

# Protecting the Monopoly

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How Big Oil Covertly  
Blocks the Sale of  
Renewable Fuels

July 2014



## **Protecting the Monopoly: How Big Oil Covertly Blocks the Sale of Renewable Fuels**

### **EXECUTIVE SUMMARY**

Oil companies continually point out that they don't physically own many retail gas stations today; thus, they argue, Big Oil has "no control" over what fuel products are offered to the consumer by the retailer. However, a deeper analysis clearly reveals that it is the oil companies themselves that are blocking the sale of greater volumes of renewable fuels by retail gas stations. Through rigid franchise and branding agreements, restrictive supply contracts, outlandish labeling requirements, punitive penalties, and other heavy-handed tactics, Big Oil prevents and discourages retail stations from selling fuels with higher renewable content, like E15 and E85.

This analysis shows that oil companies have in fact exerted substantial influence over what fuel products retail stations offer to consumers, especially those stations that carry the brand name and logo of major oil conglomerates and refining companies. Findings include:

- Of the nearly **48,000 retail gas stations** carrying a "Big Five" oil company brand, **less than 300 (0.6%) offer E85 or E15.**
- Of the approximately **34,300 retail gas stations** displaying other oil refiner brands, **less than 475 (1.4%) sell E85 or E15.** And just two brands—Cenex (CHS) and Speedway/SuperAmerica (Marathon)—account for more than half of the refiner-branded stations offering these fuels.
- Of the remaining 74,000 independently-branded stations, between 1,700 and 2,600 stations (2.3%-3.5%) sell E85 or E15.
- A "Consumer Choice Report Card" (see Appendix) reveals that most oil-branded retail gas station chains receive a grade of "F," meaning less than 1% of their branded stations offer E15 or E85. Among oil company-affiliated brands, only Speedway/SuperAmerica (Marathon) and Cenex (CHS) received high marks ("A-" and "B," respectively). Several independent/unbranded chains—including Meijer, Thorntons, Kum & Go, Break Time, and Kwik Trip—received grades of "A+," meaning more than 25% of their stations offer E15 or E85.

Unbranded or independent stations are roughly ***four to six times more likely to offer E85 and 40 times more likely to offer E15 than stations carrying a "Big Five" oil brand.*** Why? Because Big Oil's strong-arm tactics and covert practices prevent and discourage the sale of renewable fuels, especially at stations carrying their brands. An investigation of fuel supply contracts, franchise agreements, and other documents revealed the following explicit and implicit roadblocks:

- Fuel contracts require supplier **exclusivity** and allow distributors to **sell only those fuels made available by the supplier.**

- Contracts typically require **minimum sales volumes of branded fuels**, meaning increased sales of E85 or E15 could jeopardize the retailer's ability to meet minimum volume quotas for fossil-based fuels.
- Contracts often require **multiple grades of branded gasoline to be sold at all times**, which typically eliminates the retailer's ability to store E85 or E15.
- Many franchise and branding agreements require retailers to post **intimidating warning labels** on E85 and E15 dispensers.
- Some agreements require **costly and unnecessary equipment** to be installed before a retailer can sell E85 or E15.
- Some contracts require E85 dispensers to be **isolated from other dispensers**.
- Branding agreements **discourage or prohibit retailers from promoting or advertising** the availability of E85.
- Contracts include **substantial penalties** for violating the terms.

So, what can be done to enhance competition and consumer choice in the marketplace? Big Oil's stranglehold on the retail fuel market could be substantially loosened through a combination of policy and market-based solutions, including:

- A Federal investigation into anti-competitive practices
- Enforcement of the Petroleum Marketing Practices Act and Gasohol Competition Act
- Enforcement of the statutory Renewable Fuel Standard (RFS) requirements
- Investment in infrastructure
- Consumer education about the economic and environmental benefits of biofuels
- Incentivize the continued production of FFVs

In the end, whether oil companies directly "own" America's 156,000 fueling stations is largely irrelevant. Big Oil doesn't *need* to physically own retail stations to exert massive influence over which fuels are offered for sale to consumers. Contracts and franchise agreements with distributors and station owners frequently include exclusivity clauses, frightening warning label requirements, multiple product obligations, minimum volume mandates, and other provisions that create major roadblocks to the adoption of renewable fuels.

**Until these roadblocks are addressed in a comprehensive and meaningful way, American consumers will continue to suffer from Big Oil's monopoly at the pump.**

# Protecting the Monopoly:

## How Big Oil Covertly Blocks the Sale of Renewable Fuels

Major oil companies have repeatedly claimed that they are unable to provide greater volumes of renewable fuels to American consumers because retail gas stations are “unwilling” or “not equipped” to offer such fuels. Big Oil continually points out that they don’t directly own many retail gas stations today; thus, they argue, oil companies have “no control” over what fuel products are offered to the consumer by the retailer.<sup>1</sup>

However, a deeper analysis clearly reveals the hypocrisy and speciousness of Big Oil’s statements. *In reality, it is the oil companies themselves that are blocking the sale of greater volumes of renewable fuels by retail gas stations.* Through rigid franchise and branding agreements, restrictive supply contracts, outlandish labeling requirements, punitive penalties, and other heavy-handed tactics, Big Oil prevents and discourages retail stations from selling fuels with higher renewable content, like E15 and E85.<sup>2</sup> In turn, the oil companies’ subversive actions to limit renewable fuels availability have afforded them a convenient excuse for failing to meet the statutory requirements of the Renewable Fuel Standard (RFS).

This analysis shows that Big Oil has in fact exerted substantial influence over what fuel products retail stations offer to consumers—especially those stations that carry the brand name and logo of major oil conglomerates and refining companies. A review of data from the Department of Energy (DOE) and other sources reveals that the “Big Five” oil companies (BP, Chevron, ConocoPhillips, ExxonMobil, and Shell) have been remarkably successful at restricting the sale of E85 and E15 at the nearly 48,000 retail locations that carry their brand names. *In fact, independent and unbranded stations are four to six times more likely to offer E85 than retail gas stations affiliated with the “Big Five” oil company brands. Further, only one of the “Big Five” branded stations (0.002%) is offering E15 today, meaning independents are more than 40 times more likely to sell E15.* While the vast majority of retail stations are not directly owned by major oil companies, it is beyond dispute that Big Oil still enjoys extensive control over the fuel offerings of these stations through franchise agreements and supply contracts.

