



Office of the Secretary

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

January 10, 2006

VIA EMAIL AND EXPRESS MAIL

Exxon Mobil Corp.
c/o Timothy J. Muris, Esquire
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006

Re: *Exxon Mobil Corporation's Petition to Limit Civil Investigative Demand*,
File No. 051-0243

Dear Mr. Muris:

This letter advises you of the disposition of Exxon Mobil Corporation's ("Exxon Mobil" or "the Company") Petition to Limit Specification 26 of the Civil Investigative Demand ("CID") issued to it on November 23, 2005. For the reasons stated herein, the Commission denies the Petition to Limit. Pursuant to 16 C.F.R. § 2.7(e), Exxon Mobil is ordered to comply with Specification 26 of the CID on or before January 20, 2006 at 5:00 p.m. E.S.T.

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.¹

I. BACKGROUND AND SUMMARY

Section 1809 of the Energy Policy Act of 2005 ("Energy Act") directs the Commission to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refiner capacity or by any other form of market manipulation or price gouging practices."² Accordingly, the Commission is conducting an investigation to "determine whether

¹ This letter decision is being delivered by email and express mail. The email copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from 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 by this decision.

² Energy Policy Act of 2005, Pub. L. No. 109-058 § 1809, 119 Stat. 594 (2005).

certain oil refiners, marketers, or others have adopted or engaged in practices that have lessened competition in the refining, distribution, and supply of gasoline in the United States, and whether these practices are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.”³ On November 8, 2005, the Commission issued CIDs to a number of companies, including Exxon Mobil, containing 25 separate specifications. Petition to Limit at 2. Exxon Mobil did not object to the first CID.

On November 22, 2005, the President signed the fiscal 2006 appropriations bill for the Departments of State, Justice, Commerce, and related federal agencies, including the Commission. Section 632 of the act (“Pryor Amendment”) requires the Commission to investigate post-Hurricane Katrina gasoline prices and to report on industry profits, tax incentives, and the overall effects of increased gasoline prices on the economy.⁴ Subsequent to this legislation, the Commission issued a second set of CIDs to a number of companies, including Exxon Mobil, containing an additional three specifications (Specifications 26-28).⁵ The Petition to Limit only challenges Specification 26 of the second CID. Specification 26 requires Exxon Mobil to provide the Commission with its “claimed Tax Expenditures for tax years 2003 and 2004[.]” *Id.*

Exxon Mobil timely filed its Petition to Limit on December 19, 2005. Exxon Mobil claims that Specification 26 should be limited for three reasons: (1) the tax information sought by Specification 26 is not relevant to the Commission investigation, and therefore the Commission lacks authority under the FTC Act to seek this information;⁶ (2) “Exxon Mobil cannot respond accurately to the Specification” because the Company does not compile this information in the

³ Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 051-0243 (Sept. 30, 2005).

⁴ Petition to Limit at 7; and Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub.L. No.109-108 § 632, 119 Stat. 2290 (2005). The so-called “Pryor Amendment” to this act directs that not less than \$1 million of funds appropriated to the Commission must be used “to conduct an immediate investigation into nationwide gasoline prices in the aftermath of Hurricane Katrina: Provided, That the investigation shall include: (1) any evidence of price-gouging by companies with total United States wholesale sales of gasoline and petroleum distillates for calendar 2004 in excess of \$500,000,000 and by any retail distributor of gasoline and petroleum distillates against which multiple formal complaints . . . of price-gouging were filed in August or September, 2005, with a Federal or State consumer protection agency; (2) a comparison of, and an explanation of the reasons for changes in, profit levels of such companies during the 12-month period ending on August 31, 2005, and their profit levels for the month of September, 2005 . . . ; [and] (3) a summary of tax expenditures (as defined in section 3(3) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 622(3)) for such companies. . . .”

⁵ *Id.* The second CID was served on Exxon Mobil on November 28, 2005.

⁶ *Id.* at 3 and 9.

ordinary course of business;⁷ and (3) the Commission should seek tax expenditure information from the IRS and other federal agencies, rather than demand it from Exxon Mobil, in order to afford the Company greater confidentiality protection.⁸

II. THE INFORMATION REQUESTED IS RELEVANT TO THE COMMISSION'S INVESTIGATION

Exxon Mobil claims in essence that there is no nexus between the information requested in Specification 26 and the law enforcement purpose of the investigation as stated in the Resolution authorizing the use of compulsory process.⁹ We disagree. The information sought by Specification 26 is sufficiently related to the investigation. In any event, this argument has been rendered moot by the Commission's issuance of an Order Requiring the Filing of a Special Report pursuant to Section 6(b) of the FTC Act, 15 U.S.C. § 46(b).

