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Price Increases in the Aftermath of Hurricane Katrina: Authority to Limit “Price Gouging”

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Summary

This report addresses the authority of state and federal governments to control price gouging in the aftermath of Hurricane Katrina. Specifically, questions have arisen regarding increased prices in the areas affected by Hurricane Katrina and the effect that the damage caused by the hurricane will have on prices, specifically gasoline prices, in other parts of the country. State laws regarding price gouging in the event of an emergency are discussed, as well as the role the federal government could play in addressing rising gas prices in other parts of the country. This report will be updated as events warrant.

Introduction

There are no federal laws that specifically address price gouging. Price gouging laws exist at the state level and are generally applicable in situations arising from a declared emergency.¹ An increase in prices alone does not necessarily constitute price gouging, and technically, price gouging only occurs when the trigger event has been met in a particular state. If there exists evidence of collusive activity among retailers, suppliers, or manufacturers, federal antitrust laws could be applicable.² The Federal Trade Commission (FTC) monitors gas prices and investigates possible antitrust violations in

¹ At least 28 states — Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia — the District of Columbia, Guam, and the Northern Mariana Islands have laws that prohibit price gouging, excessive price increases, or unconscionable pricing. Most states have laws that are triggered in the event of a declared emergency, with a few having laws that may be applicable at other times as well. Other states may also exercise authority under general deceptive trade practice laws depending on the nature of the state law and the specific circumstances under which price increases occur.

² For more information on the applicability of the federal antitrust laws, see CRS Report RS22262, “Price Gouging,” *the Antitrust Laws, and Vertical Integration: How They Are Related*.

the petroleum industry.³ Additionally, the Energy Policy Act of 2005 requires the FTC to investigate whether the price of gasoline is being “artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices.”⁴ Currently, there is no reported evidence of collusive activity leading to an increase in retail gas prices.

Price Gouging in Affected Areas

While there is no federal price gouging law, many states have enacted some type of prohibition or limitation on price increases during declared emergencies.⁵ All of the affected states — Louisiana, Mississippi, Alabama, and Florida — have price gouging laws that are triggered by the declaration of an emergency in the state.⁶ Generally, the laws prohibit the sale of goods and services in the designated emergency area at prices that exceed the prices ordinarily charged for comparable goods or services in the same market area at or immediately before the declaration of an emergency.⁷ However, there exists a general exemption for increased prices that are the result of additional costs incurred for procuring the goods or services in question, or “national or international market trends.”⁸

The Florida statute is the most detailed of the four. It establishes a *prima facie* case of unconscionable pricing, if:

- 1) The amount charged represents a gross disparity between the price of the commodity or rental or lease of any dwelling unit or self-storage facility that is the subject of the offer or transaction and the average price at which that commodity or dwelling unit or self-storage facility was rented, leased, sold, or offered for rent or sale in the usual course of business during the 30 days immediately prior to a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of any dwelling unit or self-storage facility, or national or international market trends; or
- 2) The amount charged grossly exceeds the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of

³ For more information on the Federal Trade Commission’s activities with respect to gas pricing, see [<http://www.ftc.gov/ftc/oilgas/index.html>].

⁴ P.L. 109-58 § 1809, 119 Stat. 594, 1125 (Aug. 8, 2005).

⁵ The Federal Emergency Management Administration has declared emergencies in all four states affected by Hurricane Katrina. *See* [<http://www.fema.gov/news/disasters.fema>]. States of emergency have also been declared by the Governors of Alabama, Florida, Louisiana, and Mississippi.

⁶ Code of Ala. § 8-31-3; Fla. Stat. § 501.160; La. R.S. 29:732; Miss. Code Ann. § 75-24-25.

⁷ *See* Miss. Code Ann. § 75-24-25(2). The Alabama statute prohibits “unconscionable prices” during the period of a declared state of emergency, but does not define “unconscionable.” Code of Ala. § 8-31-3.

⁸ *See* Fla. Stat. § 501.160.

the commodity or rental or lease of any dwelling unit or self-storage facility, or national or international market trends.⁹

Commodity is broadly defined to include “any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce,” and specifically includes, “without limitation, food, water, ice, chemicals, petroleum products, and lumber necessary for consumption or use as a direct result of the emergency.”¹⁰

In Alabama, prima facie evidence of unconscionable pricing exists “if any person, during a state of emergency declared pursuant to the powers granted to the Governor, charges a price that exceeds, by an amount equal to or in excess of 25% the average price at which the same or similar commodity or rental facility was obtainable in the affected area during the last 30 days immediately prior to the declared state of emergency,” but, like Florida, price gouging does not exist where the price increase is attributable to reasonable costs incurred by the seller in connection with the rental or sale of the commodity.¹¹

