[1] We use the term “Commission” to refer to the Commissioners at the Federal Trade Commission that decided this case at th

a Pennsylvania corporatio

functions. In other words, the "Government" brings a complaint before the "Commission" for adjudication. See 16 C.F.R. §§ 3.2, 3.11; see also Genuine Parts Co. v. FTC, 445 F.2d 1382, 1388 (5th Cir. 1971).

on an annualized basis. Id., at 3. Nonetheless, based on the bidding history in each market, the ALJ found that the acquisi

[4] On February 1, 2005, CB&I filed with the Commission a petition to reconsider in lig

1978). We review de novo all legal questions pertaining to Commission orders. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986).

Section 7 of the Clayton Act prohibits acquisitions, including mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[5] 15 U.S.C. § 18; see United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355 (1963) ("The statutory test

[5] The appeal at issue primarily concerns section 7 of the Clayton Act as section 5 of the FTC Act is, as the Commission determined and the parties do not contest, a derivative violation that does not require independent analysis. See Op., at 5 n.23.

CB&I first challenges the Commission's application of the legal standards for production of evidence and persuasion.

The burden-shifting framework for deciding Clayton Act section 7 actions first requires the Government to establish a prima facie case that an acquisition is unlawful. See H.J. Heinz Co., 246 F.3d at 715 (citing United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990)). Typically the Government establishes a prima facie case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition. Id. Once the Government establishes the prima facie case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects. Id.10 TD [(D)] TJ 16.0800 0.0000 TD

The Government's evidence not only established its prima facie case that CB&I's acquisition likely would have anti-competitive effects; it also served as a redoubt against CB&I's evidence that actual or potential entry of new competitors would offset the merger's substantial lessening of competition. The Commission expressly decided that, based on the totality of the evidence, CB&I had not rebutted the Government's prima facie case. From our review of the record and the Commission's opinion, we conclude that the Commission's decision is supported by substantial evidence and that the Commission did not improperly place the burden of persuasion upon CB&I.

CB&I primarily relies on Baker Hughes as the authority for the burden-shifting framework within the anti-trust context. The Ninth and Eleventh Circuits interpret Baker Hughes' burden-shifting language as describing a flexible framework rather than an air-tight rule. The Ninth Circuit in Olin Corp. v. FTC distinguishes Baker Hughes by holding that the Commission does not need to switch burdens back to the Government if the Government addresses the respondent-company's rebuttal evidence in its prima facie case; in other words, based on an assessment of the rebuttal evidence in light of the prima facie case, the Commission can determine that the respondent company's rebuttal does not satisfy its burden of production and therefore decline to switch the burden of production back to the Government. 986 F.2d 1295, 1305 (9th Cir. 1993). The Ninth Circuit writes:

> The clearest reason why Baker Hughes does not control here is that the Commission responded to the Company's rebuttal, whereas in Baker Hughes the government did not. In the present case, the Commission pointed to evidence indicating why Olin's viability argument should fail. The Commission is able to do this because it is Olin's burden to rebut a prima facie case of illegality.

Id. (citations omitted). We believe the same situation applies in this case. The

Government's prima facie case addresses why the rebuttal evidence is not sufficient and CB&I's construal of the rebuttal evidence is not credible; therefore the Commission can conclude CB&I's burden of production on rebuttal is not satisfied without having to formally switch the burden of production back to the Government. The Eleventh Circuit in Univ. Health, Inc. approves Baker Hughes' general framework but concludes, in accord with the Ninth Circuit, that, in practice, evidence is often considered all at once and the burdens are often analyzed together. 938 F.2d at 1218-19 & n.25. The Eleventh Circuit writes:

> Conceptually, this shifting of the burdens of production, with the ultimate burden of persuasion remaining always with the government, conjures up images of a tennis match, where the government serves up its prima facie case, the defendant returns with evidence undermining the government's case, and then the government must respond to win the point. In practice, however, the government usually introduces all of its evidence at one time, and the defendant responds in kind. This is particularly true when the government seeks a temporary restraining order or, as here, a preliminary injunction and, thus, time is of the essence.[6]

