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U.S. House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations

"Gasoline Prices, Oil Company Profits, and the American Consumer"

Thank you, Mr. Chairman and members of the Subcommittee on Oversight and Investigations for the opportunity to testify on the issue of gasoline prices. My name is Tyson Slocum and I am Director of Public Citizen's Energy Program. Public Citizen is a 36-year old public interest organization with over 100,000 members nationwide. We represent consumer interests through research, public education and grassroots organizing.

Gasoline prices have nearly tripled in the last five years, creating financial hardship for millions of families, as the average annual expenditure on gasoline increased $1,000 for the typical family over that time.[1] While some households have been able to reduce their consumption in response to these high prices by either investing in a more fuel-efficient or alternative-fuel car, taking mass transit or weatherizing their home to cut down on home heating oil costs, most lack the financial resources to make such investments or lack access to alternatives to driving in their car. That explains why, even in the face of skyrocketing gasoline prices, consumption has not moderated.

While American families pay record high prices, oil companies are enjoying the strongest profits in the economy. Since 2001, the largest six oil companies operating in the United States—ExxonMobil, ChevronTexaco, ConocoPhillips, BP, Shell and Valero—recorded $477 billion in profits.[2] 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 and other anti-competitative practices, made possible by the wave of recent mergers and weak regulatory oversight, thereby denying Americans access to competitive markets. To add insult to injury, oil companies enjoy billions of dollars worth of subsidies courtesy of the U.S. taxpayer at a time when the industry records record profits. Investing in America's communities—not Big Oil—is needed to provide families with access to alternatives.

Public Citizen research shows that oil companies aren't adequately investing these record earnings into projects that will help consumers, as the largest capital expenditure in 2006

[1] http://judiciary.house.gov/media/pdfs/Cooper070516.pdf
[2] Public Citizen calculations from company financial reports.

was to buy back stock and pay dividends to shareholders. 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.[3] Until the oil industry takes the lead on prioritizing investments to curb America's addiction, Congress should take steps to revoke oil company subsidies or impose a windfall profits tax to finance sustainable energy solutions.

In addition, energy trading markets, where futures 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.

Public Citizen has a five point plan for reform:

- Repeal all existing oil company tax breaks, close loopholes allowing oil companies to escape paying adequate royalties and/or implement a windfall profits tax, dedicating the new revenues to financing clean energy, energy efficiency and mass transit.
- Strengthen antitrust laws by empowering the Federal Trade Commission to crack down on unilateral withholding and other anti-competitive actions by oil companies. Re-evaluate recently approved mergers.
- Establish a Strategic Refining Reserve to be financed by a windfall profits tax on oil companies that would complement America's Strategic Petroleum Reserve.
- Re-regulate energy trading exchanges to restore transparency and impose firewalls to stop energy traders from speculating on information gleaned from the companies' affiliates.
- Improve fuel economy standards to reduce gasoline demand.

Recent Mergers, Weak Anti-Trust Law Threaten Consumers

According to the U.S. Government Accountability Office, over 2,600 mergers have been approved in the U.S. petroleum industry since the 1990s.[4] 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. ExxonMobil, ChevronTexaco, ConocoPhillips, BP and Shell produce 10 million barrels of oil a day—more than the combined exports of Saudi Arabia and Qatar.

[3] Available at www.eia.doe.gov/environment.html

[4] *Mergers and Other Factors that Affect the U.S. Refining Industry*, U.S. Government Accountability Office, July 2004, GAO-04-982T, Page 2, available at www.gao.gov/new.items/d04982t.pdf

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 six largest oil companies operating in America have recorded $477 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,[5] slows economic growth, adds to inflationary pressures and creates financial hardship for families and businesses.

Motorists are not getting any bang for their buck. While drivers are stuck paying record high prices, oil companies are spending more money buying back their own stock then they are on investing in their ageing infrastructure. The industry leader, ExxonMobil, spent $37.2 billion buying back its stock and paying dividends to its shareholders in 2006, while spending only $19.9 billion worldwide on its oil exploration and refining capital investment.