The Mississippi and Louisiana statutes define price gouging more generally and do not provide any specific activities which could give rise to prima facie evidence of price gouging. Each of these statutes prohibits the selling of goods and services at prices which exceed “the prices ordinarily charged for comparable goods and services in the same market area at, or immediately before, the time of the [declaration of the] state of emergency.”¹² Under each statute, price gouging does not include price increases due to additional costs or expenses incurred as a result of the emergency.¹³

General Price Increases in Other Areas

Typically, many state price gouging laws are triggered only when there has been a declaration of emergency in the state. The laws, therefore, are only applicable in areas affected by the declared emergency. Thus, in other parts of the country, not directly affected by Hurricane Katrina, state price gouging laws, where they exist, are not likely to be generally applicable to any price increases occurring subsequent to the hurricane. While price increases may not fall within the definition of price gouging, if the raising of prices by retailers, suppliers, or manufacturers is the result of collusive activity, the federal antitrust laws could be applicable.¹⁴

Under special circumstances and depending on the scope of the statute in question, state price gouging laws could be triggered by the declaration of an emergency not specifically related to a natural disaster occurring in the state. For example, Georgia’s

⁹ Fla. Stat. § 501.160(1)(b).

¹⁰ Id. at § 501.160(1)(a).

¹¹ Code of Ala. § 8-31-4.

¹² La. R.S. 29:732; Miss. Code Ann. § 75-24-25(2).

¹³ Id.

¹⁴ For an overview of federal antitrust law, see CRS Report RL31026, *General Overview of United States Antitrust Law*.

price gouging statute can be triggered by the declaration of an “energy emergency,” which is defined as “a condition of danger to the health, safety, welfare, or economic well-being of the citizens of this state arising out of a present or threatened shortage of usable energy resources.”¹⁵ The Governor of Georgia declared such an emergency on August 31, 2005, triggering the state’s price gouging statute.¹⁶

At least two states have laws that do not require the declaration of any type of emergency as a “trigger” for the laws to become effective. A Maine law prohibits “unjust or unreasonable” profits in the sale, exchange or handling of necessities, defined to include fuel.¹⁷ Michigan’s consumer protection act generally prohibits “charging the consumer a price that is grossly in excess of the price at which similar property or services are sold.”¹⁸

Increases in Gas Prices

There are no federal price controls for petroleum products that would be applicable nationwide. However, such controls are not unprecedented. A variety of authorities have, from time to time, authorized executive branch implementation of price controls for crude oil and refined petroleum. Under the Economic Stabilization Act of 1970,¹⁹ for instance, the President was authorized to control the price of commodities, including crude oil and refined petroleum.²⁰ President Nixon exercised this authority in 1971; it expired in 1974.²¹

Similar authority was contained in the Emergency Petroleum Allocation Act of 1973 (EPAA),²² which directed the President to establish temporary measures “to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system” and to “minimiz[e] the adverse impacts of such shortages or dislocations on the American people and the domestic economy.”²³ To meet these objectives, the Act granted the President broad authority to allocate oil and to specify its price.²⁴ A comprehensive program was established in 1974, including standby regulations for use during emergencies, which included price controls and allocation measures.²⁵ The President was also empowered to take a variety of other actions to affect

¹⁵ O.C.G.A. § 10-1-393.4; O.C.G.A. § 38-3-3.

¹⁶ See [http://www.gov.state.ga.us/ExOrders/08_31_05_01.pdf].

¹⁷ 10 M.R.S.A. § 1105.

¹⁸ MCL 445.903(1)(z).

¹⁹ P.L. 91-379, §§201-06, 84 Stat. 796, 799-800 (1970).

²⁰ 12 U.S.C. § 1904, note (1976).

²¹ Exec. Order No. 11615, 36 Fed. Reg. 15727 (Aug. 17, 1971).

²² P.L. 93-159, 87 Stat. 627, 693-702 (codified at 15 U.S.C. §§ 751-760).

²³ 15 U.S.C. § 751(b).

²⁴ *Id.* § 753(a).

