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Prepared Statement of the Federal Trade Commission

**FTC Investigation of Gasoline Price Manipulation
and Post-Katrina Gasoline Price Increases**

**Presented by
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**Before the
Committee on Commerce, Science and Transportation
United States Senate**

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Introduction

Chairman Stevens, Co-Chairman Inouye, and members of the Committee, I am Deborah Platt Majoras, the Chairman of the Federal Trade Commission. I am pleased to appear before you to present the Commission's testimony on the findings of our investigation pursuant to two separate directives from Congress.¹ Section 1809 of the Energy Policy Act of 2005 requires the Federal Trade Commission ("Commission" or "FTC") to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices."² In addition, Section 632 of the Commission's appropriations legislation for fiscal year 2006 directs the Commission to conduct an investigation into nationwide gasoline prices and possible price gouging in the aftermath of Hurricane Katrina.³ Because the issues raised by these two statutory commands are closely related, the Commission conducted a single investigation in response to these directives. Our investigation is now complete, and yesterday we issued our final Report.

In my testimony today, I will describe the major issues addressed in our Report and present the Commission's evidentiary findings. I will conclude by discussing the policy implications of the Commission's findings, and by offering some recommendations for Congress's consideration in its ongoing efforts to protect consumers in petroleum markets.

¹ This written statement presents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or any other Commissioner.

² Energy Policy Act of 2005, Pub. L. No. 109-58 § 1809, 119 Stat. 594 (2005) ("Energy Policy Act").

³ Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108 § 632, 119 Stat. 2290 (2005) ("Section 632").

Since August 2005, the Commission has expended substantial resources on this investigation, including the full-time commitment of a significant number of attorneys, economists, financial analysts, paralegals, research analysts, and other personnel with specialized expertise in the petroleum industry. Even with this commitment of resources, it was not possible to study every pricing and output decision in this very complex industry. Thus, based on our knowledge and expertise from previous investigations and studies – and the concerns raised by knowledgeable observers and market participants about competition in this industry – the Commission and its staff focused substantially on levels of the industry and parts of the country where problematic behavior was most likely to have occurred and to have had an effect on consumers.⁴

“Price manipulation” and “price gouging” are not defined legal or economic terms and therefore must be defined for purposes of the Report. Neither antitrust law nor economics defines “price manipulation” precisely,⁵ and Section 1809 does not provide a definition for the

⁴ The Commission’s investigation examined the subjects that Congress directed the Commission to study in the Energy Policy Act and Section 632, but the Report does not address certain other issues of public interest in the petroleum industry that are beyond the purview of the investigation. For example, the Report does not examine crude oil production and exploration, in which – as recent Commission reports have shown – U.S. refiners compete with refiners around the world to obtain crude oil (and currently rely on foreign crude oil for more than 65% of their needs). Even the largest private oil companies control only a very small fraction of world crude oil production, and significant price manipulation through control of crude oil by private oil companies therefore appears highly unlikely. The Organization of Petroleum Exporting Countries (“OPEC”), however, plays a significant role in the pricing of crude oil and, accordingly, in the pricing of gasoline. For a discussion of OPEC’s effect on crude oil prices, *see* FEDERAL TRADE COMM’N, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND AND COMPETITION 22-23 (2005) (“GASOLINE PRICE CHANGES REPORT”).

⁵ “Price manipulation” is a term that appears in areas of the law other than antitrust, however. For example, although the Commodity Exchange Act bans price manipulation in futures markets, *see* 7 U.S.C. § 13(a)(2), the statute does not define manipulation, and courts and

Commission to apply. As used in the Report, the term “price manipulation” includes (1) all transactions and practices that are prohibited by the antitrust laws, including the Federal Trade Commission Act, and (2) all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and to reduce output.⁶

Transactions and practices that violate the antitrust laws include anticompetitive mergers, acquisitions, and joint ventures, collusion among competitors to fix prices or output, and monopolization or attempts to monopolize.

Although widely understood to refer to significant price increases (typically during periods of unusual market conditions), the term “price gouging” similarly lacks an accepted definition. It is not a well-defined term of art in economics, nor does any federal statute identify price gouging as a legal violation. States that prohibit price gouging have not adopted a common definition or standard to describe the practice. For example, the statutes do not describe the extent to which cost or other considerations (such as whether a declared emergency is pending)

others have struggled to define the term. *See, e.g., In re Soy Bean Futures Litig.*, 892 F. Supp. 1025, 1043 (N.D. Ill. 1995) (“[T]here is a ‘dearth of settled caselaw’ on price manipulation; as a result the courts and the CFTC are still struggling to define the basic elements of the claim and to differentiate between fair means and foul in futures trading.”). In addition, the Federal Energy Regulatory Commission (“FERC”) recently imposed a condition on all current and future market-based tariffs that prohibits “[a]ctions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products.” *See Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003).

