

**MINUTES OF THE SUBCOMMITTEE OF THE  
SENATE COMMITTEE ON COMMERCE AND LABOR**

**Seventy-fourth Session  
February 19, 2007**

The subcommittee of the Senate Committee on Commerce and Labor was called to order by Chair Joseph J. Heck at 9:37 a.m. on Monday, February 19, 2007, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**SUBCOMMITTEE MEMBERS PRESENT:**

Senator Joseph J. Heck, Chair  
Senator Michael A. Schneider

**GUEST LEGISLATORS PRESENT:**

Senator Dina Titus, Clark County Senatorial District No. 7

**STAFF MEMBERS PRESENT:**

Kelly S. Gregory, Committee Policy Analyst  
Lori Johnson, Committee Secretary  
Scott Young, Committee Policy Analyst  
Lynn Hendricks, Committee Secretary

**OTHERS PRESENT:**

John P. Sande, III, Western States Petroleum Association  
Kathleen Delaney, Senior Deputy Attorney General, Bureau of Consumer  
Protection, Office of the Attorney General  
Greg Ferraro, Nevada Resort Association  
Alfredo Alonso, Peppermill Casinos, Incorporated; Berry-Hinckley Industries

Chair Heck opened the discussion of Senate Bill (S.B.) 82.

**SENATE BILL 82:** Provides that price gouging during an emergency constitutes a deceptive trade practice. (BDR 52-31)

Chair Heck summarized points of contention regarding the bill brought forward in previous discussions. They were whether the definition of "state of emergency" would include emergencies declared anywhere or just those close to Nevada, and how the "unconscionable price" was to be set.

John P. Sande, III, Western States Petroleum Association, offered two exhibits. The first was a letter from the Chevron Corporation ([Exhibit C](#)) setting forth its opposition to the bill. The second was a press release dated June 8, 2006, from the Western States Petroleum Association ([Exhibit D](#)) stating the Federal Trade Commission found no instances of illegal market manipulation in the aftermath of Hurricane Katrina in August 2005.

Mr. Sande stated the bill was unworkable as written and would not accomplish what the sponsor of the bill wanted. First, placing it in chapter 598 of the *Nevada Revised Statutes* (NRS) under deceptive trade practices would include the private right of action. This would subject hotels that routinely raise room prices for special events to private lawsuits for the practice. Second, the bill provided a criminal penalty for knowing violations. Since it would be difficult or impossible to figure out if the terms of the bill had been violated, there would be a good chance businesses would decide not to do business in Nevada in order to avoid prosecution. Finally, the language in the bill was ambiguous. Section 1, subsection 1, referred to "immediately before or during a state of emergency," but this time period was not defined. He asked how a retailer was to know if an event was a state of emergency before it occurred.

Senator Dina Titus, Clark County Senatorial District No. 7, stated the bill was narrowly defined. The language was based on statutes from 30 states and federal legislation introduced by both Democrats and Republicans. According to the Bureau of Consumer Protection, the office that would be enforcing the statute, the phrase "immediately before and during a state of emergency" referred to the time between the occurrence of the event and the declaration of a state of emergency.

Mr. Sande said he assumed "immediately before a state of emergency" meant the time before the emergency occurred.

Mr. Sande, referring to the passage in section 1, subsection 3, declared that an "unconscionable price" would be prima facie evidence of price gouging, thus putting the burden of proof on the retailer. In addition, paragraphs (a) and (b) of

the same subsection were confusing. Paragraph (a) referred to the "average price" of the good or service for 30 days preceding the emergency but did not detail how that average price was to be computed. He asked whether this was the average price one retailer charged, the price charged at all stores in the area, or the price charged across the country; whether it referred to the price charged each day or the total sold over the 30-day period; and if an item was sold for \$10 one day and \$12 the next day, whether the retailer should include the number of items sold each day into the equation or simply average the 2 prices. Similarly, paragraph (b) did not define "trade area" or "similar consumer good." He asked how retailers were to determine the average cost of goods in their area, and suggested that if retailers surveyed competitors' prices and adjusted prices accordingly, that might be considered price-fixing. If a retailer made a mistake, the bill established a first-time penalty of misdemeanor charges.

