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April 6, 2011

The Honorable Jonathan Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request the Federal Trade Commission investigate whether agreements exist among Canadian oil shippers that violate U.S. antitrust laws. The agreements involve transportation of tar sands oil via the proposed Keystone XL pipeline, which will span the length of the continental U.S. and allow tar sands crude to bypass existing Midwest refineries. It has been brought to my attention that documents and testimony indicate that at least seven Canadian oil shippers have agreed to incur increased near-term shipping costs on the new pipeline in order to impact market supply in the existing markets so as to drive up the overall price of their product for U.S. refiners. Because of the potential impact on US gasoline consumers and because of the long-term impacts that such arrangements and the construction of the Keystone XL pipeline could have on U.S. oil supplies, markets and energy security, I am requesting the FTC investigate whether anti-competitive practices violating U.S. antitrust laws have occurred in relation to the proposed pipeline project and related shippers' agreements.

On October 8, 2008, the U.S. Federal Energy Regulatory Commission (FERC) approved Transportation Service Arrangements (TSAs) between TransCanada Keystone Pipeline, LP and shippers to utilize, or pay for, capacity on the Keystone pipeline system.[1] While the Order does not expressly state who these shippers are, it is my understanding they are members of the "Keystone Shippers Group," which includes: Canadian Natural Resources Limited, Conoco Phillips Canada Marketing & Trading ULC, EnCana Corporation, Shell Trading Canada, Total E & P Canada Ltd.' and Trafigura Canada General Partnership. Although these TSAs were approved by FERC, they remain secret, and were granted confidential status by FERC and by the Canadian National Energy Board (NEB) in a Sept. 14, 2009 NEB Order.[2] Thus, it is my understanding the exact terms of the TSAs remain hidden and the complete nature of the agreements among these shippers has not received full public scrutiny.

While the full nature of the arrangements agreed upon by the Canadian shippers is unclear, there is clear indication that there is a coordinated "strategy" among Canadian suppliers to gain higher prices. According to TransCanada, the proposed Keystone XL pipeline can be used by Canadian

[1] U.S. Federal Energy Regulatory Commission, 125 FERC ¶ 61,025, Docket No. OR08-9-000 (Oct. 8, 2008).
[2] Canadian National Energy Board, Order MO-13-2009, (Sept. 14, 2009).

oil shippers to add up to $4 billion to U.S. fuel costs.[3] Testimony taken on September 17, 2009 before the NEB indicates that the Canadian companies intend to incur higher pipeline tariff costs using the Keystone XL pipeline to bypass PADD II refineries in the Midwest. This will have the effect of manipulating supply levels allowing prices of oil refined in PADD II to rise and ultimately benefitting the Canadian companies with higher prices. This comes to the fore in this exchange between Mr. T. Wise of Purvin & Gertz on a panel for TransCanada Keystone Pipeline GP Ltd. and Mr. D. Davies of Enbridge Pipelines Inc.:

> 3715. **MR. DAVIES:** Okay.
> 3716. And if we go back to Adobe page 35 of your evidence, you say that the test of reasonableness does not apply because -- and I'm quoting from Line 6:
> "*A producer who supplies a committed volume on the Keystone XL Pipeline may expect to receive a lower net-back price on this volume but this strategy would be intended to raise the price in PADD II and raise the average net-back price.*"
> 3717. Do you see that?
> 3718. **MR. WISE:** I do.
> 3719. **MR. DAVIES:** So, first of all, this "strategy" as you call it, would be intended to raise the crude price not only in PADD II but also in Ontario; right?
> 3720. **MR. WISE:** Yes, it would raise it in Ontario and in Western Canada.
> 3721. **MR. DAVIES:** And, to be clear, the strategy is that a producer who supplies a committed volume on XL would be prepared to take a financial hit on that volume in order to raise crude prices in PADD II and Ontario; right?
> 3722. **MR. WISE:** Yes.
> 3723. This goes to the idea of a one price on a committed barrel -- call it "a term price" if you like -- versus a spot price.
> 3724. **MR. DAVIES:** And is it your view, Mr. Wise, that a single producer could use this strategy to raise the crude prices in PADD II and Ontario or would it take a number of producers pursuing this strategy together to increase the PADD II and Ontario prices?
> 3725. **MR. WISE:** I think it pertains to the committed barrels which total 380,000 barrels per day and represented by seven shippers.
> 3726. So ---
> 3727. **MR. DAVIES:** So seven ---
> 3728. **MR. WISE:** In this case, the answer is seven.
> 3729. **MR. DAVIES:** So seven shippers or seven producers are, in your view, pursuing this strategy in order to increase the PADD II and Ontario prices. Do I have it right?