⁶ Under this definition, “price manipulation” includes instances in which one or more firms temporarily may each have an increased incentive and ability to raise prices relative to costs and reduce output because markets have been disrupted by supply problems arising from natural disasters or by sudden and unanticipated changes in demand. In our view, this type of conduct should not be illegal because it entails each individual firm’s independent decisions about how to allocate sales of its products among markets.

play a role in determining whether a price increase is “price gouging.” In Section 632, Congress directed the Commission to treat as evidence of price gouging any finding that “the average price of gasoline available for sale to the public in September, 2005, or thereafter . . . exceeded the average price of such gasoline in that area for the month of August, 2005, unless the Commission finds substantial evidence that the increase is substantially attributable to additional costs in connection with the production, transportation, delivery, and sale of gasoline in that area or to national or international market trends.” Accordingly, we analyzed whether specific post-Katrina price increases were attributable either to increased costs or to national or international trends.

I. The Expertise of the Commission on Petroleum Industry Matters

The Commission’s Bureau of Competition and Bureau of Economics have significant petroleum industry experience, both from enforcing the antitrust laws and from conducting research and industry analyses. The Commission has investigated every major merger in the petroleum industry over the past twenty-five years. The Commission also has conducted major investigations of petroleum marketing and pricing practices on the West Coast and in the Midwest. During each investigation, the Commission obtained documents, economic data, and testimony from merging parties and other industry participants and used this evidence to determine whether to take law enforcement action to prevent potential anticompetitive effects.

Since 1981, the Commission has identified 20 large petroleum mergers that it believed would have reduced competition and harmed consumers.⁷ The agency obtained relief that

⁷ Investigations in which the Commission determined that the merger presented a problem, and significant structural relief was obtained, include Valero L.P., Valero Energy Corp., *et al.*, FTC Dkt. No. C-4141 (July 22, 2005) (divestiture of Kaneb terminal and pipeline assets in northern California, eastern Colorado, and greater Philadelphia area); Phillips Petroleum Co., FTC Dkt. No. C-4058 (Feb. 7, 2003) (divestiture of Conoco refinery in Denver, Phillips

resolved the competitive issues in sixteen of these transactions, and the parties abandoned the other four after the Commission formally challenged the transactions. The Commission conducted a careful evaluation of each transaction to ensure that the agency obtained adequate remedies where necessary.

In addition to merger enforcement, the Commission's economists have researched pricing and other competition issues in the petroleum industry.⁸ Since 2002, the Commission's economists also have monitored wholesale and retail prices of gasoline to identify potential anticompetitive activities that might require greater investigation. Today, this project tracks retail prices of gasoline and diesel in some 360 cities and wholesale (terminal rack) prices in 20

marketing assets in eastern Colorado, Phillips refinery in Salt Lake City, Phillips marketing assets in northern Utah, Phillips terminal in Spokane, Phillips propane business at Jefferson City and East St. Louis); Valero Energy Corp., FTC Dkt. No. C-4031 (Feb. 19, 2002) (divestiture of UDS refinery in Avon, California, and 70 retail outlets); Chevron Corp., FTC Dkt. No. C-4023 (Jan. 2, 2002) (divestiture of Texaco's interests in the Equilon and Motiva joint ventures, including Equilon's interests in the Explorer and Delta pipelines); Exxon Corp., FTC Dkt. No. C-3907 (Jan. 26, 2001) (divestiture of all Northeast and Mid-Atlantic marketing operations of the two parties and Exxon's Benicia, California, refinery); British Petroleum Co. p.l.c., 127 F.T.C. 515 (1999) (divestiture of terminals in nine markets, and divestiture of BP's or Amoco's retail outlets in eight geographic areas); and Shell Oil Co., 125 F.T.C. 769 (1998) (resulting in divestitures of Shell's refinery in Anacortes, Washington, pipeline interests in the Southeast, and retail outlets in San Diego County, California).

⁸ Representative research includes Jeremy I. Bulow, *et al.*, *U.S. Midwest Gasoline Pricing and the Spring 2000 Price Spike*, 24 ENERGY J. 121 (2003); Christopher T. Taylor & Jeffrey H. Fischer, *A Review of West Coast Gasoline Pricing and the Impact of Regulations*, 10 INT'L J. ECON. BUS. 225 (2003); DAVID W. MEYER & JEFFREY H. FISCHER, THE ECONOMICS OF PRICE ZONES AND TERRITORIAL RESTRICTIONS IN GASOLINE MARKETING (Bureau of Econ., Fed. Trade Comm'n, Working Paper 271, 2004); JOHN SIMPSON & CHRISTOPHER T. TAYLOR, MICHIGAN GASOLINE PRICING AND THE MARATHON-ASHLAND AND ULTRAMAR DIAMOND SHAMROCK TRANSACTION (Bureau of Econ., Fed. Trade Comm'n, Working Paper 278, 2005); CHRISTOPHER T. TAYLOR & DANIEL S. HOSKEN, THE ECONOMIC EFFECTS OF THE MARATHON-ASHLAND JOINT VENTURE: THE IMPORTANCE OF INDUSTRY SUPPLY SHOCKS AND VERTICAL MARKET STRUCTURE (Bureau of Econ., Fed. Trade Comm'n, Working Paper 270, 2004) (forthcoming in *Journal of Industrial Economics*).

major urban areas. Over the past several decades, the Commission has gained an understanding of the domestic petroleum industry, how participants in the industry compete, and how prices of gasoline and other refined petroleum products are set.