Mr. Sande outlined similar problems in section 1, subsection 4, which allowed a retailer to raise prices in connection with an increase in costs. He asked whether the retailer would be expected to use the price actually paid for stock at the time it was purchased or the price that would be charged to replace the stock at emergency prices. The term "national or international market trends" was also undefined and open to interpretation.

Mr. Sande stated that under S.B. 82, the average retailer would have no idea whether he or she was violating the law. As a result, many retailers would be reluctant to sell during an emergency, and many wholesalers would be reluctant to provide consumer goods in an emergency, for fear of criminal charges.

Senator Schneider said from the consumers' point of view, if a retailer sold a good or service for twice the usual price when an emergency occurred, that would be price gouging. The goods might not need to be restocked at the wholesaler's inflated price, so the cost of future goods would not necessarily be relevant. The situation would be different for perishable goods, which might need to be restocked while prices were high; but for a nonperishable good like oil, the retailer could weather out a short rise in costs. If a local gas station doubled prices while their tanks were full, that would be price gouging.

Mr. Sande said this illustrated the problem for a retailer with mixed inventory. Some goods might have been bought 30 days before the emergency at a low price, some 15 days before at a higher price, and some 1 day before at a much higher price. This would make it difficult to calculate the average price, and

retailers who bought at a later date and paid a higher price could charge more than retailers who purchased earlier. Also, a state of emergency could stimulate consumers to buy goods at a much higher rate than usual, as happened during the oil embargo of the 1970s, thus depleting the retailers' stocks faster than expected. This situation would be both confusing and unfair.

Senator Schneider said it should not be difficult for the retailer to look at his or her records and determine how much was paid and charged for stock for the previous 30 days. A retailer who could not do this would be out of business soon in any event. He agreed no one wanted price controls, but noted that most emergencies were of short duration. For example, after Hurricane Katrina hit the Gulf Coast in August 2005, the oil platforms were repaired and back pumping oil within ten days and the market was back to normal within two weeks.

Chair Heck noted that during last year's wildfires, a state of emergency was declared in Nevada lasting longer than the actual fires. The market might return to normal while a declaration of a state of emergency was still in effect.

Senator Schneider stated he was not concerned about the prices charged by hotel rooms for special events. That was a matter of market demand and easy to track.

Chair Heck asked if there had been any documented instances of price gouging in Nevada during national declarations of emergency or those in other states.

Senator Titus said there was evidence that after the terrorist attacks on September 11, 2001, when air travel was curtailed and rental cars were much in demand, rental car prices in Nevada jumped from \$150 to \$750. She said she would provide the Committee with this documentation.

Senator Titus noted that the type of industries opposing this bill was significant. She said it was important that the Committee hear an alternate explanation of the bill from an attorney who does not represent an industry that stands to profit from the type of activity this bill would govern.

Kathleen Delaney, Senior Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General, said the provisions of the bill would be under the concurrent jurisdiction of the Bureau of Consumer Protection and

the Consumer Affairs Division of the Department of Business and Industry, as well as the offices of local district attorneys.

Ms. Delaney said the concern had been raised that first offenses would be treated as misdemeanors. The Deceptive Trade Practices Act required knowing and willful violation before a misdemeanor charge would be considered for a first offense. Retailers who did not know or were not aware of their violation would not be eligible for criminal charges.