No Bang for Our Buck: ExxonMobil Spends More Buying Its Stock Than on Reinvesting in Its Ageing Infrastructure ($ billions)

	2005	2006	1st Q '07
Capital & Exploration Expenditures	**$ 17.7**	**$ 19.9**	**$ 4.2**
Upstream, U.S.	2.1	2.5	n/a
Downstream, U.S.	0.8	0.8	n/a
% invested in U.S.	16%	17%	n/a
Total Profit	$ 36.1	$ 39.5	$ 9.3
Total Profit Earned in U.S.	10.1	9.4	2.0
% of Profit Earned in U.S.	28%	24%	22%
Share Buybacks	$ 18.2	$ 29.6	$ 7.0
Dividend Payments	7.2	7.6	1.8
total for Shareholders	**$ 25.4**	**$ 37.2**	**$ 8.8**
% more spent on shareholders vs capital investment	**+44%**	**+87%**	**+108%**

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. Public Citizen research shows that 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 (see Appendix 1). This concentration has led to skyrocketing profit margins. 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.

[5] Available at www.bea.gov/bea/di/home/trade.htm

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" and concluded that "mergers and increased market concentration generally led to higher wholesale gasoline prices in the United States."[6]

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.*[7]

ExxonMobil and other major 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.

We're Not in Kansas Anymore

In 2005, Wall Street investment bank Goldman Sachs and private equity firm Kelso & Co. bought a 112,000 barrels/day oil refinery in Kansas, demonstrating how major energy traders are now acquiring hard energy assets.

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 cent margin for every gallon of gasoline refined, a 158 percent jump.[8] 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."[9] 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*

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

[7] Jeffrey Ball, "As Gasoline Prices Soar, Americans Resist Major Cuts in Consumption," May 1, 2006.

[8] *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

[9] Steve LeVine and Patrick Barta, "Giant New Oil Refinery in India Shows Forces Roiling Industry," August 29, 2006.

> *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."*[10]

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).[11]

While major oil companies haven't applied for a permit to build a new refinery, a small start-up has: Arizona Clean Fuels.[12] The company is successfully obtaining the necessary air quality permits to build the facility, which begs the question: if a small company can do it, why can't ExxonMobil, the world's most profitable corporation, do it?

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.[13]

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.*[14]

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 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

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[10] Masood Farivar, "Crude-Oil Futures Decline as Gasoline Surges," March 17-18, 2007, Page B5.

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

[12] www.arizonacleanfuels.com

[13] *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

[14] Bhushan Bahree, "Oil Prices Show No Sign of Slowing," *The Wall Street Journal*, April 10, 2006.

1998.[15] Current amounts remain at historically high levels, demonstrating that while we have plenty of surplus crude, problems lie with accessing refined products. Consumers are paying a premium not because of problems in crude oil markets, but rather the problems in the refining markets. And the biggest problem in the refining market is the industry lacks financial incentive to expand capacity to create a surplus.

The U.S. Federal Trade Commission found evidence of anti-competitive practices in its March 2001 *Midwest Gasoline Price Investigation*:[16]

> *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.[17] 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.[18] Were this capacity to be in operation today, refiners could use it to better meet today's reformulated gasoline blend needs.

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 $172 billion buying back stock and paying out dividends. In

[15] Available at http://tonto.eia.doe.gov/dnav/pet/hist/mcestus1m.htm
[16] "Midwest Gasoline Price Investigation," available at www.ftc.gov/os/2001/03/mwgasrpt.htm
[17] Available at www.govtrack.us/data/us/bills.text/109/s/s2557.pdf
[18] Energy Information Administration Form EIA-820, *Annual Refinery Report*.

addition, they held $56 billion in cash.[19] 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.

Billions for Investors But Not for Sustainable Energy

	Profit Since 2005	Amount Spent on Stock Buybacks & Dividends Since 2005	Cash on Hand as of April 2007
ExxonMobil	$ 84,910,000,000	$ 62,600,000,000	$ 29,994,000,000
Shell	$ 57,985,000,000	$ 34,943,000,000	$ 11,184,000,000
BP	$ 46,910,000,000	$ 47,088,000,000	$ 1,956,000,000
ChevronTexaco	$ 35,937,000,000	$ 18,516,000,000	$ 11,800,000,000
ConocoPhillips	$ 33,440,000,000	$ 8,422,000,000	$ 860,000,000
Total	$ 259,182,000,000	$ 171,569,000,000	$ 55,794,000,000

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.[20]

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

[19] Public Citizen calculations from company financial reports.
[20] Available at www.exxonmobil.com/corporate/files/corporate/sar_2005.pdf, page 19.