Id.; see also Baker Hughes, 908 F.2d at 991 (calling the "distinction between [the burden of production] and the ultimate burden of persuasion" "always an elusive distinction."); FTC v. Butterworth Health Corp., 121 F.3d 708, 1997 WL 420543, *1 (6th Cir. Jul. 8, 1997) (unpublished) (calling Baker Hughes burden-shifting

[6] CB&I misinterprets the last sentence to argue that the Eleventh Circuit's flexible reading of the burden-shifting framework applies only when time is of the essence. Without any basis in the text, CB&I narrows the Eleventh Circuit's opinion. Reading the passage as a whole, the Eleventh Circuit considers the Baker Hughes framework as generally flexible in practice for all situations, but only emphasizes the need for flexibility when time is of the essence. See Univ. Health, 938 F.2d at 1219 n.25 ("This is particularly true when the government seeks a temporary restraining order or, as here, a preliminary injunction and, thus, time is of the essence.") (emphasis added).

framework "somewhat artificial."). The Ninth and Eleventh Circuit interpretations of the Baker Hughes burden-shifting framework accommodate the practical difficulties in separating the burden to persuade and the burdens to produce. The flexible approach allows the Commission to preserve the prima facie presumption if the respondent, CB&I, fails to satisfy the burden of production in light of contrary evidence in the prima facie case.

CB&I then challenges the order by contending the Commission imposed an onerous burden of production that approximates a burden of persuasion. The Commission must determine whether the defendant has come forward with sufficient evidence to rebut the government's prima facie case; but the Government continues to bear the burden of persuasion even after it has made out a prima facie case t TD (e)Tj 6.6000 0.0000 TD f2F15 12.0000 Tf (case t)Tj

F.2d at 1223-24. We therefore read the Commission's opinion as deciding whether respondent's rebuttal arguments and evidence plausibly and justifiably "show[ ] that the market-share statistics give an inaccurate account of the acquisition's possible effect on competition in the relevant market" so as to satisfy its burden of production as a matter of law. Cf. Id. at 1218. Under the flexible approach

[7] The mere fact that the Commission used the word "persuasive" does not prevent this court from independently examining the context of its conclusions and affirming the judgment if it was indeed correct under the proper legal standard

Insufficient to Rebut the Prima Facie Case

A. The Commission Applied the Correct Legal Standard For Analyzing the "Potential Entry" Defense

CB&I also argues that the Commission addressed the incorrect analytical question concerning the extent of potential entry necessary to counteract any anti-competitive effects. CB&I argues that the correct legal standard should have been: "if there was a supracompetitive price increase, entry would be sufficient to counteract such an increase." See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 119 n.15 (1986) ("In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist after the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant."). Instead, according to CB&I, the Commission considered only whether there was already entry sufficient to constrain CB&I from raising prices. CB&I mischaracterizes the Commission's analysis. The Commission not only addressed whether existing entry is sufficient to constrain CB&I from raising prices but also used exis

judging the probable anticompetitive effect of the merger."); FTC v. Nat'l Tea Co., 603 F.2d 694, 700 (8th Cir. 1979). In this case, the Commission clearly concluded that:

> The history of these markets reveals that they have not been characterized by easy entry and expansion and have been dominated by [CB&I and PDM] for decades . . . The evidence strongly suggests that this dynamic would have continued absent the merger, and [CB&I and PDM's] own strategic planning documents predicted that the merged firm would "dominate" the relevant markets. Thus, to determine whether the entry [CB&I] suggest[s] is likely to restore competition lost from the merger, [the Commission] must determine whether a sea-change has occurred in the markets so as to render inapplicable the competitive conditions that have held for so long. Based on the evidence, [the Commission] conclude[s] that such is not the case and that the entry and expansion alleged by [CB&I and PDM] are not sufficient to constrain CB&I's conduct in the foreseeable future.

