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F I S C A L I M P A C T R E P O R T

SPONSOR SJC **DATE TYPED** 10/07/05 **HB**

SHORT TITLE Emergency Anti-Price-Gouging Act **SB** 3/SJCS

ANALYST Medina/ Francis/ Quezada

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	$1,000.0			Non-Recurring	General Fund Operating Reserve

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to the Unfair Practices Act (Chapter 57, Article 12 NMSA 1978)
Conflicts with Senate Bill 3 and House Bill 9

SOURCES OF INFORMATION
LFC Files
Federal Trade Commission
National Consumer Law Center
Office of the Governor
FindLaw
Library of Congress

Responses Received From
First Judicial District Attorney
Attorney General

SUMMARY

Synopsis of Committee Substitute

Senate Judiciary Committee Substitute for Senate Bill 3 authorizes the governor, with State Board of Finance approval, to transfer $1,000.0 from the general fund operating reserve to a proposed anti-price-gouging fund for the attorney general to investigate and prosecute alleged violations of the Emergency Anti-Price-Gouging Act. The release of funds would be authorized for a single period of abnormal market disruption.

The bill prohibits the sale, rent or lease of goods or services--including gasoline, natural gas, and

heating oil--and other goods necessary to preserve, protect, or sustain life, health or safety for an unconscionable price during a period of abnormal market disruption. The charging of such a good or service at an unconscionable price is the practice commonly known as price gouging. A period of abnormal market disruption is declared by executive order after any federal or state declaration of emergency or disaster has been made, subject to the governor's determination that the emergency or disaster has caused an abnormal market disruption until the governor determines that the period should cease. A period of abnormal market disruption is defined as a change in the market resulting from an emergency or disaster where market forces are or appear to be likely to be insufficient to ensure reasonably stable prices of good or services.

In an executive order determining an abnormal market disruption, the governor is to specify the geographic regions within which the restrictions imposed by the Anti-Price-Gouging Act apply and those categories of goods and services to which the restrictions imposed apply.

The committee substitute defines the allowable length of a period of abnormal market disruption to thirty days per executive order and a limit of 120 days per market disruption. Further extensions of the executive-ordered period would be subject to authorization by the legislature through joint resolution. Any declared period of abnormal market disruption could also be terminated by a legislative joint resolution.

The bill requires that evidence of price gouging lies in proving that the price that a violator charged for an eligible good or service was more than ten percent above the average price in the same market area during the twenty days prior to the even causing the emergency or disaster that resulted in an abnormal market disruption. This constitutes *prima facie* evidence that the price of that good or service was unconscionable (See Significant Issues).

Enforcement. Persons found guilty of continuous and willful violation of the Act would be subject to a court's suspension or revocation of their business licenses and may be banned from conducting business in the state. Persons found to have charged an unconscionable price in violation of the Act may also be required by a court to disgorge (expel) excess profits realized from the violation. Violations of the Act would also be considered unfair or deceptive trade practices and thus subject o the provisions of the Unfair Practices Act (Chapter 57, Article 12 NMSA 1978), including the attorney general's original jurisdiction over the implementation and enforcement of the Unfair Practices Act. The power to serve emergency civil investigative demands requiring response within three business days is also vested in the attorney general. Finally, all state agencies are to cooperate with the attorney general in the investigation of alleged violations of the Emergency Anti-Price-Gouging Act.

Significant Issues

The main difficulty in determining whether the price of a good or service is unconscionable lies in the determination of price prior to the event and the changes in the components of the price. Anti-price-gouging laws have been challenged on the basis of the inherent subjectivity of this determination. A violation of this Act would occur when a vendor charges a price deemed insufficiently supported by market forces. However, several variables make this determination difficult.

First, defining the benchmark price of goods and services is complicated by the characteristics of the market area. If price-gouging is alleged to have taken place at a prime location, say at the end

of the off-ramp of an interstate, the "market area" should include other retailers similarly located and not ones in more competitive locations. The heterogeneity of retailers of goods also creates concerns for the effects of establishing price ceilings. Large, chain-type retailers will have more control over prices and have different incentives than small, local retailers. In some cases, particularly for a highly visible emergency like a natural disaster, a large well-known company may have a public relations incentive to keep the price lower than what the market justifies.

The bill includes a non-exclusive list of four factors that could be used to determine whether a price is unconscionable:

Exercise of unfair economic or other advantage. An example of an unfair economic advantage is when the buyer has no control over the decision making process. This is usually the case when there is no other seller of a good or service in a reasonable proximity. A buyer may have no recourse in the market place to a price offered by that vendor and so has no control over the decision if that good or service is essential.

Price difference between alleged violator and market area twenty days prior to event. This exists when the price of a particular vendor significantly exceeds the price in the immediate market area. Determining an appropriate "market area" will be the challenge of this method. If the alleged violator is near an access point (i.e. an interstate ramp), is the market price of the good/service all others at that access point or the community at large. Another consideration is whether the vendor has always been higher than the market area even in non-emergencies. There are cases where retailers, due to visibility or particular locations or even brand identification, can command a higher price than surrounding retailers.

Profit margin difference. This factor would capture all of the input prices and thus isolate the cause of the higher price of the alleged violator. A significant difference in profit margin before and after a significant event would provide an example of undue price influence. However, determining profit margin difference would likely be controversial to vendors since profit margins are generally thought of as confidential information crucial to competition. It would not be improbable to envision a competitor making allegations for the sole purpose of discovering profit margin information.

