

in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

FTC Rules of Practice 3.36(b); 16 C.F.R. § 3.36(b).

As this Court explained in denying respondent's motion for the issuance of subpoenas in the Matter of Chicago Bridge & Iron Co., *et al.*, "the Commission, concerned about the numerous issues and potential conflicts that often arise in connection with issuing compulsory process to entities outside the United States, amended its Rules of Practice to require ALJ supervision of proposed foreign compulsory process." Order Denying Respondents' Motion for Issuance of Subpoenas (April 18, 2002) (attached as Appendix 1). Explaining the reasons behind the amendments, the Commission stated:

Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law. In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36.

citing 66 Fed. Reg. 17622 (F.T.C. April 3, 2001) (attached as Appendix 2). The Commission further explained that the requirements of Rule 3.36 are designed to "assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns" and to assure that exercise of compulsory process outside the United States will not be attempted unless domestic discovery and voluntary arrangements have been exhausted or are not available:

Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, *such discovery should only occur if a judge determines that the request is reasonable and that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.*

66 FR 17623 (F.T.C. April 3, 2001) (emphasis added). Thus, to effectuate the Commission's policy not to embroil the Commission in unnecessary international conflicts, it is important that Respondent be held to the standards the Commission established by amending Rule 3.36(b) specifically to avoid such conflicts.

II. Respondent Has Failed To Meet The Requirements of Rule 3.36(b)

In order to prevail in its motion for use of foreign compulsory process, Respondent must demonstrate that all four of the requirements of Rule 3.36(b) have been met. As explained below, Respondent has failed to satisfy its burden.

A. Respondent has failed to show that the testamentary evidence it seeks cannot reasonably be obtained from another source that is more convenient and less burdensome as required by Rule 3.36(b)(2)

Rule 3.36(b)(2) requires a specific showing that the material falls within the limits of discovery under § 3.31(c)(1). Commission Rule 3.31(c)(1) allows discovery of materials reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or to the defenses of any respondent, but also sets forth that discovery "shall be limited by the Administrative Law Judge if he or she determines that:

- (i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) The burden and expense of the proposed discovery outweigh its likely benefit."

16 C.F.R. § 3.31(c)(2). Respondent has failed to provide evidence that the concerns identified in Rule 3.31(c)(2) are not met and that the discovery it seeks from Mr. Fraser-Bell should be allowed.

In its motion, Respondent attempts to satisfy the requirement of 3.36(b)(2) by baldly asserting that Mr. Fraser-Bell “is believed to possess important evidence in this matter” concerning ENTEK’s battery separator sales and competitors in Europe, and “[t]his evidence cannot be obtained from sources other than Mr. Fraser-Bell.” Respondent’s claim is directly contradicted by ENTEK in recent pleadings: ENTEK explained in its January 9, 2009 Motion to Quash Respondent’s Subpoenas that ENTEK’s Vice President of Sales and Marketing, Mr. Daniel Weerts, who is employed and resides in the United States, is the person most knowledgeable about the specifications in the subpoena served by Respondent on ENTEK. (See Third Party ENTEK International LLC’s Memorandum in Support of Motion to Quash Subpoenas Ad Testificandum Issued to Graeme Fraser-Bell and Robert Keith Pursuant to 16 C.F.R. § 3.34(c) (“ENTEK Motion to Quash”) at 7.) This suggests that the information Respondent seeks from Mr. Fraser-Bell can be obtained more easily from Mr. Weerts, and with less burden and expense. Moreover, since “the vast majority of information sought from Mr. Fraser-Bell” may be obtained by deposing Mr. Weerts, any deposition of Mr. Fraser-Bell by Respondent will be largely duplicative of Mr. Weerts’s testimony. *Id.*

Finally, conducting a deposition in the United Kingdom would be a costly endeavor for all concerned. The Court should consider whether the burden and expense of taking discovery in the United Kingdom will likely be outweighed by the benefit of any non-duplicative evidence discovered during the deposition.

