

Oil Mergers, Manipulation and Mirages: How Eroding Legal Protections and Lax Regulatory Oversight Harm Consumers

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Since 2001, the largest five oil companies operating in the United States—ExxonMobil, ChevronTexaco, ConocoPhillips, BP and Shell—recorded \$435 billion in profits.¹ Recent entries to oil markets like investment banks, hedge funds and private equity firms have also been posting record earnings. While some of their profit clearly stems from certain aspects of global supply and demand, investigations show that a portion of these record earnings are fueled by market manipulation, made possible by recent mergers and weak regulatory oversight.

Energy trading markets, where prices of oil and gasoline are set, were recently deregulated, providing new opportunities for oil companies and financial firms to manipulate prices. Investigations show that energy trading firms have not only exploited recently weakened regulatory oversight, but a new trend of energy traders controlling energy infrastructure assets like pipelines and storage facilities provide additional abilities to use “insider” information to help manipulate markets.

There have been a **wave of mergers in the oil and gas industry** (see discussion beginning on page 11), which has led to greater levels of market power and industry consolidation that have made anti-competitive practices by a handful of oil companies more possible. The strong bias in recent years in the antitrust area in favor of a ***rule of reason rather than a per se analysis of alleged anticompetitive conduct*** has weakened anti-trust enforcement at the same time as industry consolidation has reached a peak (see discussion beginning on page 17). This judicial weakening of anti-trust law, combined with lax regulatory oversight by the US Federal Trade Commission, has allowed oil companies to merge operations and forge joint partnerships that undermine effective competition in domestic downstream oil markets.

Energy Trading Abuses Require Stronger Oversight

Two regulatory lapses are enabling anti-competitive practices in energy trading markets where prices of energy are set. First, oil companies, investment banks and hedge funds are exploiting recently deregulated energy trading markets to manipulate energy prices. Second, energy traders are speculating on information gleaned from their own company's energy infrastructure affiliates, a type of legal “insider trading.” These regulatory loopholes were born of inappropriate contacts between public officials and powerful energy companies and have resulted in more volatile and higher prices for consumers.

¹ Public Citizen calculations from company financial reports.

Contrary to some public opinion, oil prices are not set by the Organization of Petroleum Exporting Countries (OPEC); rather, they are determined by the actions of energy traders in markets. Historically, most crude oil has been purchased through either fixed-term contracts or on the “spot” market. There have been long-standing futures markets for crude oil, led by the New York Mercantile Exchange (NYMEX) and London’s International Petroleum Exchange (which was acquired in 2001 by an Atlanta-based unregulated electronic exchange, ICE). NYMEX is a floor exchange regulated by the U.S. Commodity Futures Trading Commission (CFTC). The futures market has historically served to hedge risks against price volatility and for price discovery. Only a tiny fraction of futures trades result in the physical delivery of crude oil.

The CFTC enforces the Commodity Exchange Act, which gives the Commission authority to investigate and prosecute market manipulation.² But after a series of deregulation moves by the CFTC and Congress, the futures markets have been increasingly driven by the unregulated over-the-counter (OTC) market over the last few years. These electronic OTC markets have been serving more as pure speculative markets, rather than traditional volatility hedging or price discovery. And, importantly, this new speculative activity is occurring outside the regulatory jurisdiction of the CFTC.

Energy trading markets were deregulated in two steps. First, in response to a petition by nine energy and financial companies, led by Enron³, on November 16, 1992, then-CFTC Chairwoman Wendy Gramm supported a rule change—later known as Rule 35—exempting certain energy trading contracts from the requirement that they be traded on a regulated exchange like NYMEX, thereby allowing companies like Enron and Goldman Sachs to begin trading energy futures between themselves outside regulated exchanges. Importantly, the new rule also exempted energy contracts from the anti-fraud provisions of the Commodity Exchange Act.⁴ At the same time, Gramm initiated a proposed order granting a similar exemption to large commercial participants in various energy contracts that was later approved in April 2003.⁵

Enron had close ties to Wendy Gramm’s husband, then-Texas Senator Phil Gramm. Of the nine companies writing letters of support for the rule change, Enron made by far the largest contributions to Phil Gramm’s campaign fund at that time, giving \$34,100.⁶

Wendy Gramm’s decision was controversial. Then- chairman of a House Agriculture subcommittee with jurisdiction over the CFTC, Rep. Glen English, protested that Wendy Gramm’s action prevented the CFTC from intervening in basic energy futures contracts disputes, even in cases of fraud, noting that that “in my 18 years in Congress [Gramm’s motion to deregulate] is the most irresponsible decision I have come across.” Sheila Bair, the CFTC commissioner casting the lone dissenting vote, argued that deregulation of

² 7 USC §§ 9, 13b and 13(a)(2).

³ The other eight companies were: BP, Coastal Corp (now El Paso Corp.) Conoco and Phillips (now ConocoPhillips), Goldman Sachs’ J. Aron & Co, Koch Industries, Mobil (now ExxonMobil) and Phibro Energy (now a subsidiary of CitiGroup).

⁴ 17 CFR Ch. 1, available at www.access.gpo.gov/nara/cfr/waisidx_06/17cfr35_06.html

⁵ “Exemption for Certain Contracts Involving Energy Products,” 58 Fed. Reg. 6250 (1993).

⁶ Charles Lewis, “The Buying of the President 1996,” pg 153. The Center for Public Integrity.

energy futures contracts “sets a dangerous precedent.”⁷ A U.S. General Accounting Office report issued a year later urged Congress to increase regulatory oversight over derivative contracts,⁸ and a congressional inquiry found that CFTC staff analysts and economists believed Gramm’s hasty move prevented adequate policy review.⁹

Five weeks after pushing through the “Enron loophole,” Wendy Gramm was asked by Kenneth Lay to serve on Enron’s Board of Directors. When asked to comment about Gramm’s nearly immediate retention by Enron, Lay called it “convoluted” to question the propriety of naming her to the board.¹⁰

Congress followed Wendy Gramm’s lead in deregulating energy trading *contracts* and moved to deregulate energy trading *exchanges* by exempting electronic exchanges, like those quickly set up by Enron, from regulatory oversight (as opposed to a traditional trading floor like NYMEX that remained regulated). Congress took this action during last-minute legislative maneuvering on behalf of Enron by former Texas GOP Senator Phil Gramm in the lame-duck Congress two days after the Supreme Court ruled in *Bush v Gore*, buried in 712 pages of unrelated legislation.¹¹ As Public Citizen pointed out back in 2001,¹² this law deregulated OTC derivatives energy trading by “exempting” them from the Commodity Exchange Act, removing anti-fraud and anti-manipulation regulation over these derivatives markets and exempting “electronic” exchanges from CFTC regulatory oversight.

This deregulation law was passed against the explicit recommendations of a multi-agency review of derivatives markets. The November 1999 release of a report by the President’s Working Group on Financial Markets—a multi-agency policy group with permanent standing composed at the time of Lawrence Summers, Secretary of the Treasury; Alan Greenspan, Chairman of the Federal Reserve; Arthur Levitt, Chairman of the Securities and Exchange Commission; and William Rainer, Chairman of the CFTC—concluded that energy trading must not be deregulated. The Group reasoned that “due to the characteristics of markets for nonfinancial commodities with finite supplies ... the Working Group is unanimously recommending that the [regulatory] exclusion not be extended to agreements involving such commodities.”¹³ In its 1999 lobbying disclosure form, Enron indicated that the “President’s Working Group” was among its lobbying targets.¹⁴

⁷ “Derivatives Trading Forward-Contract Fraud Exemption May be Reversed,” *Inside FERC’s Gas Market Report*, May 7, 1993.

⁸ “Financial Derivatives: Actions Needed to Protect the Financial System,” GGD-94-133, May 18, 1994, available at <http://archive.gao.gov/t2pbat3/151647.pdf>

⁹ Brent Walth and Jim Barnett, “A Web of Influence,” *Portland Oregonian*, December 8, 1996.

¹⁰ Jerry Knight, “Energy Firm Finds Ally, Director, in CFTC Ex-Chief,” *Washington Post*, April 17, 1993.

¹¹ HR 5660, an amendment to H.R.4577, which became Appendix E of P.L.106-554 available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ554.106.pdf

¹² *Blind Faith: How Deregulation and Enron’s Influence Over Government Looted Billions from Americans*, available at www.citizen.org/documents/Blind_Faith.pdf

¹³ “Over-the-Counter Derivatives Markets and the Commodity Exchange Act,” *Report of The President’s Working Group on Financial Markets*, pg. 16. www.ustreas.gov/press/releases/docs/otcact.pdf

¹⁴ Senate Office of Public Records Lobbying Disclosure Database, available at http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/1999/01/000/309/000309331|30, page 7.

