BEFORE THE FEDERAL TRADE COMMISSION

PROPOSED AMENDMENTS TO THE OCTANE CERTIFICATION AND POSTING RULE (16 C.F.R. PART 306) TO ADDRESS MID-LEVEL GASOLINE-ETHANOL BLENDS

75 FED. REG. 12,470 (MARCH 16, 2010)

COMMENTS OF GROWTH ENERGY

MAY 21, 2010

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Growth Energy respectfully submits these comments in response to the notice of proposed rulemaking to amend the Octane Certification and Posting Rule ("the Octane Rule") published by the Federal Trade Commission at 75 Fed. Reg. 12,470 (March 16, 2010). Growth Energy is an association of U.S. ethanol producers and other companies who serve the Nation's need for alternative fuels.[1] Growth Energy's members support the initiatives of the President and his cabinet agencies, independent agencies, and Congress to reduce greenhouse gas emissions, expand the use of ethanol in gasoline, decreasing our dependence on foreign oil, and creating American jobs at home. As part of that effort, fuel retailers must provide consumers with accurate and useful information about that the alternative fuels that they offer for sale.

The FTC's proposed revisions to the Fuel Rating Rule are directed at retail sales of mid-level gasoline-ethanol blends ("mid-level blends"). Because wider use of mid-level blends is important to the Nation's energy and environmental goals, Growth Energy appreciates the Commission's efforts to make sure that the motoring public is well-informed about the economic and environmental features of mid-level blends. Many of the issues raised by March 16 rulemaking notice turn on (1) the scope of the FTC's current statutory authority to participate in the effort to ensure consumers are well-informed about mid-level blends, and (2) the adequacy of the record compiled by the staff to adopt the specific changes in the Fuel Rating Rule contained in the notice. Those are the two main issues addressed in these comments.

As explained below, Growth Energy believes that the FTC has sufficient authority and an adequate basis to require fuel retailers to post the minimum octane ratings for mid-level blends. Growth Energy agrees, however, with the comments of the Renewable Fuels Association ("RFA") dated May 18, 2010, that the Commission lacks statutory authority for the changes in

[1] More information can be found at www.growthenergy.org.

the Octane Rule proposed in the March 16 notice, that the FTC lacks an adequate record to make those changes, and that those changes will be counterproductive to the goals and purposes of Congress in the governing statutes and in other legislation, including the Energy Independence and Security Act of 2007 ("EISA").

Growth Energy therefore proposes specific alternatives to the revisions in the Octane Rule contained in the March 16 notice. Growth Energy also proposes that some other important improvements in consumer information about mid-level blends, though beyond the scope of the FTC's current statutory powers, should be pursued on a voluntary basis by all stakeholders, under the Commission's guidance and that of other federal agencies. Growth Energy also urges the Commission to reopen this docket for further comment before any Final Action is taken, so that all interested parties can review and comment on the information and views provided in response to the March 16 Notice. Such a process would be mandatory under the Administrative Procedure Act, if the FTC determines that it does not agree with Growth Energy and RFA on the issue of statutory authority and intends to proceed with further consideration of the revisions contained in the March 16 notice.

I. Background

Ethanol has been a part of the automotive fuel pool for many years. Its value as a domestically attainable, renewable, economically viable, and environmentally friendly fuel has lead to a dramatic increase in its production and consequent use in recent years. In 2007, a bipartisan majority of Congress enacted EISA, ensuring the use of 36 billion gallons of renewable fuels, like ethanol by 2022. The result of EISA is a fuel pool that in the future is assuredly going to contain steadily increasing amounts of ethanol. To this point, sometime this year, the Environmental Protection Agency ("EPA") is expected to issue its response to Growth Energy's application under section 211(f) of the Clean Air Act to permit the use of gasoline-

ethanol blends up to 15 percent ethanol in conventional vehicles. Growth Energy's initiative at EPA is consistent with the President's statement that the United States must "remove long-standing artificial barriers" to the wider use of ethanol.[2]

Unless and until EPA acts favorably on that application, the use of mid-level blends in flexible-fuel capable vehicles ("FFVs") provides the only practical means to achieve significant increases in the use of ethanol fuel in this country. According to the National Ethanol Vehicle Coalition ("NEVC") website, there are now 2,127 pumps dispensing a nominal E85 blend across the nation.[3] Many FFV operators, however, will benefit from the use of lower-blend fuels than the nominal E85 blend. According to a Google map maintained by the American Coalition for Ethanol ("ACE"), there are currently 154 retail stations across the nation that offer other mid-level blends.[4] This number is expected to grow dramatically in the coming months as States offer incentives to retail stations to install more dispensers for blender pumps (*i.e.*, pumps capable of dispensing various concentrations of ethanol). South Dakota, for example, has allocated $1,000,000 of stimulus funds for the installation of blender pumps, and other States have similar incentive programs. That is why the Commission and other regulatory agencies are right to focus on how the gasoline marketing industry is labeling mid-level blends at the retail level.

