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BEFORE THE UNITED STATES SENATE
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

STATEMENT OF
ROBERT MORGAN
ATTORNEY GENERAL OF NORTH CAROLINA

ON THE
COMPETITIVE ASPECTS OF THE ENERGY CRISIS

DATED: June 8, 1973.

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1 Mr. Chairman and distinguished committee members:

2 I am Robert Morgan, Attorney General of North Carolina, and
3 appear before you today in response to your invitation of June
4 4, 1973.

5 It is my intention to furnish you with certain facts as to
6 the impact the current energy shortage is having on the people
7 of my State, the business community and the costs of government
8 itself.

9 The facts which I report to you today have been developed by
10 my office over a period of four years of litigation in rate
11 hearings in North Carolina involving the increasing costs of
12 energy due principally to increases in the cost of coal, natural
13 gas, and residual fuel oil used to generate electricity.

14 Additionally, my office has been conducting an ongoing in-
15 vestigation into the marketing of gasoline for some eighteen
16 months, as well as the impact of merger activity. The gasoline
17 marketing inquiry is not concluded as yet, and will not be for
18 some time. This is because an antitrust trial against certain
19 broad spectrum antibiotic manufacturers is scheduled to commence
20 on July 30th. We are devoting full time to that right now.
21 Upon completion of that case we will return to the oil industry.

22 I will address myself to the points raised in your invitation
23 point by point.
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POINT I

AS TO THE ADEQUACY OF PERFORMANCE OF FEDERAL ENFORCEMENT AGENCIES AND REMEDIES PROPOSED BY THE EXECUTIVE BRANCH AND ENACTED BY CONGRESS.

The fact of the current crisis in the energy markets speaks more eloquently to this point than words can do.

Oil import quota restrictions could have been removed as early as 1969. It was then obvious to all familiar with the increasing demand on the available domestic supply of petroleum products that the United States could advantageously use more foreign crude oil to supply the nations needs.

A special Cabinet Task Force on Oil Import Control was commissioned by President Nixon to study the problem and make appropriate recommendations to the President on alternate solutions to the problem. The Task Force studied the matter and issued its reports to the President early in 1970. It is noteworthy that at that time the majority report specifically recommended removal of the quota restrictions on imports of foreign crude oil. When the recommendation was made, the cost of foreign crude was about \$2.00 per barrel delivered to the East coast. This was substantially below the cost of domestic crude oil. Of course, had foreign crude oil been available to refiners in 1970 at much lower costs per barrel, it was foreseeable that competition for this oil would have driven domestic crude oil prices down to a competitive level. But there would have

1 been an adequate supply available to satisfy national needs.
2 In fact, had imports been freely permitted at the cheaper price
3 in 1970, it is entirely possible, if not probable, that
4 domestic production would have been cut back.

5 If appropriate long-range planning had been implemented with
6 regard to U. S. resources and stockpiles, some designated domestic
7 crude oil resources could have been conserved as an emergency
8 reserve for possible future national security contingencies.

9 The current energy crisis is primarily a long-range planning
10 failure. The responsibility for that failure rests with the
11 Executive Branch of the Federal Government. The remedies for
12 the crisis have obviously become a responsibility of Congress.

13 The President, for reasons never made clear to me at least,
14 disregarded the 1970 recommendations of the Task Force.

15 Attorney General Mitchell gave the oil companies a letter
16 of immunity from prosecution under the antitrust laws for their
17 combined negotiations to produce and purchase crude oil from the
18 OPEC* nations for importation into and sale in the United States.
19 The result has been that the oil companies have become the tax
20 collectors for foreign governments. The taxes are levied upon
21 U. S. consumers.

22 In their negotiations with the OPEC countries the oil
23 companies, in effect, entered into joint ventures and profit

24 *Organization of Petroleum Exporting Countries, E.g. Libya,
Saudi Arabia, Iraq, Kuwait, Venezuela, etc.

