurious assumption that there is a causal connection between general lending conditions and a target company's intrinsic worth. It does not establish that Goldman's assumptions vis-a-vis the lending market in any way affect its valuation of PDM's intrinsic worth. Finally, it is incomplete as it ignores Mr. Byers's testimony that financial buyers do not typically borrow money for their acquisitions and the fact that Mr. Byers did not know whether any of the potential buyers of PDM proposed by Tanner had - or did not have - enough cash to purchase PDM. (Byers, Tr. 6841-6842, 6797).

The lending market did not become tighter after June 2000. The Tribunal may take judicial notice that the Prime Rate remained unchanged, at 9.5%, from June 2000 through January 2001, then declined significantly, reaching a level of 4.25% by December 2002. A Table showing the Prime Rate is shown below:

## Prime Rate

The Prime Rate is the interest rate charged by banks to their most creditworthy customers (usually the most prominent and stable business customers). The rate is almost always the same amongst major banks. Adjustments to the prime rate are made by banks at the same time; although, the prime rate does not adjust on any regular basis. The rates reported below are based upon the prime rates on the first day of each respective month.

### Historical Chart

<b>Prime Rate</b>											
	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
<a href="#"><u>Jan 1</u></a>	6.00%	6.00%	8.50%	8.50%	8.25%	8.50%	7.75%	8.50%	9.50%	4.75%	4.25%
<a href="#"><u>Feb 1</u></a>	6.00%	6.00%	9.00%	8.25%	8.25%	8.50%	7.75%	8.75%	8.50%	4.75%	4.25%
<a href="#"><u>Mar 1</u></a>	6.00%	6.00%	9.00%	8.25%	8.25%	8.50%	7.75%	8.75%	8.50%	4.75%	
<a href="#"><u>Apr 1</u></a>	6.00%	6.25%	9.00%	8.25%	8.50%	8.50%	7.75%	9.00%	8.00%	4.75%	
<a href="#"><u>May 1</u></a>	6.00%	6.75%	9.00%	8.25%	8.50%	8.50%	7.75%	9.00%	7.50%	4.75%	
<a href="#"><u>Jun 1</u></a>	6.00%	7.25%	9.00%	8.25%	8.50%	8.50%	7.75%	9.50%	7.00%	4.75%	
<a href="#"><u>Jul 1</u></a>	6.00%	7.25%	9.00%	8.25%	8.50%	8.50%	8.00%	9.50%	6.75%	4.75%	
<a href="#"><u>Aug 1</u></a>	6.00%	7.25%	8.75%	8.25%	8.50%	8.50%	8.00%	9.50%	6.75%	4.75%	
<a href="#"><u>Sep 1</u></a>	6.00%	7.75%	8.75%	8.25%	8.50%	8.50%	8.25%	9.50%	6.50%	4.75%	
<a href="#"><u>Oct 1</u></a>	6.00%	7.75%	8.75%	8.25%	8.50%	8.25%	8.25%	9.50%	6.00%	4.75%	
<a href="#"><u>Nov 1</u></a>	6.00%	7.75%	8.75%	8.25%	8.50%	8.00%	8.25%	9.50%	5.50%	4.75%	
<a href="#"><u>Dec 1</u></a>	6.00%	8.50%	8.75%	8.25%	8.50%	7.75%	8.50%	9.50%	5.00%	4.25%	

Copyright 2003 MoneyCafe.com

Source: Federal Reserve Board

A complete history of the specific dates on which the Prime Rate changed are found on the Federal Reserve Bank of St. Louis website at <http://research.stlouisfed.org/fred/data/irates/prime>

Source: <http://www.nfsn.com/library/prime.htm>. Accord, <ftp://ftp.ny.frb.org/prime/Prime.txt>.

8.31 Day to day responsibilities at Tanner were handled by Mr. Scheman, Robert Fullerton, an associate, Michael Stanfield, and Harold Tanner, a named partner. Mr. Scheman coordinated and led the representation. Harold Tanner went to Board meetings. Mr. Fullerton assisted Mr. Scheman. (Scheman, Tr.

2912-13, 6908-09).

## **D. TANNER AND PDM DID NOT SEEK OUT ALTERNATIVE BUYERS**

### Response to RFOF 8.31

Respondents' assertions as to who at Tanner was responsible for the transaction are irrelevant.

8.33 Tanner, based on its combined years of experience, recommended that PDM sell off pieces, viewing the pieces as worth more than the whole. Tanner estimated revenues per share in the mid-thirties. (Byers, Tr. 6754-55).

### Response to RFOF 8.33

The portion of this finding relating to Tanner's recommendation is factually inaccurate. Mr. Scheman testified that Pitt-Des Moines, Inc. became obligated to sell its units piecemeal once it sold Strocal in November of 2000 and prior to that Pitt-Des Moines, Inc. was still considering selling itself whole. (Scheman, Tr. 2920-2921). Even after November 2000 the remainder of PDM could have been sold as whole; the sale of Strocal meant that it would no longer have been part of the package after it was sold. Respondents' reference to Tanner's combined years of experience is self-serving; in the field of investment banking, Tanner has no more experience or sophistication than Goldman Sachs.

8.34 From a practical as well as financial and timing standpoint, it was much more attractive to sell both the EC and Water Divisions together. The two divisions were intertwined and shared multiple facilities. (Scheman, Tr. 6912, 2926-30; RX 159 at 15).

### Response to RFOF 8.34

Complaint counsel agrees with the assertion that "[t]he two divisions were intertwined and shared multiple facilities." (*See also*, Scheman, Tr. 6912, 2929-30; RX 159 at TAN 1000329).

8.35 Tanner's conclusion would not be any different if there was a possibility of strategic buyers acquiring one of the divisions. (Scheman, Tr. 6915). The reason being that there were a lack of adequate resources by potential buyers to purchase the Water Division. The other competitors in the EC and Water Divisions were small. (Scheman, Tr. 6915-16).

### Response to RFOF 8.35

The finding that other companies involved in the lines of business in which the EC and Water Divisions operated were small is contradicted by the testimony of CBI's CEO Gerald Glenn, who noted that Skanska/Whessoe is the world's largest engineering construction company, Technigaz is owned by Saipem, one of the largest engineering construction companies

in the world, and that Tractebel is a very large company. (Glenn, Tr. 4092-4093, 4094). Moreover, potential buyers need not be limited to competitors of the EC and Water divisions.

8.36 Tanner concluded that there were "few other strategic buyers with adequate resources to acquire both Divisions." (RX 159 at 15). This conclusion was based on information concerning the industry, the companies identified by PDM, EC and Water managements, Tanner's growing knowledge of the industry, and phone calls from people expressing interest. (Scheman, Tr. 6913-14).

#### Response to RFOF 8.36

Respondents' assertion that there were "few other strategic buyers with adequate resources to acquire both Divisions" is contained in Tanner's Report to PDM's Board that "CB&I has offered \$93.5 million for PDM's EC AND Water Divisions" (RX 159 at TAN 1000328) and was made in support of Tanner's conclusion that "We believe it is doubtful that PDM could achieve a value exceeding \$93.5 million in an alternative transactions." (RX 159 at TAN 1000329).

8.38 The Board also adopted Tanner's recommendation to sell PDM in pieces. (Byers, Tr. 6755, 6757-58; Scheman, Tr. 2919). PDM management was instructed by the Board to work with Tanner in implementing the Board's directive at the June 1, 2000 meeting. (Byers, Tr. 6758).

#### Response to RFOF 8.38

The portion of this finding relating to Tanner's recommendation is factually inaccurate. Mr. Scheman testified Pitt-Des Moines, Inc. became obligated to sell its units piecemeal once it sold Strocral in November of 2000 and prior to that Pitt-Des Moines, Inc. was still considering selling itself whole. (Scheman, Tr. 2920-2921).

8.39 Tanner informed the Board of its 6 month time frame to complete the sale. Mr. Byers did not believe such a time frame was possible, but had to proceed with due speed. (Byers, Tr. 6761-62)

#### Response to RFOF 8.39

The sale of all of PDM divisions was in fact not accomplished until March 2002. (Scheman, Tr. 6909). See RFOF 8.41. PDM's interest in selling the EC and Water divisions as quickly as possible is irrelevant as to whether the requirements of the so-called "exiting asset" defense have been met.

8.40 Tanner assumed the responsibility of contacting potential purchasers and securing their level of interest, not the PDM Board or management. Any and all inquiries were directed to Tanner. (Byers, Tr. 6758-59).

#### Response to RFOF 8.40

The finding that any and all inquiries were directed to Tanner is false. Mr. Byers was instructed to direct any and all inquiries to Tanner, however Mr. Vetal testified that he made an

inquiry directly to PDM president Bill McKee and was in fact not directed to Tanner. (Vetal, Tr. 422-423). Mr. Glenn testified that Mr. McKee, PDM's president, and not Tanner, first contacted him regarding the sale of PDM's EC AND Water divisions. (Glenn, Tr. 4077, 4078).

8.42 Tanner's compensation was structured such that it had an incentive to do the best work for the shareholders. (Byers, Tr. 6881-82).

#### Response to RFOF 8.42

Respondent's assertion is misleading. Tanner was "paid a commission or a percentage of the gross proceeds of every transaction." (Byers, Tr. 6882). Accordingly, Tanner's incentive was to sell PDM's EC and Water Divisions to CB&I because Tanner determined that CB&I would pay the highest price. (RX 159 at TAN 1000329).

8.43 Tanner was paid for its efforts on a commission, a percentage of the value of funds received. Therefore, Tanner had every incentive to get the highest purchase price possible: for selfish motives and professional pride. (Scheman, Tr. 6946-47).

#### Response to RFOF 8.43

Respondents assertion is misleading. CB&I was in fact accepted as a purchaser because Tanner determined that CB&I would pay the highest price. (RX 159 at TAN 1000329). CCRFF 8.42.

8.44 In addition, Tanner had a fiduciary obligation to PDM and its shareholders. (Scheman, Tr. 6947; Byers, Tr. 6881-82).

#### Response to RFOF 8.44

Complaint counsel agrees with Respondents' finding as it applies to Mr Scheman. (Scheman, Tr. 6947). Mr. Scheman testified that he had a fiduciary obligation to get the best possible price for the PDM divisions. (Scheman, Tr. 6947).

8.45 Tanner was hired to maximize the benefit and shareholder value. In so doing, Tanner was responsible for finding prospective purchasers. PDM and Mr. Byers relied upon Tanner's statements and investment banking experience in determining that there were or were not prospective purchasers. (Byers, Tr. 6878-81).

#### Response to RFOF 8.45

The finding that PDM relied on Tanner's statements in determining there were or were not prospective purchasers is misleading in that it suggests that Respondents made a good faith effort to find alternative purchasers. Tanner never informed Mr. Byers whether or not there were other prospective purchasers. (Byers, Tr. 6799, 6878-6881). In fact, Tanner noted the day of the acquisition in their fairness opinion there *were* other potential purchasers. (RX 29 at PDM-C 1006327). Scheman testified that he never contacted prospective buyers and never sent out the offering memo because CB&I was a preemptive buyer. (Scheman, Tr. 2938-39).

The finding that PDM relied on Tanner's statements about prospective purchasers is belied by the fact that it was Pitt-Des Moines, Inc. who initiated contact with CBI and Enron about purchasing PDM. (Byers, Tr. 6764, 6812; Glenn, Tr. 4077-4078).

8.46 Mr. Scheman believes that he conducted himself consistent with a similarly situated investment banker in

relation to his representation of the PDM EC and Water Divisions. (Scheman, Tr. 6943-44).

#### Response to RFOF 8.46

This finding is irrelevant. Mr. Scheman's adherence to investment banking industry custom has no bearing on whether, as a matter of fact, Respondents made unsuccessful, good faith efforts to find other buyers. Whether other investment bankers would also have refrained from searching for alternative purchasers once they had identified a preemptive buyer who was willing to pay a premium for the assets is irrelevant as to whether the requirements for the so-called "existing asset" defense have been met.

8.47 Investment bankers do not typically pick up the phone and start calling potential buyers when selling a public company. A lot of thought and strategy goes into selling a business, from marketing materials to limiting damage of the existing business of the company. (Scheman, Tr. 6944-45).

#### Response to RFOF 8.47

Respondents' assertions rely on the speculation of Mr. Scheman as to what other investment bankers typically do or do not do. Even if Mr. Scheman were following standard investment banking procedure in his attempts to sell the PDM's EC and Water Divisions at the best price for his client, this would be irrelevant as to whether the requirements for the so-called "existing asset" defense have been met.

8.48 Tanner's decisions to market PDM EC and Water were based on the years of experience of Mr. Scheman and all of his partners. (Scheman, Tr. 6945).

#### Response to RFOF 8.48

The assertion is self-serving and misleading. Tanner's decision was based on the fact that CB&I offered a premium price for the assets and consequently there was no need to market the divisions to anyone else. (Scheman, Tr. 2938-39).

8.49 Mr. Scheman made efforts to sell PDM. These efforts included issuing a press release in July 2000 announcing that PDM had hired Tanner to explore a sale of the whole company and various companies. (RX 160 at 1). Such a press release is a curse and blessing for a public company because the process is now in the open, but disclosure requirements are triggered more quickly. However, it is a blessing because it is an advertisement in whatever publications run the news release to the world that you are selling your assets, so anyone who reads that and might be interested knows who to call. (Scheman, Tr. 6910-11, 2921-22).

