



ALAN WILSON  
ATTORNEY GENERAL

September 5, 2014

The Honorable Liston Barfield  
House District No. 58  
503-A Blatt Building  
Columbia, SC 29211

Dear Representative Barfield:

We are in receipt of your opinion request concerning commodity prices following a state or federal disaster. Specifically, you ask: (1) if it is accurate to say “South Carolina law does not . . . explicitly cap price increases at a certain percentage during and after disaster declarations,” but instead only imposes “a general prohibition on ‘unconscionable prices’ during times of disaster;” (2) if this Office, outside of the statutory definition of “unconscionable price” contained in Section 39-5-145(A)(5)(a) of the Code, relies on “any additional factors” to determine if a price is unconscionable; and (3) whether this State’s price gouging restrictions “cease to apply during lengthy periods of time in which conditions related to the disaster no longer exist?” Our responses follow.

#### Law/Analysis

As noted in your letter, it appears each of your questions relate to this State’s anti-price gouging statute, which is found in Section 39-5-145 of the South Carolina Code. See S.C. Code Ann. § 39-5-145(B)-(D) (2013 Supp.) (prohibiting a person, his agent, or employee from charging unconscionable prices for commodities, dwelling units, or self-storage units during a state of emergency, disaster, or abnormal disruption in the market). In particular, we understand your questions as generally inquiring about the breadth and applicability of Section 39-5-145.

#### **1. South Carolina Law Prohibits Charging “Unconscionable Prices” during Emergencies, Disasters and Abnormal Market Disruptions rather than Imposing Price Caps during such times**

In your first question you ask whether it would be accurate to summarize South Carolina law as regulating price gouging by imposing “a general prohibition on ‘unconscionable prices’ during times of disaster” rather than explicitly capping prices during and after disaster declarations. We believe this is an accurate statement.

A variety of state legislatures have passed laws addressing the issue of price gouging during times of disaster. Emily Bae, Are Anti-Price Gouging Legislations Effective Against

Sellers During Disasters?, 4 Entrep. Bus. L.J., 79, -- (2009). According to legal commentators, anti-price gouging statutes fall into one of three categories: (1) percentage price caps, which limit the percentage a commodity may be marked-up following a disaster or other event affecting a market; (2) unconscionability laws, which attack price gouging by barring the sale of goods at unconscionable prices; and (3) no-increase laws, which bar any price increase beyond that required by the higher costs of post-disaster economic activity. Geoffrey C. Rapp, Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation, 94 Ky. L.J. 535, 543 (2005); Michael Brewer, Planning Disaster: Price Gouging Statutes and the Shortages They Create, 72 Brook. L. Rev. 1101, 1113-14 (2007); Bae, 4 Entrep. Bus. L.J., at --. As of 2009, unconscionability laws made up a majority of state anti-price gouging legislation. See Bae, 4 Entrep. L.J. at -- (explaining that as of 2009, 16 of the 30 states that have passed anti-price gouging statutes, passed unconscionability laws). This includes South Carolina's anti-price gouging statute.<sup>1</sup>

Specifically, South Carolina's anti-price gouging statute prohibits price gouging during or after a state of disaster, emergency or abnormal disruption in the market, not by capping prices, but by simply outlawing a person, his agent, or employee from selling or renting a commodity, dwelling unit or self-storage unit at an unconscionable price in the area where a disaster, emergency, or abnormal market disruption occurs. See S.C. Code Ann. § 39-5-145(B)(1)(a-b) (Supp. 2013) (explaining that when the Governor has declared a state of emergency it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area where the emergency declaration has been issued); S.C. Code Ann. § 39-5-145(C)(1)(a-b) (Supp. 2013) (stating that where the President has declared a state of disaster, it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area where the disaster declaration has been issued); S.C. Code Ann. § 39-5-145(D)(1-2) (Supp. 2013) (providing that once the Attorney General has given notice of an abnormal disruption in the market, it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area where the abnormal market disruption occurs.). As mentioned in your letter, the statute defines an "unconscionable price" in Section 39-5-145(A)(5) of the Code as either:

- (i) [A]n amount charged which . . . represents a gross disparity between the price of the commodity or rental or lease of a dwelling unit, including a