### Oil Company-Branded Stations Are Far Less Likely to Offer E85 and E15 than Independent or Unbranded Stations

According to the National Association of Convenience Stores (NACS), there are 156,065 fueling stations in the United States.<sup>3</sup> Nearly one-third (31%) of these stations (47,928) are branded by the “Big Five” oil companies. Based on data from NACS and Convenience Store News, another 22% of fueling stations (34,315) are branded by major oil refining companies.<sup>4</sup> The remaining

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<sup>1</sup> See, for example, American Petroleum Institute “Energy Tomorrow” blog (June 18, 2014): “Ethanol proponents will claim that more E85 would be sold if more gas stations offered it for sale. Such a claim ignores the fact that over 95% of gas stations are owned by independent businessmen and women, not by oil companies.”

<http://energytomorrow.org/Blog/2014/June/june-18-the-RFS-is-broken-and-E85-is-no-solution#sthash.XLLGa6dE.dpuf>

<sup>2</sup> “E85” is a fuel blend containing between 51-83% ethanol and 17-49% gasoline; “E15” is a fuel blend containing 15% ethanol and 85% gasoline.

<sup>3</sup> National Association of Convenience Stores (NACS). “Who Sells America’s Fuel?”

[http://www.nacsonline.com/YourBusiness/FuelsReports/GasPrices\\_2013/Pages/WhoSellsGas.aspx](http://www.nacsonline.com/YourBusiness/FuelsReports/GasPrices_2013/Pages/WhoSellsGas.aspx), May 30, 2014.

<sup>4</sup> *Id.*, and Convenience Store News. “2013 Top 100 Convenience Stores: The Incredible Shrinking Big Oil.” [www.csnews.com/2013-top-100-convenience-stores-incredible-shrinking-big-oil#sthash.O9Bzb1TJ.dpuf](http://www.csnews.com/2013-top-100-convenience-stores-incredible-shrinking-big-oil#sthash.O9Bzb1TJ.dpuf).

47% of stations are not explicitly affiliated with an oil company brand (although they may have established their own brand, such as Kum & Go, WaWa, Kwik Trip, etc.). The results of a 2013 National Petroleum News retailer survey suggests the share of stations carrying a “Big Five” oil company or oil refiner brand may be even higher than reported by NACS.<sup>5</sup> Of the survey respondents, 65% carried a “Big Five” or other oil refining company brand, with the remaining 35% being independent or unbranded.

Oil company-branded stations must strictly adhere to terms and conditions set forth by the oil companies in franchise agreements and branded supply contracts. *In other words, at least half—and as much as two-thirds—of the retail stations in operation today remain firmly under the thumb of Big Oil.* And while independent stations do not bear the name or brand of a “Big Five” oil conglomerate or refining company, they still must agree to contractual restrictions with a fuel distributor that sometimes makes it difficult to sell fuels such as E85 and E15. In cases where the fuel distributor or “jobber” supplying the independent retailer is closely affiliated with a major oil conglomerate or refiner, the terms of the supply contract may make it difficult or impossible for even the independent retailer to offer fuels like E85 and E15.

The numbers don’t lie. Of the 47,928 fueling stations carrying a “Big Five” brand, only 288 stations (0.6%) offer E85 according to a review of DOE data.<sup>6</sup> In other words, only one out of every 166 stations with a “Big Five” brand sells E85. Not a single one of the “Big Five” branded chains offers E85 at more than 1% of its stations. As an example, of the nearly 6,900 retail stations bearing a ConocoPhillips brand, only 29 stations (0.4%) offer E85. In addition, only one “Big Five” branded station sells E15.

Oil refiner-branded stations are roughly twice as likely to offer E85 as “Big Five” branded stations. Approximately 1.4% of the 34,315 refiner-branded stations sell E85 according to the DOE data. However, the numbers for this group are skewed by two refining companies that far exceed the average. Cenex (CHS)—which grants franchises to local cooperatives, many of which are largely owned by farmers and agricultural cooperatives—makes E85 available at roughly 6% of its branded stations.<sup>7</sup> Cenex-branded stations also lead the industry in E15 offerings, with a least two dozen branded stations offering the fuel. Meanwhile, E85 is offered at 173 of the 1,371 stations carrying the Speedway or SuperAmerica brands, according to DOE.<sup>8</sup> Speedway is a subsidiary of Marathon Petroleum Company, as was SuperAmerica until it was sold in 2011. If Cenex and Speedway/SuperAmerica are excluded, E85 is sold at just 0.7% of refiner-branded stations—similar to the “Big Five” rate. Aside from Cenex and Speedway/SuperAmerica, only Valero (an ethanol producer and obligated refiner under the RFS) offers E85 and/or E15 at more than 1% of its branded retail stations.

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<sup>5</sup> National Petroleum News Magazine. “NPN Magazine’s 2013 MarketFacts Industry Survey.” October 2013. [http://www.npnweb.com/ME2/dirmod.asp?sid=A79131211D8846B1A33169AF72F78511&nm=Market+Data&type=M](http://www.npnweb.com/ME2/dirmod.asp?sid=A79131211D8846B1A33169AF72F78511&nm=Market+Data&type=MultiPublishing&mod=PublishingTitles&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=FC170EEBDFDFE4FF8F8EAC7E96507CF7)  
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[E8F8EAC7E96507CF7](http://www.npnweb.com/ME2/dirmod.asp?sid=A79131211D8846B1A33169AF72F78511&nm=Market+Data&type=M), viewed June 3, 2014.

<sup>6</sup> U.S. Dept. of Energy, Alternative Fuels Data Center (AFDC). “Ethanol Fueling Station Locations.” [http://www.afdc.energy.gov/fuels/ethanol\\_locations.html](http://www.afdc.energy.gov/fuels/ethanol_locations.html), viewed May 29, 2014.