Increase not directly attributable to increased costs imposed by supplier. This factor is similar to the previous in that it attempts to isolate that portion of the price that is "unconscionable." Once again, the definition of "market area" will be crucial to understanding the price differential. Smaller retailers have limited ability to negotiate with suppliers during a time of shortage and so can be subjected to higher prices.

The bill also prohibits increases in motor fuel prices more frequently than once in twenty-four hours. Price controls may have the effect of limiting supplies at a crucial time if a retailer is faced with losing money due to timing of an order from the distributor. According to the *Seattle Post-Intelligencer* (September 19, 2005), in New Jersey, a state with anti-price-gouging protections, inspectors looking into allegations of price gouging at 400 gas stations in the states issued more than 100 violation citations, but none were for price gouging. Instead, gas stations were cited for raising the price of gasoline more than once in a twenty-four hour period.

FISCAL IMPLICATIONS

The authorization for the transfer in case of an emergency of up to $1,000.0 contained in this bill is a nonrecurring expense to the general fund operating reserve. Any unexpended or unencumbered balance remaining in a newly-created anti-price-gouging fund at the end of a fiscal year shall not revert to the general fund. Rather, any funds remaining are to remain to the credit of the anti-price-gouging fund until the attorney general completes the investigation and prosecution of a violation. The costs to the attorney general of obtaining *prima facie* evidence that a price charged for a good or service is unconscionable would require issuing subpoenas for business records, obtaining search warrants, and economic analyses, among other activities.

Should a transfer of funds pursuant to this bill take place on or before the first day of a regular legislative session that convenes at least 120 days after the declaration of a period of abnormal market disruption, the attorney general is to report to the legislature on the funds received and expended from the Anti-Price-Gouging Fund. The report is to include details of expenditures and anticipated expenditures, and whether the attorney general anticipates that the balance in the fund is sufficient to perform its investigative and prosecutorial responsibilities.

By controlling the prices of goods and services, this bill invites two significant possible market effects that would have revenue implications—price effect and demand effect. The price effect of price controls for goods and services subject to gross receipts tax in an emergency period entails lower revenues than could be attained without the controls. The demand effect, by which demand for a product increases with lower prices, entails a positive effect on tax revenues for goods and services subject to an excise tax which is calculated on volume sold.

The fines associated with the successful prosecution of violations may also offset any revenue loss.

ADMINISTRATIVE IMPLICATIONS

As the primary enforcer of the Unfair Practices Act, the Office of the Attorney General's Consumer Protection Division has the resources to investigate, mediate, and prosecute cases related to consumer protection and would also have original jurisdiction of the Emergency Anti-Price-Gouging Act.

RELATIONSHIP

The Unfair Practices Act (Chapter 57, Article 12 NMSA 1978) prohibits unfair or deceptive and unconscionable trade practices but does not provide for price control mechanisms related to circumstances of emergency or disaster-related market abnormalities.

Similar legislation at the federal level is currently under consideration by the U.S. House of Representatives. House Resolution 3681 proposes to amend the Clayton Act to make unlawful price gouging for necessary goods and services during Presidentially-declared times of national disaster. H.R. 3681 includes provisions similar to those in this bill for the determination of an unconscionable price.

TECHNICAL ISSUES

In the case of a hurricane in the Gulf Coast area, a state of emergency was declared for the area both by the federal and state governments. No state of emergency existed for New Mexico and it is unclear from the legislation whether the declaration has to be for New Mexico or can be for any state or region.

OTHER SUBSTANTIVE ISSUES

According to the Office of the Governor and the National Consumer Law Center, at least nineteen states have laws or regulations that prohibit price-gouging on petroleum products or other goods in the aftermath of disasters. New Mexico is one of four states not directly affected by Hurricane Katrina that are currently taking action on alleged price gouging. These efforts are a targeted response to spikes in gas prices since Hurricane Katrina.

According to the *Seattle Post-Intelligencer* (September 19, 2005), the Federal Trade Commission (FTC), which investigates suspected violations of price gouging using broad laws regulating antitrust practices and collusion between businesses, has never brought a gas-price-gouging case.

ALTERNATIVES

Section 15 of this bill calls for a liberal interpretation of the Act in order to carry out its purpose. The Unfair Practices Act's section on the interpretation of the prohibition on unfair or deceptive and unconscionable trade practices (Section 57-12-4 NMSA 1978) reads: "It is the intent of the legislature that in construing [this provision] of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts." LFC staff recommends substituting this or similar language for Section 9 of this bill in order that the Act be consistent with current criminal statutes, which are strictly construed.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

If this bill is not enacted, current statutes would not include provisions for investigating allegations of price gouging during a state of emergency or abnormal market disruption, nor for imposing penalties for persons engaged in price gouging. By not enacting this bill, the state's economy would be allowed to react to states of emergency or abnormal market disruption as a free market economy.

POSSIBLE QUESTIONS

Has it been determined that price gouging has had a significant negative impact on the state's economy?

How successful have efforts in other states been at combating price gouging, in particular at the gas pump?

If a state of emergency is declared for which what are the implications of that declaration? In other words, what resources are automatically mobilized following an emergency declaration that are unnecessary to the public safety of New Mexicans?

Is it conceivable, following the liberal interpretation called for in Section 15 of this bill, that an executive emergency declaration in which no disaster, natural or otherwise, has befallen in the state, could be used to justify enacting the price controls contained in this bill?

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