II. The History of the Investigation

In August and September of 2005, the Commission, through its staff, began planning and organizing the investigation mandated by Section 1809 of the Energy Policy Act and the anticipated legislation that became Section 632. The planning process focused in part on how to seek the best and most complete information in the time permitted. Staff identified issues requiring analysis, information necessary to analyze those issues, and strategies to obtain that information. Staff then identified the targets of the investigation, including all gasoline and petroleum distillate wholesalers with \$500 million or more in annual sales, as well as appropriate retailers. Staff began conducting voluntary interviews with a number of firms and also consulted with various federal agencies, including the Department of Energy, the Department of Commerce, the Commodity Futures Trading Commission, the Department of the Treasury, and the Internal Revenue Service.

The Commission's staff conducted more than 65 voluntary interviews with industry participants and state and federal agencies. Staff interviewed petroleum refiners, wholesalers, retailers, terminal companies, pipeline owners and operators, traders, price reporting services, and representatives from various state agencies, including the National Association of Attorneys General and individual representatives from state attorney general offices and state consumer protection agencies.

In early November 2005, the Commission issued the first of 139 Civil Investigative Demands (“CIDs”) – similar to subpoenas – to a wide spectrum of petroleum industry firms in order to obtain information relevant to the investigation. CID recipients included integrated and unintegrated refiners, pipeline owners and operators, terminal owners, and petroleum marketers.⁹ One set of CIDs sought information directly relevant to Section 632. Another set of CIDs directed individual terminal owners to provide information relevant to aspects of petroleum futures markets. The Commission also issued 99 orders pursuant to Section 6(b) of the Federal Trade Commission Act,¹⁰ seeking profitability and tax expenditure information required by Section 632 from retailers that were investigated by state attorneys general for post-Katrina price gouging,¹¹ as well as follow-up CIDs seeking from refiners certain additional data necessary to conclude our profitability analysis under Section 632. In February 2006, staff conducted sworn investigational hearings (similar to depositions) of industry officials regarding various issues in

⁹ The Commission based its request for profitability data on a form used by the Energy Information Administration (“EIA”) of the U.S. Department of Energy. The EIA uses this form to collect revenue, cost, and profit information from major energy-producing firms operating in the United States. Each company submitted its response to the FTC’s data request. The companies also granted waivers that allowed the EIA to provide other company-specific information that that agency routinely collects from the industry, including data on production, capacity, shipments, and inventory.

¹⁰ Section 6(b), 15 U.S.C. § 46(b), empowers the Commission to require the filing of annual or special reports or answers in writing to specific questions for the purpose of obtaining information about “the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals” of the entities to which the inquiry is addressed.

¹¹ Staff identified more than 105 retailers accused of price gouging by state law enforcement authorities. Due to the late timing of identification and previous data requests sent to retailers identified in state actions, the Commission issued the ninety-nine orders pursuant to Section 6(b) of the Federal Trade Commission Act.

the investigation. The Commission also purchased a large volume of wholesale and retail pricing data from the Oil Price Information Service (“OPIS”), a private data-collection company, to complement information secured directly from market participants and from firm-level EIA data.

III. Summary of Key Findings and Recommendations

A. Part I of the Report

1. Refining

Evidence indicated that the price of crude oil, the largest cost component of gasoline, contributed to most of the gasoline price increases that occurred from early 2002 until just before Hurricane Katrina struck the United States. Higher refining margins caused some of the remaining increase, although margins in any competitive market can be expected to increase, at least in the short run, during periods of strong demand.¹²

The Commission analyzed various aspects of refinery operations to determine whether refiners manipulated, or tried to manipulate, gasoline prices. Staff investigated whether refiners manipulate prices in the short run by running their refineries below full productive capacity in order to restrict supply, by altering their product output to produce less gasoline, or by diverting gasoline from markets in the United States to less lucrative foreign markets. Staff also investigated allegations that companies refused to invest sufficiently in new refineries for the purpose of tightening supply and raising prices in the long run. Staff’s investigation revealed no evidence to suggest that refiners manipulated prices through any of these means.

The best evidence available through our investigation indicated that companies operated

¹² One measure of “refining margin” is the price at which the refiner sells finished product minus the refiner’s acquisition cost of crude oil.

their refineries at full sustainable utilization rates. Companies scheduled maintenance downtime in periods when demand was lowest in order to minimize the costs they incur in lost production. Internal company documents suggested that refinery downtime is costly, particularly when demand and prices are high. Companies track these costs, and their documents reflected efforts to minimize unplanned downtime resulting from weather or other unforeseen calamities.

The evidence also showed that companies operated their refineries – and determined the product quantities they would produce – with the goal of maximizing their profits, taking market prices as a given factor. Our investigation uncovered no evidence indicating that refiners make product output decisions to affect the market price of gasoline. Instead, the evidence indicated that refiners responded to market prices by trying to produce as much higher-valued products as possible, taking into account crude oil costs and other physical characteristics.

The evidence collected in this investigation indicated that firms behaved competitively. Firms employ computer models that rely on simplified assumptions in order to make decisions about production and capacity. These models allow refineries to determine the most profitable slate of products, given refinery input costs and market-based price forecasts. To the extent that these models take price as a given, refiners' use of such models does not signify an ability to influence prices through short-run production decisions. Refiners may occasionally modify or override the computer models to take into account market factors, such as limited product demand for some fuel specifications, but such departures appeared limited during our investigation.

