

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON HIGHWAYS AND TRANSPORTATION

Call to Order: By CHAIRMAN TVEIT, on MARCH 14, 1989, at 1:00 p.m. in Room 410 of the State Capitol.

ROLL CALL

Members Present: SENATORS: Larry Tveit, Darryl Meyer, Bill Farrell, John Harp, Jerry Noble, Lawrence Stimatz, Cecil Weeding, Bob Williams

Members Excused: Senator Hubert Abrams

Members Absent: None

Staff Present: Lee Heiman, Legislative Council

Announcements/Discussion: CHAIRMAN TVEIT announced the hearings on House Joint Resolution 17, House Bill 671, House Bill 464 and House Joint Resolution 12.

HEARING ON HOUSE JOINT RESOLUTION 17

Presentation and Opening Statement by Sponsor:

REPRESENTATIVE TED SCHYE, District 18 stated that HJR 17 deals with the essential air service in Montana. The Congress and the Department of Transportation have already adopted the rules. This bill says that Montana is still in favor of the essential air services. The essential air service act was put in 1978, the funding was to last for 10 years. In 1987 Congress reaffirmed and funded it. When the program ran short, the Department of Transportation decided to cut out the services to the rural states and Montana was one of them. There are eight areas in Montana that would be greatly affected and they are: Wolf Point, Glendive, Sidney, Miles City, West Yellowstone, Glasgow, Lewistown and Havre. He stated that during the House Committee hearing Mike Ferguson testified in support of HJR 17 for the Governor.

List of Testifying Proponents and What Group they Represent:

Jim Tutwiler, MT Chamber of Commerce
Kathy Sparr, Glendive Forward
Les Ollerman, Mayor of Glendive
Manson Daily, Glasgow
Senator Larry Tveit, Fairview

List of Testifying Opponents and What Group They Represent:

None

Testimony:

JAMES TUTWILER, MT Chamber of Commerce stated that they supported House Joint Resolution 17 and explained that the money spent on this will affect Montana. The Chamber of Commerce have participated in the past and will do so in the future.

MANSON DAILY of Glasgow expressed support for HJR 17 stating that Glasgow would be greatly affected if this does not pass.

SENATOR LARRY TVEIT expressed support for HJR 17.

Questions From Committee Members: SENATOR STIMATZ asked if the essential air service is a good service.

REPRESENTATIVE SCHYE stated that it is a good service.

Closing by Sponsor: REPRESENTATIVE SCHYE closed the hearing on HJR 17.

HEARING ON HOUSE BILL 671

Presentation and Opening Statement by Sponsor

REPRESENTATIVE JOHN PATTERSON, District 97 explained that House Bill 671 would allow to increase the speed limit in urban areas to 65 mph from 55 mph, if 55 mph is no longer required for the federal funding. There are only 3 cities in Montana where you have to slow down to 55 and they are Missoula, Great Falls and Billings. If the federal government should rescind the 55 mph in urban areas, this bill would allow us to do the same without jeopardizing the federal funding.

List of Testifying Proponents and What Group they Represent:

Jesse Munro, Acting Director for the Department of
Highways

List of Testifying Opponents and What Group They Represent:

None

Testimony:

JESSE MUNRO, Acting Director for the Department of Highways stated that they are in support of House Bill 671. If this bill does pass they would be able to erect the necessary signs within 24 hrs.

Questions From Committee Members: None

Closing by Sponsor: REPRESENTATIVE PATTERSON closed the hearing on House Bill 671 and said either Senator Noble or Senator Meyer could carry the bill. Senator Noble confirmed that if the bill passed he would carry the bill.

HEARING ON HOUSE BILL 464 AND HOUSE JOINT RESOLUTION 12

Presentation and Opening Statement by Sponsor:

REPRESENTATIVE DOROTHY BRADLEY, District 79 stated that there was a "grey bill" for House Bill 464. SEE EXHIBIT 1 & 1A. She stated that the two bills go together. The history started long ago due to a number of gas prices going up and down. A large number of those small outlets are victims of subsidized pricing and predatory practices. House Joint Resolution 12 is for a proposed study of the marketing taking place in Montana. It is to see if there are unfair practices. House Bill 464 is to eliminate subsidized pricing and predatory practices in this state.

List of Testifying Proponents and What Group they Represent:

RILEY JOHNSON, ATOM (Automotive Trades of MT)
Ron Leland, Sinclair Dealer and Automotive Trades
John Taggart, Automotive Trades of MT
Stephen Visocan, Montana Petroleum Markets

Testimony:

RILEY JOHNSON, ATOM stated that they are in support of House Bill 464 and that the grey bill did not change a thing, as far as the concept or the practices they wish to accomplish. The bill passed the House on a vote of 64-36.

RON LELAND who is a Sinclair dealer stated that this bill would help insure competition in the market place. He gave out written testimony. SEE EXHIBIT 2. He also gave the Committee members a copy of a letter written by James Butler to Representative Bradley. SEE EXHIBIT 3.