#### Response to RFOF 8.49

Respondents assertions relating to the press release are unfounded. RX 160 is not a press release; it is the PDM offering memorandum prepared by Tanner and had nothing to do with the press release. Statements relating to the issuance of a press release are uncorroborated. Respondents have not produced the alleged press release.

Scheman made no effort to sell the EC and Water divisions other than preparing the EC division offering memo, which he only gave to CB&I. (Scheman, Tr. 2933). PDM conducted discussions directly with CB&I. (Glenn, Tr. 4077, 4078). By the time the offering memorandum was completed, negotiations between CBI and PDM were at a point “that it didn’t make sense to send it out to other people.” (Scheman, Tr. 2931). CBI was a preemptive buyer, which 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. 2938-2940). Other parties expressed interest in purchasing PDM, but were turned away. An e-mail from Scheman to Rich Goodrich dated August 8, 2000, CB&I chief financial officer, states "We need to determine if there is a deal to be made between PDM and CBI or if we should be contacting other parties who have expressed similar interest." (CX 70 at PDM-C 1002706).

8.50 Mr. Byers was also involved in issuing the press release. PDM and Tanner wanted to let the public know of PDM's intent to sell. Such releases help companies find interested purchasers. (Byers, Tr. 6884-85).

#### Response to RFOF 8.50

The alleged press release is not in evidence. *See* CCRFF 8.49.

Pitt-Des Moines, Inc.’s management did not investigate whether there were any potential acquirers other than CBI. Before recommending any disposition of the EC Division, Pitt-Des Moines, Inc.’s Mr. Byers would have investigated potential acquirers if it had not concluded the sale to CB&I. (Byers, Tr. 6799-6800). Among the companies identified by Tanner as potential acquirers of PDM were Fluor, Jacobs Engineering, Foster Wheeler, Morrison Knudsen, but to Mr. Byers’s knowledge, none of these companies were contacted about acquiring PDM. (Byers, Tr. 6806-6808). The only companies Pitt-Des Moines, Inc. ever contacted as potential acquirers of PDM were CBI and Enron. (Byers, Tr. 6813).

8.51 PDM was forced to use a press release issued under expedited circumstances imposed by the PDM Board. However, PDM benefited tremendously from early disclosure and interest. (Scheman, Tr. 6944-45).

#### Response to RFOF 8.51

The alleged press release is not in evidence. *See* CCRFF 8.49. Respondents’ assertion that “PDM benefited tremendously from early disclosure and interest” is self-serving and meaningless.

8.52 Tanner ensured that the press release got into the hands of all relevant trade journals that deal with PDM's EC and Water Divisions. It was not that hard to get the word out -- in PDM's market, it was big news. (Scheman, Tr. 6945). In fact, the Jackson Family's decision to sell PDM and liquidate its assets was published in the Wall Street Journal. (Scheman, Tr. 6945-46).

#### Response to RFOF 8.52

The alleged press release is not in evidence. *See* CCRFF 8.49. The Jackson family only

owned 29-30% of PDM and consequently they alone could not sell PDM. (Scheman, Tr. 6910).

8.53 Mr. Scheman and Tanner also answered inquiries as a result of this press release. Further, they called people to see if anyone was interested. Tanner developed materials to describe to potential buyers the various major asset groups, the divisions. Tanner developed lists of potential buyers and worked over the

summer to learn about the various divisions. Tanner did what investment bankers do -- over the summer of 2000 they prepared to market PDM and prepared lists of people who might or should be interested. (Scheman, Tr. 6911, 2922; RX 164; RX 165; RX 166).

### Response to RFOF 8.53

Scheman made no effort to sell the EC and Water divisions other than preparing the EC division offering memo, which he only gave to CB&I. (Scheman, Tr. 2933). Although Tanner identified other potential purchasers, CCRFF 8.50, no effort was made to pursue them because of the pre-emptive deal with CB&I. (Scheman, Tr. 2938-2940).

8.54 Investment bankers would agree that it is a bad business decision to send 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. It would damage your ability to sell something if one day you tell a potential buyer you can talk, and the next day you cannot. (Scheman, Tr. 6912-13).

### Response to RFOF 8.54

This finding is irrelevant. Whatever motivation Tanner had for not seeking potential buyers has no bearing on whether, as a matter of fact, Respondents made unsuccessful, good faith efforts to find other buyers.

Respondents' proposed finding implies that Tanner did not send marketing materials to companies other than CB&I because it would be "bad business." Respondents imply that this, in turn, would excuse PDM's failure to consider other bidders and basically PDM's lack of "good faith efforts to find other buyers." Even were such actions on the part of Tanner within the norm of investment banker practices of trying to secure the best price for their client, they are irrelevant as to whether Respondents met the requirements of the so-called "exiting asset" defense.

8.55 PDM management represented to the Board that as of December 19, 2000, there was a thin market and no other serious potential purchasers identified. Tanner expressed its opinions and explained that the lending standards had tightened considerably. (Byers, Tr. 6776-77; RX 28 at 2). PDM was only looking for serious purchasers given the time and expense associated with the selling process. PDM did not have the time to wait and look around. (Byers, Tr. 6777-78).

### Response to RFOF 8.55

This finding is misleading because it ignores the fact that Tanner's fairness opinion, dated February 7, 2001, noted that if CBI's acquisition of PDM fell through, there were other potential buyers with the interest and adequate resources to purchase PDM. (RX 29 at PDM-C 1006327). Other parties had in fact expressed an interest in purchasing PDM. (CX 70 at PDM-C 1002706).

On November 28, 2000, PDM's President, William McKee told PDM's board 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).

Further, the finding that “PDM did not have the time to wait and look around” is an inaccurate rendition of the evidence. Mr. Byers’s testimony at 6777-6778 does not say, as RFOF 8.55 is written, that PDM did not have the time to wait and look around. Rather, Mr. Byers notes that negotiating with a potential acquirer who ultimately cannot finance the transaction is time-consuming. Mr. Byers’s testimony does not support the conclusion for which Respondents’ cite it. While it is true that Pitt-Des Moines, Inc.’s board wanted the company sold as quickly as possible, that time limitation was entirely self-imposed. (Byers, Tr. 6762-6763).

Respondents assert that “PDM did not have the time to wait and look around”; yet the sale of PDM was not completed until March 2002. CCRFF 8.39, RFOF 8.41.

8.57 It is typical for investment bankers not to waste their time chasing down potential purchasers who are unlikely to be able to consummate a transaction. (Scheman, Tr. 6948).

8.58 Adequate resources are an important consideration to prevent going down a road with one company and be left with nothing, saving an embarrassment and damaged property. (Scheman, Tr. 6916).

#### Response to RFOF 8.57 and 8.58

Respondents’ assertion is self serving and speculative. Moreover, even if Tanner’s actions were within the norm of investment banking practice of trying to secure the best price for their client, that is irrelevant as to whether Tanner met the requirements of the so-called “exiting asset” defense.

8.59 In attempting to maximize shareholder value, Tanner is not concerned with keeping assets within the same industry as currently utilized. In fact, if a potential purchaser wished to make entirely different types of tanks than PDM and offered the largest amount of money, Tanner would have been satisfied. (Scheman, Tr. 6951-52).

#### Response to RFOF 8.59

This finding is irrelevant. What Tanner might have done given a particular contingency does not establish that PDM would have in fact exited the market.

This finding is also misleading in its implication that Tanner searched high and low, including buyers outside of the industrial and water tank markets. The evidence is clear that Tanner did not search for a buyer because CB&I presented itself as a preemptive buyer so early in the process. CCRFF 8.53.

In fact, the available evidence indicates there were buyers interested in purchasing PDM and keeping it in the market. (See RX 29 at PDM-C 1006327; Scheman, Tr. 6939-6940; Vetal, Tr. 422-423, 436, 441-442).

8.60 There are two types of potential purchasers: strategic buyers and financial buyers. A strategic buyer is someone who operates a business that would be somehow related to the business for sale. A financial buyer is someone who offers money and is in the business of buying businesses, not operating within the industry of the business for sale. (Scheman, Tr. 6914).

#### Response to RFOF 8.60

This finding is incomplete. A strategic buyer may be interested in acquiring the assets in order to enter the market in which the business for sale operates. Therefore, strategic buyers are not limited to buyers that operate existing businesses related to the business for sale.

The finding that a financial buyer does not operate within the industry of the business for sale is misleading. Simply because the financial buyer itself does not operate in the businesses in which PDM operated does not necessitate the conclusion that PDM's assets would have left the market.

Tanner's fairness opinion, dated February 7, 2001, noted that if CBI's acquisition of PDM fell through, there were other potential buyers with the interest and adequate resources to purchase PDM. (RX 29 at PDM-C 1006327).

8.65 If during due diligence a \$10 million loss was projected for the following fiscal year, Mr. Vetal admits that would have been a factor influencing whether Matrix would have continued to pursue PDM EC. (Vetal, Tr. 421-22, 439).

#### Response to RFOF 8.65

Respondents assertion calls for speculation on Mr. Vetal's part.

This finding is incomplete and misleading in that it ignores Mr. Vetal's testimony that he would not make a decision based on what one year's financials were. (Vetal, Tr. 421). The finding also ignores the fact that PDM's President, Bill McKee, informed Mr. Vetal that PDM could not talk to Matrix about a sale of PDM. (Vetal, Tr. 422-23). Matrix was not allowed to get to the point of due diligence. PDM did not consider it and did not ask Matrix whether a \$10 million loss would impact its decision prior to dismissing its offer.

8.66 In 1999-2000, the industrial tank industry was not robust. Mr. Vetal stated that there were opportunities, but not projects of size. (Vetal, Tr. 433).

#### Response to RFOF 8.66

Respondents' assertion is irrelevant.

8.67 Based on his experience, Mr. Scheman does not know how Matrix could have done a deal for PDM because Matrix had a market capitalization or stock market value of \$50 million. Mr. Scheman does not feel that Matrix had the earnings or balance sheet to finance such a transaction. Second, an offer to purchase with stock did not fit into PDM's plan to liquidate because Matrix stock was smaller than that of PDM. (Scheman, Tr. 6931-33; RX 163 at 37).

#### Response to RFOF 8.67

Respondents' assertion calls for speculation on the part of Mr. Scheman. Matrix was never allowed to evaluate an acquisition of PDM and Matrix consequently never presented PDM with any proposals for purchase of the EC assets. CCRFF 8.65.

8.68 Matrix would not be able to offer stock because PDM stock was illiquid. The Jackson overhang would have had a disastrous effect on the price of stock, as much as a \$5 decrease in price in a given day. The PDM Board and shareholder goal was to increase the liquidity of stock. One way to do so would be to sell the whole company. Another method would be to sell in pieces. Therefore, Tanner believed that a stock deal would not fit into the overall plan. Plus, PDM shareholders would have been better positioned with PDM stock than with Matrix stock given Matrix's stock's poor performance. (Scheman, Tr. 6934-38).

#### Response to RFOF 8.68

Respondents' assertions are irrelevant and speculative Matrix was never allowed to evaluate an acquisition of PDM and Matrix consequently never presented PDM with any proposals for purchase of the EC assets. CCRFF 8.65.

8.69 Matrix wanted to purchase PDM's fabrication facilities in Clive, IA and Warren, PA, but not PDM's Provo, UT facility. (Vetal, Tr. 441-42). The Clive, IA and Warren, PA facilities were under the direction and control of PDM Water. (Byers, Tr. 6782). The Provo, UT shop was under the direction and control of PDM EC. (Byers, Tr. 6781).

#### Response to RFOF 8.69

The finding that Mr. Vetal did not want to purchase PDM's Provo, Utah facility is misleading. As a factual matter, Mr. Vetal would have considered purchasing PDM's Provo, Utah facility. (Vetal, Tr. 436). Vetal was told that PDM could not talk to him about a potential deal because a sale was proceeding with another buyer, CB&I. (Vetal, Tr. 422-23). At the time, PDM did not investigate the offer at all to discover the parameters of it. (It wasn't until discovery that these additional facts were known).

Moreover, each fabrication facility served both EC and the Water operations; which division had direction and control of a particular fabrication facility is irrelevant. RFOF 8.5.

8.70 PDM EC and Water Divisions were being sold together because they shared many services, human resources, physical plants, and it was considered impossible at the time to split them apart. Mr. Byers personally believed based on his experience that it was not practical to split the two divisions apart. Further, there was a consequence in switching the assets of the two divisions around. For example, the Water Division could not have performed all of its work at the EC fabrication plant in Provo, Utah.

Therefore, PDM would not have consummated a transaction that included only the EC Division and certain assets of the Water Division. (Byers, Tr. 6780-82).

### Response to RFOF 8.70

Respondents' final assertion is purely speculative on the part of Mr. Byers because a transaction that included only the EC Division and certain assets of the Water Division was never presented.

8.71 Based on the financials, Mr. Scheman believes that the largest transaction Matrix could have financed was \$20 million, maybe less depending on the downturn felt by Matrix similar to PDM EC. (RX 163 at 37). This figure is based on Matrix's financials and the assumption that it would have to borrow money -- Matrix's borrowing capacity might have been zero at the time given a combined (Matrix and PDM EC) EBITDA of \$1 million. (Scheman, Tr. 6933-34, 6938-39).

### Response to RFOF 8.71

Respondent's assertions are comprised of nothing more than speculation from Mr. Scheman. Matrix was never allowed to evaluate an acquisition of PDM and Matrix consequently never presented PDM with any proposals for purchase of the EC assets. CCRFF 8.65.