Our investigation revealed no evidence that companies export product from the United States in order to raise domestic prices. Export levels are relatively low, compared to the level of

imports entering the United States. Pre-existing supply commitments and product that is unacceptable for use in the United States constitute the bulk of exported refined products. Further, our investigation indicated that an attempt to manipulate gasoline prices by exporting products from the United States likely would result in more imports into the domestic market, as indicated by the increased imports that arrived in response to the hurricanes.

Refining capacity has increased over the past 20 years, even as the number of refineries has declined. The industry added capacity by expanding existing refineries, which appears to be more economical than building new refineries. Domestic refinery expansions have been significant, but they have not kept pace with rising demand over the same period. Nevertheless, our investigation did not uncover evidence suggesting that expansion decisions resulted from attempts by refineries, acting either unilaterally or in concert, to acquire or exercise market power. Rather, the evidence suggested that the rate of capacity growth was a response to competitive market forces that made further investment in refining capacity unprofitable.

2. Bulk Distribution Infrastructure

The bulk supply distribution infrastructure, consisting of pipelines, marine vessels and terminals, adds very little to the delivered cost of gasoline. The Commission examined the extent to which infrastructure constraints gave firms the ability or incentive to manipulate gasoline prices, or limited the ability of marketers to move additional supply to specific markets when an unexpected need arose.

Pipelines generally are the most cost-effective way to transport refined petroleum products. In the short run, pipelines can affect the flow of supply into markets through the rates they charge for transporting product. In the long run, decisions whether to expand play an

important role in the ability of pipelines to respond to increasing demand. The evidence we obtained during our investigation did not suggest that pipeline companies made rate or expansion decisions to manipulate gasoline prices. First, FERC generally regulates the rates that interstate pipelines charge, and pipeline companies generally charge the FERC maximum rate unless competition from other pipelines compels them to offer discounted rates to win business. Second, pipeline companies appear to make expansion decisions for reasons unrelated to gasoline prices, except to the extent that rising gasoline prices may signal a need for more pipeline capacity to serve a given market. Pipeline companies generally expand only when they are assured of having a sufficient volume of product committed to the new pipeline, because expansion involves significant sunk costs, regulatory barriers, and the risk of idle pipeline capacity.

Gasoline also moves to markets within the United States on marine vessels – tankers and barges – along the nation’s waterways and coasts. Two federal laws, the Jones Act and the Oil Pollution Act, apply to marine vessels and have had the effect of reducing the supply of ships qualified to move gasoline within the United States. The evidence indicated that refiners have reacted to this by increasingly entering into long-term charter arrangements with shipping companies to ensure a supply of vessels to transport their product during normal market conditions. This, however, has reduced the number of ships available on the spot market to traders seeking to move fuel in response to supply shortages.

Terminals are essential to the bulk supply infrastructure because they provide storage for marine vessel and pipeline deliveries. Many refiners that also sell gasoline (“refiner/marketers”) own terminals in various markets, and use those terminals primarily – if not exclusively – to store

product for their own needs. Public terminals (*i.e.*, terminals owned by companies that do not refine or market gasoline) exist in many markets and provide access to any bulk seller willing to pay to use the terminal. The presence of public terminals minimizes the ability of refiner/marketers to use their terminals to restrict supply into specific markets. In recent years, refiner/marketers have sold terminals to public terminal companies, reducing even further any ability to manipulate prices by restricting terminal access. As a result, competition appears sufficient in most areas to limit the potential for price manipulation.

3. Product Inventory Practices

Inventory levels have declined since at least the early 1980s, covering periods when the real price of gasoline was declining and increasing. In more concrete terms, inventory levels have declined since 1993 from a level sufficient to meet consumption for a full month to a level sufficient to meet consumption for less than 80% of a month. Our investigation did not produce evidence, however, that oil companies reduced inventory in order to manipulate prices or exacerbate the effects of price spikes due to supply disruptions. Instead, the decline in inventory levels reflects a trend that is not limited to the petroleum industry. As in many other major industries, lower inventory holdings allowed oil companies to become more efficient and to lower costs. The evidence indicated that oil companies attempt to use historical experience to determine what inventory levels would be sufficient to meet unanticipated changes in demand or supply. Inventories were a significant factor in enabling the markets to recover from the shocks stemming from Hurricanes Katrina and Rita, as discussed more fully below.

4. Other Issues Involving Potential Gasoline Price Manipulation

The evidence did not reveal a situation that might allow one firm (or a small collusive group) to manipulate gasoline futures prices by using storage assets to restrict gasoline movements into New York Harbor, the key delivery point for gasoline futures contracts. In addition, the evidence did not support a theory that firms used published bulk spot prices to manipulate prices, either (a) by falsely reporting trades to the major price publishing services, or (b) by affecting published prices in thinly traded markets by reporting actual, legitimate, small-volume trades opportunistically priced above or below competitive levels.¹³

B. Part II of the Report

In the week after Hurricane Katrina – which caused the immediate loss of 27% of the nation’s crude oil production and 13% of national refining capacity – the average price of gasoline increased by about 50 cents per gallon in six representative cities analyzed in this part of the Report. About 35 cents per gallon of the post-Katrina price increase dissipated by the time Hurricane Rita hit. Rita damaged another 8% of crude production and, even accounting for the refineries affected by Katrina and back online, 14% of domestic refining capacity was lost. In the six selected cities, during the first week after it hit, Rita caused an increase of 25 cents per gallon in the average price of gasoline. Four weeks after Rita, these prices returned to pre-Katrina levels. By the beginning of December 2005, these prices had returned to the levels prevalent at

¹³ Any evidence of this form of manipulation more likely would exist in individual company trader files – a massive volume of documents that staff did not seek and could not have reviewed within the given time. Such a detailed investigation would be appropriate when a federal agency becomes aware of specific allegations or suspicions that such conduct is occurring.

the start of summer 2005, showing that most of the price effects of the hurricanes had dissipated by that time.

