

Complaint

125 F.T.C.

IN THE MATTER OF

THE WILLIAMS COMPANIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3817. Complaint, June 17, 1998--Decision, June 17, 1998

This consent order allows, among other things, the merger between The Williams Companies, Inc., ("Williams") and MAPCO Inc., both based in Oklahoma, and requires Williams to provide Midwest pipeline capacity to Kinder Morgan Energy Partners, an operator of propane terminals, and to allow any new competing pipeline to connect to its Wyoming gas processing plants.

Appearances

For the Commission: *Frank Lipson, Phillip Broyles & William Baer.*

For the respondent: *Tom Smith, Jones, Day, Reavis & Pogue,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondent The Williams Companies, Inc. ("Williams"), a corporation, and MAPCO Inc. ("MAPCO"), a corporation, have entered into an agreement and plan of merger for Williams to acquire all of the voting securities of MAPCO, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement and merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Williams is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business located at One Williams Center, Tulsa, Oklahoma.

2. Respondent Williams is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation and sale of natural gas and related activities; natural gas gathering, processing, and treating activities; the transportation and terminaling of petroleum products and natural gas liquids, including propane; hydrocarbon exploration and production activities; the production and marketing of ethanol; and the provision of a variety of other products and services to the energy industry.

3. Respondent Williams is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. MAPCO AND THE PROPOSED ACQUISITION

4. MAPCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1800 South Baltimore Avenue, Tulsa, Oklahoma.

5. MAPCO is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation by pipeline of natural gas liquids ("NGLs"), anhydrous ammonia, crude oil and refined petroleum products; the transportation by truck and rail of NGLs and refined petroleum products; the refining of crude oil; the marketing of NGLs, refined petroleum products and crude oil; and NGL processing and storage.

6. MAPCO is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

7. On or about November 23, 1997, Williams and MAPCO entered into an agreement and plan of merger whereby Williams would acquire all of the outstanding voting securities of MAPCO, and MAPCO would become a wholly-owned subsidiary of Williams. Under the agreement, each share of MAPCO common stock will be exchanged for shares of Williams common stock and preferred stock

purchase rights. Based on relative valuations at the time of the agreement, the transaction is valued at approximately \$2.7 billion.

III. TRADE AND COMMERCE

A. *Midwest Propane*

8. A relevant line of commerce in which to evaluate the effects of this acquisition is the transportation by pipeline and terminaling of propane.

9. Relevant sections of the country in which to evaluate the effects of this acquisition on the relevant line of commerce are: (a) central Iowa, including Des Moines and Ogden; (b) northern Iowa and southern Minnesota, including Clear Lake and Sanborn, Iowa, and Mankato, Minnesota; (c) eastern Iowa, including Iowa City; (d) southern Wisconsin and northern Illinois, including Janesville, Wisconsin and Rockford, Illinois; and (e) north central Illinois, including Tampico and Farmington.

10. MAPCO owns and operates pipelines that transport propane to terminals owned and operated by MAPCO that service the relevant sections of the country.

11. Williams owns and operates pipelines that transport propane to terminals owned and operated by Kinder Morgan Operating L.P. "A" ("Kinder Morgan"), a Delaware limited partnership, that service the relevant sections of the country. Williams has agreements with Kinder Morgan pursuant to which customers of Kinder Morgan ship propane on pipelines owned by Williams to terminals owned by Kinder Morgan in the relevant sections of the country. Because it owns and operates said pipelines, Williams effectively controls the delivery of propane to the Kinder Morgan terminals under such agreements.

12. Respondent Williams, through its ownership and operation of the pipelines and through its agreements with Kinder Morgan, competes with MAPCO in the transportation and terminaling of propane in each relevant section of the country.

13. The markets for the transportation by pipeline and terminaling of propane in the relevant sections of the country are highly concentrated and would become substantially more highly concentrated as a result of the acquisition.

14. Entry into the transportation by pipeline and terminaling of propane in the relevant sections of the country is difficult.

B. Pipeline Transportation of Raw Mix from Southern Wyoming

15. Raw mix is a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus. Raw mix is processed into these individual component products at fractionation facilities.

16. MAPCO owns the only pipeline for the transportation of raw mix from gas processing plants in southern Wyoming to Hobbs, New Mexico, where it connects with other pipelines for transportation to major fractionation facilities in Texas, Oklahoma, and Kansas.

17. Williams owns and operates two large gas processing plants in southern Wyoming. At these plants, Williams extracts raw mix from natural gas produced from gas wells, for itself and for other well owners.

18. A relevant line of commerce and section of the country in which to evaluate the effects of this acquisition is the transportation by pipeline of raw mix from southern Wyoming to New Mexico, Texas, Oklahoma, and Kansas.

19. Prior to the acquisition agreement, MAPCO believed that its monopoly over the pipeline transportation of raw mix from southern Wyoming was in jeopardy. It was concerned that a new pipeline would be built to transport raw mix from southern Wyoming to fractionation facilities in Texas, Kansas and Oklahoma, and that such a pipeline would capture a significant portion of MAPCO's volume. MAPCO perceived that Williams was an important participant in any such new pipeline, because of the location of Williams' gas processing plants and the volume of raw mix extracted at these plants.

20. Because of its concern about the possible construction of a competing pipeline, MAPCO planned to expand the capacity of its pipeline and to offer a discounted tariff in exchange for long-term volume commitments.

21. Williams in fact had discussions with other interested parties concerning the construction of a pipeline to by-pass the MAPCO pipeline. Williams terminated these discussions when it entered into the agreement and plan of merger with MAPCO.

22. Entry into the pipeline transportation of raw mix from southern Wyoming is difficult.

23. After the acquisition Williams will no longer have an incentive to participate in, or cooperate with, a competing pipeline.