The Commission is entitled to require respondents to provide any information that is “not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . and not unduly burdensome to produce[.]” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). Moreover, “the agency’s own appraisal of relevancy must be accepted so long as it is not obviously wrong.” *Id.* (internal quotations and citations omitted). Furthermore, “the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation.” *Id.* at 1090 (citing *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977)). Determination of relevancy in an investigation is “more relaxed than in an adjudicat[ion].” *Id.* The material requested “need only be relevant to the *investigation* – the boundary of which may be defined quite generally, . . . as it was in the Commission’s resolution here.” *Id.*

The Resolution authorizing the CID implements an investigation to determine whether a violation of Section 5 of the FTC Act may have occurred. Note 3, *supra*. Accordingly, the information sought by Specification 26 is relevant to that purpose if it is of some assistance to the Commission in deciding whether there is reason to believe that Section 5 has been violated and whether an enforcement action should be commenced. *Invention Submission Corp.*, 965 F.2d at 1090. Exxon Mobil’s assertion that there can be no relevance is mistaken. The material required by Specification 26 will permit the Commission to make a more accurate assessment of whether

⁷ *Id.* at 3.

⁸ *Id.* at 1819 (“Therefore, the FTC would be required to provide the taxpayer information to Congress upon request, and that information could identify Exxon Mobil. Congress would have no statutory limitation on the use of that information, and courts are unlikely to provide any tangible limitation on any such use in deference to the separation of powers. . . . As a practical matter, therefore, there would be nothing to prevent Congress from disclosing Exxon Mobil’s tax information, inadvertently or otherwise.”).

⁹ Note 3, *supra*.

Exxon Mobil's profits were the product of tax expenditures or whether those profits were the result of other market-based forces. Thus, the information requested by Specification 26 clearly falls within the "more relaxed" standard of relevance applicable to investigative subpoenas. *Id.* Indeed, Exxon Mobil has tacitly recognized that profitability information is relevant to this investigation because it has responded without objection to Specification 21 of the November 8 CID.¹⁰

Exxon Mobil correctly observes that the Commission's antitrust investigations do not routinely request information regarding tax expenditures. Petition to Limit at 9. However, this investigation is somewhat different from most Commission antitrust investigations. In the ordinary investigation, the Commission would identify a suspicious practice and inquire whether it contributed to higher consumer prices. In this investigation, by contrast, the inquiry begins, as directed by Congress, with the existence of higher prices and the Commission is investigating whether specific company practices have led to artificially maintained higher prices, or whether those prices are part of a properly functioning long-term competitive landscape.

Because this investigation begins, as directed by Congress, with the premise that prices and profits are high, the Commission must guard against mistakenly or reflexively ascribing high profits to the illegal exercise of market power. The information requested by Specification 26 will allow the Commission to gauge the portion of profitability attributable to Exxon Mobil's business efforts and the portion attributable to tax expenditures. Ultimately this information will allow the Commission to make a more accurate assessment of whether or not Exxon Mobil's profits are the product of market-based forces. We therefore find that the information requested by Specification 26 is sufficiently relevant to the law enforcement purposes of the Commission's investigation.

In any event, even if there were merit to Exxon Mobil's relevance argument, that argument is moot. As Exxon Mobil recognizes, Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), provides a means whereby the Commission may obtain information even if that information is not related to a law enforcement investigation. *See* Petition to Limit at 10. Pursuant to Section 6(b), the Commission has now served Exxon Mobil with an Order Requiring the Filing of a Special Report. That Order seeks the same information sought by Specification 26 of the CID. Exxon Mobil's compliance with that Order, to which its relevance argument does not apply, will obviate its compliance with Specification 26.¹¹

¹⁰ Specification 21 requested monthly revenue and cost data for Exxon Mobil's wholesale motor fuels sales.

¹¹ Although compliance with the Order Requiring the Filing of a Special Report obviates compliance with Specification 26, thus mooting Exxon Mobil's Petition to Limit, this letter nonetheless responds to all the arguments raised in the Petition lest Exxon Mobil seek to quash the Order.