- B. Respondent has failed to make the required showing that the evidence cannot reasonably be obtained by other means as required by Rule 3.36(b)(3)**

Rule 3.36(b)(3) requires Respondent to make a specific showing that “the information or material sought cannot reasonably be obtained by other means.” The Federal Register notice accompanying the publication of the rule explains that:

[foreign] discovery should only occur if a judge determines that . . . other means of obtaining the information (*such as domestic discovery or voluntary arrangements*) have been exhausted or are not available.

66 Fed. Reg. 17623, (F.T.C. April 3, 2001) (emphasis added). This is consistent with the express policy of the United States and other nations to minimize conflicts in the enforcement of antitrust laws that can arise from, *inter alia*, attempts to enforce discovery outside the territory. Thus, the United States antitrust agencies adhere to principles of international comity by taking into account the interests of the affected foreign country in conducting law enforcement proceedings.¹ This policy is also embodied in international instruments such as the OECD Recommendation on antitrust cooperation, which calls for member countries to consider whether information is available from sources within their national territory before seeking foreign discovery and to seek voluntary production of foreign-located evidence before resorting to the use of compulsory process.²

Respondent does not explain how it has exhausted other means of obtaining the information that it contends Mr. Fraser-Bell holds. Respondent makes no attempt to explain

¹ See, e.g., Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations ¶ 3.2 (April 1995) (“DOJ & FTC, Antitrust Enforcement Guidelines”) (“In enforcing the antitrust laws, the Agencies consider international comity.”).

² Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Business Practices Affecting International Trade, OECD Doc. C (95)130 (Final) (July 1995) (attached as Appendix 3). See also Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations ¶ 4.2 (April 1995).

why it cannot discover the information it seeks from other sources located in the United States. Moreover, since Respondent has issued *subpoenas duces tecum* and *ad testificandum* to ENTEK and a subpoena *ad testificandum* to Daniel Weerts, ENTEK's Vice President of Marketing and Sales, which seeks the same information Respondent seeks from Mr. Fraser-Bell, Respondent cannot be deemed to have exhausted domestic sources.

C. Respondent has failed to show that the discovery requested would be permitted by treaty, law, custom or practice as required by Rule 3.36(b)(4)

Rule 3.36(b)(4) requires that a motion applying for issuance of a subpoena to be served in a foreign country show:

that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

Respondent asserts "a good faith belief that the deposition of Mr. Fraser-Bell is permitted in the United Kingdom." Respondent's belief is based on the United States and United Kingdom both being signatories to the "Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters" ("Hague Convention"). Respondent also cites to a U.S. Department of State's briefing paper entitled "Judicial Assistance United Kingdom," for the proposition that "Respondent can hire a British solicitor to take the deposition of Mr. Fraser-Bell in the U.K."

Respondent's "good faith belief" falls short of the requirements of 3.36(b)(4) in at least two respects. First, the Hague Convention does not provide for the use of subpoenas to obtain information abroad. Rather, the three established methods are by letter of request,³ by consular

³ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Article
(continued...)

or diplomatic official,⁴ or by appointed commissioner.⁵ The first method can be compulsory, while the latter two can only be used with willing witnesses (an obvious nullity in this case where ENTEK has moved to quash Respondent's subpoena *ad testificandum* to Mr. Fraser-Bell).⁶ Thus, Respondent cites no legal authority supporting the issuance of the requested process.

Respondent's motion additionally fails to mention other likely legal impediments to the use of compulsory process to obtain evidence in the United Kingdom. Notably, the United Kingdom⁷ has enacted a blocking statute that can limit or prohibit subpoenaed parties from producing evidence in connection with a foreign legal proceeding. Impediments to obtaining personal jurisdiction and to effecting valid service can also render it, at a minimum, highly problematic, to obtain evidence consistent with U.K. law and practice. Additionally, Respondent offers no assurances that discovery of Mr. Fraser-Bell could be completed pre-trial. Complaint Counsel opposes any delay in the proceedings to accommodate superfluous foreign discovery.

