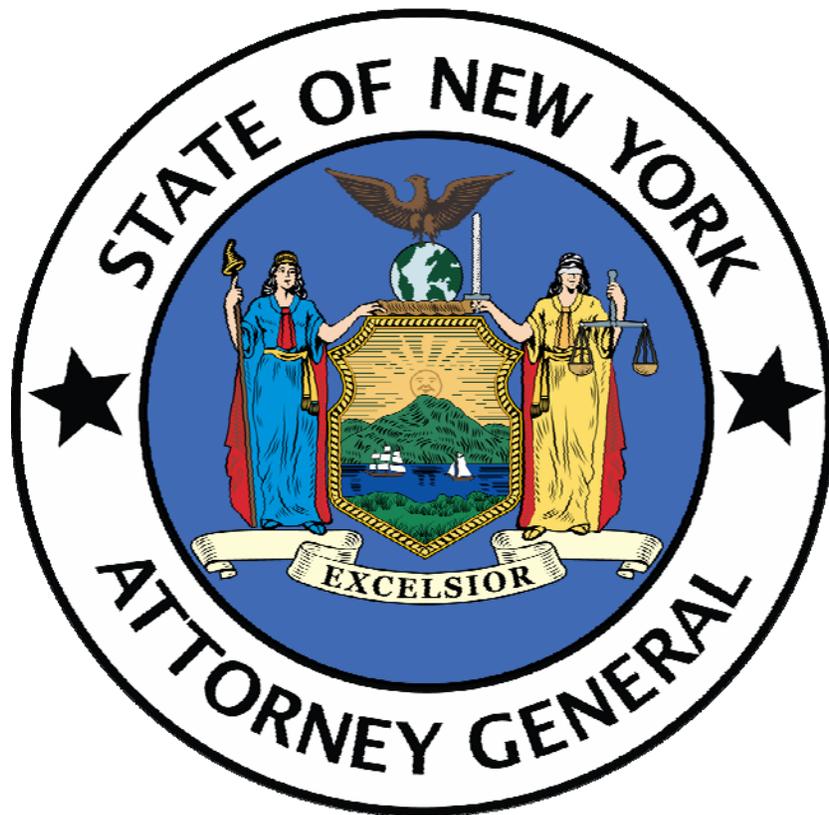


REPORT ON NEW YORK GASOLINE PRICES



ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL
December 2011

EXECUTIVE SUMMARY

The New York Attorney General's Office has a longstanding record of enforcing the state's price gouging law when merchants charge unconscionably excessive prices during abnormal disruptions of the market caused by storms and other emergencies. Price gouging is prohibited in New York pursuant to General Business Law § 396-r.

Consistent with that record, and in recognition of the importance of gasoline prices to New York consumers, Attorney General Eric T. Schneiderman has made a high priority of protecting consumers against gasoline price gouging during abnormal disruptions of the market that occurred in 2011.

To that end, the Attorney General looked closely into possible price gouging by retail gas stations during the first part of the year, when gas prices skyrocketed as unrest spread through the Middle East. The results showed that the threatened disruption of the world oil market did not lead to price gouging in New York.

The Attorney General is also investigating gas price increases during Tropical Storm Irene and other major storms that struck New York later in the year, and has already taken enforcement action against two gas stations that were found to be charging "unconscionably excessive" prices.

As part of his review of gasoline prices, the Attorney General also examined statewide pricing data to determine the extent to which increases in retail gasoline prices reflected (i) increases in the price of crude oil, and (ii) increases in the price of gasoline sold on the wholesale market at terminals throughout the state.

Finally, the Attorney General examined whether gasoline wholesalers were engaged in "zone pricing" of gasoline, or the setting of different wholesale prices in different geographic areas. Zone pricing is prohibited by General Business Law § 399-ee.

Pricing Gouging

The price of gasoline in New York rose dramatically in the first half of 2011, as turmoil in the Middle East threatened to disrupt the world market for crude oil. Between February 1 and April 1, 2011, the average price of unleaded regular gasoline in New York rose from \$3.37 to \$3.81 per gallon, with prices varying regionally. The average price of unleaded regular gasoline broke the \$4 mark in mid-April and peaked on May 9 at \$4.18 per gallon. Many consumers complained to the Attorney General's Office about rapidly rising and variable gasoline pricing.

In March 2011, in response to consumer complaints and in an effort to understand why prices rose so rapidly, the Attorney General launched a comprehensive review of New York gasoline prices. The goal was to determine whether gas prices accurately reflected market conditions, or if there were unjustifiable price increases. By publicly announcing the commencement of the inquiry, the Attorney General also sought to temper market

volatility by deterring the gasoline industry from engaging in price gouging and profiteering. The Attorney General cautioned that there may not be wrongdoing behind the price spikes, but vowed to thoroughly review and investigate the matter.

The Attorney General obtained detailed wholesale and retail pricing information from eighty nine (89) gas stations across the state. For the period from February 1 to April 1, 2011, the stations provided the daily prices they paid for gasoline on the wholesale market, and the prices they charged consumers at the pump. Analyzing this data enabled the Attorney General to determine whether the gas stations engaged in price gouging by charging "unconscionably excessive prices," or whether the stations were merely passing along increased wholesale costs.

The results clearly demonstrated that, although gasoline prices rose dramatically during this period of time, retail gas stations did not significantly increase their markup - - the spread between the wholesale price and the retail price - - as prices were rising. To the contrary, retailer markups were generally consistent throughout the period. As the stations paid increasingly higher wholesale prices for gasoline, they passed those increased costs along to consumers. Thus, it was apparent that price gouging by gas stations was not behind the price spikes.

In late August, the Attorney General, mindful of the fact that price gouging has occurred following catastrophic weather-related events such as ice storms, wind storms and hurricanes, issued a stern warning to vendors as the Tropical Storm Irene was bearing down on New York. Vendors were warned against charging unconscionably excessive prices for essential items such as gasoline, food, water, generators, batteries and flashlights. Warnings such as this provide a strong deterrent against price gouging, as businesses must weigh the economic benefit of increasing prices during an emergency against the risk of being charged with price gouging, incurring substantial fines, and suffering a loss of good will with their customers.

As is turned out, some gouging did occur during Irene, and the Attorney General is looking closely at pricing data. The Attorney General has already taken enforcement action against two gas stations that were found to be charging "unconscionably excessive" prices.

The Attorney General's investigation of price gouging by gasoline retailers and other types of businesses during Irene - - and other major storms that hit New York this year - - is ongoing.

Crude Oil Prices Drive Gasoline Prices

If price gouging wasn't behind the rise in gasoline prices in the first half of the year, what was the cause? Analysis showed that gasoline price fluctuations were primarily driven by changes in the price of crude oil, not actions taken by gasoline retailers. The rise in New York retail gasoline prices in early 2011, as well as from July to August 2011, coincided with sharp increases in the price of crude oil, and corresponding increases in the price of

gasoline sold on the wholesale market at terminals throughout the state. Similarly, when crude oil and terminal prices fell, prices at the pump fell as well - - although not as fast. This phenomenon is known as "rockets and feathers" because prices are said to go up like a rocket but fall like a feather.

Zone Pricing

The Attorney General found evidence that some wholesalers continue to charge different prices to different retail gas stations, even after the enactment of New York's ban on zone pricing. This practice was most apparent in the case of one wholesaler that acknowledged dividing its retail service station customers into "pricing zones" consisting of between one and five stations each. Between February 1 and June 1, 2011, prices charged on the same date to stations in different zones ranged by as much as 25 cents per gallon. Zones with higher wholesale prices had correspondingly higher pump prices, as dealers passed along the higher wholesale prices to consumers.

New York's zone pricing ban was enacted in 2008. However, the statute contains several key weaknesses. For example, the statute prohibits wholesalers from charging different prices within the "relevant geographic market," but does not provide a meaningful definition of the "relevant geographic market." The definition of "zone pricing" could be made clearer. And because the statute prohibits "arbitrary" price differences, wholesalers can argue that their price differences are not "arbitrary" as prohibited by law, but instead are based on business-related factors such as differing marketing conditions, costs of operation and degree of competition.

For these reasons, among others, no enforcement actions have been brought pursuant to the zone pricing law since it was enacted in 2008, and it is uncertain what effect, if any, the law has had on wholesaler pricing policies - - or pump prices - - across the state.

Ultimately, for New York to have an effective zone pricing law, the statute must be amended by the state Legislature. Key terms such as "relevant geographic market" and "zone pricing" must be clearly defined, and the definition of zone pricing must take into account the varying costs a wholesaler may incur in delivering gasoline to different locations.

In addition, if the law is to truly prohibit wholesalers from setting different prices in different geographic areas, the word "arbitrary" must be deleted from the definition of zone pricing. Otherwise, wholesalers will still be able to set different prices, but evade enforcement, by claiming that their price differences are based on non-arbitrary, business-related market factors.

Conclusion

The Attorney General is committed to protecting consumers against gasoline price gouging, and will continue to monitor gasoline prices in New York. Prices will be closely scrutinized during abnormal disruptions of the market, especially catastrophic weather-related events. If price gouging occurs, the Attorney General will take action to penalize violators and continue to send a strong signal that price gouging is illegal in New York and will not be tolerated.

Price Gouging

The price of crude oil rose dramatically in the first part of 2011, largely due to fears that the popular uprisings in Tunisia, Egypt and Libya, and the sharp drop-off in Libyan oil production,¹ would spread throughout the Middle East and disrupt the global market for oil. Between February 4 and April 15, 2011, the price per barrel of crude oil in the United States rose from \$90.64 to \$115.07.²

New Yorkers felt the increase in crude oil prices at the pump. Between February 1 and April 1, 2011, the average price of unleaded regular gasoline in New York State rose from \$3.37 to \$3.81 per gallon, with prices varying regionally.³ The average price of unleaded regular gasoline broke the \$4 mark in mid-April and peaked on May 9 at \$4.18 per gallon.⁴ As a result, many consumers complained to the Attorney General's Office about rapidly rising and variable gasoline pricing.

In response to consumer complaints and in an effort to understand why gasoline prices rose so rapidly, the Attorney General launched a comprehensive review of New York gasoline prices. The goal was to determine whether gas prices accurately reflected market conditions or if there were unjustified price increases. By publicly announcing the commencement of the inquiry, the Attorney General also sought to temper market volatility by deterring the gasoline industry from engaging in price gouging and profiteering. The Attorney General cautioned that there may not be wrongdoing behind the price spikes, but vowed to thoroughly review and investigate the matter.

There are no petroleum refineries located in New York State. All refined petroleum products, including gasoline, are imported from outside the state. Refined products are transported into New York primarily via pipeline and barge, where they are stored in terminals.⁵ Terminals are large storage facilities for petroleum products that also act as the local source of supply for wholesalers, and in turn, individual retail outlets. Accordingly, the Attorney General looked at the sale of gasoline within New York, i.e., from terminal to wholesaler to retail gasoline outlet.

The primary focus of the Attorney General's inquiry was to determine whether retail gas stations were engaged in price gouging in violation of New York law. Price gouging is prohibited in New York pursuant to General Business Law § 396-r.

The Attorney General obtained detailed wholesale and retail pricing information from eighty nine (89) gas stations across the state. For the period from February 1 to April 1, 2011, the stations provided the daily prices they paid for gasoline on the wholesale

¹ According to the [International Energy Agency](#), oil production in Libya dropped from 1.6 million barrels per day before the uprising to an estimated 200,000 barrels per day by May 2011.

