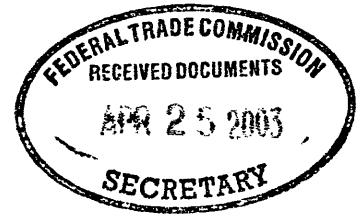


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
)
UNION OIL COMPANY OF)
CALIFORNIA,)
)
a corporation.)
)
)
_____)

Docket No. 9305

To: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION FOR LEAVE TO FILE REPLY**

Respondent Unocal moved to dismiss the Complaint and Complaint Counsel responded by showing that Unocal’s arguments were unfounded in law and the facts as alleged in the Complaint. Under the Commission’s Rules of Practice, the briefing ends there: “The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.” Rule 3.22(c). This Tribunal has denied leave to file a reply brief on other occasions. *In the Matter of Chicago Bridge & Iron Company N.V.*, Docket No. 9300 (Order dated January 28, 2003) (a copy is attached).

Rule 3.22(c) prohibits reply filings because it would be unfair to allow the moving party to place new material in the record without affording the opposing party an opportunity to respond. Respondent has submitted a brief (without leave of the Tribunal) that goes much further than simply correcting a “typographical error.” (Respondent’s Response to Complaint Counsel’s Statement Regarding Unocal’s Motion at 3).¹ Respondent’s reply reargues its motion

¹ Complaint Counsel does not object to filings that are properly limited to correcting citation and typographical errors. However, Respondent’s motion goes significantly further than correcting a typographical error, as evidenced by Respondent’s proposed Order, which labels

and cites new law (the district court's opinion in *Crossroads Cogeneration*) without an opportunity for Complaint Counsel to respond. This is the type of unfair and inappropriate rebuttal that Rule 3.22(c) prohibits.

Respondent's motion further suffers because the new precedent relied upon – the district court's decision in *Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc.*, 969 F. Supp. 907 (D.N.J. 1997), *rev'd in part and aff'd in part*, 159 F.3d 129 (3rd Cir. 1998) – involved a plaintiff that failed to make **any** allegations concerning the relevant market nor the barriers that would prevent the plaintiff's entry into the relevant market.² As set forth more fully in Complaint Counsel's opposition to Unocal's motion to dismiss, the Complaint is replete with sufficient allegations about the relevant market and the significant barriers to entry that sustain Respondent's monopoly power in the relevant market. *See* Complaint Counsel's Opposition to Unocal's Motion for Dismissal of the Complaint for Failure to Make Sufficient Allegations that Respondent Possesses or Dangerously Threatens to Possess Monopoly Power at 6-11 and 15-17.

Respondent's motion as "Unocal's Response to Complaint Counsel's Accusation."

² If Respondent's cite is actually to *Crossroads Cogeneration* rather than *Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280, 407 (1984), the citation is puzzling because *Crossroads Cogeneration* does not hold that the **defendant** must be a competitor in the relevant market (as argued by Unocal); rather, the passage cited by Respondent focuses entirely on whether or not the **plaintiff** was a participant in the relevant market. *Crossroads Cogeneration*, 969 F. Supp. at 914 ("Plaintiff fails to allege such necessary facts as defendant's market share in the markets in which **plaintiff** is a competitor or the barriers that exist which prevent **plaintiff's** entry into such markets") (emphasis supplied); *see also Crossroads Cogeneration*, 159 F.3d 129, 141 (3rd Cir. 1998) (quoting district court's opinion).

Respondent has shown no good cause for filing a reply brief and, accordingly,
Respondent's motion should be denied.

Dated: April 25, 2003

Respectfully submitted,


J. Robert Robertson

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3498

UNITED STATES OF AMERICA
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 ON RESPONDENTS' MOTION FOR
DIRECTED VERDICT ON THE ISSUE OF REMEDY**

I.

On January 13, 2003, Respondents filed their Motion for Directed Verdict on the Issue of Remedy. Complaint Counsel filed its opposition to Respondents' motion on January 23, 2003. On January 24, 2003, Respondents filed a motion for leave to file a reply to Complaint Counsel's opposition. Complaint Counsel filed an opposition to the motion for leave to file a reply on January 28, 2003. The motion for leave to file a reply is DENIED. For reasons set forth below, the motion for directed verdict is DENIED WITHOUT PREJUDICE.

II.

Respondents seek a directed verdict on the issue of remedy. Respondents assert that because Complaint Counsel has completed its presentation of evidence and because Complaint Counsel did not present evidence regarding the practicality, desirability or effectiveness of Complaint Counsel's proposed remedy, directed verdict is appropriate pursuant to Rule 3.22(e) of the Commission's Rules of Practice.

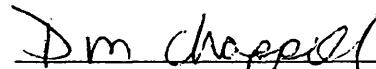
Rule 3.22(e) of the Commission's Rules of Practice sets forth: "[w]hen a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge may defer ruling thereon until immediately after all evidence has been received and the hearing record is closed." 16 C.F.R. § 3.22(e).

Complaint Counsel's opposition asserts that a motion for directed verdict makes little sense in an administrative proceeding where there is no jury. Complaint Counsel further asserts that divestiture is required if a violation of Clayton Act § 7 is found.

III.

The trial of this matter concluded on January 16, 2003. The record was closed on January 28, 2003. Post trial briefing has been scheduled. Commission Rule 3.22(e) authorizes the filing of a motion to dismiss at the close of the government's case. However, Respondents' motion raises substantive issues that, at this point in the proceedings, are better addressed after a thorough review of the record and full briefing on all the legal issues raised by the violations alleged in the Complaint and any defenses thereto. Accordingly, the motion is DENIED WITHOUT PREJUDICE. The issues raised by this motion and opposition may be incorporated into the post trial briefs and will be addressed, as appropriate, in the Initial Decision.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: January 28, 2003

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

UNION OIL COMPANY OF)
CALIFORNIA,)
a corporation.)
)
_____)

Docket No. 9305

ORDER

On April 23, 2003, Respondent filed a Motion for Leave to Respond to Complaint Counsel's Statement Regarding Unocal's Motion to Dismiss. On April 25, 2003, Complaint Counsel filed an Opposition to Respondent's motion. Having fully considered Respondent's motion and Complaint Counsel's opposition thereto, the Court denies Respondent's motion.

IT IS HEREBY ORDERED that Respondent's motion is denied in its entirety.

D. Michael Chappell
Administrative Law Judge

Date: _____, 2003

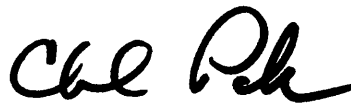
CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2003, I caused a copy of Complaint Counsel's Opposition to Unocal's Motion for Leave to Respond to Complaint Counsel's Statement Regarding Unocal's Motion to be served on the following persons:

The Honorable D. Michael Chappell (by hand)
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

David W. Beehler, Esq. (by overnight delivery)
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2800 LaSalle Plaza
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(612) 349-8500

Counsel for Unocal Corporation



Chul Pak