One other initial, background issue is important for comment. Currently, motor fuels containing ethanol available in the marketplace would fall into two identifiable groups. One

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[2] *See* letter from President Obama to the Governors' Biofuels Coalation, *available at* http://www.governorsbiofuelscoalition.org/assets/files/President%20Obama%27s%20Response5-27-09.pdf

[3] *See* http://www.e85refueling.com/states.php.

[4] *See* http://www.google.com/maps/ms?ie=UTF8&hl=en&msa=0&msid=114795702092705781866.0004506e7cf3ae206a7c0&ll=38.959409,-97.119141&spn=29.32350 9,54.140625&z=4.

group contains the fuels that are commonly known as E85, which the are currently called in the Octane Rule "[m]ixtures containing 85% or more by volume of methanol, denatured ethanol, and/or other alcohols (or such other percentage, but not less than 70%, as determined by the Secretary of the United States Department of Energy, by rule, to provide for requirements related to cold start, safety, or vehicle functions), with gasoline or other fuels."[5] The other group of alternative fuels containing ethanol available in the marketplace is becoming known as "Mid-Level Ethanol Blends," and those are the midlevel blends that are the focus of the March 16 notice.

The fuel commonly called E85 is problematic in its nomenclature. The fuels in this group are required to meet the performance specifications in the ASTM Standard, "D5798 Standard Specification for Fuel Ethanol (Ed75-Ed85) for Automotive Spark-Ignition Engines" ("D5798"), which is under the jurisdiction of the ASTM group for petroleum products and lubricants ("ASTM D02"). The current version of D5798 includes specific ethanol concentration minimums of 79 percent, 74 percent and 70 percent by volume depending on the geography and season the fuel is being distributed. Furthermore, ASTM D5798 contains an ethanol concentration maximum of 83 percent by volume, by stating a hydrocarbon minimum of 17 percent by volume for all geographies and seasons.[6]

Changes to ASTM D5798, currently being balloted by ASTM DO2, would reduce the minimum ethanol concentration for "E85" blends further, to 68 percent by volume. In addition, there have been several meetings of subcommittees under ASTM D02 and significant data brought forth at these meetings that would support further reductions in the "E85" blend,

[5] 16 CFR Part 306.0.

[6] Standard Specification for Fuel Ethanol (Ed75-Ed85) for Automotive Spark-Ignition Engines; Designation: D 5798 – 09b

possibly as low as 50 percent by volume. Given the fact that the name "E85" already does not represents the true ethanol concentration of all fuels under the current ASTM specifications, coupled with the fact that more changes are in store, Growth Energy believes that a new name and a related definition for "E85" would be needed to ensure transparency and proper representation of this group of fuels in the marketplace, if the term "E85" were to be used in any Commission regulation.

In addition, all federal agencies active in this area need to use consistent definitions. The term "flex fuel" is in current usage to describe the relevant types of vehicles, and should provide the starting point for a unified and fully-description. For their part, EPA and the National Highway Traffic Safety Administration call FFVs "vehicles that can run both on an alternative fuel and conventional fuel. Most FFVs are E85 capable vehicles, which can run on either gasoline or a mixture of up to 85 percent ethanol and 15 percent gasoline (E85)." 75 Fed. Reg. 25,324, 25,339 (May 7, 2010). That simple description accurately captures the reality of the marketplace, better than what the March 16 notice calls "E85." *See also id.* at 25,684 (defining as an FFV any vehicle "designed to operated on a petroleum fuel and on a methanol or ethanol fuel, or any mixture of the petroleum fuel and methanol or ethanol), *to be codified at* 40 C.F.R. §86.1803-01.