² Source: U.S. Energy Information Agency

³ Source: Oil Price Information Service (OPIS).

⁴ The all-time high price average in New York State (\$4.28 per gallon) was reached on July 7, 2008.

⁵ See "Report On Petroleum Products Markets in the Northeast," September 2007, pp. 29-51, available at http://www.statecenterinc.org/docs/Complete_Petroleum_Report_09-07-07.pdf.

market, and the prices they charged consumers at the pump. By analyzing this data, the Attorney General was able to determine whether the gas stations engaged in price gouging by increasing their markup and charging "unconscionably excessive prices," or whether the stations were merely passing along increased wholesale costs.

As explained below in greater detail, although gasoline prices rose dramatically, the threatened disruption of the world oil market resulting from turmoil in the Middle East did not lead to gasoline price gouging in New York. A thorough review of the data showed that gas stations did not significantly increase their markup during the period when gasoline prices were rising. To the contrary, retailer markups were generally consistent throughout the period.

In other words, price gouging by gas stations was not the reason for price spikes across the state in February and March of 2011. The retail gas stations paid increasingly higher wholesale prices for gasoline, and passed those increased costs along to consumers.

In contrast, however, some price gouging did occur when Tropical Storm Irene hit New York in late August. The Attorney General has already taken enforcement action against two gas stations that were found to be charging "unconscionably excessive" prices.

The Attorney General's investigation of price gouging by gasoline retailers and other types of businesses during Irene - - and other major storms that hit New York this year - - is ongoing.

New York State's Price Gouging Law (General Business Law § 396-r)

The [price gouging law](#) prohibits merchants from taking unfair advantage of consumers by selling goods or services for an "**unconscionably excessive price**" during an "**abnormal disruption of the market**."

The law was enacted in response to high heating oil prices in the winter of 1978-1979, and was first enforced after Hurricane Gloria struck Long Island in 1985. After the storm, the Attorney General's office took action against a company that overcharged for electric generators.⁶ Subsequently, the law has been applied in a variety of circumstances, such as when companies charged excessive prices for generators after an ice storm,⁷ for home repairs after a wind storm,⁸ for tree removal after a storm,⁹ and for hotel rooms after the September 11 terrorist attacks¹⁰ and weather-related emergencies.¹¹

⁶ See *People v. Two Wheel Corp.*, 71 N.Y.2d 693 (1988), available at http://scholar.google.com/scholar_case?case=12726360631494611329&hl=en&as_sdt=2,33&as_vis=1

⁷ See *People v. Beach Boys Equipment Co., Inc.*, 273 A.D.2d 850 (4 Dept. 2000), http://scholar.google.com/scholar_case?case=903175922694476609&hl=en&as_sdt=2&as_vis=1&oi=scholar and *People v. Chazy Hardware, Inc.*, 176 Misc.2d 960 (Sup. Ct. Clinton Co. 1998), available at http://scholar.google.com/scholar_case?case=8925140036455305510&hl=en&as_sdt=2&as_vis=1&oi=scholar.

⁸ See *People v. Dame and Precision Roofing Co.*, 289 A.D.2d 998 (4 Dept. 2001), available at <http://caselaw.findlaw.com/ny-supreme-court-appellate-division/1063125.html>.

The price gouging statute was also utilized against gasoline stations that raised prices after Hurricane Katrina in 2005.¹²

When Does the Statute Take Effect?

Generally speaking, New York does not fix gasoline prices. Instead, price regulation - - in the form of the state's price gouging law - - takes effect only upon the occurrence of triggering events that cause an "abnormal disruption of the market." An "abnormal disruption of the market" is defined as "any change in the market, whether actual or imminently threatened," that results from triggering events such as "weather events, power failures, strikes, civil disorder, war, military action, national or local emergency, or other causes."

During an abnormal disruption of the market, all parties within the chain of distribution for any essential consumer goods or services are prohibited from charging unconscionably excessive prices. "Consumer goods" are defined by the statute as "those used, bought or rendered primarily for personal, family or household purposes."

Gasoline, which is vital to the health, safety and welfare of consumers, is a "consumer good" under the terms of the statute. Therefore, retailers may not charge unconscionably excessive prices for gasoline during an abnormal disruption of the market.

What is an unconscionably excessive price?

New York's price gouging law does not specifically define what constitutes an "unconscionably excessive price."¹³ However, the statute provides that a price may be "unconscionably excessive" if:

the amount charged represents a *gross disparity* between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the

⁹ See *People v. Lonnie Joe Drake*, individually and doing business as Upstate Tree Service (Sup. Ct. Onondaga Co. 1999) (unreported).

¹⁰ See "Long Island Hotel Cited for Price Gouging," December 26, 2001, available at http://www.ag.ny.gov/media_center/2001/dec/dec26a_01.html.

¹¹ See "Price Gouging Investigation Leads to Refunds and Penalty," August 15, 2006, available at http://www.ag.ny.gov/media_center/2006/aug/aug15a_06.html and "Motels Settle Ice Storm Price Gouging Allegations," December 4, 2003, available at http://www.ag.ny.gov/media_center/2003/dec/dec04a_03.html.

¹² See e.g., *People of the State of New York v. Wever Petroleum, Inc.*, 14 Misc.3d 491 (Sup. Ct. Albany Co. 2006), available at http://scholar.google.com/scholar_case?case=17078581455699290691&hl=en&as_sdt=2&as_vis=1&oi=scholar, and *People v. My Service Center, Inc.*, 14 Misc. 3d 1217(A) (Sup. Ct. Westchester Co. 2007).

¹³ Legislation proposed in 2006 by then-Attorney General Eliot Spitzer provided that increases in prices or mark-ups of more than 25 percent following the onset of an abnormal market disruption trigger a presumption of price gouging. See http://www.ag.ny.gov/media_center/2006/jan/jan10a_06.html The proposal was not passed into law.

defendant in the usual course of business *immediately prior to the onset of the abnormal disruption of the market* (emphasis supplied).

In other words, a "before-and-after" price analysis can be used as evidence of price gouging.

Evidence that a price is unconscionably excessive may also include proof that "the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area." However, a merchant may rebut a prima facie case with evidence that additional costs not within its control were imposed for the goods or services.

Notably, the price gouging law does not prohibit *any* disparity between the price charged before and after there is an abnormal disruption of the market. Rather, the statute prohibits a "gross disparity," when it is clear that a business is taking unfair advantage of consumers by charging unconscionably excessive prices, and increasing its profits, under severe circumstances that call for shared sacrifices.

The Attorney General's spring 2011 price gouging investigation

As noted above, the New York price gouging statute has repeatedly been used in connection with price increases that followed catastrophic weather-related events, such as ice storms, wind storms and hurricanes that caused an abnormal disruption of the market.¹⁴

The events that have triggered application of the price gouging statute have primarily been local events. However, the statute was also applied after Hurricane Katrina struck the Gulf Coast on August 29, 2005 and immediately impacted the nation's gasoline production. Refineries, drilling operations and pipelines located along the Gulf Coast were flooded or severely damaged and the disabled electrical grid affected refineries and pipelines that serve New York. The Attorney General's Office successfully brought price gouging actions against 18 gasoline retailers that charged unconscionably excessive prices in the wake of the storm.¹⁵

By contrast, the events that led to a sharp rise in gasoline prices during the first part of 2011 did not take place in New York - - or even in the United States. Instead, the abnormal disruption of the market was caused by international geopolitical events - - popular uprisings in the Middle East (the "Arab Spring") that threatened to disrupt the global oil market.

Moreover, there was no single event that caused an abnormal disruption of the market and led to an immediate rise in gasoline prices. Rather, it was a series of events in Libya

¹⁴ The price gouging law was also applied after the terrorist attacks on September 11, 2001.

¹⁵ Fifteen of the stations [settled price gouging charges](#) with the Attorney General. [In three other cases](#) where the station owners declined to settle, courts ruled that the stations violated the price gouging statute.

and elsewhere in the Middle East, over the course of several months, that led to gradual but steady price increases.

Nonetheless, events in the Middle East correlated with a significant rise in New York State gasoline prices, and were sufficient to trigger the Attorney General's price gouging investigation in March of 2011. This is believed to be the first time the price gouging law has been utilized to investigate price increases related to an abnormal disruption of the market that was not a single occurrence and did not take place within New York or the United States.

Data Sought by the Attorney General

The Attorney General obtained detailed wholesale and retail pricing information from 89 gas stations across the state. The invoices and other documentation provided by the stations confirmed that wholesale and retail gasoline prices both rose consistently from February 1 through April 1, 2011. In other words, retailers paid more for gasoline they purchased from suppliers, and increased their pump prices accordingly.

To determine whether the pump price increases were proportionate to the wholesale price increases - - i.e., whether retailers were charging unconscionably excessive prices, or simply passing along their increased costs - - the Attorney General's office compared each retailer's markup per gallon of gasoline before and after specific events that occurred in the Middle East. Markup was determined by calculating the difference between the price the retailer paid its supplier for gasoline (the wholesale price) and the price at which the retailer sold that same gasoline to the public (the retail price).

Markup Analysis

The Attorney General calculated each station's average markup during three key periods:

Period One: February 1 to February 17 (days leading up to the Libyan "Day of Rage");

Period Two: February 18 to March 19 (the period between the Day of Rage and the date when NATO airstrikes in Libya began); and

Period Three: March 20 to March 31 (the period after airstrikes began).

The goal was to determine whether the stations were increasing their markup based on the events that were transpiring in Libya.

Overall, there was little change in markup for most stations during these key periods. For example:

- A gas station in Buffalo had an average markup of 78.4 cents per gallon during Period One, 78.5 cents per gallon during Period Two, and 79.6 cents per gallon during Period Three.¹⁶
- A station in Syracuse had an average markup of 76.7 cents per gallon during Period One, 78.1 cents per gallon during Period Two, and 75.2 cents per gallon during Period Three.
- A station in Watertown had an average markup of 81.7 cents per gallon during Period One, 81.9 cents per gallon during Period Two, and 81.2 cents per gallon during Period Three.
- A station in Westchester had an average markup of 75.4 cents per gallon during Period One, 76.6 cents per gallon during Period Two, and 76.1 cents per gallon during Period Three.
- A station in Brooklyn had an average markup of 71.5 cents per gallon during Period One, 71.6 cents per gallon during Period Two, and 72.2 cents per gallon during Period Three.

The largest increase in markup from period-to-period was for a station in Watertown, which increased its average markup by 14.2 cents per gallon (23.4%) from Period One to Period Two. However, the station then lowered its average markup by 10 cents per gallon (13.3%) from Period Two to Period Three. Overall, from Period One to Period Three, the station's markup increased by 4.2 cents per gallon (6.9%), which does not rise to the level of an "unconscionably excessive" increase that would constitute price gouging.

There were also numerous stations that significantly *lowered* their average markup during this timeframe. For example, from Period One to Period Three, a station in Nassau County lowered its overall average markup by 29 cents per gallon (24.5%), a station in the Bronx lowered its overall average markup by 19.6 cents per gallon (14.3%), and a station in Westchester County lowered its overall average markup by 7.6 cents per gallon (12.1%).

¹⁶ The markup, or differential between a station's wholesale cost and retail price, is not equivalent to a station's profit. The retail price includes taxes and fees that are collected from consumers and remitted to the state, not retained by the retailer. Also, the differential does not take into account a station's operating costs.

