

REPORT OF THE FEDERAL TRADE COMMISSION ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES

REPORTING PERIOD JANUARY-JUNE 2009

The Federal Trade Commission (“Commission” or “FTC”) is pleased to submit this report to the Congressional Appropriations Committees (“the Committees”) in response to the Explanatory Statement that accompanied the Omnibus Appropriations Act for Fiscal Year 2009. That Explanatory Statement directed the Commission to “keep the House and Senate Committees on Appropriations apprised of findings made regarding fuel prices, as well as other planned activities and investigations regarding the oil and gas industries.”¹

In the Commission’s view, it bears repeating that the energy sector has long been, and remains today, one of our most important fields of endeavor for protecting the American public. The Commission continued to pay very close attention to the energy sector during the first half of calendar 2009. During this period, the FTC and its staff continued to focus on mergers and acquisitions, possible anticompetitive conduct, and other activities involving pricing or competition in the petroleum and natural gas industries. The Commission’s rulemaking proceeding concerning potential market manipulation in the petroleum sector (described in more detail *infra*) constituted another important aspect of the FTC’s work in this area. The Commission expects its vigorous activity to continue during the second half of 2009 and beyond.

During the first six months of 2009, personnel from all parts of the Commission were involved in law enforcement, economic analysis, and rule- or policy-related activities in the oil and natural gas industries. The Commission’s specially appointed Associate General Counsel for Energy remained involved in virtually all aspects of the agency’s work in these industries. Personnel from the Mergers III division of the Bureau of Competition (which is devoted primarily to petroleum and natural gas issues), from that Bureau’s front office, and from numerous other Bureau divisions have been involved in addressing oil and natural gas issues as well.² In addition to the Bureau of Competition, one division of the Commission’s Bureau of

¹ Explanatory Statement for Division D, Title V, Omnibus Appropriations Act, 2009, Pub. L. No. 111-8 (House Appropriations Committee Print at 983, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:47494d.pdf). As the Commission noted in previous reports to the Appropriations Committees, because this is a public report, it is drafted to exclude sensitive details of ongoing investigations, which the Commission is prohibited by law from revealing.

² Additional offices in the Bureau of Competition that have participated in oil and gas matters during the first half of 2009 include the Mergers I and Mergers II divisions, the Division of Anticompetitive Practices, the Division of Compliance, the Division of Technology and Information Management, the Office of Policy and Coordination, the Division of Operations, and the Office of Premerger Notification.

Economics also bore major responsibility for conducting competition analysis of pricing and other competitive issues in the petroleum and natural gas industries. Other staff involved in oil and natural gas matters during the first half of 2009 came from the Commission's Bureau of Consumer Protection,³ the Office of the General Counsel, the Office of Congressional Relations, the Commissioners' offices, and other FTC organizations.⁴

Since January 1, 2009, the Commission has received premerger filings under the Hart-Scott-Rodino Act for seven proposed transactions in these industries. The agency reviewed each of these transactions, and also monitored the industry for other, nonreportable transactions that might raise antitrust concerns. For transactions that raised antitrust concerns, the Commission investigated further. During the relevant period, the Commission investigated transactions involving petroleum or natural gas, including acquisitions involving pipeline and refining assets. Certain merger examinations were closed due to a lack of competitive overlap or because the transactions being scrutinized were unlikely to lead to anticompetitive effects.

The Commission's work involving oil and natural gas also includes the examination of possibly anticompetitive conduct by firms in these industries. A prominent example of this type of activity was the Commission's investigation of gasoline prices in Western New York and Vermont that began during the fall of 2008. Alerted both by Congressional expressions of concern and by its own Gasoline and Diesel Price Monitoring Project (described in more detail, *infra*), the Commission conducted a detailed examination of the reasons for higher-than-expected gasoline prices in and around Buffalo and in Northern Vermont. Following a six-month investigation, the Commission found substantial evidence that the prices were unlikely to have been caused by law violations. In response to Members' requests, the Commission also noted various possible proposals that have been raised in the public discussion on addressing concerns about gasoline prices.⁵

³ Although the bulk of the FTC's activities in the oil and natural gas sectors involves antitrust enforcement and economic analysis, the Bureau of Consumer Protection also prosecutes cases of importance to consumers of gasoline and other energy products. For example, on June 9, 2009, the U.S. District Court for the District of New Jersey entered a Stipulated Preliminary Injunction Order against Dutchman Enterprises, LLC, and other entities that, according to the Order, were "engaged in a concerted course of illegal activity by deceptively marketing a purported fuel-saving product in violation of Section 5 of the FTC Act." The FTC's Complaint charged the defendants with falsely advertising that their "Hydro-Assist Fuel Cell" boosts automobile gasoline mileage by at least 50 percent. *See* FTC Press Release, "FTC Sues Promoters of Bogus Fuel Efficiency Device" (Feb. 2, 2009), *available at* <http://www2.ftc.gov/opa/2009/02/dutchman.shtm>.

⁴ The staff involved in the Commission's petroleum market manipulation rulemaking proceeding continues to come from offices spanning the entire agency.

⁵ The FTC staff also pursued other inquiries concerning gasoline prices. Some of these inquiries involved close cooperation between the FTC staff and a number of state attorney

In addition to the matters described above, the Commission has several other efforts underway to examine pricing behavior and to identify and, where appropriate, take action against potential law violations in these industries.