Op., at 9; see also Op., at 53 ("[The Commission] conclude[s] that these new entrants do not confront CB&I with competition sufficient to constrain it from raising prices."). The Commission also clearly stated: "In light of these assertedly low entry barriers, [CB&I] then argue[s] that potential entrants either already constrain CB&I or can be expected to enter the market in the event of anticompetitive price increased by CB&I . . . We . . . reject [CB&I's] arguments." Op., at 83. Thus, the Commission concludes that if supracompetitive pricing existed, the new entrants would be insufficient to counteract it - the exact legal standard CB&I proposes.

B. There Is No Structural Change in the Markets to Indicate That the Potential for Future Entry Would Be Any Greater than the Minimal Entry of the Past

CB&I also argues that the evidence of potential entry can be distinguished from the history of actual entry because structural changes in the market create a tendency toward stronger competition. See Baker Hughes, 908 F.2d at 986

(citing United States v. Int'l Harvester, 564 F.2d 769, 773-779 (7th Cir. 1977)). As we stated in Fort Worth Nat'l Corp. v. Fed. Sav. & Loan Ins. Corp.:

> . . . Congress provided [the Commission] authority for arresting mergers at a time when the trend to a lessening of competition was still in its incipiency. Application of this standard requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.

469 F.2d 47, 60-61 (5th Cir. 1972) (internal citations and quotations omitted). CB&I's bald assertion does not rebut the Government's strong prima facie evidence. As we discuss later, the Government provides substantial evidence of barriers to entry and substantial evidence that they will continue to exist in the near future. Thus, the Commission relies on substantial evidence for its prediction that no "sea change" in market structure distinguishes current market conditions from the history of market conditions. Op. at 71. CB&I does not provide sufficient evidence in its rebuttal that potential entrants will overcome these entrenched barriers to entry[8] and encourage stronger competition even if there are supracompetitive prices. As the Commission concludes: "In short, the post-acquisition evidence in the LPG market demonstrates no more than two minor competitors submitted bids after the acquisition. We are not, however, persuaded that CB&I's cost-cutting and margin-shaving represent a 'sea-change' in the market sufficient to overcome the contrary evidence." Op., at 71.

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[8] Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir.1993) (internal quotations omitted); see also Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. Of Am., 885 F.2d 683, 696 n.21 (10th Cir. 1989) ("Barriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market.").

[9] CB&I also misconstrues the I.D. and the Commission opinion to argue that the Commission ignored the ALJ's finding of no supracompetitive price increases post-acquisition. In fact, the ALJ only concluded that the Government did not prove nor was required to prove supracompetitive prices existed post-acquisition. I.D., at 114. Neither the ALJ nor the Commission directly ruled that there were no supracompetitive price increases post-acquisition. See Op., at 91; I.D., at 114. In the pertinent part of the opinion, the Commission rejected the Government's proffered evidence of post-acquisition price increases because while

[10] CB&I relies on Baker Hughes to argue that the very threat of entry from foreign firms would constrain anti-competitive effects a fortiori such that it is not necessary that a new entrant enter "on par." See Baker Hughes, 908 F.2d at 988. Such reliance is misplaced. First, Baker Hughes' conclusion that a mere threat of entry is sufficient to constrain anti-competitive effects has been criticized, and we will not adopt it here. See United States v. United Tote, Inc., 768 F. Supp. 1064, 1081 (D. Del. 1991) (noting that interpreting Baker Hughes as encouraging a lax standard is inconsistent with the critical examination of potential entrant's ability to restrain competition); see also 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 941h (2dpo

not demonstrate that they are adequate replacement for the competition that has been lost.") (emphasis added); Op., at 82 ("[E]ntry pointed to by [CB&I] is insufficient to constrain CB&I post-acquisition." ran

evidence to the contrary; and (C) the Commission's finding that CB&I's customers have no real alternatives to CB&I.