8.73 Matrix knew that PDM had many businesses unrelated to Matrix. Mr. Vetal had not put together a formal financing package. (Vetal, Tr. 421). Mr. Vetal had no idea of the amount of financing Matrix could have obtained, especially in light of the poor performance of the EC Division. (Vetal, Tr. 439, 444).

### Response to RFOF 8.73

Respondents' assertion mistates the record. The PDM EC and Water divisions were historically profitable divisions. (CX 522 at TAN 1003373).

8.74 Mr. Vetal never asked its bankers when discussing possible financing for a PDM acquisition whether the bankers would finance the purchase of a division that had lost \$30 million the previous year. (Vetal, Tr. 441).

### Response to RFOF 8.74

Whether Mr. Vetal discussed with this bankers a possible financing of a PDM acquisition is irrelevant. Respondents' assertion that PDM lost \$30 million is incorrect. In a sworn affidavit submitted to the Commission, CB&I stated that PDM lost \$15.5 million in 2000. (CX 1023).

8.75 Mr. Vetal did not know anything about PDM's shared assets or the PDM asking price. (Vetal, Tr. 423, 440).

### Response to RFOF 8.75

Mr. Vetal's lack of knowledge about PDM's shared assets or asking price was due to Pitt-Des

Moines, Inc.'s refusal to provide Matrix any information about PDM. When Mr. Vetal expressed interest in buying PDM to Bill McKee (Pitt-Des Moines, Inc.'s CEO), Mr. McKee refused to speak with Mr. Vetal about it. (Vetal, Tr. 422-423).

8.76 Mr. Vetal did not know whether the Clive and Warren facilities were apart [sic] of the PDM EC or Water Divisions, and if PDM would have sold those facilities without the entire divisions. (Vetal, Tr. 435-36, 444).

### Response to RFOF 8.76

Mr. Vetal's lack of knowledge about PDM's fabrication facilities was due to Pitt-Des Moines, Inc.'s refusal to provide Matrix any information about PDM. When Mr. Vetal expressed interest in buying PDM to Bill McKee (Pitt-Des Moines, Inc.'s CEO), Mr. McKee refused to speak with Mr. Vetal about it. (Vetal, Tr. 422-423). CCRFF 8.65, 8.69.

8.77 Mr. Vetal did not know if the liquidation value of the company was higher than its value as a going concern. (Vetal, Tr. 441).

### Response to RFOF 8.77

Mr. Vetal's lack of knowledge about the valuations of PDM was due to Pitt-Des Moines, Inc.'s refusal to provide Matrix any information about PDM. When Mr. Vetal expressed interest in buying PDM to Bill McKee (Pitt-Des Moines, Inc.'s CEO), Mr. McKee refused to speak with Mr. Vetal about it. (Vetal, Tr. 422-423). CCRFF 8.65, 8.69, 8.76.

8.78 Mr. Vetal based his opinion on only publicly available information, such as the consolidated balance sheet. (Vetal, Tr. 420).

### Response to RFOF 8.78

Mr. Vetal's lack of knowledge about the valuations of PDM was due to Pitt-Des Moines, Inc.'s refusal to provide Matrix any information about PDM. When Mr. Vetal expressed interest in buying PDM to Bill McKee (Pitt-Des Moines, Inc.'s CEO), Mr. McKee refused to speak with Mr. Vetal about it. (Vetal, Tr. 422-423). CCRFF 8.65, 8.69, 8.76, 8.77.

8.80 Pasadena Tank had two fatal strikes against them. Pasadena was a smaller company than Matrix and privately held. While Matrix at least had stock to trade, Pasadena did not. Its only option was debt financing, and Tanner felt that Pasadena was very unlikely to obtain enough financing to offer an attractive price. Second, PDM wanted to sell both divisions together. (Scheman, Tr. 6940-41).

### Response to RFOF 8.80

Mr. Scheman's speculative opinion that Pasadena "was very unlikely to obtain enough financing to offer an attractive price" is questionable because to Mr. Byers's knowledge, no one from Pitt-Des Moines, Inc. asked Pasadena Tank for an offer for PDM. (Byers, Tr. 6808-6809).

8.81 It is damaging to selling prospects and to the business itself if offering memorandum and books are sent to everybody. As a result, only viable candidates should receive such materials. Therefore, Pasadena Tank was not sent these materials. (Scheman, Tr. 6940-41).

### Response to RFOF 8.81

Respondents' assertion is incomplete and misleading. Scheman did not send the offering

memo to anyone other than CB&I. (Scheman, Tr. 2933).

**E. THE PDM EC AND WATER DIVISIONS WERE PROFITABLE AND SUCCESSFUL DIVISIONS OF PDM**

8.82 [

( [ ] ).

]

Response to RFOF 8.82

This finding is misleading. In fact, the evidence shows Respondents really have no foundation for their conclusion that no foreign tank contractor had the interest in or viability to purchase PDM. Tanner never contacted any foreign firms in connection with purchasing PDM. (Scheman, 2938-2939). Tanner did not contact Skanska/Whessoe, Technigaz, TKK, Tractebel, Mitsubishi, Entropose, Nooter, or Wiley. (Scheman, 2938-2939). The following companies are foreign firms that were never contacted (to Mr. Byers’s knowledge) by Pitt-Des Moines, Inc. about acquiring PDM: Technigaz, TKK, Mitsubishi, Entropose, Nooter, and Wiley. (Byers, Tr. 6811-6812). Also, *see* CCRFF 8.49.

The simple fact that [ ] was not interested in pursuing tank projects does not support the conclusory heading above the finding that states “No foreign tank contractors were interested or viable purchasers.” One foreign tank contractor’s attitudes towards the U.S. market does not necessitate a conclusion about every foreign tank contractor’s interest or viability as purchasers of PDM.

**F. PDM’S EC DIVISION COULD HAVE CONTINUED PROFITABLY**

8.83 After Tanner was retained, it was realized that PDM EC was going to have a substantial loss for 2000. At the same time, the credit markets tightened and the availability of borrowed money was difficult. These factors affected the salability of PDM’s divisions. (Byers, Tr. 6763-64; RX 163 at 4).

Response to RFOF 8.83

The finding that the EC Division was going to have a substantial loss for 2000 is misleading. As Respondents concede, RFOF 8.5, the EC and Water Divisions are intertwined, and together were profitable according to the Tanner fairness opinion of February 7, 2002. (RX 29 at PDM-C 1006326).

The finding that PDM’s salability was questionable is belied by the fact that CBI eventually purchased PDM for more than investment bankers Goldman Sachs’ valuation for the company and for an amount within the valuation range determined by Tanner. (Byers, Tr. 6843).

Respondents’ assertion that “the credit markets tightened and the availability of borrowed money was difficult” is incorrect. The Prime Rate remained unchanged from June 2000 through

January 2001 and declined significantly, reaching a level of 4.25% by December 2002. RFOF 8.29.

8.84 While some competitors might be interested in the EC Division, it was unlikely that financial buyers would consider an acquisition due to the EC Division's recent performance. (RX 163 at 7). As of February 7, 2001, Tanner felt that a potential buyer for the EC Division alone might be at a negative price. (Scheman, Tr. 6920).

#### Response to RFOF 8.84

The finding that Tanner believed a potential buyer for the EC Division alone might be at a negative price ignores the fact that at the time of the acquisition, management's best projects were that PDM EC would be profitable in 2001. (RX 29 at PDM-C 1006326). The finding also ignores the fact that the EC Division's President, Luke Scorsone, assuming the EC Division was not acquired by CBI, would earn gross profit of \$20.0 million in 2002, \$22.4 million in 2003, and \$25.1 million in 2004. (CX 1713 at CBI/PDM-H 4015089). Also, PDM was not looking for a buyer for the EC division alone but was looking for a buyer for both the EC and Water divisions. RFOF 8.70.

8.85 AT&V decided not to pursue a purchase of the PDM EC Division prior to the merger because AT&V saw the EC Division "consistently losing money" in the industrial tank business and wanted no part of it. (Cutts, Tr. 2458, 2534).

#### Response to RFOF 8.85

The finding that AT&V "saw" the EC Division losing money misstates the evidence. Mr. Cutts of AT&V actually testified that it was his "personal feeling" that the EC Division was losing money, and he further qualified his statement that he did not know, as a matter of fact, whether or not the EC Division was losing money. (Cutts, Tr. 2458). Cutts had never saw any of PDM EC's financials and was never contacted as a potential purchaser. (Scheman, Tr. 2933, 2938-40).

8.86 Potential investors only saw the consolidated financials. Companies expressing interest did not know PDM's profitability and would have been surprised by the lack of profitability of the EC Division, and likewise their ability to finance a transaction. (Scheman, Tr. 6950-51).

#### Response to RFOF 8.86

This finding is based on Mr. Scheman's speculation as to what someone else might have thought. Further, it ignores Mr. Byers's testimony that it is possible alternative purchasers of PDM had the cash necessary to finance the transaction. (Byers, Tr. 6796-6797). It also does not excuse Respondents' failure to search for alternative buyers, and is misleading in that manner.

8.87 In 2000, the EC Division lost \$9 million after making \$10 million in 1999. (Scheman, Tr. 6920-21; RX 163 at 4). After the date of closing, PDM and CB&I ultimately determined that PDM EC's losses approximated \$30 million in fiscal year 2000. (Scheman, Tr. 6917, 6921, 6926; Byers, Tr. 6789).

### Response to RFOF 8.87

The finding that the EC Division's losses were approximately \$30 million in fiscal year 2000 is incorrect. According to CBI Vice-President Tim Novak's signed affidavit of July 2001, the EC Division's losses in fiscal year 2000 were \$15.5 million. (CX 1023). According to the testimony of PDM EC's President Luke Scorsone, the EC Division's losses in fiscal year 2000 were \$8 million. (Scorsone, Tr. 4824-4825). Further, a short-term reduction in capital expenditures in the petroleum and petrochemical industries in 1999 negatively impacted all suppliers in 2000, including CBI. (CX 522 at TAN 1003372; CX 529 at TAN 1000596 ("1999 - Down - Mergers in Oil + Gas - Market Driver (Oil + Gas)")).

Further, the finding is misleading because it ignores the fact that at the time of the acquisition, management's best projections were that PDM EC would be profitable in 2001. (RX 29 at PDM-C 1006326). The finding also ignores the fact that the EC Division's President, Luke Scorsone, assuming the EC Division was not acquired by CBI, predicted the EC Division would earn gross profits of \$20.0 million in 2002, \$22.4 million in 2003, and \$25.1 million in 2004. (CX 1713 at CBI/PDM-H 4015089). Mr. Scorsone also testified that if the EC Division had not been sold, that it would not have gone out of business, and that it would be profitable in the future (demonstrating the circular reasoning behind Respondents' use of the exiting assets defense). (Scorsone, Tr. 4838).

As the two divisions were sold together, it is logical to look at the profitability of the two divisions on a combined basis. The Water division was historically profitable. (RX 29 at PDM-C 1006326). According to the Tanner fairness opinion of February 7, 2001, the profits of the combined entity were profitable, even in 2000. (RX 29 at PDM-C 1006326).

8.88 The EC Division was profitable in 1996-1999. Yet, the EC Division was troubled because in 2000, the profitability had dropped 80 percent and later went below zero. A business does not have to go below zero in terms of earnings to be troubled. A company whose earnings are projected to decline by 80 percent would be described as having trouble. (Scheman, Tr. 6916-18, 2922-23, 2950-51).

### Response to RFOF 8.88

The finding that the EC Division was "troubled" because it had a bad year in 2000 is misleading because it ignores the fact that a short-term reduction in capital expenditures in the petroleum and petrochemical industries in 1999 negatively impacted all suppliers in 2000, including CBI. (CX 522 at TAN 1003372; CX 529 at TAN 1000596 ("1999 - Down - Mergers in Oil + Gas - Market Driver (Oil + Gas)")).

Further, the finding that the EC Division was "troubled" is misleading because it ignores the fact that at the time of the acquisition, management's best projections were that the EC Division would be profitable in 2001. (RX 29 at PDM-C 1006326). The finding also ignores the fact that Mr. Scorsone, assuming the EC Division was not acquired by CBI, predicted the EC Division would earn gross profits of \$20.0 million in 2002, \$22.4 million in 2003, and \$25.1

million in 2004. (CX 1713 at CBI/PDM-H 4015089). Mr. Scorsone also testified that if the EC Division had not been sold, that it would not have gone out of business, and that it would have been profitable in the future (demonstrating the circular reasoning behind Respondents' use of the exiting assets defense). (Scorsone, Tr. 4838).

According to the Tanner fairness opinion of February 7, 2001, the profits of the combined entity were profitable, even in 2000. CCRFF 8.87.

8.90 The year 2000 was a weak sales year for PDM EC, and EC had 2 jobs not performing well -- the Sea-3 LPG project and the Puerto Rico LNG import terminal. (Scorsone, Tr. 4825-26, 4828; RX 163 at 4).

#### Response to RFOF 8.90

The finding is misleading because it ignores the fact that 2000 was a bad year for all suppliers to the petroleum and petrochemical industry, including CBI, as recognized by RFOF 8.66. (CX 522 at TAN 1003372; CX 529 at TAN 1000596 ("1999 - Down - Mergers in Oil + Gas - Market Driver (Oil + Gas)")).

According to the Tanner fairness opinion of February 7, 2001, the profits of the combined entity were profitable, even in 2000. CCRFF 8.87.