In sum, Respondent's motion does not set forth a basis for "a good faith belief" that their discovery request would be permitted by treaty, law, custom or practice in the country from which the discovery is sought.

³ (...continued)
1, *codified at* 28 U.S.C. § 1781.

⁴ *Id.*, Article 15.

⁵ *Id.*, Article 17.

⁶ *Id.*, Articles 1, 15, 17.

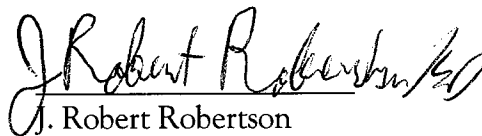
⁷ Protection of Trading Interests Act 1980, *reprinted in* 1 Bruno Ristau, International Judicial Assistance Civil and Commercial (1990 Revision) at CI-236.

III. Conclusion

For the reasons stated herein, Respondent has not made the necessary showing under Rule 3.36(b) to justify foreign discovery. Accordingly, Respondent's motion for authorization to conduct foreign discovery should be denied.

January 23, 2009

Respectfully submitted,



J. Robert Robertson
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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

_____)
In the Matter of)
)
Polypore International, Inc.) Docket No. 9327
a corporation.)
_____)

[PROPOSED] ORDER

Upon consideration of Respondent's Motion For Leave To Take The Deposition Of Graeme Fraser-Bell In The United Kingdom Pursuant To 16 C.F.R. § 3.36(b) dated January 14, 2009, and Commission Counsel's response thereto, it is HEREBY ORDERED AND ADJUDGED THAT, based upon Respondent's failure to satisfy the requirements of Rule 3.36 of the Federal Trade Commission's Rules of Practice, Respondent's motion is DENIED.

ORDERED:

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2009 I filed *via* hand and electronic mail delivery an original and two copies of the foregoing with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580


I hereby certify that on January 23, 2009, I served *via* electronic mail and mail delivery a copy of the foregoing with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oyalj@ftc.gov

I hereby certify that on January 23, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing with:

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By.



Linda Cunningham
Federal Trade Commission
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Washington, DC 20580
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APPENDIX 1

§ 337.6 [Amended]

2. Section 337.6(e) is removed and reserved.

By order of the Board of Directors.

Dated at Washington, D.C., this 26th day of March, 2001.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 01-8100 Filed 4-2-01; 8:45 am]

BILLING CODE 6714-01-P

FEDERAL TRADE COMMISSION**16 CFR Parts 2, 3 and 4****Rules of Practice**

AGENCY: Federal Trade Commission (FTC).

ACTION: Interim rules with request for comments.

SUMMARY: The Commission is updating and making other technical corrections and changes to its regulations on Organization, Procedures and Rules of Practice.

DATES: These rule amendments will be effective May 18, 2001. Comments must be received on or before May 4, 2001. These amendments will govern all Commission adjudicatory proceedings commenced on or after May 18, 2001. They will also govern all pending Commission adjudicatory proceedings commenced before May 18, 2001 unless, in the opinion of the Administrative Law Judge (ALJ) or the Commission, the application of one or more amended rules in a particular proceeding would not be feasible or would work injustice.

ADDRESSES: Written comments must be submitted with 20 copies to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: John Graubert, Office of General Counsel, FTC, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326-2186, jgraubert@ftc.gov.

SUPPLEMENTARY INFORMATION: The Commission has periodically examined and revised its rules of practice in the interest of clarifying the rules and making the Commission's procedures more efficient and less burdensome for all parties.¹ The Commission is further amending parts 2, 3 and 4 of its rules, 16 CFR parts 2, 3 and 4, to update and make other technical clarifications,

corrections, and changes to the rules, as follows.