1 sharing agreements with the OPEC countries. With increasing
2 demand for petroleum products in the United States and the
3 limited amount of foreign crude oil available to domestic re-
4 finers due to the import restriction, the price of foreign crude
5 oil climbed steeply. Domestic crude oil prices have also risen
6 sharply in recent years. The oil companies and foreign
7 governments have used the period between 1970 and the present
8 to eliminate the large price differential between domestic crude
9 oil and foreign crude oil landed in the United States.

10 It is significant that when the foreign prices of crude oil
11 had climbed to about the same as domestic prices, President
12 Nixon then eased restrictions on imports of foreign crude oil
13 and products. With the approximate doubling of price in a two
14 year period, and with the oil companies in effect having a
15 profit sharing agreement with the OPEC countries, you can readi-
16 ly understand the reason for the recent upsurge of profits of
17 the major oil companies.

18 For example, Exxon's first quarter 1973 profits are 43
19 percent higher than their profits in the first quarter of 1972.
20 I suspect the answer to this increase will, upon a thorough
21 investigation, be found to be attributable to the dealings
22 between the combined oil companies and the OPEC countries
23 during the period when the import restrictions were kept on
24 in 1973.

1 It may seem that North Carolinians are ganging up on
2 President Nixon and former Attorney General Mitchell, but never-
3 theless those are the facts.

4 The second part of Point I relates to the potential effect
5 of the Eagleton amendment to the Energy Bill and the President's
6 program of voluntary allocation of scarce oil supplies. I will
7 deal with this under a subsequent point.

8 POINT II

9 "DOES THE COMBINATION OF BEHAVIOR OR POTENTIAL EFFECT ON
10 COMPETITION, PRODUCT AVAILABILITY AND RETAIL PRICES INDICATE
11 THE PROBABLE OR POSSIBLE EXISTENCE OF AN ILLEGAL COMBINATION,
12 CONTRACT, CONSPIRACY OR CARTEL OPERATING TO BRING ABOUT THE
13 CURRENT CRISIS?"

14 I feel that it would be improper for a government prosecutor
15 to suggest that a citizen, either natural or corporate, may be
16 violating the law until that prosecutor has sufficient evidence
17 to convince him that either a criminal indictment should be
18 sought from the Grand Jury or that a civil action should be
19 brought by the State and that the government prosecutor has
20 satisfied himself from evidence that there is a strong possi-
21 bility or probability of success in the action.

22 I can only advise the committee that as of this time I do
23 not have sufficient evidence to warrant our going to the Grand
24 Jury, or to institute a civil action against the oil companies.

POINT III

"DO THE ADVERSE CONDITIONS IN THE MARKET PLACE WARRANT AN
IMMEDIATE, EXPEDITED, BUT COMPREHENSIVE INVESTIGATION BY THE

1 FEDERAL LAW ENFORCEMENT AGENCIES OF THE INTERNATIONAL ACTIVITIES
2 OF THE MAJOR INTEGRATED OIL COMPANIES DOING BUSINESS IN THE
3 UNITED STATES?"

4 Here the answer is unequivocally yes. It is my opinion
5 that this is the most urgent and compelling need facing this
6 nation today.

7 I would go even further. I say to you now that failure by
8 the Executive Branch and the Congress to act, and act now, will
9 cause the energy crisis to get far worse before it gets better.
10 The economic costs of failure to act will be borne by consumers,
11 businesses and governmental units alike.

12 POINT IV

13 "SHOULD SUCH A THOROUGH INVESTIGATION FAIL TO ADDUCE EVIDENCE
14 OF ILLEGAL ACTIVITIES, DO YOU FEEL THE SITUATION CALLS FOR NEW
15 FEDERAL OR STATE LEGISLATION WHICH WOULD PRESERVE COMPETITION
16 IN THE VARIOUS LEVELS OF PETROLEUM MARKETING?"