	2/1/11-2/17/11		2/18/11-3/19/11		3/20/11-3/31/11			
	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	% increase or decrease in average retail supply margins between 2/1/11-2/17/11 and 2/18/11-3/19/11	% increase or decrease in average retail supply margins between 2/18/11-3/19/11 and 3/20/11-3/31/11
Binghamton								
Binghamton 1	0.835	0.809	0.793	0.760	0.798	0.752	-5.030%	0.631%
Binghamton 2	0.795	0.800	0.782	0.749	0.778	0.773	-1.635%	-0.512%
Binghamton 3	0.776	0.768	0.796	0.739	0.779	0.756	2.577%	-2.136%
Binghamton 4	0.855	0.846	0.792	0.781	0.788	0.780	-7.368%	-0.505%
Binghamton 5	0.854	0.840	0.803	0.790	0.860	0.854	-5.972%	7.098%
Binghamton 6	0.829	0.813	0.900	0.913	0.861	0.844	8.565%	-4.333%
Binghamton 7	0.814	0.798	0.808	0.798	0.834	0.826	-0.737%	3.218%
Binghamton 8	0.837	0.824	0.827	0.804	0.805	0.778	-1.195%	-2.660%
Binghamton 9	0.818	0.746	0.807	0.717	0.845	0.740	-1.345%	4.709%
Brooklyn								
Brooklyn 1	0.715	0.713	0.716	0.705	0.722	0.715	0.140%	0.838%
Brooklyn 2	0.804	0.795	0.816	0.788	0.821	0.808	1.493%	0.613%
Brooklyn 3	0.814	0.765	0.814	0.776	0.825	0.768	0.000%	1.351%
Brooklyn 4	0.755	0.752	0.732	0.708	0.756	0.739	-3.046%	3.279%
Brooklyn 5	0.960	0.951	0.940	0.916	0.887	0.869	-2.083%	-5.638%
Brooklyn 6	0.787	0.782	0.776	0.766	0.853	0.853	-1.398%	9.923%
Brooklyn 7	0.857	0.812	0.859	0.794	0.842	0.842	0.233%	-1.979%
Buffalo								
Buffalo 1	0.784	0.762	0.785	0.777	0.796	0.713	0.128%	1.401%
Buffalo 2	0.814	0.791	0.796	0.761	0.801	0.709	-2.211%	0.628%
Buffalo 3	0.793	0.765	0.785	0.736	0.853	0.809	-1.009%	8.662%
Buffalo 4	0.738	0.734	0.819	0.744	0.882	0.860	10.976%	7.692%
Buffalo 5	0.821	0.774	0.797	0.736	0.791	0.839	-2.923%	-0.753%
Buffalo 6	0.790	0.778	0.777	0.755	0.814	0.777	-1.646%	4.762%
Harlem								
Harlem 1	1.049	1.044	1.082	1.072	1.119	1.117	3.146%	3.420%
Harlem 2	1.369	1.368	1.297	1.286	1.173	1.172	-5.259%	-9.561%
Harlem 3	0.947	0.958	0.958	0.948	0.925	0.920	1.162%	-3.445%
Harlem 4	0.808	0.805	0.753	0.742	0.781	0.773	-6.807%	3.718%

	2/1/11-2/17/11		2/18/11-3/19/11		3/20/11-3/31/11			
	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	% increase or decrease in average retail supply margins between 2/1/11-2/17/11 and 2/18/11-3/19/11	% increase or decrease in average retail supply margins between 2/18/11-3/19/11 and 3/20/11-3/31/11
Harlem 5	0.788	0.787	0.799	0.788	0.869	0.865	1.396%	8.761%
Harlem 6	0.863	0.862	0.855	0.844	0.814	0.802	-0.927%	-4.795%
Harlem 7	0.849	0.849	0.812	0.802	0.880	0.878	-4.358%	8.374%
Nassau								
Nassau 1	0.644	0.644	0.702	0.640	0.674	0.674	9.006%	-3.989%
Nassau 2	0.866	0.860	0.894	0.807	0.882	0.882	3.233%	-1.342%
Nassau 3	0.872	0.782	0.926	0.822	0.898	0.892	6.193%	-3.024%
Nassau 4	0.800	0.852	0.847	0.878	0.902	0.902	5.875%	6.494%
Nassau 5	1.182	1.165	1.012	0.931	0.942	0.942	-14.382%	-6.917%
Nassau 6	0.829	0.826	0.846	0.827	0.850	0.844	2.051%	0.473%
Nassau 7	0.896	0.850	0.922	0.871	0.950	0.918	2.902%	3.037%
Nassau 8	0.816	0.800	0.872	0.809	0.847	0.845	6.863%	-2.867%
Nassau 9	1.201	0.810	1.017	0.792	0.910	0.809	-15.321%	-10.521%
Plattsburgh								
Plattsburgh 1	0.820	0.720	0.719	0.677	0.676	0.720	-12.317%	-5.981%
Plattsburgh 2	0.638	0.646	0.672	0.584	0.672	0.618	5.329%	0.000%
Plattsburgh 3	0.891	0.880	0.827	0.805	0.937	0.923	-7.183%	13.301%
Plattsburgh 4	0.910	0.863	0.897	0.836	N/A	N/A	-1.429%	N/A
Plattsburgh 5	0.907	0.776	0.863	0.818	N/A	N/A	-4.851%	N/A
Poughkeepsie								
Poughkeepsie 1	0.472	0.505	0.457	0.372	0.421	0.628	-3.178%	-7.877%
Poughkeepsie 2	0.778	0.778	0.790	0.756	0.852	0.812	1.542%	7.848%
Poughkeepsie 3	0.954	0.930	0.941	0.910	0.938	0.908	-1.363%	-0.319%
Poughkeepsie 4	0.839	0.786	0.833	0.777	0.825	0.793	-0.715%	-0.960%
Poughkeepsie 5	0.811	0.708	0.849	0.745	0.829	0.808	4.686%	-2.356%
Poughkeepsie 6	0.837	0.727	0.895	0.832	0.927	0.824	6.930%	3.575%

	2/1/11-2/17/11		2/18/11-3/19/11		3/20/11-3/31/11			
	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	% increase or decrease in average retail supply margins between 2/1/11-2/17/11 and 2/18/11-3/19/11	% increase or decrease in average retail supply margins between 2/18/11-3/19/11 and 3/20/11-3/31/11
Rochester								
Rochester 1	0.755	0.750	0.789	0.756	0.770	0.757	4.503%	-2.408%
Rochester 2	0.779	0.747	0.798	0.741	0.823	0.783	2.439%	3.133%
Rochester 3	0.692	0.648	0.768	0.685	0.786	0.719	10.983%	2.344%
Rochester 4	0.812	0.776	0.854	0.725	0.955	N/A	5.172%	11.827%
Rochester 5	0.826	0.806	0.821	0.796	0.838	0.812	-0.605%	2.071%
Rochester 6	0.732	0.710	0.811	0.781	0.840	0.798	10.792%	3.576%
Rochester 7	0.810	0.780	0.843	0.719	N/A	N/A	4.074%	N/A
Rochester 8	0.810	0.764	0.844	0.805	0.871	0.853	4.198%	3.199%
Suffolk								
Suffolk 1	1.125	1.124	1.017	0.960	1.104	1.024	-9.600%	8.555%
Suffolk 2	1.149	0.999	1.011	0.944	1.056	1.050	-12.010%	4.451%
Suffolk 3	1.120	1.124	1.012	0.944	1.025	1.020	-9.643%	1.285%
Suffolk 4	1.123	1.104	1.048	0.894	0.976	0.961	-6.679%	-6.870%
Suffolk 5	1.135	1.115	1.016	0.975	1.029	1.028	-10.485%	1.280%
Suffolk 6	0.940	0.937	0.972	0.908	1.005	0.925	3.404%	3.395%
Suffolk 7	0.961	0.957	0.973	0.941	0.961	0.948	1.249%	-1.233%
Syracuse								
Syracuse 1	0.767	0.732	0.781	0.734	0.752	0.727	1.825%	-3.713%
Syracuse 2	0.677	0.648	0.668	0.643	0.658	0.615	-1.329%	-1.497%
Syracuse 3	0.861	0.811	0.826	0.782	0.826	0.779	-4.065%	0.000%
Syracuse 4	0.756	0.753	0.772	0.755	0.753	0.742	2.116%	-2.461%
Syracuse 5	0.609	0.588	0.561	0.504	0.630	0.557	-7.882%	12.299%
Syracuse 6	0.769	0.753	0.703	0.653	0.742	0.710	-8.583%	5.548%
Utica								
Utica 1	0.688	0.684	0.674	0.660	0.647	0.634	-2.035%	-4.006%
Utica 2	0.747	0.741	0.725	0.704	0.764	0.757	-2.945%	5.379%
Utica 3	0.765	0.762	0.720	0.710	0.732	0.717	-5.882%	1.667%

	2/1/11-2/17/11		2/18/11-3/19/11		3/20/11-3/31/11			
	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	average retail supply margin	average replacement margin	% increase or decrease in average retail supply margins between 2/1/11-2/17/11 and 2/18/11-3/19/11	% increase or decrease in average retail supply margins between 2/18/11-3/19/11 and 3/20/11-3/31/11
Utica 4	0.841	0.830	0.770	0.761	0.753	0.745	-8.442%	-2.208%
Utica 5	0.855	0.842	0.794	0.760	0.759	0.724	-7.135%	-4.408%
Watertown								
Watertown 1	0.737	0.614	0.741	0.550	N/A	N/A	0.543%	N/A
Watertown 2	0.864	0.782	0.865	0.791	0.906	0.821	0.116%	4.740%
Watertown 3	0.605	0.588	0.747	0.624	0.647	0.622	23.471%	-13.387%
Watertown 4	0.800	0.784	0.801	0.762	0.805	0.773	0.125%	0.499%
Watertown 5	0.650	0.607	0.665	0.624	0.753	0.689	2.308%	13.233%
Watertown 6	0.817	0.733	0.819	0.697	0.812	0.789	0.245%	-0.855%
Westchester								
Westchester 1	0.542	0.542	0.542	0.530	0.542	0.542	0.000%	0.000%
Westchester 2	0.624	0.519	0.534	0.457	0.548	0.502	-14.423%	2.622%
Westchester 3	0.754	0.743	0.766	0.730	0.761	0.747	1.592%	-0.653%
Westchester 4	0.772	0.764	0.730	0.730	0.710	0.703	-5.440%	-2.740%
Westchester 5	0.542	0.535	0.542	0.531	0.542	0.538	0.000%	0.000%
Westchester 6	0.822	0.819	0.831	0.813	0.864	0.841	1.095%	3.971%
Westchester 7	0.797	0.758	0.766	0.711	0.793	0.740	-3.890%	3.525%
Westchester 8	0.971	0.850	0.901	0.856	0.966	0.926	-7.209%	7.214%

Results

The results of this investigation clearly demonstrated that the threatened disruption of the world oil market caused by turmoil in the Middle East did not lead to gasoline price gouging in New York. A thorough review of the data showed that, even as gasoline prices were rising, stations did not significantly change their markup. Although there were some minor fluctuations in markup from day-to-day and week-to-week, retailer margins were generally consistent throughout the study period.