Reports of Compliance

To facilitate the processing and review of compliance reports, Rule 2.41(a) is being amended to provide (1) that an original and one copy of each such compliance report should be filed with the Secretary of the Commission, and (2) that, at the same time, one additional copy should be filed with the Associate Director for Enforcement in the Bureau of Consumer Protection (for consumer protection orders) or with the Assistant Director for Compliance in the Bureau of Competition (for competition orders).

Pretrial and Discovery

Responsive Motions: Rule 3.12(a): In federal court practice, Federal Rule of Civil Procedure 12(a)(4) provides that the filing of a "motion permitted under this rule" tolls the period for answering a complaint. Commission Rule 3.12(a) generally follows the federal rule but mentions only a motion for a more definite statement. Although other motions, such as motions to dismiss, are undoubtedly rare at the outset of FTC administrative proceedings, there is no reason to exclude such dispositive motions from the rule. Making Rule 3.12(a) consistent with Fed. R. Civ. P. 12(a)(4) will spare the parties and ALJ the additional inconvenience of arranging extensions of time to answer in individual cases where such motions are filed.

Initial Pretrial Conferences: Rule 3.21(b): Under the Commission's 1996 Rule amendments, the ALJs must hold a scheduling conference not later than seven (7) days after the last answer is filed. Although the 1996 amendments were designed to expedite administrative litigation, this is one instance in which some additional time might actually make the proceedings more efficient. As a practical matter, particularly in cases when service on one or more respondents is complicated for any reason (e.g., overseas service), it has proved difficult to predict when the last answer will be filed and difficult to schedule and plan for a scheduling conference in this narrow seven-day window. Moreover, two days after the initial scheduling conference, no matter how hastily convened, the ALJ is required to issue a prehearing scheduling order based in part on the results of the conference. See Rule 3.21(c). Because the Commission wants the parties to exchange disclosures and have meaningful discussions about the proceeding before the scheduling conference in order to identify and

attempt to narrow the issues in the case, which will also assist the ALJ in crafting a meaningful pretrial order, the Commission will make a modest enlargement of the period in Rule 3.21(b) from seven to fourteen (14) days.

Adjudicative Motions: Rule 3.22: When the Commission amended the Part 3 Rules in 1996, it approved a change to Rule 3.22(b) to require "that all motions in adjudicative proceedings include the name, address, and telephone number of counsel, and attach a draft order containing the proposed relief." See 61 FR 50640, 50644. This language was inadvertently omitted from the revised Rule itself, as published in the **Federal Register** and later incorporated into the Code of Federal Regulation (although part of this requirement is contained in Rule 4.2(e)(1)). In addition to making this change in Rule 3.22, the amended rule will also require counsel to provide a fax number and e-mail address, if any, along with name, address and phone number.

Summary Decision: Rule 3.24(a)(2): The rule currently provides that a decision shall be rendered "within thirty (30) days." For clarity, the Rule is being amended to specify that the decision is due within thirty (30) days after the opposition or any final brief ordered by the ALJ is filed.

Expert Discovery: Rule 3.31(c)(4)(i): Under the Commission's current rule, discovery of experts is handled principally by interrogatory. Further discovery, including depositions, requires an order from the ALJ. The amended Rule, reflecting the development of practice in recent years under the Federal Rules of Civil Procedure, generally provides for disclosure of expert opinions and depositions of experts. Rule 3.31(c)(4)(B)(iii), regarding payment of expert fees for certain discovery, is deleted. The ALJ can address any issues regarding fees or costs under Paragraph (d) of this rule.

Depositions: Rule 3.33(a): The amended Rule incorporates a provision modeled on Federal Rule of Civil Procedure 30(b)(7), which permits the parties to stipulate or the court to order that a deposition may be taken by telephone or other remote electronic means.