As a result of the Commodity Futures Modernization Act, trading in lightly-regulated exchanges like NYMEX is declining as more capital flees to the completely unregulated OTC markets, such as those run by the Intercontinental Exchange (ICE). Trading on the ICE has skyrocketed, with the 93 million contracts traded in 2006 representing a 120 percent increase from 2005, and the 12.6 million contracts traded in January 2007 a 166 percent increase from a year earlier.¹⁵ This explosion in unregulated trading volume means that more trading is done behind closed doors out of reach of federal regulators, increasing the chances of oil companies and financial firms to engage in anti-competitive practices.

The founding members of ICE include Goldman Sachs, BP, Shell and Totalfina Elf. In November 2005, ICE became a publicly traded corporation. Goldman Sachs remains a significant shareholder of ICE, owning about 7.4 percent of the exchange's shares, while Morgan Stanley owns 7.3 percent and BP five percent.¹⁶

Goldman Sachs' trading unit, J. Aron, is one of the largest and most powerful energy traders in the United States, and commodities trading represents a significant source of revenue and profits for the company. Goldman Sachs' most recent 10-k filed with the U.S. Securities and Exchange Commission show that Fixed Income, Currency and Commodities (which includes energy trading) generated nearly 40 percent of Goldman's \$37.7 billion in revenue for 2006. In 2005, Goldman Sachs and Morgan Stanley—the two companies are widely regarded as the largest energy traders in America—each reportedly earned about \$1.5 billion in net revenue from energy trading. One of Goldman's star energy traders, John Bertuzzi, made as much as \$20 million in 2005.

In the summer of 2006, Goldman Sachs, which at the time operated the largest commodity index, GSCI, announced it was radically changing the index's weighting of gasoline futures, selling about \$6 billion worth. As a direct result of this weighting change, Goldman Sachs unilaterally caused gasoline futures prices to fall nearly 10 percent.¹⁷

A recent bipartisan U.S. Senate investigation summed up the negative impacts on oil prices with this shift towards unregulated energy trading speculation:

Over the last few years, large financial institutions, hedge funds, pension funds, and other investment funds have been pouring billions of dollars into the energy commodity markets—perhaps as much as \$60 billion in the regulated U.S. oil futures market alone...The large purchases of crude oil futures contracts by speculators have, in effect, created an additional demand for oil, driving up the price of oil to be delivered in the future in the same manner that additional demand for the immediate delivery of a physical barrel of oil drives up the price on the spot market...Several analysts have estimated that speculative purchases

¹⁵ Available at www.theice.com/exchange_volumes_2005.jhtml

¹⁶ Available at <http://finance.yahoo.com/q/mh?s=ICE>

¹⁷ Heather Timmons, "Change in Goldman Index Played Role in Gasoline Price Drop," *The New York Times*, September 30, 2006.

of oil futures have added as much as \$20–\$25 per barrel to the current price of crude oil...large speculative buying or selling of futures contracts can distort the market signals regarding supply and demand in the physical market or lead to excessive price volatility, either of which can cause a cascade of consequences detrimental to the overall economy...At the same time that there has been a huge influx of speculative dollars in energy commodities, the CFTC's ability to monitor the nature, extent, and effect of this speculation has been diminishing. Most significantly, there has been an explosion of trading of U.S. energy commodities on exchanges that are not regulated by the CFTC...in contrast to trades conducted on the NYMEX, traders on unregulated OTC electronic exchanges are not required to keep records or file Large Trader Reports with the CFTC, and these trades are exempt from routine CFTC oversights. In contrast to trades conducted on regulated futures exchanges, there is no limit on the number of contracts a speculator may hold on an unregulated OTC electronic exchange, no monitoring of trading by the exchange itself, and no reporting of the amount of outstanding contracts ("open interest") at the end of each day.¹⁸

Thanks to the Commodity Futures Modernization Act, participants in these newly-deregulated energy trading markets are not required to file so-called Large Trader Reports, the records of all trades that NYMEX traders are required to report to the CFTC, along with daily price and volume information. These Large Trader Reports, together with the price and volume data, are the primary tools of the CFTC's regulatory regime: "The Commission's Large Trader information system is one of the cornerstones of our surveillance program and enables detection of concentrated and coordinated positions that might be used by one or more traders to attempt manipulation."¹⁹ So the deregulation of OTC markets, by allowing traders to escape such basic information reporting, leave federal regulators with no tools to routinely determine whether market manipulation is occurring in energy trading markets.

Oil companies, investment banks and hedge funds are exploiting the lack of government oversight to price-gouge consumers and make billions of dollars in profits. These energy traders boast how they're price-gouging Americans, as a recent *Dow Jones* article makes clear: energy "traders who profited enormously on the supply crunch following Hurricane Katrina cashed out of the market ahead of the long weekend. 'There are traders who made so much money this week, they won't have to punch another ticket for the rest of this year,' said Addison Armstrong, manager of exchange-traded markets for TFS Energy Futures."²⁰

The ability of federal regulators to investigate market manipulation allegations even on the lightly-regulated exchanges like NYMEX is difficult, let alone the unregulated OTC market. For example, as of August 2006, the Department of Justice is still investigating

¹⁸ *The Role Of Market Speculation In Rising Oil And Gas Prices: A Need To Put The Cop Back On The Beat*, Staff Report prepared by the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the U.S. Senate, June 27, 2006, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_senate_committee_prints&docid=f:28640.pdf

¹⁹ Letter from Reuben Jeffrey III, Chairman, CFTC, to Michigan Governor Jennifer Granholm, August 22, 2005.

²⁰ Leah McGrath Goodman, "Oil Futures, Gasoline In NY End Sharply Lower," September 2, 2005.

allegations of gasoline futures manipulation that occurred *on a single day in 2002*.²¹ If it takes the DOJ four years to investigate a single day's worth of market manipulation, clearly energy traders intent on price-gouging the public don't have much to fear.

That said, there have been some settlements for manipulation by large oil companies. In January 2006, the CFTC issued a civil penalty against Shell Oil for "non-competitive transactions" in U.S. crude oil futures markets.²² In March 2005, a Shell subsidiary agreed to pay \$4 million to settle allegations it provided false information during a federal investigation into market manipulation.²³ In August 2004, a Shell Oil subsidiary agreed to pay \$7.8 million to settle allegations of energy market manipulation.²⁴ In July 2004, Shell agreed to pay \$30 million to settle allegations it manipulated natural gas prices.²⁵ In June 2006, the CFTC brought civil charges against BP for allegedly manipulating the entire U.S. propane market.²⁶ In September 2003, BP agreed to pay NYMEX \$2.5 million to settle allegations the company engaged in improper crude oil trading, and in July 2003, BP agreed to pay \$3 million to settle allegations it manipulated energy markets.²⁷

There is near-unanimous agreement among industry analysts that speculation is driving up oil and natural gas prices. Representative of these analyses is a May 2006 Citigroup report on the monthly average value of speculative positions in American commodity markets, which found that the value of speculative positions in oil and natural gas stood at \$60 billion, forcing Citigroup to conclude that "we believe the hike in speculative positions has been a key driver for the latest surge in commodity prices."²⁸

Natural gas markets are also victimized by these unregulated trading markets. Public Citizen has testified before Congress on this issue,²⁹ and a March 2006 report by four state attorneys general concludes that "natural gas commodity markets have exhibited

²¹ John R. Wilke, Ann Davis and Chip Cummins, "BP Woes Deepen with New Probe," *The Wall Street Journal*, August 29, 2006.