Putting aside the questions of statutory authority to establish new definitions within the alternative fuels category,[7] Growth Energy therefore believes the Commission should reconsider the definitional approach it is currently taking. In order to ensure consumers are properly matching the fuel dispensed with the vehicle's capabilities to use that fuel, an intuitive and

[7] *See* RFA Comments at 4. With respect to amendments to the Octane Rule's labeling requirements themselves, there is no statutory authority for the March 16 notice's proposal, as explained in Part II of these comments.

representative name should be developed, in an appropriate regulatory process. Growth Energy believes that if the FTC elects with promulgation of additional definitions, the text of 16 C.F.R. 306.0(i) should be modified as follows (with the key text shown with double underscoring):

> (i)Automotive fuel means liquid fuel of a type distributed for use as a fuel in any motor vehicle, and the term includes, but is not limited to:
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> > (1) Gasoline, an automotive spark-ignition engine fuel, which includes, but is not limited to, gasohol (generally a mixture of approximately 90% unleaded gasoline 37 and 10% denatured ethanol) and fuels developed to comply with the Clean Air Act, 42 U.S.C. 7401 et seq., such as reformulated gasoline and oxygenated gasoline; and
> >
> > (2) Alternative liquid automotive fuels, including, but not limited to:
> >
> > > (i) Methanol, denatured ethanol, and other alcohols;
> > >
> > > (ii) Flex Fuel, liquid automotive fuel that contains greater than 15 precent ethanol and less than 83 percent ethanol by volume and is intended for use in Flexible Fuel Vehicles.[[8]]

II. Statutory Framework

The March 16 notice bases the proposed amendments to the Octane Rule on its authority under Title II of the Petroleum Marketing Practices Act ("PMPA"), as amended by the Energy Policy Act of 1992 ("the 1992 Act"). *See* 75 Fed. Reg. at 12,474 n. 60. It is therefore important to examine the relevant text and statutory materials.

The purpose of the octane disclosure requirements in PMPA was to improve the information available to consumers and to prevent octane mislabeling and unnecessary purchases

[8] The lower limit of 15 percent in the suggested definition of Flex Fuel assumes that the allowable concentration of ethanol allowed in conventional vehicles will be increased by EPA. Given the current gasoline consumption rate in this country, and the number of Flexible Fuel Vehicles available and expected to be manufactured in the future, it will be necessary to increase the ethanol concentration in base gasoline beyond 10 percent to be compliant with EISA. In addition, at least one State (Minnesota), has already written in its statues the intent to move to 20 percent ethanol in the base gasoline sold in the state. It is therefore possible that a 20 percent volume ethanol minimum in the Flex Fuel definition would also be an appropriate and logical cutoff, making unnecessary any further updates in the foreseeable future.

of high-octane gasoline. The 1978 and 1992 legislative histories of PMPA both reflect these concerns. In 1978, when PMPA referred only to gasoline, the legislative history stated that "the purpose of title II [is] to require the testing, certification and posting of the octane rating of gasoline sold at retail and the display on any new automobile of the proper octane rating for that automobile." S. Rep. No. 95-732, at 14-15 (1978); S. Rep. No. 95-731, at 15 (1978) (identical language). In 1992, the PMPA was amended to add, among other things, 15 U.S.C. § 2821(17)(C). That addition allowed the FTC to require, in lieu of octane ratings:

> [A]nother form of rating determined by the Federal Trade Commission, after consultation with the American Society for Testing and Materials, to be more appropriate to carry out the purposes of this subchapter with respect to the automotive fuel concerned"

15 U.S.C. § 2821(17)(C). "This subchapter" refers to Subchapter II (titled "Octane Disclosure") of Chapter 55 (titled "Petroleum Marketing Practices") of Title 15 of the U.S. Code. Subchapter II is the codification of Title II of PMPA.[9]

When PMPA was enacted in 1978, the legislative history contained the following statements concerning the purpose of Title II:

- "It is the purpose of title II to require the testing, certification and posting of the octane rating of gasoline sold at retail and the display on any new automobile of the proper octane rating for that automobile." S. Rep. No. 95-732, at 14-15 (1978); S. Rep. No. 95-731, at 15 (1978) (identical language).
- The "Background and Need" section of the Senate Reports explained: (1) the usefulness of the octane rating to consumers in selecting the appropriate gasoline, (2) a concern with "octane overbuying" (consumers buying higher-octane gasoline than necessary on the mistaken assumption that there will always be a measurable benefit from higher octane),

[9] The relevant language in the 1992 Act was not debated, and the discussion in the legislative history largely refers to extending PMPA to other types of fuel beyond gasoline. *See, e.g.*, H. Rep. 102-474, at 220 (1992) ("This section amends Title II of the [PMPA] to extend automotive fuel posting ("octane") requirements to all liquid automotive fuels, such as gasohol, diesel fuel, ethanol and methanol. The [FTC], after consulting with the [ASTM] could design new more appropriate "octane" rating procedures if necessary for other liquid motor fuels such as methanol and ethanol. The FTC could also decide to require a cetane rating be posted for diesel fuel…") (paragraph breaks omitted).