Foreign Discovery: Rule 3.36: Since the 1996 amendments to the Rules, parties may issue subpoenas for depositions or production of documents without prior approval or supervision from the ALJs, except when the discovery request seeks information or testimony from another governmental agency. For discovery involving other

¹ See, e.g., 61 FR 50640 (Sept. 26, 1996); 50 FR 41485 (Oct. 11, 1985).

government agencies, the parties have to file a motion with the ALJ, who determines whether the request is reasonable in scope and whether the information sought cannot be reasonably obtained by other means. See Rule 3.36(b). For all other discovery, the parties obtain subpoena forms identifying the Part 3 matter at issue (but executed in blank as to the subpoena target) from the Secretary's office, and deliver them on their own. See Rule 3.34(a). These subpoenas include the seal of the agency, are signed by the Secretary, and bear every indication of being official agency documents.

Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law.² In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36. Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, such discovery should only occur if a judge determines that the request is reasonable and that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.³

Parties seeking foreign discovery must also make a good faith demonstration before the ALJ that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served. This does

not mean that the ALJs will be expected to make rulings on questions of foreign law. This showing, together with the other requirements of Rule 3.36(b), will merely assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns.

There is no comparable need at this time for rule revisions regarding discovery requests served within the United States that may require production of documents located abroad (in foreign offices of multinational corporations, for example). Cases arising under similar statutory provisions confirm that such discovery requests are authorized by the FTC Act and are not likely to present the same extraterritoriality concerns as actual service of discovery requests abroad.⁴

Rule 3.36 is also being amended to add a new subsection (c), to make it clear that each subpoena issued pursuant to an order of the ALJ under Rule 3.36 shall be signed by the Secretary, but must have attached to it, and be served in conjunction with, a copy of the Order authorizing its issuance.

Rule 3.34, the rule providing for issuance of subpoenas in blank, is amended to make clear that that procedure does not apply to discovery requests covered by Rule 3.36. Finally, the reference to § 3.31(b)(1) in § 3.36(b)(2) to § 3.31(c)(1).

Orders Compelling Witness Testimony: Rule 3.39(a): For completeness, this rule should specifically include Directors and Deputy Directors of Bureaus, Assistant Directors in the Bureau of Competition, Associate Directors in the Bureau of Consumer Protection, and Regional Directors and Assistant Regional Offices, to reflect the current organization of the Bureaus.

Filing of Documents Other Than Correspondence

In order to facilitate the filing, receipt, and processing of documents submitted to the Commission, in both adjudicative and nonadjudicative proceedings—and to accommodate the need to secure electronic copies of such documents in a routine, systematic, and efficient manner—Rule 4.2 has been amended in a number of respects:

Copies: Rule 4.2(c): The present Rule 4.2(c) requires the filing of an original and twenty (20) copies of "all documents before the Commission" and

certain motions before an ALJ, and an original and ten (10) copies of all other documents before an ALJ. In light of the rule amendments regarding electronic filing, discussed below, and to reduce the burden of the filing process as much as possible, this rule is amended to require the filing of a paper original and twelve (12) copies of documents filed before the Commission, and the paper original and only one (1) paper copy of each document filed before an ALJ in an adjudicative proceeding. The current Rule 4.2(c) also requires the filing of "an original and one copy of compliance reports" and the filing of "one (1) copy of admissions and answers thereto." As noted above, the first requirement has been transferred to Rule 2.41, which deals with the filing of compliance reports, and therefore need no longer appear in Rule 4.2(c). Similarly, the second requirement replicates the requirement covering admissions and answers thereto already set forth in Rule 3.32, and therefore need no longer appear in Rule 4.2(c) as well. In addition, Rule 4.2(c) currently requires parties filing motions to provide copies to the ALJ at the time such motions are filed with the Secretary. Because this requirement already appears in Rule 3.22, and is being added to Rule 4.4(b), it may also be removed from Rule 4.2(c).

