



THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

August 28, 2007

The Honorable Darrell E. Issa
United States House of Representatives
Washington, D.C. 20515

Dear Representative Issa:

Thank you for your letter soliciting the Federal Trade Commission's views on possible legislation relating to temperature adjustment in the retail sale of gasoline. In your letter, you explain that those advocating such legislation allege that gasoline retailers' failure to adjust their prices based on variations in gasoline temperature above 60° F ("hot fuel") could be a deceptive practice. As we understand this position, such deception could arise when a retailer claims that the price that consumers pay is a stated amount per gallon, measured at 60° F, when in fact on hot days the stated price is for slightly less than a gallon of gasoline as most states define "gallon."¹

The weights and measures authorities in each state oversee the calibration and monitoring of gasoline pumps to ensure that they accurately measure gasoline purchased by consumers. FTC staff understands that, with the exception of Hawaii, the states have uniformly followed the procedures set by National Institute of Standards and Technology ("NIST") Handbook 44. Because gasoline expands at a relatively high rate when heated, the NIST definition of a gallon of gasoline (the amount occupying 231 cubic inches) includes the temperature at which the gasoline must be measured, which currently is 60° F.² Based on discussions with state weights and measures officials, the staff understands that a variation in temperature of 20° F affects the volume of a typical 20-gallon tank of gasoline by about 6 tablespoons.³ FTC staff also understands that, in connection with the calibration of gasoline pumps, it is not uncommon for states to include tolerances of plus or minus 6 tablespoons for every 5 gallons of gasoline pumped.

¹ Although consumers still receive 231 cubic inches of gasoline for each gallon purchased, gasoline expands when heated, so that consumers receive slightly less on hot days than they would if the temperature were 60° F.

² FTC staff understands that Hawaii defines a gallon of gasoline based on a measurement at 80° F.

³ For a consumer refilling a 20-gallon gas tank, a 6-tablespoon fluctuation is equal to 0.1 percent of the total gasoline purchased.

As you point out, the Federal Trade Commission protects consumers from deceptive and unfair practices. For a misrepresentation to be deceptive under the Federal Trade Commission Act, it must be misleading in a material respect to consumers acting reasonably under the circumstances.⁴ A material misrepresentation is one that is likely to affect a consumer's choice of, or conduct regarding, a product. In the sale of gasoline, the individual discrepancies stemming from any failure to adjust for temperature are very small. Moreover, presumably many consumers are both "overcharged" and "undercharged" depending on fluctuations in gasoline temperature above and below 60° F. Therefore, it is unclear whether misrepresentations respecting the volume of gasoline arising from its sale at greater than 60° F necessarily would be material to consumers acting reasonably under the circumstances.

In order for an act or practice to be unfair under the FTC Act, it must be "likely to cause substantial injury which is not reasonably avoidable by consumers themselves and not be outweighed by countervailing benefits to consumers or to competition."⁵ The requirement that the injury to consumers not be outweighed by countervailing benefits to them or to competition stems from the recognition that "most conduct creates a mixture of both beneficial and adverse consequences."⁶

In considering whether to enact legislation concerning this issue, Congress may wish to gather additional facts and weigh carefully the benefits and costs that may result from such legislation. Although the FTC has not conducted an investigation of this matter, it appears that the sale of "hot fuel" might not cost consumers extra money, while the solution under consideration may raise consumer prices. Looking at the two basic approaches to addressing this issue puts the cost/benefit analysis in sharper perspective. The first approach involves requiring the installation of devices designed to make temperature adjustments automatically where the gasoline is dispensed. FTC staff understands that the cost of retrofitting existing pumps with such devices is considerable, and probably would ultimately fall on consumers in the form of higher gasoline prices.⁷

The other approach would be to change the definition of a "gallon" according to local conditions. This approach, however, presupposes that the competitive dynamic of the marketplace does not already take the "hot fuel" phenomenon into consideration in setting prices.

⁴ See Appendix to *Cliffdale Associates, Inc. et al.*, 103 F.T.C. 110, 174 (1984).

⁵ See Section 5(n) of the FTC Act, 15 U.S.C. § 45(n).

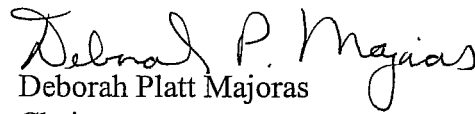
⁶ *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984).

⁷ If the federal government were to subsidize the retrofitting with grants, consumers would still pay those costs indirectly through taxes.

Yet depending on competitive conditions in the particular gasoline retailing market being examined, retail prices might well fluctuate according to even small changes in the volume of gasoline dispensed. If legislation required more gasoline to be dispensed on hot days to compensate for the increased temperature of the fuel, this would add to retailers' costs and likely would increase retail prices. If that occurred, the added compliance burden on gasoline retailers would raise consumer prices at the pump without providing consumers with a corresponding benefit. Again, we suggest gathering more facts and weighing the benefits and costs of new legislation.

I appreciate your interest in this area, and hope that the foregoing information is of assistance to you in your inquiry. If you or your staff have any additional questions or comments or wish to share additional information, please feel free to contact me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,


Deborah Platt Majoras
Chairman