<sup>7</sup> Notably, CHS is a diversified company involved in both the energy and agriculture sectors; the company’s agriculture segment accounts for roughly half of its net revenue.

<sup>8</sup> Industry sources report that more than 200 Speedway/SuperAmerica stations sell E85, meaning DOE’s database likely omits some locations. Still, for the sake of data consistency, the DOE figures are used for this analysis.

Of the remaining 74,000 independent or “unbranded” stations, approximately 1,713 (or 2.3%) sell E85 or E15, according to DOE data on E85 and RFA data on E15. A separate data set suggests approximately 2,570 “unbranded” stations (3.5% of the total) are selling E85 and/or E15.<sup>9</sup> *This means “unbranded” stations are roughly four to six times more likely to offer E85 than stations carrying a “Big Five” oil brand.* This is substantiated by a recent report by AJW Inc., which found approximately 80% of the stations offering E85 were “unbranded” or independent, while the remaining 20% carried a major oil company brand.<sup>10</sup>

### Who Sells E85 and E15? Oil-Branded Stations vs. Independent-Branded Stations

	Branded Stations	Stations Offering E85	Stations Offering E15*	% Offering E85/E15
<b>"Big Five" Branded Stations</b>				
Shell	14,000	99	0	0.71%
BP	11,300	60	0	0.53%
Chevron	8,000	44	0	0.55%
ExxonMobil	7,753	56	0	0.72%
ConocoPhillips	6,875	29	1	0.42%
<i>Sub-Total "Big Five"</i>	<b>47,928</b>	<b>288</b>	<b>1</b>	<b>0.60%</b>
<b>Oil Refiner Branded Stations</b>				
Citgo	5,900	38	0	0.64%
Marathon	5,046	38	0	0.75%
Valero	5,000	54	1	1.08%
Sunoco	4,933	42	0	0.85%
Sinclair	2,700	10	2	0.37%
Gulf Oil	2,000	7	0	0.35%
Texaco	2,000	6	0	0.30%
CHS (Cenex)	1,600	93	24	5.81%
Speedway/SuperAmerica (Marathon)	1,371	173	0	12.62%
Hess	1,360	-	0	0.00%
Murphy USA	1,128	9	8	0.80%
Alon	900	-	0	0.00%
Tesoro	377	2	0	0.53%
<i>Sub-Total Oil Refiner</i>	<b>34,315</b>	<b>472</b>	<b>35</b>	<b>1.38%</b>
<b>Unbranded/Independent Stations</b>				
<i>Sub-Total (DOE E85 Data/RFA E15 Data)</i>	<b>73,822</b>	<b>1,713</b>	<b>42</b>	<b>2.32%</b>
<i>Sub-Total (E85Prices.com/RFA E15 Data)</i>	<b>73,822</b>	<b>2,573</b>	<b>42</b>	<b>3.49%</b>
<b>Grand Total</b>				
Grand Total (DOE E85 Data/RFA E15 Data)	<b>156,065</b>	<b>2,473</b>	<b>78</b>	<b>1.58%</b>
Grand Total (E85Prices.com /RFA E15 Data)	<b>156,065</b>	<b>3,333</b>	<b>78</b>	<b>2.14%</b>

\*Most stations selling E15 also sell E85. Thus, stations selling both E15 and E85 are included in the total for E85, and the % of stores offering E85/E15 is derived by dividing “Stations offering E85” by “Branded Stations.” If there are stations selling E15 but not E85, they would be very limited in number, and thus would not affect the percentages.

<sup>9</sup> See E85prices.com. “E85 Map.” <http://www.e85prices.com/>, viewed May 23, 2014.

<sup>10</sup> AJW, Inc. “E85: A Tale of Two Markets.” May 8, 2014. <http://ajw-inc.com/are-market-distortions-depressing-consumer-demand-for-e85-2/>

While oil-branded stations have generally failed to offer renewable fuels, some independent chains have enthusiastically embraced E85, E15 and other alternatives. For example, Meijer (a company that operates grocery stores in five Midwestern states) offers E85 at nearly 60% of its 164 fueling locations. Spinx, Thorntons, Kum & Go, and Break Time are other independent brands that have shown a remarkable commitment to renewable fuels, with each offering E85 at one-third or more of their retail stations (see Appendix, “Consumer Choice Report Card”).

The AJW Inc. paper also found wide E85 pricing disparities between oil-branded stations and independent stations. At oil-branded stations, E85 was typically 4-8% less expensive than E10 in 2013. Meanwhile, E85 was generally 14-18% cheaper than E10 at “unbranded” stations during the same time period.<sup>11</sup> This demonstrates that distributors to oil-branded stations are less willing to offer E85 at a price that will increase demand and awareness for the product.

## **Big Oil’s Strong-Arm Tactics Prevent and Discourage the Sale of Renewable Fuels**

A detailed review of fuel supply contracts, franchise agreements, branding guidelines, and other documents reveals a disturbing pattern of manipulation by major oil companies. Big Oil has deftly erected explicit and implicit roadblocks that have effectively prevented or discouraged retailers from selling higher blends of ethanol such as E15 or E85. Those roadblocks take many forms, and a wide array of tactics and strategies have been employed to prevent retailers from expanding E85 and E15 sales. Examples of common anti-competitive practices employed by Big Oil are enumerated below:

### **1. Fuel contracts require supplier exclusivity and allow distributors to sell *only those fuels made available by the supplier.***

Supply contracts between major oil companies and fuel distributors often require the distributors to remain exclusive and sell only those branded fuels that the refiner produces or otherwise makes available. In turn, the fuels sold by the distributor to the branded retailer are limited to fuels offered by the oil companies. Thus, if an oil company-branded retail station wished to offer E85 or E15, it simply would not be able to source those fuels unless the terms of the refiner-distributor contract allowed it; and in all but a few isolated cases, oil companies *do not* make such branded fuels available to distributors.