Electronic Filing: Rule 4.2: The Rule is amended in a number of respects to reflect current practices and technology. First, the amended rule requires the submission to the Commission of electronic copies of pleadings, motions, briefs, and all other filings in adjudicative proceedings—whether before the Commission or an ALJ—and of all other formal filings before the Commission, such as petitions to limit or quash and appeals from rulings thereon; requests to reopen or modify; and applications for approval of proposed divestitures, acquisitions, or similar transactions.

The Commission notes that other agencies have had electronic filing requirements for many years,⁵ and that the burden of this proposal on the public is likely to be negligible at this point. The use of electronic word-processing equipment is virtually universal, certainly among parties appearing before the Commission. In case of extreme hardship, however, the Secretary is empowered to excuse a party from this requirement. The rule follows the format requirements used in the Commission's request for nominations for the Advisory Committee on Online Access and

² See *CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984) (district court lacks jurisdiction to enforce a CFTC investigative subpoena served on a foreign citizen in a foreign nation); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (FTC Act does not authorize service of subpoenas abroad by registered mail). These issues are less likely to arise with Civil Investigative Demands served at the behest of Commission staff, because section 20(c)(7)(b) of the FTC Act specifically provides for foreign service of CIDs.

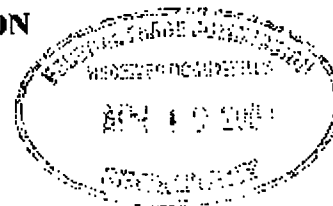
³ See, e.g., Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C. (95)130 (Final) (July 1995) at Appendix ¶ 8(a)–(c); U.S. Dept. of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations § 4.2 (April 1995).

⁴ See *FMC v. DeSmedt*, 366 F.2d 464 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *accord CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979).

⁵ See, e.g., 49 CFR 1104.3(a) (Surface Transportation Board).

APPENDIX 2

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.)
a foreign corporation,)
)
CHICAGO BRIDGE & IRON COMPANY,)
a corporation, and)
)
PITT-DES MOINES, INC.,)
a corporation.)

DOCKET NO. 9300

ORDER DENYING RESPONDENTS'
MOTION FOR ISSUANCE OF SUBPOENAS

I.

On April 5, 2002, Respondents filed a motion for the issuance of several subpoenas *duces tecum* and subpoenas *ad testificandum*. Respondents' motion is filed pursuant to Rule 3.36 of the Commission's Rules of Practice which requires a party seeking the issuance of a subpoena to be served in a foreign country to file a motion demonstrating that the requirements of Rule 3.36(b) have been met. 16 C.F.R. § 3.36. Complaint Counsel filed its opposition on April 17, 2002. For the reasons set forth below, Respondents' motion is DENIED WITHOUT PREJUDICE.

II.

Rule 3.36(b) of the Commission's Rules of Practice requires the party seeking issuance of a subpoena to be served abroad to make specific showings that:

- (1) the material sought is reasonable in scope;
- (2) the material sought falls within the limits of discovery under § 3.31(c)(1);
- (3) the information or material sought cannot reasonably be obtained by other means; and
- (4) the party seeking discovery has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

16 C.F.R. § 3.36(b).

In 2001, the Commission, concerned about the numerous issues and potential conflicts that often arise in connection with issuing compulsory process to entities outside the United States, amended its Rules of Practice to require ALJ supervision of proposed foreign compulsory process. Explaining the reasons behind the amendment to the FTC's Rules of Practice, the Commission stated:

Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law. In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36.

Federal Trade Commission Amendments to Rules of Practice, 66 Fed. Reg. 17622, 17623

(F.T.C. April 3, 2001.) The Commission further explained that the requirements of Rule 3.36 are designed to "assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns" and to assure that exercise of compulsory process outside the United States will not

be attempted unless domestic discovery and voluntary arrangements have been exhausted or are not available:

Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, such discovery should only occur if a judge determines that the request is reasonable and that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.

