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FEDERAL TRADE COMMISSION
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Prepared Statement of the Federal Trade Commission

**Market Forces, Anticompetitive Activity and Gasoline Prices—
FTC Initiatives to Protect Competitive Markets**

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Before The

**Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
United States Senate**

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I. Introduction

Mr. Chairman and members of the Subcommittee, I am Bill Kovacic, General Counsel of the Federal Trade Commission. I am pleased to appear before you today at this hearing on the important topic of competitive prices for gasoline, and to present the testimony of the Federal Trade Commission.¹ The title of this hearing is particularly appropriate. As Figure One illustrates, changes in gasoline prices have historically tracked changes in the price of crude oil.² With crude oil prices at approximately \$37, it is not surprising that we are seeing higher prices, nationwide, at the pump.

The FTC is a law enforcement agency with two related missions: to preserve competition in the marketplace for the benefit of consumers, and to protect consumers from deceptive or unfair practices that may injure them. The Commission's statutory authority covers a broad spectrum of sectors in the American economy, including the energy industry and its various components.

The significance of antitrust law enforcement is particularly clear in the petroleum industry; fuel price increases can strain the budgets of consumers and can have a direct and substantial impact on businesses of all sizes throughout the U.S. economy. Antitrust enforcement helps ensure that the petroleum industry is, and remains, competitive. During the

¹This written statement represents the views of the Federal Trade Commission. My oral presentation and response to questions are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

²Figure One (covering the period 1949 through 2002) also illustrates that the real price of gasoline has fallen dramatically since its historic high in the early 1980s. The difference between the price of crude oil (per gallon of gasoline) and the price of a gallon of gasoline has remained fairly constant for the same time period, generally around \$.80 per gallon. (All figures are in 2002 dollars.) This is dramatically lower than the difference for the years preceding 1980.

period of large oil industry mergers, the Bureau of Competition has spent almost one-fourth of its enforcement budget on investigations in energy industries.

The Commission also performs functions beyond law enforcement. Congress established the agency to provide expert analysis of major trends affecting the American economy. Because of the importance of the petroleum industry to the American economy, and increased public concern about the level and volatility of gasoline prices in recent years, the Commission studies, on an on-going basis, the central factors that may affect the level and volatility of refined petroleum product prices in the United States. The Commission held public conferences on this topic in 2001 and 2002.³ The Commission also is updating its 1982 and 1989 “Petroleum Merger Reports” to focus on mergers and structural change in the oil industry since 1985. In March, Commission staff economists released a retrospective study of the effects of the Marathon-Ashland joint venture in Kentucky.⁴

In addition to the agency’s conferences and research reports, the Commission actively monitors wholesale and retail prices of gasoline. About two years ago, the FTC launched an initiative to monitor gasoline prices to identify “unusual” movements in prices⁵ and then

³*FTC to Hold Second Public Conference on the U.S. Oil and Gasoline Industry in May 2002*, FTC Press Release (Dec. 21, 2001).

⁴Christopher T. Taylor and Daniel S. Hosken, “The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure,” Federal Trade Commission Bureau of Economics Working Paper (March 17, 2004) This paper examines the price effects of the Marathon-Ashland joint venture by comparing the wholesale and retail price of gasoline in a number of regions unaffected by the merger to the price of gasoline in Louisville, Kentucky. The transaction does not seem to have affected the relative price of gasoline in Louisville.

⁵Briefly, an “unusual” price movement in a given area is a price that is significantly out of line with the historical relationship between the price of gasoline in that area and the gasoline prices prevailing in other areas.

examine whether any such movements might result from anticompetitive conduct that violated Section 5 of the Federal Trade Commission Act. FTC economists developed a statistical model for identifying such movements. They look at price movements in 20 wholesale and over 350 retail markets across the country. A map of these markets is attached (Figure Two).

Our gasoline monitoring and investigation initiative focuses on the timely identification of unusual movements (compared to historical trends) in gasoline prices to determine if a law enforcement investigation is warranted. If the FTC's staff detects unusual price movements in

⁶Natural causes can include movements in crude oil prices, supply outages (*e.g.*, from refinery fires or pipeline disruptions), or changes in and/or transitions to new fuel requirements imposed by air quality standards.