As an example, a contract between Valero and Susser Marketing clearly stipulates that the “Distributor and its Dealer(s) shall not offer for sale at a Station motor fuels other than the Products purchased under this Agreement without written consent...”<sup>12</sup> Similarly, a 2005 contract between BP and MAPCO required that MAPCO “...purchase and receive [BP’s] *currently offered and available branded petroleum products* as determined and designated by [BP]...”<sup>13</sup> Thus, under the terms of that particular contract, MAPCO was prevented from offering

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<sup>11</sup> *Id.*

<sup>12</sup> Branded Distributor Marketing Agreement (Valero Brand). <http://www.sec.gov/Archives/edgar/data/1361709/000119312506179294/dex1026.htm>, viewed May 30, 2014. Henceforth “Valero-Susser Agreement.”

<sup>13</sup> BP Branded Jobber Contract. <http://contracts.onecle.com/delek/bp.jobber.2005.12.15.shtml>, viewed June 6, 2014. Emphasis Added. Henceforth “BP-MAPCO Contract.”



E85 to consumers unless the fuel was a “currently offered and available branded petroleum product[]” from BP. Notably, MAPCO has evidently discovered ways to loosen Big Oil’s grip on the retail market. The company recently announced that it intends to offer E15 for sale at 100 of its stores, stating that “Ethanol based fuels have been a lower per gallon cost alternative over the past few years and this should allow us to offer our customers additional fuel options.”<sup>14</sup>

A Chevron branded fuel agreement explicitly states that “[a]t no time shall any product not authorized by ChevronTexaco to be sold thereunder be offered for sale or sold under [Chevron] trademarks and trade names.”<sup>15</sup> In fact, the Chevron agreement obliges the jobber to “diligently promote the sale” of Chevron-branded fuels and requires that the jobber “...shall conduct the operation of...business in such a manner as to promote goodwill toward ChevronTexaco and its products.” So, not only does Chevron dictate what fuels are sold at its 8,000 branded stations, but it also *requires* that distributors and retailers actively promote Chevron’s petroleum-based fuels at the expense of other fuel alternatives.

A “Flex Fuels Ethanol Guidelines” document distributed by Phillips 66 to its franchisees and obtained by RFA shows that retailers wishing to sell E85 can only do so if it is a Phillips 66 branded fuel: “If Phillips 66 offers *pre-blended branded* flex fuels at the terminals where marketers are authorized to purchase and receive branded Phillips 66 products, customers *must* purchase branded Phillips 66 flex fuels for sale at branded retail outlets.” Not surprisingly, Phillips 66 rarely offers E85 as a branded product at terminals, and thus branded retailers served by those terminals are prevented from offering E85.

One of Big Oil’s favorite arguments in the debate over the RFS is that they don’t control what products are offered by retail gas stations because they don’t directly own those stations anymore. But in reality, oil companies absolutely retain undue influence over what fuels are offered to consumers; branded retailers are contractually obligated to sell only the fuels that the oil companies choose to make available.

## **2. Contracts typically require minimum sales volumes of branded fuels, meaning increased sales of E85 or E15 could jeopardize the retailer’s ability to meet minimum volume quotas for fossil-based fuels.**

Most contracts between oil companies and marketers or retailers require the purchase of minimum quantities of branded fuels. For example, a contract between BP and The Pantry, Inc. specifies that The Pantry “...will be required to purchase a minimum number of gallons of Products [i.e., BP-branded fuels] during every continuous 12-month period during the Term...”<sup>16</sup> In this way, oil companies create a powerful disincentive for retailers or distributors to offer E85 or E15 sourced from a separate supplier (assuming such an arrangement with a different supplier would even be allowed). That is, if more customers choose to fill up with E85 or E15 instead of branded gasoline, the retailer may be in jeopardy of selling less than the minimum

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<sup>14</sup> Business Wire. January 15, 2014. “MAPCO to offer E15 to Customers in 2014.”

<http://www.businesswire.com/news/home/20140115005879/en/MAPCO-offer-E15-Customers-2014>

<sup>15</sup> Chevron Branded Jobber Petroleum Products Agreement.

<http://www.sec.gov/Archives/edgar/data/1361709/000119312506109368/dex1015.htm>, viewed June 6, 2014. Henceforth “Chevron-Susser Agreement.”

<sup>16</sup> BP Branded Jobber Contract. <http://www.sec.gov/Archives/edgar/data/915862/000091586213000017/ptry-20121227ex101ee4e2b.htm>, viewed May 30, 2014. Henceforth “BP-Pantry Contract.”



required branded fuel. This would constitute a breach of contract and put the retailer at risk of facing stiff penalties or losing the franchise. Indeed, in a contract between BP and MAPCO, BP states that “...failure to purchase the applicable, annual minimum volume...will constitute grounds for termination of this Contract and non-renewal of any franchise relationship.”<sup>17</sup>

**3. Contracts often require multiple grades of branded gasoline to be sold at all times, which typically eliminates the retailer’s ability to store E85 or E15.**

Most retail stations offer three grades of gasoline: regular (typically a 10% ethanol blend [E10] with 87 octane), mid-grade (89 octane) and premium (91 octane). Stations typically have two underground storage tanks for gasoline—one tank usually stores regular grade E10, while the other tank stores premium gasoline. Mid-grade gasoline is produced by mixing fuel from both tanks. With modest investment, a two-tank retail station interested in selling E85 or other higher ethanol blends could store regular grade E10 in one tank and E85 in the other tank. If the retailer installed blender pumps, E10 from one tank could be blended with E85 from the other tank to produce a range of fuel blends (e.g., E15, E20 and E30) in addition to regular grade E10 and E85. Retailers with a third tank could continue to offer premium and mid-grade. Obviously, such an arrangement would offer greater choice to the consumer.

However, fuel supply contracts typically require that distributors (and, in turn, their retailer customers) purchase and sell a minimum of two or all three grades of gasoline, making it next to impossible to offer customers E85 or other higher ethanol blends. As an example, a contract between Valero and Susser Marketing states that the “...Distributor and its Dealer(s) shall continuously offer at least three grades of ‘Valero’ branded gasoline at each Station.”<sup>18</sup> This requirement ensures that Valero-branded fuel occupies all available storage space at the retail station, squeezing out any room for other fuel alternatives. A contract between BP and MAPCO similarly stipulates that “At all times at each Approved Retail Site...Jobber will offer for sale, or cause to be offered for sale, *representative amounts of each grade of Company-designated Products* that are necessary, in Company's discretion, to satisfy public demand.”<sup>19</sup> Thus, the oil company reserves the right to require the jobber to offer only those fuels that the oil company believes are “necessary...to satisfy public demand.”