²² "U.S. Commodity Futures Trading Commission Assesses Penalties of \$300,000 Against Shell-Related Companies and Trader in Settling Charges of Prearranging Crude Oil Trades" available at www.cftc.gov/opa/enf06/opa5150-06.htm

²³ "Commission Accepts Settlement Resolving Investigation Of Coral Energy Resources," available at www.ferc.gov/press-room/press-releases/2005/2005-1/03-03-05.asp

²⁴ "Order Approving Contested Settlement," available at www.ferc.gov/whats-new/comm-meet/072804/E-60.pdf

²⁵ "Coral Energy Pays \$30 Million to Settle U.S. Commodity Futures Trading Commission Charges of Attempted Manipulation and False Reporting," available at www.cftc.gov/opa/enf04/opa4964-04.htm

²⁶ "U.S. Commodity Futures Trading Commission Charges BP Products North America, Inc. with Cornering the Propane Market and Manipulating the Price of Propane," available at www.cftc.gov/opa/enf06/opa5193-06.htm

²⁷ "Order Approving Stipulation and Consent Agreement," 104 FERC ¶ 61,089, available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10414789>

²⁸ *The Role Of Market Speculation In Rising Oil And Gas Prices: A Need To Put The Cop Back On The Beat*, Staff Report prepared by the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the U.S. Senate, June 27, 2006, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_senate_committee_prints&docid=f:28640.pdf

²⁹ "The Need for Stronger Regulation of U.S. Natural Gas Markets," available at www.citizen.org/documents/Natural%20Gas%20Testimony.pdf

erratic behavior and a massive increase in trading that contributes to both volatility and the upward trend in prices.”³⁰

While most industry analysts agree that the rise in speculation is fueling higher prices, there is one notable outlier: the federal government. In a widely dismissed report, the CFTC recently concluded that there was “no evidence of a link between price changes and MMT [managed money trader] positions” in the natural gas markets and “a significantly negative relationship between MMT positions and prices changes...in the crude oil market.”³¹

The CFTC study (and similar one performed by NYMEX) is flawed for numerous reasons, including the fact that the role of hedge funds and other speculators on long-term trading was *not* included in the analysis. The *New York Times* reported that “many traders have scoffed at the studies, saying that they focused only on certain months, missing price run-ups.”³²

Public Citizen has long supported reregulation of these exchanges, but the latest legislative effort was rejected by the Senate by a vote of 55-44 in June 2003.³³ The lobbying influence of oil companies, financial firms and hedge funds played a key role in defeating the amendment. As the meteoritic growth of hedge funds in energy markets continues, so does the industry’s presence on Capitol Hill.

The Managed Funds Association (MFA) has been around for a few years, and its political action committee has doled out \$300,900 in campaign contributions to members of congress since 2003. MFA—which recently put former Democratic Sen. John Breaux (now a Patton Boggs lobbyist) on its Board—operates out of the offices of the lobbying firm Smith Bucklin. MFA has hired at least nine former Congressional and Executive Branch officials, including: Patton Boggs’ Don Moorehead (former GOP Chief Counsel to the Senate Finance Committee); the duo of Peter Rich (former GOP House Energy Committee staffer and husband of a former senior counsel to the House Committee on Financial Services) and Mitchell Feuer (former Democratic staffer on the Senate Banking Committee); Sullivan & Cromwell’s Kenneth Raisler (former general counsel of the CFTC); and Williams & Jensen’s cadre of lobbyists: David E. Franasiak, former Staff Director to the Tax Oversight Subcommittee of the U.S. House of Representatives Small Business Committee; J. Steven Hart, a former Reagan Administration official; Joel G. Oswald, former Senate Banking Committee staffer working for Senator Michael B. Enzi (R-WY); and Christopher W. Hatcher, Legislative Director and Counsel for former Congressman Scott McInnis (R-CO).

³⁰ *The Role of Supply, Demand and Financial Commodity Markets in the Natural Gas Price Spiral*, available at www.ago.mo.gov/pdf/NaturalGasReport.pdf

³¹ Michael S. Haigh, Jana Hranaiova and James A. Overdahl, “Price Dynamics, Price Discovery and Large Futures Trader Interactions in the Energy Complex,” available at www.cftc.gov/files/opa/press05/opacftc-managed-money-trader-study.pdf

³² Alexei Barrionuevo and Simon Romero, “Energy Trading, Without a Certain ‘E’,” January 15, 2006.

³³ www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00218

James Chanos, president of the hedge fund Kynikos Associates, has teamed up with other hedge fund directors to form the Coalition of Private Investment Companies to influence Congress. Their first order of business was to hire former congressional staffers: Andrew Lowenthal (former Democratic Senate Banking Committee aide) and Lendell Porterfield (former aide to Senate Banking Committee member Richard Shelby).

The lightly-regulated exchanges, like NYMEX, have their own revolving door army: NYMEX hires the lobbying services of Arent Fox, where at least three former Congressional staffers influence their former bosses: Harry Katrichis, former chief counsel to the US House of Representatives Committee on Small Business from 1995 to 2001; Lance Kotschwar, former General Counsel for the Senate Agriculture Committee; and Nicki J. Hicks, former senior Democratic Senate staffer and a senior USDA political appointee. Since 2003, the trading floor has made \$1.5 million in campaign contributions.

BP has been paying the Duberstein Group \$100,000 every six months to lobby Congress on “CFTC trading issues,” with at least four lobbyists on the BP account: Kenneth Duberstein, former chief of staff to President Reagan; Michael Berman, well connected with Democrats; Steven Champlin, staffer for former Rep. David Bonior; Henry Gandy, former legislative aide to President Bush; and Daniel Meyer, who serves on the board of the GOP-affiliated Congressional Institute.

The CFTC has a troublesome streak of “revolving door” appointments and hiring which may further hamper the ability of the agency to effectively regulate the energy trading industry. In August 2004, CFTC chairman James Newsome left the commission to accept a \$1 million yearly salary as president of NYMEX, the world’s largest energy futures marketplace. Just weeks later, Scott Parsons, the CFTC’s chief operating officer, resigned to become executive vice-president for government affairs at the Managed Funds Association. Former CFTC Lead Prosecutor Tony Mansfi recently left the Commission to join the DC firm Heller Ehrman, where he will work for Geoff Aronow—his old boss at CFTC. Such prominent defections hamper the CFTC’s ability to protect consumers. As a result, a revolving door moratorium must be established to limit CFTC decision makers from leaving the agency to go to entities under its regulatory jurisdiction for at least two years.

Latest Trading Trick: Energy Infrastructure Affiliate Abuses

Energy traders like Goldman Sachs are investing and acquiring energy infrastructure assets because controlling pipelines and storage facilities affords their energy trading affiliates an “insider’s peek” into the physical movements of energy products unavailable to other energy traders. Armed with this non-public data, a company like Goldman Sachs most certainly will open lines of communication between the affiliates operating pipelines and the affiliates making large bets on energy futures markets. Without strong firewalls prohibiting such communications, consumers would be susceptible to price-gouging by energy trading affiliates.

For example, In January 2007, Highbridge Capital Management , a hedge fund controlled by JP Morgan Chase, bought a stake in an energy unit of Louis Dreyfus Group to expand

its oil and natural gas trading. Glenn Dubin, co-founder of Highbridge, said that owning physical energy assets like pipelines and storage facilities was crucial to investing in the business: “That gives you a very important information advantage. You’re not just screen-trading financial products.”³⁴

Indeed, such an “information advantage” played a key role in allowing BP’s energy traders to manipulate the entire U.S. propane market. In June 2006, the CFTC filed a civil complaint against BP, alleging that the company’s energy trading affiliate used the company’s huge control over transportation and storage to allow the energy trading affiliate to exploit information about energy moving through BP’s infrastructure to manipulate the market.

BP’s energy trading division, North America Gas & Power (NAGP), was actively communicating with the company’s Natural Gas Liquids Business Unit (NGLBU), which handled the physical production, pipeline transportation and retail sales of propane. A powerpoint exhibit to the civil complaint against BP details how the two divisions coordinated their manipulation strategy, which includes “assurance that [the] trading team has access to all information and optionality within [all of BP]...that can be used to increase chance of success [of market manipulation]... Implement weekly meetings with Marketing & Logistics to review trading positions and share opportunities.”³⁵

This shows that the energy traders were actively engaging the physical infrastructure affiliates in an effort to glean information helpful for market manipulation strategies. And it is important to note that BP’s market manipulation strategy was extremely aggressive and blatant, and regulators were tipped off to it by an internal whistleblower. A more subtle manipulation effort could easily evade detection by federal regulators, making it all the more important to establish firewalls between energy assets affiliates and energy trading affiliates to prevent any undue communication between the units.

The *Wall Street Journal* reported that the government investigation goes beyond manipulation of propane: “investigators are examining, among other things, whether BP used information about its own pipelines and storage tanks at a key oil-delivery point in Cushing, Okla., to influence crude-oil price benchmarks that are set each day and influence billions of dollars of transactions.”³⁶

Financial firms like hedge funds and investment banks that normally wouldn’t bother purchasing low-profit investments like oil and gasoline storage have been snapping up ownership and/or leasing rights to these facilities mainly for the wealth of information that controlling energy infrastructure assets provides to help one’s energy traders manipulate trading markets. For example, according to *The Trader Monthly*, just one Morgan Stanley trader was able to earn as much as \$25 million and “helped the bank dominate the heating oil market by locking up New Jersey storage-tank farms adjacent to

³⁴ Saijel Kishan and Jenny Strasburg, “Highbridge Capital Buys Stake in Louis Dreyfus Unit,” Bloomberg, January 8, 2007, www.bloomberg.com/apps/news?pid=20601014&sid=aBnQy1botdFo

³⁵ www.cftc.gov/files/enf/06orders/opa-bp-lessons-learned.pdf

³⁶ John R. Wilke, Ann Davis and Chip Cummins, “BP Woes Deepen with New Probe,” August 29, 2006.