The price increases after the hurricanes varied substantially by region. For example, the average price in Baltimore increased by 65 cents per gallon after Katrina, while the average price in Los Angeles increased by 20 cents per gallon. In addition, the range (or “dispersion”) of both wholesale and retail prices within particular cities far exceeded typical levels immediately after the hurricanes. For example, the typical range of prices within a band encompassing the middle 50% of prices in a given urban area, on average, spans from 3 to 10 cents per gallon. After Katrina, prices in that middle 50% range rose by a factor of 2 to 3, or 12 to 18 cents per gallon. High dispersion is evidence that some firms increased prices more than most other firms – evidence that should be considered in a search for price gouging as defined in Section 632.

In light of the amount of crude oil production and refining capacity knocked out by Katrina and Rita, the sizes of the post-hurricane price increases were approximately what would be predicted by the standard supply-and-demand paradigm that presumes a market is performing competitively. The regions of the country that experienced the largest price increases were those that normally receive supply from areas affected by the hurricanes. In the cities with the largest price increases, the sizes of the increases were consistent with the standard supply-and-demand competitive paradigm. Moreover, in general, the wholesalers and retailers that raised prices the most within particular cities in the weeks following the hurricanes were not firms that experienced increases in market power (stemming, for example, from the closing of rivals). Rather, they were firms that experienced the largest reductions in their own supplies and the greatest increases in their own costs.

Evidence gathered during our investigation indicated that the conduct of firms in response to the supply shocks caused by the hurricanes was consistent with competition. After both hurricanes, companies with unaffected assets increased output and diverted supplies to high-priced areas. This is what we would expect in competitive markets. Refiners deferred scheduled maintenance in order to keep refineries operating. Imports increased and companies drew down existing inventories to help meet the shortfall in supply.

In its assessment of potential gasoline price gouging as defined in Section 632, the FTC examined price, cost, and profit margin data for large sellers of petroleum products – refiners and wholesalers – and for retailers that were targets of state price gouging enforcement actions in the aftermath of Katrina. Financial data for 30 refiners were analyzed. Although there were exceptions, refiners generally saw increased profit margins in September 2005 compared to August 2005. Between August and September 2005, the average gasoline price charged by eight of the 30 refiners analyzed increased five or more cents per gallon more than the national average price trend for this period. Seven of these eight refiners also had increased profit margins during the same period, indicating that average cost increases did not substantially explain the firms' higher average prices. Accordingly, the findings that individual refiners' prices increased substantially more than the national average trend, accompanied by increased profit margins, meet Section 632's definition of price gouging.

Further investigation and analysis revealed evidence that may explain the price increases of these refiners and their profit uplifts. Refiners vary significantly in terms of where, and through which channels, they distribute product. Hurricane Katrina's impact on prices differed significantly across geographic regions, and refiners that sold relatively more of their gasoline in

higher-priced regions had average price increases greater than the increase in the national average. In addition, refiners varied significantly in the extent to which they sold gasoline through their owned-and-operated retail outlets, through franchised dealers supplied on a delivered price basis, through branded jobbers supplied on a branded rack price basis, through unbranded jobbers supplied on an unbranded rack price basis, and through bulk sales to other refiners or other major resellers on a bulk spot price basis. Because of time lags and differing contractual relationships between sellers and buyers, the relative prices for sales through these various distribution channels changed significantly in response to changing market conditions, such as those associated with the major supply disruptions from last year's hurricanes. Once geographic locations of sales and channels of distribution were taken into account, individual refiners' price increases appeared comparable to local market trends, except in one case. In that case, which involved a very small refiner, further inquiry indicated that the refiner's acquisition costs for the gasoline it was obligated to supply increased significantly beyond the level suggested by the aggregated accounting data because of hurricane damage.

Staff also evaluated financial operating data for 23 large wholesalers that had no refinery operations (eight of which also had some retail operations). Staff found that the operating margins of these wholesalers generally did not increase, suggesting that higher costs primarily caused their price increases. A few non-refining wholesalers, however, did enjoy significantly higher operating margins, and their price increases constitute price gouging under the Section 632 definition. Nevertheless, a further analysis of the evidence reveals that they derived these gains from either (1) retail operations in areas that experienced the largest post-Katrina price increases, or (2) activities such as futures market trading or distillate sales.

The Commission also examined margin and price data for 24 individual retailers that had been the targets of state price gouging actions. Although one might have expected these retailers generally to satisfy the criteria for price gouging set forth in Section 632, this proved not to be the case. As a group, these retailers did not have significantly increased operating margins in September 2005, nor were their average price increases much different from the change in the national average retail price from August to September 2005. Nevertheless, in September, six of these retailers (1) earned significantly higher monthly average gross margins, and (2) increased their average prices at least five cents per gallon more than the national average price increase in September compared to August 2005. Accounting for regional price differences associated with the hurricanes' impact, one retailer of the six significantly exceeded the benchmark average price increase.