A. The Proffered HHIs Can Be Used As Indicators of Probable Future Competitiveness

The HHIs are just one element in the Government's strong prima facie case. Market concentration figures should be examined in the context of the entire prima facie case. See H.J. Heinz Co., 246 F.3d at 717-18. Here, the prima facie case establishes without dispute that the two dominant, and often only, players in these four domestic markets are merging. This indisputable fact "bolster[s]" the Government's market concentration figures. See id. Where the post-merger HHI exceeds 1,800, and the merger produces an increase in the HHI

solely on sales from the 1996-2001 period is unreliable, and therefore extended the sales data time period to a 11-year period, 1990-2001. When sales data are sporadic, a longer historical perspective may be necessary. The Department of Justice and Federal Trade Commission's Merger Guidelines,[11] which describe the standards applied by the Government in exercising its prosecutorial discretion in the anti-trust realm, note, "[t]ypically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the [Department of Justice and the Commission] may measure market shares over a longer period of time." Merger Guidelines, 57 Fed. Reg. at 41557, at § 1.41; cf. 2A Areeda & Hovenkamp, at ¶ 535d (noting that averaging over a significantly long period of time is a solution, albeit an imperfect solution, to "lumpy" sales statistics.).[12] Regardless, the Commission adequately explained why it chose an extended period: (1) the extended period provided more data points, which averages out the year-to-year fluctuations and "chance outcomes" and (2) CB&I presents no evidence that a structural change affected the market, and thus the same market conditions persist in the 1996-2001 time-period as the 11-year period, except the 11-year period has additional data points. See Op.peof

[11] Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws. See United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995).

[12] Long-term trends in HHI changes can be used to examine the structure of markets and are used to determine the effect of mergers on the market. See State of N.Y. v. Kraft Gen. Foods, Inc., 926 F.Supp. 321, 362 (S.D.N.Y. 1995). Here, the market trends in HHIs provide substantial evidence that CB&I and PDM have been the dominant players in the relevant markets and do not indicate any trend of reduced concentration; rather, a merger accelerates the trend towards increased concentration, as its previous competitors have dropped out of the relevant markets. Id.

measure of market concentration when other indicators of the market structure and history of the market clearly bolster what the HHIs already indicate - that rivals are limited and CB&I and PDM are the only two firms with any market power in these markets. See FTC v. Warner Communications, Inc., 742 F.2d 1156, 1163 n.1 (9th Cir. 1984) (concluding that concentration statistics merely provide a "meaningful context within which to address the question of the merger's competitive effects.") (citing Gen. Dynamics Corp., 415 U.S. at 498); see also FTC v. PPG Inds., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (noting that the use of the HHIs "rests upon the theory, that, where rivals are few, firms will be able to coordinate their behavior, either

Supp.2d 1073, 1080 (M.D. Fla. 2005), the court dismissed monopolization claims for the "heavy-lift satellite launch services for the government" market, because the sales data was limited to two launch contracts. We agree that reliance on very limited data, such as two data points may undermine an entire prima facie case. However, we find this to be a very limited exception, such as the extreme situation in Lockheed Martin, because the academic literature has not accepted any broad conclusion that small markets are all per se problematic. See 4 Areeda & Hovenkamp, at ¶ 929; see also FTC v. Food Town Stores, 539 F.2d 1339, 1345 (4th Cir. 1976) ("The fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act, and does not affect the legality of the merger.").