New York Harbor.” The publication also revealed that legendary trader T. Boone Pickens earned as much as \$1.5 billion in 2005, for a rate of return exceeding 700 percent, which the editors believe “is the largest one-year sum ever earned.”

In August 2006, Goldman Sachs, AIG and Carlyle/Riverstone announced the \$22 billion acquisition of Kinder Morgan, Inc., which controls 43,000 miles of crude oil, refined products and natural gas pipelines, in addition to 150 storage terminals.

Prior to this huge purchase, Goldman Sachs had already assembled a long list of oil and gas investments. In 2005, Goldman Sachs and private equity firm Kelso & Co. bought a 112,000 barrels/day oil refinery in Kansas. In May 2004, Goldman spent \$413 million to acquire royalty rights to more than 1,600 natural gas wells in Pennsylvania, West Virginia, Texas, Oklahoma and offshore Louisiana from Dominion Resources. Goldman Sachs owns a six percent stake in the 375-mile Iroquois natural gas pipeline, which runs from Northern New York through Connecticut to Long Island. Goldman Sachs owns 6.6 percent of the shares of natural gas producer Bill Barrett Corp, an oil/natural gas developer in Wyoming, Colorado Utah and New Mexico. In December 2005, Goldman and Carlyle/Riverstone together are investing \$500 million in Cobalt International Energy, a new oil exploration firm run by former Unocal executives.

In July 2005, GE and Caisse de dépôt et placement du Québec (which manages public and private pension and insurance funds) purchased Southern Star Central Gas Pipeline from AIG for \$326 million plus the assumption of \$476 million in debt and preferred stock. Southern Star runs for 6,000 miles through Texas, Oklahoma, Kansas, Missouri, Colorado, Nebraska, and Wyoming. AIG had bought it from Williams Cos. for \$555 million in 2002. GE will own 60%; Caisse will own 40%.³⁷

In June 2003, the private equity fund Carlyle/Riverstone teamed up with Madison Dearborn Partners to purchase a controlling stake in Williams Energy Partners (since renamed Magellan Midstream Partners) for \$1.08 billion. Magellan Midstream went on to pony up \$530 million for another refined product pipeline system from Shell Oil. In May 2004, Carlyle/Riverstone became the general partner of Buckeye Partners, which owns a pipeline system running from the Midwest to New England. Carlyle/ Riverstone is the general partner of SemGroup, which owns pipelines and storage facilities throughout the United States. Carlyle/Riverstone owns Legend Natural Gas and Phoenix Exploration, both domestic oil and gas producers.

In 2003, Morgan Stanley teamed up with Apache Corp to buy 26 oil and gas fields from Shell for \$500 million, of which Morgan Stanley put up \$300 million in exchange for a portion of the production over the next four years, which it used to supplement its energy trading desk.

³⁷ Kathryn Kranhold, “Pipeline Pact Set As Interest Grows in U.S. Energy,” July 11, 2005, *The Wall Street Journal*.

Solutions

- Re-regulate energy trading markets by subjecting OTC electronic exchanges to full compliance under the Commodity Exchange Act and mandate that all OTC energy trades adhere to the CFTC's Large Trader reporting requirements. In addition, regulations must be strengthened over existing lightly-regulated exchanges like NYMEX. Senators Feinstein, Snowe, Levin and Cantwell have introduced S.577 in the 110th Congress which would address many of these issues.
- Impose legally-binding firewalls to limit energy traders from speculating on information gleaned from the company's energy infrastructure affiliates or other such insider information, while at the same time allowing legitimate hedging operations.
- Congress must authorize the FTC and DOJ to place greater emphasis on evaluating anti-competitive practices that arise out of the nexus between control over hard assets like energy infrastructure and a firm's energy trading operations. Incorporating energy trading operations into anti-trust analysis must become standard practice for federal regulatory and enforcement agencies to force more divestiture of assets in order to protect consumers from abuses.
- A revolving door moratorium must be established to limit federal government decision makers from leaving the agency to go to entities under its regulatory jurisdiction for at least two years.

Recent Mergers, Weak Anti-Trust Law Threaten Consumers

In just the last few years, mergers between giant oil companies—such as Exxon and Mobil, Chevron and Texaco, Conoco and Phillips—have resulted in just a few companies controlling a significant amount of America's gasoline, squelching competition. In 1993, the largest five oil refiners controlled one-third of the American market, while the largest 10 had 55.6 percent. By 2005, as a result of all the mergers, the largest five now control 55 percent of the market, and the largest 10 dominate 81.4 percent. This concentration has led to skyrocketing profit margins.

In addition, legal decisions favoring of a *rule of reason* rather than a *per se* analysis of alleged anticompetitive conduct continue to erode anti-trust law, thereby exposing consumers to uncompetitive markets. This judicial weakening of anti-trust law, combined with lax regulatory oversight by the US Federal Trade Commission, has allowed oil companies to merge operations and forge joint partnerships that undermine effective competition in domestic downstream oil markets.

Although the U.S. is the third largest oil producing nation in the world³⁸—producing more oil than Iran, Kuwait and Qatar *combined*—we consume one out of every four barrels used in the world every day, forcing us to import 66 percent of our oil and

³⁸ Available at www.eia.doe.gov/emeu/cabs/topworldtables1_2.html

gasoline. In all, we use more than the next five biggest oil consumers (China, Japan, Russia, Germany and India) put together.³⁹

Sixty percent of the oil consumed in America is used as fuel for cars and trucks. Nine percent is for residential home heating oil, with the remainder largely used for various industrial and agricultural processes (only 1.4 percent is to fuel electric power).⁴⁰

Persian Gulf OPEC nations supply 11.2 percent of America's oil and gasoline. Other OPEC nations—such as Indonesia, Nigeria and Venezuela—supply 15.6 percent, and non-OPEC nations such as Canada, Mexico, Norway and England provide 39.1 percent of our oil and gasoline needs. 34.1 percent of our oil is drilled here at home.⁴¹

So while OPEC member nations clearly have a significant presence, a corporate cartel should also concern policymakers. Consider that ExxonMobil, ChevronTexaco, ConocoPhillips, BP and Shell produce 10 million barrels of oil a day—more than the combined exports of Saudi Arabia and Qatar.

According to the U.S. Government Accountability Office, over 2,600 mergers have been approved in the U.S. petroleum industry since the 1990s. In just the last few years, mergers between giant oil companies—such as Exxon and Mobil, Chevron and Texaco, Conoco and Phillips—have resulted in just a few companies controlling a significant amount of America's gasoline, squelching competition. And the mergers continue unabated as the big just keep getting bigger. In August 2005, ChevronTexaco acquired Unocal; ConocoPhillips acquired Burlington Resources in December 2005; and in June 2006, Anadarko Petroleum announced it was simultaneously acquiring Kerr-McGee and Western Gas Resources.

Consumers are paying more at the pump *than they would if they had access to competitive markets*, and five oil companies are reaping the largest profits in history. Since 2001, the five largest oil companies operating in America have recorded \$435 billion in profits. While of course America's tremendous appetite for gasoline plays a role, uncompetitive practices by oil corporations are a cause—more so than OPEC or environmental laws—of high gasoline prices around the country.

High prices are having a detrimental impact on the economy and national security. Imported oil represents one-third of America's trade deficit,⁴² slows economic growth, adds to inflationary pressures and creates financial hardship for families and businesses. America's addiction to oil enriches not only oil companies, but non-democratic nations that are often hostile to U.S. interests. In our frenzied pursuit to secure sources of oil abroad, we often prioritize oil company rights over human rights, as demonstrated in the

³⁹ Available at www.eia.doe.gov/emeu/cabs/topworldtables3_4.html

⁴⁰ *Adjusted Sales of Distillate Fuel Oil by End Use in the U.S., 2005*, http://tonto.eia.doe.gov/dnav/pet/pet_cons_821dsta_dcu_nus_a.htm

⁴¹ Available at http://tonto.eia.doe.gov/dnav/pet/pet_move_impqus_a2_nus_ep00_im0_mbbldpd_a.htm

⁴² Available at www.bea.gov/bea/di/home/trade.htm

deferential treatment the Bush Administration shows towards Kazakhstan despite that country's poor human rights record.⁴³

The consolidation of downstream assets—particularly refineries—plays a big role in determining the price of a gallon of gas. Recent mergers have resulted in dangerously concentrated levels of ownership over U.S. oil refining. A recent government study revealed that the “source of potential market power in the wholesale gasoline market is at the refining level because the refinery market is imperfectly competitive and refiners essentially control gasoline sales at the wholesale level.”⁴⁴

In 1993, the five largest U.S. oil refining companies controlled 34.5 percent of domestic oil refinery capacity; the top ten companies controlled 55.6 percent. By 2005, the top five—ConocoPhillips, Valero, ExxonMobil, Shell and BP—controlled 55 percent and the top ten refiners controlled 81.4 percent. As a result of all of these recent mergers, the largest five oil refiners today control as much capacity as the largest 10 did a decade ago. This dramatic increase in the control of just the top five companies makes it easier for oil companies to manipulate gasoline by intentionally withholding supplies in order to drive up prices. Because most of the largest companies are also vertically integrated, they enjoy significant market share in oil drilling and retail sales.