⁷Section 7 of the Clayton Act specifically prohibits acquisitions where the

Chevron and Texaco.⁹ This transaction combined assets located throughout the United States. Twelve states participated in the FTC's investigation. The Commission entered a consent order with Chevron and Texaco requiring numerous divestitures to maintain competition in particular relevant markets, primarily in the western and southern United States. Among other requirements, the consent order required Texaco to: (a) divest to Shell and/or Saudi Refining, Inc. ("SRI") all of its interests in two joint ventures – Equilon¹⁰ and Motiva

⁹*Chevron, Corp.*, C-4023 (Dec. 18, 2001) (consent order).

¹⁰The Equilon venture was jointly controlled by Shell and Texaco, and its major assets included full or partial ownership in four refineries, about 65 terminals, and various pipelines. It marketed gasoline through approximately 9,700 branded gas stations nationwide.

¹¹Motiva, jointly controlled by Texaco, Shell, and SRI, consisted of their eastern and Gulf Coast refining and marketing businesses. Its major assets included full or partial ownership in four refineries and about 50 terminals, with the companies' products marketed through about 14,000 branded gas stations nationwide.

¹²The California Air Resources Board mandates that gasoline sold in California meet certain specifications.

¹³*Valero Energy Corp.*, C-4031 (Feb. 22, 2002) (consent order).

in California (*i.e.* gasoline that meets the specifications of the California Air Resources Board

¹⁴The Commission also alleged competitive concerns in the refining and bulk supply of CARB 2 and CARB 3 gasoline for sale in Northern California, contending that even a price increase of one cent per gallon would increase costs to those consumers by approximately \$60 million per year.

¹⁵The Commission also considered the likely competitive effects of Tosco's proposed acquisition by Phillips Petroleum. After careful and close scrutiny, the Commission, by a vote of 5-0, declined to challenge the acquisition. The Commission's statement closing the investigation set forth its reasoning in detail. *Phillips Petroleum Corp.*, FTC File No. 001 0095 (Sept. 17, 2001) (Statement of the Commission). In its most recent complaint regarding an oil merger, the Commission alleged that the merger of Phillips and Conoco would harm competition in the Midwest and the Rocky Mountain region. The consent order settling the case required substantial divestiture of assets as well as additional relief. *Conoco Inc. and Phillips Petroleum Corp.*, C-4058 (Aug. 30, 2002) (Analysis of Proposed Consent Order to Aid Public Comment). The Commission recently closed its investigation of Sunoco's acquisition of the Coastal Eagle Point refinery in the Philadelphia area without requiring any relief. The Commission's statement noted that the acquisition would not have any anticompetitive effects and that substantial efficiencies were associated with the transaction. *Sunoco Inc./Coastal Eagle Point Oil Co.*, FTC File No. 031 0139 (Dec. 29, 2003) (Statement of the Commission).

III. Nonmerger Investigations Into Gasoline Pricing

The next important part of the Commission's enforcement function is to detect and stop anticompetitive nonmerger conduct. The Commission has been aggressive in investigating, and prosecuting when appropriate, instances of potentially anticompetitive nonmerger activity. When it appears that higher prices might result from collusive activity, or anticompetitive unilateral activity by a firm with market power, the agency investigates to determine if unfair methods of competition have occurred. If the facts warrant, the Commission challenges the anticompetitive behavior, usually by issuing an administrative complaint.

Several recent petroleum investigations deserve discussion. On March 4, 2003, the Commission issued an administrative complaint, stating that it had reason to believe that the Union Oil Company of California ("Unocal") had violated Section 5 of the FTC Act. The Commission alleged that Unocal deceived the California Air Resources Board ("CARB") in connection with regulatory proceedings to develop the reformulated gasoline ("RFG") standards that CARB adopted. Unocal allegedly misrepresented that certain technology was non-proprietary and in the public domain, while at the same time it pursued patents that would enable it to charge substantial royalties if CARB mandated Unocal's technology in the refining of CARB-compliant summer RFG. As a result of Unocal's activities, the Commission alleged, Unocal illegally acquired monopoly power in the technology market for producing the new CARB-compliant summer RFG. In addition, the Commission alleged that Unocal undermined competition and harmed consumers in the downstream product market for CARB-compliant summer RFG in California.

The Commission's complaint further charged that these activities, unless enjoined, could

close to, or at, full capacity. If gasoline is in short supply in a locality due to refinery or pipeline outages, and there are no immediate alternatives, a market participant may find that it can increase prices - - generally for a short time only until the outage is fixed or alternative supply becomes available. However, this transient power over price - which occurs infrequently and lasts only as long as the shortage - should not be confused with the sustained power over price that is the hallmark of market power in antitrust law.