17 My answer is yes. I feel that the legislation should be
18 aimed at giving the Federal Trade Commission and the Federal
19 Courts greater discretion and direction to prevent the growth
20 of energy companies to the point that they become multi-fuel,
21 international cartels. In any case where such cartelization
22 is found to be realized or incipient, the Commission and the
23 Courts should be given the authority and direction to order
24 divestiture as a means to restore and maintain competition in
the finding, production, transportation, processing and
marketing of energy.

1 I am one of those who believe that the best regulation of
2 sellers flows from vigorous competitive activity among the
3 sellers for customers.

4 However, for competition to work as a regulating influence,
5 buyers must have meaningful alternatives in their purchasing
6 activities.

7 If it is true, as I believe it is, that the current oil
8 shortage in the United States is a result of the combined
9 collaboration of international oil companies with foreign
10 governments, then the existing antitrust laws as restrictively
11 interpreted by the Court and enforced by the Federal Government
12 have proven ineffective to maintain a truly competitive market
13 in which sellers market their products and services.

14 POINT V

15 STATE'S LEGISLATIVE AND INVESTIGATIVE EFFORTS TO DEAL WITH THE
16 CRISIS.

17 Our initial efforts were twofold.

18 First, we felt that the major buyers of fossil fuel energy
19 would be able to exert the most meaningful influence on the
20 sellers. The major purchasers of fossil fuels are, of course,
21 the electric utility companies. They were the first buyers to
22 feel the impact of scarcity in fossil fuels.

23 Liftoff, for the rising price of coal, occurred in 1969. . .
24 The reaction of the electric companies to these price increases
was to request rate increases for electricity. We intervened

1 in rate hearings and we believe successfully prevented the
2 electric companies from passing-on additional costs to the
3 electric user. We urged and pleaded with other states to do
4 likewise as we believed if all the states refused to permit
5 these major users of fossil fuel to pass on the increases in
6 costs, then the combined pressure of these buyers would force
7 the price of coal down.

8 However, most states merely permitted the utility companies
9 to add fuel cost adjustment clauses to their rate structure. The
10 result of these clauses was merely to pass on the cost of fossil
11 fuel to the electric user.

12 We defeated that approach in North Carolina and defeated
13 the efforts of the electric companies to prove those coal costs
14 were even reasonable. If North Carolina had, in 1969 and 1970,
15 followed the course of our sister states, the proven added costs
16 of higher fossil fuel prices in electric rates would have been
17 \$100,000,000.

18 As I said, we initially defeated those efforts while our
19 sister states did not. The result of our standing alone on this
20 was to drive our utility companies earnings down to near disaster.
21 Their earnings fell to the point where they were 98th and 99th
22 in the country of class A utilities. Their bond ratings fell,
23 and this occurred at a time when they needed additional capital
24 to build new plants.

1 Subsequent rate hearings were held and the increased costs
2 of fossil fuel was then passed on to the consumers. The added
3 annual costs in electric rates alone is \$140,000,000.

4 It is noteworthy that the costs of coal started increasing
5 in 1969 -- which just happened to coincide with the acquisitive
6 activities of the oil companies to purchase coal reserves and
7 coal companies as well as nuclear fuel reserves. They became
8 "total energy" companies.

9 Thus the pattern developed in the coal industry became
10 clear. A shortage occurred in a vital commodity, prices shot
11 up, the shortage was alleviated and prices leveled out at about
12 90 percent higher than 3 years earlier. There was, and is, no
13 alternative but to pay.

14 The impact of these increases does not stop with the
15 residential household. Manufacturers and other businesses are
16 tremendous users of electricity. As these added costs are
17 passed on to them, they must increase the prices they charge
18 for the goods manufactured and sold. This then reduces their
19 ability to compete effectively with foreign produced goods.
20 As more foreign goods come on the market, this adversely affects
21 our employment situation.

22 Now, that same pattern is recurring in the petroleum end
23 of the fossil fuels. Unforeseen shortage, emergency and crisis,
24 no alternatives to the buyers, and rapid escalation of prices.

1 You may be interested to know that using January 1, 1969
2 as the base point, the price of coal has risen more rapidly
3 than the price of beef. See Charts I and II.