(3) a need for a uniform system of rating the octane of gasoline, and (4) the need for legislation because of litigation over previous FTC rules and underenforcement of other regulations. S. Rep. No. 95-732, at 19-20 (1978); S. Rep. No. 97-731, at 19-20 (1978) (identical language).

In the 1992 Act's development, there was no expansion of the Commission's relevant authority, beyond the requirement to post octane levels, or alternative metrics developed in the ASTM process, for fuels other "traditional gasoline." Representative Sharp, for example, explained that the House bill that became the 1992 Act "would extend octane ratings to liquid fuels other than traditional gasoline to allow customers to compare posted octane for these fuels to their engine's requirements. Another goal of this legislation is to improve the information available to consumers."[10] *See also* H.Rep. No. 102-474, at 151 (1992) ("The octane provisions would also extend certification and posting requirements to fuels other than traditional gasoline. Fuels such as diesel fuel, certain types of reformulated gasoline, gasohol, ethanol, and methanol could now receive octane notices similar in format to those required of gasoline. This would allow consumers of these fuels to compare posted octane with their engine's requirements."); H. Rep. 102-474, at 220 (1992) ("This section amends Title II of the [PMPA] to extend automotive fuel posting ('octane') requirements to all liquid automotive fuels, such as gasohol, diesel fuel, ethanol and methanol . . . . The [FTC], after consulting with the [ASTM] could design new more appropriate "octane" rating procedures if necessary for other liquid motor fuels such as methanol and ethanol.")

Notably, the brief discussion of statutory authority in the March 16 notice does not advert to the key limiting text in the statute, which cabins the Commission to the establishment of octane ratings or alternative metrics that (1) have been developed in consultation with ASTM,

[10] *Hearing Before the Subcomm. on Energy and Power of the Comm. on Energy and Commerce*, 102d Cong. 406 (1992) (Serial No. 102-76) (Opening statement of Rep. Sharp, chairman).

and (2) found to be "more appropriate" as an anti-knock metric than octane in order to carry out the purposes of PMPA, as amended in relevant part in the 1992 Act. Agencies are required to explain adequately why regulatory proposals fit within the scope of their delegated power from Congress. As noted by RFA (*see* RFA comments at note 2), that requirement is enforced by the reviewing courts.

Consistent with the position of RFA, Growth Energy submits that the current text of the statute does not permit the Commission to adopt the amendments proposed by the March 16 notice. The complete statement on the issue of statutory authority in states as follows:

> The PMPA authorizes the Commission to require labels displaying fuel "ratings," which the statute defines as including information the Commission deems "appropriate to carry out the [statute's] purposes . . . ." 15 U.S.C. 2821(17)(C). The Commission has explained that, under this definition, a fuel's rating encompasses not only a numerical value but also text necessary to assure consumers that "they are purchasing a product that satisfies automobile engine minimum content requirements, which may be specified in their owner's manuals." 58 FR 41356, 41364-65 (Aug. 3, 1993). Thus, because the proposed additional language will assist consumers in determining whether they can use ethanol fuels, the language is part of the fuel's rating and the Commission may require it under PMPA.

75 Fed. Reg. at 12,474 n.60. The two-step analytical test in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (footnote 10 omitted), provides the controlling approach for how courts would review the FTC's exercise of authority in this rulemaking:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.FN9 If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

> question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> FN9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e.g., [string of citations]. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

The current text of PMPA does not provide a general authorization to the FTC to engage in labeling for consumer-protection purposes, and thus is unlike some other statutory programs that the Commission administers. Nor is the statute a general authorization to the FTC to require the display of fuel ratings consistent with the statutory purpose. The statute is far more specific in its textual directives than that, and those details are critical to determining whether the statute is unambiguous in general or in particular respects. The PMPA provides, in full, as follows:

> The term "automotive fuel rating" means—
>
> (A) the octane rating of an automotive spark-ignition engine fuel; ***and***
>
> (B) if provided for by the Federal Trade Commission by rule, the cetane rating of diesel fuel oils; ***or***
>
> (C) another form of rating determined by the Federal Trade Commission, after consultation with the American Society for Testing and Materials, to be more appropriate to carry out the purposes of this subchapter with respect to the automotive fuel concerned.

