UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 8, 2010

VIA E-MAIL AND EXPRESS MAIL

Messrs. Ramón González Cordero and
Ramón González Simonet
c/o Néstor Méndez-Gómez, Esquire
Pietrantoni Mendez & Alvarez LLP
Popular Center 19th Floor
San Juan, PR 00918

Re: *Request for Rehearing of Denial of Ramón González Cordero's and Ramón González Simonet's Petition to Quash or Modify Civil Investigative Demand and Subpoena* Ad Testificandum, File No. 091-0115

Dear Mr. Méndez-Gómez:

This letter advises you of the Commission's disposition of Petitioners' Request for Rehearing of Denial of Petition to Quash or Limit Compulsory Process in the Matter of Empire Gas Inc. and Liquilux Gas Corp. filed on December 10, 2009 ("Request"). On November 19, 2009, Petitioners Ramón González Cordero and Ramón González Simonet, officers, directors, and stockholders of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CIDs") and subpoenas ad testificandum ("Petition") on the ground that the FTC Act does not give the FTC jurisdiction to investigate the conduct of Empire and Liquilux based on the state action doctrine. On December 3, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying the Petition on the grounds that the state action doctrine, if applicable, is an affirmative defense that must be asserted during the trial of any FTC claims alleging antitrust or FTC Act[1] violations.[2]

Petitioners now request a rehearing of the issues raised by the Petition before the full Commission. No new evidence or arguments are presented in support of this rehearing request. Additionally, you ask the Commission to stay the return of the subpoenas until: (1) the Commission's decision on the Request; and (2) the Commission's compliance with Rule 2.6, 16 C.F.R. § 2.6, which directs that subpoena recipients be "advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under

---

[1] 15 U.S.C. § 45, as amended.

[2] The Petition also requested that the subpoenas be made returnable in Puerto Rico. Petitioners do not seek a rehearing on the denial of that request. Request at 1.

investigation and the provisions of law applicable to such violation." Request at 2. For the reasons set forth herein, the Letter Ruling is affirmed; and the request for stay is denied as moot.

The State Action Doctrine Is An Affirmative Defense.

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), the progenitor of the state action doctrine, that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. Subsequent cases have applied the doctrine to the FTC Act. *See, e.g., FTC v. Ticor Ins. Co.*, 504 U.S. 621 (1992). Petitioners incorrectly frame their state action argument as one involving the FTC's jurisdiction. *See* Petition at 1, 12. The state action doctrine is an affirmative defense, not a jurisdictional limitation. *South Carolina Board of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) (denying an interlocutory appeal from an adverse ruling on respondent's state action defense).

In *FTC v. Monahan*, 832 F. 2d 688 (1st Cir. 1987) (Breyer, J.), the First Circuit held that a state action claim could not be used to deprive the Commission of the opportunity to investigate because doing so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and allow the FTC to determine for itself whether there was a basis for pursuing a law enforcement action. *Id.* at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of" a state action defense.). The Letter Ruling correctly held that the state action doctrine, if applicable, would only be an affirmative defense that could be raised by Empire during the trial of any FTC allegations of an antitrust or FTC Act violation.[3]

[3] Even if Petitioners' state action arguments were jurisdictional, investigations by administrative agencies should not be bogged down unnecessarily with jurisdictional challenges. *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001); *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996) ("[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until [a substantive law] enforcement action is brought against the subpoenaed party."); *Monahan*, 832 F. 2d at 690; *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious."). The Letter Ruling correctly held that the state action doctrine is not an immunity from investigation.

The Request for A Stay Is Moot.

Petitioners ask for a stay until the Commission satisfies its obligations under Rule 2.6, and issues a ruling on the Request. The Commission satisfied its obligations under Rule 2.6 when it adopted a resolution fully describing the scope of the investigation. The Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation for this investigation states that the nature and scope of the investigation is:

> To Determine whether Empire Gas ("Empire"), Tropigas de Puerto Rico, Liquilux Gas Corporation ("Liquilux"), or other unnamed persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, through various acts or practices, including but not limited to, agreements to fix prices or allocate customers, exclusive dealing, or other conduct regarding liquified petroleum gas or related products in Puerto Rico; and to determine whether Empire or Liquilux has engaged or is engaging in unlawful acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.[4]

Petitioners' only remaining justification for a stay, the Commission's ruling on the Request, is mooted by the issuance of this letter disposing of the Request.[5]

---

[4] Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, FTC File No. 091-0115 (Sept. 15, 2009) ("Resolution"). The Resolution was attached to the CIDs and subpoenas, copies of which can be found in the Request, Appendix B.

[5] Petitioners waived any claim that the CIDs or subpoenas should be quashed because the Resolution did not comply with Rule 2.6 when they failed to raise that claim in their Petition. *Wellness Support Network*, FTC File No. 072-3179 at 2 (Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition to quash CID) ("The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."). Petitioners have offered no explanation for not having raised this issue in the Petition.

Conclusion and Order

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

Donald S. Clark
Secretary