8.91 On the Sea-3 LPG project, there was a \$400,000 piece of equipment that was left out of the estimate, which had ramifications in terms of the cost of the equipment and the attenuated associated construction costs. In addition, PDM had very poor performance by its engineering group, which resulted in late procurement of equipment and materials thereby extending the project's schedule and driving up costs in the field. Finally, PDM had a difficult time with labor stability in the field of almost 300 percent turnover, which resulted in inefficiencies and poor quality. (Scorsone, Tr. 4826). PDM hired and processed three times as many field personnel as needed. (Scorsone, Tr. 4827). Consequently, the project was delivered late by two months. This delay caused the customer problems. As a result, the customer withheld \$2 million in payments from PDM. (Scorsone, Tr. 4827). The contract value was \$13 million, and eventually settled for a \$1 million. (Scorsone, Tr. 4827-28).

#### Response to RFOF 8.91

Mr. Scorsone testified that his instructions were to settle the dispute noted in this finding as rapidly as possible, and not necessarily to get the best commercial resolution. (Scorsone, Tr. 4831-4832). Therefore, the reasons for some of the losses noted above were self-imposed, and not reflective of PDM's viability as a business entity.

8.93 The Puerto Rico LNG import terminal suffered from late engineering, which again pushed back procurement and certain deliverables of drawings to construct the facility. PDM had large owner-directed changes at the final months of the project. The PDM final plans did not schedule any extra time, so the customer directed PDM had to hire additional field labor. For reassurance reasons, the client insisted air lifting fabricated pieces of the tank to the site. All of these reasons were costs to PDM. (Scorsone, Tr. 4828-29). There was a business dispute over these issues, which PDM ultimately settled through management meetings. The client withheld monies on the project. (Scorsone, Tr. 4830-31; Izzo, Tr. 6482).

### Response to RFOF 8.93

Mr. Scorsone testified that his instructions were to settle the dispute noted in this finding as rapidly as possible, and not necessarily to get the best commercial resolution. (Scorsone, Tr. 4831-4832). Therefore, the reasons for some of the losses noted above were self-imposed, and not reflective of PDM's viability as a business entity.

8.94 AT&V was very suspicious of PDM, believing that PDM was very poor at estimating, coordination, and marketing. (Cutts, Tr. 2534).

### Response to RFOF 8.94

Respondents' assertion relies on Mr. Cutts' speculation and should be disregarded.

8.96 The EC Division offering memorandum stating that the Division was expected to return to profitability was created before the EC Division turned downward. (Byers, Tr. 6875). Likewise, in a marketing document, Tanner predicted that the EC Division would return to profitability in 2001. However, the market changed unexpectedly and turned a lot worse than expected. (Scheman, Tr. 6918-19, 2952-54; RX 160 at 9-10).

### Response to RFOF 8.96

This finding is misleading in so far as it attempts to causally connect the expectations of the market with projections of the EC Division's future performance. The finding glosses over and takes advantage of an ambiguity in Mr. Scheman's testimony. Although Mr. Scheman testified the market got worse than expected, it is not clear that the projection of the EC Division's return to profitability was made before or after the market got worse than expected. Therefore, it is disingenuous to imply as RFOF 8.96 does that the projections of the EC Division's return to profitability are unreliable because of an unexpected worsening in the market.

Further, this finding completely ignores Tanner's fairness opinion (RX 29), provided to Pitt-Des Moines, Inc. *after* the EC Division turned downward (and dated the day of the acquisition, February 7, 2001), that predicted the EC Division would recover and earn a profit of \$4.8 million in 2001. (RX 29 at PDM-C 1006325-26; Byers, Tr. 6816, 6818). Finally, it ignores Mr. Scorsone's projections that the EC Division would earn gross profit of \$20.0 million in 2002, \$22.4 million in 2003, and \$25.1 million in 2004. (CX 1713 at CBI/PDM-H 4015089). Mr. Scorsone also testified that if the EC Division had not been sold, that it would not have gone out of business, and that it would have been profitable in the future. (Scorsone, Tr. 4838).

8.97 Mr. Scorsone made projections for the PDM EC Division's performance for 2002: \$212 million. Of that figure, only \$120 million were products now being sold at CB&I. Today, the actual numbers are about \$112 million. That forecast has not proven to be accurate. Nor does Mr. Scorsone regard his projection for PDM EC's sales from 2000 to 2002 to be accurate either. (Scorsone, Tr. 5242-45).

### Response to RFOF 8.97

Scorsone's testimony relating to his financial projections for PDM are self-serving and should be disregarded.

8.98 As President of the EC Division, Mr. Scorsone's compensation and responsibilities were tied to the financial performance of that division. EC's most profitable year was in 1999. The profit margin that year was 4 percent, and total revenues were about \$188 million. The year 2000 was very difficult, and not a good year for the EC Division. In 2000, the EC Division did not make any money. (Scorsone, Tr. 4823-24). For the year, EC lost \$8 million despite that number at one time approaching \$30 million. (Scorsone, Tr. 4824-25).

### Response to RFOF 8.98

This finding, as it relates to the EC Division's performance in the year 2000, is misleading because it ignores the fact that the EC and Water Divisions, which Respondents concede are intertwined, were as a whole profitable in 2000 according to the Tanner fairness opinion of February 7, 2002. (Scheman, Tr. 2928-2929; RX 29 at PDM-C 1006326). CCRFF 8.87.

8.99 Mr. Byers, in his regular course of business, reviewed performance projections of each division in order to create a consolidated projection for the Board. Mr. Scorsone predicted PDM EC would earn a profit in 2001. Mr. Byers felt Mr. Scorsone's projection was optimistic, typical of Mr. Scorsone's tendency to overstate profitability of his division. Mr. Byers altered Mr. Scorsone's projection to a break even year for 2001. (Byers, Tr. 6752-54, 6876).

### Response to RFOF 8.99

The portion of the finding relating to Mr. Scorsone's projections is misleading as it ignores the fact that as of the date of the acquisition, management's best estimate of the EC Division's performance in the year 2000 was that the EC Division would enjoy EBIT of \$4.8 million. (Scheman, Tr. 2961-2962). It also ignores Mr. Scorsone's testimony that if the EC Division had not been sold, that it would not have gone out of business and that it would have been profitable in the future. (Scorsone, Tr. 4838).

8.100 Even with the EC Division's dire losses and poor performance in 2000, Tanner's best estimate for 2001 was that the company would make \$4.8 million. (RX 163 at 6). Given these facts, Mr. Scheman, relying on his years of experience in the industry as an investment banker, believed it would have been very difficult to convince a buyer that EC would make \$5 million after losing \$9 million the year before under those market conditions. (Scheman, Tr. 6926-27, 2961-63).

### Response to RFOF 8.100

The finding that the EC Division's losses were dire and its performance poor is a misstatement of the evidence. RX 163, which is used to support the finding, does not characterize the EC Divisions losses as dire or its performance as poor. In fact, it simply notes that the EC Division had a "disappointing" year in 2000. (RX 163 at TAN 1000383). It then goes on to note the cause as "[w]eak industry conditions." (RX 163 at TAN 1000383). The only individual to use the terms "dire losses" and "poor performance" in this context was Respondents' Counsel, Jeff Leon. (Leon, Tr. 6926). Respondents' are attempting to assert as a finding of fact testimony by their counsel.

## **G. CB&I PREEMPTIVELY ACQUIRED PDM**

8.113 The final purchase price ended at \$76-77 million. (Byers, Tr. 6794). Based on his experience, Mr. Byers does not believe that CB&I paid a premium for PDM EC. (Byers, Tr. 6794).

### Response to RFOF 8.113

Mr. Byers's belief that CBI did not pay a premium for PDM is belied by the fact that CBI's CEO, Gerald Glenn, testified PDM was worth more to CBI than to other firms—which is the very definition of a premium. (Glenn, Tr. 4261-4262). Scheman also stated that alternative buyers were unlikely to pay a premium price for PDM because they would face continued tough competition from CB&I. (Scheman, Tr. 2966-67).

8.114 CB&I never attempted to negotiate downward the purchase price of the Water Division. CB&I's \$93.5 million was at the high end of Tanner's projections, but the purchase price eventually fell by \$22 million. (Byers, Tr. 6873-75).

### Response to RFOF 8.114

The math in RFOF 8.113 and 8.114 are not consistent. If the final purchase price was \$77 million, the purchase price fell by \$16.5 million and not by \$22 million as asserted by Respondents. Mr. Byers' testimony is inconsistent. At one point, he testifies that the final price paid by CB&I for the PDM divisions was \$76-77 million (Byers, Tr. 6794); at another price, he testifies that the final price was \$72 million. (Byers, Tr. 6874).

Moreover, whatever CB&I ultimately paid for PDM is irrelevant. What is relevant is that based on historical profitability, CB&I was willing to pay a premium for PDM. CCRFF 8.113.

## **H. PDM'S MANAGERS NEVER DECIDED TO SELL PDM TO AN ALTERNATE ACQUIRER**

8.115 Tanner believed that had the CB&I deal fallen apart, there was a "high probability" that PDM would have liquidated the EC Division. (Scheman, Tr. 6952; RX 163 at 29).

### Response to RFOF 8.115

Tanner's belief as to the probability of liquidation is at odds with the evidence. Before recommending any disposition of the EC Division, if the deal with CBI had fallen through, Mr. Byers would have checked to see if there were any alternative purchasers. (Byers, Tr. 6799-6800). Mr. Byers testified that in fact his fiduciary duties would have required he attempt to find alternative purchasers for the EC Division prior to recommending liquidation. (Byers, Tr. 6799-6800). Tanner would also have attempted to find alternative purchasers prior to recommending liquidation. (JX 34 at 83 (Scheman, IHT)). In November 2000, Pitt-Des Moines, Inc.'s CEO, Mr. McKee, informed the board that if the transaction with CBI was not consummated he would continue his efforts to sell the EC and Water Divisions. (CX 1590 at PDM-C 1006065). The EC Division's President, Luke Scorsone, testified that if the EC Division had not been sold, that it would not have gone out of business, and that it would have been profitable in the future. (Scorsone, Tr. 4838). Pitt-Des Moines, Inc.'s board of directors never took up the issue of liquidating the EC Division. (Byers, Tr. 6891). Finally, Tanner's fairness opinion, dated

February 7, 2001, noted there were other prospective purchasers with the interest in and resources for an acquisition of PDM. (RX 29 at PDM-C 1006327).

8.116 Had the deal with CB&I not closed on February 7, 2001, and given the state of the industry, PDM EC would have been liquidated -- most likely at the low end of the liquidation range due to deteriorated financing conditions. (RX 163 at 7, 28). The potential buyers who would have been contacted had the deal not gone through would not have paid more than the liquidation value. (Scheman, Tr. 6924-26).

#### Response to RFOF 8.116

The categorical statement that without the acquisition the EC Division would have been liquidated is at odds with the evidence. Tanner's fairness opinion, dated February 7, 2001, noted that if CBI's acquisition of PDM fell through, there were other potential buyers with the interest and adequate resources to purchase PDM. (RX 29 at PDM-C 1006327). Mr. Byers testified that his fiduciary duties required he would have attempted to have found alternative purchasers prior to recommending liquidation. (Byers, Tr. 6799-6800). The EC Division's President, Luke Scorsone, testified that if the EC Division had not been sold, that it would not have gone out of business, and that it would have been profitable in the future. (Scorsone, Tr. 4838). Other parties had in fact expressed an interest in purchasing PDM. (CX 70 at PDM-C 1002706).

8.117 The uncertainty associated with liquidation does not necessarily provide a seller like PDM an incentive to conduct a thorough search before liquidating the EC Division if you could get more money elsewhere. The time spent in failing to sell may be very harmful to the already lower liquidation value. (Scheman, Tr. 6923-24).

#### Response to RFOF 8.117

This finding assumes liquidation was inevitable, which is at odds with the evidence. See CCRFF 8.115 and 8.116.

8.118 PDM management began looking for alternatives on how to sell PDM EC and Water. Management considered selling PDM Water to Mike Braden, president of PDM Water, in an LBO and liquidating PDM EC. (Byers, Tr. 6769-70). This alternative was studied with the help of Tanner, and discussed with Bill McKee. Mr. Byers and Mr. McKee decided to present this recommendation to the PDM Board. (Byers, Tr. 6770, 6773).

#### Response to RFOF 8.118

Mr. McKee's purported decision is inadmissible hearsay, and in RFOF 8.118 is being cited for the truth of the matter asserted. (Byers, Tr. 6772-6773). Consequently, it should be ignored. Also, *see* CCRFF 8.116, stating that Tanner recognized there were other potential buyers and PDM officials recognized that they had a fiduciary duty to pursue them.

8.119 PDM did not have time to pursue another potential purchaser and still comply with the Board's directives. Moreover, finding another potential purchaser would have been difficult given the financial performance and continued deterioration of the EC Division. (Byers, Tr. 6773-74).

Response to RFOF 8.119

The finding that Pitt-Des Moines, Inc.'s management would have recommended liquidation is contradicted by the evidence. See CCRFF 8.115 and 8.116. Mr. Byers specifically

testified that his fiduciary duties would have required he seek alternative purchasers for PDM prior to making a liquidation recommendation to the board. (Byers, Tr. 6799-6800).

8.120 PDM threatened to liquidate the company if CB&I did not close the deal. (G. Glenn, Tr. 4079-80).

#### Response to RFOF 8.120

PDM's representations to CBI - made while negotiating at arm's length an acquisition - are contradicted by the statements of PDM's own management and Tanner that liquidation was by no means inevitable. *See* CCRFF 8.115 and 8.116.

8.121 In fact, Mr. McKee told Mr. Scorsone in December 2000 that if the deal fell through with CB&I, EC would be liquidated. (Scorsone, Tr. 4839) (state of mind).