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<sup>1</sup> South Carolina's practice is consistent with a variety of other state legislatures, which have adopted a similar approach. E.g. Ala. Code §§ 8-31-1 to 8-31-6 (2014); Fla. Stat. Ann. § 501.160(2) (2014); Idaho Code Ann. § 48-603(18) to (19)(a-c) (2014); Idaho Code Ann. § 48-603C (2014); Ind. Code Ann. §§ 4-6-9.1 to 4-6-9.7 (2014); Iowa Admin. Code 61-31.1 (714) (2014); 940 Code Mass. Regs. 3.18 (2014); Mass. Gen. Laws Ann. Ch. 93A, § 2 (2014); N.Y. Gen. Bus. Law § 396-r(1) (2014); N.C. Gen. Stat. § 75-38 (2014); 73 Penn. Stat. §§ 232.2 to 232.5 (2014); R.I. Gen. Laws § 6-13-21 (as amended by 2014 R.I. Pub. Laws Ch. 14-528); Tenn. Code Ann. §§ 47-18-5101 to 47-18-5104 (2014); Tex. Bus. & Com. Code § 17.46(b)(27) (2014); 9 Vt. Stat. Ann. § 2461d (2014); Va. Code Ann. § 59.1-527 (2014); Wis. Stat. Ann. § 100.305 (2014).

motel or hotel unit, or other temporary lodging, or self-storage facility that is the subject of the offer or transaction at the average price at which the commodity or dwelling unit, including a motel or hotel unit, or other temporary lodging, or self-storage facility was rented, leased, sold, or offered for rent or sale in the usual course of business during the thirty days immediately before a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of the dwelling unit, including a motel or hotel unit, or other temporary lodging, or self-storage facility, or local, regional, national, or international market trends; or

- (ii) [G]rossly exceeds the average price at which the same or similar commodity, dwelling unit, including a hotel or motel unit, or other temporary lodging, or self-storage facility was readily obtainable in the trade area during the thirty days immediately before a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of the dwelling unit, including a motel or hotel unit, or other temporary lodging, or self-storage facility, or local, regional, national, or international market trends.

S.C. Code Ann. § 39-5-145(A)(5)(a)(i-ii) (2013 Supp.). In short, the Legislature defines an “unconscionable price” as one which is either grossly disparate or grossly excessive in comparison to the average price in the affected area in the 30 day timeframe preceding the declaration of the event giving rise to the conditions facilitating such a declaration. Id. Accordingly, we agree with your summary that South Carolina law regulates price-gouging during disasters, emergencies and market disruptions not by imposing price caps, but by prohibiting a person, his agent, or employee from charging unconscionable prices for commodities, dwelling units and self-storage units.

## **2. Determining Whether a Price is Unconscionable**

In your next question you ask whether this Office, outside of the statutory definition of “unconscionable price” contained in Section 39-5-145(A)(5)(a)(i-ii) of the Code, relies on “any additional factors” to determine if a price is unconscionable. We do not.<sup>2</sup>

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<sup>2</sup> However, we do note that Section 39-5-145(A)(3) gives the Attorney General the power to give notice of an “abnormal disruption of the market” which is defined as “a change in the market for a commodity in a part of South Carolina, whether actual or imminently threatened, resulting from stress of whether, forces of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, or other cause that constitutes the basis for an out-of-state declaration.” See S.C. Code Ann. § 39-5-145(A)(3) (2013 Supp.) (empowering the Attorney General

As explained above, the Legislature, via Section 39-5-145, has banned charging unconscionable prices for commodities, dwelling units and self-storage units where a state of disaster, state of emergency, or abnormal disruption in the market occurs. S.C. Code Ann. § 39-5-145(B)(1)(a-b); S.C. Code Ann. § 39-5-145(C)(1)(a-b); S.C. Code Ann. § 39-5-145(D)(1-2). Moreover, the Legislature, by expressly defining the phrase “unconscionable price” in Section 39-5-145(A)(5)(a)(i-ii), has already set the parameters for determining whether a price is unconscionable. See S.C. Code Ann. § 39-5-145(A)(5)(a)(i-ii) (defining an “unconscionable price” as one that is either “a gross disparity” or “grossly exceeds” the average price in the affected area in the 30 days preceding the declaration of applicable emergency, disaster, or abnormal market condition). Thus, the only factor to review for purposes of determining an “unconscionable price” is whether the price at issue meets the statutory definition contained in Section 39-5-145(A)(5)(a)(i-ii) of the Code. Accordingly, this Office does not rely on “any additional factors” to determine if a price is unconscionable.

