UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

July 24, 2003

The Honorable Eliot Spitzer
Attorney General
120 Broadway
New York, New York 10271-0332

Dear General Spitzer:

The staffs of the Federal Trade Commission's Office of Policy Planning and Bureau of Competition are pleased to respond to your request, sent to us on July 1, 2003 by Assistant Attorney General Richard Grimm, for comments on New York's Motor Fuel Marketing Practices Act ("MFMPA"), Bill Nos. A.8398 and S.4947.[1] The MFMPA would prohibit refiners and nonrefiners of motor fuel from selling motor fuels below 98% of the bill's definition of refiner and nonrefiner cost, respectively, where the effect is to injure competition.

We believe that there is a significant risk that the MFMPA could harm consumers. Last August, FTC staff submitted comments to Governor Pataki on a virtually identical bill, S.4522-B, which the governor ultimately vetoed. In those comments (copy attached), FTC staff concluded that the bill was at best unnecessary and at worst could discourage pro-competitive pricing. The current bill suffers from the same flaws. The changes – banning sales below 98% of cost, rather than cost, and creating a *de minimis* exception – do not correct the fundamental problems in the previous bill. In particular, the 98% measure appears arbitrary, with no basis in Supreme Court precedent, federal antitrust law, basic economic theory, or empirical studies. Moreover, the *de minimis* exception, while better than no exception at all, still appears too narrow to allow vigorous competition.

Our views on the entire bill are summarized below:

Low prices benefit consumers. Consumers are harmed only if, because of low prices, a dominant competitor is able later to raise prices to supracompetitive levels. *See* Attached Letter at 6-7.

[1] This letter expresses the views of the Federal Trade Commission's Bureau of Competition and Office of Policy Planning. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

purpose of eliminating competitors in the short run and reducing competition in the long run."[7] Although the Court has not stated what the appropriate measure of cost should be,

C. The MFMPA's *de minimis* exception

The second principal difference between the MFMPA and S.4522-B is the creation of a *de minimis* "exception." The bill would grant authority to the state consumer protection board to dismiss complaints that, in the board's view, result from a *de minimis* injury to competition. As a practical matter, however, the exception likely would not encourage pro-competitive price cutting, and instead likely would simply increase uncertainty about the scope of the bill's "below-cost" sales ban. This uncertainty, in turn, could lead to higher prices for consumers. The bill provides no guidance to the consumer protection board or to suppliers about how to evaluate *de*