Thus, it is apparent that price gouging by gas stations was not behind the price spikes across the state. Instead, as the stations paid increasingly higher wholesale prices for gasoline, they passed those increased costs along to consumers.

Tropical Storm Irene

As noted above, price gouging has occurred in New York following catastrophic weather-related events such as ice storms, wind storms and hurricanes. Gasoline, electric generators, home repairs and hotel rooms, are among the goods and services that have been the subject of unconscionably excessive price increases during times of emergency.

Therefore, as Tropical Storm Irene was bearing down on New York in late August 2011, the Attorney General issued a stern warning to vendors against charging unconscionably excessive prices for essential items such as gasoline, food, water, generators, batteries and flashlights. Because public transportation was being shut down due to the storm, the Attorney General also warned taxi and livery cab drivers against gouging.¹⁷

As is turned out, some price gouging did occur, and the Attorney General is looking closely at pricing data. Thus far, the Attorney General has taken enforcement action against two gas stations that were found to be charging "unconscionably excessive" prices.

One of the stations, Parmod Food Mart Inc., d/b/a Ultimate Quality Food and Fuel Mart and Parmod Pitt Stop, is located in Yonkers. On August 26, 2011, the day before Irene moved into the New York area, Parmod's retail price for regular unleaded gasoline was \$3.829. Over the course of the next two days, while Irene was in the area, Parmod increased its price to \$4.799. Then, on August 29, 2011, the day Irene left the New York area, Parmod lowered its price to \$3.839.

Parmod's price increases during Irene were unconscionably excessive and were not attributable to additional costs imposed by its suppliers. Although Parmod paid slightly more for gasoline during Irene, the prices Parmod charged during Irene went well beyond what was necessary to recoup the increased cost.

¹⁷ See "A.G. Schneiderman Warns Against Price Inflation of Necessary Goods During Hurricane Irene," August 27, 2011, available at http://www.ag.ny.gov/media_center/2011/aug/aug27a_11.html.

Indeed, Parmod dramatically and unconscionably increased its markup on the gasoline it sold during Irene. On August 26, when Parmod received its last delivery before Irene, Parmod paid its supplier \$3.086 per gallon for regular unleaded gasoline. Parmod's retail price that day was \$3.829, representing a markup of \$0.743 per gallon. On August 27, as Irene was moving into the New York area, Parmod raised its price to \$4.799. That represented a markup of \$1.713 per gallon, which constituted an increase of \$0.97 per gallon - - or 130% - - over the markup the day before Irene.

On August 28, Parmod paid \$3.113 per gallon for a delivery of regular unleaded gasoline. Parmod's price that day for regular unleaded gasoline was \$4.779. That represented a markup of \$1.686 per gallon, which constituted an increase of \$0.943 per gallon - - or 126.9% - - over the markup the day before Irene.

The Attorney General found that the amounts charged by Parmod for gasoline during Tropical Storm Irene were unconscionably excessive. The company, without admitting or denying the Attorney General's findings, entered into a civil Assurance of Discontinuance, agreed to comply with the price gouging law, and paid penalties and costs of \$7,500.¹⁸

The other station found to have price gouged, JW Station Corp. d/b/a Gulf Gas Station, is located in Farmingdale. JW's retail price immediately before Irene was \$4.059 for regular unleaded gasoline. While Irene was in the area, JW raised its price to \$4.899. After the storm, JW's retail price returned to the pre-Irene cost of \$4.059

Prior to Irene, the station's markup was \$0.389 per gallon. But while the storm was in the area, JW increased its markup to \$1.229 per gallon, which was an increase of \$0.84 per gallon - - or 215% - - over the markup before Irene struck.

The Attorney General found that the amounts charged by JW for gasoline during Tropical Storm Irene were unconscionably excessive. The company, without admitting or denying the Attorney General's findings, entered into a civil Assurance of Discontinuance, agreed to comply with the price gouging law, and paid penalties and costs of \$3,061.74.

The Attorney General's review of Irene-related price gouging by gasoline retailers, as well as by other types of businesses, is ongoing. The Attorney General is also looking into possible price gouging during Tropical Storm Lee and other storms that hit New York this year.

¹⁸ Penalties in these cases were determined by calculating the amount of excess profit earned due to the unconscionable price increases, i.e., the increased markup multiplied by the number of gallons sold.

Conclusion

The evidence gathered by the Attorney General did not point to price gouging by gasoline retailers during the first part of 2011.¹⁹ Nonetheless, the Attorney General used the price gouging law to gather relevant information and inform the public that gas station operators were not taking advantage of events in the Middle East to unjustifiably raise their prices.

Months later, as Tropical Storm Irene was about to strike New York, the Attorney General reminded businesses that the price gouging law prohibits them from taking advantage of the emergency by charging unconscionably excessive prices, and warned businesses that the law would be enforced. Warnings such as this provide a strong deterrent against price gouging, as businesses must weigh the economic benefit of increasing prices during an emergency against the risk of being charged with price gouging, incurring substantial fines, and suffering a loss of good will with their customers.

The Attorney General will continue to monitor gasoline prices in New York. Prices will be closely scrutinized during abnormal disruptions of the market, especially catastrophic weather-related events. If price gouging occurs, the Attorney General will take action to penalize violators and continue to send a strong signal that price gouging is illegal in New York and will not be tolerated.

¹⁹ Similarly, the data indicates that gasoline wholesalers did not increase their markup or engage in price gouging. See "Wholesaler Pricing Trends," infra.

Crude Oil Prices Drive Gasoline Prices

In September 2011 the Federal Trade Commission ("FTC") issued a report on gasoline price changes which concluded that "[c]rude oil prices continue to be the main driver of gasoline prices."²⁰ The report built upon prior FTC staff reports²¹ which also determined that crude oil prices primarily account for changes in gasoline prices:

If world crude prices rise, then U.S. refiners must offer and pay higher prices for crude they buy. Facing higher input costs from crude, refiners charge more for the gasoline they sell at wholesale. This requires gas stations to pay more for their gasoline. In turn, gas stations, facing higher input costs, charge consumers more at the pump. When crude oil prices rise, gasoline prices rise because gasoline becomes more costly to produce.

A 2007 report prepared for the Attorneys General of Maine, Massachusetts, New Hampshire, New York and Vermont²² also found that "changes in the world price of crude oil are the primary determinant of changes in retail gasoline prices over time."

Consistent with the findings cited above, the Attorney General's analysis showed that the sharp rise in pump prices in February and March of 2011 coincided with a sharp rise in crude oil prices during the same timeframe.

What Makes Up the Price of a Gallon of Gasoline?

When examining gasoline price trends, it is instructive to examine the main components of the retail price of gasoline.

According to [analysis](#) by the U.S. Energy Information Administration ("EIA"), the cost of crude oil comprises 69% of the national average retail price of gasoline. Here is EIA's complete breakdown as of October 2011:

Crude Oil — 69%.
Refining Costs and Profits — 11%
Distribution, Marketing, and Retail Costs and Profits — 8%
Taxes — 12%

²⁰ FTC Report, "Gasoline Price Changes and the Petroleum Industry: An Update," September 2011, available at <http://www.ftc.gov/opa/2011/09/gasprices.shtm>.

²¹ FTC Report, "Gasoline Price Changes: The Dynamic of Supply, Demand and Competition," 2005, available at <http://www.ftc.gov/opa/2005/07/gaspricefactor.shtm> ("Worldwide supply, demand and competition for crude oil are the most important factors in the national average price of gasoline in the U.S."); FTC report, "The Petroleum Industry: Mergers, Structural Change and Antitrust Enforcement," 2004, available at <http://www.ftc.gov/opa/2004/08/oilmergersrpt.shtm> ("Changes in crude oil prices have accounted for approximately 85% of the increases and decreases in U.S. motor gasoline prices over the past two decades.").

²² ["Report On Petroleum Products Markets in the Northeast,"](#) September 2007.

It should be noted that the EIA based its calculations on Federal excise taxes of 18.4 cents per gallon and State excise taxes averaging 22.6 cents per gallon. However, New York State imposes taxes and fees of approximately 49.1 cents per gallon, which is considerably higher than the national average.²³

Therefore, taxes on gasoline sold in New York comprise somewhat more than the national average of 12% of the per-gallon price, and the three other main components make up somewhat less than the national average. Accordingly, in New York, crude oil makes up somewhat less than the national average of 69% of the per-gallon price. Nonetheless, it is clear that crude oil is still by far the largest component of the per-gallon price in New York.

It follows that if crude oil is by far the largest component of the price of gasoline in New York, then changes in the price of crude oil are the "main driver" of changes in the cost of gasoline.

New York State Taxes

As noted above, state taxes and fees on gasoline sold in New York total approximately 49.1 cents per gallon.²⁴ That number is comprised as follows.

- A tax on motor fuel of 8.1 cents per gallon, which consists of an 8 cents per gallon motor fuel excise tax, plus a .05 cents per gallon petroleum testing fee, plus .05 cents per gallon for sales at a filling station. These rates are effective through December 31, 2011, and will remain unchanged after the Tax Law's annual adjustment effective January 1, 2012.²⁵
- A "petroleum business tax" of 17 cents per gallon, which is in effect through December 31, 2011, but will increase to 17.8 cents per gallon effective January 1, 2012.²⁶

²³ Indeed, gasoline taxes and fees in New York are the third highest in the country behind Connecticut (68.7 cents per gallon) and California (67.5 cents per gallon). Source: American Petroleum Institute, [Motor Fuel Taxes](#). These figures are current as of October 1, 2011, and reflect a weighted average for each state, meaning that any taxes which can vary across a state's jurisdiction are averaged according to the population of the local areas subject to each particular tax rate. See American Petroleum Institute, [Motor Fuel Taxes](#), available at <http://www.api.org/statistics/fueltaxes/index.cfm>.

²⁴ Federal excise taxes are an additional 18.4 cents per gallon.

²⁵ New York State Department of Taxation and Finance, Fuel Tax Rates, Tax Law-Article 12-A, Publication 908, available at <http://www.tax.ny.gov/pdf/publications/multi/pub908.pdf>.

²⁶ New York State Department of Taxation and Finance, Fuel Tax Rates, Tax Law-Article 13-A, [Publication 908](#).

- A sales tax of 8 cents per gallon outside the Metropolitan Commuter Transportation District (“MCTD”) and 8 ¾ cents per gallon inside the MCTD.²⁷
- Sales tax imposed by counties and cities, which can use a cents-per-gallon method or a percentage rate method.²⁸ Most localities have elected to impose their local sales tax on a percentage rate method.²⁹

Recent Findings in New York

Consistent with the findings of the FTC reports, the five-state report and the EIA analysis cited above, the Attorney General's analysis of 2011 New York gasoline prices showed that gasoline price fluctuations were primarily driven by changes in the price of crude oil, not actions taken by gasoline retailers. The rise in New York retail gasoline prices in early 2011, as well as from July to August 2011, coincided with sharp increases in the price of crude oil, and corresponding increases in the price of gasoline sold on the wholesale market at terminals throughout the state.³⁰ Similarly, when crude oil and terminal prices fell, prices at the pump fell as well.

Crude Oil vs. Terminal vs. Retail Prices

The graph and chart on the following pages show average pump prices, terminal prices and crude oil prices on the first day of each month from January 1 to September 1, 2011. Clearly, increases in statewide pump prices from February 1 to May 1 and from July 1 to August 1 coincided with sharp increases in crude oil and terminal prices during those periods of time.

