ORIGINAL

UNITED STATES OF AMERICA
BEFORE DE FEDERAL TRADE COMMISSION

IN THE MATTER OF ---------- **Empire Gas Inc. and Liquilux Gas Corporation**	**File No. 091-0115**

Ramón González Cordero's and Ramón Gonzalez Simonet's Petition to Quash or Modify Civil Investigation Demand and Subpoena Ad Testificandum

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CONFIDENTIAL TREATMENT REQUESTED

[!] CONFIDENTIAL

UNITED STATES OF AMERICA
BEFORE DE FEDERAL TRADE COMMISSION

IN THE MATTER OF ----------	**File No. 091-0115**
Empire Gas Inc. and Liquilux Gas Corporation	

COMMISSIONERS:

William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

Ramón González Simonet's and Ramón González Cordero's Petition to Quash or Limit Civil Investigative Demand and Subpoena *ad Testificandum*

Petitioners Ramón González Simonet and Ramón González Cordero ("Gonzalez Petitioners") petitions the Federal Trade Commission ("FTC"), pursuant to 16 C.F.T. §2.7 (d), to quash or modify the Civil Investigative Demand, and subpoena *Ad Testificandum* ("CID") issued to the Gonzalez Petitioners on October 29, 2009, pursuant to Section 20 of the FCT Act, 15 U.S.C. §57 b-1. Although the Gonzalez Petitioners as officers of Empire Gas Inc. and Liquilux Gas have cooperated with the above referenced investigation and produced responsive documents under the CID, counsel have been unable to agree upon the FTC's lack of jurisdiction to conduct the above referenced investigation and accordingly, the González Petitioners respectfully request the FTC Commissioners to quash the CID as requested below.

I. Introduction and Summary

On August, 2009 the FTC initiated the above referenced investigation "to determine whether Empire Gas Inc. ("Empire"), Tropigas de Puerto Rico, Liquilux Gas Corporation ("Liquilux") or other unnamed persons, partnerships, or corporations have engaged or are engaging in unfair methods or 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 liquefied petroleum gas or related products in Puerto Rico; and to determine whether the 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.."

Empire and Liquilux voluntarily cooperated with the FTC inquiry, provided information and documents relevant to the inquiry and corresponded with FTC Staff and Counsel to address some of their questions and concerns. Notwithstanding, Empire and Liquilux objected the investigation asserting that although Empire, Liquilux and their affiliates deny any allegation or inference of antitrust violations on their part, based on the foregoing, the Puerto Rico government's involvement in the regulation of the Liquified Petroleum Gas ("LPG") market, including its control over LPG prices, profit margins, and rates of return on invested capital at all levels of the LPG chain of distribution within Puerto Rico as well as the treatment of the LPG industry as a regulated public utility, is sufficient to establish antitrust immunity under Parker v. Brown, 317 U.S. 341 (1943) and its progeny.

In September, 2009, counsel for Empire and Liquilux also met with FTC counsel and Staff and voluntarily provided the Staff with information related to the inquiry. Counsel also

submitted a legal memorandum on the applicability of the Parker Doctrine to the instant investigation. On October 29, 2009, the FTC issued the CIDs to the González Petitioners requesting them additional information and demanding them to appear and testify at the request of the FTC at a hearing scheduled for next December 7 and 8, 2009. in Washington, DC.

Based on the legal arguments set forth below, the Gonzalez Petitioners respectfully request that the FTC quash the CID, served upon to the González Petitioners.

II. Legal Arguments

A. The Parker Inmunity Doctrine

Under the "Parker Immunity Doctrine" or "state action doctrine", the United States Supreme Court has permitted state governments and certain private actors to show that a state regulatory scheme precludes antitrust liability. Today, the state action doctrine primarily comes into play when the conduct of state or private actors undertaken pursuant to a state regulatory program is challenged under the federal antitrust laws. Parker, *supra*. Courts have applied the state action doctrine not only within the context of claims alleging violations of Section 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 but also within the context of claims alleging violations under Section 7 of the Clayton Act, 15 U.S.C. § 18. Cine 42nd Street Theater Corporation, 790 F. 2d 1032 (2nd Cir. (1986). Courts have also applied the state action doctrine within the context of actions brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, 15 U.S.C.§45. Massachusetts Furniture & Piano Movers Association, Inc., v. Federal Trade Commission, 773 F. 2d 391 (1st Cir. 1985).

