



## ENERGY AND THE ENVIRONMENTAL SURCHARGES

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We all know that the price of oil has rocketed to new heights. All across our economy the effects of increased energy costs can be seen in the prices of the goods and services that we purchase. In some industries such as the airline industry and the electric power industry, fuel surcharges have become so commonplace that customers expect these types of charges as an unavoidable extra burden.

In a similar manner, environmental surcharges are common in industries that deal with treating water, land, or air that has been contaminated with pollutants. When you examine the bill you receive from your local car dealer or service station that has serviced your car or put on new tires, you may find that you have a disposal fee or environmental fee that reflects the cost of disposing oily rags, used oil, or used tires.

Consumers have accepted these types of charges so readily that pricing systems based on a bundled or flat rate price seem to be falling out of favor in most industries. Consumers like a base rate with add-ons. As an example, consumers appear much more willing to pay a \$750 base price and accept additional add-ons and service fees totaling another \$250 than to pay an all inclusive \$1,000 price for a product. When you call your car rental company and ask for the daily rate to rent a car, you may be told that the rate is \$39.95 per day. When you go to return that \$39.95 car, having used it for

two days, you will find that with ancillary charges, taxes, etc., your actual daily rate is closer to \$60 per day than \$39.95.

In the past several years, several groups of plaintiff's class action attorneys have challenged the way that various industries use to determine energy or environmental surcharges. According to these plaintiff's attorneys, companies in some industries believe that it is easier to add a surcharge to a bill than to get consumers to accept a price increase. According to complaints that have been filed, in some industries, companies have added energy surcharges or environmental surcharges to their bills that greatly exceed their actual incremental energy or environmental costs. As an example, if the increase energy cost related to a specific transaction was \$1.00, the invoice might have an energy surcharge of \$5.00. Similarly, if the cost of processing pollutants associated with the transaction was \$5.00, your environmental surcharge might be \$20.00.

Courts that have looked at this issue have concluded that if a seller adds a "energy surcharge" or "environmental surcharge" to its invoice, the amount charged must be reasonably related to actual or incremental energy costs or environmental costs. Sellers who put these charges on their invoices must be able to substantiate the amount of the charge with

hard numbers. If you are considering adding an energy surcharge or an environmental surcharge to your bids, you should make sure that you can substantiate that these charges are in fact related to incremental energy or environmental costs.

At the same time, if you are buying a significant amount of product or services from a vendor who is charging you an environmental or energy surcharge, make sure that the charge that you are paying is

related to the amount of incremental costs incurred by the vendor.

As the cost of oil continues to grow, more and more litigation will focus on whether companies are acting in a fair and reasonable manner when they add what they describe as an “environmental” or “energy” surcharge. We recommend that any company that is considering such a charge, consult with legal counsel prior to the implementation of such a practice.