66 Fed. Reg. at 17623.

The requirement of Rule 3.36(b)(4) stems from the statutory limitations on the subpoena powers of the Federal Trade Commission. Section 9 of the Federal Trade Commission Act authorizes the Commission to compel depositions and the production of documentary evidence from any place in the United States. 15 U.S.C. § 49. In *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the Court of Appeals for the D.C. Circuit, in interpreting the statutory provision similar to Section 9 of the Federal Trade Commission Act which authorized the Commodity Futures Trading Commission to compel the attendance of witnesses and the production of documents "from any place in the United States," held that a district court is without jurisdiction to enforce an investigative subpoena served on a foreign citizen in a foreign nation. *Id.* at 496.

Under *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), a subpoena issued by an administrative agency of the United States must not violate international law. "When an American regulatory agency directly serves its compulsory process upon a citizen of a foreign country, the act of service itself constitutes an exercise of American sovereign power within the area of the foreign country's territorial sovereignty." *Id.* at 1304.

“Such an exercise constitutes a violation of international law.” *Id.* at 1313. “The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body’s conduct.” *Id.* at 1315.

To effectuate the Commission’s policy not to embroil the Commission in unnecessary international conflicts, Respondents will be held to the standards the Commission established by amending Rule 3.36(b).

III.

As set forth below, Respondents have failed to satisfy its burden of proof in demonstrating that the four requirements of Rule 3.36(b) have all been met.

- (1) Respondents have not demonstrated that the material sought is reasonable in scope.**

Respondents have not demonstrated with sufficient specificity that the material sought is reasonable in scope. 16 C.F.R. §§ 3.34(b); 3.36(b)(1). Respondents’ motion simply lists the foreign companies from which they seek discovery and generally describes the materials they seek. This is not sufficiently specific for a motion seeking discovery from foreign sources.

- (2) Respondents have not demonstrated that the material sought falls within the limits of discovery under § 3.31(c)(1).**

Commission Rule 3.31(c)(1) allows discovery of materials reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief or the defense of any respondent, but also sets forth that discovery may be limited by the ALJ if the material sought is unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive, or if the burden and expense of the proposed

discovery outweighs its likely benefit.

Complaint Counsel, in its opposition, states that Respondents have already issued subpoenas *duces tecum* and *subpoenas ad testificandum* directing thirteen companies to designate one or more officers, directors, managing agents, or other persons to testify on their behalf regarding: (1) foreign and domestic suppliers and manufacturers of cryogenic tanks worldwide; (2) the ability of foreign companies to compete in the U.S. market for cryogenic tanks; (3) the ability of foreign and domestic companies to enter the U.S. market for cryogenic tanks; (4) the ability of foreign companies to hire and utilize U.S.-based field crews in the U.S. market for field erection of cryogenic tanks; (5) attempts by Skanska/Whessoe, Tokyo Kanetsu K.K. (TKK), Entrepouse, Bouygues/Technigaz, Tractebel, MHI, IHI, Technip/Coflexip or any other foreign company to enter the U.S. market for cryogenic tanks; (6) the extent to which foreign companies are aware of, and are able to work with, U.S. design codes and the domestic infrastructure needed to compete in the U.S. market for cryogenic tanks; (7) methods used (or able to be used) by foreign companies in conducting the construction phase of field-erected cryogenic tanks; and (8) foreign and domestic suppliers and manufacturers of cryogenic tanks and/or vacuum chambers worldwide. These sources should be able to provide Respondents with the information they seek, such that discovery from foreign sources would be cumulative or duplicative.

Respondents have not shown that they cannot obtain information regarding foreign suppliers' activities in the United States from customers or from the U.S. partners of the foreign suppliers. Because Respondents have not demonstrated that they cannot obtain the information requested from domestic sources, Respondents have not demonstrated that the information is not

available in a manner that is more convenient, less burdensome, and less expensive than foreign discovery.