The industry has plenty of incentive to intentionally keep refining markets tight. ExxonMobil's new CEO told *The Wall Street Journal* that even though American fuel consumption will continue growing for the next decade, his company has no plans to build new refineries:

*Exxon Mobil Corp. says it believes that, by 2030, hybrid gasoline-and-electric cars and light trucks will account for nearly 30% of new-vehicle sales in the U.S. and Canada. That surge is part of a broader shift toward fuel efficiency that Exxon thinks will cause fuel consumption by North American cars and light trucks to peak around 2020—and then start to fall. “For that reason, we wouldn't build a grassroots refinery” in the U.S., Rex Tillerson, Exxon's chairman and chief executive, said in a recent interview. Exxon has continued to expand the capacity of its existing refineries. But building a new refinery from scratch, Exxon believes, would be bad for long-term business.*⁴⁵

ExxonMobil and other oil companies are not building new refineries because it is in their financial self interest to keep refining margins as tight as possible, as that translates into bigger profits.

Margins for U.S. oil refiners have been at record highs. In 1999, U.S. oil refiners enjoyed a 18.9 cent margin for every gallon refined from crude oil. By 2005, they posted a 48.8

⁴³ Information available at <http://hrw.org/doc?t=europe&c=kazakh>

⁴⁴ *Mergers and Other Factors that Affect the U.S. Refining Industry*, U.S. Government Accountability Office, July 2004, GAO-04-982T, Page 3, available at www.gao.gov/new.items/d04982t.pdf

⁴⁵ Jeffrey Ball, “As Gasoline Prices Soar, Americans Resist Major Cuts in Consumption,” May 1, 2006.

cent margin for every gallon of gasoline refined, a 158 percent jump.⁴⁶ That forced *The Wall Street Journal* to conclude that “the U.S. market is especially lucrative, sometimes earning its refiners \$20 or more on every barrel of crude oil they refine.”⁴⁷

Indeed, BP’s most recent financial report shows that refining profit margins at their US operations are more than double the margins in other countries. In 2006, BP earned \$9.14 for every barrel they refined in the Midwest, \$12/barrel in the Gulf Coast and \$14.84/barrel on the West Coast. Compare these returns with those at BP’s English operations (\$3.92/barrel) and Singapore (\$4.22/barrel).⁴⁸

Concentration of refinery markets has been compounded by consolidation in gasoline marketing. Refiners get gasoline to the market by distributing their product through terminals, where jobbers then deliver to retail gas stations. The number of terminals available to jobbers in the U.S. was cut in half from 1982 to 1997, leaving retailers with fewer options if one terminal raises prices.⁴⁹

As a result of this strategy of keeping refining capacity tight, energy traders in New York are pushing the price of gasoline higher, and then trading the price of crude oil up to follow gasoline:

*“Last time, Mother Nature intervened in the market [in the form of Hurricane Katrina],” [Larry] Goldstein [president of New York-based Petroleum Industry Research Foundation] said. “This time, prices are being driven by market forces,” with gasoline pulling crude and other forms of fuel higher, he says.*⁵⁰

Another *Wall Street Journal* article notes:

*On a per-barrel basis, the difference between crude prices and gasoline prices, known as the “crack spread” and considered to be a proxy for refining profit margins, widened to more than \$23 a barrel [in March 2007], the highest level this year and up from this year’s low of less than \$5 on Jan. 31. Last year, the spread briefly topped \$26 a barrel in April [2006], and following the devastation Hurricane Katrina of 2005, it ballooned to \$40.87. In recent years, the spread has averaged about \$10 a barrel...rising gasoline prices tend to lift crude prices because they boost refinery margins, leading to a rise in crude-oil demand.”*⁵¹

Since gasoline futures are a more localized market than crude oil, it is easier for oil companies, hedge funds and investment banks to manipulate gasoline markets. Now that

⁴⁶ *Refiner Sales Prices and Refiner Margins for Selected Petroleum Products, 1989-2005*, available at www.eia.doe.gov/emeu/aer/pdf/pages/sec5_53.pdf

⁴⁷ Steve LeVine and Patrick Barta, “Giant New Oil Refinery in India Shows Forces Roiling Industry,” August 29, 2006.

⁴⁸ www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/B/bp_fourth_quarter_and_full_year_2006_results.pdf, page 8.

⁴⁹ *The Petroleum Industry: Mergers, Structural Change and Antitrust Enforcement*, Federal Trade Commission, Table 9-1, August 2004, available at www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf

⁵⁰ Bhushan Bahree, “Oil Prices Show No Sign of Slowing,” *The Wall Street Journal*, April 10, 2006.

⁵¹ Masood Farivar, “Crude-Oil Futures Decline as Gasoline Surges,” March 17-18, 2007, Page B5.

crude oil trading often follows the gasoline markets, the ability of these traders to exploit America's underregulated futures markets raises concerns that consumers are being price-gouged.

High domestic inventories are not suppressing prices. In April 2006, U.S. commercial inventories of crude oil surpassed 347 million barrels—the highest level since May 1998.⁵² Despite this record domestic surplus, energy traders continue to push the price of crude oil up.

The U.S. Federal Trade Commission found evidence of anti-competitive practices in its March 2001 *Midwest Gasoline Price Investigation*:⁵³

An executive of [one] company made clear that he would rather sell less gasoline and earn a higher margin on each gallon sold than sell more gasoline and earn a lower margin. Another employee of this firm raised concerns about oversupplying the market and thereby reducing the high market prices. A decision to limit supply does not violate the antitrust laws, absent some agreement among firms. Firms that withheld or delayed shipping additional supply in the face of a price spike did not violate the antitrust laws. In each instance, the firms chose strategies they thought would maximize their profits.

Although federal investigators found ample evidence of oil companies intentionally withholding supplies from the market in the summer of 2000, the government has not taken any action to prevent recurrence. S.2557, introduced by Senator Arlen Specter (R-Penn.), and its House companion HR 5279 introduced by Representative John Conyers, would amend the Clayton Act to make it unlawful oil companies to engage in unilateral withholding.⁵⁴ But neither of these bills received a hearing in the 109th Congress.

A congressional investigation uncovered internal memos written by major oil companies operating in the U.S. discussing their successful strategies to maximize profits by forcing independent refineries out of business, resulting in tighter refinery capacity. From 1995-2005, 97 percent of the nearly 929,000 barrels of oil per day of capacity that has been shut down were owned by smaller, independent refiners.⁵⁵ Were this capacity to be in operation today, refiners could use it to better meet today's reformulated gasoline blend needs.

FTC Not Adequately Protecting Consumers

The Federal Trade Commission has contributed to the problem by allowing too many mergers and taking a stance too permissive to anti-competitive practices, as evidenced by the conclusions in its most recent investigation, for example, finding evidence of price-gouging by oil companies but explaining it away as profit maximization strategies and

⁵² Available at <http://tonto.eia.doe.gov/dnav/pet/hist/mcestus1m.htm>

⁵³ "Midwest Gasoline Price Investigation," available at www.ftc.gov/os/2001/03/mwgasrpt.htm

⁵⁴ Available at www.govtrack.us/data/us/bills/text/109/s/s2557.pdf

⁵⁵ Energy Information Administration Form EIA-820, *Annual Refinery Report*.

opposing federal price-gouging statutes.⁵⁶ This stands in stark contrast to the May 2004 conclusions reached by a U.S. Government Accountability Office report⁵⁷ which found that recent mergers in the oil industry have directly led to higher prices. It is important to note that this GAO report severely *underestimates* the impact mergers have on prices because their price analysis *stops* in 2000—before the mergers that created ChevronTexaco-Unocal, ConocoPhillips-Burlington Resources, and Valero-Ultramar/Diamond Shamrock-Premcor.