It should be noted that there is an important connection between E85 and E15 availability at the wholesale and retail level. Because E15 is not offered by refiners at any terminals today, marketers/jobbers and retailers must blend E15 themselves by combining E10 and E85. This can be done via “splash blending” by the marketer, or via blender pumps at the retail gas station. Thus, if a multiple grade requirement in a franchise agreement or supply contract prevents the storage of E85 at a retail site, it is also effectively preventing the blending and sale of E15 via blender pumps. The case of Zarco 66 in Lawrence, Kansas (see case study on next page), is a prime example of how a contractual multiple grade requirement can prevent the sale of both E85 *and* E15.

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<sup>17</sup> BP-MAPCO Contract

<sup>18</sup> Valero-Susser Agreement. Emphasis added.

<sup>19</sup> BP-MAPCO Contract. Emphasis added.

### Case Study: Zarco 66 Forced to Become Zarco USA

The story of Zarco 66, Inc. (now Zarco USA), a Kansas-based former ConocoPhillips (Phillips66) franchisee, clearly illustrates how Big Oil uses the multiple grade requirement to squeeze out competition from renewable fuels. For many years, Zarco 66 offered E85 at its fueling station in Lawrence, Kansas. One of the station's fuel tanks contained regular gasoline (E10) and a second tank contained ethanol rather than premium gasoline. At that time, Zarco 66's agreement with Phillips 66 did not require Zarco 66 to sell premium gasoline. Zarco 66 offered customers E85 by blending the appropriate mixture of gasoline and ethanol straight at the pump using blender pump technology. Because only certain vehicles can use E85, the oil industry likely viewed this alternative fuel as a gimmick—one that posed no real threat to the industry's monopoly. But shortly after Zarco 66 became the first fueling station in the nation to offer E15—a fuel that can be used in any light-duty vehicle manufactured since 2001—the oil giant suddenly changed its tune. Phillips 66 quickly threatened to terminate Zarco 66's franchise agreement and charge Zarco 66 hundreds of thousands of dollars in penalties unless Zarco 66 started offering premium gasoline. But Zarco 66 didn't want to sell premium; the station's customers wanted E15 and E85. The only way Zarco 66 could offer premium gasoline would be to replace the ethanol housed in the second underground storage tank with premium, thus eliminating the station's ability to offer E15 or E85. Zarco 66 was given an ultimatum by the oil company—stop selling E15 and E85 and replace it with premium...or face stiff penalties. As a true believer in consumer choice and renewable fuels, Zarco 66 continued to look for options that would allow the station to sell E15. In the end, however, the company was forced out of its 28-year franchise relationship with Phillips 66 and forced to repay more than \$300,000 to the franchisor. This resulted in significant financial damages to Zarco 66, which has since re-branded itself as Zarco USA.<sup>20</sup> Today, E85, E15 and other ethanol blends are offered at Zarco USA's seven Kansas locations.

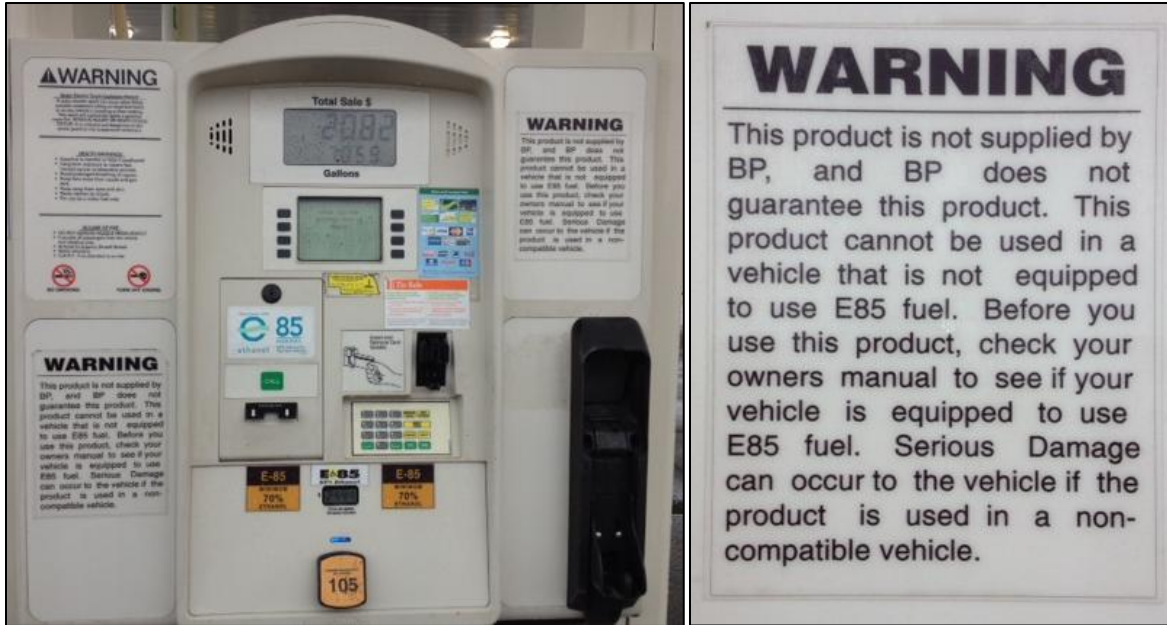
#### 4. Many franchise and branding agreements require retailers to post intimidating warning labels on E85 dispensers.

In the rare instances where Big Oil allows its distributors and associated retailers to offer E85, it often requires that frightening and confusing warning labels be affixed to dispensers. Federal law already requires that E85 dispensers are labeled with a sticker advising consumers about the fuel. In addition, some state laws require additional labeling for E85 dispensers to provide further information on the proper use of the fuel.