Ms. Delaney agreed with Senator Titus that this bill was narrowly drawn and was virtually identical to price-gouging measures passed by other states. Section 1, subsection 3, would put the burden on the state to determine that there might be a violation. Some states with price-gouging legislation in place prior to September 11, 2001, ran into difficulties because they did not have an objective standard in place to make the presumption that there had been price gouging. The Attorney General would be looking for merchants attempting to profiteer, not standard marketplace fluctuations. Subsection 3 would put the burden on the State to find out if the merchant was selling those same goods or services at a lower price and later raised the price to profit from the emergency without relevance to their own increased costs. Paragraph (a) would cover situations in which the goods or services were ones the merchant usually sold, and paragraph (b) would give a way to uncover price gouging when the goods or services are ones the merchant had not sold before. Subsection 4 of section 1 would be the business's opportunity to rebut the presumption by showing that their prices were related to actual cost increases.

Ms. Delaney stated that with regard to the definition of "immediately before," one state addressed this by confining it to 24 hours before the declaration of a state of emergency.

Ms. Delaney said that she would like to keep the language of section 1, subsection 6, paragraph (b), broad to allow the State to react to situations in other places that have an effect on Nevada, such as Hurricane Katrina in Louisiana or the terrorist attacks in New York.

Chair Heck asked if a merchant raised prices because their experience suggested an event would increase costs, whether they would be liable under this bill.

Ms. Delaney said technically the answer was yes. The scenario assumed the merchant was raising prices in anticipation of increased costs, which could be taking advantage of the consumers' lack of knowledge. It would be better for consumers if merchants increased prices because their costs were actually higher, rather than in anticipation of higher costs that might not occur. However, to prove price gouging in that scenario, the Attorney General would still have to prove the will to profiteer with no justification for the increase.

Chair Heck said savvy retailers would be able to recall data from previous emergencies to provide such justification. With regard to the duration of disasters, the state of emergency declared for Hurricane Katrina was issued September 13, 2005, and had not yet been lifted for the State of Nevada. This would mean the provisions of this bill would apply at the present, almost 18 months after the original emergency.

Ms. Delaney said the other states that have enacted price-gouging legislation have had language like this in place. The fact that the declaration of a state of emergency had not been lifted would have no impact unless a merchant profiteered and a consumer made a complaint. The state of emergency simply allowed the bill to apply; it would not give the consumer rights that would not otherwise exist.

Chair Heck asked if a merchant raised prices with the intent to profiteer for reasons unrelated to a state of emergency, whether they could be prosecuted under this bill if a state of emergency was still in effect.

Ms. Delaney said it would have to be related to the emergency for it to be actionable. If a merchant simply thought the market would bear a massive increase in price for reasons unrelated to an emergency, it would not be actionable. Some states have confined price-gouging legislation to goods and services required because of the emergency in order to avoid such a situation.

Senator Titus appreciated the suggestion and said she would work on an amendment on those lines.

Mr. Sande said it would be an improvement over the existing language.

Greg Ferraro, Nevada Resort Association, said he had serious reservations about S.B. 82 and felt it would have unintended consequences. He interpreted the bill

as being in place before and during emergencies. In 2006, there were 143 federal declarations of disaster. Of these, only six were in states bordering Nevada. This bill would prevent hotel operators from adjusting their rates consistent with market forces for special events; for example, a hotel operator in Elko could not charge what the market will bear during Cowboy Poetry Week because of a completely unrelated emergency elsewhere in the United States.

Mr. Ferraro said the Federal Emergency Management Agency had stated states of emergency could last as long as 18 months and be renewed for another 6 months. Thus, there could be a two-year period in which the bill had an effect on Nevada.

Mr. Ferraro said the hotel industry had a strong record of citizenship during disasters. For example, during Hurricane Katrina, rooms were made available for those displaced.

Senator Schneider said the hotel industry had a documented history of adjusting prices according to specific events and holidays. It would not be the intention of this bill to change that, though language could be added to specifically allow it.

Mr. Ferraro repeated that he had serious concerns about the bill as written.

Chair Heck asked if the Governor had the authority to issue an executive order to deal with price gouging during a declared state of emergency.