15 U.S.C. § 2821(17) (emphasis added). The FTC is thus authorized by PMPA to require the display of "fuel ratings," which are defined as either an octane rating and a cetane rating (for diesel fuels), ***or*** "another form of rating determined by the Federal Trade Commission, after consultation with the American Society for Testing and Materials, to be more appropriate to carry out the purposes of this subchapter with respect to the automotive fuel concerned." The

statute draws an explicit contrast between two different types of fuel ratings: an octane and cetane rating on the one hand, and "another form of rating" meeting certain conditions on the other. The use by Congress of "ands" and "ors" to connect different parts of the key definitional provision of the PMPA contained section 2821(17) must not be ignored.[11] Congress delegated the power to require fuel ratings consisting of an octane and a cetane rating, or an alternative metric that would carry out the same purposes as (i) an octane rating or (ii) an octane and cetane rating.

Even if section 2821(17) set out a list of three alternative kinds of fuel ratings separated by semicolons and a single concluding "or," that the FTC was being empowered to issue (in other words (i) an octane rating, (ii) a cetane rating, or (iii) "another form of rating"), the Commission still would lack the authority to choose any form of fuel rating it deemed consistent with the purposes of the statute. Instead, the specific terms listed before the concluding "or" would have to be considered to impart meaning back to the more general category of authority at the end of the list. The principle of *ejusdem generis* states:

> *ejusdem generis* * * * [Latin "of the same kind or class"] A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. • For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animal, the general language or any other farm animal — despite its seeming breadth — would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

BLACK'S LAW DICTIONARY (8th ed. 2004). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("Construing the residual phrase to exclude all employment contracts fails to

[11] *See Crooks v. Harrelson*, 282 U.S. 55, 58 (1930) ("We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense; and to construe the clause as though it said, 'to the payment of charges and expenses, or either of them,' as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law.").

give independent effect to the statute's enumeration of the specific categories of workers which precedes it . . . . The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991) . . . ."); *Santa Fe Pac. R. Co. v. Secretary of Interior*, 830 F.2d 1168, 1175 (D.C. Cir. 1987) (invalidating agency decision for failing to properly grapple with and apply the *ejusdem generis* canon).

Canons of construction are clearly "traditional tools of statutory construction" within the meaning of *Chevron* footnote 9, and hence are part of the *Chevron* step one inquiry. *See Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (court must "exhaust[] traditional tools of statutory construction" at *Chevron* step one); *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) ("if employment of an accepted canon of construction illustrates that Congress had a specific intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*."). Hence, considering the *ejusdem generis* canon where it applies is not optional; it is a mandatory step for agencies to undertake at *Chevron* step one to make sure they are properly construing the scope of any delegated authority.

The text of PMPA, with its deliberate use of contrasting conjunctions, makes it unambiguous that Congress wanted to require any other rating forms that the FTC might attempt to promulgate to be similar in purpose to octane or cetane ratings. In short, the use of a canon like *ejusdem generis* to link other forms of ratings back to octane or cetane ratings, and thereby dispel what would otherwise be ambiguous proves unnecessary here. In that respect, the

contrasting conjunctions and structure of section 2821(17) already do any work the canon would do.

It is also clear that the Commission must consult with ASTM, and under the APA, that consultation must be subject to public review and comment. Consultation obligations are regularly enforced by the courts.[12] Their enforcement is a simple matter of *Chevron* step one as applied to the text of those statutes. The obligation to consult with the ASTM about new forms of fuel ratings is equally mandatory.

