

Regular Session, 2009

SENATE BILL NO. 272

BY SENATOR HEITMEIER

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

EMERGENCY PREPAREDNESS. Prohibits certain practices regarding fuel during a declared state of emergency. (8/15/09)

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AN ACT

To amend and reenact R.S. 14:329.6(A)(9) and R.S. 29:734 and to enact R. S. 29:732.1 and R.S. 51:422.1(C)(5), relative to fuel; to prohibit excessive fuel pricing during a declared state of emergency; to allow sales below costs during such time; to provide for definitions; to provide for civil and criminal penalties; to provide for exceptions; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 14:329.6(A)(9) is hereby amended and reenacted to read as follows:

§329.6. Proclamation of state of emergency; conditions therefor; effect thereof

A. During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any municipality or parish, or in the event of reasonable apprehension of immediate danger thereof, and upon a finding that the public safety is imperiled thereby, the chief executive officer of any political subdivision or the district judge, district attorney, or the sheriff of any parish of this state, or the public safety director of a municipality, may request the governor to proclaim a state of emergency within any part or all of the territorial limits of such local government. Following such proclamation by the governor, and during the

1 continuation of such state of emergency, the chief law enforcement officer of the
2 political subdivision affected by the proclamation may, in order to protect life and
3 property and to bring the emergency situation under control, promulgate orders
4 affecting any part or all of the territorial limits of the municipality or parish:

5 * * *

6 (9)(a) Prohibiting the sale or offer for sale of goods or services within the
7 designated emergency area for value exceeding the prices ordinarily charged for
8 comparable goods and services in the same market area at, or immediately before,
9 the time of the state of emergency. However, the value received may include
10 reasonable expenses and a charge for any attendant business risk in addition to the
11 cost of the goods and services which necessarily are incurred in procuring the goods
12 and services during the state of emergency, pursuant to the provisions of R.S. 29:701
13 through 716.

14 **(b) Prohibiting the sale or offer for sale of fuel, as defined in R.S.**
15 **29:732.1(A)(2)(b), within the designated emergency area for a value exceeding**
16 **by ten percent or more the average price at which the same or similar fuel was**
17 **obtainable in the area during the last thirty days immediately preceding the**
18 **state of emergency. However, the value received may equal or exceed ten**
19 **percent of such average price if the seller can prove that the additional amount**
20 **is equivalent or less than the increased costs of supplies plus the seller's average**
21 **markup for the same or similar product for sale to similar buyers during the**
22 **last thirty days immediately preceding the state of emergency, pursuant to the**
23 **provision of R.S. 29:701 through 716.**

24 * * *

25 Section 2. R.S. 29:734 is hereby amended and reenacted and R.S. 29:732.1 is hereby
26 enacted to read as follows:

27 **§732.1 Price gouging on fuel prohibited**

28 **A. (1) Upon the initial proclamation of a state of emergency declared by**
29 **the governor or by the parish president due to a named tropical storm or**

1 hurricane, it shall be unlawful for any person within the designated emergency
2 area to sell fuel for an excessive price or to demand an excessive price for fuel.
3 Such prohibition shall extend for twenty calendar days or until the end of the
4 state of emergency, whichever occurs sooner.

5 (2) For purposes of this Section, the following terms shall have the
6 following meaning:

7 (a) "Excessive price" means a price greatly exceeding the price for the
8 same or similar fuel prior to the state of emergency.

9 (b) "Fuel" means gasoline of any type sold at wholesale or retail for use
10 in the operation of motor vehicles, generators, power tools and small engines.

11 (c) "Person" means a natural person, corporation, trust, partnership,
12 incorporated or unincorporated association, or any other nongovernmental
13 legal entity.

14 B. Each sale or offer for sale in violation of this Section constitutes a
15 separate offense.

16 C. If it is determined that fuel inventory was deliberately withheld or
17 production of fuel was deliberately reduced by a producer, refiner, or retailer
18 so as to increase a supply shortage, it shall be considered an aggravating factor
19 and there may be an additional fine on the violator of up to ten thousand
20 dollars.