From February 1 to May 1, the price of crude oil rose from \$90.64 to \$113.76 per barrel, an increase of 25.5%. During the same timeframe, the average terminal price in New York rose from \$2.576 to \$3.389 per gallon, an increase of 31.6%. The average retail price of gasoline rose from \$3.584 to \$4.154 per gallon, an increase of 15.9%.³¹

The same upward trend occurred from July 1 to August 1, when the price of crude oil rose from \$97.45 to \$104.51 per barrel, an increase of 7.2%. Terminal prices rose from \$2.997 to \$3.122 per gallon, an increase of 4.2%. The average retail price of gasoline rose from \$3.853 to \$3.978 per gallon, an increase of 3.2%.

²⁷ New York State Department of Taxation and Finance, Publication 718-F, available at <http://www.tax.ny.gov/pdf/publications/sales/pub718f.pdf>.

The MCTD includes New York City and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

²⁸ New York State Department of Taxation and Finance, [Publication 718-F](#).

²⁹ The percentage rates for local gasoline sales taxes range from 2% (Auburn) to 4.75% (Erie and Oneida counties). The percentage rate in New York City is 4.5%.

³⁰ Terminals are large storage facilities for petroleum products that also act as the local source of supply for wholesalers, and in turn, individual retail outlets. Petroleum is delivered to these terminals by pipeline and waterway shipments from refineries. There are no refineries in New York.

³¹ This was a dramatic rise, but was actually less than the percentage increase in crude oil and terminal prices.

Retail gasoline prices also followed crude oil prices downward. From May 1 to July 1, the price of crude oil fell from \$113.76 to \$97.45 per barrel, a decline of 14.3%. During the same time, the average terminal price in New York fell from \$3.389 to \$2.997 per gallon, a decline of 11.6%. The average retail price of gasoline fell from \$4.154 to \$3.853 per gallon, a decline of 7.2%.

Similarly, from August 1 to September 1, crude oil prices fell from \$104.51 to \$102.78 per barrel, a decline of 1.7%. During that time, terminal prices fell from \$3.122 to \$3.094 per gallon, a decline of 0.9%. Retail gasoline prices fell from \$3.978 to \$3.878 per gallon, a decline of 2.5%.³²

Rockets and Feathers

The chart also shows the difference, or "spread," between the average terminal price and the average retail price on the first day of each month from January 1 to September 1, 2011.

From January 1 to May 1, the spread between the average terminal price and the average retail price remained in a narrow range of between 75.4 and 79.3 cents per gallon. From June 1 to August 1, the spread rose to between 85.4 to 90.9 cents per gallon. Then, on September 1, the spread fell back to 78.4 cents per gallon.

The increased spreads from June 1 to August 1 are evidence of the so-called "rockets and feathers" phenomenon, in which retail gasoline prices react faster when prices are increasing than when they are decreasing.

When terminal prices rose from January 1 to May 1, retail prices rose in lockstep and the spread between the two prices remained relatively constant. However, when terminal prices fell from May 1 to August 1, retail prices did not fall as much. Thus, the spread between the two prices grew by about 10 cents per gallon.

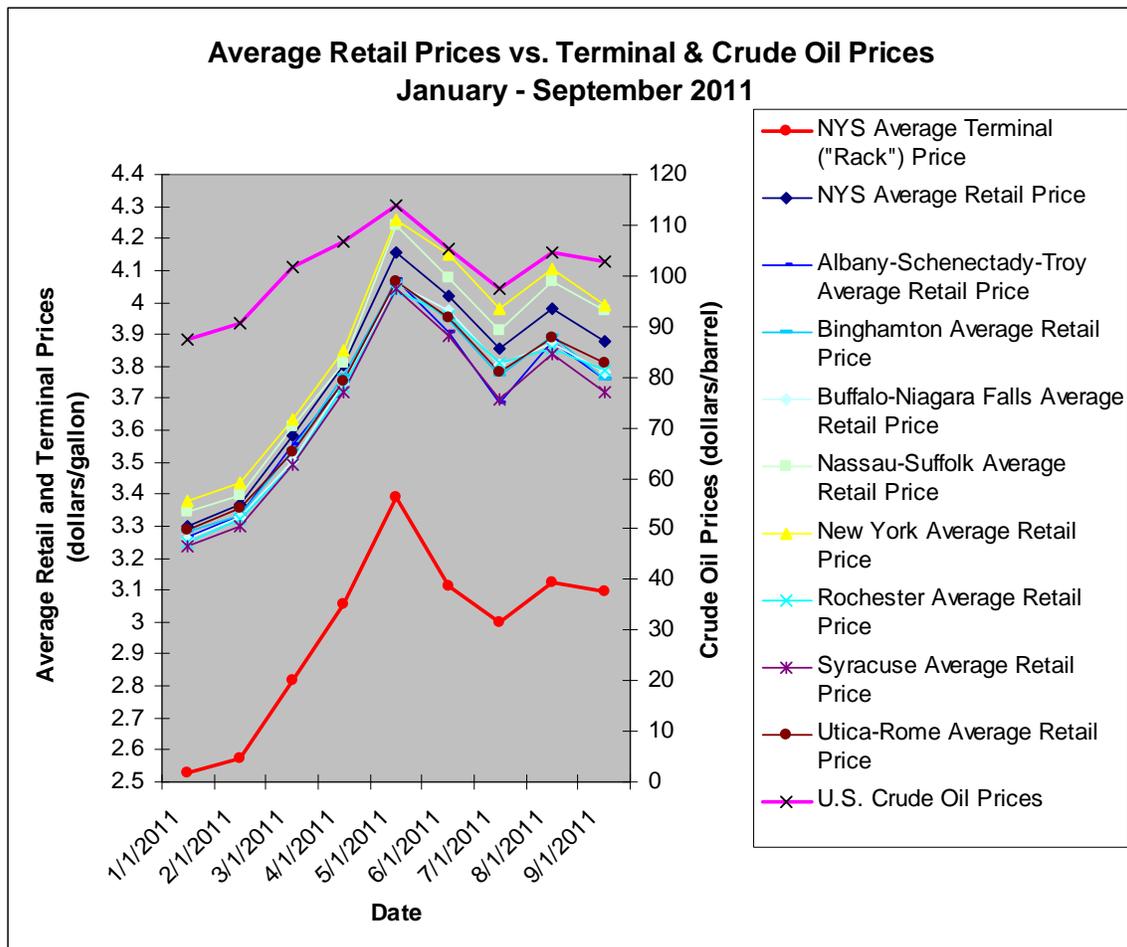
By September 1, retail prices caught up with the decline in terminal prices and the spread between the two went back down to the figures seen from January 1 to May 1.

³² Interestingly, a rise in crude oil prices from October 1 to November 1 did not lead to an immediate increase in pump prices. Although the price of crude oil rose from \$93.71 to \$103.98 per barrel during that time, an increase of 10.9%, terminal prices rose by only 3% and retail gasoline prices decreased by 1.2%. This pattern continued into November. See, e.g., "Syracuse gas prices trickle lower despite increase in crude oil price," Syracuse Post-Standard, November 7, 2011, available at http://www.syracuse.com/news/index.ssf/2011/11/syracuse_gas_prices_trickle_lo.html, and "Local gas prices dip again despite rise in price of crude oil," Syracuse Post-Standard, November 20, 2011, available at http://www.syracuse.com/news/index.ssf/2011/11/local_gas_prices_dip_again_des.html.

Wholesaler Pricing Trends

The fact that the spread between the average terminal price and the average retail price remained in a narrow range in the first part of 2011 also suggests that wholesalers, which buy gasoline at the terminal and sell it to retailers, did not engage in price gouging during that timeframe. If wholesalers had significantly increased their markup, the spread between terminal prices and retail prices would have increased unless retailers had decreased their markup correspondingly. However, the data obtained by the Attorney General showed that was not the case (i.e., that retailer markups remained consistent).

Indeed, a sampling of wholesaler pricing data obtained by the Attorney General (see "Zone Pricing," *infra*) showed that wholesaler markups remained consistent in the first part of 2011, and did not account for the increase in retail gasoline prices.



Terminal and retail prices are based on data supplied by Oil Price Information Service (OPIS).

**NEW YORK STATE
 TERMINAL ("RACK")PRICE/RETAIL PRICE CHART
 JANUARY - SEPTEMBER 2011**

	1/1	2/1	3/1	4/1	5/1	6/1	7/1	8/1	9/1
NYS Average Terminal Price	2.527	2.576	2.818	3.053	3.389	3.110	2.997	3.122	3.094
NYS Average Retail Price	3.302	3.369	3.584	3.807	4.154	4.019	3.853	3.978	3.878
NYS Average Terminal/Retail Spread	0.775	0.793	0.766	0.754	0.765	0.909	0.856	0.856	0.784
Albany-Schenectady-Troy Average Retail Price	3.266	3.331	3.553	3.747	4.072	3.909	3.686	3.881	3.761
Binghamton Average Retail Price	3.281	3.333	3.539	3.773	4.063	3.947	3.769	3.897	3.760
Buffalo - Niagara Falls Average Retail Price	3.258	3.329	3.504	3.747	4.059	3.977	3.803	3.875	3.782
Nassau-Suffolk Average Retail Price	3.346	3.397	3.609	3.812	4.241	4.076	3.913	4.065	3.973
New York City Average Retail Price	3.379	3.433	3.635	3.851	4.257	4.148	3.980	4.106	3.993
Rochester Average Retail Price	3.250	3.322	3.491	3.738	4.038	3.957	3.809	3.853	3.785
Syracuse Average Retail Price	3.235	3.297	3.491	3.721	4.042	3.894	3.696	3.841	3.718
Utica-Rome Average Retail Price	3.286	3.356	3.535	3.756	4.068	3.950	3.784	3.892	3.811

Terminal and retail prices are based on data supplied by Oil Price Information Service ("OPIS").

Note: The differential between the average terminal price and average retail price is not equivalent to a retailer's profit. The retail price includes taxes and fees that are collected by retailers from consumers and remitted to the state (i.e., not retained by the retailers). Also, the differential does not take into account retailer operating costs.

Price Variations Across the State

The above chart demonstrates that gasoline prices vary in different geographic locations across the state.³³

It is clear that average prices are highest in New York City, followed by Long Island. In these locations, the average retail price is consistently above the statewide average.³⁴

The average retail price in New York City was above the statewide average price on all of the dates surveyed in 2011, with the differential ranging from 4.4 to 13.2 cents per gallon.

The average retail price in Nassau and Suffolk counties was also above the statewide average price on all of the dates surveyed, with the differential ranging from 2.5 to 9.5 cents per gallon.

The average retail price was below the statewide average in each of the other areas that was surveyed: Albany-Schenectady-Troy, Binghamton, Buffalo-Niagara Falls, Rochester, Syracuse and Utica-Rome.

Comparison of Upstate Cities

The six upstate areas had lower retail prices than the statewide average, but how did prices compare among these locations?³⁵

None of the upstate cities had the highest or lowest price on all of the dates surveyed. Instead, the ranking of prices in these cities varied from date-to-date.³⁶

³³ According to the NYS Department of Agriculture & Markets, there are currently 5,857 gas stations in New York State, not counting stations in Livingston, Chemung, Onondaga, Saratoga and Tompkins Counties, as these counties do not participate in the Department's Petroleum Quality Program. Overall, according to the [U.S. Energy Information Administration](http://www.eia.gov/state/state-energy-profiles-data.cfm?sid=NY#Distribution), there are approximately 6,500 gas stations in the state. Available at <http://www.eia.gov/state/state-energy-profiles-data.cfm?sid=NY#Distribution>.