Yet, some oil companies apparently believe these federal- and state-required labels don't go far enough. Thus, they require retailers to attach additional warning labels to E85 dispensers. These additional labels are often designed to evoke fear and confusion about the use of E85. For example, an E85 pump at a BP-branded station in Nebraska includes two large identical labels stating "**WARNING:** This product is not supplied by BP, and BP does not guarantee this product. ... Serious Damage can occur to the vehicle if the product is used in a non-compatible vehicle." Similarly, Phillips 66 requires that its branded retailers affix labels to E85 dispensers that state "**STOP! NOT GASOLINE!**" and "**Not a Phillips 66 (or Conoco) Fuel Product.**"<sup>21</sup> Obviously, such dire warnings deter consumers who might otherwise be interested in purchasing E85 or other fuels with higher renewable content.

<sup>20</sup> See Letter from RFA to U.S. Environmental Protection Agency, Federal Trade Commission, U.S. Department of Energy, and U.S. Department of Agriculture. March 19, 2013. <http://ethanolrfa.org/page/-/PDFs/RFA%20Zarco%20Letter%203-19-13.pdf?nocdn=1>

<sup>21</sup> Phillips66. "Flex Fuels Ethanol Guidelines." April 3, 2013. Obtained by RFA.



**5. Some agreements require costly and unnecessary equipment to be installed before a retailer can sell E85 or E15.**

Franchise and branding agreements between Big Oil and downstream distributors and retailers often require that retailers must install new equipment before allowing them to offer E85 or other higher ethanol blends. For example, former gasoline retailer Tim Hamilton stated that Chevron required installation of new underground storage tanks before granting permission to offer E85—*regardless of the compatibility of existing tankage with E85*. “Gas station owners would have to spend up to \$250,000 to satisfy Chevron’s contract requirements, even if they had the space to install new underground tanks, which most do not,” Hamilton said.<sup>22</sup>

<sup>22</sup> Oilwatchdog.org. “Chevron Talks Green, Yet Prevents Retailers From Selling Renewable Fuels.” March 29, 2007. <http://www.oilwatchdog.org/2007/03/chevron-talks-green-yet-prevents-retailers-from-selling-renewable-fuels/>, viewed May 20, 2014.

In another example, Phillips 66 requires that E15 can only be dispensed at branded retail stations through pumps with yellow hoses and nozzles (which are typically required by some franchisors for E85).<sup>23</sup> In the case of Zarco 66 (now Zarco USA), this Phillips 66 yellow hose requirement for E15 was put in place *after* Zarco 66 had already begun offering E15 through standard black hoses and nozzles, meaning the retailer would need to pay to change the hoses and nozzles or stop selling E15. An investigation by Reuters found that the yellow hose requirement would effectively require the retailer to spend "...\$100,000 to \$250,000 to install new stand-alone gas pumps for E15."<sup>24</sup> Moreover, requiring retailers to dispense E15 from a yellow hose at a single-hose pump may constitute a violation of the federal E15 Misfueling Mitigation Plan (i.e., if that pump is already dispensing E85 through the yellow hose).

## **6. Some contracts require E85 dispensers to be isolated from other dispensers.**

After investigating the terms and conditions of Chevron fuel contracts, the Foundation for Taxpayer and Consumer Rights found that branded retailers would not be allowed to sell E85 or other alternative fuels "...unless they sold those products from pumps that are on different islands."<sup>25</sup> Such a requirement would not only entail costly changes to the retail station's layout, but would also serve to isolate E85 dispensers from those dispensers selling branded gasoline. Requiring that E85 dispensers be segregated from gasoline dispensers clearly would deter and confuse drivers who might otherwise pursue E85.

Similarly, Phillips 66 only allows E85 to be sold under a branded retail station canopy in four states. For the other 46 states, Phillips 66 states that it may allow branded retailers to sell E85 "...outside the branded canopy in a separate unbranded fueling dispenser...if they choose."<sup>26</sup> Such a requirement makes it impractical and costly for branded retailers to offer E85, assuming they would even be able to source E85 from their contracted supplier.

## **7. Some branding agreements discourage or prohibit retailers from promoting or advertising the availability of E85.**

Many franchise or branding agreements covertly discourage oil-branded retailers from promoting or advertising the availability of E85 at their stations. In many cases, E85 prices are not advertised at all on retail station price signs, meaning drivers passing by the station are not made aware that E85 is being offered. Typically, this is because the retailer may have limited space on its price sign and it is required to display the prices of branded gasoline or diesel fuel products. In cases where branded retailers are allowed to display E85 prices on the price sign, they are often required to show the E85 price in the bottom position of the sign. For example, Phillips 66 states that "Because flex fuels are not a Phillips 66 product, it must be in the last position in the price sign...beneath the prices for motor fuel products manufactured and sold by

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<sup>23</sup> Podkul, Cezary. Reuters. "Insight: Ethanol lobby sees red over a yellow gas hose in Kansas." June 10, 2013. <http://www.reuters.com/article/2013/06/10/us-e15-rules-phillips66-insight-idUSBRE95907G20130610>

<sup>24</sup> *Id.*

<sup>25</sup> KTLA5CW News. March 2007. <https://www.youtube.com/watch?v=c4v8slGHuG8>

<sup>26</sup> Phillips 66. "Products and Services." [http://www.phillips66.com/EN/products/consumer/brands\\_domestic/pages/e-85.aspx](http://www.phillips66.com/EN/products/consumer/brands_domestic/pages/e-85.aspx), viewed May 20, 2014.

Phillips 66 company.”<sup>27</sup> When still a Phillips 66 franchisee, Zarco 66 was penalized for advertising E85 prices in the top position of its price sign.<sup>28</sup>

Further, Phillips 66 prohibits the use of “pump toppers” on stand-alone E85 dispensers.<sup>29</sup> Pump toppers are the small two-sided cardboard or plastic advertising signs that sit atop modern dispensers. The pump toppers typically display information promoting the fuel being dispensed from the pump, or promoting sales of in-store items (e.g., snacks, soda, tobacco products). This contractual provision prevents branded retailers from displaying pump toppers that promote E85 and inform the consumer about its benefits.