In addition to the Unocal and the West Coast pricing investigations, the Commission in 2001 issued a report on its nine-month investigation into the causes of gasoline price spikes in local markets in the Midwest in the spring and early summer of 2000.¹⁶ The Commission found a variety of factors that contributed in different degrees to the price spikes. Primary factors included refinery production problems (e.g., refinery breakdowns and unexpected difficulties in producing the new summer-grade RFG gasoline required for use in Chicago and Milwaukee),

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¹⁶Midwest Gasoline Price Investigation, Final Report of the Federal Trade Commission (Mar. 29, 2001).

The discussion above covers but a few of the gasoline pricing investigations to which the Commission has devoted substantial time and resources. To date, we have identified no instances of collusion between petroleum companies. That does not mean that collusion cannot

you know, we have been experiencing rapid price increases for gasoline this spring as well. As noted above, the FTC is monitoring wholesale and retail gasoline prices in cities throughout the country, and will continue to analyze this data to seek explanations for pricing anomalies. A look at some recent price spikes illustrates the kinds of factors, other than crude oil prices, that affect retail price levels.

ARIZONA

At the end of last summer, gasoline prices increased sharply in Arizona. The average price of a gallon of regular gasoline in Phoenix rose from \$1.52 during the first week in August to a peak of \$2.11 in late August. Several sources accounted for these price movements. The majority of gasoline sold in Phoenix comes from West Coast refineries. A pipeline from Texas also brings gasoline into the Phoenix area but it is usually at capacity, so the marginal supply comes from the West Coast.¹⁷

Product supplies on the West Coast were already becoming tight in early August, following a number of unplanned refinery interruptions in California and an unplanned shutdown at a refinery in Washington. This placed upward pressure on prices on the West Coast and in Arizona. On July 30, 2003, Kinder Morgan's El Paso to Phoenix pipeline ruptured between Tucson and Phoenix. With this disruption, most of Arizona immediately became much more dependent on California for its gasoline supplies. The outage immediately reduced the volume of gasoline delivered to Phoenix by 30 percent. With supplies reduced by 30 percent, a price increase is likely, and necessary to both attract additional volume and to reduce demand.

¹⁷Marginal supply is the last product brought into a market and effectively sets the equilibrium price. It is also the increment of product that can adjust in the short run to market conditions and thus ameliorate price spikes.

Without a price increase, stations would likely run out of gasoline.

On August 24, Kinder Morgan opened a temporary by-pass of the pipeline section affected by the rupture, and prices quickly fell. The average price of regular gasoline began to drop immediately. (See Figure Three.)

Marked price increases in the wake of a sudden, severe drop in supply are a normal market reaction. Because gasoline is so important to consumers, a large price increase may be required to reduce immediate demand to equal the level of available supply following a large reduction in supply. Price increases in turn attract additional supplies, which should then cause prices to decline. This response occurred in the Kinder Morgan rupture. Retail prices in Phoenix increased during the week immediately following the August 8 pipeline rupture (the week ending August 16) to levels higher than predicted by historical relationships.¹⁸ As California refineries increased supply shipments to Arizona (displacing refining capacity that could otherwise serve California markets), retail prices in Los Angeles increased above the predicted level during the following week (the week ending August 23). By the end of August, gasoline prices in the Phoenix area were declining; they continued to drop throughout September and October. In examining this pricing anomaly, the FTC staff consulted with the Attorneys Generals' offices in Arizona and California.

¹⁸Price increases in Phoenix were not large enough to equate short run supply and demand. Gasoline was rationed by long lines of motorists, and a number of stations ran out of gasoline. *See e.g.*, Phoenix Gas Crisis Worsens, MSNBC News (Aug. 21, 2003) (only 45 percent of gasoline stations had product to sell), at <http://www.msnbc.com/local/AZSTAR/A1061452904.asp?0cv=BB10>; Phoenix Gas Stations Running Dry After Pipeline Shut Down, Associated Press (Aug. 18, 2003), at <http://www.cnn.com/2003/US/Southwest/08/18/phoenix.gas.crunch.ap/>.

ATLANTA

Another recent price anomaly picked up by the monitoring project occurred in Atlanta, Georgia, and surrounding counties. This anomaly is not the traditional price spike that attracts the public's attention. Instead, it took the form of a small, sustained increase. Atlanta and its surrounding counties have experienced gasoline formulation changes in the past few years that have differentiated it from the rest of the Southeast. On April 1, 2003, an interim low sulfur standard of 90 parts per million (ppm) took effect. Additionally, Georgia soon required the 45-county area surrounding Atlanta to introduce a new 30 ppm low sulfur gasoline by September 16. These formulation changes increased the cost of producing gasoline. After the 90 ppm standard was implemented, gasoline prices in Atlanta increased.