The FTC consistently allows refining capacity to be controlled by fewer hands, allowing companies to keep most of their refining assets when they merge, as a recent overview of FTC-approved mergers demonstrates.

The major condition demanded by the FTC for approval of the August 2002 ConocoPhillips merger was that the company had to sell two of its refineries—representing less than four percent of its capacity. Phillips was required only to sell a Utah refinery, and Conoco had to sell a Colorado refinery. But even with this forced sale, ConocoPhillips remains the largest domestic refiner, controlling refineries with capacity of more than 2.2 million barrels of oil per day, or 13 percent of America’s entire capacity. And the FTC allowed ConocoPhillips to purchase Premcor’s 300,000 barrels/day Illinois refinery in 2004.

As a condition of the 1999 merger creating ExxonMobil, Exxon had to sell some of its gas retail stations in the Northeast U.S. and a single oil refinery in California. Valero Energy, the nation’s fifth largest owner of oil refineries, purchased these assets. The inadequacy of the forced divestiture mandated by the FTC was compounded by the fact that the assets were simply transferred to another large oil company, ensuring that the consolidation of the largest companies remained high.

The sale of the Golden Eagle refinery was ordered by the FTC as a condition of Valero’s purchase of Ultramar Diamond Shamrock in 2001. Just as with ExxonMobil and ChevronTexaco, Valero sold the refinery, along with 70 retail gas stations, to another large company, Tesoro. But while the FTC forced Valero to sell one of its four California refineries, the agency allowed the company to purchase Orion Refining’s only refinery in July 2003, and then approved Valero’s purchase of the U.S. oil refinery company Premcor. This acquisition of Orion’s Louisiana refinery and Premcor defeats the original intent of the FTC’s order for Valero to divest one of its California refineries.

In response to the Carlyle/Riverstone 2006 acquisition of Kinder Morgan, the FTC only required that Carlyle/Riverstone’s investment in Magellan be changed to *passive*. The FTC required no firewalls or other restrictions between Goldman Sachs’ energy trading affiliate (J. Aron) and the Kinder Morgan affiliate.⁵⁸

⁵⁶ “Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases,” available at www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf

⁵⁷ *Effects of Mergers and Market Concentration in the U.S. Petroleum Industry*, GAO-04-96, available at www.gao.gov/new.items/d0496.pdf

⁵⁸ “FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings,” available at www.ftc.gov/opa/2007/01/kindermorgan.htm

Rule of Reason versus Per Se Antitrust Analysis

A recent Supreme Court decision continued an unfortunate trend of relying on the *rule of reason* rather than a *per se* analysis of alleged anticompetitive conduct. *Per se* offenses are those that are, on their face, illegal, with no economic justification. All *per se* offenses are violations of section 1 of the Sherman Act. As the Supreme Court has argued:

*...there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.*⁵⁹

Examples of *per se* antitrust violations include: horizontal and vertical price fixing, bid rigging, territorial allocation and tying arrangements.

A *rule of reason* standard, on the other hand, is one where the activity is judged in context and the reasonableness is considered. Therefore, an action that otherwise would be unlawful could be judged to be in compliance with the Sherman Act if the conduct surrounding the unlawful activity is deemed to justify it.

Clearly then, courts that favor a *rule of reason* standard over *per se* condone otherwise uncompetitive actions. Such is the case in *Texaco v. Dagher*, where the Supreme Court ruled in February 2006 that a joint venture Equilon between two competitors, Shell and Texaco, that resulted in the companies unilaterally setting prices that the venture charged customers.⁶⁰ As an amicus brief filed by the American Antitrust Institute explained:

*Evidence suggests that Shell and Texaco officials had deliberately refrained from discussing brand pricing prior to the formation of the venture “because of anti-trust concerns.” Of greatest significance, Respondents offered evidence that Equilon sharply raised the price of its gasoline, at a time when crude oil prices were stable or declining...Shell and Texaco were not seeking to create a more efficient competitor in a competitive marketplace, but to profit by lessening competition between the two former rivals.*⁶¹

But because the Court relied on a *rule of reason* analysis, this anti-competitive practice was deemed to be in compliance with the Sherman Act.

Natural Gas Markets In Need of Stronger Regulations, Too

While the CFTC regulates the natural gas futures markets, the Federal Energy Regulatory Commission is in charge of regulating other aspects of natural gas markets. While FERC has a legal mandate to ensure that electricity prices under its jurisdiction are “just and reasonable,” it has no such “fair price” standard for natural gas. As natural gas continues to have a bigger impact on the U.S. economy—not to mention setting the de facto price of electricity due to its use as fuel for power—legislation establishing a “just and reasonable” standard for all natural gas production should be considered.

⁵⁹ *Northern Pacific Railroad Co. v. United States*, 356 US 1, 5 (1957)

⁶⁰ Available at www.supremecourtus.gov/opinions/05pdf/04-805.pdf

⁶¹ At 3, 6, available at www.antitrustinstitute.org/archives/files/465.pdf

While FERC does regulate the transportation of natural gas through pipelines (and can enforce “just and reasonable” rates there), this is a tiny portion that ultimately determines the price of natural gas.

The largest portion, production, was deregulated by two Congressional acts. First, the Natural Gas Policy Act of 1978 phased-in the removal of most wellhead price controls. This was followed up by the 1989 Wellhead Decontrol Act, which ended the last remaining price controls.

While there was merit to getting rid of price controls, Congress made the mistake of completely removing FERC jurisdiction over wellhead prices. So we went from having strict price controls to having markets dictate the price, with no opportunity for FERC to step in and regulate the rates being charged by producers. That’s why a “just and reasonable” standard comparable to electricity does not exist for natural gas. The solution is to extend FERC regulation over wellhead prices, which would include subjecting producers to “just and reasonable” standards—just as FERC has the current authority to subject electricity producers to “just and reasonable” standards.

Indeed, the National Association of Gas Consumers (a coalition of municipal gas systems) filed a complaint with FERC in 2001 arguing that skyrocketing natural gas prices were not “just and reasonable,” and requested that FERC either: a) set an emergency nationwide price ceiling; or b) initiate an investigation into whether or not refunds could be ordered for those prices above the “just and reasonable” standard.⁶²

FERC dismissed the complaint: “A number of parties contend the Commission should also take action to limit the prices at which natural gas can be sold. However, under the Wellhead Decontrol Act, and the Commission regulations implementing that Act, natural gas prices have been effectively decontrolled. Therefore, the Commission declines to take the requested action on the instant complaints.”⁶³

Amending the Natural Gas Act⁶⁴ to expand FERC’s “just and reasonable” jurisdiction over wellhead prices would help correct this error. Changing this statute to include “the production or gathering of natural gas” would help hold natural gas producers accountable.

The 9th Circuit Court of Appeals recently ruled that FERC had broader power than it currently exercises to force energy companies to provide refunds to consumers for overcharging. The ability of FERC to order such refunds, however, is contingent upon the existence of the “just and reasonable” standard enshrined in the Federal Power Act. Without such a standard for natural gas, consumers are left unprotected.

⁶² Docket RP01-223, available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9030121>

⁶³ Docket RP01-223, available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9588339>

⁶⁴ “Regulation of natural gas companies,” 15 USC § 717.

Reform NYMEX Natural Gas Trading Price Limits

Trading exchanges can impose price limits on daily trading as a way to protect consumers. For example, in response to the Mad Cow scare, the Chicago Mercantile Exchange (CME) imposed a price limit on cattle of 3¢ per pound⁶⁵—so if the price fluctuates more than that amount, trading on cattle is stopped until the next day. The 3¢ limit is about 0.03 percent of the current trading price of live cattle—a very low threshold that protects consumers and producers from volatility. Even commodities unaffiliated with Mad Cow-like “scares” have strict price limits. Trading in milk futures contracts is suspended until the following day if the price changes more than 75¢⁶⁶ (4.7 percent of the current price). Trading in lumber futures is halted for the day if the price swings more than \$10.00 per thousand board feet⁶⁷ (four percent of the current price). These severe price limits help control volatility and reduce damaging speculation. The CME implemented these strict price limits typically at the request of producers, since many of the price swings were hurting their bottom line.

But NYMEX has weak price limits on natural gas trading. If the price changes by \$3/Btu during a daily session, then trading is suspended for only 5 minutes.⁶⁸ This \$3 limit is 40 percent of the current Henry Hub price, compared to the much smaller range of 0.03 percent to 4.7 percent listed in the above agricultural commodities. This means that NYMEX tolerates more volatility in natural gas trading markets, making it a more attractive market for speculators to profit at the expense of consumers. But, unlike agricultural products with tough price limits, the natural gas producers and speculators are making billions of dollars off these volatile natural gas markets.