Ms. Delaney said she was not aware of executive orders being used for this purpose in the past. Historically, when complaints were received by the Attorney General, they did not have a way to address those complaints directly because of the lack of a price-gouging statute. The best that could be done was to attack the problem indirectly, for example, by looking for false statements or failure to disclose material facts in a transaction.

Mr. Ferraro said he believed the matter would be covered under NRS 414.070, which gives the Governor broad powers during an emergency.

Alfredo Alonso, Peppermill Casinos, Incorporated; Berry-Hinckley Industries, said section 12 of S.B. 82 allowed for private right of action, which would allow a customer who paid \$50 for a hotel room to bring an action against the hotel for price gouging because someone else paid \$40. While this was clearly not the

intent of the bill, it could be the consequence. Narrowing the list of goods and services might be one way to avoid this problem, though he did not advocate this.

Senator Schneider said he had heard stories of Las Vegas hotels actually lowering prices in the wake of September 11, 2001, to accommodate people who could not get home. He asked Mr. Alonso to work with Mr. Ferraro to come up with an amendment to the bill regarding the hotel industry's pricing during special events.

Mr. Alonso said he would do so. He repeated his concerns about section 12 of the bill.

Ms. Delaney said regarding section 12, as the bill was drafted, it put the price-gouging prohibition in the Deceptive Trade Practices Act, which allowed consumers the private right of action. She recommended the Committee discuss keeping the bill mostly intact but placing it elsewhere in statute that would give the appropriate parties the ability to enforce it while alleviating concerns about all the matters attendant to the Deceptive Trade Practices Act, though she did not advocate it.

Ms. Delaney said another issue that had been raised was narrowing the definition of "commodity" to those directly in need because of the emergency. This would address many of the concerns about ongoing declared states of emergency where the market had settled but something else was going on.

Ms. Delaney suggested the Committee consider adding a statement of legislative intent to the bill. She cited precedent for this in other statutes, including NRS 599B.005, and said such statements were also included in many of the measures enacted in other states. One such statement was: "When a declared state of emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential goods or services be prohibited." This might be a way to alleviate concerns about future enforcement. This bill is not price control, but rather a prohibition against post-disaster price gouging.

Chair Heck asked Ms. Delaney to prepare a revision of the bill dealing with the issues brought up in this meeting: a better definition of "immediately before" in section 1, subsection 1; a more specific definition of how the "average price"



referred to in section 1, subsection 3, paragraph (a), was to be determined; a definition of the "trade area" referred to in section 1, subsection 3, paragraph (b); in section 1, subsection 6, paragraph (b), subparagraph (1), restriction of the statute to states of emergency expected to have an impact on Nevada; and suggestions on how to rectify the private right-of-action clause of section 12.

Ms. Delaney agreed to work on language addressing the majority of these concerns. She said, however, that if the bill was to work, the Attorney General would need to have the ability to utilize enforcement measures when an emergency had an impact on Nevada, whether it was expected to or not. She noted that neither Hurricane Katrina nor the terrorist attacks on September 11, 2001, would have been expected to affect Nevada, yet they did. Whenever there was a public perception of a supply shortage, an unscrupulous merchant could be expected to try to take advantage of it.

Chair Heck asked for documentation showing evidence of price gouging. He said he wished to be sure the bill was not a solution in search of a problem.

Ms. Delaney agreed to gather any evidence they had for the Committee. She said, however, that since there was no legislation dealing directly with price gouging, the Office of the Attorney General did not have a wealth of case histories to draw from.

Chair Heck asked Ms. Delaney to work with Senator Titus and the interested parties and report back to the subcommittee when she had the language worked out.

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Chair Heck asked if there was any further comment. Hearing none, he adjourned the meeting at 10:29 a.m.

RESPECTFULLY SUBMITTED:

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Lynn Hendricks,  
Committee Secretary

APPROVED BY:

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Senator Joseph J. Heck, Chair

DATE: \_\_\_\_\_