



OFFICE OF THE SECRETARY

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

July 15, 2005

**VIA FACSIMILE AND EXPRESS MAIL**

Aloha Petroleum, Ltd.  
c/o Marc Schildkraut, Esquire  
Heller Ehrman LLP  
1717 Rhode Island Ave., NW  
Washington, DC 20036

Re: *Petition to Quash Civil Investigative Demand*, File No. 051-0131

Dear Mr. Schildkraut:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand ("Petition to Quash") served on Aloha Petroleum, Ltd. (hereinafter "Petitioner" or "Aloha") in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission") of a proposed transaction between Aloha and Truststreet Properties, Inc. ("Truststreet"). The Petition to Quash is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand ("CID") is July 18, 2005.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). 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.<sup>1</sup> The filing of such a request for review does not, however, stay the time for compliance established herein. 16 C.F.R. § 2.7(f).

**I. Background and Summary**

On June 29, 2005, the Commission issued a CID to Petitioner in connection with the Commission's investigation. Petitioner received the CID on July 5, 2005. The original return date, July 6, 2005, was extended by letter dated July 8, 2005 until July 13, 2005. After conferring with counsel for the Commission in accordance with the provisions of 16 C.F.R. § 2.7(d)(2), the Petition to Quash was timely filed on July 13, 2005.

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<sup>1</sup> This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal should be calculated from the date you receive the original by express mail.

The investigation involves a proposed purchase of assets by Aloha from Trustreet. Since the transaction is below the reporting thresholds established by 15 U.S.C. § 18a, the Commission's investigation has been conducted through both voluntary and compulsory requests for information.

The two-page Petition to Quash raises two issues. First, Aloha claims that the information sought is irrelevant to the Commission's deliberative process because Staff recommendation's already have been made to the Commission and because Commission Staff would not have adequate time to evaluate the information prior to the Commissioners taking any action concerning the transaction. Related to this point, Aloha asserts that the CID provided an inadequate response time and that "it typically takes months to respond" to the type of information request posed by the CID. Petition at 1.<sup>2</sup> Second, Aloha claims that production of its own records to the Commission at this time would be unfair to it because the timing of the transaction is such that a Commission decision to challenge the transaction would have to be made before Aloha could "respond to any new issues raised by Staff's analysis of the CID."<sup>3</sup> Petition at 2.

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<sup>2</sup> Even if the Commission were to treat this cryptic statement as an assertion that compliance was too burdensome, Petitioner has failed to carry its burden of demonstrating such unreasonableness. *See* Federal Trade Commission v. Rockefeller, 591 F.2d 182, 190 (2<sup>nd</sup> Cir. 1979); and National Claims Service, Inc., 1998 FTC Lexis 192, \*8 (FTC 1998).

<sup>3</sup> This argument is based on a misperception on the part of Aloha regarding Commission procedures. As a courtesy, Commission Staff typically advises subjects of investigation of the bases upon which Staff will be recommending any enforcement action that might be authorized by a vote of the Commissioners. After receiving that advice from Staff, meetings with the parties may be scheduled with individual Commissioners to provide an opportunity for the subjects of the investigation to present reasons why the Commissioners should not adopt a particular Staff enforcement recommendation with which they disagree. The timing of this transaction is such that production of materials on July 18<sup>th</sup> will not provide enough time for either additional Staff discussions or Commissioner meetings before the time that the Commission must make a decision on whether it should seek to enjoin the consummation of this transaction. No legally cognizable right of Aloha would be adversely affected if such additional consultation cannot occur here. Further, the timing constraints here are not of the Commission's making. The dates by which Aloha and Trustreet have advised the Commission that this transaction must close are solely within the control of one or the other of them. If the transaction parties desire the Commission to have additional time for consultation, it is a problem uniquely within their hands to resolve.

## II. Analysis

When reviewed by a federal court, a CID must be enforced so long as the information sought is: (1) reasonably relevant, *i.e.*, not plainly incompetent or irrelevant to any lawful purpose of the agency; and (2) not unduly burdensome to produce. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). *See also Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 107 (D.C. Cir. 1997).<sup>4</sup> Though the Commission is not a federal court, the standard by which the courts would evaluate the Commission's decision is the appropriate standard for the evaluation of the Petition to Quash.

Notably, the Petition does *not* assert that the information sought by the CID is not relevant to the transaction. Indeed, such an assertion would be impossible since the CID directly addresses issues concerning the transaction. For this reason alone, under the standard enunciated in *Invention Submission*, the Petition must be denied.

Attempting to sidestep the critical (but fatal) relevance issue, Aloha, in effect, claims that it should be excused from responding to the CID because the Commission already has sufficient information to make its decision whether to challenge the transaction. It is not, however, within Aloha's purview to make this determination. Indeed, a similar argument was rejected in *EEOC v. Med-National, Inc.*, 186 F.R.D. 609, 618 (D. Hawaii 1999). In *Med-National*, the petitioner asserted that it should not be required to respond to an administrative subpoena because the EEOC already had sufficient evidence to resolve the merits of the related claim. Citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 191 (1990), the district court held that the only germane issue as to whether it should enforce the EEOC's administrative subpoena was whether the information sought was relevant to the EEOC's investigation. The court was not to make an evaluation of whether the agency, without the information sought by the administrative subpoena, already had sufficient evidence to determine if the issue being investigated was well-founded.

Beyond these issues, and without waiving the Commission's deliberative process privilege, assuming *arguendo* that: (1) Staff's recommendations have been made to the Commission; and (2) that these recommendations were unanimous in their conclusions, the information sought in the CIDs would still be relevant to the Commission's deliberative process. Most simply stated, the Commission does not merely "rubber stamp" Staff's recommendations. Up until the moment that the Commissioners formally vote, each individual Commissioner has both the right and obligation to deliberate upon all relevant information that is legitimately available to her or him before voting as to whether the transaction does or is likely to violate any

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<sup>4</sup> It also must be within an agency's authority to conduct an investigation and to issue a CID. In this merger, the Commission's authority neither is nor could be challenged.

statute enforced by the Commission. Moreover, Commissioners are fully capable of evaluating such evidence directly, without the need for Staff intercession.

**III. Conclusion and Order**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition to Quash should be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e),<sup>5</sup> the new date for Petitioner to comply with the subject Subpoena and CID, as amended herein, is July 18, 2005.<sup>6</sup>

**By Direction of the Commission.**

  
C. Landis Plummer  
Acting Secretary

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<sup>5</sup> 16 C.F.R. § 2.7(e).

<sup>6</sup> Petitioner is urged, but not required, to respond to the Subpoena on a rolling basis.