The immunity recognized in Parker derives from the fact that Congress, in enacting the Sherman Act, did not intend to restrain state behavior in regulating economic activities within its boundaries. If the state clearly acts in such matters in its sovereign capacity, it avoids the

constraints of the antitrust laws. S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 54 (1985). In that connection, state governments may therefore create or tolerate monopolies, oligopolies or economic regimes in which competition is displaced or limited in order to ensure a consistent provision of essential services like electric power, gas (LPG in our case), cable television, or local telephone service.

With regard to the actions of private parties, the Supreme Court in California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97 (1980) stated that any presumptive anti-competitive conduct engaged in by private parties should be deemed state action and thus shielded from antitrust laws if; first, the challenged restraint is one clearly articulated and affirmatively expressed as state policy; and second, the policy is actively supervised by the state itself.

The state action to displace or limit competition may be inferred "if suppression of competition is the 'foreseeable result' of what the statute authorizes". Columbia v. Omni Advertising, 499 U.S. 356 at 372-73 (quoting Hallie v. Eau Claire, 471 U.S. 34, 42, 85 L.Ed. 2d 24, 105 S. Ct. 1713 (1985). A government agency or private party need not be able to point to a specific, detailed, legislative authorization for its challenged conduct. As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, first prong of Midcal test for determining whether state regulation of private parties is shielded from federal antitrust law, is satisfied. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 59 (1985). Therefore a state or territory may displace competition with active state supervision if the displacement is both intended by the state and implemented in its specific details. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633, 119 L. Ed. 2d. 410, 112 S. Ct. 2169 (1992).

The second requirement of the Midcal test is whether the resulting activity was "actively supervised" by the state. In order to determine its application, one must determine if the activity within the contemplated scheme, is the state's own. FTC v. Ticor Title Ins. Co., *supra*. Therefore, in such scheme, state officials must have maintained sufficient power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policy. Patrick v. Burget, 486 U.S. 94, 101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988). The active supervision requirement requires that the state is able to exercise ultimate control over the otherwise anticompetitive conduct. Id.

B. **Puerto Rico Antitrust Law**

In Puerto Rico, the Commonwealth's legislative assembly enacted an antitrust law which is virtually identical to the federal antitrust legislation with respect to the regulation of unlawful restraints of trade, unfair trade practices as well as mergers and acquisitions. See 10 L.P.R.A.§§257 et seq. Article 1 of the Puerto Rico Antitrust Act ("PRAA") mirrors Article 1 of the Sherman Act, (15 U.S.C. §1); Article 4 of the PRAA mirrors Section 2 of the Sherman Act (15 U.S.C. §1); Article 3 of the PRAA mirrors Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and Article 5 of the PRAA mirrors Section 7 of the Clayton Act (15 U.S.C. §18.

Article 19 of the PRAA specifically exempts public service companies, subject to the jurisdiction of the Puerto Rico Public Service Commission, from the regulatory scope of the law. Such Article states:

> "The legal regulation of public utilities, insurance companies and any other enterprises or entities subject to special regulation by the Government of the Commonwealth of Puerto Rico or by the United States Government, including cooperatives, shall not be affected by this act."

See, 10 L.P.R.A. 257 (Historical Note); see also Liquilux Gas Corporation v. Martin Gas Sales, Inc., 979 F. 2d. 887 (1st Cir. 1992) (holding that an importer of liquefied petroleum gas to Puerto Rico was within exclusive jurisdiction of Puerto Rico Public Service Commision and thus, was exempt Fromm Puerto Rico's antitrust statute) and Méndez Gómez, Néstor, "Inaplicabilidad de la ley sobre Monopolios a las compañías de servicio público" Revista Jurídica de la Universidad de Puerto Rico, Volumen 16 Número 2. (Inapplicability of the Antitrust Laws to Public Service Companies, University of Puerto Rico Law Journal, Volume 16, Number 2).

C. Puerto Rico Government's Regulation of the LPG Market

The Puerto Rico LPG market is highly regulated at all levels of the chain of distribution by the Puerto Rico Public Service Commission ("the PSC") and the Puerto Rico Consumer Affairs Department (known by its acronym in Spanish as "DACO").

Section 2 of the Puerto Rico Public Service Act, Act No. 109 of June 28, 1962, as amended (the "PSC Act") designates "gas enterprises" as "Public Service Companies" subject to regulation by the PSC. "Gas Enterprises" are defined as including:

"...[a]ny person that owns, controls, exploits, or manages was a public service company, any plant or business in Puerto Rico for the importation, production, generation, transmission, delivery, supply or distribution of natural gas, elaborated, [derived/derivate], or any other liquid susceptible of conversion into gas and distributed by pipeline, cylinder, or any other type of container, for residential, commercial, or industrial use. The following, among other, are deemed gas "importation" and "production" enterprises; those refineries, import companies, wholesale-distribution companies, and/or marine terminals dedicated to the importation, production, elaboration or manufacture, trafficking, storage, distribution, or sale of liquefied petroleum gas, or any mixture of hydrocarbons, known as refinery gas, irrespective of whether these persons sell or supply their product to a limited number of people and/or wholesalers." PSC Act, §1002 (q).

