

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

In the Matter of	)	
	)	
CHICAGO BRIDGE & IRON COMPANY, N.V.,	)	<b>PUBLIC</b>
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.<sup>1</sup> In the alternative, Respondents request that the Commission exercise its discretion to stay the provisions of Paragraph III pending resolution of Respondents’ appeals.<sup>2</sup> Respondents present several arguments in support

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

<sup>2</sup> 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

of their request for entry of a discretionary stay of Paragraph III.

For the reasons herein, Complaint Counsel do not oppose Respondents' request for a discretionary stay of Paragraph III pending Respondents' appeal of the Final Order. Complaint Counsel recognize that Paragraph IV containing the requirement to divest is subject to the automatic stay of Section 5(g)(4), and that Paragraph V containing the divestiture trustee provisions is effectively stayed by the stay of Paragraph IV. Complaint Counsel also recognize that Paragraph III is not on its face a provision "to divest," nor would it effectively be stayed by a stay of Paragraph IV. Accordingly, a determination by the Commission as to the treatment of Paragraph III is appropriate. Complaint Counsel oppose a discretionary stay of any other Paragraph of the Order,<sup>3</sup> as we believe Respondents' compliance with the other requirements, such as the asset maintenance provisions, pending appeal are necessary to assure that the Commission's remedy is achieved.<sup>4</sup>

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provide that any party subject to a cease and desist order may apply for a stay of all or part of an order pending judicial review. 16 C.F.R. § 3.56(b).

<sup>3</sup> In particular, Paragraph II containing the Monitor Trustee provisions and Paragraph VI containing the asset maintenance provisions are not automatically stayed pending appeal and therefore, absent the grant of a discretionary stay, would become effective on the sixtieth day after service of the Final Order. 15 U.S.C. § 45(g)(2); 16 C.F.R. § 3.56 (a).

<sup>4</sup> Respondents also request that "the finality of the Order be tolled until such time as the Commission has ruled on this Motion." Stay Motion at 2; Respondents' Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth ("Petition to Reconsider") (February 1, 2005) at 1, 18. By this request, Respondents appear to seek a total stay of the Final Order pending the Commission's ruling on the Stay Motion and Respondents' Petition to Reconsider. The Commission's Rules explicitly provide that:

. . . [t]he filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

## 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 subsidiaries, respectively New PDM and New CB&I,” prior to divesting New PDM.<sup>5</sup> Therefore, absent a determination by the Commission or an appropriate court of appeals that Paragraph III is a provision “to divest,” the requirements of Paragraph III would not be stayed; however, the Commission may, in the exercise of its discretion, determine that these provisions should be stayed.<sup>6</sup>

In their Stay Motion, Respondents assert that a stay of Paragraph III is warranted. Although Complaint Counsel reach no conclusions as to the accuracy of the factual assertions made by Respondents in support of their Stay Motion, Complaint Counsel believe that a stay is appropriate in this case because of the potential that implementation of Paragraph III during a prolonged period of time pending appeal may have an adverse impact on the Commission’s contemplated remedy and on the customers of the Relevant Business.

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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.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup> At that time, CB&I will have ninety (90) days

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<sup>7</sup> 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.

to reorganize.

Finally, Respondents acknowledge that, absent a stay as provided pursuant to Section 5(g) of the FTC Act, the unstayed Final Order provisions become effective upon the sixtieth day after service of the Final Order.<sup>8</sup> In this case, completion of service of the Final Order on Respondents occurred on January 18, 2005. Pursuant to Section 5(g) of the Act, 15 U.S.C. § 5(g), other than as stayed by operation of the statute's provisions or by Commission (or court) action, the Final Order's requirements become final and effective on March 21, 2005. Accordingly, during the pendency of appeal, Respondents will be required to comply with the relevant asset maintenance provisions of the Final Order.<sup>9</sup> In addition, the Commission will have a Monitor Trustee in place to oversee that the Relevant Business is properly maintained and to provide guidance as to the most effective method for reorganization once Paragraph III becomes final.<sup>10</sup>

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<sup>8</sup> Stay Motion at 5.

<sup>9</sup> Respondents specifically have acknowledged that the requirements of Paragraph VI to maintain assets as they relate to the Relevant Business generally become binding when Paragraph VI becomes final, notwithstanding any stay of Paragraph III. Stay Motion at 10-11.

<sup>10</sup> *Id.* at 10. See Final Order ¶ II.

## 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  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

One copy to be served by hand delivery upon:

Nada Sulaiman  
Winston & Strawn  
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Commission Counsel

Dated: February 7, 2005