After the 90 ppm standard was instituted in April and even more frequently after the 30 ppm standard was instituted in September, the Commission's monitoring project picked up small anomalies in Atlanta gasoline pricing. Atlanta and the surrounding area have experienced slightly higher prices relative to the historical level because of the greater costs of making low sulfur gasoline. This increase is illustrated at Figure Four.

MID-ATLANTIC AREA

A third pricing anomaly occurred in September and October of last year. Gasoline prices were generally falling nationwide in September-October 2003. However, the price of reformulated gasoline in the New York, New Jersey, Connecticut, and Philadelphia area declined more slowly than the price of gasoline in the rest of the country. The FTC monitoring model showed the price of gasoline in this region was unusually high even though prices were decreasing elsewhere. (See Figure Five.)

¹⁹Import data compiled from tariff and trade data from the U.S. Department of

²⁰ A simple regression of the monthly average national price of gasoline on the monthly average price of WTI crude shows that the variation in the price of crude explains approximately 85 percent of the variation in the price of crude oil. (This percentage may vary across states or regions.) This is similar to the range of effects given in United States Department of

crude prices affect gasoline prices directly through the feedstock cost but also indirectly by reducing gasoline inventories.”²¹ Participants also commented that average inventories for refined products have declined over time,²² contributing to price spikes as additional supply is less available quickly to meet demand.²³ Lower inventory costs decrease the average cost of producing gasoline, to the benefit of consumers.²⁴

Participants in the FTFncil.3r

²¹Cook (EIA), Aug. 2 tr. at 52.

²²Greene (Cal.), Aug.2. tr. at 11 (“[i]n the 1990’s, reserves and inventories [in California] have declined roughly 20-plus percent.”); Rothschild (Podesta/Mattoon), Aug.2 tr. at 82 (consistently below an average of 5 days of gasoline inventory). Cooper (Cons. Fed. of Am.), written statement at 21.

²³EIA, Inquiry into August 2003 Gasoline Price Spike (Nov. 2003) (reporting that low inventories played a key role in Summer 2003 price spike).

²⁴In a recent study of the petroleum inventory system, the National Petroleum Council concluded that the trend towards lower product inventories was “the result of improved operating efficiencies partially offset by operational requirements for an increased number of product formulations to comply with environmental regulations,” noting also that “[s]ince holding inventory is a cost, there is an underlying continuous pressure to eliminate that which is not needed to meet customer demand or cannot return a profit to the holder.” National Petroleum Council, *U.S. Petroleum Product Supply–Inventory Dynamics*, December 1998 at 11. The National Petroleum Council study also concluded (at 22) that “(c)ompetition has resulted in the consumer realizing essentially all of the cost reductions achieved in the downstream petroleum industry.”

facilities at high rates of capacity utilization, supply disruptions from unexpected refinery outages or pipeline failures may not be easily or immediately compensated for by other supply sources due to capacity limitations, resulting in substantial market price effects in some cases.

The interaction of environmental quality requirements and gasoline supplies was one area identified as deserving consideration by policymakers. It is clear that environmental regulations have yielded substantial benefits. Since 1970, emissions of the six principal air pollutants – nitrogen dioxide, ozone, sulfur dioxide, particulate matter, carbon monoxide, and lead – have been cut by 25 percent, even as vehicle miles increased by 149 percent.²⁵ However, these regulations add to the cost of refining crude oil, and to gasoline prices. The Environmental Protection Agency (“EPA”) estimates that the cost of producing a gallon of reformulated gasoline is 4 to 8 cents per gallon more than the cost of producing conventional gasoline.²⁶ These costs may be higher during times of supply disruption, when significant marginal costs are incurred as firms attempt to quickly adjust previously determined production runs.

Additionally, several participants at the conferences reported that the proliferation of different environmentally mandated gasoline blends has reduced the ability of firms to ship gasoline from one region to another in response to supply disruptions.²⁷ (Figure Six illustrates

²⁵EPA, Air Quality and Emissions Trends Report (2002).

²⁶Larson (EPA), May 8 tr. at 74.