As public service companies, all participants in the Puerto Rico LPG market must be licensed by the PSC to operate. PSC Act, §23(b). Article 23 (b) of the PSC Act provides that the approval of applications for permits or authorizations by the PSC is contingent upon the PSC's determination that the requested permit or authorization is necessary and appropriate for the public's service, comfort, convenience, and security.

In addition to controlling the entry into the LPG market based on convenience and necessity criteria, the PSC also has authority to: establish territorial limitations where services may be rendered (PSC Act §24 (c)); approve or reject an LPG enterprise's discontinuance, reduction, or impairment of the services it provides to the community, based on necessity and convenience criteria PSC Act §38(n); and impose penalties, including monetary penalties, for violations of the PSC Act or the regulations promulgated there under (PSC Act, §§62-65. Moreover, the PSC has authority to prohibit acts or contracts that may be deemed discriminatory or that restrain trade in the LPG market. To that effect, the PSC regulation promulgated under the PSC Act ("PSC Reg. 7160") expressly prohibits any LPG enterprise to refuse to deal with any other LPG enterprise or consumer when a LPG service is requested or to discriminate in any way among customers. (PSC Reg. Art. 8, Sec. III N). Every LPG enterprise is required to distribute its final product evenly among its clients. Id. Any contract restraining trade in the LPG market is expressly prohibited and sanctioned by the PSC. Id. Exclusive contracts are prohibited. PSC Reg. Art. 8 Sec. III P.

On March 9, 2009, the Puerto Rico Legislature approved Act. No. 10 ("Act No. 10") pursuant to which it granted DACO the power to regulate prices, profit margins, and rates of return on investment at all level of the LPG market in Puerto Rico. Act No. 10 was enacted with the express purpose of protecting the consumer and promoting a greater degree of competitiveness in the market. Act 10, Statement of Motives. As required by Act 10, on July 3, 2009, DACO promulgated Regulation No. 7721 ("Regulation 7721"), in order to adopt measures to allow the adoption or issuance of orders to establish maximum prices, profit margins and/or rates of return on invested capital in the local fuels market, which expressly includes LPG.

Regulation No. 7721 also establishes economic criteria to be considered by DACO in approving price orders.

Locally, the price regulatory scheme has been in effect for approximately 60 years, although until the adoption of Act. No. 10 and Regulation No. 7721, governmental intervention – through DACO- had been limited to gasoline, kerosene, and diesel fuel.

Regulation No. 7721 grants DACO authority to regulate prices, price margins, and rates of return on investment over gasoline, kerosene, diesel oil and LPG and their respective components, analogues, substitutes, derivates, and all of their respective variations. (Regulation No. 7721 §3). In addition to retailers, Regulation No. 7721 covers "wholesalers", which are defined as "[a]ny person that operates a business for the wholesale or distribution of fuel [and] includes refiners, importers, truckers, sale and storage operations, distribution plants, intermediaries, agents, commissioned sales persons, all whether for registered trademarks or independent operators, that sell [fuel] to any other component in the chain of distribution other than the end user. Regulation No. 7721§3(f).

Section 4 of Regulation No. 7721 sets forth in detail the economic and financial criteria based on which DACO may –*sua sponte* or at the request of an interested party- issue orders to fix or review maximum prices, profit margins, and rates of return on investment.

Furthermore, Regulation No. 7721: requires all LPG wholesalers to file with DACO quarterly reports setting forth sales volumes, acquisition costs, operating expenses, and sales revenues; requires all LPG wholesalers to notify DACO all changes in sales prices at least one day in advance of the effective date of the change; imposes record-keeping requirements on LPG market participants; **creates a presumption of unlawful pricing practice when any market**

participant, in any given quarter, realizes a profit that exceeds, by 25% or more, the profit margin established by DACO as baseline in any monitoring process or proceeding; and grants DACO authority to impose penalties (including monetary penalties for violations thereof.