Solutions

- Strengthen antitrust laws by empowering the Federal Trade Commission to crack down on unilateral withholding and other anti-competitive actions by oil companies.
- Congress must legislate tougher merger guidelines to prevent the kind of consolidation permitted by the FTC over the last few years, including mandating that cases brought under the Sherman Act must use the *per se* standard when evaluating violations of the Act.
- The Department of Energy should implement a Strategic Refinery Reserve (SRR), to complement the successful Strategic Petroleum Reserve, such as the one proposed in S.1979. Refined products produced at the facility could be placed in reserve to be released in times of natural disasters or price spikes. An SRR would prove useful in diminishing the ability of oil companies to engage in unilateral withholding, as the SRR could be used to release supplies to satisfy the needs of consumers, thereby lowering prices.

⁶⁵ ftp://ftp.cme.com/pub/span/util/rm_beefGroup.pdf

⁶⁶ ftp://ftp.cme.com/pub/span/util/rm_dairyGroup.pdf

⁶⁷ <http://rulebook.cme.com/Rulebook/Chapters/pdf/files/201.pdf>

⁶⁸ http://www.nymex.com/rule_main.aspx?pg=32

- Reregulate natural gas markets by granting the Federal Energy Regulatory Commission “just and reasonable” rate authority over natural gas wellhead prices, and set stronger trading price limits to ease volatility.

Taxing Oil Company Profits

Apologists for record oil company profits argue that the companies need and deserve record windfalls to provide the necessary market incentive to invest more money into increased energy production.

Public Citizen’s analysis of oil company profits and their investments show that they are spending unprecedented sums on benefits for their shareholders in the form of stock buybacks and dividend payments and not adequately investing in sustainable energy that is necessary to end America’s addiction to oil. Since January 2005, the top five oil companies have spent \$153 billion buying back stock and paying out dividends—more than the companies spent on capital investment.⁶⁹ This not only represents a huge transfer of wealth from consumers to oil company investors, but shows that oil companies are squandering opportunities to use their record profits to make investments that will end America’s addiction to oil.

With nearly \$1 trillion of combined assets tied up in extracting, refining and marketing petroleum and natural gas, the big five oil companies’ entire business model is designed to squeeze every last cent of profit out of their monopoly control over fossil fuels. They simply will not make significant investments in anything else until their monopoly control over oil is spent.

And this monopoly control translates into unprecedented profits. When communicating to the general public and lawmakers, oil companies downplay these record earnings by calculating profits differently than they do when they speak to Wall Street and shareholders. Conversing with lawmakers and the general public, the oil industry highlights the small profit margins (typically around 8 to 10 percent) that measuring net income as a share of total revenues produces.

But that’s not the calculation ExxonMobil and other energy companies use when talking to investors and Wall Street. For example, here’s an excerpt from the company’s 2005 annual report: “ExxonMobil believes that return on average capital employed (ROCE) is the most relevant metric for measuring financial performance in a capital-intensive business such as” petroleum.⁷⁰

ExxonMobil’s 2006 earning report shows that that the company’s global operations enjoyed a 32 percent rate of return on average capital employed. And the company’s rate of profit in the U.S. was even higher: domestic drilling provided a 37 percent rate of return on average capital employed, while domestic refining returned 66 percent. ChevronTexaco has posted record returns as well, reporting a 23 percent rate of return on

⁶⁹ Public Citizen calculations from company financial reports.

⁷⁰ Available at www.exxonmobil.com/corporate/files/corporate/sar_2005.pdf, page 19.

average capital employed in 2006—the median return on capital employed for Chevron over the last 18 years was only 8.6 percent.

It isn't just oil producing nations like Saudi Arabia that get rich when the price of a barrel of oil exceeds \$60—major oil producing corporations get rich, too. On average, it costs an oil company like ExxonMobil about \$20 to extract a barrel of oil from the ground, while they sell that barrel to American consumers at the market price of \$60/barrel. Indeed, a Merrill Lynch analyst estimated that “ConocoPhillip’s overall ‘finding and developing’ costs last year were \$18 a barrel, including barrels obtained through acquisitions.”⁷¹

With oil companies failing to take action to protect America’s middle- and low-income families from the high energy prices that fuel their profits, oil industry subsidies should be repealed with the proceeds invested in renewables, alternative fuels, energy efficiency and mass transit. Indeed, HR 6, which passed the House on January 18, 2007 repeals \$14 billion in oil company subsidies over the next decade and dedicates the money to a new “Strategic Energy Efficiency and Renewables Reserve.”⁷² A windfall profits tax could be modeled on HR 2070, introduced in the 109th Congress.⁷³

Naysayers argue that increasing taxes on oil companies or enacting a Windfall Profits Tax didn't work the last time it was tried. The Windfall Profits Tax of 1980-88 was ineffective not because of the tax itself, but because oil prices fell shortly after enactment of the tax due to global events unrelated to U.S. tax policy. Congress enacted the Windfall Profits Tax in 1980 after U.S. oil company profits surged following the Iranian Revolution and the resulting Iran-Iraq war, which caused oil prices to increase from \$14/barrel in 1979 to \$35/barrel by January 1981. But after 1981, crude oil prices steadily decreased until completely bottoming out in 1986-87 as demand slackened and as other oil producing countries increased their output. As the value of the commodity subject to tax fell, the effectiveness of the tax was diminished.

But that was then. *The Wall Street Journal* recently concluded that “a crash looks unlikely now, both because supplies remain tight and because of the large volumes of money that investors are pouring into oil markets.”⁷⁴

In addition to a Windfall Profits Tax, Congress needs to reform the royalty system imposed on companies drilling for oil and natural gas on public land. One-third of the oil and natural gas produced in the United States comes from land owned by the taxpayers, but royalty payments by oil companies have not been keeping up with the explosion in energy prices and profits enjoyed by the industry. A recent Inspector General audit of the U.S. Department of the Interior’s Minerals Management Service concludes that oil companies are pumping oil from federal land without paying adequate royalties to taxpayers for the privilege. The report cites widespread cronyism, ethical breaches,

⁷¹ Russell Gold, “Big Oil’s Earnings Gusher Starts to Slow,” *The Wall Street Journal*, January 25, 2007, Page A2.

⁷² For more information see www.citizen.org/pressroom/release.cfm?ID=2362

⁷³ www.govtrack.us/data/us/bills.text/109/h/h2070.pdf

⁷⁴ Bhushan Bahree, “Oil Settles Above \$70 a Barrel, Despite Inventories at 8-year High,” April 18, 2006.

decimated auditing staff and overreliance on information provided by Big Oil as culprits in the oil industry giveaway.⁷⁵ Meanwhile the Justice Department unexpectedly announced the welcome news that it has initiated criminal investigations into the Interior Department's oversight of oil companies.⁷⁶ Taxpayers must be fairly compensated for allowing oil companies the privilege of extracting resources from federally-owned land.

Other countries often feature higher gas prices than the U.S., but that is because they impose higher taxes on gasoline than we do. For example, the average federal, state and local gas taxes in the United States are 39 cents/gallon, compared to \$2.06/gallon in Japan, \$3.77/gallon in France; \$4.12/gallon in Germany; and \$4.33/gallon in the United Kingdom.⁷⁷ These high taxes are not only a disincentive to drive, but generate the revenue the countries need to help subsidize mass transit and other sustainable energy investments to actively provide citizens with alternatives to driving.

Raise Fuel Economy Standards to Lower Oil Consumption, Reduce Global Warming, Save Money at the Pump and Improve National Security

Due to increasing numbers of gas-guzzling SUVs on America's roads and the absence of meaningful increases in government-set fuel economy standards, America's average vehicle fuel economy is lower today than a decade ago, forcing our less-efficient vehicles to use more gasoline and therefore increasing our need to import oil.

The Environmental Protection Agency found that the average fuel economy of 2006 vehicles is 21 miles per gallon (mpg), compared to 22.1 mpg in 1988.⁷⁸ This drop is attributable in part to the fact that automobile fuel economy standards have not increased since 1985, and light truck standards are only about 5 mpg higher than they were 25 years ago. This has allowed the manufacturers to allocate efficiency improvements over the last 20 years to larger engines, faster starts and heavier vehicles. And sales of fuel inefficient SUVs and pickups have exploded: in 1987, 28 percent of new vehicles sold were light trucks, compared to 50 percent in 2005. Only now with gasoline prices approaching \$3/gallon are SUV sales slowing down.