Without Williams' participation or cooperation, the prospects for such a competing pipeline are substantially reduced. Owners of raw mix extracted at Williams' gas processing plants will continue to have no choice other than MAPCO for transporting their raw mix to major fractionation centers. Without the threat of a competing pipeline, MAPCO will have less of an incentive to expand its pipeline or to offer a reduced tariff.

IV. EFFECT OF THE PROPOSED TRANSACTION

24. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. In particular, the proposed acquisition will:

A. Eliminate actual, direct and substantial competition between Williams and MAPCO in the pipeline transportation and terminaling of propane in the relevant sections of the country;

B. Increase concentration in the pipeline transportation and terminaling of propane in the relevant sections of the country;

C. Increase the ability of the combined Williams and MAPCO, unilaterally and through coordinated interaction, to exercise market power in the pipeline transportation and terminaling of propane in the relevant sections of the country;

D. Insure the ability of the combined Williams and MAPCO to exercise market power in the transportation of raw mix from southern Wyoming; and

E. Increase barriers to entry into the relevant markets.

V. VIOLATIONS CHARGED

25. The agreement and plan of merger between Williams and MAPCO constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

26. The proposed acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of MAPCO Inc. ("MAPCO") by The Williams Companies, Inc. ("Williams"), and it now appearing that Williams, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Williams is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Williams Center, Tulsa, OK.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

- A. “*Williams*” means The Williams Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Williams Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “*MAPCO*” means MAPCO Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by MAPCO Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “*Commission*” means the Federal Trade Commission.
- D. “*Competing Pipeline*” means any existing, planned or proposed pipeline owned or operated by anyone other than Williams or MAPCO that transports, or is intended to transport, Raw Mix from Gas Processing Plants in Wyoming, directly or indirectly, to any Fractionation Plant located in Kansas, Oklahoma, New Mexico or Texas.
- E. “*Connection Agreement*” means an agreement between Williams or MAPCO and a Competing Pipeline that provides for, among other things, the connection of a pipeline and the associated installation of valves, measurement apparatus, flanges and other devices necessary to deliver Raw Mix from a Williams Wyoming Gas Processing Plant to a Competing Pipeline and to measure the volume of such Raw Mix.
- F. “*Fractionation Plant*” means a facility that separates Raw Mix into its individual components.
- G. “*Gas Processing Plant*” means any facility that separates Raw Mix from methane.
- H. “*Kinder Morgan*” means Kinder Morgan Operating L.P., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Kinder Morgan,

and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- I. "*KM Agreement*" means the Pipeline Lease and Operating Agreement between Kinder Morgan and Williams, dated March 3, 1998, and attached hereto as Confidential Exhibit A.
- J. "*KM Terminals*" means the propane terminals owned or operated by Kinder Morgan at Des Moines, Clear Lake and Iowa City, Iowa and Tampico and Rockford, Illinois, and all tangible and intangible assets used in operating said terminals, that receive, or that can receive, propane in whole or in part from the Williams NGL System.
- K. "*Propane*" means a colorless paraffinic hydrocarbon product with a chemical formula of C_3H_8 that is derived either as a by-product of petroleum refining or from natural gas processing, and that can be used for heating, cooking, agricultural crop drying, as a petrochemical feedstock, and for other applications.
- L. "*Proposed Acquisition*" means the proposed acquisition of the voting securities of MAPCO by Williams.
- M. "*Raw Mix*" means a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus.
- N. "*Respondent*" means "Williams."
- O. "*Terminaling*" means all services performed by a facility that provides temporary storage of propane received from a pipeline and the redelivery of propane from storage facilities into transport or tanker trucks.
- P. "*Williams NGL System*" means the assets owned by Williams comprising the following pipeline segments: Plattsburg, Missouri to Des Moines, Iowa; Des Moines, Iowa to Clear Lake, Iowa; Des Moines, Iowa to Iowa City, Iowa; and Iowa City to Clinton, Iowa/Middlebury Junction, Illinois.
- Q. "*Williams Wyoming Gas Processing Plant*" means any Gas Processing Plant owned or operated, in whole or in part, by Williams or MAPCO in the State of Wyoming, including plants located at or near Opal and Echo Springs, Wyoming.

II.

It is further ordered, That:

- A. Respondent shall comply with the KM Agreement, including, but not limited to, the provision of pipeline capacity to Kinder Morgan to service the KM Terminals pursuant to the terms and conditions of the KM Agreement.
- B. Respondent shall not cancel the KM Agreement for any reason except pursuant to the provisions of paragraph 4.5 thereof. If respondent determines to cancel the KM Agreement pursuant to such provisions, respondent shall provide the Commission with at least ninety (90) days' prior written notice of such cancellation. At the time of such notice, respondent shall designate, subject to the approval of the Commission, a proposed successor to Kinder Morgan's rights and interests under the KM Agreement. If no successor in interest has been approved by the time of such cancellation, the Commission may appoint a trustee pursuant to paragraph V of this order.
- C. Notwithstanding Section 16.1 of the KM Agreement, if Kinder Morgan sells any of the KM Terminals, respondent shall, not later than thirty (30) days after such sale, enter into a pipeline capacity lease and operating agreement with the acquirer of such KM Terminals that is substantially identical to the KM Agreement with respect to such terminals, and consistent with the purpose of this order. Respondent shall provide a copy of such agreement to the Commission not less than ten (10) days prior to its execution.
- D. Until the date at which all of respondent's obligations under the KM Agreement expire, respondent shall not, without prior approval of the Commission, make or agree to any modifications with respect to any term or terms of the KM Agreement.
- E. Respondent shall provide to the Commission, no later than thirty (30) days after their receipt or transmittal, copies of all communications between Kinder Morgan, or its successor in interest, and respondent regarding changes in or alleged breaches of the KM Agreement.
- F. The purpose of this paragraph II of this order is to ensure Kinder Morgan's access to pipeline capacity, as set forth in the KM Agreement, to prevent the elimination of Kinder Morgan as a competitor in the transportation and terminaling of propane at the KM Terminals, and to remedy the lessening of competition in the

transportation and terminaling of propane in Illinois, Iowa, Wisconsin, and Minnesota resulting from the acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