³⁴ Reformulated gasoline, which must be sold in New York City and on Long Island (as well as Orange, Putnam, Rockland and Westchester counties), is generally more expensive than conventional gasoline. This may account for a portion of the price differential between New York City, Long Island and the upstate areas. See "[Report On Petroleum Products Markets in the Northeast](#)," September 2007, pp. 124-126.

³⁵ The FTC coordinated with the Attorneys General of New York and Vermont to investigate "unusually high gasoline prices" in Western New York and Vermont during the fall of 2008. The FTC "did not find any evidence of illegal activity in gasoline markets in the affected cities." Instead, the FTC found that "it is highly unlikely that illegal conduct caused these price levels...." Ultimately, FTC staff "was unable to identify precise reasons why retail gasoline prices in some cities in Western New York and Vermont did not fall as quickly as prices in other Northeast cities." See FTC letter dated May 13, 2009 to Representative Brian Higgins, available at http://giberson.ba.ttu.edu/public/FTC_letter_to_Rep_Higgins_2009-May-13.pdf. As noted herein, retail prices Western New York were not consistently higher than prices in other locations outside New York City and Long Island during 2011.

³⁶ The differential between the highest and lowest average prices on the dates surveyed ranged from 3.4 to 12.3 cents per gallon. The average differential was 7.1 cents per gallon.

For example, Utica-Rome had the highest prices on January 1, February 1 and September 1. However, Albany-Schenectady-Troy had the highest prices on March 1, Binghamton had the highest prices on April 1 and August 1, Buffalo-Erie had the highest prices on June 1, and Rochester had the highest prices on July 1.

Similarly, Syracuse had the lowest prices on January 1, February 1, April 1, June 1 and August 1. But in other months, Albany-Schenectady-Troy, Binghamton and Rochester had the lowest prices.

Overall, Syracuse had the lowest average prices among the upstate cities on the dates surveyed, while Utica-Rome had the highest prices.³⁷ For example, on February 1 Syracuse had the lowest average price of \$3.297, while Utica-Rome had the highest average price of \$3.356 per gallon, a spread of 5.9 cents per gallon. The average spread between the two cities on the dates surveyed was 5.9 cents per gallon.

Relationship Between Terminal and Retail Prices

We examined whether there was a correlation between average terminal prices and average pump prices in the upstate areas, i.e., whether Syracuse had the lowest terminal prices and Utica the highest. As it turns out, this was not the case.

As shown in the chart on the following page, Syracuse - - despite having the lowest retail prices of the upstate cities on the dates surveyed - - tended to have relatively high average terminal prices.³⁸ Albany tended to have the lowest terminal prices. Utica terminal prices fell somewhere in between.

It is unclear why there was a divergence between terminal price rankings and retail price rankings between the upstate cities.

³⁷ The cities are only about 50 miles apart.

³⁸ There are different gasoline formulations, such as conventional, conventional ethanol, CBOB ethanol and RFG ethanol, that are sold at different terminals at different times of the year. For purposes of comparison, we selected CBOB ethanol, which, with one exception (Albany on January 1) was sold at all of the upstate terminals on the first day of each month from January to September.

**AVERAGE TERMINAL ("RACK") PRICE
CBOB ETHANOL***

	1/1	2/1	3/1	4/1	5/1	6/1	7/1	8/1	9/1
Albany	-	2.609	2.864	3.093	3.373	3.059	2.931	3.078	3.078
Binghamton	2.574	2.620	2.859	3.129	3.433	3.139	2.998	3.117	3.175
Buffalo	2.562	2.599	2.841	3.085	3.386	3.122	2.953	3.094	3.111
Rochester	2.581	2.609	2.862	3.114	3.415	3.086	2.982	2.982	3.107
Syracuse	2.578	2.626	2.893	3.149	3.437	3.134	3.003	3.138	3.143
Utica	2.594	2.619	2.891	3.102	3.418	3.121	2.992	3.144	3.151

*CBOB is Conventional Blendstock for Oxygenate Blending. Ethanol is blended with CBOB at the terminal.

Terminal prices are based on data supplied by Oil Price Information Service (Opisnet.com).

Zone Pricing

In 2008, New York became the only state in the country to adopt a "zone pricing" law with regard to the sale of gasoline. See Chapter 579 of the Laws of 2008. The statute, [General Business Law § 399-ee](#), prohibits the use of zone pricing by wholesalers, which is the setting of different wholesale prices in different geographic areas. Specifically, gasoline wholesalers are prohibited from utilizing "arbitrary price differences within the relevant geographic market, based on the posted terminal price or where the effect is to injure competition."

As part of his inquiry into higher gasoline prices, the Attorney General examined whether wholesalers are continuing to use the pricing policies that led to the passage of the law in 2008. The answer is "yes" - - some wholesalers are continuing to set different prices in different geographic areas.

However, as explained below, the 2008 legislation contains several key weaknesses. Key terms such as "relevant geographic market" and "zone pricing" are not adequately defined. In addition, wholesalers can continue to charge different prices in different geographic areas by maintaining that their prices are not "arbitrary" as prohibited by law, but based on business-related factors such as differing marketing conditions, costs of operation and degree of competition.

As a result, no enforcement actions have been brought since the zone pricing law was enacted in 2008, and it is uncertain what effect, if any, the law has had on wholesaler pricing policies - - or pump prices - - across the state.

Ultimately, for New York to have an effective zone pricing law, the statute must be amended by the state Legislature.

Legislative Background

New York's zone pricing statute is based on a legislative finding that price fluctuations in the gasoline market are caused in part by "artificial manipulation of the market," and that "[o]ne such artificial manipulation is zone pricing." Zone pricing, according to the legislative finding, "increases the price of retail motor fuel for certain consumers, leading to inequities among consumers and regions around the state." The statute provides that "[n]o wholesaler shall engage in zone pricing with respect to any motor fuel of like grade or quality."

The primary justification for the legislation is that zone pricing results in higher pump prices in affluent areas, where consumers are presumably able to pay more. The Assembly and Senate Sponsors' Memorandum in support of the bill stated:

The [wholesaler] determines geographical price zones based on the demographics of a certain area. For example, if one area typically is more affluent than another, the tank wagon price, in other words, the price per gallon determined by the wholesaler,

at which gasoline is offered for sale to the retailers may be slightly higher in that area, than an area where the clientele is primarily a working class neighborhood. Because the petroleum companies increase the amount charged to the service station dealers for the gasoline in those designated zones, this cost is then passed on to the consumer. Thus, the result of zone pricing is higher prices at the pump for individuals who are presumed to be able to pay more. This legislation would prohibit this discriminatory pricing policy.

Among the most vocal supporters of legislation prohibiting zone pricing have been the Service Station Dealers of Greater New York, Inc. ("SSDGNY") and the New York State Association of Service Stations & Repair Shops, Inc. These groups believe that zone pricing legislation protects consumers and helps to level the playing field between service station operators in different communities. As stated by SSDGNY in its memorandum in support of the zone pricing legislation:

Some stations, some even with the same owner, less than a mile apart, within the same sales tax zone, are paying different wholesale prices. Why? Same delivery costs, same taxes, but perhaps because of a higher population with more affluent customers, hence, a higher wholesale price is charged by the oil companies to the service station dealer. This translates to the consumer, along with the service station dealer, paying higher prices. In essence, the consumer and the independent service station operators have become the victims.

One study has found that zone pricing has the opposite effect, a so-called "poverty premium" for gasoline sold in poor neighborhoods:³⁹

We conclude that the evidence from the market for gasoline indicates that prices are not greatly inflated in minority neighborhoods, but that there is a small poverty premium that may represent a noteworthy burden for the very poor living in very poor neighborhoods.

Whatever the demographics, zone pricing causes confusion, and even anger, among consumers who live in areas with high gasoline prices. Similarly, zone pricing vexes gasoline retailers who believe they are put at a competitive disadvantage by having to pay higher wholesale prices than their competitors.⁴⁰

³⁹ Myers, Close, Fox, Meyer, and Niemi, "Retail Redlining: Are gasoline prices higher in poor and minority neighborhoods?" Middlebury College 2009, available at <http://sandcat.middlebury.edu/econ/repec/mdl/ancoec/0906.pdf>.

⁴⁰ There have been state and federal legislative proposals to enact so-called "open supply" laws that would enable franchise gas station owners to purchase gasoline from alternative suppliers, i.e., suppliers other than the sole source designated by the franchisor. See A07663 and S5183 (2011-2012) and H.R. 2283 ("Eliminate Gas Price Discrimination Act").

AG's Inquiry

As part of his inquiry into gasoline prices, the Attorney General issued subpoenas to five gasoline wholesalers from across the State. These wholesalers supply gasoline to stations in New York City, Long Island, the Hudson Valley and western New York. The Attorney General sought to determine whether these wholesalers were setting different wholesale prices in different geographic areas.

The setting of different prices in different geographic areas was most apparent in the case of one wholesaler that acknowledged dividing its retail service station customers into "pricing zones" consisting of between one and five stations each. Between February 1 and June 1, 2011, prices charged on the same date to stations in different zones ranged by as much as 25 cents per gallon. Zones with higher wholesale prices had correspondingly higher pump prices, as dealers passed along the higher wholesale prices to consumers.

The chart on the following page shows the wholesale price charged in each zone on February 1, March 1, April 1, May 1 and June 1, 2011. Each zone has been ranked, with "1" being the zone(s) with the highest wholesale price on a given date; the lower the ranking, the lower the wholesale price.⁴¹

⁴¹ Multiple zones that were charged the same price on a given date have the same ranking. For example, if three zones were charged the highest price, all are ranked "1". The zone(s) with the next highest price would be ranked "4" because there are three zones with higher prices.