In contrast, for three of the four markets here, the data underlying the HHI for market concentration is not nearly as sparse as that in Lockheed Martin. For the LNG market, from 1990 to the acquisition date, nine LNG tank plants were awarded --- CB&I won five and PDM won four. I.D., at 65. Out of all seventy-five LNG peak-shaving plants in the United States, CB&I and PDM constructed all but six of them (the six were constructed by a now out-of-business competitor). Id. at 64. For the LPG market, out of the eleven LPG tank projects awarded in the United States between 1990 and 2001, CB&I won five and PDM won four. Id., at 213. From 1990 to the Acquisition, 109 LIN/LOX tanks were constructed and CB&I and PDM built 72.8% of these tanks. Id. at 269. The third major player, accounting for 23.3% of those tanks, went out of business in 2001. Id. at 270. This history provides substantial evidence for discerning a trend towards increased market concentration. However, for the same reasons as in Lockheed Martin, we conclude that the evidence in the TVC market is too sparse and sporadic for that market's HHI statistics to be a reliable factor. Lockheed Martin, 390 F. Supp.2d, at 18-19. The TVC market's HHI statistic

cites in the Merger Guidelines.[13] The Merger Guidelines, 57 Fed. Reg. at 4.1557 § 1.41 n.15, simply state: "[w]here all firms have, on a forward-looking basis, an equal likelihood of securing sales, the [Department of Justice and the Federal Trade Commission] will assign firms equal [market] shares." Under this rule, in order to apply an equal number of market shares to the field of competitors, as CB&I urges, the competitors, on a forward-looking basis, must have "an equal likelihood of securing sales."[14] The Commission relied on substantial and overwhelming evidence that there is no equal likelihood to secure bids given the high entry barriers, i.e., because of CB&I's reputation and control of skilled crews. See infra Section II.3.C.iii.

C. Commission's Rejection of Rebuttal Arguments, viz., Alleged Market Entry and Low Entry Barriers, Is Supported by Substantial Evidence

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[13] Moreover, as we noted earlier in supra note 11, the Merger Guidelines are not binding on the courts and the agency during adjudication but are only highly persuasive authorities as a "benchmark of legality." See United States v. Kinder, 64 F.3d 757, 771 & n.22 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect, courts commonly cite them as a benchmark of legality."). The Merger Guidelines do not guide adjudicative decisions at the agency and court-level, because they are merely enforcement policy statements that establish standards for exercising prosecutorial discretion. Id.; see also Native Am. Arts, Inc. v. Waldron Corp., 399 F.3d 871, 874 (7th Cir. 2005); Merger Guidelines, 57 Fed. Reg. at 41553 § 0. Enforcement policy is not binding on the agency and has no force of law. See Olin Corp., 986 F.2d at 1300 ("Certainly the [Merger] Guidelines are not binding on the courts . . . or, for that matter, on the Commission.") (emphasis added); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986); see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 383 F.3d 1047, 1048 (D.C. Cir. 2004); cf. Ash Grove Cement Co. v. F. T. C., 577 F.2d 1368, 1374 (9th Cir. 1978). CB&I's citation to Nevins v. NLRB, 796 F.2d 14, 18 (2d Cir. 1986) is inapposite. Nevins deals with guidelines concerning the adjudicatory function within the NLRB context, but the Merger Guidelines deal with the enforcement function of the agency and are explicitly denoted as non-binding. Enforcement, unlike adjudication, is also an area the courts are "most reluctant to interfere." See Brock, 796 F.2d at 538.

[14] Even so, the Merger Guidelines delegate much discretion in the application of these rules and reject a "mechanical application" of the Guidelines. Merger Guidelines, 57 Fed. Reg. at 41552. The Merger Guidelines urge the Commission to "apply [the Guidelines'] standards reasonably and flexibly to the particular facts and circumstances of each proposed merger." Id.

_____i. Post-Acquisition Evidence Has Little Probative Weight if It Is Manipulable, and Evidence in this Case Is Reasonably Viewed as Manipulable.