### 3. When Price Gouging Restrictions Apply

Finally, you ask if Section 39-5-145’s unconscionable price restrictions “apply during lengthy periods of time in which conditions related to the disaster no longer exist?” We believe this is squarely addressed in §§ 39-5-145(B)(2), 39-5-145(C)(2) and 39-5-145(E) of the Code, each of which explain that the statutory restriction on unconscionable prices apply until the applicable declaration or notice either expires, or is terminated by the proper authority.

As detailed above, Section 39-5-145’s unconscionable price restrictions apply in one or more of the following circumstances: where the Governor has declared a state of emergency; where the President has declared a state of disaster; or where the Attorney General has given notice of an abnormal disruption in the market. See S.C. Code Ann. § 39-5-145(B)(1)(a-b) (explaining that when the Governor has declared a state of emergency it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area where the emergency declaration has been issued); S.C. Code Ann. § 39-5-145(C)(1)(a-b) (stating that where the President has declared a state of disaster, it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area where the disaster declaration has been issued); S.C. Code Ann. § 39-5-145(D)(1-2) (providing that once the Attorney General has given notice of an abnormal disruption in the market, it is unlawful to rent or sell a commodity, dwelling unit, or self-storage unit at an unconscionable price in the area

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to give “[n]otice of an abnormal disruption of the market”); see also S.C. Code Ann. § 39-5-145(A)(1) (2013 Supp.) (defining an abnormal disruption in the market). Therefore, while this Office does not rely on “any additional factors” to determine if a price is unconscionable, it appears Section 39-5-145 does empower the Attorney General to determine whether an “abnormal disruption of the market” has occurred as defined in Section 39-5-145(A)(1). As a result, this Office does have the authority to determine *when* Section 39-5-145’s prohibitions apply. S.C. Code Ann. § 39-5-145(D)(1); S.C. Code Ann. 39-5-145(E) (2013 Supp.).

where the abnormal market disruption occurs.). With respect to instances when the Governor or President declare a state of emergency or state of disaster, Section 39-5-145's unconscionable price restrictions, "remain in effect until the declaration expires or is terminated." S.C. Code Ann. § 39-5-145(B)(2); S.C. Code Ann. § 39-5-145(C)(2). The same is true when the Attorney General has given notice of an abnormal disruption of the market, as Section 39-5-145(E) explains "the prohibitions in this section are in effect for fifteen days unless notice of an abnormal disruption in the market is earlier retracted or renewed." S.C. Code Ann. § 39-5-145(E). Thus, we believe the answer to your third question is that Section 39-5-145's unconscionable price restrictions only apply when a state of emergency, state of disaster, or abnormal market disruption occurs, and such restrictions only remain in effect until the applicable declaration or notice expires or is terminated by the proper authority.

**Conclusion**

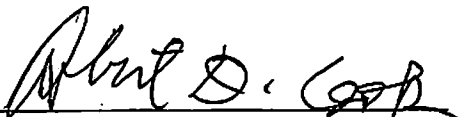
In conclusion, it is the opinion of this Office that it would be accurate to summarize South Carolina's anti-price gouging statute as regulating price gouging by imposing "a general prohibition on 'unconscionable prices' during times of disaster" rather than explicitly capping prices during and after disaster declarations. Further, this Office looks only to the Legislature's definition of "unconscionable price" within the anti-price gouging statute when determining whether a price is unconscionable under the anti-price gouging statute. Finally, pursuant to the terms of Section 39-5-145, unconscionable price restrictions only apply when a state of emergency, state of disaster, or abnormal market disruption occurs, and such restrictions only remain in effect until the applicable declaration or notice expires or is terminated by the proper authority.

Sincerely,



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REVIEWED AND APPROVED BY:



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