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"Energy Pricing & Profits"

Committee on Commerce, Science & Transportation
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Chairman Stevens, Co-Chairman Inouye, Chairman Domenici, Ranking Member Bingaman and Members of the two Committees. I am Peter Harvey, Attorney General for the State of New Jersey. Thank you for inviting me to testify today about energy pricing and profits.

As New Jersey's top law enforcement officer, I filed lawsuits in September against three oil companies and a number of independent gas-station operators alleging that they violated New Jersey's Motor Fuels Act and Consumer Fraud Act in connection with gasoline price increases in the wake of Hurricane Katrina. New Jersey citizens, like consumers in other states, were stunned by the steep price hikes that followed this tragic storm in the Gulf States. Similar to other states, New Jersey has a specific price gouging law that is part of our Consumer Fraud Act. It applies, however, only when a state of emergency has been declared within our state. Its protections were not available to us following Katrina because this disaster occurred in another region.

To protect our consumers, who rightly questioned whether they were being treated fairly and honestly, we thoroughly investigated what was happening at our gas stations in New Jersey and took the strongest legal action we could under our state laws. I'm here to share our experience in New Jersey and discuss why I believe that we need a federal price gouging statute that applies nationwide to the sale of essential goods and services following a disaster occurring in a particular region of the United States.

A. New Jersey's Investigation

In the week after Katrina struck, gas prices in New Jersey soared upward, to an average of $3.16 a gallon by Labor Day. That was a dollar higher than the average price just one month earlier. Hundreds of concerned citizens telephoned the New Jersey Division of Consumer Affairs and the State Office of Weights and Measures, both of which are within the Attorney General's Office. The acting Governor, Richard Codey, also expressed concern about escalating gas prices. We responded by closely monitoring gas prices and investigating individual complaints regarding gas retailers.

To be specific, we sent state, county and municipal weights and measures inspectors to visit more than 500 of New Jersey's 3,260 gas stations. The Office of Weights and Measures in the Division of Consumer Affairs has responsibility for ensuring that all commercial weighing and measuring devices, including gas pumps, accurately measure commodities being sold to consumers. In this case, under our oversight and pursuant to our statutory enforcement authority, these state and local inspectors conducted broader investigations to ensure that gasoline retailers were complying with state laws and treating customers fairly. They monitored price changes and demanded access to books and records that retailers are required by law to maintain and make available to state inspectors. The inspectors identified over 100 violations of New Jersey's laws.

B. Our Lawsuits Against Oil Companies and Gas Stations

On September 26, 2005, my Office filed suit against three oil companies, Hess, Motiva Shell and Sunoco, as well as various independent gas-station operators. The suits allege violations at 31 gas stations: 13 owned by the three oil companies, and 18 independently owned. As I previously stated, without a declared state of emergency in New Jersey, our state's price gouging statute does not enable us to target gas retailers and suppliers who seek to profit unjustly as a result of a disaster occurring in another part of the country. In our suits, we instead allege specific violations of New Jersey's Motor Fuels Act and Consumer Fraud Act. Specifically, we allege that the defendants violated a provision in the Motor Fuels Act that prohibits a gas retailer from changing gas prices more than once in a 24-hour period. We also allege that price increases that violate the Motor Fuels Act constitute an unconscionable commercial practice in violation of our Consumer Fraud Act. In other instances, we allege that defendants posted prices on roadside signs that were lower than the actual prices charged at the pumps, a violation of the advertising regulations under the Consumer Fraud Act that prohibit deceptive practices and misrepresentations in the sale of merchandise. In addition, we charged defendants with not maintaining and providing access to books and records required to be kept under the Motor Fuels Act.