#### Response to RFOF 8.121

This finding is irrelevant. What Mr. McKee told Mr. Scorsone is hearsay and was admitted only for the purpose of Mr. Scorsone's state of mind, not for the truth of the matter asserted. (Scorsone, Tr. 4839). Because Mr. Scorsone had no decision-making capacity vis-a-vis Pitt-Des Moines, Inc.'s sale of PDM, the purported conversation is irrelevant to the issues of whether PDM constituted assets exiting the market. (Scorsone, Tr. 4793). Moreover, the record does not support the argument that the PDM assets were exiting or would exit the market. Also, *see* CCRFF 8.115 and 8.116.

8.122 Mr. McKee stated on December 19, 2000, some three weeks after the November 28th Board meeting, that there was a thin market and no other serious potential purchaser was identified. As of the November Board meeting, liquidation scenarios had not been run by Tanner. In fact, Mr. McKee's statements at the December Board meeting were after Tanner and PDM management began looking at alternatives to the CB&I deal. (Byers, Tr. 6872-73; RX 28 at 2).

#### Response to RFOF 8.122

Mr. McKee's categorical pronouncement that there were no other potential serious acquirers is contradicted by the evidence. (RX 29 at PDM-C 1006327.) *See* CCRFF 8.115 and 8.116, stating that Tanner recognized there were other potential buyers; PDM officials recognized that they had a fiduciary duty to pursue them; and PDM was not a failing company.

8.123 The fairness opinion presented in February 2001 was really the written work product of December 2000 liquidation scenarios performed by Tanner. These documents were prepared for purposes other than as backup for a fairness opinion. (Byers, Tr. 6877-78).

#### Response to RFOF 8.123

Tanner, who owed Pitt-Des Moines, Inc. and its shareholders a fiduciary obligation, provided Pitt-Des Moines, Inc. a fairness opinion on February 8, 2001. (Byers, Tr. 6896; Scheman,

Tr. 6947). Regardless of when the data was compiled, it was prepared on February 7, 2001 and provided by Tanner to Pitt-Des Moines, Inc. on February 8, 2001. (RX 29 at PDM-C 1006323; Byers, Tr. 6896).

8.124 Mr. Byers believed based on his experience that PDM Water could have obtained a higher price sold as part of an LBO than could the EC Division sold as part of liquidation. Mr. Byers was prepared to act on this knowledge in December 2000 had the CB&I deal fallen through. (Byers, Tr. 6786).

#### Response to RFOF 8.124

The finding about what knowledge Mr. Byers was prepared to act on ignores the fact that prior to recommending PDM's disposition to the board, his fiduciary duties required that he would have sought other prospective acquirers. (Byers, 6799-6800).

8.125 Mr. Byers and executives make decisions based on probabilities, not certainties. (Byers, Tr. 6887-88). Based on Mr. Byers' years of experience and discussions with Mr. McKee, a decision as to the best approach to proceed if the CB&I deal fell through had to rely on probabilities. (Byers, Tr. 6889-90).

#### Response to RFOF 8.125

This finding is irrelevant. The fact that business people make decisions based on probabilities has no bearing on whether, as a factual matter, the facts of this case meet the elements of the "so-called" exiting assets defense. The speculation that no one would buy PDM EC and Water is insufficient to meet the requirements for a good-faith search for an alternative buyer of the "so-called" exiting assets defense.

8.126 As an officer of PDM, Mr. Byers had a fiduciary duty to the shareholders of PDM to maximize shareholder value. Mr. Byers felt he was acting within his duty to recommend liquidation of the EC Division if the CB&I deal fell through. (Byers, Tr. 6774-75).

#### Response to RFOF 8.126

This finding is misleading. It implies Mr. Byers would inevitably recommend liquidation if the transaction with CBI fell through. Mr. Byers himself testified that he would not have inevitably recommended liquidation, and that his fiduciary duties required that he search for alternative acquirers first. (Byers, 6799-6800). The finding also implies that Mr. Byers actually did recommend liquidation to the board, which is not true. (Byers, Tr. 6891).

8.131 Graver, however, was unable to locate a viable purchaser. (Simpson, Tr. 5672-74; Kamrath, Tr. 1991). Consequently, Graver was liquidated and went out of business, but left the remnants of its fabrication facility to wind down business for awhile. (Cutts, Tr. 2425).

#### Response to RFOF 8.131

Respondents' assertions are incomplete and misleading. The Graver that historically was a strong LIN/LOX competitor of PDM and CB&I referenced in RFOF 8.127 was a field-erected

tank constructor that executed turn-key projects. (Cutts, Tr. 2425). That was not the company that failed to find a viable purchaser and had to be liquidated. After Iteq took over Graver, Iteq reorganized the company and left Graver only with shop-fabrication assets. (Cutts, Tr. 2425). The entity that was unable to locate a viable purchaser “. . . was the remnants that was left.” As Mr. Cutts stated, “[b]y the time Iteq got done with them, there wasn’t hardly anything left.” (Cutts, Tr. 2425).

The finding is also misleading in its implication that because Graver, whatever its status, could not find a viable purchaser, CB&I was the only available purchase of the PDM assets.

8.132 Mr. Vetal was aware that Graver's equipment was auctioned off in a liquidation sale. In fact, Matrix purchased heavy press and fabrication equipment from Graver in that sale. (Vetal, Tr. 442-43).

### Response to RFOF 8.132

Complaint Counsel agrees with this finding. It also shows that even were PDM to be shut-down, which is contrary to the evidence, CCRFF 8.115 and 8.116, its assets might have been acquired by and strengthened other industrial tank competitors. Therefore, the assets would not have exited the market, as is required by the so-called “exiting asset” defense.

8.133 AT&V attempts to hire former Graver employees every year. (Cutts, Tr. 2570). In fact, AT&V employs former Graver foremen with cryogenic experience, and any others that AT&V would be interested in have retired. (Cutts, Tr. 2570-71).

### Response to RFOF 8.133

Complaint Counsel agrees with this finding.

## **VII. REMEDY FINDINGS OF FACT**

### **A. COMPLAINT COUNSEL’S REMEDY SEEKS TO FOLLOW THE LAW AND RESTORE THE PRE-ACQUISITION COMPETITION**

9.1 Complaint Counsel's proposed remedy seeks a breakup of CB&I. Complaint Counsel's Notice of Contemplated Relief included within its Complaint seeks the "[r]establishment by CB&I of two distinct and separate, viable and competing businesses . . . ." (RX 79 at 8).

### Response to RFOF 9.1

This finding is misleading in that it implies that Complaint Counsel’s proposed relief is novel, is punitive, and is directed towards the spin-off of a stand-alone business. None of these implications are accurate. Divestiture is not a novel concept; the purpose of divestiture is to restore competition, by reestablishing “two distinct and separate, viable and competing businesses.” (RX 79 at 8). Moreover, as demonstrated in Complaint Counsel’s proposed Order,

Complaint Counsel requests the divestiture of PDM's assets, with any additions or improvements to those assets, to a Commission-approved acquirer, not a spin-off of a stand-alone business. Order ¶ II.A.

The purpose of this divestiture is not punitive; as stated in the Order, the purpose of the requested divestiture is to "remedy the lessening of competition alleged in the Commission's complaint..., to restore the competition lost as a result of the Acquisition, and to ensure the continued use of the PDM Assets in the same business in which the PDM Assets were engaged at the time of the announcement of the Acquisition by CB&I and PDM." Order, ¶ II.K.

9.2 During opening statements, Complaint Counsel stated that "[r]elief in this matter must re-establish two independent viable and competitive entities." (Krulla, Tr. 101).

### Response to RFOF 9.2

Complaint Counsel agrees with this finding.

### **B. COMPLAINT COUNSEL EXCEED THE LAW'S REQUIREMENTS AND PRESENTED RECORD EVIDENCE DEMONSTRATING THE NEED FOR THE PROPOSED REMEDY.**

9.3 The only "testimony" supporting Complaint Counsel's requested remedy was provided by its expert economist Dr. John Simpson. Dr. Simpson is not a fact witness, he has no background in breaking-up companies, and did not have any fact evidence available to him to offer any opinions regarding remedy. (Simpson, Tr. 5715).

### Response to RFOF 9.3

Respondents' proposed finding is misleading, as it implies that there is no evidence in the record that supports Complaint Counsel's requested relief, divestiture.

Respondents' implication that Dr. Simpson has an obligation to offer opinions relating to the implementation of any proposed remedy is wrong. Dr. Simpson was qualified as an expert in industrial organization economics. (Simpson, Tr. 2984). Dr. Simpson, therefore, limited his testimony to the economic and competitive benefits of one type of relief versus another. (Simpson, Tr. 3606-07, 3611).

Respondents ignore testimony in the record that supports divestiture. Mr. Neary of TRW endorsed Complaint counsel's proposed remedy, stating that competition would be restored if the EC Division was returned to the marketplace. (Neary, Tr. 1502). [ ] admitted that a divestiture that restored PDM to the marketplace would result in increased competition. ([ ], *in camera*).

Respondents ignore testimony and documentary evidence in the record that establish a

need to restore competition in the relevant markets. CCRFF 9.6. For example, [ ] testified that intense competition between CB&I and PDM saved [ ] million on the anticipated cost of its thermal vacuum chamber – savings which cannot be replicated in the current environment. ([ ], *in camera*). Respondents' business documents describe intense pre-acquisition head-to-head competition between CB&I and PDM for relevant products. (*See* CX 259 at 3002; CX 863 at 8410; CX 293 at 8141; CX 191 at 8948). [

]. (Neary, Tr. 1444, 1451; Hall, Tr. 1830-31; Kistenmacher, Tr. 878; [ ], *in camera*). Customers have already suffered anticompetitive price increases as a result of the acquisition, or have received pricing for prospective projects suggestive of future anticompetitive pricing. CCFF 749 to 1220.

There is abundant documentary evidence in the record that supports Complaint Counsel's proposed Order and that provide this Tribunal with the foundation to determine the elements of a successful divestiture. For example, Respondents' business documents, purchase agreements, and organizational charts detail the structure of CB&I and PDM before the acquisition and the structure of CB&I/PDM after the acquisition; list and describe the assets that were purchased from PDM by CB&I; and provide information on the employees that were retained and that were terminated as a result of the acquisition. *See* CX 385 at 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). The proposed Order utilizes these documents, and this Tribunal can rely on this evidence as a guide for recreating PDM by divestiture.

Moreover, there is ample testimony in the record that supports Complaint Counsel's basis for what is necessary to accomplish a successful divestiture. Several fact witnesses told this Tribunal what assets or resources are needed or what obstacles need to be overcome in order to create a company that can replace PDM and effectively compete with CB&I. (*See* [redacted], *in camera* ([redacted]) has a wish list of what it needs to effectively compete against CB&I, which includes CB&I's customer base, CB&I's technical specifications, additional equipment, a larger revenue base, and increased field capacity to handle multiple large projects at once); [redacted], *in camera* ([redacted]) needs a fabrication facility in the United States to overcome a cost disadvantage versus CB&I); Bryngelson, Tr. 6154-55 (a potential competitor would need an adequate revenue base to compete); Vetal, Tr. 428-433 (a potential competitor needs multiple fabrication facilities in order to rationalize freight costs); Gill, Tr. 199-201 (mentoring is not sufficient to enable Howard Fabrication to build TVCs in competition against CB&I); Scorsone, Tr. 4939-40 (an obstacle that a potential competitor must overcome is to ensure that it has sufficient size and financial base to provide customers with acceptable financial guarantees that the work will be performed); CX 442 at 152 (Knight, Dep.) (a company with only \$10 million in revenues does not have the financial strength to compete for projects); CX 615 at 46-47 (Knight, IHT) (a potential competitor would need its own specially trained field crews and its own equipment, rather than procure these items from third parties, which is not economical); CX 624 at 131 (Crain, IHT); Newmeister, Tr. 1566-67 (in order to compete effectively against CB&I, there is specialized equipment that must be obtained and modified, and there are specialized procedures that must be developed).

Respondents' counsel supports Complaint Counsel's proposed Order. There are several issues that Respondents' counsel raised in closing arguments that deal either with resources that Newco would need to possess or with obstacles that Newco would need to overcome for a divestiture to be successful. As described below, Complaint Counsel's proposed Order addresses and resolves each of these issues:



(1) *Newco “has to have work in the system.” (Leon, Tr. 8316-17)*

Respondents’ counsel’s statement supports the proposed Order, which requires CB&I to divest to New PDM no less than 45% of CB&I’s contracts relating to tanks. Order ¶ II.C. These contracts include work in progress, and CB&I is obligated, under the Order, to use its best efforts to obtain the necessary customer approvals to transfer these contracts to the Acquirer. Order ¶ II.C. CB&I is also obligated to divest to the Acquirer those assets that are necessary to “complete all work in progress in substantially the same manner and quality employed or achieved by CB&I,” even if it means purchasing assets or equipment. Order ¶ II.D.

(2)  *“[T]here’s nonassignment clauses in these contracts...” (Leon, Tr. 8317)*

This statement supports the proposed Order’s requirement that CB&I use its best efforts to secure any necessary customer approvals to sign or transfer these contracts. Order ¶ II.C. In fact, the proposed Order encourages CB&I to offer incentives or discounts to secure the necessary customer approvals. Order ¶ II.C.