We agree with CB&I that post-acquisition evidence may be useful in determining the possibility that new entrants would counteract the anti-competitiveeee

[15] Just allowing entrants to win bids does not guarantee the entrants would be able to enter the market permanently, since winning a bid does not necessarily result in the successful completion of the project especially in light of evidence that CB&I controls

[16] The petitioner's argument that the evidence is part of the administrative record, because the petition for reconsideration at the Commission level was included in Fed. R. App. P. 17's certified list of documents listing the "record" on appeal is without merit. The certified list includes not only "any findings or report on which [the order at issue on appeal] is based," but also any "pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a); Fed. R. App. P. 17. Pleadings and evidence relevant to other parts of the proceedings before the agency, such as a petition for reconsideration, do not constitute the administrative record for the order at issue. Moreover, the Commission has explicitly rejected the evidence as a basis for its order in its denial of the petition to reconsider. See Global Van Lines, Inc. v. I.C.C., 714 F.2d 1290, 1298 (5th Cir. 1983) ("It has, moreover, been settled for at least forty years that '[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.'") (quoting SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 87 (1943)).

[17] In addition, for the reasons we noted in Section II.3.C.i, supra, this post-acquisition evidence is likely not very probative, because it can arguably be subject to manipulation.

be relevant to our decision, and this evidence of one successful entry by a foreign company does not affect the substantial evidence upon which the Commission based its decision and our decision to deny CB&I's petition. CB&I's prime example of actual entry is Dynegy's Hackberry project, which was awarded to a foreign firm, Skanska, at the outset, but then awarded to another foreign firm, IHI. CB&I argues that this is evidence that CB&I lost two chances to work on the large Hackberry project. CB&I inaccurately characterizes the evidence. The Commission noted that this evidence was for the whole LNG port, and there was supposed to be a separate bid for the tank work as a sub-contract. R.O. at 12-15. As for the Freeport LNG project, after learning that it was not awarded the entire project, CB&I withdrew from any particip

barrier to entry. Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997); see also FMC Corp., 170 F.3d at 531 . However, unlike FMC Corp. and Am. Prof'l Testing Serv., the Government presents something more than just generalized reputation as a market entry barrier. Instead, what the Government presents as "reputation" is CB&I's reputation for particular industry-specific traits. See Advo Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1202 & n.11 (3d Cir. 1995) ("[W]e do not question the judgment of other courts of appeals that in other market contexts reputation is a significant barrier to entry.") (citing Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1577 (11th Cir. 1991); U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988)); see also United Tote, 768 F. Supp. at 1075-76. Advo concludes that reputation evidence could be considered a market barrier if there is some limiting principle. Id. at 1202. The Government presents its reputation evidence in a limited fashion; "reputation" is considered in this case as a proxy for experience and success in building LNG projects in the United States, foremost an understanding of industry-specific U.S. regulations, labor force, and "cost-competitiveness." CB&I is therefore able to distinguish its brand within the industry as the foremost (and now only) domestic expert. Compare Op., at 58, with Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 529 n.12 (5th Cir. 1982) ("When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller touTD (n)Tj 7.9200 (iz)Tj

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CB&I also challenges the Commission's conclusion that regulatory experience with the Federal Energy Regulatory Commission ("FERC") is a barrier to entry. Ability to do FERC work is a component of the bidding proposal and CB&I, in its own advertising materials, advertises FERC's familiarity with and its respect for CB&I. Op. at 41 n.248. FERC expertise can be analogized to other technical prerequisites to doing business in a market that are considered barriers to entry. See United States v. Syufy Enters., 903 F.2d 659, 673 (9th Cir.1990) ("It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation."); Rebel Oil, 51 F.3d at 1439 (noting that one "main source[] of entry barriers" is "legal license requirements."); cf. Reazin v. Blue Cross & Blue Shield of Kan., 663 F. Supp. 1360, 1435-436 (D. Kan. 1987), aff'd, 899 F.2d 951 (10th Cir.), cert. denied, 497 U.S. 1005 (1990) (recognizing as an entry of barrier "the 'clout' with Kansas hospitals, which defendant itself recognizes."); United States v. Blue Bell, Inc., 395 F.Supp. 538, 549 (M. D. Tenn. 1975) (recognizing familiarity with setting up the business as a barrier to entry); Atl. Richfield Co., 439 F.2d at 295 (recognizing "technical expertise" as a barrier to entry). There is strong prima facie evidence from one customer that a lack of FERC experience is a deal-breaker and a reason to award CB&I sole-source contracts. Op., at 56-57. While we agree with CB&I that owners are responsible for filing applications and other outside consultants are available, the fact remains that as part of the bidding process, customers select LNG tank builders depending on whether they would be able to help with the highly technical application process as a component of a whole LNG tank building project. CB&I does present evidence that one foreign firm successfully guided a huge project towards FERC compliance. We cannot conclude that this single instance is production of sufficient evidence to rebut the Commission's finding on this issue; however,