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."[21]

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."[22] A windfall profits tax could be modeled on HR 2070, introduced in the 109th Congress.[23]

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."[24]

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, decimated auditing staff and overreliance on information provided by Big Oil as culprits in the oil industry giveaway.[25] Meanwhile the Justice Department unexpectedly

[21] Russell Gold, "Big Oil's Earnings Gusher Starts to Slow," *The Wall Street Journal*, January 25, 2007, Page A2.
[22] For more information see www.citizen.org/pressroom/release.cfm?ID=2362
[23] www.govtrack.us/data/us/bills.text/109/h/h2070.pdf
[24] Bhushan Bahree, "Oil Settles Above $70 a Barrel, Despite Inventories at 8-year High," April 18, 2006.
[25] "Minerals Management Service's Compliance Review Process," December 2006, available at www.doioig.gov/upload/2007-G-00011.pdf

announced the welcome news that it has initiated criminal investigations into the Interior Department's oversight of oil companies.[26] Taxpayers must be fairly compensated for allowing oil companies the privilege of extracting resources from federally-owned land.

Public Citizen also recommends repealing all federal subsidies currently enjoyed by the oil industry and transferring those expenditures to renewable energy, energy efficiency and mass transit. Public Citizen estimates that the oil industry receives 65 percent of all federal government energy tax breaks and government spending programs, estimated at as much as $8 billion annually, including:[27]

- Excess of percentage over cost depletion.
- Credit for enhanced oil recovery costs.
- Expensing of exploration and development costs.
- Exception from passive loss limitation for working interests in oil and gas properties.
- Last in, first out accounting for vertically integrated oil companies.
- "Geological and geophysical" costs from Section 1329 of EPACT 2005.
- Oil refinery expensing from Section 1323 of EPACT 2005.
- Deductions for foreign taxes.
- Manufacturing tax deduction from Section 102 of HR 4520 passed in 2004.
- Various Department of Energy spending programs, including the Ultra-Deepwater drilling subsidy in Title IX, Subtitle J of EPACT 2005.

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.[28] 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.

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 opposing federal price-gouging statutes.[29] This stands in stark contrast to the May 2004 conclusions reached by a U.S. Government Accountability Office report[30] which found

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

[27] Based on data contained in *Inventory of Major Federal Energy Programs and Status of Policy Recommendations*, The U.S. Government Accountability Office, GAO-05-379, June 2005, www.gao.gov/new.items/d05379.pdf

[28] www.fhwa.dot.gov/ohim/mmfr/sep06/mftrates.htm

[29] "Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases," available at www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf

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

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.[31]

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*

[31] "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

offences 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.*[32]

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.[33] 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."*[34]

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.

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.

[32] *Northern Pacific Railroad Co.* v. *United States*, 356 US 1, 5 (1957)
[33] Available at www.supremecourtus.gov/opinions/05pdf/04-805.pdf
[34] At 3, 6, available at www.antitrustinstitute.org/archives/files/465.pdf

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.[35] 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 Enron[36], 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.[37] 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.[38]

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.[39]

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

[35] 7 USC §§ 9, 13b and 13(a)(2).
[36] 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).
[37] 17 CFR Ch. 1, available at www.access.gpo.gov/nara/cfr/waisidx_06/17cfr35_06.html
[38] "Exemption for Certain Contracts Involving Energy Products," 58 Fed. Reg. 6250 (1993).
[39] Charles Lewis, "The Buying of the President 1996," pg 153. The Center for Public Integrity.

energy futures contracts "sets a dangerous precedent."[40] A U.S. General Accounting Office report issued a year later urged Congress to increase regulatory oversight over derivative contracts,[41] and a congressional inquiry found that CFTC staff analysts and economists believed Gramm's hasty move prevented adequate policy review.[42]