The March 16 notice states that the Commission can adopt "another form of rating" "appropriate to carry out the [statute's] purposes . . . ." 75 Fed. Reg. at 12,474 n.60. At the very least, a rulemaking promulgated on such a basis would require a court to remand it for the agency to complete such an unfinished task. *See, e.g., Teva Pharm. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006). As far as regulated parties and the public can determine, the only step taken to date is to declare that "providing specific labeling requirements for Mid-Level Ethanol blends will further PMPA's purpose of 'assisting purchasers in identifying the specific type(s) of fuel required for their vehicles.'" *Id.* at 12,473. But the quotation concerning the purpose of the PMPA is not to the text of the PMPA, or to any passage from the PMPA's legislative history, but only to a prior rulemaking preamble. What an agency pronounces a statutory purpose to be does not itself become the purpose of the statute as defined by Congress. *See, e.g., Adams Fruit Co.,*

[12] For example, section 7 of the Endangered Species Act imposes a consultation obligation on agency decisions that might impact protected species. *See In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 415 (D.C. Cir. 2004). And the National Historic Preservation Act provides for "notification and consultation procedures federal agencies must follow prior to a federal 'undertaking' to consider the undertaking's effect on historic properties." *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003).

Inc. v. Barrett, 494 U.S. 638, 650 (1990) (agencies cannot bootstrap themselves into areas in which they have no jurisdiction).

In the cited 1993 rulemaking, the Commission stated that "although comparative unit pricing would give information to purchasers about different types of fuels, it does not constitute an alternative rating more appropriate than an octane rating." 58 Fed. Reg. 41,356, 41,360 (Aug. 3, 1993). The FTC thus recognized that section 2821(17) requires the Commission to promulgate other forms of fuel rating only by way of comparison to the objectives of an octane rating. The March 16 notice is not consistent with the 1993 rulemaking, because it proposes to construe the kinds of other fuel ratings it has been delegated to impose at the pump without comparative reference to octane or cetane ratings. Moreover, the March 16 notice does not explain why it is proposing to change course from its 1993 approach to the statute. *See FCC v. Fox Telev. Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

As the FTC recognized in 1993, a new fuel rating metric must be "***more*** appropriate" to carry out the statutory purpose than another. *See* 15 U.S.C. § 2821(17)(C) (emphasis added). The FTC fully recognized that this required a comparison between a new form of rating designed by the Commission and the congressionally mandated octane rating: "[A]lthough comparative unit pricing would give information to purchasers about different types of fuels, it does not constitute an alternative rating ***more appropriate than an octane rating***." *Id.* at 41,360 (emphasis added).

III. The Risk of Confusion and Conflict with Other Federal Statutory Programs

In addition to lacking statutory authority for the revisions to the Octane Rule proposed in the March 16 notice, the notice's specific proposed labels create a substantial risk of confusion. This would a separate ground for legal objection to the proposal in the March 16 notice, if the FTC were to proceed with that proposal, because fuel pump labels that confuse consumers more than they may inform them accurately are not consistent with PMPA or reasoned decisionmaking.

In the 1993 rulemaking, the Commission was careful to avoid the inclusion on fuel pump labels of information that, regardless of its benefit to some consumers, would tend to confuse others, particularly when the actual performance or impact of given fuel in a vehicle depends on factors other than the chemical composition or physical characteristics. *See* 58 Fed. Reg. at 41,364 (Aug. 3, 1993) (declining to include heating values on labels). Here, the risk is far more serious than in any prior rulemaking effort. The statement that midlevel blends "MAY HARM SOME VEHICLES" has no apparent basis in the record, other than two comment letters unaccompanied by any technical or market-research analysis.[13] Posting such a statement would serve to only confuse the consumer. The statement would leave the consumer wondering if his or her vehicle fits within the "some" category. Not knowing whether or not their vehicle fits the definition of "some," consumers who decide not to check the vehicle's manual may just assume their vehicle is not in the "some" category. Even more likely, consumers who are driving an FFV will be deterred from the use of the midlevel blend, even though all participants in this rulemaking would presumably agree that FFVs are designed for operation on any midlevel blend.

[13] Note that in the 1993 rulemaking, the claims concerning heating values were at least technically sound and not in dispute. *See* 58 Fed. Reg. at 41,363-64. Growth Energy concurs in RFA's comment that there is not sufficient evidence to support the proposed warming. *See* RFA comments at 6-7.