Based on these findings and other analyses of retail pricing data and retailer interviews, the Commission concludes that some price gouging by individual retailers, as defined by Section 632 (which is premised on a comparison to national average prices), did occur to a limited extent. Local or regional market trends, however, seemed to explain the price increases in all but one case. Exceptionally high prices on the part of individual retailers generally were very short-lived. Interviews with retailers that charged exceptionally high prices indicated that at least some were responding to station-level supply shortages and to imprecise and changing perceptions of market conditions.

C. Part III of the Report – Policy & Recommendations

At the heart of the Congressional mandates is an inquiry into the prices for gasoline and all other refined petroleum products, which have risen substantially in the past two years. Higher

gasoline prices cause substantial economic hardship for consumers. Sharing a profound interest in protecting consumers, both Congress and the Commission naturally are focused on this issue.

Section 632 of the Science, State, Justice, Commerce, and Related Agencies

Appropriations Act of 2006 directs the Commission to investigate price gouging in the aftermath of Hurricane Katrina and, based on the agency findings, to recommend possible legislation that might be needed to protect consumers from price gouging. Section 1809 of the Energy Policy Act of 2005 also requires that the Commission submit any recommendations along with its investigational findings. The Commission investigated the higher prices that occurred after the hurricanes and has considered the experience of several states that sought to enforce their price gouging statutes during this emergency period. The states' enforcement experience provides some insight into the enforcement process under price gouging statutes.

The challenge in crafting a price gouging statute is to be able to distinguish gougers from those who are reacting in an economically rational manner to the temporary shortages resulting from the emergency. This is more than just a problem for legislators and prosecutors. Gasoline suppliers may react to this difficulty in distinguishing gougers by keeping their prices lower than they rationally would. Consumers, in turn, may have no incentive to curb their demand as they would in response to a higher price. Other suppliers may have no incentive to send new supplies to the affected area, as they would if the price increased. The possible result may be long gasoline lines and shortages. In short, any decision to enact federal price gouging legislation should be made with full awareness of both sides of the possible tradeoff.

1. The Critical Role of Prices

Consumers might be better off in the short run if they did not have to pay higher prices for the same quantity of goods; in the long run, however, distortions caused by controls on prices would be harmful to consumers' economic well-being. Prices serve a crucial function in market-based economies. They are signals to producers and consumers that tell how to value one commodity against another, and where to put scarce resources in order to produce or purchase more or fewer goods. If these price signals are distorted by price controls, consumers ultimately might be worse off because producers may manufacture and distribute an inefficient amount of goods and services, and consumers may lack the information necessary to properly value one product against another. Moreover, even in periods of severe supply shock, such as a major reduction in production or distribution caused by a natural disaster like the 2005 hurricanes, higher prices signal consumers to conserve and producers to reconfigure operations to better prepare for the next supply shock. Thus, if there is a "right" price for a commodity, it is not necessarily the low price; rather, it is the competitively determined market price. Relative to past prices, a competitive market price may sometimes be low, and it may sometimes be high; but it will send an accurate signal to producers to manufacture a sufficient amount of goods and services that consumers want to buy at that price, and an accurate signal to consumers to reallocate purchase decisions.

If prices are constrained at an artificial level for any reason, then the economy will work inefficiently and consumers will suffer. Economists have known for years that price controls are bad for consumers, and the deleterious effect extends far beyond strictly fixed prices.¹⁴ The

¹⁴ See WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 53 (2d ed. 1982) ("The consequences [of price controls] usually are quite unfortunate,

constraint need not be total or permanent to have adverse effects. “Soft” price caps that allow for some recovery of price increases, or a price gouging statute that temporarily constrains prices during periods of emergency, still may have the effect of misallocating resources by reducing the incentives to produce more and consume less.¹⁵ Thus, any type of price cap, including a constraint on raising prices in any emergency, risks discouraging the kind of behavior necessary to alleviate the imbalance of supply and demand in the marketplace that led to the higher prices in the first place. A temporary price cap may have an especially adverse effect on incentives as producers withhold supply in order to wait out the capped period.

An artificially low price may cause producers to shift their fungible resources (of which capital is the most fungible) to other markets. Sooner or later, the result may be shortages, and the relatively scarce goods may be allocated by some method other than a market-clearing price. Experience with past markets in which prices have been held artificially low through price controls has included such results as consumers waiting in lines (and often burning scarce fuel while waiting), a politically designed allocation system, or an illegal “black market” in which the market price is charged.

2. The Important Role of the Antitrust Laws

The antitrust laws are designed to protect consumers by ensuring that they are offered competitive market prices. The antitrust laws seek to protect consumers against high prices that result from price fixing and from other market distortions that almost inevitably lead to higher prices. The Commission, along with the U.S. Department of Justice, is charged with protecting

exacting heavy costs from the general public and often aggravating the problem the legislation was intended to cure.”).