The nonassignment clauses are not absolute; Respondents were able to transfer PDM’s contracts to CB&I when PDM was purchased. (Leon, Tr. 8317). In fact, PDM was prepared to secure consents from customers to allow the sale and transfer of its contract backlog to third parties for completion. (Byers, Tr. 6804-05). Respondents’ counsel assumes that securing these assignments will be impossible. However, Respondents’ counsel admits that it was “pretty easy” to transfer PDM’s contracts to CB&I:

“Now, it was pretty easy to get people to assign their contracts to CBI in the PDM transaction, because the customer knew PDM was going out of business, and why do you want somebody to work on your contract when you know they know they don’t have a long-term incentive to do it and do it well?”

(Leon, Tr. 8317).

(3) *The divestiture must avoid “disrupting and harming the projects of customers that are being performed. . .” (Leon, Tr. 8318).*

To avoid disrupting customer projects, the proposed Order requires CB&I to provide the Monitor Trustee with a list of the contracts that CB&I is currently working on or that is in its backlog within 30 days of the Order being signed. Order ¶ II.H. This list shall be available for review by the Acquirer, “in advance of the divestiture of New PDM, in order to facilitate the identification and nomination of such Customer Contracts.” Order ¶ II.C.2.

The proposed Order also seeks to avoid disrupting ongoing projects by requiring CB&I to provide the Acquirer with a list of all CB&I employees whose work relates to tank projects within four weeks of entering into a divestiture agreement with the Acquirer. Order ¶ II.G.1.

The Order also requires CB&I to allow the Acquirer to review these employees' files, so that the Acquirer can determine which personnel are key to the success of the divested business and to the completion of any ongoing projects to be divested. Order ¶ II.G.1.

CB&I must also divest additional assets "to insure that, as a result of the divestiture, the Acquirer is able to ... perform all Customer Contracts and complete all work in progress in substantially the same manner and quality employed or achieved by CB&I." Order ¶ II.D.

The proposed Order also requires CB&I to provide, upon request of the Acquirer, technical assistance until the Acquirer has completed 90% of the contracts that it acquired with the divestiture. Order ¶¶ I.Q., II.J. The purpose of this technical assistance is to minimize any disruption that may occur as a result of divestiture.

- (4) *"Here's another question, unanswered. Is there enough personnel in CBI to staff both companies?" (Leon, Tr. 8319).*

Complaint Counsel's proposed Order answers Respondents' question. As New PDM will be divested to an Acquirer, CB&I is not obligated to divide its personnel in half; it is likely that the Acquirer will have its own staff, and only require that this staff be supplemented, in order to be successful. The proposed Order allows the Acquirer flexibility in determining what personnel it needs from CB&I. The proposed Order requires CB&I to use its best efforts to transfer those current employees that the Acquirer requests, after inspection of CB&I's personnel files and interviewing potential employees to be transferred. Order ¶¶ II.G.1-II.G.3. The proposed Order also provides the Acquirer with access to former employees that left CB&I after the acquisition, by requiring CB&I to provide the Acquirer with the names and last known contact information of all former CB&I or PDM employees whose employment ended after Respondents submitted their HSR filings, September 8, 2000. Order ¶ II.G.1.

- (5) *"Now, the other important thing that Graver shows us, Your Honor, is that new management can worsen competitive consequences. . . . They were poorly managed." (Leon, Tr. 8331).*

Complaint Counsel's proposed Order addresses this issue by requiring that CB&I divest to the acquirer that is approved by the Commission. Order ¶ II.A. In making its determination whether an Acquirer is acceptable, the Commission can examine the management structure of the acquiring company and its ability to successfully manage the divested entity.

- (6) *"[I]f you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank." (Leon, Tr. 8311-12).*

Respondents' counsel's statement supports the requirements outlined in the proposed Order. First, CB&I is required to divest assets related to the manufacture of all tanks, not just the relevant products. Order ¶ II.A. (CB&I must divest New PDM, which includes PDM EC and PDM Water assets, Order ¶ I.U.). Second, CB&I is required to divest contracts relating to all tanks that CB&I manufactures, such as water, industrial, flat-bottom, and low temperature or cryogenic tanks; digesters; vacuum systems; and specialty structures. Order ¶ II.C.; *see* Order ¶ I.Y. (description of products included in CB&I's Tank Business). To avoid an inequitable distribution of the types of contracts that the Acquirer receives (*e.g.*, receiving all water tank contracts but no refrigerated LPG tank contracts), the proposed Order requires CB&I to ensure that the contracts the Acquirer receives "are equitably apportioned among the types of products relating to CB&I's Tank Business." Order ¶ II.C.3.(c).

To ensure that the Acquirer receives "enough personnel so that everybody would have the expertise to do every kind of tank," the proposed Order requires Respondents to transfer employees to the Acquirer "who collectively shall possess the technical experience and expertise: (i) to complete all Customer Contracts held by Acquirer, (ii) to bid on and obtain new customer contracts relating to a Tank Business, and (iii) to complete any new customer contracts relating to the Tank Business of the Acquirer in substantially the same manner and quality employed or achieved by CB&I. . ." Order ¶ II.F.

9.4 Dr. Simpson was unable to cite any evidence that the customers in any of the relevant product markets favored a breakup of CB&I. (Simpson, Tr. 3611). When asked to identify any customers that favor a breakup Complaint Counsel's expert stated "[n]one come to mind." (Simpson, Tr. 5718).

#### Response to RFOF 9.4

This finding is misleading, as it implies that there are no customers who supported the restoration of PDM to the marketplace. Respondents ignore Mr. Neary's testimony that competition would be restored if the EC Division was returned to the marketplace. (Neary, Tr. 1502). Respondents' finding also disregards the testimony of Respondents' own fact witness, [ ], that the divestiture of PDM would result in increased competition. ([ ], *in camera*). *See* CCRFF 9.3.

9.5 Complaint Counsel's expert also does not even know how the remedy proposed by Complaint Counsel would be implemented and that he is not qualified to oversee such a breakup. (Simpson, Tr. 5715).

#### Response to RFOF 9.5

Respondents' proposed finding erroneously places an obligation on Dr. Simpson to establish how Complaint Counsel's proposed remedy would be implemented. Dr. Simpson is an expert on industrial organization economics, not the implementation of remedy. CCRFF 9.3. Moreover, Respondents' proposed finding is misleading in that it suggests that Dr. Simpson would be overseeing the implementation of a Court-ordered divestiture. At no time has Complaint Counsel suggested that Dr. Simpson be responsible for monitoring the divestiture of PDM's

assets. It is not Complaint Counsel's responsibility to determine who would monitor such a divestiture. As stated in the proposed Order, the Commission is responsible for appointing a person to monitor Respondents' compliance with the proposed Order. Order ¶ VI.A.

**C. THE REMEDY IS NECESSARY AND INDEED MANDATED BY THE CLAYTON ACT AND SUPREME COURT PRECEDENT.**

9.6 There is no need to institute a remedy because of the competition that exists and the entry that has occurred in each of the relevant product markets. (Harris, Tr. 7375-76).

Response to RFOF 9.6

Respondents' proposed finding that no remedy is needed is off the mark. Dr. Harris' statement is conclusory, and is unsupported by the evidence.

The record shows that the acquisition has lessened competition. The acquisition eliminated CB&I's closest competitor in the LNG, LPG, and TVC market. CCFF 212-226. The acquisition eliminated a major competitor and the low-cost supplier in the LIN/LOX market. CCFF 227-230. Customers within the relevant markets have testified that their choices of qualified suppliers for the relevant products is diminished. CCFF 234-235 (LNG), 236-237 (LPG), 239-242 (LIN/LOX), 243-249 (TVC).

The record also shows that the acquisition has resulted in higher prices, *i.e.* evidence of actual anticompetitive effects. CCFF 898-911 (Cove Point), 944-954 (Memphis Light Gas & Water), 1058-1070 (Linde BOC Process Plants), 1072-1076 (Praxair New Mexico project #1), 1077-1086 (Praxair New Mexico project #2), 1146-1159 (Spectrum Astro), 1207-1220 ([ ]).

Entry has not occurred; rather, higher-priced competitors who were not considered prior to the acquisition are now being considered as customers search for an alternative to replace PDM. For example, Matrix, which Respondents claim is an entrant in the LIN/LOX market, has been in the market for several years, winning its first LIN/LOX project in 1997. (Newmeister, Tr. 1585); CCRFF 5.24. Another company, Morse Construction, is not an entrant; Morse had been soliciting Texaco for LPG projects since the 1980s. CCRFF 4.73, 4.82.

The restoration of PDM to the market is needed, as these higher-priced competitors are unable to replace PDM. As the evidence shows, domestic suppliers cannot replace PDM. CCFF 448-482, 490-529, 567-570. Foreign companies, and the recently formed joint ventures between domestic and foreign tank suppliers are also inadequate substitutes for PDM's competitive presence. CCFF 483-489, 530-566.

9.7 The relevant product markets are "robust" competitive environments where CB&I has a difficult time competing. While CB&I wins some projects in the relevant products markets, it faces strong competition that continually takes projects away from CB&I due to their competitive strength. (Scorsone, Tr. 4881-82) (state of mind).

Response to RFOF 9.7

Mr. Scorsone's statement is self-serving and contradicts Respondents' business documents, statements to its shareholders, and the testimony in the record. There is evidence in the record that the acquisition has lessened, and is likely to lessen competition. *See* CCRFF 9.6.

Mr. Glenn refutes Mr. Scorsone's assertion that CB&I has a difficult time winning projects; in fact, Mr. Glenn asserts that "we can win the work **every time**." (CX 1731 at 44; Glenn, Tr. 4380 (emphasis added)). In order to "take[] projects away from CB&I," Mr. Glenn asserts that a company would have to take "a **big dive on the price**. ... 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).

Further, the evidence of CB&I's post-acquisition conduct rebuts Respondents' misguided assertion that CB&I lacks competitive strength. Post-acquisition, CB&I has exercised market power by refusing to bid on projects and forcing customers to accept its prices and/or terms. CCF 1007-1026 (CB&I's refusal to bid the tank portion of Yankee Gas' LNG project forced Yankee Gas to consider CB&I as a turnkey supplier, rather than find an alternative tank supplier); CCF 1098-1107 (CB&I forced [ ] to accept its price by refusing to negotiate); CX 1016 (pre-acquisition, CB&I offered to help BOC standardize its LIN/LOX tanks; post-acquisition, CB&I refuses to help BOC unless BOC makes CB&I its partner for LIN/LOX tanks); CX 693 at [ ] 01 027 (CB&I refuses to consider innovations).

9.8 Complaint Counsel's expert witness was unable to identify one customer who supports the remedy proposed by the FTC. (Simpson, Tr. 5718).

#### Response to RFOF 9.8

Respondents' proposed finding is duplicative and repeats same incorrect assertions in RFOF 9.4.

9.9 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).

#### Response to RFOF 9.9

Respondents' finding overstates the alleged concerns of some witnesses relating to a breakup of CB&I; these witnesses' concerns are based upon incorrect assumptions regarding Complaint Counsel's proposed remedy.

Mr. Sawchuck is concerned that if CB&I's "engineering design department were instantly cut in half" it might cause a problem. (Sawchuck, Tr. 6077). At no time has Complaint Counsel suggested cutting anything in half, including CB&I's engineering department.

Mr. J. Kelly's concerns are addressed by the proposed Order. Mr. Kelly testified only that he would be concerned if personnel were pulled off his current project. (Kelly, Tr. 6265). As stated in CCRFF 9.3, the proposed Order addresses this concern by allowing the Acquirer the opportunity to review employee files, determine which employees are key to the success of the divested contracts.

Mr. Bryngelson’s concerns are based on the assumption that Complaint Counsel is requesting Respondents to spin-off a stand-alone entity. (Bryngelson, Tr. 6155-56). As stated in CCRFF 9.3, Complaint Counsel’s proposed Order requires Respondents to divest the PDM Assets to an Acquirer that is approved by the Commission, not create a stand-alone entity. The proposed Order also does not suggest splitting CB&I into two smaller companies, which is the only thing that Mr. Bryngelson testified would cause him concern. (Bryngelson, Tr. 6155-56; *see* Glenn, Tr. 4233-34).

9.10 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).

#### Response to RFOF 9.10

This finding mischaracterizes Mr. Hilgar’s testimony. Mr. Hilgar’s testifies that a breakup would result in harm, based on the assumption that a breakup would remove both CB&I and the divested entity from the market: “That’s an interesting question. To the extent that there was nothing left or [sic] either of the two companies after any FTC action, yes, I think that would inhibit—that would be bad for Air Products and the industrial gas business in general.” (Hilgar, Tr. 1540).

Second, Respondents’ use of one customer’s statement to make a blanket assertion for all LIN/LOX customers is disingenuous. There are LIN/LOX customers that have testified that the acquisition of PDM raises concerns. [ ] testified that the acquisition “takes away a very aggressive competitive bidder for LOX and LIN tank” ([ ], *in camera*); “not having a PDM bid took away – took away what could have been the lower – lower price to [ ].” ([ ], *in camera*). Respondents are aware that BOC expressed “concern to the US FTC regarding CB&I’s acquisition of PDM’s divisions.” (CX 1616). Air Liquide has stated that it is concerned about CB&I’s acquisition of PDM, because “. . . 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).

#### **D. THE RESTORATION OF COMPETITION IS REQUIRED BY THE LAW**

9.11 CB&I’s customers and competitors alike have each recognized that “it would be pretty difficult” to breakup CB&I into two separate and competing entities. ([ ]).