²⁵ 39 Fed. Reg. 1924 (Jan. 15, 1974); 44 Fed. Reg. 3928 (Jan. 18, 1979); 45 Fed. Reg. 55374 (continued...)

petroleum product prices, such as ordering refineries to modify their output and to control the accumulation of petroleum by importers, producers, refiners, marketers or distributors.²⁶ These regulations were slowly phased out over successive Administrations and eventually terminated by President Reagan in 1981;²⁷ the law itself expired on September 30, 1981.²⁸

The federal government may be able to add crude oil supply to markets through use of the Strategic Petroleum Reserve (SPR). The SPR was created by the Energy Policy and Conservation Act,²⁹ enacted in 1975, which authorizes the stockpiling of petroleum products and the drawdown and distribution of SPR oil by the Secretary of Energy pursuant to Department of Energy (DOE) regulations.³⁰

The law also authorizes drawdown and sale of petroleum products contained within the SPR; however, before that can occur, the President must find that such actions are “required by a severe energy supply interruption” or by international obligations.³¹ The law requires the Secretary to sell SPR products at “public sale to the highest qualified bidder ... without regard to Federal, State, or local regulations controlling sales of petroleum products.”³² DOE regulations indicate that contracts for sale of SPR petroleum are to be awarded to “responsive, responsible persons offering the highest prices ...[through] sales conducted pursuant to [DOE] rules”³³ Sale prices are to be certified by the offeror that they

have been arrived at independently, without, for the purposes of restricting competition, any consultation, communication, or agreement with any other offeror or competitor to: (i) those prices; (ii) the intention to submit an offer; or (iii) the methods or factors used to calculate the prices offered.³⁴

This and other provisions indicate that sales of SPR petroleum should generally result in a return to the government of market-priced petroleum. Thus, any effect on

²⁵ (...continued)
(Aug. 19, 1980).

²⁶ See 15 U.S.C. §§ 760b-760e.

²⁷ See, e.g., 15 Weekly Comp. of Pres. Doc. 609 (Apr. 1979); Exec. Ord. No. 12287, “Decontrol of Crude Oil and Refined Petroleum Products,” 46 Fed. Reg. 9909 (Jan. 30, 1981). The price controls in the petroleum markets were generally considered by economists to be inefficient and the cause of additional problems.

²⁸ 15 U.S.C. § 760g.

²⁹ P.L. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. §§ 6231-6247).

³⁰ 42 U.S.C. §§ 6234, 6241.

³¹ Id. § 6241(d)(1), (h). The President made this finding on September 2, 2005. See Memorandum for the Secretary of Energy and Secretary of Homeland Security (Sept. 2, 2005), available at [<http://www.whitehouse.gov/news/releases/2005/09/20050902-10.html>].

³² Id. § 6241(e).

³³ 10 C.F.R. § 625.2.

³⁴ 10 C.F.R. Pt. 625, App. A, § B.3.

gasoline prices resulting from SPR petroleum sales would seem more likely to be caused by increased supply or the perception of increased supply.

There is a second authority for limited use of the SPR to address any disruption in crude supply that is internal to the United States. Under this provision, a drawdown may be initiated in a situation that “constitutes, or is likely to become, a domestic or international energy supply shortage of significant scope or duration” and where “action taken ... would assist directly and significantly in preventing or reducing the adverse impact of such shortage.”³⁵ This authority allows for a limited use of the SPR. No more than 30 million barrels may be sold over a maximum period of 60 days, and this limited authority may not be exercised at all if the level of the SPR is below 500 million barrels.³⁶ This authority was invoked on September 2, 2005.³⁷ In coordination with the International Energy Agency (IEA), the President authorized a drawdown of 30 million barrels of SPR oil to be offered for bid. Member nations of the IEA will release 60 million barrels of European and Asian strategic stocks of crude and refined products at the rate of 2 million barrels daily. The SPR drawdown represents half of the IEA stock drawdown.

A few days earlier, on August 31, Secretary of Energy Bodman indicated that the Bush Administration was authorizing releases of SPR crude oil. Requests for loans totaling roughly 12.6 million barrels have been approved to operating refineries whose crude supply has been interrupted by the hurricane. As payment for the SPR petroleum, the recipient is required to provide a somewhat larger amount of oil to the SPR when oil prices have fallen.³⁸ This process does not appear to be expressly provided for in the applicable statutes and regulations; however, authority may be inferred from the Secretary’s SPR development and operations powers, which include authority to “acquire ... by purchase, exchange, or otherwise, petroleum products for storage in the Strategic Petroleum Reserve ... [and to] execute any contract necessary to develop, operate, or maintain ... [the SPR].”³⁹

³⁵ 42 U.S.C. § 4261(h)(1).

³⁶ *Id.* § 4261(h)(2).

³⁷ DOE Press Release, President Bush Directs Energy Secretary to Draw Down Strategic Petroleum Reserve (Sept. 3, 2005), *available at* [http://www.fe.doe.gov/news/techlines/2005/tl_spr_drawdown.html].

³⁸ For a description of this process, see CRS Issue Brief IB87050, *Strategic Petroleum Reserve*, by Robert Bamberger.

³⁹ 42 U.S.C. §§ 6239; 6240.