- A. Within thirty (30) days of receipt of a written request from a Competing Pipeline, respondent shall enter into a Connection Agreement for the connection of such Competing Pipeline to each Williams Wyoming Gas Processing Plant. The terms and conditions of such Connection Agreement shall be the terms customarily used by such Competing Pipeline to connect to other Gas Processing Plants. If the respondent and a Competing Pipeline are unable to agree on the terms and conditions of a Connection Agreement, the Competing Pipeline may elect to cause the issue to be submitted to outside, independent, binding arbitration in accordance with the procedures in Exhibit B hereto. Respondent shall provide the Commission with a copy of each written request from a Competing Pipeline within ten (10) days after respondent receives such request.
- B. Respondent shall connect each Williams Wyoming Gas Processing Plant that is the subject of a Connection Agreement to a Competing Pipeline under the terms and conditions established by such Connection Agreement. All steps necessary to effectuate such connection shall be accomplished by respondent within 180 days after the execution of such Connection Agreement.
- C. From the date on which the agreement is signed until the earlier of (a) three days after the Commission rejects this agreement or (b) 120 days after the date this order becomes final, respondent shall not enter into any new or renewed agreement to process natural gas at any Williams Wyoming Gas Processing Plant pursuant to which the producer or seller of natural gas gives up its right, for a term of more than one year, to sell or otherwise dispose of its Raw Mix.
- D. The purpose of this paragraph III of this order is to ensure that the acquisition does not reduce the likelihood that a Competing Pipeline may be constructed to service Gas Processing Plants in Southwestern Wyoming.

IV.

It is further ordered, That:

- A. Respondent shall immediately notify the Commission of the initiation of any arbitration proceedings, agreements, or changes in agreements, involving any of the matters in this order.
- B. Judgment upon the decision rendered by any arbitrator(s) pursuant to this order or pursuant to any agreements entered into pursuant to this order may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to the Federal Arbitration Act, 9 U.S.C. 1, *et seq.*, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of respondent thereafter to abide by the arbitrator's decision shall be a violation of this order.

V.

It is further ordered, That:

- A. If respondent has not selected a successor to Kinder Morgan's rights and interests under the KM Agreement as required by paragraph II.B of the order, the Commission may appoint a trustee (or trustees) to select a successor and to lease the Williams NGL System, subject to the prior approval of the Commission. If the trustee does not select a successor to Kinder Morgan's rights and interests under the KM Agreement, then the trustee may divest the Williams NGL System. Such divestiture shall be at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the

Commission, for any failure by the respondent to comply with this order.

- C. If a trustee is appointed by the Commission or a court pursuant to the terms of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall appoint a trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in leasing, acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of the proposed trustee, within ten (10) days after notice by the staff of the Commission to respondent of the identity of the proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to lease or divest the assets as described in paragraph V.A of this order. Such sale or lease, if it occurs prior to January 1, 2001, shall require that the lessee or buyer shall, for each year for five (5) years from the date of lease or sale, dedicate to the transportation of propane an amount of capacity equivalent to the average annual throughput of propane during the previous five-year period on that portion of the pipeline extending from Plattsburg Junction, Missouri, to Des Moines, Iowa.
 3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to lease or divest the assets as described in paragraph V.A of this order.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.C.3 to effectuate paragraph V.A of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of how the trustee intends to effectuate paragraph V.A of this order or believes that compliance can be achieved within a reasonable time, this period may be extended by the Commission,

or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets involved or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the lease or divestiture. Any delays in the lease or divestiture caused by respondent shall extend the time for leasing or divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to lease or divest expeditiously at no minimum price. The transactions shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order, provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall lease or divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.
7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the leases or divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at

least in significant part on a commission arrangement contingent on the trustee's leasing or divesting the assets to be leased or divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph V.A of this order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this order.
11. Except as otherwise provided in this order, the trustee shall have no obligation or authority to operate or maintain the assets to be leased or divested.
12. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the leases or divestitures.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

- A. Acquire any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in providing terminaling or pipeline transportation for propane located in Iowa or in any contiguous states within seventy (70) miles of the Iowa border; or
- B. Acquire any assets used or previously used (and still suitable for use) for terminaling or pipeline transportation of propane in Iowa

or in any contiguous states within seventy (70) miles of the Iowa border.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VII.

It is further ordered, That:

- A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraph III.C of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph III.C of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph III.C of this order, including a description

of all substantive contacts or negotiations for the leases or divestitures and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning leases or divestitures.

- B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with each provision of this order.

VIII.

It is further ordered, That:

- A. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.
- B. Upon consummation of the acquisition, respondent shall cause the merged entity to be bound by the terms of this order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and
- B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

X.

It is further ordered, That this order shall terminate on June 17, 2018.

[Confidential Exhibits A and B redacted from public record version.]

**Re: Postal Careers Institute, Incorporated, Petition
to Quash Civil Investigative Demand.
File No. 972-3282.**

February 25, 1998

Dear Mr. Venzara:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. As also set forth below, the new deadline for Postal Careers Institute, Incorporated ("PCI" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demand ("CID") is Friday, March 13, 1998.

PCI 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. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- March 13, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

The CID was issued to Petitioner on December 22, 1997, pursuant to the Commission's omnibus resolution of December 8, 1997. The resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services have engaged or are engaging in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. The CID specified a return date of January 16, 1998.

Commissioner Anthony has carefully reviewed the Petition. The procedural defects in the Petition and each of Petitioner's objections are discussed separately below.

