

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

## **REPORTING PERIOD JULY-DECEMBER 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.”<sup>1</sup>

The Commission’s significant activities involving petroleum and natural gas during the second half of calendar 2009 demonstrate that protecting American consumers from potentially anticompetitive practices in the energy sector remains one of our most important responsibilities. The Commission continued to pay very close attention to the energy sector during this six-month period. The agency’s most widely noted activity in the sector during the relevant period was its promulgation in August of a Final Rule prohibiting manipulation (as defined in the Rule) in wholesale markets for crude oil, gasoline, or petroleum distillates. The FTC and its staff also 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 expects its vigorous activity to continue into 2010 and beyond.

During the final six months of 2009, personnel from many parts of the Commission continued to be involved in law enforcement, economic analysis, and rule- or policy-related activities in the oil and natural gas industries. The Commission’s 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.<sup>2</sup> In addition to the Bureau of Competition, one division of the Commission’s Bureau of

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<sup>1</sup> 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](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.

<sup>2</sup> Additional offices in the Bureau of Competition that have participated in oil and gas matters during the second half of 2009 include the Office of the Director, the Mergers II division, the Division of Anticompetitive Practices, the Division of Compliance, the Division of Technology and Information Management, the Office of Policy and Coordination, the Division

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 second half of 2009 came from the Commission's Office of the General Counsel, Office of Congressional Relations, the Commissioners' offices, the Bureau of Consumer Protection, and other FTC organizations.

The most widely noted FTC activity in the oil and natural gas sector during the second half of 2009 arose from the market manipulation rulemaking proceeding involving wholesale transactions in crude oil, gasoline, and petroleum distillates. As noted in the Commission's last semiannual report, Section 811 of the Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, authorized the Commission 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 an intensive suite of activities during 2008 and the first half of 2009,<sup>3</sup> the Commission announced its Final Rule against wholesale market manipulation in these products on August 6, 2009 (and published the Rule in the Federal Register on August 12). The Market Manipulation Rule went into effect on November 4, 2009.<sup>4</sup>

Shortly after the Rule took effect, the FTC staff published a "Guide to Complying with Petroleum Market Manipulation Regulations." In the words of the compliance guide, the Petroleum Market Manipulation Rule prohibits market participants from "engaging in fraudulent or deceptive conduct (including making false or misleading statements of material fact) in connection with wholesale purchases or sales of crude oil, gasoline, or petroleum distillates. The

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of Operations, and the Office of Premerger Notification.

<sup>3</sup> Highlights of the Commission's work in preparation for issuance of the final Market Manipulation Rule included the issuance in May 2008 of an Advance Notice of Proposed Rulemaking ("ANPR"), including a request for public comment on a range of issues and questions; the receipt of 155 comments on the ANPR from a wide spectrum of consumer groups, businesses, academic experts, and other informed sources; the issuance in August 2008 of a Notice of Proposed Rulemaking ("NPRM") that set forth the text of a proposed rule on petroleum market manipulation and invited further public comment; the receipt of 34 comments on the NPRM; a day-long public workshop on November 6, 2008, that featured more than 15 outside panelists representing diverse interests and views and 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; the publication in April 2009 of a Revised Notice of Proposed Rulemaking ("RNPRM"), seeking public comment on a revised version of the proposed rule; and the evaluation of 17 public comments received in response to the RNPRM.

<sup>4</sup> See [http://www.ftc.gov/os/2009/08/P082900mmr\\_finalrule.pdf](http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf) for the Federal Register notice containing the Final Rule.

Rule separately bans . . . [the] intentional failure to state a material fact when the omission (1) makes . . . [a] statement misleading and (2) distorts or is likely to distort market conditions for any product covered by the Rule.” EISA provides the FTC with authority to recover substantial civil penalties (and secure other forms of relief) against violators of the Market Manipulation Rule.<sup>5</sup>

The Commission has established a process to monitor compliance with the Market Manipulation Rule and target potential Rule violations. The compliance guide provides addresses – including an email address<sup>6</sup> – to which the public may send complaints of possible Rule violations, and staff in the Bureau of Competition’s Office of Policy and Coordination are tracking all incoming complaints and inquiries concerning the Rule. Complaints that evidence a serious possibility of a Rule violation are referred to FTC litigation staff who specialize in maintaining competition in energy industries. Complaints that concern activity in futures markets are shared with the Commodity Futures Trading Commission (through the FTC’s working relationship with that agency), to ensure that consumers are protected against fraud and deception in whatever form they take.<sup>7</sup>