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[3] Keystone XL Pipeline Section 52 Application, Section 3: Supply and Markets, at 7. *Available at* https://www.neb-one.gc.ca/ll-eng/Livelink.exe/fetch/2000/90464/90552/418396/550305/556487/549220/B-1f_-_Supply_and_Markets_%28Tab_3%29_incl._Appendix_3.1_-_A1I9R7?nodeid=549324&vernum=0&redirect=3

3730. **MR. WISE:** We gave a sample calculation a few -- a page earlier in this same evidence which shows how -- shows how that would work.
3731. But if some of -- if a minority of the barrels were sold at the Gulf Coast at a Gulf Coast price, that that would have the effect of raising the price not only in the Midwest and Ontario but in Western Canada thus reduce -- increasing the net-back price for producers.
3732. **MR. MILLER:** May we have a moment, please?
3733. **MR. DAVIES:** I think you should take one.
--- (A short pause/Courte pause)[4]

This "strategy" apparently relates to an attempt to reverse the recent relative lowering of pricing that has occurred in Midwest refineries. The reasons for the price decrease in the Midwest are complex, but they can be reversed by Canadian shippers agreeing to bypass PADD II refineries and sending their crude to PADD III. Construction of KXL would open the Gulf Coast to tar sands crude. This would reduce total oil flows to the Midwest, in turn reducing the current crude supply and causing prices to rise in PADD II. Midwestern refiners would pass this rise in price on to consumers.

The Canadian oil shippers appear to cooperate to use the new pipeline capacity to expand tar sands operations in Canada and then transfer some of the flows to the Gulf Coast, resulting in higher per barrel costs in the Midwest on all crude oil pipelines. The increase would be $3.00 per barrel overall and $6.55 per barrel sold in Midwest markets.[5] This could increase revenue for the Canadian producing industry by $2-3.9 billion per year.

The proposed pipeline will likely also encourage the eventual export of crude oil derived from tar sands from North America. Substantial investments have been made in Canadian production by foreign firms, including China National Petroleum Corporation, the Chinese state-run oil company. While it does not appear that SINOPEC or the other Chinese companies are currently included in the group of already committed shippers, the proposed pipeline expansion far exceeds the initial committed capacity. As a result, other Canadian production will likely utilize the Keystone expansion, including projects supported by foreign investment. Current pipeline capacity does not, on its face, warrant the kind of additional foreign investment that is occurring and strongly suggests that exports outside of North America are ultimately envisioned by these

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[4]Canadian National Energy Board, Hearing OH-1-2009, TransCanada Keystone Pipeline GP Ltd., Keystone XL Pipeline Project, Transcript Volume 3 (September 17, 2009), *available at* https://www.neb-one.gc.ca/ll-eng/Livelink.exe/fetch/2000/90464/90552/418396/550305/570526/570650/A1L3V6_-_Vol.3-ThuSep17.09?nodeid=570651&vernum=0&redirect=3.

[5] Western Canadian Crude Supply and Markets, prepared by T. Wise for TransCanada Keystone Pipeline GP Ltd. (February 12, 2009), at 26-27. *Available at* https://www.neb-one.gc.ca/ll-eng/Livelink.exe/fetch/2000/90464/90552/418396/550305/556487/549220/B-1f_-_Supply_and_Markets_(Tab_3)_incl._Appendix_3.1_-A1I9R7?nodeid=549324&vernum=0&redirect=3&redirect=4

investors. Canadian oil would then not only bypass PADD II refineries, but also PADD III refineries in the Gulf Coast; the avowed purpose of the pipeline.

It is therefore critical to determine whether the increased prices expected to be incurred by U.S. consumers and the potential for significant redistribution of crude oil supplies now destined to U.S. refineries due to the proposed construction of this pipeline is the result of anti-competitive practices that violate U.S. laws through agreements among the proposed shippers. For these reasons, I urge the FTC to investigate the proposed Keystone XL pipeline and related agreements.

Thank you for your prompt attention to this important matter.

Sincerely,

Ron Wyden

RON WYDEN
United States Senator