II. PROCEDURAL DEFECTS

Commission Rule 2.7, 16 CFR 2.7, provides succinct and clear guidance regarding the requirements for submitting a petition to limit or quash compulsory process. Petitioner ignored virtually every one of the dictates of this rule.

A. The Petition Was Not Timely Filed

Subsection (d)(1) of Rule 2.7 provides that petitions to quash must be filed with the Secretary "within twenty days after service ... or, if the return date is less than twenty days after service, prior to the return date." 16 CFR 2.7(d)(1). Thus, at the least, PCI was required to file its petition on or before the return date, January 16, 1998. Although Petitioner dated the document January 15, 1998, the notary block reflects that it was not signed until January 16th. Moreover, the Petition was not received by the Secretary until January 20, 1998, four days after the return date.¹

While, in this instance, the Secretary did not reject this untimely filing outright, Petitioner should consider itself on notice that the Commission expects strict adherence to all procedural rules.

B. Petitioner Failed to Comply With Rule 2.7(d)(2)

Even more serious than the fact that the Petition was filed late and without the required number of copies is the fact that Petitioner failed to comply with Rule 2.7(d)(2), which provides, in relevant part:

Each Petition shall be accompanied by a signed statement representing that counsel for petitioner has conferred with counsel for the Commission in a good faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.... The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

16 CFR 2.7(d)(2). PCI failed to provide the required statement.

The conferral requirement is mandatory. Orderly process and judicial economy considerations dictate that efforts to resolve compulsory process disputes be exhausted at the staff level before being brought before the Commission. Those served with compulsory

¹ Even when it was ultimately received by the Secretary's office, the Petition was not accompanied by the correct number of copies (twenty) as required by Rule 4.2(c), 16 CFR 4.2(c).

process do not have a choice, but rather, *must* engage in good faith negotiations with the Commission staff regarding their objections to a given request. Furthermore, these negotiations must be documented in the statement required by Rule 2.7(d)(2).

The Commission understands from the staff attorneys conducting this investigation that they have repeatedly invited PCI to engage in discussions regarding PCI's objections and concerns relating to the CID, but that Petitioner has failed to make a good faith attempt to resolve these issues. Nevertheless, the staff remains willing to engage in such discussions. The Commission strongly urges PCI to take advantage of the staff's offer and to do so immediately.

C. Petitioner Failed to Comply With Rule 2.7(d)(1)

Rule 2.7(d)(1) provides, in relevant part, that petitions "shall set forth all assertions of privilege or other factual and legal objections to the ... civil investigative demand, *including all appropriate arguments, affidavits and other supporting documentation.*" 16 CFR 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement. It consists of five extremely short double-spaced paragraphs, each asserting a distinct objection. These paragraphs make broad assertions without offering any support, explanation, or reasoned argument. In addition, no supporting affidavits or documents are included. Petitioner's conclusory and unsupported assertions fall far short of the standard set forth in Rule 2.7(d)(1).

III. SPECIFIC OBJECTIONS

In addition to its procedural deficiencies, the Petition is substantively without merit. None of Petitioner's objections justify quashing or limiting the CID.

A. Confidentiality

PCI first complains that "[t]he FTC has not kept the investigation of Postal Careers Institute confidential...." Petition ¶ 1. PCI provides absolutely no explanation, example, or support for this assertion. Lacking any mention whatsoever of any specific instance where a confidentiality obligation was breached, this unsupported assertion must be rejected.

B. Burden

PCI next complains that the requests are "broad and undefined" and adds that compliance would impose an "undue financial burden" upon PCI. Petition ¶ 2. Again PCI fails to elaborate or give examples. This conclusory argument must be rejected for at least three reasons.

First, breadth and ambiguity issues are precisely the types of issues that are supposed to be negotiated between petitioner and the Commission staff pursuant to Rule 2.7(d)(2). Given that Petitioner failed to engage in these mandatory negotiations, its complaints in this regard ring particularly hollow. As stated above, the staff attorneys continue to stand ready to discuss these matters.

Second, Petitioner has failed to specify which requests it considers unclear or too broad and in what respect. The Commission cannot be expected to guess which requests PCI finds objectionable and why.

Third, Petitioner has failed to offer any explanation of why it would be financially burdensome to comply with the CID. Likewise, it has failed to offer any documents or affidavits evidencing the expected financial impact of compliance.

C. Release of Information to United States Postal Service

PCI next claims that it and its students might suffer irreparable harm if the FTC released information gathered during the investigation to the United States Postal Service ("USPS"). Petition ¶ 3. As with all the rest of its allegations, PCI fails to elaborate or provide any support for this contention.

PCI adds the unsupported assertion that "[t]he FTC has already released information from the investigation to the [USPS]." *Id.* However, PCI fails to supply any specific details or any evidence showing that a release actually occurred, identifying what information was released, or demonstrating that such release was improper or unlawful.

Moreover, the Commission's rules anticipate and authorize sharing information with other government agencies and law enforcement authorities. For example, Section 15.7.1 of the Commission's Operating Manual provides that "staff may advise federal, state, and local law enforcement agencies of the existence of an investigation, the identity of the target, and the general nature of the information in the agency's files." Likewise, Section 4.11(c) of

the Commission's Rules, 16 CFR 4.11(c) sets forth the procedures for making more detailed disclosures to law enforcement agencies. In short, the lawful sharing of information between government agencies is not a valid ground upon which to resist compulsory process.

D. Alleged Failure to Specify Applicable Laws

PCI next contends that the FTC has failed to inform PCI "of any alleged violation or the provisions of law that are applicable." Petition ¶ 4. This contention is untrue. The resolution authorizing the use of compulsory process in this investigation, which is incorporated in the CID by reference as well as attached thereto, spells out the nature and scope of the investigation.