4 Now it is predicted that the price of gasoline may reach
5 as high as 75¢ per gallon this year.

6 Gentlemen, we just simply cannot permit this to happen.

7 Our records show that over two billion five hundred million
8 gallons of fuel for over the road use were sold in North Caro-
9 lina alone last year. The latest sales figures indicated that
10 consumption rate will increase this year by some 8 percent.

11 The price of gasoline has already increased, in the last
12 6 months by more than 5¢ per gallon and the increase is now
13 reaching 10¢ per gallon.

14 At that rate of use, just adding 5¢ per gallon will drain
15 off from the general economy of our state an added \$125,000,000
16 in one year. If it increases 10¢ per gallon, that figure becomes
17 \$250 million dollars. If the prices were to double, as some
18 predict, this would place an additional strain of a billion
19 dollars a year on North Carolinians alone -- attributed only to
20 gasoline price increases.*

21 That means much of these added costs will be passed on in
22 the form of increased costs of goods manufactured, transported
23 and sold. Again, severely injuring our ability to compete with
24 foreign manufactured goods. We are a big textile state,

*Our State purchases over 15,000,000 gallons of gasoline annually and the cost has recently increased 7 1/4¢ per gallon or more than \$1,000,000. Local governments fear they may curtail police cruisers due to the gasoline crisis.

1 trucking state, and farming state. If our industrial base is
2 further eroded in its ability to compete, I hate to think of the
3 consequences to our labor market.

4 The second phase of our efforts was to look at the antitrust
5 implications. When we thought that a state could sue for injury
6 to its economy we felt that it was worthwhile to pursue an
7 investigation into the matter.

8 However, when the U. S. Supreme Court held in Hawaii vs.
9 Standard Oil of Calif., 405 U.S. 251 (1972) that a state could
10 not sue an antitrust violator for injury to its economy (the
11 parens patriae cause of action) we felt the expenditure of our
12 resources to pursue a major antitrust investigation was not
13 warranted when the only possible result would be some injunctive
14 order issuing from the court.

15 Because of the mere size of such an undertaking, a huge
16 lag occurs between the time an antitrust violation has its impact
17 and the time a plaintiff can prove the violation occurred. Thus,
18 where the only remedy available against a defendant is an in-
19 junction, this is no better than locking the barn door after
20 the horse has gotten out.

21 Class actions have proven too cumbersome as a device to
22 recover damages as part of meaningful antitrust enforcement.*

23 Thus we have been ground to a virtual halt in our efforts
24 by Federal Court decisions. The latest decisions on these points

*Boshes vs. General Motors Corp., _____ F. Supp. _____ (N.D.
Ill. 1973)

1 are Eisen vs. Carlisle & Jacquelin, ___ F. 2d ___ (2d Cir.
2 1973) and the Frito-Lay case, ___ F. 2d ___ (9th Cir. 1973).

3 I call your attention to the fact that the Courts are
4 specifically saying in these cases that if a monetary remedy
5 is to be enforced by the Courts against antitrust violators
6 whose impact hits the public generally, then Congress must
7 add new sections to the antitrust laws.

8 POINT VI

9 THE VARIOUS PROPOSED FEDERAL REMEDIES, BOTH VOLUNTARY AND
10 MANDATORY, TO ALLOCATE PETROLEUM PRODUCTS.

11 The answer here is short and to the point. The evidence
12 is clear and unequivocal that voluntary allocation is not
13 working and will not work.

14 Frankly, I can think of no good reason why it should. I
15 can think of no sound basis in law or morals to ask a business-
16 man to voluntarily take action which is injurious to himself
17 for the benefit of his principal competition.

18 I am reliably informed, I believe, that the independent
19 marketer of gasoline had, by February of this year, captured
20 38 percent of the total retail sales of gasoline to the
21 motoring public in North Carolina.