The Commission’s work in the oil and natural gas sector also involves the analysis of mergers and acquisitions. Since July 1, 2009, the Commission has received premerger filings under the Hart-Scott-Rodino Act for 26 proposed transactions in these industries. The agency reviewed each of these transactions, and also monitored the industry for nonreportable transactions that might raise antitrust concerns. For transactions that raised such concerns, the Commission investigated further. During the relevant period, the Commission has investigated a number of transactions involving petroleum or natural gas, including acquisitions involving refined petroleum products pipelines and terminals, liquefied petroleum gas (propane), and certain lubricant oils, and natural gas and natural gas liquids storage and transportation.<sup>8</sup>

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<sup>5</sup> See <http://www.ftc.gov/os/2009/11/091113mmrguide.pdf> for the compliance guide.

<sup>6</sup> The email address is [mmr@ftc.gov](mailto:mmr@ftc.gov). This address may also be used to report suspected violations of Section 812 of EISA, which (in the words of the compliance guide) “makes it unlawful for you to report false or misleading information related to the wholesale price of crude oil, gasoline, or petroleum distillates to a federal department or agency if (1) you are legally required to report the information, (2) you knew, or reasonably should have known, that the information was false or misleading, and (3) you intended for the false or misleading information to affect the integrity of the data compiled by the department or agency for statistical or analytical purposes with respect to the market for crude oil, gasoline, or petroleum distillates.”

<sup>7</sup> Of course, FTC litigators and economists also continue to monitor prices and other activity in petroleum markets, as described in more detail below.

<sup>8</sup> The Commission’s activities involving oil and natural gas also have included the examination of possibly anticompetitive conduct by firms in those industries, including an investigation of conduct in the propane business.

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 the 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. 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 remains a key element of the FTC's activities. To help the public avoid being victimized by scam artists eager to profit from consumers' desire to replace their less fuel-efficient vehicles with new, more efficient vehicles, the Commission issued a press release in late July entitled "Be on the Alert for Bogus 'Cash for Clunkers' Offers."<sup>9</sup> The release drew attention to a consumer alert explaining how consumers could take advantage of the "Cash for Clunkers" program and warning them to "Steer Clear of 'Cash for Clunkers' Scams." The Commission issued another press release in late October concerning "Cutting Home Heating Bills Down to Size,"<sup>10</sup> cross-referencing additional FTC consumer alerts (including "Weathering the High Cost of Heating Your Home"<sup>11</sup>).

On November 27, 2009, the Commission submitted its fifth annual *Report on Ethanol*

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Some of the Commission's inquiries concerning gasoline prices have involved close cooperation between the FTC staff and a number of state attorney general offices. For example, the FTC staff continues to coordinate with the staff of one state attorney general concerning gasoline prices in a particular part of a state. In addition, the Commission – in conjunction with the U.S. Department of Justice and the National Association of Attorneys General – held a two-day workshop in November for law enforcement officials to discuss key competition issues in the natural gas, electric power, and renewable energy industries.

<sup>9</sup> See <http://www.ftc.gov/opa/2009/07/cash4clunkers.shtm>.

<sup>10</sup> See <http://www.ftc.gov/opa/2009/10/homeheating.htm>.

<sup>11</sup> See <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt080.shtm>.

*Market Concentration* to Congress and to the Administrator of the Environmental Protection Agency. This series of reports, issued pursuant to Section 1501(a)(2) of the Energy Policy Act of 2005 (45 U.S.C. § 7545(o)), involves 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.”<sup>12</sup>

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 second half of 2009 and advised the Assistant Attorney General for Antitrust regarding its views of the proposed lease sale.

### Conclusion

The Commission has maintained its intensive antitrust scrutiny of the energy sector during the second 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.

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<sup>12</sup> The Commission’s 2009 ethanol report, *available at* <http://www.ftc.gov/os/2009/12/091201ethanolreport.pdf>, concluded that the dynamics of the industry in 2009 – including a continuing “industry trend toward less concentration,” an increase in ethanol production capacity, potential entry by new firms, and the availability of ethanol imports – “make it extremely unlikely that a single ethanol producer or marketer or a small group of such firms could wield sufficient market power to successfully engage in price-fixing 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 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>.