To investigate the advertising, marketing, promotion, offering for sale, and sale of enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services, for the purpose of determining whether unnamed persons, partnerships or corporations, or others that are engaged in the advertising, marketing, promotion, offering for sale or sale of such services, or that assist such persons or entities, have engaged or are engaging in unfair or deceptive practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Thus, the CIDs do, in fact, adequately notify PCI of the purpose and scope of the investigation, the nature of the conduct under investigation, and the applicable provisions of law, as required by Section 2.6 of the Commission's Rules, 16 CFR 2.6.

E. Issuance of CIDs to PCI Employees

Finally, PCI claims that CIDs served by the FTC upon current PCI employees somehow "limit [PCI's] ability to properly and timely respond...." Petition ¶ 5. PCI again fails to elaborate on or otherwise provide any support for its assertion. The only individual upon whom the FTC has served a CID in this matter is Alice V. Lanoie, a New Hampshire resident who has served as a bookkeeper for PCI. In its Petition, PCI failed to identify Ms. Lanoie as a PCI employee or indicate how service upon her has interfered with the company's ability to respond to the CID directed to it. Moreover, the Commission would further suggest that to the extent any such interference has any basis in fact, it would be yet another issue best dealt with in negotiations with the Commission staff.

In sum, the Petition is nothing more than a series of unsubstantiated and meritless assertions. Both its last-minute timing and then its lack of substance strongly suggest that the Petition was submitted by PCI merely as a delaying tactic.

IV. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with Civil Investigative Demand on or before Friday, March 13, 1998.

**Re: Postal Careers Institute, Incorporated, Petition
for Full Commission Review. File No. 972-3282.**

March 13, 1998

Dear Mr. Exposito:

The Commission has considered (1) the Petition to Quash filed on behalf of Postal Careers Institute, Incorporated ("PCI") by Anthony Venzara; (2) the underlying Civil Investigative Demands; (3) the February 25, 1998, letter ruling by Commissioner Anthony denying the Petition to Quash; (4) PCI's request for full Commission review of the letter ruling; and (5) PCI's motion for an extension of time to file the request for full Commission review. For the reasons set forth below, the Commission denies PCI's motion for an extension of time as moot and affirms the February 25, 1998 letter ruling denying PCI's Petition to Quash.

Turning first to PCI's motion for an extension of time to file its request for full Commission review, the Commission denies the motion as moot. PCI's request was timely filed on March 3, 1998, one day before the deadline, and therefore, no extension is needed.¹

Turning next to PCI's motion for review of Commissioner Anthony's ruling, the Commission has determined that the motion raises no issues that were not fully considered and addressed in the earlier ruling. Indeed PCI's request for review adds nothing to its Petition to Quash. Rather, PCI merely emphasizes the fact that the Petition was prepared by a non-attorney -- a fact that was known to Commissioner Anthony when preparing her ruling. Based solely upon this fact, PCI asks the Commission to construe the Petition to Quash liberally and reverse the prior ruling. However, no matter who prepares a petition to quash, certain basic elements are required; a petitioner must at a minimum (1) confer with staff in a good faith effort to resolve its objections before filing the petition, (2) state specific objections and explain them, and (3) present whatever

¹ Rule 2.7(f) allows a petitioner to seek review "within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition." 16 CFR 2.7(f). Service was accomplished on Friday, February 27, 1998, when PCI received the ruling by mail. *See* 16 CFR 4.4 (service). While the Secretary's office also transmitted the ruling to PCI by facsimile on or about February 26, 1998, the facsimile copy was merely provided as a courtesy and was not intended to constitute service. Therefore, PCI's right to seek review did not expire until Wednesday, March 4th. *See* 16 CFR 4.3 (computation of time).

evidence it can muster to support its contentions. PCI did none of these things. Instead, it failed to confer with staff² and presented only unsupported, general, and vague objections. The fact that a layperson prepared the Petition to Quash neither justifies these fundamental failures and omissions nor transforms the otherwise insufficient Petition into one that should be granted.

Accordingly, the full Commission concurs with, and hereby adopts, the February 25, 1998 letter ruling by Commissioner Anthony in this matter. As set forth in the letter ruling, Petitioner must comply with the Civil Investigative Demands on or before Friday, March 13, 1998.

² PCI's motion for review includes a certification attesting to PCI's efforts to "agree on or to narrow the issues involved in this motion " by contacting Gregory Ashe, a staff attorney responsible for the investigation, on February 26, 1998. Mr. Ashe, however, sent PCI's counsel a letter, dated March 5, 1998, acknowledging that a telephone conversation between the two did take place on the date in question, but adding:

I do not recall having any substantive discussions as to PCI's problems with the CIDs. Neither do I recall any discussions as to narrowing the scope of the CIDs. In fact, I do not recall having any conversations regarding any of the issues raised in either PCI's motion to extend time or PCI's motion to review.

PCI's counsel has yet to respond.

While the intended meaning of PCI's certification is somewhat unclear, what is clear is that it does not appear to meet the requirements imposed by Rule 2.7(d)(2), 16 CFR 2.7(d)(2), that a petitioner confer with the staff in a good faith attempt to resolve or narrow its objections to the subpoena or civil investigative demand.

**Re: National Claims Service, Inc., Petition to Limit
Civil Investigative Demands. File No. 952-3169.**

June 2, 1998

Dear Mr. Hodgson:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The petition is denied for the reasons stated below. As also set forth below, the new deadline for National Claims Service, Inc. ("NCS" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demands ("CID") is Tuesday, June 16, 1998.

NCS 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 The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- June 16, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

NCS markets a medical billing business opportunity. As part of its marketing efforts, NCS provides prospective purchasers with the names of "successful" NCS customers as references. NCS also makes various express and implied earnings claims about its billing center opportunities to prospective purchasers. Over the past several years, the Commission has routinely investigated companies offering business opportunities in order to determine, among other things, whether the representations made by these companies during their sales efforts are fair and accurate.