WHOLESALE PRICES BY ZONE*

<u># of Stations in Zone</u>	<u>2/1/11</u>	<u>3/1/11</u>	<u>4/1/11</u>	<u>5/1/11</u>	<u>6/1/11</u>	<u>Rank 2/1/11</u>	<u>Rank 3/1/11</u>	<u>Rank 4/1/11</u>	<u>Rank 5/1/11</u>	<u>Rank 6/1/11</u>
4	\$2.7995	\$3.1395	\$3.3195	\$3.6695	\$3.4695	1	1	1	1	4
4	\$2.7995	\$3.1395	\$3.2795	\$3.6295	\$3.4795	1	1	4	4	1
2	\$2.7995	\$3.1395	\$3.2895	\$3.6395	\$3.4695	1	1	3	3	4
1	\$2.7595	\$3.0995	\$3.3195	\$3.6695	\$3.4795	6	7	1	1	1
2	\$2.7795	\$3.1045	\$3.2495	\$3.5995	\$3.3795	4	6	12	12	19
1	\$2.7795	\$3.1295	\$3.2795	\$3.6295	\$3.4795	4	5	4	4	1
5	\$2.7595	\$3.0845	\$3.2595	\$3.6095	\$3.4295	6	8	7	7	14
4	\$2.7595	\$3.0845	\$3.2595	\$3.6095	\$3.4595	6	8	7	7	6
2	\$2.7595	\$3.0845	\$3.2595	\$3.6095	\$3.4595	6	8	7	7	6
2	\$2.7595	\$3.0845	\$3.2595	\$3.6095	\$3.4095	6	8	7	7	15
3	\$2.7595	\$3.0845	\$3.2595	\$3.6095	\$3.4495	6	8	7	7	12
1	\$2.7595	\$3.0395	\$3.2195	\$3.5695	\$3.3895	6	18	18	18	18
1	\$2.7595	\$3.1395	\$3.2695	\$3.6195	\$3.3995	6	1	6	6	16
4	\$2.7395	\$3.0645	\$3.2395	\$3.5895	\$3.4595	14	13	13	13	6
2	\$2.7395	\$3.0645	\$3.2395	\$3.5895	\$3.4395	14	13	13	13	13
4	\$2.7195	\$3.0445	\$3.2395	\$3.5895	\$3.4595	16	16	13	13	6
2	\$2.7195	\$3.0645	\$3.2395	\$3.5895	\$3.4595	16	13	13	13	6
1	\$2.7195	\$3.0445	\$3.2395	\$3.5895	\$3.4595	16	16	13	13	6
4	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.3395	19	19	18	18	22
2	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.3995	19	19	18	18	16
3	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.3395	19	19	18	18	22
1	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.2995	19	19	18	18	29
2	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.3395	19	19	18	18	22
2	\$2.6995	\$3.0245	\$3.2195	\$3.5695	\$3.3395	19	19	18	18	22
2	\$2.6795	\$3.0045	\$3.1995	\$3.5495	\$3.3195	25	25	25	25	26
1	\$2.6795	\$3.0045	\$3.1995	\$3.5495	\$3.3595	25	25	25	25	21
1	\$2.6795	\$3.0045	\$3.1995	\$3.5495	\$3.2595	25	25	25	25	32
3	\$2.6595	\$2.9845	\$3.1595	\$3.5095	\$3.2595	28	28	29	29	32
3	\$2.6595	\$2.9795	\$3.1795	\$3.5295	\$3.3195	28	29	28	28	26
2	\$2.6395	\$2.9645	\$3.1595	\$3.5095	\$3.2895	30	30	29	29	30
1	\$2.6395	\$2.9645	\$3.1595	\$3.5095	\$3.3195	30	30	29	29	26
1	\$2.6395	\$2.9645	\$3.1595	\$3.5095	\$3.2795	30	30	29	29	31
1	\$2.6395	\$2.9645	\$3.1595	\$3.5095	\$3.3695	30	30	29	29	20
1	\$2.6395	\$2.9645	\$3.1595	\$3.5095	\$3.2195	30	30	29	29	34

*Multiple zones that were charged the same price on a given date have the same ranking. For example, if three zones were charged the highest wholesale price, all are ranked "1". The zone(s) with the next highest price would be ranked "4" because there are three zones with higher prices.

Price Zones

With few exceptions, the rankings for the zones tended to be consistent and did not vary significantly from date-to-date. In other words, zones that were charged relatively high wholesale prices on a given date tended to be charged high prices on other dates, and zones that were charged relatively low wholesale prices on a given date tended to be charged low prices on other dates.

For example, the rankings for one multi-station zone were 1-1-1-1-4 on the first day of each month from February to June, 2011. The rankings for another multi-station zone were 1-1-4-4-1. A single-station zone had rankings of 6-7-1-1-1. Stations in these zones were consistently charged the highest - - or among the highest - - prices.

The same pattern emerges at the other (cheaper) end of the spectrum. For example, the rankings for one single-station zone were 30-30-29-29-34. The rankings for another single-station zone were 30-30-29-29-31. A multi-station zone had rankings of 28-29-28-28-26. Stations in these zones were consistently charged the lowest - - or among the lowest - - prices.

Zones in the middle of the price range also tended to have consistent rankings. For example, the rankings for one multi-station zone were 19-19-18-18-16. The rankings for another multi-station zone were 14-13-13-13-13.

Distance from Terminal

We calculated the distance of each pricing zone from the terminal where the wholesaler purchased the gasoline, to determine the extent to which price differences between zones were based on the cost of transporting the fuel. We sought to determine whether there was a correlation between price and distance from the terminal.

Overall, we did not find that distance from the terminal was a significant factor in wholesale prices.⁴² Indeed, zones located farther from a terminal were often charged lower wholesale prices than closer zones.

For example, a one-station zone located about 49 miles from the terminal was consistently charged the highest, or among the highest, prices for gasoline. This zone had rankings of 6-7-1-1-1 over the five month period studied. The supplier also charged high prices to other zones in the same geographic vicinity.

Yet, zones located significantly farther from the terminal were consistently charged lower wholesale prices. For example, one zone located about 68 miles from the terminal, or 19 miles farther away, was charged an average of 6.5 cents per gallon *less* than the closer

⁴² This finding is consistent with the Federal Trade Commission's conclusion that wholesale prices "generally are unrelated to the cost of hauling fuel from the terminal to the retail store." Analysis to Aid Public Comment, Exxon Corporation and Mobil Corporation, FTC File No. 991-0077, Docket No. C-3907, available at <http://www.ftc.gov/os/1999/11/exxonmobilana.pdf>.

zone. Another zone located about 65 miles from the terminal, or 16 miles farther away, was charged an average of 5.5 cents per gallon less. And a zone about 54 miles from the terminal, or five miles farther away, was charged an average of 6.7 cents per gallon less.

Differing Market Conditions

As noted, distance from the terminal did not appear to be a significant factor in wholesale prices that were charged in different zones. The wholesaler's general manager, who was interviewed by the Attorney General's office, attributed price discrepancies between zones to differing market conditions such as the number of competing gas stations, the specific location of a station, and the costs of doing business in a particular area.

According to the general manager, lower priced zones tended to be in areas with relatively low costs of doing business, such as real estate prices, real estate taxes, labor costs and operating expenses. Conversely, higher priced zones tended to be in areas with relatively high costs of doing business.

Prices were also affected by demand, a station's specific location and traffic flow,⁴³ the number of competing stations, prices charged at competing gas stations, and the differing gasoline formulations that are sold around the state. Replacement cost was also cited as a factor in setting prices - - although the focus was on projected short-term price changes rather than long-term pricing trends.

Although not cited directly as a factor by the general manager, the demographics or affluence of an area also appeared to be a factor.⁴⁴ For example, the high-priced zone referenced above, located 49 miles from the terminal, had a median household income of \$133,696 in 2010.⁴⁵ The lower priced zones, more distant from the terminal, had lower median household incomes of \$55,469, \$62,321, \$66,770 and \$82,869.⁴⁶ Also, the lower priced zones were in more densely populated areas with a greater number of competing gasoline stations.

Legal Challenges to Zone Pricing

While no other states have banned zone pricing, several legal challenges have been brought by retail gas station operators alleging that zone pricing is inherently unfair, arbitrary and illegal. However, courts have generally rejected those challenges.⁴⁷

⁴³ Sometimes, stations located in close proximity to each other within the same city or town were placed into different price zones.

⁴⁴ Affluence may be seen as a corollary to the cost of doing business in a given area.

⁴⁵ Source: CLRsearch.com. The U.S. Census Bureau does not provide median household income data for this location, which has a population of less than 5,000.

⁴⁶ Source: U.S. Census Bureau. The figures are for the period 2005-2009.

⁴⁷ See, e.g., Callahan v. Sunoco, Inc., (E.D. Pa. 2005)(unreported), available at http://scholar.google.com/scholar_case?case=12737748541919512509&hl=en&as_sdt=2&as_vis=1&oi=scholar; United Food Mart, Inc. v. Motiva Enterprises, LLC, 457 F.Supp.2d 1329 (S.D. Fla. 2005), available at

General Business Law § 399-ee

The statute prohibits "arbitrary price differences within the relevant geographic market" Although the wholesaler referenced above consistently sets different prices in different geographical areas, is it engaging in prohibited "zone pricing" under the current statute?

What is the "relevant geographic market"?

General Business Law § 399-ee(1)(g) defines "relevant geographic market" as "the geographic area of effective competition." Unfortunately, this definition does not provide meaningful guidance. Does it mean stations located within the same village or town? Within the same county? Within a specified distance of a terminal? Within a specified distance of each other? Within an area supplied by the same terminal? The statute is silent.

The statute also does not define other terms such as "wholesale class of trade" and "general trade area."

The definition of "zone pricing" is itself unclear, because it prohibits "arbitrary price differences within a relevant geographic market, based on the posted terminal price" (emphasis added). However, the clear intent of the statute was to regulate prices that are set *without regard to* the "posted terminal price," i.e., to prohibit a wholesaler from selling gasoline for different prices in different geographic areas *without regard to* the fact that the wholesaler purchased the gasoline at a terminal for the same posted price.

Also, the definition of zone pricing does not take into account the varying costs a wholesaler may incur in delivering gasoline to different locations, such as replacement costs,⁴⁸ transportation and taxes.⁴⁹

What Are "Arbitrary Price Differences"?

The statute prohibits "*arbitrary* price differences" (emphasis supplied).⁵⁰ Wholesalers argue that there are legitimate, *non*-arbitrary business reasons that support charging different prices to different nearby stations.

http://scholar.google.com/scholar_case?case=2409925020230741194&hl=en&as_sdt=2&as_vis=1&oi=scholar;

⁴⁸ Replacement cost is the wholesaler's cost of replacing the gasoline inventory it has just sold.

⁴⁹ Nor does the statute take into account differing market conditions and level of competition.

⁵⁰ Oxford Dictionaries Online defines "arbitrary" as "based on random choice or personal whim, rather than any reason or system." Courts have defined "arbitrary" as "fixed or done capriciously or at pleasure, not founded in the nature of things, nonrational, not done or acting according to reason or judgment, depending on the will alone, tyrannical, despotic." See, e.g., *Matter of Monachino v. Rohan*, 13 Misc.2d 719 (Sup. Ct. Cayuga Co. 1958), available at

http://scholar.google.com/scholar_case?case=4111140347804335326&hl=en&as_sdt=2&as_vis=1&oi=scholar

For example, in its memorandum in opposition to the 2008 zone pricing legislation, the New York State Petroleum Council argued:

Generally, the practice of zone pricing is a market-based strategy that is neither new nor unique to the petroleum industry. Supermarkets, drug store and hotel chains, car rental companies and movie theaters typically charge different prices based on different market conditions. Gasoline suppliers use zone pricing for the same reason these other industries do - to remain competitive in setting wholesale gasoline prices in different areas of the state or within a metropolitan area.

Zone pricing is a practice that essentially recognizes that different competitive conditions exist in different geographic areas. Typically, the price differential between neighboring stations is not significant, but is always relevant to, and reflective of, differing and fluid competitive conditions. The price level, first and foremost, is based primarily on competitive conditions such as physical boundaries between stations, real estate costs and taxes, personnel costs and governmental regulatory requirements.

Price zones are also the consequence of different levels of competition in different areas.

Similarly, counsel for two of the wholesalers subpoenaed by the Attorney General wrote as follows in response to the subpoena:

Zone pricing is a legitimate pricing practice designed to respond to the competitive market forces that exist in and among different geographic areas and regions. Generally, those geographic areas vary in size, configuration, level of competition and traffic counts. Naturally, consumer prices are lower in areas where competition is greater. In practice, zone pricing tends to reduce prices in urban and suburban areas, where traffic counts are high and where there are significant numbers of competing stations. Prices tend to be higher in rural areas and areas of less competition, particularly where zoning and demographics limit the number of gas stations, and construction and development of new service stations.

