

**SB 2000 (Dunn) – Electric power and natural gas: unlawful practices.**

**As Introduced**

**Recommendation:** Support

**Summary:** This bill

- Creates a new cause of action for damages against a person “engaged in the business of generating, selling, distributing, transferring or marketing electricity or natural gas if the person possesses and exercises market power.” Damages recoverable include the difference between the actual price charged and a “competitive benchmark price,” triple damages, cost and attorney’s fees.
- Defines market power as the “ability to profitably maintain prices above competitive levels for a period of time.”
- Creates a rebuttable presumption that market power was exercised in any case in which the price of electricity or natural gas is above the competitive benchmark. The “competitive benchmark” is defined as “the short-run marginal cost of the highest cost unit needed to meet demand.”

**Analysis:** This bill creates a new kind of economic tort for the exercise of market power in the sale of electricity and gas. The author contends that the creation of this cause of action will provide a powerful deterrent to the price gouging which afflicted California during the energy crisis. Suits under the bill can be brought by the Attorney General or by persons injured by the exercise of market power in pricing essential services.

1. The Attorney General, various individuals and governmental entities have initiated civil litigation based on violations of the Unfair Practices Act (B&P Code section 17200) , the Cartwright Act (B&P Code 17000), the Sherman Act, the Federal Power Act and various other state and federal law claims in connection with price gouging for electricity and gas. In addition, the California Public Utilities Commission (Commission), the Electricity Oversight Board (EOB) and investor-owned utilities have filed administrative complaints with the Federal Energy Regulatory Commission (FERC) asserting that electric and gas sales have violated the provisions of the Federal Power Act. None of these claims is based on a law, statutory or common law, specifically adapted to address the problem of charging high prices for essential services. This bill would fill in that gap, according to its proponents.
2. Electricity and gas sales are the subjects of comprehensive federal legislative and regulatory schemes. The federal law expressly preserves state law in a number of areas, particularly in respect to all aspects of retail service and retail ratemaking. However, federal law appears to address comprehensively the subject matter of wholesale electricity and gas sales. This bill does not distinguish between market power exercised in respect to retail sales and wholesale sales, and thus it may be pre-empted by federal law in some of its applications including the crucial ones at issue in the energy crisis price gouging.
3. Electricity and gas delivered in California may be bought and sold in other states. The bill may have extra-territorial applications that will implicate constitutional questions about the ability of California courts to reach conduct – the exercise of market power – that occurs outside the state but has impacts inside the state.

4. The rebuttable presumption that market power has been exercised depends on a bench-mark price that is defined as the marginal cost of the last unit. Charging a price above the benchmark shifts the burden of proof to the seller. By defining the standard with commonly used economic terms that nevertheless may have multiple meanings, the bill is leaving to the courts the task of providing content for the key concepts. The bill is thus consistent with the common law tradition in American courts of defining legal duties in the context of specific factual controversies. However, the bill does not provide precise numeric formulas for identifying the existence and exercise of market power.

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Date:            April 16, 2002

**Bill Language**

**Bill Language**

BILL NUMBER: SB 2000 INTRODUCED

BILL TEXT

INTRODUCED BY Senator Dunn

FEBRUARY 22, 2002

An act to add Title 3.6 (commencing with Section 1883) to Part 4 of Division 3 of the Civil Code, relating to energy resources.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 2000, as introduced, Dunn. Electric power and natural gas: unlawful practices.

Existing law sets forth obligations that arise from particular transactions.

This bill would prohibit any person engaged in the business of generating, selling, distributing, transferring, or marketing electricity or natural gas from engaging in specified unlawful acts or practices. This bill would provide that a person found in violation of these provisions would be required to disgorge the revenue from the unlawful acts, and would be liable for, among other things, 3 times the amount of the disgorgement and attorney fees. The bill would require that actions for relief under these provisions be brought in a court of competent jurisdiction by the Attorney General or by another person, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

SECTION 1. Title 3.6 (commencing with Section 1883) is added to Part 4 of Division 3 of the Civil Code, to read:

**TITLE 3.6. UNLAWFUL ELECTRIC POWER AND NATURAL GAS PRACTICES**

1883. For purposes of this chapter:

(a) "Competitive benchmark" for assessing market power is

determined as the short-run marginal costs of the highest cost unit needed to meet demand.

(b) "Exercise of market power" means charging prices above the competitive benchmark.

(c) "Market power" means the ability to profitably maintain prices above competitive levels for a period of time. A person may also possess market power with respect to significant competitive dimensions other than price such as quality, service, or innovation.

(d) "Person" means and includes a natural person, corporation, firm, partnership, joint stock company, association, and other organization or entity of persons.

1883.1. (a) A person engaged in the business of generating, selling, distributing, transferring, or marketing electricity or natural gas may not possess and exercise market power.

(b) There shall be a rebuttable presumption that market power was exercised in any case in which prices above the competitive benchmark were charged.

1883.2. A person who violates Section 1883.1 shall, in addition to other damages, be required to disgorge the revenue that is equal to the difference between the actual price charged and the competitive benchmark price as a result of that unlawful conduct. As used in this section, "disgorgement" shall be measured by the difference in the actual price charged and the competitive benchmark price as a result of that unlawful conduct. In addition, a person found to be in violation of Section 1883.1 shall be liable for three times the amount of damages sustained, as measured by the amount of disgorgement, because of the act or acts of that person. A person found to be in violation of Section 1883.1 shall also be liable for the costs of a civil action brought to recover those damages and attorney fees.

1883.3. (a) Specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in any case of a violation of Section 1883.1.

(i) (b) A person who engages, has engaged, or proposes to engage in any of the conduct set forth in Section 1883.1, may be enjoined in any court of competent jurisdiction. The court may make these orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by a person of a practice or conduct set forth in Section 1883.1, or as may be necessary to restore to a person in interest money or property. The court shall order the disgorgement of the revenue from the use or employment of any act or practice prohibited by Section 1883.1, and shall establish a fluid recovery fund for the return of the funds.

1883.4. Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the

Attorney General, or by a person acting for the interests of itself, its members, or the general public.

1883.5. Unless otherwise expressly provided, the remedies or penalties provided by this section are cumulative to each other and to the remedies or penalties available under all other laws of this state.