On March 18, 1997, pursuant to its omnibus resolution, dated July 10, 1980, the Commission issued two CIDs to the Petitioner, one requesting written responses and the other seeking documents. The July 10, 1980 resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed persons,

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

partnerships, or corporations engaged in the sale of franchises, business opportunities, distributorships and other forms of businesses to consumers have been or are engaged in unfair or deceptive acts or practices in violation of 16 CFR Part 436 and/or Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. Both CIDs specified a return date of April 3, 1998. Petitioner subsequently requested, and the staff granted, two extensions which resulted in a new return date of April 24, 1998.

On or about April 24, 1998, NCS produced objections and partial responses to the CIDs and simultaneously served its Petition to Limit. Among the information the CIDs requested and NCS failed to produce is: (1) the identity of its billing center purchasers or licensees (*i.e.*, customers); (2) the identity of the individuals whose names or initials appear in the testimonials widely used by NCS in its sales solicitations; (3) complete copies of consumer complaints received by NCS; and (4) documents showing the amount of revenues NCS has generated through its sales. The Commission staff maintains that without this basic information, they cannot complete their investigation.

By its Petition, NCS seeks to be excused from providing any further responses to the CIDs. It presents four arguments in support of its Petition: (1) production of the omitted information would be unduly burdensome and oppressive; (2) some of the information requested is not available to NCS, namely, the success or failure rates of its customers; (3) the demands violate contractual, statutory, and constitutional privacy rights of NCS and its customers; and (4) the Commission is unfairly pursuing case-by-case investigations rather than commencing a rulemaking proceeding.

Commissioner Anthony has carefully reviewed the Petition to Limit, Petitioner's "Supplement to Petition to Limit Re: Privacy Rights," dated May 15, 1998 ("Supplement"), and Petitioner's "Second Supplement to Petition to Limit Re: Privacy Rights and Re: Cooperation" ("Second Supplement"). None of Petitioner's arguments, which are addressed separately below, provide a basis for excusing Petitioner from providing the additional information specified in the CIDs.

II. ANALYSIS

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* 15 U.S.C. 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 57b-1. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission, asking only whether (i) the information sought is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not too indefinite or unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). While this matter is, of course, not presently before a federal court, it is worth noting that the CIDs issued to NCS plainly meet all three of these criteria. It cannot reasonably be contested that this investigation is authorized by the Commission's statutory mandate and that the CIDs seek information relevant to the investigation at hand. Petitioner has not even argued that the CIDs are too indefinite, and, as detailed below, has failed to make any showing that the CIDs are unduly burdensome.

A. *Burden*

Petitioner complains that the CIDs are oppressive and burdensome because they "will require petitioner to search thousands of pieces of paper and to segregate and transport the same." Petition at 2. Petitioner adds that as a small company with a small profit margin, it cannot afford what it claims would be a "significant diversion of

personnel and financial resources." This is a legally deficient objection.

First, *all* compulsory process specifications require the recipient to expend some effort to respond. If the mere fact that documents would have to be examined and that resources would have to be expended provided a basis for resisting production, compulsory process would be rendered useless.

Second, an examination of the CIDs themselves reveals that the specifications are narrow and focused in scope. The principal outstanding specifications require NCS to identify its purchasers/licensees, the testimonialists, and its employees, and to provide information regarding its revenues. This basic information is very important to the staff's investigation. The specifications requesting this information are essentially standardized and cannot accurately be characterized as overbroad or unreasonable.

Third, Petitioner offers no details regarding the nature of the burden it alleges and absolutely no evidence that such a burden exists. Rather, the Petition to Limit contains only a single paragraph (numbered lines 15 to 28 on page 2) regarding burden, and that paragraph contains nothing but vague generalizations and conclusory statements. Petitioner does not refer to any particular specifications contained in the CIDs and does not explain what aspects of its record-keeping system make compliance burdensome.² In addition, Petitioner has not provided a single affidavit or shred of documentary evidence supporting the existence of this alleged burden. *See United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome).

In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost

² While the form (paper or electronic) of the records at issue does not change the analysis, given that the business opportunity offered by Petitioner involves electronic processing of massive amounts of information, the Commission would be surprised if most of the records being sought by the Commission were not maintained by NCS in computer files. These computer files could be printed or downloaded to a storage device with the touch of a button.

of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

B. Information Requested Is Unavailable

Petitioner next objects that the CIDs seek information that is not available to it. Specifically, Petitioner argues that it "does not possess sufficient data to accurately specify the typical success or failure rates of its licensees." Petition at 3. Petitioner does not cite to the particular specifications that it contends seek this information.

First, even assuming that the CIDs request this information, which they do not, Petitioner's statement that it has no such information is a *response*, not an objection, and, therefore, is misplaced in the context of a petition to limit.

Second, and even more importantly, the CIDs do not include a specification requiring Petitioner to specify the typical success or failure rate of its licensees. Indeed, it is precisely to investigate the experiences of NCS billing center purchasers that the Commission has requested the identity of those purchasers and the testimonialists. Petitioner's argument amounts to a *non sequitur* and must be rejected.

C. Privacy Claims

In support of its refusal to provide information identifying its customers/licensees as well as information regarding its employees, Petitioner asserts privileges based upon privacy rights it contends arise from, among other sources, California state law, the U.S. Constitution, and confidentiality provisions contained in its contracts with its customers. All of these arguments are without merit.

As a general matter, the fact that a respondent considers information confidential is not grounds for resisting compulsory process. *See, e.g., FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1978); *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957). This is true even if a subpoena or CID requests personal information about third parties. *See FTC v. Shaffner*, 626 F.2d 32, 37-38 (7th Cir. 1980) (information about debtors); *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 993 (D.C. Cir. 1975) (consumer credit reports). As the court in *FTC v. Invention Submission Corp.*, so succinctly explained:

Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So

long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993).³

The main thrust of Petitioner's privacy argument is founded on an assertion of California state law privacy rights applicable to discovery disputes arising in civil litigation. Relying on these California precedents, Petitioner contends that the Commission is obligated to show that the information sought is "directly relevant" to a cause of action, the Commission has a "particularized need" for the information, and the information is "essential" to determining the truth of the matter in dispute. These state law discovery standards are completely misplaced in the context of a statutorily authorized investigation undertaken by a federal agency.