## **8. Contracts include substantial penalties for violating the terms.**

The penalties for violating any of the terms of fuel supply contracts and franchise agreements are severe. In most cases, oil companies include broad language in their contracts that allows them to immediately terminate the agreement—even for largely unspecified reasons. A contract between Chevron and Susser Marketing, for instance, includes language allowing Chevron to terminate the contract for a litany of specific infractions, but also for “[a]ny other event which is relevant to the relationship between ChevronTexaco and Jobber and as a result of which termination of this agreement is reasonable.”<sup>30</sup> Other contracts specify that breach of the agreement will require re-payment of franchise royalties and incentives.

As most retail gas stations are small businesses with limited resources, termination of a franchise agreement or supply contract could be disastrous and could even precipitate the closure of the station. Thus, oil companies hold tremendous leverage over distributors and retail gas stations.

## **What Can Be Done to Enhance Competition in the Fuels Market?**

Big Oil’s stranglehold on the retail fuel market could be substantially loosened through a combination of policy and market-based solutions. The actions described below, among others, would enhance competition and facilitate greater consumer choice at the pump.

### **1. Federal Investigation into Anti-Competitive Practices**

As described in the previous section, the oil industry has gone to great lengths to undermine competition and block greater volumes of renewable fuels from reaching the consumer. Many of the tactics employed by Big Oil appear to violate federal law that was explicitly designed to protect fuel retailers and consumers. As the government entity tasked with preventing business practices that are “anticompetitive or deceptive or unfair to consumers,” the Federal Trade Commission (FTC) has a responsibility to investigate the oil industry’s subversive practices. RFA requested such an investigation in 2013, encouraging FTC and other federal agencies to

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<sup>27</sup> Phillips 66. “Flex Fuels Ethanol Guidelines.” April 3, 2013. Obtained by RFA.

<sup>28</sup> Personal Communication with Scott Zaremba.

<sup>29</sup> Phillips 66. “Flex Fuels Ethanol Guidelines.” April 3, 2013. Obtained by RFA.

<sup>30</sup> Chevron-Susser Agreement.



“...investigate and put an end to the oil industry’s highly discriminatory and unlawful conduct—conduct that is impeding the delivery of renewable fuels to the American marketplace.”<sup>31</sup>

## **2. Enforce the Petroleum Marketing Practices Act and Gasohol Competition Act**

The oil industry’s conduct is contrary to the Gasohol Competition Act of 1980, which makes it unlawful to “unreasonably discriminate against or unreasonably limit the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability.”<sup>32</sup> Through the practices described in this report, the oil industry is unreasonably limiting the sale of E85 and E15.

Similarly, the oil industry’s actions violate the policies that underlie the Petroleum Marketing Practices Act. By forcing franchisees to purchase and sell premium gasoline, franchisors are acting to preclude franchisees from “converting an *existing* tank or pump on the marketing premises of the franchisee for renewable fuel”—a clear violation of the legislation.<sup>33</sup> Moreover, the Act was intended to allow franchisees to sell “a renewable fuel in lieu of 1 . . . grade of gasoline.”<sup>34</sup> As a result, the oil industry is directly subverting this legislation by making it impossible for franchisees to offer gasoline-ethanol blends higher than E10, such as E85.

Rigid enforcement of these established laws would greatly enhance competition and consumer choice in the fuels market.

## **3. Enforce the Statutory Renewable Fuel Standard (RFS) Requirements**

The Renewable Fuel Standard (RFS) program is intended to gradually expand the availability and use of renewable fuels by “replac[ing] or reduc[ing] the quantity of fossil fuel present in a transportation fuel”; it achieves this purpose by requiring that domestic producers and distributors of transportation fuel make available steadily increasing volumes of renewable fuels each year. Mindful of this purpose, Congress granted the U.S. Environmental Protection Agency only limited authority to waive the volume obligations under the program.

Unfortunately, EPA proposed to substantially reduce the quantities of renewable fuels required by the statute in 2014. EPA cited the oil industry’s self-erected “blend wall” and lack of infrastructure as factors that could prevent consumption of the renewable fuel volumes envisioned by Congress. If finalized, EPA’s proposal for 2014 RFS requirements would place the key to our energy future firmly back in the hands of the oil industry. By embracing the “blend wall” concept, the proposal effectively destroys the incentive to expand biofuel production and distribution capacity, and allows oil companies to blend only as much renewable fuel as they are comfortable using. The proposed rule would stifle innovation and fundamentally alter the future course of the RFS program.

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<sup>31</sup> See Letter from RFA to U.S. Environmental Protection Agency, Federal Trade Commission, U.S. Department of Energy, and U.S. Department of Agriculture. March 19, 2013. <http://ethanolrfa.org/page/-/PDFs/RFA%20Zarco%20Letter%203-19-13.pdf?nocdn=1>

<sup>32</sup> 15 U.S.C. § 26a(a)(2).

<sup>33</sup> 15 U.S.C. § 2807(b)(1)(B). Emphasis Added.

<sup>34</sup> *Id.* § 2807(c).

EPA should enforce the RFS volumetric requirements established by Congress and exercise its waiver authority only in a manner that is consistent with the statute. Doing so would benefit consumers by ensuring greater access to lower-cost renewable fuels at the retail level.

#### **4. Investment in Infrastructure**

Modest investment is needed to install more infrastructure capable of dispensing higher ethanol blends at retail stations. To date, the oil industry—the most profitable business sector in the world—has largely refused to partner with its distributors and branded stations to invest in the retail fuel dispensing equipment that would provide greater choice at the pump. Due to Big Oil's intransigence, independent-branded stations and ethanol producers have stepped up to the plate to invest in the equipment necessary to offer higher ethanol blends like E15 and E85. Several private and public-private initiatives are under way to rapidly expand retail refueling infrastructure capable of dispensing higher blends. However, greater investment in infrastructure will be required to spur the transition to larger volumes of renewable fuels.

#### **5. Consumer Education**

Along with its heavy-handed efforts to prevent renewable fuels from reaching the American drivers, Big Oil has funded a massive misinformation campaign designed to confuse consumers about cleaner, greener alternatives to oil. Polling data show that when properly informed about the positive attributes of renewable fuels, consumers will overwhelmingly choose renewable fuels over fossil fuel options.<sup>35</sup> Continuing efforts are needed to educate consumers about the advantages of renewable fuels and the benefits of having greater choice at the pump. Additionally, dealers of new and used automobiles should be encouraged or incentivized to educate customers about the benefits of Flex Fuel Vehicles (FFVs), which are capable of operating on ethanol/gasoline blends up to E85.