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.[43]

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.[44] As Public Citizen pointed out back in 2001,[45] 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."[46] In its 1999 lobbying disclosure form, Enron indicated that the "President's Working Group" was among its lobbying targets.[47]

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[40] "Derivatives Trading Forward-Contract Fraud Exemption May be Reversed," *Inside FERC's Gas Market Report*, May 7, 1993.
[41] "Financial Derivatives: Actions Needed to Protect the Financial System," GGD-94-133, May 18, 1994, available at http://archive.gao.gov/t2pbat3/151647.pdf
[42] Brent Walth and Jim Barnett, "A Web of Influence," *Portland Oregonian*, December 8, 1996.
[43] Jerry Knight, "Energy Firm Finds Ally, Director, in CFTC Ex-Chief," *Washington Post*, April 17, 1993.
[44] 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
[45] *Blind Faith: How Deregulation and Enron's Influence Over Government Looted Billions from Americans*, available at www.citizen.org/documents/Blind_Faith.pdf
[46] "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
[47] 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 IntercontinentalExchange (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.[48] 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.[49]

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.[50]

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*

[48] Available at www.theice.com/exchange_volumes_2005.jhtml
[49] Available at http://finance.yahoo.com/q/mh?s=ICE
[50] 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.* [51]

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."[52] 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.

One result of the lack of transparency is the fact that even some traders don't know what's going on. A recent article described how:

> *Oil markets were rocked by a massive, almost instant surge in after-hours electronic trading one day last month, when prices for closely watched futures contracts jumped 8%…this spike stands out because it was unclear at the time what drove it. Two weeks later, it is still unclear. What is clear is that a rapid shift in the bulk of crude trading from the raucous trading floor of the New York Mercantile Exchange to anonymous computer screens is making it harder to nail down the cause of price moves…The initial jump "triggered more orders already set into the system, and with prices rising, people thought somebody must know something," Tom Bentz, an analyst and broker at BNP Paribas Futures in New York who was watching the screen at the time, said the day after the spike. "The more prices rose, the more it seemed somebody knew something."*[53]

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[51] *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

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

[53] Matt Chambers, "Rise in Electronic Trading Adds Uncertainty to Oil," *The Wall Street Journal*, April 10, 2007.

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."[54]

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 allegations of gasoline futures manipulation that occurred *on a single day in 2002*.[55] 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.[56] 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.[57] In August 2004, a Shell Oil subsidiary agreed to pay $7.8 million to settle allegations of energy market manipulation.[58] In July 2004, Shell agreed to pay $30 million to settle allegations it manipulated natural gas prices.[59] In June 2006, the CFTC brought civil charges against BP for allegedly manipulating the entire U.S. propane market.[60] 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.[61]

In December 2006, Oil giant BP admitted in a filing to the Securities and Exchange Commission that U.S. Commodity Futures Trading Commission staff "notified BP on November 21, 2006 that they intend to recommend to the CFTC that a civil enforcement action be brought against BP…alleging violations…of the Commodity Exchange Act in

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[54] Leah McGrath Goodman, "Oil Futures, Gasoline In NY End Sharply Lower," September 2, 2005.
[55] John R. Wilke, Ann Davis and Chip Cummins, "BP Woes Deepen with New Probe," *The Wall Street Journal*, August 29, 2006.
[56] "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
[57] "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
[58] "Order Approving Contested Settlement," available at www.ferc.gov/whats-new/comm-meet/072804/E-60.pdf
[59] "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
[60] "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
[61] "Order Approving Stipulation and Consent Agreement," 104 FERC ¶ 61,089, available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10414789

connection with its trading of unleaded gasoline futures…The U.S. Attorney for the Northern District of Illinois is also conducting an investigation into BP's gasoline trading." The announcement also confirmed that "the Commodity Futures Trading Commission is currently investigating various aspects of BP's crude oil trading and storage activities in the US since 2003."[62]

In May 2007, Marathon Oil revealed that CFTC staff was recommending an enforcement action against the company for its efforts "to manipulate the price of West Texas Intermediate crude oil."[63]