Those consumers will reject the midlevel blend, and will take away a message from the FTC that ethanol blends are bad for "some vehicles" — a message of undeniable vagueness, that will set back efforts to increase use of ethanol in vehicles designed or, or capable of, operation on ethanol without risk of any "harm."[14]

The Commission would need to address these specific issues, among others, if it decided to proceed with any type of "warning" label (and putting aside the other issues of statutory authority), and support its analysis with credible scientific data:

- What evidence demonstrates that consumers at a retail gasoline outlet will check an owner's manual before selecting a pump?
- What is the population of vehicle owners at risk of harming their vehicles if they use a midlevel blend — owners of conventional vehicles, FFVs, or both?
- What amount of putatively incorrect fuel usage will cause "harm," and what are the economic consequences of that harm for consumers?
- What are the economic benefits of the use of midlevel blends, and to what extent will consumers who are now or in the future who may be operating FFVs going to lose those benefits?
- What would the economic benefits be to consumers if EPA granted Growth Energy's E15 waiver request under the Clean Air Act, and to what extent would those benefits be lost based on the impression created by the proposed "warning" in this rulemaking?

[14] The same statement, "May Harm Some Vehicles," could be posted on every fuel pump in the United States and be equally true, for diesel will harm some engines (e.g. gasoline engines), gasoline will harm some engines (e.g. diesel engines), and so on. Instead of posting a blanket warning that is undefined and likely to be misinterpreted by the consumer, Growth Energy requests posting what the consumer needs to know, that the fuel is for "Flex Fuel Vehicles Only."

The last issue is particularly important. EPA has authority under the Clean Air Act, if it needs to exercise it, to ensure that consumers have adequate information about the impact of fuels on vehicle performance and durability — which appears to be the objective of the March 16 notice. *See, e.g.*, 40 C.F.R. §§ 80.570-574. And EPA now has before it the question, under section 211(f), whether to determine that blends up to 15 percent ethanol are suitable for use in some or all conventional vehicles. If EPA makes such a determination, and proposes to require gasoline retailers to provide appropriate consumer information under the Clean Air Act, the "warning" proposed by the March 16 notice would conflict with EPA's action. Such a result would raise additional questions for a reviewing court.[15] Such a conflict would draw into sharper relief the absence of authority for the Commission to adopt the March 16 proposal.

IV. Recommended Action

Under these circumstances, the appropriate course of action is to limit any amendments to the Octane Rule to measures that come within the scope of the Commission's power, and for the Commission to develop voluntary labeling requirements that will accomplish the proper goals of the March 16 notice.

The Commission clearly has authority to add octane ratings for alternative fuels to the Octane Rule. It should do so. Sample labels providing that information are attached to these comments. The labels also could include, as part of a voluntary program, the fact that midlevel blends (*i.e*,, blends with ethanol above levels approved by EPA) are suitable only for FFVs, and the minimum ethanol concentrations in the blend. The ethanol concentration has an impact on the economics of the purchase, and the consumer needs to know more precisely the

[15]*See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

concentration of the ethanol in the fuel to make an informed decision regarding the purchase. Stating the ethanol concentration on the label is a simple and straightforward approach to providing some consumers with information that he or she can use in selecting a fuel.

The labels for octane levels of midlevel blends that the Commission can and should adopt under PMPA, with or without the supplemental information that could be included as part of a voluntary program, should use colors to ensure that consumers are alert to the message being conveyed. There is already precedent for this, as biodiesel and biodiesel blends have been assigned a light blue background color to distinguish these fuels from both hydrocarbon-based diesel and other Alternative Liquid Automotive Fuels.

In keeping with this pattern, Growth Energy proposes that alternative fuels containing ethanol be assigned a label background color that distinguishes these fuels from the other alternative fuels. Given that many of the color options are already assigned to other fuels, Growth Energy proposes a dark blue background with white font for alternative fuels containing ethanol. The dark blue color background coupled with the white font should be adequate to distinguish alternative fuels containing ethanol from biodiesel and biodiesel blends. In addition, the fact that biodiesel and biodiesel blends are typically, like hydrocarbon-based diesel, offered at different pump islands at the retail stations than gasoline blends, should ensure that there is no confusion between biodiesel/biodiesel blends and alternative fuels containing ethanol. The proposed color (Pantone 286 C) for the labels for alternative fuels containing ethanol is used in the attached sample labels displayed at the top of the next page.

V. Conclusion

Growth Energy appreciates the opportunity to comments on the proposed amendments to the Octane Rule, and hopes these comments are helpful in presenting the perspective of the U.S. ethanol industry on the important issues presented by those proposed amendments. Growth Energy and its members stand ready to participate further in these proceedings and in other work by the FTC to fulfill the Commission's statutory mandates.

GROWTH ENERGY