¹⁵ Office of Governor Linda Lingle, *Governor Approves Gas Cap Repeal*, May 5, 2006, available at http://www.hawaii.gov/gov/news/releases/2006/News_Item.2006-05-05.5815.

consumers by maintaining competitive markets, to make sure that the prices charged in markets are not artificially fixed or manipulated by private interests. The Commission's work in the petroleum industry over many years conforms to this mandate. The agency protects consumers by ensuring that markets remain competitive, and that the price charged in each market is free from collusion or the exercise of market power.

Congress determined long ago that the nation's economy should largely be free from government regulation and that the national common market should be governed by the principles of competition.¹⁶ In enacting the antitrust laws, however, Congress also recognized that markets can be distorted by concentrations of market power. The antitrust laws are not designed to prevent prices from increasing; rather, they are designed to prevent firms from using market power to raise prices artificially.

The antitrust laws cover three primary areas – collusion among competitors (including price fixing), anticompetitive mergers, and monopolistic and other exclusionary unilateral practices. The Commission has been active in each area in the petroleum industry.

¹⁶ Over the years, Congress has passed a number of industry-specific statutes imposing regulation, including price regulation. Prices have been fixed through regulation in airlines, trucking, and other industries originally deemed ill-suited for market-based price competition. Regulations also have been passed to meet goals other than competition, and although these regulations have price impacts, a policy decision has been made that control of prices can be tolerated in order to achieve other goals such as health care and safety. At certain times, Congress has even placed general price controls on all industries. The price of gasoline was strictly regulated during World War II, and the market was cleared through a system of ration coupons.

A general consensus has emerged, however, that in most markets competition is more effective than any form of price control in ensuring that consumers get the full benefits of innovation and productive and distributive efficiencies. Numerous formerly regulated industries have been substantially deregulated. Consumers are best protected when markets are kept free and open. These benefits to consumers depend, of course, on law enforcement agencies that can keep markets competitive and free from distortion and manipulation. This is the role of the Federal Trade Commission.

3. Price Gouging – State and Federal Perspectives

There is no federal statute that prohibits price gouging. Twenty-nine states and the District of Columbia, however, have laws that prohibit the excessive pricing of motor fuels and other commodities during periods of abnormal supply disruption (normally triggered by a declaration of emergency by the President, the governor, or local officials).¹⁷ These laws provide for civil penalties, criminal penalties, or both. Commission staff looked at the experience of the states in enforcing their price gouging statutes as information relevant to the enactment and enforcement of a possible federal statute.¹⁸

4. Federal Price Gouging Legislation

Consumers understandably are upset when they face dramatic price increases within very short periods of time, especially during a disaster. In a period of shortage, however – particularly with a product, like gasoline, that can be sold in many markets around the world – higher prices create incentives for suppliers to send more product into the market, while also

¹⁷ See National Conf. of State Legislatures, *State Laws and Regulations: Price Gouging* (Oct. 8, 2004), available at <http://www.ncsl.org/programs/energy/lawsgouging.htm>.

¹⁸ Several states and the Canadian Competition Bureau investigated post-hurricane high gasoline prices and potential price gouging and concluded, largely consistent with the Commission's Report, that market forces were for the most part responsible for the higher prices. See David R. Baker, *Anti-Gouging Laws Don't Cut Gas Prices: State Probed 50 Potential Cases; No Charges*, SAN FRAN. CHRONICLE, May 6, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/10/MNGQHIOUJP1.DTL> (California Attorney General investigates 50 of more than 1,150 complaints, finds no evidence of price gouging); Press Release, Attorney General Rob McKenna, *McKenna Encourages Conservation, Reports No Evidence of Price-Fixing So Far*, Apr. 26, 2006, available at http://www.atg.wa.gov/releases/2006/rel_No_evidence_Of_Price_Fixing_042606.html; Office of the Attorney General, State of Arizona, Consumer Protection Section, 2005 Gasoline Report Hurricane Katrina, Apr. 26, 2006 (Arizona "investigation did not uncover any illegal conduct"), available at <http://www.azag.gov/consumer/gasoline/PublicGasReport2005.pdf>; Canadian Competition Bureau, *Competition Bureau Concludes Gasoline Pricing Examinations*, Mar. 30, 2006 (finding "no evidence of a national conspiracy to fix gasoline prices"), at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemid=2046&lg=e>.

creating incentives for consumers to use less of the product. Higher gasoline prices in the United States after Hurricanes Katrina and Rita resulted in the shipment of substantial additional supplies of gasoline to the United States from foreign locations.¹⁹

If pricing signals are not present or are distorted by legislative or regulatory command, markets may not function efficiently and consumers may be worse off. Accordingly, our competition-based economy generally allows a seller, acting independently in its own business interests, to set prices as it chooses, and relies on market forces – rather than government intervention – to determine the prices a seller can seek.

In addition, it can be very difficult to determine the extent to which price increases are greater than “necessary.” Our examination of the federal gasoline price gouging legislation that has been introduced and of state price gouging statutes and enforcement efforts indicates that the offense of price gouging is difficult to define. Moreover, throughout antitrust jurisprudence, one area into which the courts have refused to tread is the question of what constitutes a “reasonable price.” Ultimately, the lack of consensus on which conduct should be prohibited could yield a federal statute that would leave businesses with little guidance on how to comply and would run counter to consumers’ best interest.