First, Petitioner's assertion of California law is fundamentally flawed because this is a federal, and not a state, matter. This is a federal investigation of potential violations of Section 5 of the Federal Trade Commission Act. "Investigations for federal purposes may not be prevented by matters depending on state law." *United States v. Cortese*, 410 F. Supp. 1380, 1381-82 (E.D. Pa. 1976), *aff'd* 540 F.2d 640 (3rd Cir. 1976). In short, state law privileges do not apply here.⁴

³ While Petitioner objects to providing the requested information to the FTC in the first instance and is not merely concerned about maintaining its non-public status, it is worth noting that this investigation is non-public. Under the Commission's own rules any confidential information provided to the Commission will be used only for law enforcement purposes in determining whether the law has been violated, and will not be made publicly available without recourse to proper procedures. *See* 16 CFR 4.10. Indeed, pursuant to Section 10 of the FTC Act and Rule 4.10(c), 16 CFR 4.10(c), it is a crime for an FTC employee to improperly reveal confidential information gathered in the course of a non-public investigation.

⁴ Petitioner's assertion that federal courts will honor state law privileges (Petition at 3-4) overstates, and as such, misstates, the law. State privileges will be applied by federal courts only when the federal court will be applying state law to determine the outcome of the case, such as when a state law claim is brought to a federal court based upon its diversity jurisdiction. *See* Fed.R.Evid. 501. In either an enforcement proceeding or a Section 5 suit brought in a federal district court, federal law and, therefore, the federal law of privilege would apply. *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("The nature of a subpoena enforcement proceeding . . . rests soundly on federal law, and federal law of privilege governs any restrictions on the subpoena's scope"). Petitioner has not articulated any applicable federal privilege. Indeed, the only support Petitioner offers for its vague assertion of a federal privilege is a passing reference to the U.S. Constitution generally and a citation to *Griswold v. Connecticut*, 381 U.S. 479 (1965), a reproductive rights privacy case that has no bearing on the instant matter.

Second, Petitioner fails to appreciate the distinction between an investigation undertaken by the Commission pursuant to its statutory authority and discovery undertaken by a private litigant involved in a lawsuit. While both of these activities are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them. As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

Id. at 906; *see also Linde*, 5 F.3d at 1513 ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *EPA v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate"(internal citations omitted)). Thus, Petitioner's privacy arguments begin from the mistaken premise that California or federal discovery rules apply here; they do not. As such, all of Petitioner's arguments that the Commission cannot meet California's "particularized need" and related standards are inapposite.

Moreover, the "particularized need" standards urged by petitioner are simply relevancy thresholds that must be met before a California court will compel the production of certain private information. The relevancy inquiry applicable to administrative compulsory process is much different than the inquiry applicable to civil litigation discovery:

Unlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy...Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., 1991-1 Trade Cas. (CCH) at 65,351. In the seminal case of *FTC v. Texaco*, the court explained that "an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case" and that "the agency's subpoena requests may be measured only against the general purposes of its investigation." 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) (emphasis original). Here, the disputed specifications plainly seek information that is directly relevant to the general purpose of this investigation, namely, to determine whether NCS has engaged in any deceptive acts or practices in marketing its business opportunity. In order to determine the scope of the representations NCS made to its customers, and whether or not those representations were borne out by the consumers' experiences, the Commission must contact at least a sampling of the consumers. Likewise, in order to determine whether the testimonialists are telling the truth about their experiences, the Commission must contact them. The representations made by NCS orally and in its advertisements cannot be judged true or false on their face; such representations can only be judged in light of empirical data.⁵ That data can only come from Petitioner's licensees.

Petitioner also relies upon confidentiality provisions contained in its contracts with its customers whereby NCS promises not to reveal any information about the customers to third-parties without prior approval. These provisions have no effect on Petitioner's obligation to respond to the CIDs. This very same argument was rejected by the court in the *Invention Submission* case. The court enforced the subpoenas reasoning that "any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny

⁵ In its Supplement, Petitioner, starting again from California discovery law, argues that contacting consumers is not "essential" here based upon Commission precedent standing for the proposition that the Commission does not need to present testimony from actual consumers in order to make out a deception claim and instead may apply a "reasonable consumer" standard. Even ignoring the fact that the California requirement is inapplicable, Petitioner's reliance on the reasonable consumer standard is misguided. The Commission will find deception in cases where "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Deception Statement*, 103 FTC 174, 176 (1983), published as an appendix to *Cliffdale Associates, Inc.*, 103 FTC 110 (1984). The reasonable consumer standard, therefore, goes to the issue of whether the target consumers are likely to be deceived by the advertiser's misrepresentation. That is, the standard does not even come into play until a misrepresentation -- "an express or implied statement contrary to fact" -- has already been found. *Id.* at 175 n.4. Here, investigation is necessary to determine this threshold issue of whether Petitioner's representations were "contrary to fact."

simply by protecting all information under confidentiality agreements." 1991-1 Trade Cas. (CCH) at 65,353.

With regard to its employees, Petitioner argues that it would violate their privacy rights if it were to provide their home addresses and telephone numbers. The Invention Submission court also considered and rejected this very argument, holding: "Agencies have discretion to fashion how investigations are conducted. Since employees will not speak freely if they are under the watchful eye of management, the agency's desire to conduct interviews away from the workplace is neither arbitrary nor an abuse of discretion." *Id.* at 65,352 n.23.

