

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

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

To: Commission

**COMPLAINT COUNSEL’S ANSWER TO RESPONDENTS’ MOTION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, FOR A STAY**

Complaint Counsel file this response to Respondents’ Motion for Clarification or, in the Alternative, for a Stay (“Stay Motion”). Respondents (or “CB&I”) seek clarification of the Commission’s Final Order to confirm that the requirements of Paragraph III are provisions “to divest” within the meaning of Section 5(g)(4) of the Federal Trade Commission Act, 15 U.S.C. § 45(g)(4), and thus are automatically stayed pending Respondents’ appeal of the Commission’s Decision and the Final Order entered in Docket No. 9300.¹ In the alternative, Respondents request that the Commission exercise its discretion to stay the provisions of Paragraph III pending resolution of Respondents’ appeals.² Respondents present several arguments in support

¹ Stay Motion (February 1, 2005) at 1. Respondents represent that they intend to file an appeal. *Id.*

² Section 5(g)(2) of Act provides that any order of the Commission to cease and desist “may be stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission.” 15 U.S.C. § 45(g)(2). Section 3.56(b) of the FTC’s Rules of Practice

ARGUMENT

Paragraph III is not on its face a provision “to divest”; rather, it requires Respondents “to reorganize its Relevant Business into two independent, stand-alone operating divisions or

16 C.F.R. § 3.55. Other than as set forth in this Response to the Stay Motion, Complaint Counsel oppose Respondents’ request that any prescribed time periods be tolled and the Final Order as a whole be stayed during the Commission’s consideration of the Stay Motion or the Petition to Reconsider.

⁵ See Final Order, ¶ IV.A. Paragraph V of the Final Order further provides that if Respondents have not divested New PDM within the time and manner prescribed in Paragraph IV.A., the Commission may appoint a Divestiture Trustee to divest either New PDM or New CB&I.

⁶ Section 3.56 of the Commission’s Rules of Practice, 16 C.F.R. § 3.56, provides that an application for such a stay shall address:

the likelihood of the applicant’s success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to the other parties if a stay is granted, and why the stay is in the public interest.

Complaint Counsel observe that the reorganization requirements of Paragraph III are designed to work in concert with the Final Order's requirements to divest. These requirements would appear to be most effective at restoring competition when the reorganization and the divestiture occur reasonably close in time to each other. We draw this conclusion as well from the fact that the specific customer contracts that are a part of the Relevant Business of CB&I will change, perhaps significantly, over longer periods of time. Accordingly, to be most effective in establishing a marketable and economically viable entity, capable of competing independently with CB&I, we believe a reorganization of CB&I should occur when divestiture is imminent, *i.e.*, within ninety (90) days of the date on which the provisions of Paragraph IV to divest become final.

In addition, Complaint Counsel believe that requiring CB&I to reorganize its Relevant Business and operate as two distinct entities within the same company for an extended period of time pending completion of the appeal process presents an unnecessary risk of interim harm to customers and competition without providing any countervailing interim remedial benefit from establishing a truly independent competitor to CB&I during such period. The potential for inefficiencies and costs that might result from a reorganization not followed closely in time by divestiture may have the unintended consequence of raising costs and lowering service to customers and undermining the objective that the Final Order is intended to achieve. Complaint Counsel also believe that staying Paragraph III pending appeal will not unduly hamper the divestiture once the appeal process is exhausted.⁷ At that time, CB&I will have ninety (90) days

⁷ Complaint Counsel do not oppose a stay of Paragraph III during appeal even though Complaint Counsel believe Respondents are not likely to succeed on appeal.

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Stay Motion at 5.

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CONCLUSION

For the reasons herein, Complaint Counsel do not oppose Respondents' Stay Motion requesting a stay of Paragraph III of the Final Order pending appeal.

DATED: February 7, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I today caused:

One original and twelve copies of Complaint Counsel's Answer to Respondents' Motion for Clarification or, in the Alternative, for a Stay, to be served by hand delivery and one copy to be served by electronic mail upon:

Office of the Secretary