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

Office of the Secretary

December 3, 2009

VIA E-MAIL AND EXPRESS MAIL

Messrs. Ramón González Cordero and
Ramón González Simonet
c/o Néstor Méndez-Gómez, Esquire
Pietrantoni Mendez & Alvarez LLP
Suite 1901. 19th Floor
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209 Munoz Rivera Avenue
San Juan, Puerto Rico 00918

Re: *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:

The Commission is investigating whether Empire Gas, Inc. and Liquilux Gas Corp, or others, are engaged in violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or violations of federal antitrust laws, including without limitation price fixing, customer allocation, exclusive dealing, unlawful acquisitions, or other conduct regarding liquified petroleum gas ("LPG") or related products in Puerto Rico. Petition at 2. On November 19, 2009, Petitioners, Ramón González Cordero and Ramón González Simonet, officers of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CID") and subpoenas *ad testificandum* on the grounds that: (1) the FTC does not have jurisdiction to investigate the conduct of Empire and Liquilux because their conduct is not covered by the FTC Act or the federal antitrust laws by reason of the state action doctrine, Petition at 3-5; and (2) the returns on the subpoenas, if required, should be held in Puerto Rico, not Washington, DC, Petition at 13. These claims are wholly without merit, and the Petition must, therefore, be denied.

This letter advises you of the Commission's disposition of the Petition. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

[1] This letter ruling is being delivered by e-mail and express mail. The e-mailed copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from

This Challenge to the FTC's Jurisdiction Is Premature.

"With rare exceptions . . . , a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced." *Fed. Trade Comm'n v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). "[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 an enforcement action is brought against the subpoenaed party." *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *Fed. Trade Comm'n v. Monahan*, 832 F. 2d 688, 690 (1st Cir. 1987) (Breyer).[2] Petitioners do not claim that the FTC Act excludes their companies or their activities on behalf of those companies from its coverage; rather, they erroneously claim that the so-called state action doctrine is an immunity that excludes them from the Commission's investigatory reach. Petition at 3-4. Petitioners misapprehend the nature and effect of the state action doctrine.

The State Action Doctrine Is Only An Affirmative Defense Assertable In Litigation.

The Petition correctly notes that the Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), 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. This so called "state action doctrine" creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. Fed. Trade Comm'n*, 455 F.3d 436, 444 (4th Cir. 2006).

Assuming, *arguendo*, that Empire Gas, Inc., Liquilux Gas Corp. or others may have some basis for asserting a state action doctrine defense in the event of a Commission law enforcement action against them, that still does not excuse them from responding to valid FTC investigatory compulsory process. To do so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and whether the Commission has a basis for pursuing a law enforcement action. *Monahan*, 832 F.2d at 689-90 ("We, like the FTC, must wait

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the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

[2] *Monahan* relied on *Fed. Trade Comm'n 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 parties in *Swanson* were tour operators who claimed to be subject only to regulation by the Civil Aeronautics Board.

to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy. . . . Again, we cannot now say, without knowing more facts, whether or not this additional 'state supervision' condition will apply.").[3] Unlike Petitioners' employers, the party seeking state action protection from an FTC investigation in *Monahan* was an agency of the Commonwealth of Massachusetts itself. Petitioners have offered no plausible justification for why the Commission should accord a private party's claims for protection under the state action doctrine from an FTC investigation any greater weight than was accorded to the Massachusetts Board of Registration in Pharmacy by the First Circuit Court of Appeals in *Monahan*. Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.[4]

CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the CIDs on December 11, 2009. Commission staff may reschedule the investigational hearings for Petitioners pursuant to the subpoenas at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

Donald S. Clark
Secretary

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[3] *Fed. Trade Comm'n v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) ("But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency's adjudication.); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board's state action defense did not qualify for interlocutory appeal because the state action issue would not be "effectively unreviewable" on appeal from the FTC's final decision).

[4] Petitioners' claim that the subpoenas should be made returnable in Puerto Rico is without merit. Petitioner's citation to provisions regarding the taking of testimony pursuant to a CID issued under 15 U.S.C. § 57b-1, Petition at 13, is unavailing in this case. The subpoenas at issue in this matter were issued under 15 U.S.C. § 49; this latter provision of the FTC Act permits the taking of testimony "at any designated place of hearing."