At the end of its initial argument on the privacy issue (Petition at 9-10), Petitioner is perhaps the most forthright about the actual reason that it opposes providing the names of its customers to the FTC. Petitioner admits that it is concerned that consumers contacted by the staff may be inspired to register complaints that they would not otherwise have made. Petitioner contends that the staff might "create or manufacture consumer dissatisfaction against Petitioner where none has heretofore been expressed." Petition at 9. This is yet another argument considered and rejected by the court in Invention Submission:

Although respondent envisions a doomsday scenario in which overzealous investigators ask leading questions and plant seeds of distrust and suspicion in the minds of interviewees, the court is convinced that plaintiff's apprehensions are unfounded and insufficient to overcome the FTC's presumptive right to access to individuals and records. . . . If this court were to acknowledge [respondent's] highly speculative fears of damage to corporate reputations adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.

1991-1 Trade Cas. (CCH) at 65,352. For these same reasons, Petitioner's objection here is rejected.⁶

In an effort to reach a compromise and in response to Petitioner's concern that by merely contacting its customers, the FTC might somehow raise concerns in the customers' minds that NCS has

⁶ This conclusion is not changed by Petitioner's vague reference to a consumer that it believes was contacted by the FTC who later sought a refund and its speculative assertion that there is an improper cause and effect relationship between the two events. While contact with the FTC might alert a consumer to his or her rights or embolden the consumer to act if the consumer believes he or she suffered a wrong, such contact does not create the wrong.

engaged in deceptive practices, staff contacted Petitioner's counsel and offered to tell interviewees that it is investigating the industry generally, and not just NCS. The idea for this offer came directly from the Invention Submission opinion where the court commented favorably on this practice:

[T]he agency has stipulated that in conversations with customers and databank participants, it will state that the Commission is investigating the idea promotions industry generally and that no specific allegations of wrongdoing have been made. These prefatory remarks recharacterizing the nature of the investigation should allay [respondent's] fears of false incrimination.

Id. In its Second Supplement, Petitioner rejected this offer suggesting both that it was misleading and that it ignored the privacy rights of the interviewees themselves. Petitioner's assertion that the representation would be misleading and improper is baseless. Indeed, the representation is true; the marketing practices of the business opportunity industry are a topic of widespread and longstanding investigation by the Commission as evidenced by, among other things, the 1980 Resolution authorizing such investigations. As for the privacy rights of the third-parties, those arguments have been addressed and rejected above. *See Shaffner*, 626 F.2d at 37-38 (information about debtors); *Manager, Retail Credit Co.*, 515 F.2d at 993 (consumer credit reports).

D. Rulemaking Versus Litigation

Petitioner's final argument amounts to an allegation that it is unfair for the Commission to proceed against medical billing business opportunity providers on a case-by-case enforcement basis and that the Commission should instead proceed through a rulemaking. This argument has absolutely no basis in law. The fact that the Commission has exercised its prerogative to proceed by investigation and, where appropriate, administrative adjudication or federal court litigation has absolutely no effect on Petitioner's obligation to respond to the CIDs at issue here.

First, and most importantly, no rulemaking is needed. This series of investigations is aimed at uncovering deceptive trade practices under Section 5 of the FTC Act and violations of the Commission's Franchise Rule, 16 CFR Part 436. No special rules tailored to the

medical billing business opportunity industry are required.⁷ The main issues under investigation with respect to NCS are basic: whether Petitioner has made false representations regarding income potential and whether Petitioner has used phony or exaggerated testimonials to market its product. In short, this is not a situation where guidance as to required behavior is inadequate or lacking; instead it is a situation where investigation is necessary in order to root out potential violations of existing and well-established rules and laws.⁸

Second, Petitioner has not filed a petition to commence a rulemaking proceeding as required pursuant to Section 1.9 of the Commission's Rules, 16 CFR 1.9. Even if such a petition were filed, its filing would not affect the ongoing investigation. Indeed, even if NCS filed a rulemaking petition that was denied, NCS would have to wait until the Commission brought an action against it before it could appeal the rulemaking versus adjudication issue to a federal court. *Weight Watchers International v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995).

Finally, it is nothing short of a bedrock principle of administrative law that agencies have broad discretion in determining whether to proceed by rulemaking or adjudication. *See, e.g., Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328-29 (9th Cir. 1982) ("It is well settled that the decision whether to proceed by adjudication or rule-making lies in the first instance within the agency's discretion." (citations and internal quotations omitted)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (Chenery II), *reh'g denied*, 332 U.S. 783 (1947). The fact that it might be more convenient for Petitioner if the Commission proceeded by rulemaking imposes absolutely no limits on the Commission's discretion here.

⁷ Indeed, in addition to Section 5, itself, and the Franchise Rule, the Commission has already adopted guides concerning the use of testimonials and endorsements in advertising, *see* 16 CFR Part 255.

⁸ Petitioner's arguments that it should not have to bear the expenses associated with an investigation because it believes that many of its competitors are not being investigated are untenable. Without addressing the accuracy of that belief, the Commission necessarily has prosecutorial discretion in identifying the targets of its investigations. Without the discretion to proceed against whom it sees fit, when it sees fit, the Commission's investigative and prosecutorial powers would be rendered useless. Petitioner has not even suggested, much less offered any evidence, that the Commission improperly chose NCS for investigation.

E. Request for Oral Argument

In both its Petition and again in its Supplement, Petitioner requested an oral argument. These requests are denied. Petitioner submitted three briefs in this matter totaling twenty-six pages. No oral argument is necessary to further illuminate the points presented in these extensive briefs.

III. CONCLUSION

This is an absolutely proper and statutorily authorized investigation. These CIDs seek information that is plainly relevant to that investigation and have been crafted to avoid placing an undue burden on NCS. Moreover, as noted above, NCS has failed to make any evidentiary showing whatsoever as to burden.

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with the Civil Investigative Demands on or before Tuesday, June 16, 1998.