III. EXXON MOBIL HAS NOT ESTABLISHED THAT COMPLIANCE WITH SPECIFICATION 26 IS UNDULY BURDENSOME

Exxon Mobil does not claim that it would be unable to prepare a response to Specification 26 or that the preparation is “burdensome,” as that term is ordinarily understood. *See, e.g., Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (target of compulsory process must show that compliance threatens to unduly disrupt or seriously hinder operation of its business). Rather, Exxon Mobil claims that it does not prepare the information requested in its ordinary course of business and would have to make assumptions and calculations in responding and that such assumptions and calculations might differ from those made by other respondents to similar CIDs. Petition to Limit at 4.

The Commission regularly anticipates that CID recipients may need to provide estimates, or make assumptions and calculations in responding to a CID. Instruction K of the CID and the Certification language clearly state that CID responses be accompanied by adequate explanations of the methods used in preparing the responses.¹²

Nor does Exxon Mobil establish undue burden with its contention that other federal agencies could provide the Commission with the information it seeks. The Commission is not obligated to exhaust all other potential sources for information before issuing a CID to a respondent.

The Pryor Amendment requires both a company-specific comparison of profitability and an aggregate summary of tax expenditures, for a group of firms with gasoline and distillate sales above a dollar threshold, or that have been the subject of recent price-gouging complaints. Exxon Mobil has not shown that other federal agencies could, in fact, provide equally probative information to the Commission.¹³ More importantly, even if responsive information were

¹² Instruction K of the CID expressly directs Exxon Mobil that:

Whenever a Specification requests the submission of data: (i) provide documents sufficient to show the data used and all sources for such data; (ii) explain each step in the Company’s calculations in sufficient detail to permit replication of the Company’s calculations from the source documents submitted; and (iii) explain why the methodology used represents the most accurate estimate the Company can make.

CID at 4.

¹³ Exxon Mobil has made an unsupported assertion that other federal agencies could provide the Commission with the information required of Exxon Mobil by Specification 26. Even if that were a sufficient ground for relief, Exxon Mobil has not provided the Commission with either a factual or legal basis to believe that such agencies could or would provide the information. Indeed, the Commission believes that such agencies could not provide the Commission with information of comparable probative value to that which can be provided by Exxon Mobil. That

available from alternative sources, Exxon Mobil cannot be permitted to determine the course of the Commission's investigation. Rather, the Commission must remain free to structure its investigations, including the selection of the sources from which it seeks information, in the manner it deems most appropriate. Accordingly, Exxon Mobil's second argument provides no grounds for relief.

IV. EXXON MOBIL'S CONCERN ABOUT CONGRESSIONAL DISCLOSURE DOES NOT RAISE A VALID CLAIM OF PRIVILEGE

The Commission appreciates Exxon Mobil's confidentiality concerns, but Congress has the prerogative to request trade secret and other business confidences that the Commission acquires during the course of an investigation. Further, the Commission cannot restrict Congress's ultimate uses of such information. Under the Commission's rules, if Congress requests confidential information from the Commission, notice will be given to the person who provided such information to the Commission and the Commission will advise Congress that the person who provided the information to the Commission considers it to be confidential. 16 C.F.R. § 4.11(b). If fear of Congressional use or disclosure of information provided a legitimate ground for limiting a CID, however, the Commission would be deprived of its ability to acquire the confidential business information that often is central to its investigations, especially given that Congress often requests the initiation of agency investigations in the first instance. Therefore, Exxon Mobil's concern about Congress's possible use or disclosure of the Company's confidential business records does not create a legitimate basis for limiting the CID.

V. CONCLUSION AND ORDER

Accordingly, no grounds having been established by Exxon Mobil to warrant limiting Specification 26 of the CID, **IT IS ORDERED THAT** Exxon Mobil's Petition to Limit should be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Exxon Mobil shall respond to Specification 26 of the CID on or before January 20, 2006 at 5:00 p.m. E.S.T.

By Direction of the Commission.

Donald S. Clark
Secretary

being the case, Exxon Mobil has not satisfied its burden of demonstrating that it is entitled to relief. *Rockefeller*, 591 F.2d at 190 ("the burden of showing that an agency subpoena is unreasonable remains with the respondent . . .").