#### Response to RFOF 9.11

Respondents’ proposed finding is inaccurate in that it implies that a divestiture is not feasible. As stated in CCRFF 9.3, there is ample evidence in the record to guide this Tribunal as to what assets and personnel are required to accomplish a successful divestiture. Indeed, Respondents’ counsel has offered guidance to this Tribunal as to what is necessary to accomplish the divestiture. (Leon, Tr. 8311, 8316-23, 8330-31).

Respondents' proposed finding inappropriately suggests that difficulty or hardship is a defense to an order of divestiture. That divestiture will be "pretty difficult" or will result in economic hardship is not a defense. According to the Supreme Court, "the Government cannot be denied the latter remedy [divestiture] because economic hardship, however severe, may result." *U.S. v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316, 326-27. Respondents have failed to show that Complaint Counsel's proposed Order is unreasonable. In fact, Respondents' findings bolster Complaint Counsel's request for relief under the proposed Order. *See Hospital Corp. of America*, 806 F.2d 1381, 1393 (7<sup>th</sup> Cir. 1986) ("Hospital Corporation has not shown that the Commission's order is unreasonable. There is no merit to the suggestion that the order is punitive. Burdensome, yes; more burdensome than the requirements of premerger notification that the law imposes on firms that have not been found to have made an unlawful acquisition, yes. But respondents must remember that those caught violating the Act must expect some fencing in.")

9.12 Complaint Counsel's expert witness does not "know exactly how [the proposed remedy] would be implemented." (Simpson, Tr. 5715).

#### Response to RFOF 9.12

As in RFOF 9.5, Respondents' proposed finding inappropriately places the onus of determining how Complaint Counsel's proposed Order would be implemented upon Dr. Simpson.

9.13 There is insufficient evidence in the record to support the governments suggested remedy of a breakup. (Harris, Tr. 7375-76).

#### Response to RFOF 9.13

Respondents' proposed finding misstates the evidence and repeats the misguided assertions made in RFOF 9.3 and 9.6.

9.14 The relevant products are not the only products that are made by CB&I's Industrial Tank Division. (Scorsone, Tr. 4843). In fact, the relevant products constitute a very small percentage of sales from CB&I's Industrial Tank Division. (Scorsone, Tr. 4844). CB&I performs a majority of its work in markets and product areas other than the relevant product markets. (Glenn 4168).

9.15 CB&I's Industrial Tank Division also constructs standard flat bottom storage tanks, pressure spheres, pressure vessels, specialty plate structures, bins, hoppers, aqueducts, wind tunnels, and essentially any other type of structure that if constructed from metal plate. (Scorsone, Tr. 4843-44).

#### Response to RFOF 9.14 and 9.15

Respondents' assertion supports Complaint Counsel's proposed Order; according to Mr. Glenn and Mr. Scorsone, CB&I is able to compete in the relevant product markets because it performs work within product areas other than the relevant product markets. As conceded by

Respondents counsel, the facts of this case will require a broad divestiture of assets and ongoing business:

“[I]f you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank.”

(Leon, Tr. 8311-8312).

In order to ensure that the divested entity can compete against CB&I, Complaint Counsel’s proposed Order seeks to divest work to the Acquirer “within product areas other than the relevant product markets,” Order ¶ II.C., and to transfer employees to the Acquirer that can complete such work. Order ¶ II.G. *See* CCRFF 9.3.

9.16 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. In order to provide a new company with sufficient work, these clauses would have to be waived by the customer, re-negotiated, or breached by CB&I. (Glenn, Tr. 4168-69).

#### Response to RFOF 9.16

As stated in CCRFF 9.3, Respondents’ proposed finding ignores the fact that it is feasible and “pretty easy” to obtain customer approval to transfer contracts to another party. Mr. Byers testified that he was prepared to obtain customer approval to transfer PDM’s customer backlog to third parties. (Byers, Tr. 6803-05).

Complaint Counsel’s proposed Order also addresses Respondents’ proposed finding by requiring CBI to obtain the necessary waivers, assignments, and transfers. Order ¶ II.C.3.

9.17 Many of CB&I’s contracts also 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).

#### Response to RFOF 9.17

Respondents’ proposed finding is misleading in that it suggests that key personnel clauses are a significant barrier to an effective remedy in this matter. Respondents’ proposed finding supports the relief sought in Complaint Counsel’s proposed Order; the Order requires the New PDM be permitted to select employees, thereby allowing the New PDM to ensure its assumption of ongoing projects avoids contractual issues vis-a-vis the key personnel clauses. Order ¶ II.F.

Further, Respondents’ proposed finding misstates Mr. Glenn’s testimony. Mr. Glenn did not say that “[r]emoving or replacing those employees would create numerous contractual

issues.” Rather, Mr. Glenn stated that the customer’s written permission was required to remove employees from a project. (Glenn, Tr. 4169). The purpose of requiring the customer’s permission is to protect the customer from falling victim to a “bait and switch.” (Glenn, Tr. 4169). During the acquisition, PDM had to obtain customers’ approval and was able to obtain customer permission to transfer contracts to CB&I. (Leon, Tr. 8317).

- 9.18 Any remedy imposed must create two low cost companies, the remedy proposed here may actually harm competition if it fails to produce two lost [sic] cost competitors but rather creates two high cost competitors. (Harris, Tr. 7367-68; 7375-76).

### Response to RFOF 9.18

Respondents' proposed finding supports Complaint Counsel's proposed remedy in this matter. As Complaint Counsel's proposed Order requires the replication and restoration of PDM to the marketplace, it is likely that Complaint Counsel's proposed relief in this matter will create two low-cost competitors. Post-acquisition, CB&I was able to lower its costs by combining PDM's and its own practices. (CX 1550 at 301-303 (Bacon Dep.)). Under the proposed Order, the Acquirer would obtain access to the same best practices that CB&I implemented post-acquisition, and presumably benefit in the form of lower costs. The Order requires CB&I to license these technological improvements and best practices to the Acquirer. Order ¶ II.E. This license would require CB&I to provide the Acquirer with duplicates of all CB&I's Intellectual Property, which is defined to include all patents, best practices, standards, bidding and estimating documents, software (which includes CB&I's estimating software programs, Pricer and TASK), and customer records, among other things. Order ¶ I.R. At the same time, CB&I is required to divest PDM's intellectual property, including its books, records and files. Order ¶ I.U.

- 9.19 Instituting a breakup as a result of a finding of competitive harm in one market will likely cause significant harm in each of the other markets because it will remove a competitor and replace it with a high cost competitor. (Harris, Tr. 7375-76).

### Response to RFOF 9.19

Respondents' proposed finding mischaracterizes Dr. Harris' testimony. Before the cited testimony, Dr. Harris testified that he does not know "one way or the other" whether the divestiture will restore competition. (Harris, Tr. 7374-75).

As a matter of pure logic, divestiture in this matter will add, not "remove" a competitor. The purpose of the Order is to restore competition and replace PDM, not remove CB&I. *See* CCRFF 9.3.

- 9.20 The potential of any separated company to compete in the relevant product markets must be evaluated with the same standards that are used to evaluate any other competitor seeking entry into the market. Since the FTC has not performed such an analysis, it is unclear if a breakup of CB&I will help competition more that it would harm it. (Harris, Tr. 7375-76).

### Response to 9.20

Respondents' proposed finding is misleading in that it suggests that Complaint Counsel has a burden to prove that, upon divestiture, the Acquirer will be a potential entrant. The proposed Order establishes the Acquirer as a viable competitor, not a potential entrant.

Unlike an entrant, the Acquirer does not have to work for several years to secure an opportunity to bid on projects. Under the terms of the proposed Order, an Acquirer is provided, upon divestiture with a number of ongoing contracts and backlog. Order ¶ II.C.

There is no need to establish whether the Acquirer is likely to compete on an equal footing with CB&I, or whether the work obtained by the Acquirer is sufficient to compete against CB&I; the proposed Order provides the Acquirer with an equitable share of CB&I's work and revenue across all product areas, Order ¶ II.C., and provides the Acquirer with PDM's sole-source or exclusive supply agreements, such as its agreement with Praxair. Order ¶ I.U. By obtaining a portion of CB&I's work in progress, the Acquirer is immediately provided with a track record and experience, which customer testimony attests are key to success in the relevant markets. (Blaumueller, Tr. 301-02; Cutts, Tr. 2385; Scully, Tr. 1240; Vetal, Tr. 427-48).

9.21 CB&I in its current state is often too small to qualify for the financial guarantees on some projects. If CB&I were forced to breakup, the two newly formed companies would certainly be even smaller and therefore even less likely to qualify for projects. Both companies created from a breakup would be unable to provide the financial guarantees required for projects in the relevant product markets. (Glenn, Tr. 4168). [

] Prior to the acquisition CB&I was struggling in terms of letters of credit, financing and insurance premiums. (Glenn, Tr. 4080).

### Response to 9.21

[  
] (Blaumueller, Tr. 302; Izzo, Tr. 6479-80; Carling, Tr. 4529, 4531; CX 1210, *in camera*; CX 824; CX 1212, *in camera*; CX 1645 at 2 (demonstrative); CX 26 at CBI-PL069530, *in camera*; RX 757; Simpson, Tr. 3046, 3052-3055).

Respondents' reliance on Mr. Kelly's testimony is misguided. Mr. Kelly's alleged concerns are unfounded. Mr. Kelly does not know the financial result of the merger; he does not know whether his company, CMS Energy, was comfortable with CB&I's financial size pre-merger; and he does not know the history of CB&I's financial size. (JX 26 at 29-30 (J. Kelly, Dep.)).

Respondents' proposed finding is also misguided in that it assumes that, by requesting divestiture, Complaint Counsel is requesting that this Tribunal create a new, stand-alone entity, that is spun off from CB&I. This is wrong. As demonstrated by Complaint Counsel's proposed Order, Complaint Counsel requests that this Tribunal divest the PDM Assets to a Commission-approved Acquirer. Order ¶ II.A.; CCRFF 9.3.

9.22 LNG customers believe that both companies that emerge from a breakup of CB&I would suffer a significant disadvantage with respect to required financial guarantees as compared to the other large LNG tank suppliers in the market. (Izzo, Tr. 6511-12; Bryngelson, Tr. 6155-56; Sawchuck, Tr. 6077-78). For example, shortly before the Acquisition, Enron determined that PDM was too small to qualify for its LNG project in Dabhol, India. (Carling, Tr. 4471).

## Response to RFOF 9.22

Respondents' reliance on the testimony of Messrs. Izzo, Bryngelson and Sawchuck is misplaced, as their testimony relies on incorrect assumptions. For example, Mr. Bryngelson's testimony is based on the assumption that the remedy will create a stand-alone business that is spun-off from CB&I. As stated in CCRFF 9.3 and 9.21, this is not the relief that Complaint Counsel is requesting in its proposed Order. Likewise, Mr. Sawchuck testimony about splitting CB&I's engineering department in half assumes, incorrectly, that CB&I either cannot or will not hire new personnel; that the Acquirer has no personnel of its own; and that the remedy that Complaint Counsel seeks is to create a stand-alone business. None of these assumptions are corroborated by Complaint Counsel's proposed Order.

Respondents' proposed finding is misleading in that it implies that [

] CCRFF 9.21; (Blaumueller, Tr. 302; Izzo, Tr. 6479-80; Carling, Tr. 4529, 4531; CX 1210, *in camera*; CX 824; CX 1212, *in camera*; CX 1645 at 2 (demonstrative); CX 26 at CBI-PL069530, *in camera*; RX 757; Simpson, Tr. 3046, 3052-3055).

Respondents' finding that Enron determined PDM was too small to qualify for Dabhol misstates the evidence. Mr. Izzo testified that negotiation with PDM to work on Dabhol broke down because as a matter of negotiation PDM refused to provide the level of guarantee Enron was seeking. (Izzo, Tr. 6488-6489). That evidence does not necessitate the conclusion for which Respondents cite it, that PDM was unable to provide the guarantee. An equally likely explanation is that PDM viewed the Indian project as highly risky and thus was unwilling to provide guarantees that it might have felt comfortable providing for a project in a another location. Mr. Carling, who also worked on the Dabhol project, in fact testified he believes that PDM's unwillingness to provide financial guarantees on the Dabhol project had nothing to do with PDM's size relative to CB&I. (Carling, Tr. 4529).

9.23 LNG customers are concerned that if CB&I were split up into two separate companies, the size of the separated companies would be insufficient to qualify for LNG projects. (Bryngelson, Tr. 6155-56). LNG customers believe that a broken-up company would not be large enough to meet their needs. (Sawchuck, Tr. 6077-78).

9.24 LNG customers are concerned that the companies created from a breakup of CB&I would be too small to qualify for LNG projects. LNG customers are "concerned about whether either of the two residual companies would have the bonding or guarantee ability to make [their] bid list." (Izzo, Tr. 6511-12). LNG customers "seriously doubt" that a broken-up company would be large enough to qualify for LNG projects. (Izzo, Tr. 6511-12). For many customers, financial viability of a prospective bidder is important to a pre-qualification process. (Rapp, Tr. 1313).

9.25 Association with a larger company can assist a particular division because the larger financial size will enable the division to qualify for larger projects. For example, PDM's Bridge Division benefited from its association with the Water and EC Divisions by being able to bond larger projects. After the sale of the Water and EC Division, much of PDM Bridge's bonding capacity was lost. (Byers, Tr. 6738).



9.26 CB&I's acquisition of PDM has benefited LNG customers because CB&I is now a larger company with more financial assets to go against in the event of a problem. CB&I's acquisition of PDM, and as a result its larger financial size, is a benefit to LNG customers. (Bryngelson, Tr. 6154).