22 I believe that it is folly to ask an integrated supplier
23 of a product to voluntarily take a part of a scarce commodity
24 he produces, and to his own detriment, sell it to his competition.
If I were a lawyer for an integrated oil company, I personally

1 would advise them not to so sell.

2 Apparently that is exactly the advice they are receiving.
3 In North Carolina the independents have requested their suppliers
4 to allocate according to the voluntary allocation plan of the
5 President. Thus far, the suppliers have refused to do so.

6 As a consequence, the independents have sued their suppliers
7 in the Federal and State Courts. Through the imaginative decision
8 of U.S. District Court Judge Franklin Dupree in Raleigh, he
9 found that under the provisions of N.C. G.S. Sec. 25-2-615,*
10 the suppliers must allocate to their previous customers. He
11 set the case for trial on June 4, 1973. His decision was
12 quickly followed by a federal judge in Charlotte and a state
13 judge in Greensboro.

14 Thus, through these court actions under N.C. G.S. Sec.
15 25-2-615,*independents in North Carolina are receiving some
16 gasoline but under State law -- not Federal voluntary plans.

17 Not only are the suppliers not following the voluntary
18 plan, but, according to evidence produced at the hearings.
19 the majors are not allocating crude oil to their former customers
20 who are minor refineries.

21 Thus we see the phenomenon of idle refinery capacity, a
22 potentially ready supply of crude oil, and a shortage of
23 gasoline.

24

*North Carolina's Statutory Sections of the Uniform Commercial Code.

1 For the short run, the only answer is a mandatory alloca-
2 tion plan and its immediate implementation. In the oil industry
3 itself, such provisions have a long history as devices to more
4 equitably share the burden of adverse conditions. Examples
5 are production prorationing by the producing states and the
6 historical allotment component of import quotas. A temporary
7 mandatory allocation plan for the duration of the current crisis
8 would not be a violent departure from previous arrangements in
9 other segments of the oil industry.

10 POINTS VII AND VIII

11 OTHER ENERGY MATTERS INCLUDING OIL COMPANY OWNERSHIP OF COAL,
12 URANIUM, ATOMIC POWER AND NATURAL GAS, GIVING US YOUR VIEWS ON
13 THE CURRENT STRUCTURE AS IT MAY AFFECT THE CRISIS.

14 COMPETITIVE FACTORS INFLUENCING ENERGY REQUIREMENTS FOR (A)
15 UTILITIES, (B) HOME HEATING FUEL OIL AND NATURAL GAS, (C)
16 COMMERCIAL ACCOUNTS, AND (D) OTHERS.

17 These matters have been previously mentioned above and I
18 will not restate my views here, except to state that we should
19 not panic and jump headfirst into hasty actions. I certainly
20 do not have any confidence in the ability of a new regulatory
21 agency to regulate effectively the oil industry to the
22 consumers' benefit.

23 Restoration of a truly competitive market will work to both
24 the producers and the consumers benefit. I.e. increased
efficiency in production and distribution and lowered prices
to the consumer.

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POINT IX

SPECIFIC PROPOSALS THAT CAN BE ADOPTED AT STATE AND FEDERAL LEVELS INCLUDING BOTH SHORT AND LONG-RANGE REMEDIES.

We considered at the close of our State's legislative period this year, legislation which would require all producers to sell to all buyers. This would be a radical remedial statute which would overturn the rule in the case of U.S. vs. Colgate & Co, 250 U.S. 300 (1919), in which the court held a supplier has an unqualified right to refuse to deal with a customer.

Before pushing for this remedy at the state level however, I desired to have it fully studied by our economists to make sure we are not engaging in overkill. But in the short run, I believe it would open the energy market to all customers.

For the long run, I believe you should add a new section to the Clayton Act to give the states a right to sue in their capacity as parens patriae, for treble damages for injury to the economy of the states. If the Clayton Act were also modified so that the states could sue as parens patriae for the collective injuries to the states' consumers, then the efficacy of the private enforcement part of the scheme envisaged by the framers of the antitrust laws will become a practical and workable reality.