D. Puerto Rico's regulatory structure of the LPG market precludes antitrust liability

Clearly, the PSC's enabling statute, together with DACO's oversight of LPG prices, established a comprehensive public service regulatory scheme for public utilities such as Empire and Liquilux, involved in the importation, sale and distribution of LPG in Puerto Rico. Its clearly articulated public policy to replace regular market forces with such regulatory regime is clearly articulated in the law, and the Commonwealth of Puerto Rico, through PSC and DAC has been actively supervising the performance of the LPG market in Puerto Rico since the 1960's, for the benefit of the Puerto Rican LPG consumer.

As recognized by the Commonwealth of Puerto Rico in Article 19 of the PRAA, such law does not apply to LPG and other utilities and public service companies subject to a special utility regulatory regime. The same analysis should be maintained with regard to Section 7 of the Clayton Act, as well as Section 5 of the Federal Trade Commission Act, for two basic reasons.

First, independently of the requirements for the exemption of private parties acting pursuant to state action as stated in Midcal, the Commonwealth's enactment of Article 19 of its Antitrust Law, indicating unequivocally its intention to exempt regulated LPG companies from antitrust laws, even though not binding per se on the interpretation of federal antitrust law, evidences the Commonwealth's desire and clear intention as a sovereign to avoid the constraints of the antitrust laws with respect to the LPG market in Puerto Rico. This by itself, without the need to consider Midcal's two prong test should be sufficient to exclude any actions undertaken

by regulated LPG companies from the application of the federal antitrust laws. See S. Motor Carriers Rate Conference, Inc. v. United States, *supra*.

Second, Puerto Rico's regulatory structure over the local LPG market squarely meets the two pronged test that must be satisfied for state-action immunity under the antitrust laws, as formulated by the United States Supreme Court in Midcal, *supra*. As previously discussed, the PSC Act, together with Act. No. 10 and Regulation No. 7721, articulate a clear and affirmative policy to regulate the local LPG market at all levels, from entry to cessation or reduction of operations or impairment of services by market participants. Contrary to the anti-competitive regulatory schemes invalidated by the U.S. Supreme Court in Midcal, *supra*, and Ticor Title Insurance Company, *supra*, the Puerto Rico statutory regime to regulate LPG prices is not a "negative option" system in which market participants are allowed to set prices unless the relevant governmental authority objects to the agreed upon rates.

As to the "active supervision" requirement of Midcal, *supra*, the Supreme Court stated in Ticor Title Insurance Company, *supra* at 634, that it "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." To accomplish this purpose, the active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such supervision program, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

It is notable in this respect that in adopting Act. No. 10 the Puerto Rico Legislature recognized that, while approximately 800 active franchises to operate LPG businesses existed as

of March 2009, the local market as a whole was controlled by three companies, one of which allegedly held a 70% market share. With that in mind, the Legislature decided to grant local agencies additional powers and authority to regulate prices, rather than taking action or approving legislation aimed at wresting market share from the larges existing participants. This legislative and regulatory approach is consistent with the PRLA which mirrors the Sherman and Clayton Act, in the sense that it exempts public service companies, insurance companies, and other businesses and entities subject to special regulation by the Puerto Rico or federal governments from local antitrust legislation.

While the PSC has actively regulated the LPG industry in Puerto Rico, since its inception, DACO's intervention with businesses under its jurisdiction is well known in Puerto Rico, particularly – in the fuels context- in recent periods of high volatility in the oil markets. On that basis, the provisions of Act. No. 10 and Regulation No. 7721(have been, and past experience has shown the likelihood that they will continue to be, strictly enforced. To that effect, since 1942, Puerto Rico has provided for the regulation of prices and profit margins on staple commodities sold in its territory. In 1973, regulatory authority was vested by statute in DACO which, together with its predecessor agency has regulated the price of gasoline and other petroleum products form 1953 to 1973. From 1973 until 1975, DACO suspended its regulatory authority over gasoline prices and profit margins pursuant to an existing federal price stabilization act. In 1975, DACO issued Price Regulation 45 which provided that the Secretary of DACO could issue orders fixing prices and profit margins for gasoline, kerosene and diesel oil sold "at all levels of distribution within Puerto Rico" and required that, when no such orders were in effect, 15 days' notice be given to the Secretary before any seller raised its price for a regulated item. See P.R. Consumer Affairs Dept. v. Isla Petroleum, 485 U.S. 495 (1988). Since

then, DACO has been continuously monitoring the fuels markets in Puerto Rico, imposing price controls orders every time it considers it favorable to the public interest. Accordingly, the currently effective regulatory structure of the LPG market provides more than the mere potential for state supervision.