#### **6. Incentivize the Continued Production of FFVs**

In the past, automakers who manufactured FFVs have received attractive credits toward compliance with federal fuel economy and tailpipe emissions standards (i.e., CAFE/GHG rules). However, the CAFE/GHG rules that take effect in 2017 eliminate such credit and will likely discourage the continued production of FFVs. The impending CAFE/GHG regulations treat FFVs much differently than other dual-fueled and alternative fuel vehicles (such as plug-in hybrid vehicles and battery electric vehicles) in terms of calculating fuel economy and tailpipe emissions. Further, the regulations heap generous credits and incentives on certain dedicated alternative fuel vehicles to the detriment of FFVs. A meaningful incentive to encourage the continued production of FFVs after 2016 should be restored in the context of the CAFE/GHG regulations.

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<sup>35</sup> RFA. "New Poll: For 3rd Year in a Row, Americans Overwhelmingly Support the RFS." April 9, 2014. <http://www.ethanolrfa.org/news/entry/new-poll-for-3rd-year-in-a-row-americans-overwhelmingly-support-the-rfs/>.



## Conclusion

In the end, whether oil companies directly “own” America’s 156,000 fueling stations is largely irrelevant. Big Oil doesn’t *need* to physically own retail stations to exert massive influence over which fuels are offered for sale to consumers. Contracts and franchise agreements with distributors and station owners frequently include exclusivity clauses, frightening warning labels, multiple product requirements, minimum volume obligations, and other provisions that create major roadblocks to the adoption of renewable fuels.

Data on E85 and E15 availability validate what we see in the contracts. While both “branded” and “unbranded” stations are affected to some degree by these strong-arm oil industry tactics, stations branded under the name of major oil companies or refiners are far less likely to offer E85 or E15 than “unbranded” or independent stations.

Cynically, oil companies frequently cite a shortage of fueling infrastructure as a reason why the EPA should lower the requirements of the RFS. Yet, as demonstrated in this analysis, the oil industry itself has deliberately created this shortage by making it as difficult and burdensome as possible for retail gas stations to offer greater volumes of renewable fuels. Like a child who breaks all of his pencils and then tells his parents he can’t do his homework, the oil industry should not be permitted to claim it is not possible to expand renewable fuels consumption when it is taking calculated steps to stifle the broad introduction of E85, E15 and other fuels.

**Until these roadblocks are addressed in a comprehensive and meaningful way, American consumers will continue to suffer from Big Oil’s monopoly at the pump.**

# Consumer Choice Report Card

Consumer Choice Grade	Criteria	Station Brand (% of Stores Selling E85 or E15)	
<b>A+</b>	>25% of branded stations offer E85/E15	Meijer Gas (58%) Spinx Company (41%) Thorntons Inc. (37%) Kum & Go (34%)	Break Time (MFA) (33%) Rebel Oil Company (29%) MFA Oil (27%) Kwik Trip (26%)
<b>A</b>	16-25% of branded stations offer E85/E15	Super Pantry (22%) Bosselman's Pump & Pantry (22%) Petro Serve USA (17%) Road Ranger (16%)	
<b>A-</b>	11-15% of branded stations offer E85/E15	<b><u>Speedway/SuperAmerica (Marathon) (13%)</u></b> Holiday Stationstores (12%) Fast Stop (11%)	
<b>B</b>	6-10% of branded stations offer E85/E15	MAPCO Mart (9%) Stinker Stores (6%) Kroger (6%) <b><u>CHS (Cenex) (6%)</u></b>	Jet-Pep Stores (6%)
<b>C</b>	3-5% of branded stations offer E85/E15	GetGo (4%) H-E-B (4%) Freedom Valu Center (4%) CountryMark (4%)	Hy-Vee (4%) Alta Convenience Stores (4%) Express Mart (3%) Flash Foods (3%)
<b>D</b>	1-2% of branded stations offer E85/E15	Stripes Stores (2%) Sheetz Stores (1%) Agriland Fast Stop (1%) <b><u>Valero (1%)</u></b>	
<b>F</b>	<1% of branded stations offer E85/E15	<b><u>ConocoPhillips (0.4%)</u></b> <b><u>BP (0.5%)</u></b> <b><u>Chevron (0.6%)</u></b> <b><u>Shell (0.7%)</u></b> <b><u>Citgo (0.6%)</u></b> <b><u>Marathon (0.8%)</u></b> <b><u>Sunoco (0.9%)</u></b> <b><u>Sinclair (0.4%)</u></b> Casey's General Stores (0.1%) Presto/Kangaroo Express/The Pantry (0.2%) 7-Eleven (0.1%) RaceTrac (0.0%) Wawa (0.0%) Allsup's (0.0%) Stewart's Shops (0.0%) Maverik (0.0%) Walmart/Sam's Club (0.0%)	<b><u>ExxonMobil (0.7%)</u></b> <b><u>Hess (0.0%)</u></b> <b><u>Alon (0.0%)</u></b> <b><u>Murphy Oil (0.8%)</u></b> <b><u>Tesoro (0.5%)</u></b> <b><u>Gulf (0.4%)</u></b> <b><u>Texaco (0.3%)</u></b> Pilot Travel Center (0.9%) Pacific Pride (0.9%) Getty/Kwik Farms/Lukoil (0.1%) APlus/Coastal/Optima (0.0%) QuikTrip (0.0%) Love's (0.0%) Fike's CEFCO Stores (0.0%) Fas Mart/Shore Stop (0.0%) Timewise (0.0%) Huck's (0.0%)

Oil company brands denoted by **bold italic underline**.

**Methodology:** Total number of branded stations derived from Natl. Association of Convenience Stores and Convenience Store News. Number of stations selling E85 and E15 derived from DOE AFDC data (E85) and RFA data (E15).

**Brands with less than 50 branded stations are excluded.**