⁷⁵ "Minerals Management Service's Compliance Review Process," December 2006, available at www.doi.gov/upload/2007-G-00011.pdf

⁷⁶ Edmund L. Andrews, "Criminal Inquiries Look at U.S. Oil-Gas Unit," *The New York Times*, December 15, 2006.

⁷⁷ www.fhwa.dot.gov/ohim/mmfr/sep06/mfrates.htm

⁷⁸ *Light-Duty Automotive Technology and Fuel Economy Trends: 1975 Through 2006*, July 2006, www.epa.gov/OMS/fetrends.htm

The auto and oil industry have fought tooth and nail against increases in fuel economy standards. From 1995 to 2002, their efforts in Congress resulted in zero appropriations

Ethanol's No Panacea

Politicians on both sides of the aisle have promoted ethanol as the solutions to America's addition to oil. But the crop fuel poses more problems than it solves.

The 2005 Energy Policy Act created a mandate of 7.5 billion gallons of ethanol to be blended into motor gasoline by 2012. Combined with a 51 cent tax credit paid for every gallon of ethanol that producers like ADM cash in for adding their corn-fuel to gasoline, and the U.S. corn ethanol industry is enjoying huge profits with the help of more than \$2 billion in annual subsidies from taxpayers.

So what's the problem with ethanol? For starters, we're having trouble moving ethanol from the source of production (the Midwest farm belt) to the areas of consumption (the coasts). Without a dedicated pipeline network, we're forced to move ethanol by truck, rail and barge, resulting in huge supply bottlenecks. Second, corn ethanol production is inefficient, as it takes more energy to make than is gained when it is combusted as fuel in a car's engine. Finally, while the American farmer is the most productive in the world, she will never be able to produce enough crop fuel to fill the tank of every American car. Shifting crop production from food to fuel risks higher prices for the meals we eat.

What's the solution? Focusing on raising fuel economy standards, investing in mass transit and developing other alternative fuels like hydrogen or plug-in electric hybrids to reduce our oil consumption.

for agency work, and now the agency gets only about a million and a half dollars a year, preventing it from doing research to demonstrate large increases are feasible. Since 2001, the PACs and executives of General Motors and Ford have made \$5 million in campaign contributions to federal candidates, with 65 percent of that total going to Republicans. Combined with the Alliance of Automobile Manufacturers, the companies have spent an additional \$137 million lobbying Congress and the executive branch over that same time period.⁷⁹

Thus, the National Highway Traffic Safety Administration isn't doing enough under the Energy Policy Act to

enact the maximum feasible fuel economy increase and is constrained by administration and congressional politics from applying any pressure to challenge manufacturers to do better.

Some who oppose improving fuel economy standards claim that raising them will result in American job losses. But how many jobs are being lost from sustained high energy prices caused in part by the failure to stem America's growing oil demand? Recent announcements by GM and Ford to cut 60,000 North American jobs can be directly tied to the companies' loss of market share due to over-investment in SUVs and other fuel-guzzling vehicles, which turn around a fast and sizeable profit but do not sell well in these times of three-dollar-a-gallon gas prices. Some foreign manufacturers invested in more fuel-efficient vehicles and paved the way for a future of improved fuel economy with hybrid vehicles, while Detroit manufacturers' sales continue to shrink.

⁷⁹ Compiled by Public Citizen from Center for Responsive Politics data, www.opensecrets.org

Opponents of increasing fuel economy standards often erroneously claim that improving standards makes cars lighter and less safe. The truth is that safety research over decades shows that the quality of vehicle design—not weight—is the best indicator of safety. Increasing fuel economy standards would improve safety by reducing the impact of the heaviest behemoths on the road, while saving consumers money and reducing oil consumption.

Solutions

- Billions of gallons of oil would be saved if significant fuel economy increases were mandated. Improving fuel economy standards for passenger vehicles from 27.5 to 40 mpg, and for light trucks (including SUVs and vans) from 22.2 to 27.5 mpg by 2015 (for a combined fleet average of 34 miles per gallon) would reduce our gasoline consumption by one-third.
- The administration, however, has responded to the current crisis with nonchalance, recently increasing fuel economy for light trucks by a meager 1.8 mpg by 2011 and implementing a size-based system that could actually increase oil consumption. Under the new scheme, the larger the vehicle the less fuel economy it must achieve, thus encouraging manufacturers to continue making gas-guzzling vehicles but also providing an incentive to upsize smaller vehicles to qualify for less stringent standards. The House and Senate are currently considering legislation that, problematically, would mimic the scheme for light trucks in the program for automobile fuel economy. Such legislation will likely be debated in September in both the House and Senate.

Conclusion

This era of high energy prices and record oil company profits isn't a simple case of supply and demand, as the evidence indicates that consolidation of energy infrastructure assets, combined with weak or non-existent regulatory oversight of energy trading markets, provides opportunity for energy companies and financial institutions to price-gouge Americans. Forcing consumers suffering from inelastic demand to continue to pay high prices—in part fueled by uncompetitive actions—not only hurts consumers economically, but environmentally as well, as the oil companies and energy traders enjoying record profits are not investing those earnings into sustainable energy or alternatives to our addiction to oil. As a result, our consumption of fossil fuels continues to grow, and the impacts of global warming take their toll on our environment. America's addiction to oil is a major source of greenhouse gas emissions that cause global warming. Forty-four percent of America's world-leading carbon dioxide emissions are from the burning of petroleum products.⁸⁰

⁸⁰ Available at www.eia.doe.gov/environment.html

Reforms to strengthen regulatory oversight over America's energy trading markets and bolster anti-trust enforcement are needed to restore true competition to America's oil and gas markets.

In 2006, ExxonMobil's U.S. Operations Outpaced Rest of Company

	2001	2002	2003	2004	2005	2006
All ExxonMobil Operations						
Net income	\$ 15,320,000,000	\$ 11,460,000,000	\$ 21,510,000,000	\$ 25,330,000,000	\$ 36,130,000,000	\$ 39,500,000,000
Average Capital Employed	\$ 88,000,000,000	\$ 88,342,000,000	\$ 95,373,000,000	\$ 107,339,000,000	\$ 116,961,000,000	\$ 122,573,000,000
Return on Capital, Companywide	17.4%	13.0%	22.6%	23.6%	30.9%	32.2%
US Oil Production Only						
Net income	\$ 3,933,000,000	\$ 2,524,000,000	\$ 3,905,000,000	\$ 4,948,000,000	\$ 6,200,000,000	\$ 5,168,000,000
Average Capital Employed	\$ 12,952,000,000	\$ 13,264,000,000	\$ 13,508,000,000	\$ 13,355,000,000	\$ 13,491,000,000	\$ 13,940,000,000
Return on Capital	30.4%	19.0%	28.9%	37.0%	46.0%	37.1%
US Oil Refining Only						
Net income	\$ 1,924,000,000	\$ 693,000,000	\$ 1,348,000,000	\$ 2,186,000,000	\$ 3,911,000,000	\$ 4,250,000,000
Average Capital Employed	\$ 7,711,000,000	\$ 8,060,000,000	\$ 8,090,000,000	\$ 7,632,000,000	\$ 6,650,000,000	\$ 6,456,000,000
Return on Capital	25.0%	8.6%	16.7%	28.6%	58.8%	65.8%

SOURCE: Compiled by Public Citizen's Energy Program <www.citizen.org> from ExxonMobil's 10-k's filed with the SEC

Mergers Concentrate the U.S. Oil Refinery Industry: Changes in Control of Market Share 1993 to 2005

1993		2005	
Company	Market Share	Company	Market Share
Chevron	9.1%	ConocoPhillips-Tosco-Burlington Resources	12.8%
Exxon	6.6%	Valero-Ultramar-Diamond Shamrock-Orion Refining-Premcor-TPI	12.6%
Amoco	6.5%	ExxonMobil-Chalmette	11.7%
Texaco-Star Enterprise	6.2%	Shell-Motiva-Equilon-Pennzoil-Quaker State-Deer Park	9.3%
Mobil	6.0%	BP	8.5%
Top 5 in 1993	34.5%	Top 5 in 2005	54.8%
Shell	4.9%	ChevronTexaco-Unocal	5.8%
BP	4.4%	Sunoco	5.7%
Citgo (PDV)/Lyondell	4.2%	Marathon	5.6%
Arco/Lyondell	3.8%	Citgo-PDV	5.0%
Marathon	3.8%	Koch-Flint Hills	4.5%
Top 10 in 1993	55.6%	Top 10 in 2005	81.4%

Note: Lyondell refinery capacity in 1993 is equally split between two of its equity partners at the time, Citgo and Arco.

SOURCE: Compiled by Public Citizen's Energy Program <www.citizen.org/cmep> from corporate annual reports and U.S. Energy Information Administration data.