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."[64]

Natural gas markets are also victimized by these unregulated trading markets. Public Citizen has testified before Congress on this issue,[65] and a March 2006 report by four state attorneys general concludes that "natural gas commodity markets have exhibited erratic behavior and a massive increase in trading that contributes to both volatility and the upward trend in prices."[66]

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."[67]

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

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[62] www.sec.gov/Archives/edgar/data/313807/000102123106000617/b843546-6k.htm

[63] www.sec.gov/Archives/edgar/data/101778/000110465907036538/a07-13350_110q.htm

[64] *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

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

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

[67] 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

have scoffed at the studies, saying that they focused only on certain months, missing price run-ups."[68]

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."[69]

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

[68] Alexei Barrionuevo and Simon Romero, "Energy Trading, Without a Certain 'E'," January 15, 2006.
[69] 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

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."[70]

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."[71]

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 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. 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.

[70] www.cftc.gov/files/enf/06orders/opa-bp-lessons-learned.pdf
[71] John R. Wilke, Ann Davis and Chip Cummins, "BP Woes Deepen with New Probe," August 29, 2006.

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.[72]

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.

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

In the twenty years since the last fuel economy increases for passenger cars, vehicles have undergone a number of changes. Overall, vehicles are bigger, heavier, with more powerful engines and faster acceleration than they were twenty years ago.[73] Travel patterns have changed also—with a nearly 20 percent increase in vehicle miles traveled per year since 1995.[74] Although the U.S. is the third largest oil producing nation in the world[75]—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

[72] Paul Merolli, "Two Morgan Stanley M&A deals show bullish stance on gas," Natural Gas Week, Volume 19; Issue 28, July 14, 2003.
[73] Robert Heavenrich,. "Light Duty Automotive Technology and Fuel Economy Trends: 1975 through 2006." U.S. Environmental Protection Agency, Office of Transportation and Air Quality, July 2006.
[74] Federal Highway Administration, "Annual Vehicle Distance Traveled in Miles 1936-1995." April 1997, and "Annual Vehicle Distance Traveled in Miles and Related Data -2005." November 2006.
[75] Available at www.eia.doe.gov/emeu/cabs/topworldtables1_2.html

our oil and gasoline. In all, we use more than the next five biggest oil consumers (China, Japan, Russia, Germany and India) put together.[76]

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).[77] So improving efficiency in our transportation sector will go a long way to reducing our dependence on oil.

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 over $3/gallon are SUV sales slowing down.

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.

After waiting twenty years for action on fuel economy, pressure from increased oil prices has brought national attention back to the need for improved fuel efficiency. Since January, there have been a flurry of legislative proposals, but not a single one provides a sufficiently stringent mandate for NHTSA to raise fuel economy. Existing proposals for increasing CAFE standards give NHTSA the authority to undermine potential improvements in fuel economy by opening the door for industry-biased economic analyses. Many of the proposals fail to guarantee a level of improvement.

In the State of the Union address, the president unveiled his "20 in 10" plan for reducing oil consumption by 20 percent in ten years. He proposes meeting this goal in two ways: 15 percent of the reduced consumption would come from mandating that 35 billion gallons of *alternative* or renewable fuel by 2017. This is a significant departure from the language in the Energy Policy Act of 2005, which mandated 7.5 billion gallons of renewable fuel by 2012, with the same percent of fuel being renewable fuel in 2013 and

[76] Available at www.eia.doe.gov/emeu/cabs/topworldtables3_4.html

[77] *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

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

thereafter. The distinction between "alternative" and "renewable" fuel is important, particularly with respect to greenhouse gas emissions. Alternative fuels could potentially include coal-to-liquids fuel, an attractive prospect for the coal industry, but a potential environmental disaster, if sufficient precaution is not taken to capture and sequester carbon dioxide emissions. Without capture and storage, the use of coal-to-liquid fuel could potentially raise greenhouse gas emissions by 118 percent.[79]

The remaining five-percent reduction in oil consumption is to be attributable to increased CAFE standards. The president proposes restructuring the CAFE program for passenger cars to mirror the system implemented for light trucks. The light truck sliding scale system was developed under collaboration between Vice President Cheney and the Office of Management and Budget.[80] Extending the restructure of CAFE is counterproductive and unnecessary. Additionally, the restructure of the CAFE program for light trucks introduced marginal-cost/marginal-benefit criteria for assessing achievable increases; however, the economic analyses under the light truck rule have failed to properly account for significant externalized benefits. One notable failure is NHTSA's valuation of the benefit of reduced greenhouse gas emissions at zero.