even if it were, it is not sufficient evidence to rebut the Commission's general conclusion that high entry barriers exist in these markets based on the findings concerning the other two barriers.

c. The Control over the Specialized Labor Force

"Control of essential or superior resources" is a recognized barrier to entry. Image Technical Serv., Inc. v. Eastman Kodak, Co., 125 F.3d 1195, 1208 (9th Cir. 1997). "Employee skill levels required for a firm to be successful" can be considered a barrier to entry. See In Re IBM Peripheral EDP Devices Antitrust Litig., 481 F. Supp. 965, 976 (N.D. Cal. 1979). Here, the Government presents specific evidence that employee skills in cryogenic tank constructi

considered in this appeal. Assuming arguendo, however, the propriety of its consideration, CB&I still has not produced sufficient evidence to rebut the Government's prima facie case based on evidence that large and sophisticated customers continue to choose CB&I for sole-source contracts w

ability to:

> (a) Refus[e] to reveal the prices quoted by other suppliers and the price which a supplier must meet to obtain or retain business, creating uncertainty among suppliers.
> (b) Swing[ ] large volume back and forth among suppliers to show each supplier that it better quote a lower price to obtain and keep large volume sales.
> (c) Delay[ ] agreement to a contract and refusing to purchase product until a supplier accedes to acceptable terms.
> (d) Hold[ ] out the threat of inducing a new entrant into HFCS production and assuring the new entrant adequate volume and returns

Id. at 1418.

None of the factors apply to the present situation, in which: (a) Buyers cannot compare past bids not only because they are mostly confidential, but also because each project is unique; (b) As we noted earlier, the market has had only two dominant players, PDM and CB&I, so buyers cannot now swing back and forth between competitors to lower bids post-acquisition; (c) Instances of CB&I pressuring customers to offer sole-source contracts by withdrawing its bid and CB&I's success at obtaining sole-source contracts undermine any argument that buyers have the ability to pressure CB&I in contract negotiations; and (d) No buyer can assure that a new entrant has "adequate volume and returns" for meaningful entry into the market as there is no evidence that buying power is sufficiently concentrated.

In addition, courts have not considered the "sophisticated customer" defense as itself independently adequate to rebut a prima facie case. "Although the courts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness, courts have found that the existence of power buyers can be considered in their evaluation of an anti-trust case, along with such other factors as the ease of entry and likely efficiencies." Cardinal Health, 12 F. Supp.2d at 58; see also 4 Areeda &

[19] CB&I cites to Reynolds Metals Co. v. FTC, 309 F.2d 223, 230-231 (D.C. Cir. 1962), to suggest the Commission failed to distinguish between after-acquired properties

that though the assets are unrelated to the construction of cryogenic tanks, they are necessary to enable the separate entity to compete with CB&I on an "equal footing." "Total divestiture is not necessarily inappropriate even though the antitrust violation found relates to but one aspect of the company thus acquired, especially where, as here, total divestiture is deemed necessary to restore effective competition." OKC Corp. v. FTC, 455 F.2d 1159, 1163 (10th Cir. 1972). Total divestiture here "does not appear to be a remedy that 'has no reasonable relation to the unlawful practices found to exist.'" Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 940 (7th Cir. 2000) (quoting Seigel Co., 327 U.S. at 612-613). Here, the violation is the acquisition of a previously viable and independent entity capable of competing on an equal footing. The Commission's divestiture of the water pla