One substantial activity concerns potential market manipulation in the petroleum sector. Pursuant to Section 811 of the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, the Commission is acting to address the potential use or employment of “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale of crude oil gasoline or petroleum distillates at wholesale.” Following intensive preparatory work by a task force composed of attorneys, economists, and other staff from throughout the agency, the Commission issued an Advance Notice of Proposed Rulemaking (“ANPR”) on its website on May 2, 2008 (and in the *Federal Register* on May 7, 2008), and requested public comments by June 6 (extended to June 23) on a range of issues and questions raised in the ANPR. The Commission elicited the views of a wide spectrum of consumer groups, businesses, academic experts, and other informed sources on the issues raised in this proceeding, and received 155 public comments on the ANPR. Following analysis of those comments and additional analysis, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) on its website on August 13, 2008 (and in the *Federal Register* on August 19, 2008), setting forth the text of a proposed rule on petroleum market manipulation and inviting further public comment. In addition to evaluating 34 comments on the NPRM, the Commission held a public workshop on November 6, 2008, as part of the rulemaking proceeding. The all-day workshop – featuring more than 15 outside panelists representing diverse interests and views – considered such issues as the use of Securities and Exchange Commission Rule 10b-5 as a model for an FTC rule, the appropriate reach of an FTC market manipulation rule, and whether to include market or price effects as an element of a cause of action under an FTC rule. Based on the record developed to that point, the Commission published a Revised Notice of Proposed Rulemaking (“RNPRM”) on its website on April 16, 2009 (and in the *Federal Register* on April 22, 2009), seeking public comment on a revised version of the proposed rule. The Commission currently is evaluating the 17 public comments that it received in response to the RNPRM, and anticipates completion of the rulemaking proceeding during the third quarter of calendar 2009.

During the relevant period, the FTC also continued a longstanding project that has provided valuable information in connection with the agency’s efforts to police conduct in the petroleum industry. Since 2002, the Gasoline and Diesel Price Monitoring Project has involved monitoring by our Bureau of Economics of the wholesale and retail prices of gasoline in order to help detect possible anticompetitive activities and determine whether a law enforcement investigation is warranted. This project continues to track retail gasoline and diesel prices in some 360 cities across the nation and wholesale (terminal rack) prices in 20 major urban areas.

general offices. One state attorney general recently asked the Commission to look more closely into gasoline prices in a particular part of the state. FTC staff have been coordinating with that attorney general’s staff in this inquiry.

The staff of the Bureau of Economics receives daily data from the Oil Price Information Service (except on Sundays) and reviews other relevant information that the Commission might receive directly from the public or from other government agencies or Members of Congress. The staff reviews the data and uses an econometric model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, the staff consults with the Energy Information Administration. FTC staff also contacts the offices of the appropriate state attorneys general to discuss the anomaly and appropriate potential actions, including the opening of an investigation. The Commission expects to continue this important activity.

Consumer education is always at the forefront of the FTC's activities, and in late May the Commission took the opportunity to post information on its website that should help consumers save money in their energy purchases in a number of ways. The Commission's "Don't Let Summer Fuel Costs Strain Your Budget" press release provides tips to consumers on ways to save on home energy costs, as well as advice on improving the fuel efficiency of their cars.⁶

FTC staff continued to gather information needed to prepare the Commission's fifth annual *Report on Ethanol Market Concentration*, which will be due at the beginning of December 2009. These reports, issued pursuant to Section 1501(a)(2) of the Energy Policy Act of 2005 (45 U.S.C. § 7545(o)), involve an annual analysis of ethanol industry concentration to determine whether there is sufficient competition among ethanol industry participants "to avoid price-setting and other anticompetitive behavior."⁷

⁶ This press release is available at <http://www.ftc.gov/opa/2009/05/gasprices.shtm>.

⁷ The Commission's 2008 ethanol report, *available at* <http://www.ftc.gov/os/2008/11/081117ethanolreport.pdf>, concluded that although "the trend of the industry to become more and more unconcentrated each year is now slowing or even slightly reversing," industry dynamics "make it extremely unlikely that a single ethanol producer or marketer, or a small group of such firms, could wield sufficient market power to be able to engage in price-setting or other anticompetitive behavior."

A number of reports prepared by the FTC or its staff that predate the period covered by the current report to Congress also demonstrate the Commission's commitment to delving deeply into key competition and consumer issues in the energy sector and sharing its expertise with Congress and the public. *See, e.g.*, FEDERAL TRADE COMMISSION, REPORT ON SPRING/SUMMER 2006 NATIONWIDE GASOLINE PRICE INCREASES (2007), *available at* <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>; FEDERAL TRADE COMMISSION, REPORT ON GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (2006), *available at* <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>; FEDERAL TRADE COMMISSION, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND, AND

Another ongoing responsibility is the FTC's antitrust review of proposed oil and natural gas leases on the Outer Continental Shelf, pursuant to the Outer Continental Shelf Lands Act Amendments of 1978. The Commission undertook one such review during the first half of 2009 and advised the Acting Assistant Attorney General regarding its views of the proposed lease sale.

Conclusion

The Commission has maintained its intensive antitrust scrutiny of the energy sector during the first half of 2009. In view of the fundamental importance of oil, natural gas, and other energy resources to the overall vitality of the United States and world economy, we expect that FTC review and oversight of the oil and natural gas industries will remain a centerpiece of our work for years to come.

COMPETITION (2005), *available at* <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>; FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (2004), *available at* <http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf>.