It should be noted that it has been held by a federal district court that when a state establishes and creates a pervasive economic regulatory scheme to regulate public utilities such as natural gas public services companies, if such scheme requires consideration and approval by the governmental entity for a proposed merger of two gas companies, then neither Section 7 of the Clayton Act, nor Section 5 of the Federal Trade Commission Act are applicable to the proposed merger. In Federal Trade Commission v. Equitable Resources, et al, 512 F. Supp. 2d, 361 (2007), W.D. Pennsylvania, appeal vacated as moot by the U.S. Court of Appeals, Third Circuit on February 5, 2008, case No. 07-2499, the Pennsylvania Public Utility Commission had approved a proposed intrastate merger between two natural gas public service utilities. The Commission approved the merger, but the Federal Trade Commission moved the District Court to enjoin the merger on the grounds that it violated Section 7 of the Clayton Act, as well as Section 5 of the Federal Trade Commission Act. The District Court granted a utility's motion to dismiss, reasoning that the Pennsylvania public utilities regulatory regime was so comprehensive that it reflected the state's clear intention to displace competition with such a regulatory scheme. In such case, the state action doctrine precludes the applicability of the antitrust legislation and hence the jurisdiction of the FTC.

In sum, for the reasons stated above, Puerto Rico's government involvement in the regulation of the LPG market, including its control over LPG prices, profit margins and rates of

return on invested capital at all levels of the LPG chain of distribution within Puerto Rico, is sufficient to establish antitrust immunity under Parker v. Brown, *supra*, and its progeny.

The recognized standard in determining whether a CID should be quashed or limited in scope or breadth was adopted by the Supreme Court in United States v. Morton Salt Co., 338 US 632 (1950). In said case, the Court recognized that agency subpoenas or CIDs should not be enforced if it is determined that they demand information that is: (a) not "within the authority of the agency", (b) "too indefinite" or (c) "not reasonably relevant to the inquiry". Id. at 652.

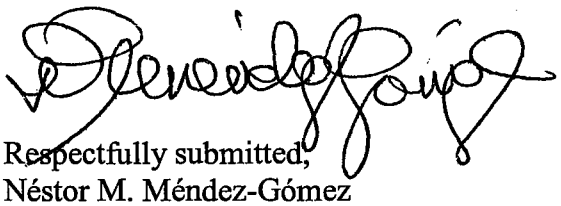
In light of the afore discussed, the Gonzalez Petitioners hereby request the FTC to quash the CIDs served upon them in as much the instant investigation is not within the authority of the agency because the state action doctrine precludes the applicability of the antitrust legislation to the LPG industry in Puerto Rico and hence, the jurisdiction of the FTC over said industry.

In the alternative, the CIDs should be modified to allow the depositions to be taken to the Gonzalez Petitioners to be conducted in San Juan, Puerto Rico, where they reside and work ("The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the judicial district of the United States in which such person resides, is found or transacts business, or in such other place as may be agreed upon by the Commission investigator before whom the oral testimony of such person is to be taken" Section 20(c)(14)(C) of the Federal Trade Commission Act, 15 U.S.C. §57b-1).

III CONCLUSION

For all the foregoing reasons, the Gonzalez Petitioners respectfully request that the Commission quash the challenged CIDs, or in the alternative, the same be modified to allow the depositions to be taken to the Gonzalez Petitioners to be conducted in San Juan, Puerto Rico.

Date : November 18, 2009



Respectfully submitted,

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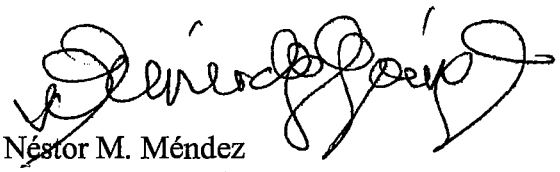
CERTIFICATION

Pursuant to 16 C.F.R. §2.7(d) (2) counsel for Petitioners González hereby certify that he conferred repeatedly with FTC counsel and staff by phone, email and letter correspondence in a good faith effort to resolve the objections hereby raised but have been unable to reach an agreement.



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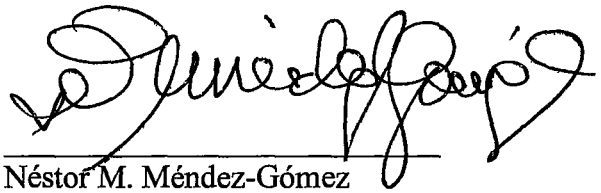
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November 2008, I caused the original and ten (10) copies of this Petition to Quash to be sent via Federal Express to the Secretary of the Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C., 20580 and one copy to Ms. Keitha Clopper at same address.



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