For all of these reasons, the Commission cannot say that federal price gouging legislation would produce a net benefit for consumers. If Congress nevertheless proceeds with passing

¹⁹ Total gasoline imports into the United States for September and the first three weeks of October 2005 were approximately 34% higher than imports over this period in 2004. See Energy Info. Admin., U.S. Dep’t of Energy, *Petroleum Navigator: Weekly Imports & Exports* (shows receipts of crude oil and petroleum products into the 50 States and the District of Columbia from foreign countries, Puerto Rico, the Virgin Islands, and other U.S. possessions and territories), available at http://tonto.eia.doe.gov/dnav/pet/pet_move_wkly_dc_NUS-Z00_mbbldpd_w.htm (last updated May 3, 2006).

federal price gouging legislation, several factors should be considered in order to enact a statute that will be most likely to attack gouging while having the smallest adverse impact on rational price incentives. First, any price gouging statute should define the offense clearly. A primary goal of a statute should be for businesses to know what is prohibited. An ambiguous standard would only confuse consumers and businesses and would make enforcement difficult and arbitrary.

A price gouging bill also should account for increased costs, including anticipated costs, that businesses face in the marketplace. Enterprises that do not recover their costs cannot long remain in business, and exiting businesses would only exacerbate the supply problem. Furthermore, cost increases should not be limited to historic costs, because such a limitation could make retailers unable to purchase new product at the higher wholesale prices.

The statute also should provide for consideration of local, national, and international market conditions that may be a factor in the tight supply situation. International conditions that increase the price of crude oil naturally will have a downstream effect on retail gasoline prices. Local businesses should not be penalized for factors beyond their control.

Finally, any price gouging statute should attempt to account for the market-clearing price. Holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will ameliorate the problem. If supply responses and the market-clearing price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off.

IV. Conclusion

Under existing antitrust laws, the Commission has a strong role to play in this area. As noted above, enforcing the antitrust laws strictly to prohibit business behavior that has anticompetitive effects will have a major impact in keeping markets free so that prices are set by competitive forces, not by manipulation or “gouging.” Beyond that, the Commission will remain vigilant about any distortions that may harm competition and consumers in petroleum markets. Moreover, the Commission will vigorously implement and enforce any additional legislation that is enacted.

On April 25, 2006, the President directed the Department of Justice to work with the Commission and the Department of Energy to conduct an inquiry into current gasoline prices and the reasons for their more recent increases.²⁰ The makeup of this investigating group presents the opportunity to examine a range of issues and conduct by market participants potentially affecting the underlying supply and demand factors that ultimately shape prices in the long run. In the context of this directive, the Commission also is considering whether to conduct further inquiry into other topics – for example, oil company profitability – and is working to identify any other aspects of the petroleum industry that may warrant further economic examination. The Commission also will continue to evaluate and upgrade its gasoline and diesel price monitoring project. This is an ongoing process to ensure that our detection efforts are as robust as possible.

²⁰ A number of Members of Congress also have requested that the Commission investigate recent increases in gasoline prices. *See, e.g.*, letter of April 24, 2006, from Speaker of the House Dennis Hastert and Senate Majority Leader Bill Frist to President Bush; letter of April 28, 2006, from Senators Mike DeWine and Herb Kohl to FTC Chairman Majoras and Attorney General Gonzales.

In addition, we will continue with consumer education projects to help consumers make informed decisions in the energy marketplace.

The legal and industry enforcement expertise of the Commission, bolstered by the Justice Department's long history of aggressive enforcement against criminal cartels, should enable this investigation to determine whether any petroleum companies have engaged in conduct that would violate the antitrust laws to the detriment of consumers. If any illegal activity is uncovered, it will be prosecuted by the appropriate agency.

The addition of the Department of Energy to the investigating group brings an added level of expertise in energy markets. The Department's long experience in data collection across all energy markets will provide the information necessary to study and make recommendations about macroeconomic trends in energy use, imports, alternative fuels, and other issues that go far beyond traditional law enforcement.

The Commission also is working with many state attorneys general to add to our understanding of their laws, to continue to refine our analysis of petroleum industry issues, and to improve our working relationships. We will conduct a seminar on petroleum matters with state attorneys general and their staffs in September 2006.

Past Commission law enforcement investigations in the petroleum industry have concluded that supply and demand forces are the ultimate drivers of prices to consumers. The Commission, however, will continue to monitor this industry closely and investigate any potential illegal activity.

Further, that does not, and should not, end the debate about appropriate government energy policy. Consumers understandably are frustrated to be told that no laws are being broken

even as prices increase substantially. It is important that they gain a better understanding of the working of energy markets. Gasoline prices – and energy prices in general – depend on the actions of all consumers and producers, and those actions can be changed. They can be modified over time by policies designed to make supply more responsive to high prices or to shift demand toward alternative energy sources. There are numerous initiatives that would have the effect of holding down future increases in gasoline prices. These actions do not relate directly to antitrust enforcement, but any policy that increases the supply of products at competitive prices may increase consumer welfare, as long as the costs of that policy decision do not outweigh the benefits.

A fresh examination of the costs and benefits of all forms of regulation – federal, state, and local – that impact the supply of gasoline may be warranted. Policies that influence demand also should be considered. A constructive debate among policymakers is what is needed, and the FTC stands ready to participate and add our expertise where appropriate.