21 D. Nothing in this Section shall be construed so as to create a private
22 cause of action in favor of any person damaged by a violation of this Section.

23 * * *

24 §734. Violations; judicial relief; prima facie proof

25 A. Upon a violation of R.S. 29:732 ~~or 732.1~~, the attorney general, district
26 attorney, or parish attorney may bring the appropriate judicial action for an order
27 enjoining or restraining commission or continuance of the alleged unlawful acts. In
28 the event, the district court of proper venue is not operational due to the declared
29 state of emergency, the action shall be brought in the Nineteenth Judicial District

1 Court in the parish of East Baton Rouge or the operating judicial district court
2 located closest in geographic distance thereto. In any such proceeding, the court may
3 impose a civil penalty and, where appropriate, order restitution to aggrieved
4 consumers.

5 B. **(1)** In any proceeding instituted pursuant to this Section **for a violation of**
6 **R.S. 29:732**, the following shall constitute prima facie proof of a violation:

7 ~~(1)~~ **(a)** Evidence that the amount charged represents a gross disparity
8 between the price of the goods or services which were the subject of the transaction
9 and their value, measured by the price at which such goods or services were sold or
10 offered for sale by the merchant in the usual course of business immediately prior
11 to the onset of the abnormal disruption of the market, and the amount charged by the
12 merchant was not attributable to additional costs imposed by its suppliers.

13 ~~(2)~~ **(b)** Evidence that the amount charged grossly exceeded the price at which
14 the same or similar goods or services were readily obtainable by other consumers in
15 the trade area and the amount charged by the merchant was not attributable to
16 additional costs imposed by its suppliers.

17 **(2)(i) In any proceeding instituted pursuant to this Section for a**
18 **violation of R.S. 29:732.1, evidence that the amount charged or demanded**
19 **exceeds by an amount equal to or in excess of ten percent of the average price**
20 **at which the same or similar fuel was obtainable in the affected area during the**
21 **last thirty days immediately preceding the declared state of emergency shall**
22 **constitute prima facie proof of a violation.**

23 **(ii) For instances where it is alleged that the excessive price for fuel is**
24 **attributable to additional costs imposed by the supplier, the prima facie proof**
25 **may be overcome by the seller producing reliable evidence that the additional**
26 **amount charged or demanded for fuel is equivalent or less than the additional**
27 **costs of supplies plus the seller's average markup for the same or similar**
28 **product for sale to similar buyers during the last thirty days immediately**
29 **preceding the declared state of emergency.**

1 C. In addition to the civil penalties provided herein, any person who violates
2 the provisions of R.S. 29:732 **and 732.1**, which violation is deemed a violation also
3 of R.S. 14:329.6, shall be subject to criminal penalties as provided in R.S. 14:329.7.

4 Section 3. R.S. 51:422.1(C)(5) is hereby enacted to read as follows:

5 §422.1. Unfair sales of motor fuel; impairment of competition; exemptions; records
6 to support exemptions

7 * * *

8 C. The provisions of Subsection B shall not apply in any of the following
9 situations:

10 * * *

11 **(5) When motor fuel is sold, both:**

12 **(a) During the time period of the first twenty calendar days of an initial**
13 **proclamation of a state or local state of emergency due to a named tropical**
14 **storm or hurricane or until the end of the state of emergency, whichever occurs**
15 **sooner.**

16 **(b) At a location within the geographic area designated by the**
17 **proclamation as within the emergency area.**

18 * * *

The original instrument and the following digest, which constitutes no part
of the legislative instrument, were prepared by Dawn Romero Watson.

DIGEST

Present law (R.S. 29:732, Price Gouging Statute) provides that during a state of emergency, or during a named tropical storm or hurricane in or threatening the Gulf of Mexico, the price charged or value received for goods and services sold within the designated emergency area may not exceed the prices ordinarily charged for comparable goods and services in the same market area at or immediately before the time of the state of emergency. Provides an exception in instances when the price by the seller is attributable to fluctuations in applicable commodity markets, fluctuations in applicable regional or national market trends, or to reasonable expense and charges for attendant business risk incurred in procuring or selling the goods or services during the state of emergency.