#### Response to RFOF 9.23, 9.24, 9.25, and 9.26

Respondents' proposed finding is misleading in that it implies that Respondents were unable to compete in the relevant product markets prior to the acquisition. As stated in CCRFF 9.22, Respondents' proposed finding is contradicted by the fact that prior to the acquisition, CB&I and PDM had no difficulty qualifying for LNG projects. Indeed, CB&I and PDM were the major competitors in the relevant markets, CCRFF 231-250; CB&I described itself as the "world leader" and touted that "none compare to CB&I's ability and experience record" (CX 1173 at 7562).

Additionally, Respondents' proposed finding misstates Mr. Bryngelson's testimony; Mr. Bryngelson testified that even if split into two, he would still do jobs with the companies. (Bryngelson, Tr. 6155-6156). Also, as stated in CCRFF 9.22, Mr. Izzo's testimony is based upon the incorrect assumption that Complaint Counsel's proposed Order seeks to spin-off a stand-alone business, not divest assets to an Acquirer.

Respondents' proposed finding is also misleading because [ \_\_\_\_\_ ], *in camera*). (Hall, Tr. 1830-31; Blaumueller, Tr. 323-24; [ \_\_\_\_\_ ], *in camera*).

Respondents' proposed findings also mistakenly imply that the divested assets will be unable to qualify for bonding and financial guarantees because Respondents assume that the divested assets will lack the financial backing of a Commission-approved Acquirer, in the same manner that PDM EC possessed the financial backing of its parent company, Pitt-Des Moines. The proposed Order requires the New PDM be given work that provides the Acquirer with revenues similar to those earned by PDM EC. Order ¶ II.C.3.(a). Moreover, as the Commission is responsible for approving the Acquirer, the Commission has the power to ensure that the Acquirer has a sufficiently large revenue base to qualify for large projects. Order ¶ II.A.

9.27 CB&I has over 300 ongoing projects at any given point in time over a number of product markets. A breakup would certainly cause disruption to most if not all of the ongoing projects, regardless of the product market, due to shared personnel and resources. (Glenn, Tr. 4170).

#### Response to RFOF 9.27

As stated in CCRFF 9.3, Complaint Counsel's proposed Order addresses this concern and minimizes disruptions to ongoing projects by requiring that CB&I identify its contracts and its employees well in advance of divestiture. In this way, the Acquirer can determine what contracts it will receive, secure necessary customer approvals to transfer these contracts, and hire the key

employees necessary to secure these customer approvals, prior to the divestiture of these contracts and of the PDM Assets. CCRFF 9.3; Order ¶¶ II.C.2.; II.D.; II.G.1.; II.H.

In order to minimize any disruption that may occur as a result of divestiture, the proposed Order also requires CB&I to provide, upon request of the Acquirer, technical assistance until the Acquirer has completed 90% of the contracts that it acquired with the divestiture. Order ¶¶ I.Q., II.J.

9.28 LNG customers with ongoing projects being constructed by CB&I believe that a breakup would cause disruption to their project and they would suffer a disadvantage by losing personnel that are currently working on their project. (J. Kelly, Tr. 6265).

#### Response to RFOF 9.28

Respondents' proposed finding is misleading. Mr. Kelly's testimony is based upon an incorrect assumption; in his testimony, Mr. Kelly assumes that key personnel would be lost, and that the Acquirer would not be allowed to hire these key personnel to continue working on the project. (Kelly, Tr. 6265). This assumption is wrong; the proposed Order permits the Acquirer to hire, and indeed, requires CB&I to use its best efforts to facilitate the transfer of, CB&I's employees. Order ¶ II.G.

9.29 CB&I employees are not dedicated to one project or one market, but rather work simultaneously on numerous projects across numerous market. Separating the company in two and therefore removing those people would disrupt a large number of projects. (Glenn, Tr. 4168).

#### Response to RFOF 9.29

As stated in CCRFF 9.3, Respondents' proposed finding supports the requirement in the proposed Order that CB&I transfer employees to the Acquirer that work in all product areas, such that the Acquirer can complete work on current projects, and bid on future projects in all product areas that CB&I competes, and not just the relevant product markets. Order ¶ II.F. As Respondents note, employees are "not dedicated to one project or one market," which suggests that, in order to be viable, an entity which replaces PDM must include similarly non-dedicated employees. (*See* Leon, Tr. 8311 ("CBI and PDM before makes a lot more than just the tanks made by these relevant products, and if you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long.")).

9.30 Within PDM the EC Division and Water Division shared resources, personnel, equipment, and facilities. Due to the intermingling of resources, PDM decided to sell the two divisions together because it was impossible to sell one without the other. (Beyers, Tr. 6780-6781).

#### Response to RFOF 9.30

Respondents' proposed finding supports the proposed Order's requirement that CB&I divest the assets it acquired from PDM, namely the PDM EC and PDM Water Divisions. Order ¶¶ I.U., II.A. That "pulling apart and selling the EC and Water Divisions separately" is, in the

words of Respondents' counsel, "infeasible" supports Complaint counsel's request that both be divested. (Leon, Tr. 8330). Moreover, as stated in CCRFF 9.3 and 9.29, Respondents' counsel supports Complaint Counsel's assertion that, in order to be successful, the Acquirer would need

to receive work from CB&I for work other than within the relevant product markets; otherwise the Acquirer's business "would wilt like a rose." (Leon, Tr. 8311).

9.31 LNG customers are concerned with the prospect of splitting up CB&I personnel. LNG customers " have some real concerns about" the possibility of CB&I's engineering department being divided between two companies. (Sawchuck, Tr. 6077-78). Due to the small number of people within CB&I who work on engineering the projects in the relevant product markets, it would be " real difficult to split one person in half" when the entire group consists of a total of only one or two people. (Sawchuck, Tr. 6077-78).

#### Response to RFOF 9.31

The finding that a customer had "some real concerns" about divestiture is misleading and misstates the evidence. Mr. Sawchuck's testimony, based on a hypothetical posed by Respondents' counsel, was that he was concerned about the ramifications of splitting in half a "tight" engineering group of one or two people. (Sawchuck, Tr. 6077). Respondents' proposed finding belies the fact that, according to Mr. Glenn, CB&I employs about a thousand graduate engineers. (Glenn, Tr. 4355-56).

### **E. THE APPLICABLE LAW DICTATES A RESTORATION OF COMPETITION AND REQUIRES DIVESTITURE IN BOTH THE RELEVANT PRODUCT MARKETS AND ALL MARKETS NECESSARY TO SUPPORT THE RELEVANT PRODUCT MARKETS**

9.32 Complaint Counsel's expert witness did not consider what the appropriate remedy would be if a violation is found in only some but not all of the relevant product markets. If a violation is found in only one market, Complaint Counsel's expert stated that it would "require quite a bit of thought" in order to determine what a proper remedy would be. (Simpson, Tr. 5586).

#### Response to RFOF 9.32

Respondents' proposed finding repeats the erroneous assertions represented in RFOF 9.3 and 9.12.

9.33 Complaint Counsel has failed to conduct an analysis to determine the effect of a breakup would have on all of the markets if it is determined that a remedy is required for only one market. Attempting to institute a remedy for the benefit of one market could harm competition in the remaining markets. (Harris, Tr. 7375-76).

#### Response to RFOF 9.33

Respondents' proposed finding is duplicative of RFOF 9.20, and equally misleading.

### **F. THERE ARE NO OTHER ADEQUATE OR PERMISSIBLE REMEDIES**

9.34 CB&I's CEO, Gerald Glenn has presented an offer on the thermal vacuum chamber market. (*See supra* Part VI) (Glenn, Tr. 4164-65).



### Response to RFOF 9.34

Respondents' proposed finding, and the referenced RFOFs in Part IV, erroneously suggest that CB&I's offer is adequate. When questioned about Mr. Glenn's offer, witnesses in the TVC industry testified as to the offer's inadequacy:

Q. Do you think that if Chicago Bridge gave them a little mentoring, taught them some classes and stuff like that, do you think that would make Mr. Gill's company a real viable competitor in the thermal vacuum chamber -- large field-erected thermal vacuum chamber business?

A. No, I would say not.

(Neary, Tr. 1458). Mr. Gill of Howard Fabrication also testified as to the inadequacy of Respondents' proposed remedy in the thermal vacuum chamber market:

Q. Mr. Leon mentioned at the end of his opening about remedies, a proposal that they have made, and do you think that a little mentoring by Chicago Bridge would give you the ability to go out and compete in the large thermal vacuum chamber business?

A. It would take more than mentoring.

(Gill, Tr. 202).

9.35 American Tank & Vessel ("AT&V"), one of the recent entrants into the relevant product markets, provided a list of CB&I's assets that it would like to have. Although ATV believes that can "effectively compete with CB&I," it provided a "wish list" of items that any competitor would like to acquire from its competition. (Cutts, Tr. 2371-73; 2374; 2391). A potential alternative remedy could involve CB&I using this "wish list" as a guide to mentor ATV or another recent entrant in the relevant product markets.

9.36 ATV provided a "wish list" of assets that it believed would be beneficial to assisting ATV when competing against CB&I. ATV would like to acquire the following items from CB&I: CB&I's customer lists, technical specifications of LNG applications, cryogenic welding systems, CB&I's name and reputation, and a few of CB&I's cryogenic marketing employees, employees and equipment for four additional field crews, more financial strength and bonding capacity, and CB&I's red book or standard operating procedures. (Cutts, Tr. 2371-74; 2391).

### Response to RFOF 9.35 and 9.36

Respondents' proposed findings contradict the implication in Respondents' earlier finding, RFOF 9.3, that there is no evidence of what is necessary to accomplish a successful divestiture; these findings identify a list of tangible and intangible assets that would help a company compete effectively against CB&I.

Respondents' proposed findings ignore Mr. Cutts' testimony. Mr. Cutts did not list these assets as a suggestion for mentoring; Mr. Cutts was asked what he would like to **purchase** from

CB&I if given the opportunity. (Cutts, Tr. 2371). As stated in CCRFF 9.34, there is already testimony in the record that suggests that mentoring is an inadequate remedy.

Respondents' proposed findings also support Complaint Counsel's proposed Order. The proposed Order requires that all these assets be divested to a Commission-approved Acquirer. Order ¶ I.U.

9.38 Another remedy option could include CB&I assisting new entrants to locate or become acquainted with the correct customer contacts in the relevant product markets. Some new entrants are familiar with the companies that purchase the relevant products in the U.S., but do not necessarily know how to locate the correct contact person at each customer. (Cutts, Tr. 2559-60).

### Response to RFOF 9.38

Respondents' proposed finding is misleading and grossly mischaracterizes Mr. Cutts' testimony. Mr. Cutts does not state or even suggest that AT&V would be able to compete effectively against CB&I with only an introduction. Even if ATV was given customer contact information, Mr. Cutts admitted that a customer would still be "more inclined to want to use CB&I as opposed to other companies." (Cutts, Tr. 2385). "AT&V is not a household name for cryogenic tanks." (Cutts, Tr. 2385). In contrast, "the PDM name, like the CB&I name, could obviously break down a lot of walls and barriers." (Cutts, Tr. 2389). Recognizing that introductions and customer contact information is insufficient to replicate the goodwill invested in the PDM name, the proposed Order requires CB&I to divest its rights in the PDM name. Order ¶¶ I.U., II.A.

9.39 Another option could include CB&I selling some of its assets to its competitors. At one time, ATV was interested in purchasing some of PDM's assets including the Provo plant and certain automated welding equipment from CB&I after the acquisition. (Cutts, Tr. 2411-12). ATV was interested in acquiring some of PDM's assets in order to increase some market share. (Cutts, Tr. 2533).

### Response to RFOF 9.39

Respondents' proposed option supports Complaint Counsel's proposed Order in that Respondents' proposed finding supports the selling of PDM's assets to an acquirer. Order ¶ II.A. Indeed, Respondents' finding supports the fact that the remedy must require the divestiture of PDM's physical plant, including its fabrication facilities and its automated welding equipment. (Cutts, Tr. 2411-12; [redacted], *in camera*; Simpson, Tr. 3155-3156; Vetal, Tr. 428, 432-433; RFOF 3.35). As Mr. Cutts testified, the purchase of PDM's fabrication facility was "part of a package" that would provide ATV with "market share, customer base, technology and some other things." (Cutts, Tr. 2533). As Complaint Counsel and Respondents recognize the importance of a fabrication facility, the proposed Order requires Respondents to divest the three fabrication facilities CB&I acquired from PDM. Order ¶¶ I.U., II.A.

March 14, 2003

Respectfully submitted,

---

J. Robert Robertson  
Counsel Supporting the Complaint

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington D.C. 20580  
(202) 326-3498

**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2003, I caused a copy of Complaint Counsel's Corrected Responses to Respondents' Proposed Findings of Fact and Conclusions of Law (Public Version) to be delivered by hand to

The Honorable D. Michael Chappell  
Federal Trade Commission  
H-104  
6<sup>th</sup> and Pennsylvania Ave. N.W.  
Washington D.C. 20580

Administrative Law Judge

and by express mail to:

Jeffrey A. Leon  
Duane M. Kelley  
Winston & Strawn  
35 W. Wacker Drive  
Chicago, IL 60601-9703  
(312) 558-5600

Counsel for Respondents Chicago Bridge & Iron Company  
N.V. and Pitt-Des Moines, Inc.

\_\_\_\_\_  
Mary C. Forster

DATED: March 25, 2003