Natural Gas Co., 386 U.S. 129, 136-137 (1967), the Supreme Court assumed after-acquired assets may be included in the divestiture order, though the Court in Cascade Natural Gas remanded the case for an additional hearing on how assets should be divided. Here, instead of a hearing, the Commission devolved authority to decide what assets will be involved in the divestiture to CB&I and the monitor trustee. Permitting the respondent and a trustee to decide, instead of holding another court hearing, is within the Commission's broad authority to fashion relief. The Commission's remedy in this case is also possibly a superior and more efficient method to resolve the issue.

to become an entity equally capable of competing in the future; the order does not intend CB&I to be split into two equal halves. Id. Instead, the order carefully devolves discretion to CB&I and a third-party monitor to determine how assets must be divided to effectuate the order and its general remedial purpose. Op. at 95 ("[W]e have included a provision that allows the exclusion of the water assets if the acquirer and monitor trustee both find them unnecessary."). Accordingly, as we read the Commission's order, CB&I and the monitor are required to divest to the new separate entity no more nor less of the former PDM assets as are necessary for the new separate entity to compete with CB&I in the relevant markets on an equal footing. Construing the Commission's order as having this meaning and intent, we conclude that the Commission did not abuse its discretion, but instead fashioned a remedy reasonably calculated to eliminate the anti-competitive effects of CB&I's acquisition in violation of the Clayton and FTC Acts.[20]

B. A Separate Evidentiary Hearing Was Not Required In This Case

Finally, the petitioner argues that a hearing was required for the remedy phase of the proceedings separate from the liability phase. We disagree. Generally, a hearing is required if, for example, new evidence was not presented at trial or important factual issues were not resolved by the trier of fact in respect to the remedy. See Microsoft, 253 F.3d at 101-102; Am. Can Co. v. Mansukhani, 814 F.2d 421, 425 (7th Cir. 1987). We review the denial of an evidentiary hearing under an abuse of discretion standard. Alberti v.

[20] We also find the Commission's detailed decisions in both its Opinion and Decision on Petition for Reconsideration where remedy issues were discussed, see, e.g., R.O., at 23-24, as providing adequate reasons justifying the remedy and its relationship with its objectives. Unlike in United States v. Microsoft, 253 F.3d 34, 103 (D.C. Cir. 2001), which remanded due to the lack of an adequate explanation for the remedy, the Commission provided much more in form and substance than a "mere four paragraphs" to explain its remedy.

Klevenhagen, 46 F.3d 1347, 1358 (5th Cir. 1995). CB&I now proffers parts of the trial transcripts as evidence that a new evidentiary hearing should be offered. However, that evidence was considered by the Commission in fashioning the remedy imposed. CB&I does not present any new evidence or factual issues critical to the remedy phase not already considered by the trier of fact as a basis for a possible evidentiary hearing. The long trial below offered opportunities for both sides to extensively discuss the ramifications of possible remedies. See Op. at 93-106. The ALJ and the Commission both considered a great amount of evidence relating to the remedy before fashioning the remedial order. Id. There is thus no new factual dispute warranting a remand for an evidentiary trial. Id.

CB&I has proposed a remand because it was allegedly "surprised" by the extent of the remedy.[21] CB&I misconstrues the Commission's order, however, in arguing that the extent of the remedy was a "surprise." The remedy does not, as CB&I contends, create two "equal" tank companies. The remedy, as we have stated above, only requires the creation of two companies equally able to compete for bids in the relevant markets. Any interpretation

[21] Even assuming CB&I was surprised by the extent of the remedy, surprise itself does not merit reversal without allegations of prejudice. See Microsoft, 253 F.3d at 103; Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096, 1106 (5th Cir. 1972) ("[S]urprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice."). CB&I does not present any argument "that the lack of notice caused the complaining party to withhold certain proof which would show his entitlement to relief on the merits," thus we cannot reverse based on allegations of surprise alone. Id.