Indeed, when the Attorney General's office interviewed the general manager of one of the wholesalers that was subpoenaed, he readily conceded that his company continues to charge different prices in different geographic areas - - even after the enactment of New York's zone pricing law. However, he maintained that the wholesale price differences are not arbitrary because they are based on business-related market and economic conditions such as operating costs, degree of competition, the specific location of a station, and other factors. Therefore, argued the general manager, the wholesaler is not violating the statute.

Ultimately, the inclusion of the word "arbitrary" in the definition of zone pricing renders the prohibition toothless. Wholesalers can argue that their price differences are not

random or "arbitrary" as prohibited by law, but instead are based on business-related reasons such as differing marketing conditions, costs of operation and degree of competition.

Other Objections to the Zone Pricing Law

Other objections to New York's zone pricing legislation have been raised, including: (i) the law is impermissibly vague; (ii) the law is unconstitutional;⁵¹ and (iii) the Attorney General did not promulgate regulations, on an emergency basis, within the sixtieth day of when the Act became law on September 25, 2008.⁵²

Will a Zone Pricing Ban Lower Prices?

Some have argued that a zone pricing ban will not result in lower prices for consumers, or at best, will result in lower prices in some areas of the state and higher prices in others.⁵³

For example, a working paper issued by the Federal Trade Commission⁵⁴ ("FTC") in 2004 found that, if uniform wholesale prices were required, consumers in areas with high prices benefit, but consumers in areas with low wholesale prices "do not necessarily benefit much from this situation, because dealers will capture much of the gain."⁵⁵ The report concluded:

Economic theory, empirical research, and experimental research all provide reasons to believe that banning price zones would be likely to result in higher average prices.

⁵¹ Cf. 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), which struck down a New York law that required liquor retailers to charge at least 112% of a wholesaler's "posted" bottle price. Available at http://scholar.google.com/scholar_case?case=8744915485713191563&hl=en&as_sdt=2&as_vis=1&oi=scholar.

⁵² See §4 of Chapter 570 of the Laws of 2008, which states that the act "shall take effect on the sixtieth day after it shall have become a law; provided, however, that the attorney general shall promulgate, on an emergency basis, all rules and regulations necessary for the timely implementation of this act on its effective date."

⁵³ See, e.g., Michael C. Keeley and Kenneth G. Elzinga (2003), "Uniform Gasoline Price Regulation: Consequences for Consumer Welfare," International Journal of the Economics of Business, vol. 10, pp. 157-168 (while prices in high priced zones might fall, there will likely be a corresponding increase in prices in low-price zones).

⁵⁴ David W. Meyer and Jeffrey Fischer, "The Economics of Price Zones and Territorial Restrictions in Gasoline Marketing," Federal Trade Commission, March 2004, available at <http://www.ftc.gov/be/workpapers/wp271.pdf>.

⁵⁵ The paper also found that zone pricing is more likely explained by "one or more of the business justifications" rather than "anticompetitive explanations."

In 2007 the staff of the FTC opposed a proposed ban of zone pricing in Connecticut⁵⁶ on the basis that a ban:

may result in increased prices and harm consumers by hindering the market's ability to respond to supply disruptions. The ban on zone pricing may also reduce the incentives of refiners to establish gasoline stations in areas with relatively weak competition vis-à-vis other areas.

Similarly, a report on the proposed ban of zone pricing in Connecticut,⁵⁷ authored by three economics professors at Quinnipiac University, concluded that a ban "would likely result in higher prices at the pump for a majority of the state and no drop in pump prices for the remaining areas."⁵⁸

Proposed Statutory Amendments

Whether one believes that zone pricing legislation is beneficial to consumers, an anti-competitive restriction that will ultimately result in higher prices, or a law that will lower prices in some areas of the State and raise them in others, the bottom line is that the current law contains key weaknesses.⁵⁹ Most notably, there is no meaningful definition of "relevant geographic market," an unclear definition of "zone pricing," and a toothless ban of "arbitrary" price differences.

Accordingly, the zone pricing law has never been enforced since it was enacted in 2008, and it is uncertain what effect, if any, the law has had on wholesaler pricing policies - - or

⁵⁶ Letter dated May 2, 2007 from FTC staff to Representative Christopher R. Stone, available at <http://www.ftc.gov/be/V070008.pdf>.

The letter "represents the views of the staff of the FTC Office of Policy Planning, Bureau of Economics, and Bureau of Competition. It does not necessarily represent the views of the FTC or any individual Commissioner. However, the Commission has voted to authorize staff to file this comment."

⁵⁷ See Christopher Ball, Mark Gius and Matthew Rafferty, "Protecting Consumers by Raising Gas Prices?" Quinnipiac University, Summer 2007, available at <http://www.cato.org/pubs/regulation/regv30n2/v30n2-noted.pdf>. The authors also wrote "The Effects of Banning Zone Pricing in Connecticut" for the American Petroleum Institute.

⁵⁸ See also Cary A. Deck and Bart J. Wilson, "Economics at the Pump," Regulation Magazine, Spring 2004, Cato Institute ("Our observations directly counter the claims that zone pricing harms consumers and that uniform ... pricing would benefit them. **** In our experiments, banning zone pricing nearly tripled average station owners' profits. Most of those gains came at the expense of consumers in terms of higher pump prices"); Andrew N. Kleit, Ph.D., "The Economics of Gasoline Retailing," December 2003, ("Eliminating zone pricing, as sought by some franchised dealers and their associations, would have two negative consequences for consumers and refiners alike. First, requiring equal prices would raise prices to some dealers of a particular supplier, and reduce them to others. Recent economic research ... however, indicates that prices are more likely to rise on average than to fall. The reason is that eliminating zone pricing would change the focus of competition from many retail outlets to only a few terminal locations. The resulting "softening" of competition will likely generate, on net, higher prices for consumers."); William Comanor and Jon Riddle (2003), "The Costs of Regulation: Branded Open Supply and Uniform Pricing of Gasoline," International Journal of the Economics of Business, vol. 10, pp. 157-168 ("imposing uniform prices on the leading refiners in California would lead to higher delivered prices of gasoline, on average, than those found currently").

⁵⁹ Indeed, there appears to be widespread consensus among legislators, gasoline wholesalers and retailers that, for the current law to be enforceable, it must be amended.

pump prices - - across the state. Certain areas of the state that had relatively high retail prices before the law took effect in 2008, such as the South Fork of Long Island and northern Westchester, still tend to have relatively high prices.⁶⁰

Perhaps in recognition of the weaknesses in the current statute, there have been numerous Chapter Amendments proposed in the Assembly and Senate since the zone pricing law was passed in 2008.⁶¹ Many of these proposals would address weaknesses in the statute by defining additional terms and providing guidance about how the statute is to be enforced. However, none has passed and been signed into law.⁶²

For example, [A0775/S04170 \(2011-2012\)](#) would define "relevant geographic market" as "the geographic area which is supplied by the same terminal facility." This Chapter Amendment would also redefine "zone pricing" as "the establishment of arbitrary price differences based on the geographic location of the retail outlet within the relevant geographic market and without regard to the posted terminal price and any additional costs where the effect is to injure competition."

These changes would (i) provide a clear definition of the geographic area within which wholesalers may not establish arbitrary price differences (i.e., the area supplied by the same terminal); (ii) correct the reference in the current statute to the posted terminal price (by substituting "without regard to" for "based on"); and (iii) factor in "additional costs" as a basis for different wholesale prices. "Additional costs" would be defined as "all replacement and transportation costs and taxes incurred."

This proposed amendment would also expand the prohibition against zone pricing to include dealers,⁶³ and would permit wholesalers and dealers injured by zone pricing to bring an action seeking an injunction against the practice.⁶⁴

Under the statute as so amended, a wholesaler could charge different prices to different stations served by the same terminal if it could demonstrate that "additional costs" justified the price differential. For example, if one station is five miles from a terminal, and another is 50 miles from the terminal, a wholesaler could point to higher transportation costs as the justification for charging a higher wholesale price to the more distant station. But if the closer station (with lower transportation costs) was being

⁶⁰ See, e.g., "Thiele Charges Memorial Day Price Gouging on the South Fork," May 31, 2011, available at <http://assembly.state.ny.us/mem/?ad=002&sh=story&story=43020> ("while gasoline has dipped below \$4 a gallon on the North Fork and in other areas of Long Island, gasoline prices have seemed frozen in time for the last month on the South Fork, above \$4.25 "); "Kaplowitz: End zone pricing and save money on gas," September 2, 2010, available at <http://polhudson.lohudblogs.com/2010/09/02/kaplowitz-end-zone-pricing-for-gas-save-money/> ("Unfortunately, the new law has had only limited effect, and zone pricing remains widespread in New York State").

⁶¹ See, e.g., for 2007-2008: A06491, A07010, A07775, S00141, S02442, S03709, S04170. For 2009-2010: A00234, A09764, S00558, S03766, S07012, S07122, S07168. For 2011-2012: A06491, A07010, A07775, S00141, S02442, S03709, S04170.

⁶² One bill, A00234A, passed in the Assembly in June 2009. However, the Senate version did not pass.

⁶³ The current statute only prohibits zone pricing by wholesalers.

⁶⁴ Other amendments, such as A07010 and S3709, would extend the ban on zone pricing to include producers, refiners and dealers.

charged a higher price, the wholesaler would have to demonstrate that other "additional costs," such as replacement costs or taxes incurred, justified the differential.

Notably, this proposed amendment to the statute, as well as the others that have been introduced in the Legislature, would continue to prohibit only "arbitrary" price differences. Therefore, even if a wholesaler could not point to "additional costs" as a basis for higher prices in a given geographic area, it could still argue that its higher prices are based on market-based and/or competitive reasons. In other words, the wholesaler could argue that the higher prices are not "random" or based on a "whim," and therefore are not "arbitrary." Thus, from a practical standpoint, it is doubtful that any of the proposed statutory amendments could be utilized to prohibit wholesalers from setting different prices in different geographic areas.

Conclusion

The Attorney General will continue to monitor zone pricing by wholesalers, as it appears that some wholesalers set different prices in different geographic areas.

For New York to have an effective zone pricing law, the statute must be amended by the state Legislature. Key terms such as "relevant geographic market" and "zone pricing" must be clearly defined, and the definition of zone pricing must take into account the varying costs a wholesaler may incur in delivering gasoline to different locations.

In addition, if the law is to truly prohibit wholesalers from setting different prices in different geographic areas, the word "arbitrary" must be deleted from the definition of zone pricing. Otherwise, wholesalers will still be able to set different prices, but evade enforcement, by claiming that their price differences are based on non-arbitrary, business-related market factors.

STATE OF NEW YORK ATTORNEY GENERAL

This report was prepared by:

Martin J. Mack, Executive Deputy Attorney General for Regional Offices

Gary S. Brown, Assistant Attorney General-in-Charge, Westchester Regional Office

Judith Malkin, Assistant Attorney General, Syracuse Regional Office

Irma K. Nimetz, Volunteer Assistant Attorney General, Westchester Regional Office

John D. Maas, Assistant to the Executive Deputy Attorney General for Regional Offices

Brittany Tofinchio, Law Student Intern