²⁷*E.g.*, Felmy (API), Aug. 2 tr. at 26; Cooper (Assoc. of Oil Pipe Lines), Aug.2 tr. at 102. According to one participant, “[t]ight specifications for reformulated gasoline sold in [California] and limited pipeline interconnections . . . isolate the California gasoline market from gasoline markets in the rest of the country,” thus contributing to higher prices in the state. Gilbert (U. Cal.Berkeley), written statement at 3-4.

²⁸*Study of Unique Gasoline Fuel Blends (“*

A federal statute known as the Jones Act³⁰ increases the cost of transporting petroleum products by requiring that any product transported by vessel between U.S. ports be carried in domestically-built ships staffed by U.S. crews, which is more expensive than carriage by foreign-built, foreign-staffed ships. A recent government estimate of the total welfare cost of the Jones Act for all tanker shipping is \$656 million dollars a year, based on the assumption that a foreign ship has operating costs of only 59 percent of a Jones Act ship.³¹ The observed cost of transportation of refined petroleum products from the Gulf to the West Coast, 10-25 cents per gallon,³² imply the Jones Act imposes an additional cost of about at least 4 cents per gallon during the times of the year when it is necessary to transport gasoline using Jones Act ships.

A number of states have regulatory schemes that substantially influence gasoline prices. Several states have divorcement statutes that require the unbundling of retail sales from upstream refining operations. Careful economic analyses of divorcement statutes conclude that such statutes have the effect of raising consumer prices.³³ Other regulatory statutes that appear to have have the effect of increasing gasoline prices include bans on self-service sales, and restrictions on below-cost sales, which appear to simply protect retailers from competition from

³⁰Sec. 27 of the Merchant Marine Act of 1920, 46 U.S.C. 883, 19 CFR 4.80 and 4.80(b).

³¹The Economic Effects of Significant U.S. Import Restraints, U.S. International Trade Commission, Pub. No. 3519 (June 2002).

³²California Energy Commission, Gulf Coast to California Pipeline Feasibility Study (Aug. 2003).

³³*See e.g.*, Michael Vita, "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impacts of Gasoline Divorcement Policies," 18(3) J. of Regulatory Econ. 217-33 (Nov. 2000); Asher Blass and Dennis Carlton, "The Choice of Organizational Form in Gasoline Retailing and the Cost of Laws that Limit that Choice," XLIV(2)(Pt. 1) J.Law and Econ. 551 (2001).

³⁴Retail markets are being transformed by hypermarkets, which are high volume retail outlets mostly owned by or leased from grocery stores, mass merchandise retailers, large convenience stores or membership clubs. Hypermarkets have substantial economies of scale that enable them to sell at low prices. They may pump up to one million gallons of fuel a month. Hypermarkets, in some circumstances, can reduce their costs further by doing their own wholesaling. Some hypermarkets already buy their gasoline directly from the refineries through long term contracts. As of the fourth quarter of 2002, the market share for hypermarkets, nationally, was approximately 6%. See Energy Analysts International, *Evolution of the High Volume Gasoline Retailer* (February 13, 2003).

³⁵See Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Kansas State Sen. Les Donovan (Mar. 12, 2004), at <http://www.ftc.gov/be/v040009.pdf>; Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Demetrius Newton, Speaker Pro Tempore of the Alabama House of Representatives (Mar. 12, 2004), at <http://www.ftc.gov/be/v040005.htm>; Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Wisconsin State Rep. Shirley Krug (Oct. 15, 2003), at <http://www.ftc.gov/be/v030015.htm>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Eliot Spitzer, Attorney General of New York (July 24, 2003), at <http://www.ftc.gov/be/nymfmpa.pdf>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Roy Cooper, Attorney General of North Carolina (May 19, 2003), at <http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf>; *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing House Comm. On Energy and Environmental Protection et al.* (Jan. 28, 2003) (testimony of Jerry Ellig, Deputy Director, FTC Office of Policy Planning), at <http://www.ftc.gov/be/v030005.htm>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Gov. George E. Pataki of New York (Aug. 8, 2002), at <http://www.ftc.gov/be/v020019.pdf>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, and R. Ted Cruz to Hon. Robert F. McDonnell, Commonwealth of Virginia House of Delegates (Feb. 15, 2002).

sector of the economy. Higher prices for products that are critical to our citizens' quality of life and for the efficient functioning of the national economy are matters of serious concern. When price increases result from conduct that violates the antitrust laws, the FTC will take enforcement action.

I am pleased to answer your questions.