Proposals in the House and Senate contain similarly weak mandates for improved fuel economy, preferring instead the setting of "targets" and giving the agency extensive latitude to set lower standards, further delaying progress in improving fuel economy. The 2002 National Academy of Sciences study assessing the CAFE program firmly established that the auto industry was capable of increasing the fuel economy of passenger cars and light trucks to 35 miles per gallon at a rate of 4 percent per year. This study is now five years old, used technology that was "off the shelf" even then, and did not consider hybrid electric technology as a means of improving fuel economy.

National attention has also been turned to the issue of global warming, and there is a sense of urgency on controlling greenhouse gas emissions. Extensive inquiry has been undertaken by committees in the House and Senate to explore the potential of greenhouse gas cap-and-trade programs at reducing greenhouse gas emissions. There has been a great deal of discussion about how such programs would be structured, including whether the program should be economy-wide or sector-by-sector.

In April, the Supreme Court decided *Massachusetts v. EPA*, finding that carbon dioxide was a pollutant under the Clean Air Act, and that the EPA could regulate carbon dioxide as a pollutant. The implications of this decision for motor vehicle carbon dioxide emission regulation are not clear. Regulation of carbon dioxide emissions from motor vehicles is tantamount to fuel economy regulation.

In this context, it is important not to lose sight of the need to improve fuel economy now, rather than waiting for all the questions about what regulatory schemes will be used to

[79] "Greenhouse Gas Impacts of Expanded Renewable and Alternative Fuels Use," U.S. Environmental Protection Agency, EPA420-F-07-035, April 2007.

[80] *See* Public Citizen, Comments on Reforming the Automobile Fuel Economy Standards (ANPRM), May 14, 2004, at 25-27, 33-43, *available at* www.citizen.org/documents/ACF938B.pdf

achieve greenhouse gas emissions reductions overall. Improved CAFE standards are consistent with reducing greenhouse gas emissions, and the CAFE program would not compete with sector-by-sector regulation of greenhouse gas emissions.

Contrary to the position taken by U.S. auto manufacturers, raising fuel economy standards could actually benefit automakers. Walter McManus at the University of Michigan Transportation Research Institute found that increased fuel economy standards could actually *improve* the financial positions of U.S. auto manufacturers.[81] The overreliance of U.S. automakers on the largest vehicles has led to significant weakening of the industry, and has also made it difficult for them to be responsive to changes in consumer attitudes about fuel economy. During the mid to late 1990s when oil prices were relatively low, fuel economy became less of a concern to consumers, but now that oil prices are on the rise again, consumers have been moving away from gas-guzzling SUVs back to more fuel efficient vehicles.

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.

Opponents of increased fuel economy standards often claim that improving fuel economy could erode safety. The argument that improved fuel economy would be achieved by reducing vehicle weight is not supported by historical experience, and it is not supported by the significant innovations in fuel saving technology that have been introduced in the past twenty years. It is design and vehicle size, not weight, that are the biggest determiners of vehicle safety.

Improved fuel economy is long overdue. There are significant potential savings to be had from reducing our oil consumption. Raising the light duty vehicle fuel economy to 35

[81] McManus, W. 2006. *Can Proactive Fuel Economy Strategies Help Automakers Mitigate Fuel-Price Risks?.*

miles per gallon would save 1.1 million barrels of oil *every day*, saving approximately $65 million dollars a day. Additionally, the needs for reductions in greenhouse gas emissions and improved efficiency to reduce consumption of energy in every sector are urgent improvements for the future.

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 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.[82]

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.

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.

[82] Compiled by Public Citizen from Center for Responsive Politics data, www.opensecrets.org

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.

Appendix 2

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