- (3) **Respondents have not demonstrated the information or material sought cannot reasonably be obtained by other means.**

Rule 3.36(b)(3) requires respondents to make a specific showing that “[t]he information or material sought cannot reasonably be obtained by other means.” 16 C.F.R. § 3.36(b)(3). The Federal Register notice accompanying the amendment to Rule 3.36 explains that:

[foreign] discovery should only occur if a judge determines that . . . other means of obtaining the information (*such as domestic discovery or voluntary arrangements*) have been exhausted or are not available.

66 Fed. Reg. at 17623 (*emphasis added*). This is consistent with the express policy of the U.S. and other nations to minimize conflicts in the enforcement of antitrust laws that can arise from attempts to enforce discovery outside the territory.

As discussed above, Respondents have failed to demonstrate that they cannot obtain the information from domestic sources. In addition, Respondents have not demonstrated that they cannot obtain the requested evidence voluntarily from the foreign companies. See Commission Statement, 66 Fed. Reg. at 17623 (*citing* OECD Revised Recommendation, OECD Doc. C (95)130 (Final) (July 1995); DOJ & FTC, Antitrust Enforcement Guidelines.) The Antitrust Enforcement Guidelines For International Operations issued by the U.S. Department of Justice and the Federal Trade Commission provide:

In conducting investigations that require documents that are located outside the United States, or contacts with persons located outside the United States, the Agencies first consider requests for voluntary cooperation when practical and consistent with enforcement objectives.

DOJ & FTC, Antitrust Enforcement Guidelines ¶ 4.2. (April 1995). Respondents have made no

showing in their motion that they have contacted the foreign companies to determine whether they will voluntarily provide documents, statements, or deposition testimony.

- (4) **Respondents have not demonstrated that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served, as is required by law.**

Respondents have represented that each of the companies from which they seek discovery are located in countries that have agreed to abide by the terms of the Hague Convention.

Respondents further assert that, in general, for countries that have adopted the Hague Convention, the international discovery process can be summarized as the following government to government transaction: a U.S. judicial proceeding makes a request to the U.S. government who in turn makes a request its foreign government counterpart, who likewise makes a request to its judicial equivalent, who then decides whether or not to grant the request and order the discovery on a particular entity or person.

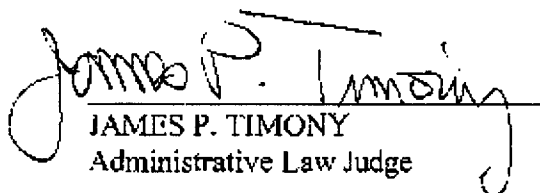
In its opposition, Complaint Counsel asserts that two of the countries from which Respondents seek discovery are not parties to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, which provides for the transmittal of letters rogatory or request in civil or commercial judicial proceedings. Complaint Counsel further argues that another two countries from which Respondents seek discovery may not consider a non-criminal antitrust case filed by a government in an administrative proceeding to be a "civil or commercial matter" within the scope of the Hague Convention. In addition, Complaint Counsel states that two of the countries have enacted blocking statutes that can limit or prohibit subpoenaed parties from producing evidence in connection with a foreign legal proceeding.

To make a good faith showing that the discovery requested would be permitted by treaty requires more than a bald assertion that the countries in which the proposed deponents and materials are located are signatories to the Hague Convention. Although Respondents assert that they intend to prepare the necessary papers in conjunction with local counsel in each of the relevant countries, Respondents have not demonstrated this is legally sufficient or would fulfill all procedural requirements under the laws of each of the countries from which Respondents seek discovery. Accordingly, Respondents have failed to demonstrate that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

IV.

Because Respondents have not satisfied the requirements of Commission Rule 3.36(b), Respondents' motion for issuance of a subpoena is DENIED WITHOUT PREJUDICE.

Dated: April 18, 2002


JAMES P. TIMONY
Administrative Law Judge

APPENDIX 3