We were able to pursue claims against these retailers who failed to obey our laws by their rapid escalation of prices. We do believe that part of the volatility in gas prices in New Jersey following Katrina was the result of retailers charging prices based not on what they actually paid, but on what they feared they might eventually pay or, worse yet, on what they thought they could get away with given the market conditions. While some busy gas stations do get fuel deliveries more than once a day, others were charging increasingly high prices for the same gas they had in the ground when the day, or week, began. New Jersey's Motor Fuels Act, enacted in 1938, was indeed aimed at reducing volatility in gas pricing. However, this trust-busting era legislation was originally intended to maintain healthy competition by preventing one gas retailer, who is perhaps in a stronger financial position, from continuously undercutting a competitor's prices to drive the competitor out of business. In other words, it was aimed at preventing predatory pricing. The Motor Fuels Act still carries the penalty schedule originally enacted in 1938, with penalties ranging from $50 to $200 and retail license suspension. Unfortunately, these penalties are inadequate to punish an oil company given the enormous revenue generated by the sale of gasoline.

While the Motor Fuels Act applies to the unlawful pricing conduct engaged in by certain oil companies in New Jersey, it does not get at the heart of the price gouging issue that we experienced in the wake of Katrina. Our Consumer Fraud Act casts a wider net and carries penalties of up to $10,000 for a first offense and up to $20,000 for subsequent offenses. However, this law also is inadequate because it still does not get us beyond the gas retailer and onto the conduct of the supplier or refinery. Moreover, it does not provide penalties that, for a big oil company, represent more than a marginal cost of doing business. We are here today because serious questions have been raised about why the major oil and gas companies posted record profits for the most recent quarter when consumers who rely upon gas every day to get to work and run essential errands were getting squeezed financially with record high prices, increased, perhaps, without any economic justification. I believe that our experience with Hurricane Katrina clearly points to the need for a federal price gouging statute.

C. The Need for a Federal Price Gouging Statute

When there is a state of emergency declared in New Jersey, we have the ability under the price gouging provisions of our Consumer Fraud Act to take action against merchants operating within the state who reap unconscionable profits from essential commodities. In the impacted geographical area, we can prevent those affected by the disaster from being unfairly exploited by profiteers and sharp operators. However, when there is a disaster or emergency situation in one area of the country that affects the supply and pricing of an essential, nationally distributed product, as with Katrina, Congress should provide a mechanism that reduces the volatility of prices across state lines. Even if states were to enact new laws to address these situations, a state-by-state approach would prove difficult and inconsistent. A nationwide problem demands a nationwide solution, though I would recommend one that does not pre-empt state remedies and, ideally, one that provides an enforcement role for state attorneys general.

Let me make one thing clear: I am not talking about attacking profits; I am talking about attacking profiteering. There is a difference. Consumers should not face artificially inflated prices that bear no substantial relationship to the supply of goods. Congress has long recognized the need to curb profiteering. After the outbreak of the Civil War, it enacted the Federal False

Claims Act to prevent false claims and overcharging by those who contracted with the federal government to provide essential services. Its impact has greatly expanded in recent years through private enforcement actions authorized under the law. A federal price gouging statute should take effect, when needed, for a limited time span, perhaps for 60 days. The purpose of the law should be to allow things to settle, just as the New York Stock Exchange can now close the market to prevent a crash if there is a large enough fall in stock prices. The factors involved in fuel pricing are complex, and sustained attempts to control fuel prices might prove counterproductive.

Ultimately, we must have a balance that accommodates business as well as the consumer. People must to be able to buy essential goods such as food, gasoline, home heating oil and electricity. I would emphasize that in striking that balance, we cannot lose sight of just how essential these goods are to Americans. For some, the cost of a tank of gas can be the obstacle that prevents them from driving to a doctor’s appointment or to the grocery store for food. We hear stories during winter of elderly Americans who freeze to death because they run out of fuel oil, and, in summer, of those who die in the heat for lack of electricity and air conditioning. People should not have to make life or death decisions based upon prices that have been put out of their reach by profiteering. Many will not have a choice, and the result will be death. Economics will self-select them to freeze, boil or live in darkness. If Katrina teaches us nothing else, it should teach us that our emergency plans must include providing for the poor, the immobile, the sick and the elderly -- in other words, those with the least resources to help themselves.

Thank you again for the opportunity to testify. This is a critical issue, and I am prepared to offer whatever assistance you might request in the future as you address it. I look forward to answering any questions that you have for me today.