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United States Senate

WASHINGTON, DC 20510–4705

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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Leibowitz and Commissioners Rosch, Ramirez, Brill, and Ohlhausen:

May was a tough month for any Washington state family or business filling up at the pump. As the national average price of gasoline dropped 17 cents per gallon over the month, and crude oil prices fell around $14 per barrel, pump prices in Washington state inexplicitly spiked. Last week, the average gas price in Washington state was only eight cents from its all-time high of $4.35 per gallon, reached on July 6, 2008 when oil was trading at almost $150 per barrel.

These prices are not only a burden and source of frustration for my constituents, they raise questions as to why a state that produces much more refined product than it consumes is forced to pay so much more than the rest of the country. One likely factor is the February 17, 2012, Cherry Point refinery fire which took about 225,000 barrels of refining capacity offline for about three months. But that shutdown alone should not have resulted in the lowest gasoline inventory levels in history unless other West Coast refiners failed to undertake actions that could have made up for the supply shortages resulting from the Cherry Point accident. The reasons why six other West Coast refineries simultaneously reduced operations are not well documented.

To help answer these important questions, I am requesting the Federal Trade Commission (FTC) utilize its regulatory authority and responsibility granted by Congress to ensure that Washington state consumers are not subject to "any manipulative or deceptive device or contrivance" that could be resulting in unjustifiably high gasoline prices. In particular, I am asking the Commission, pursuant to the Prohibition on Market Manipulation Rule, to investigate whether or not recent and inexplicable gas price spikes in Washington state are the result of deliberative efforts by West Coast refiners to keep gasoline inventories artificially low.

As part of your investigation, I would appreciate your review of a new report by McCullough Research that questions whether today's historically low gasoline inventories were really just the inevitable result of the BP refinery fire and unfortunately timed refinery maintenance shutdowns. The report also suggests that the current divergence from typical West Coast

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pricing trends may have generated significant windfall profits for West Coast suppliers. The results of this analysis--by the same organization that was instrumental in uncovering Enron's manipulation of West Coast electricity markets--affirm concerns I have heard from many of my constituents. Specifically, the McCullough Research report estimates that retail gasoline prices in Washington should have fallen to $3.51 per gallon this week if prices had followed crude oil prices like they normally do. Actual prices are now 77 cents per gallon higher than would have been expected, resulting in what the report calculates to be windfall profits of $48 million dollars a day.

Similarly, over the last several weeks, I have heard many disconcerting stories from Washington state distributors of wholesale gasoline, diesel, and lube oil products. They are astounded and outraged by petroleum price spikes of almost ten percent in just one day, and 90 cent per gallon premiums over the futures market. In addition, one marketer reported that he could purchase unbranded gasoline in Spokane for 38 cents per gallon cheaper than at the rack in Ferndale (near two major refineries), despite shortages statewide. And for branded gasoline, the difference between the Spokane and Anacortes market (where two more major refineries are located) was 19 cents per gallon.

In light of this troubling evidence and the corresponding burden on Washington state consumers, I urge the Commission to investigate these price anomalies using the FTC's Prohibition on Market Manipulation Rule (16 C.F.R. Part 317). To provide clarity and transparency about this effort, I would very much appreciate a detailed response to the following questions:

- Until recently, Washington state gas prices were highly correlated with national and international price trends. While I recognize the West Coast petroleum market (sometimes defined as PADD V) is relatively isolated and utilizes cleaner burning fuels, historically that has resulted in a price premium over national gasoline prices, not any deviation from national price trends. But over the last month, the average price per gallon of gas in Western Washington rose around 20 to 25 cents, while the national average price declined by approximately 17 cents. Has the recent divergence of Washington state and national average petroleum prices triggered the Commission's Gasoline and Diesel Monitoring Project? If not, why? If so, when did the Commission notice these anomalies? And what is it doing to address them?