Proposed law retains present law and adds special provisions of law regarding fuel. Provides that upon the initial proclamation of a state of emergency due to a named tropical storm or hurricane, it shall be unlawful for any person within the designated emergency area to sell or demand an excessive price for fuel. Provides that the prohibition shall extend for 20 calendar days or until the end of the state of emergency, whichever occurs sooner.

Proposed law defines "excessive price" as a price greatly exceeding the price for the same or similar fuel prior to the state of emergency. Defines "fuel" as gasoline of any type sold at wholesale or retail for use in the operation of motor vehicles, generators, power tools and small engines. Defines "person" as a natural person, corporation, trust, partnership, incorporated or unincorporated association or any other nongovernmental entity.

Proposed law provides that each sale or offer for sale in violation of proposed law shall constitute a separate offense.

Proposed law provides that evidence that the amount charged or demanded exceeds by 10% or more the average price at which the same or similar fuel was obtainable in the affected area during the 30 days immediately preceding the declared state of emergency shall constitute prima facie proof of an excessive price in violation of proposed law.

Proposed law provides that in instances where it is alleged that the excessive price for fuel is attributable to additional costs imposed by the supplier, the prima facie proof may be overcome by the seller producing reliable evidence that the additional amount charged or demanded for fuel is equivalent or less than the additional costs of supplies plus the seller's average markup for the same or similar product for sale to similar buyers during the 30 days immediately preceding the declared state of emergency.

Present law (R.S. 29:734) authorizes the attorney general, district attorney, or parish attorney to bring an action for a violation of the price gouging statute enjoining the unlawful act and the court may impose a civil penalty and, where appropriate, order restitution to aggrieved customers.

Proposed law retains present law and adds to such enforcement authority for violations of proposed law.

Present law (R.S. 14:329.6 and 329.7) also provides that a violation of present law is a criminal act and provides criminal penalties. Provides that during a declared emergency, the chief law enforcement officer may promulgate orders prohibiting the sale of goods or services within the designated emergency area in violation of the Price Gouging Statute. Provides that such orders shall be in effect for five days or until state of emergency no longer exists, whichever occurs sooner. Allows such order to be extended for successive periods of five days with the consent of the governor. Provides that penalties for a violation shall be a fine of not more than \$500 or imprisonment of not more than six months, or both. Provides that if there is a willful violation that causes serious bodily injury or property damage in excess of \$5000, the offender shall be imprisoned at hard labor for not more than five years. Provides that if there is a willful violation that causes a death of a person, the offender shall be imprisoned at hard labor for not more than 20 years.

Proposed law retains present law and adds a violation of proposed law as a criminal act and subject to present law criminal penalties.

Proposed law provides that if it is determined that fuel inventory was deliberately withheld or production of fuel was deliberately reduced by a producer, refiner, or retailer so as to increase a supply shortage, it may be considered an aggravating factor and subject the producer, refiner or retailer to an additional fine of up to \$10,000.

Proposed law provides that proposed law shall not be construed so as to create a private cause of action in favor of any person damaged by a violation of proposed law.

Present law (R.S. 51:422.1, Unfair Sales Law) provides that it shall be an unfair trade practice and unlawful for any person who is a retailer to sell, at retail, motor fuel (defined as gasoline and diesel fuel) at a price which is below the retailer's cost plus taxes, applicable fees, and transportation charges when the intent or effect is to impair or injure competition. Present law provides several exceptions when such prohibitions shall not apply.

Proposed law adds an exception for motor fuel sold during at state of emergency within the designated geographic emergency area thereby authorizing the sale of motor fuel below costs during such time periods in such areas.

Effective August 15, 2009.

(Amends R.S. 14:329.6(A)(9) and R.S. 29:734; adds R.S. 29:732.1 and R.S. 51:422.1(C)(5))