- The Commission's market manipulation rule specifically prohibits a single actor or a few collusive actors from setting the market price. Given current market data and the results from the McCullough analysis, what is the Commission doing to ensure that West Coast petroleum inventories are adequate to protect consumers from unfair petroleum prices? Oil marketers in my state find it unjustifiable that branded and unbranded products could rise nearly 40 cents per gallon in one day, what normative market circumstances does the Commission believe could result in such a price spike?

- There are reports of petroleum products being shipped overseas from the Puget Sound refineries, despite elevated prices in the region. If these exports were shown to purposefully or recklessly reduce inventory levels resulting in higher gasoline prices in Western Washington (or the West Coast more broadly), would it be a violation of the FTC's Market Manipulation Rule? How will the Commission obtain the necessary market data to make this determination?

- With West Coast gasoline inventories at their lowest point in history and retail prices near record highs, does the Commission believe other refiners in the isolated West Coast market could have adjusted the timing or scope of their maintenance shutdowns to keep inventories, and thus prices, closer to their usual levels? If refiners failed to take actions that could have prevented abnormally low inventory levels is that a violation of the FTC's Market Manipulation Rule or any other FTC Rule? In a low-supply situation, where does the Commission draw the line between "legitimate conduct undertaken in the ordinary course of business" and "fraudulent or deceptive conduct" that "distorts or is likely to distort" the market, particularly in matching orders for refined product?

- The McCullough Research report notes that the Herfindahl-Hirschman Index (HHI) for West Coast refineries is over 2,000, above the Justice Department's benchmark for highly concentrated industries. Does the Commission believe that this situation could provide enough market power to enable pivotal suppliers to influence prices, such as through abnormal refinery shutdowns, particularly in the isolated West Coast refinery market? If so, is there any evidence that market power abuses may be responsible for some of the recent price spikes in Washington state?

- Does the Commission believe that the McCullough Research report is reasonable in estimating that Washington state prices are now 77 cents per gallon higher than would have been expected given crude oil prices? Similarly, does the Commission believe that the McCullough Research report is reasonable in estimating that such a differential translates into a windfall profit for suppliers of $48 million dollars a day? Can the Commission provide an estimate as to what the total cost to consumers was for abnormally high West Coast gasoline prices were during the month of May? Are windfall profits of this magnitude indicative of an uncompetitive marketplace?

- I wrote the Commission last year, along with the Chairman of the Senate Commerce Committee and other Commerce Committee members, requesting an investigation into whether elevated oil and gas prices could be caused by excess speculation on the oil futures market. The Commission responded with their view that the elevated and volatile gas prices at the time (which continue today) were a natural result of rising and volatile crude oil prices. Given that Washington state gas prices, according to the McCullough Research report, are now 77 cents per gallon higher than would have been expected due to falling international crude oil prices, does the Commission continue to hold this view or does it now believe that other factors also help to explain these higher prices?

- In 2005, the Federal Energy Regulatory Commission (FERC) received very similar authority and responsibility from Congress to police and prevent manipulation of the electricity and natural gas markets. To date, FERC has successfully conducted 199 investigations resulting in 61 settlements and civil penalties of $302 million and disgorgement of profits totaling $155 million. If the same inexplicable price spike occurred in the electricity or natural gas markets, does the Commission believe FERC would investigate to make sure that no laws or regulations are being broken and consumers are being protected? Is there something different about wholesale oil markets or the FTC that has prevented it from being similarly proactive in protecting consumers?

High gasoline prices are contributing to significant economic pain for consumers and businesses in Washington state and are jeopardizing our fragile economic recovery. A report by the University of Southern California's Marshall School of Business estimated that for every penny increase in a gallon of gas, as much as a billion dollars is pulled from the U.S. economy each year. That's money that American families and businesses could be spending at local retail stores, neighborhood restaurants, and other small businesses that create more than two thirds of our nation's jobs.

It is therefore critical that the Commission use its statutory authority aggressively to pursue and remedy any purposeful market schemes or reckless supply allocation decisions that are leading to today's elevated gasoline and diesel prices in Washington state or anywhere else across the nation.

Thank you very much for your consideration of this matter and I look forward to your timely response.

Sincerely,

Maria Cantwell

Maria Cantwell
United States Senator