JOHN TAGGERT, Automotive Trades of MT stated that they support House Bill 464 and House Joint Resolution 12. He explained that HJR 12 deals with the investigation of marketing. SEE EXHIBIT 4. He stated that several businesses have pulled out of Montana. Mr. Taggert also wondered if the refineries could defend a 14 cent price difference per gallon of gas between stations which are 150 miles apart. Letters from Senator Max Baucus were submitted. SEE EXHIBIT 5 & 6. In the House they introduced a legislative study which took place in 1986. From February to October crude oil prices fell while gas actually rose. While companies our better to set prices according to demand, the refiners will be able to make higher margins. He distributed a chart of major oil refiners' downstream profits for 87 & 88. SEE EXHIBIT 7.

STEPHEN VISOCAN representing the Montana Petroleum Markets stated that they support House Bill 464. They have a problem with below cost pricing. Though the intent was to deal with below cost selling, the bill has been rewritten and deals only with the sale of gas from retail outlets.

List of Testifying Opponents and What Group They Represent:

John Augustine, Conoco
James Butler, Ashland Oil
Mark Staples, Exxon
Ben Havdahl, MT Motor Carriers Association
Ward Shanahan, Chevron U.S.A.
Charles Brooks, MT Retailers Association
Don Ingels, MT Chamber of Commerce
Janelle Fallan, MPA

Testimony:

JOHN AUGUSTINE representing Conoc stated that they oppose House Bill 464. The bill says that Government intervention and regulations are needed in order to protect small business. What it does is protect a small group from freeing all the competition in the market place. SEE EXHIBITS 8 & 9.

JAMES BUTLER representing Ashland Oil stated they operate the Super America stores around Montana. He stated they are not in support of below cost sales and that if the bill could be written in a manner to stop illegal practices they would be hard pressed to oppose it. The problem with this bill is the enforcement mechanism. They have operated for many years in Wisconsin and they have this type of legislation now in effect. In the rural areas of the state it has worked. The prices are higher and margins are better. SEE EXHIBIT 10.

MARK STAPLES representing Exxon stated that they are opposed to House Bill 464. SEE EXHIBIT 11.

BEN HAVDAHL, Executive Vice President for the MT Motor Carriers gave testimony opposing House Bill 464. SEE EXHIBIT 12.

WARD SHANAHAN representing Chevron U.S.A. testified opposing House Bill 464. SEE EXHIBIT 13.

CHARLES BROOKS, Executive Vice President of the MT Retailers Association who operate 22 convenient stores in Western Montana. They oppose House Bill 464 and feel strongly that competition should set the prices. He distributed a copy of a letter from the Federal Trade Commission. SEE EXHIBIT 14.

DON INGELS, MT Chamber of Commerce stated they oppose House Bill 464.

JANELLE FALLAN, Executive Director of the Montana Petroleum Association stated they are opposed to House Bill 464, but they do support HJR 12. She stated that you really need to have third party studies.

RILEY JOHNSON, ATOM explained the grey bill. Most of the change is on page 5, line 6. The way the bill is now, all agriculture trucking types of sales are exempt.

Questions From Committee Members: SENATOR WILLIAMS asked Riley Johnson how underselling would be considered.

RILEY JOHNSON stated that the percentages are based on a set percentage in lieu of proof. If you can prove that you can sell it for less, you are free to do so.

SENATOR WILLIAMS asked who this would be proved to.

RILEY JOHNSON stated the Department of Commerce or the County Attorney. If you bought it at \$.80 and the price should be \$.85 but you sell it for \$.84, then an investigation could be requested. This will allow them to do it on a county level rather than a state level.

SENATOR NOBLE asked Steve Visocan if there is an advantage in buying greater volumes.

STEVE VISOCAN stated that no, the refineries have an established rack price. The rack price of fuel is the price established by the refiner at the location. It is the refiner's selling price.

SENATOR MEYERS asked Representative Bradley if there will be a need for more FTEs in the Department of Commerce.

REPRESENTATIVE BRADLEY stated she does not anticipate that with either the Department of Commerce or the County Attorney.

Closing by Sponsor: REPRESENTATIVE BRADLEY closed the hearing on House Bill 464 and House Joint Resolution 12 saying that if you really want to stop unfair subsidization in this particular industry, you have to provide the tools. As far as this bringing higher prices, looking at records in other states who have the WANG process, once that is assured by the law, it has kept the competition very heavy. She explained that the efforts were a compromise, the study and also addressing below cost pricing, and did not take any of the other lines of action which would have been far more drastic to all parties involved.

ADJOURNMENT

Adjournment At: 3:00 p.m.



SENATOR LARRY TVEIT, Chairman

ROLL CALL

HIGHWAY

COMMITTEE

DATE March 14, 1989

51st
LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
CHAIRMAN TVEIT	✓		
VICE CHAIRMAN MEYER	✓		
SENATOR ABRAMS			✓
SENATOR FARRELL	✓		
SENATOR WEEDING	✓		
SENATOR NOBLE	✓		
SENATOR STIMATZ	✓		
SENATOR HARP	✓		
SENATOR WILLIAMS	✓		

Each day attach to minutes.

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1 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF
2 RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING FOR
3 PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF ESTABLISHED
4 PRICES; AND PROHIBITING UNFAIR PRACTICES IN THE SALE OF MOTOR
5 FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

6

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

8 NEW SECTION. Section 1. Short title. [This act] may be cited as the
9 "~~Montana Petroleum Trade Practices~~ RETAIL MOTOR FUEL MARKETING Act".

10 NEW SECTION. Section 2. Purpose. The legislature recognizes that
11 independent and small dealers and distributors of petroleum and related products
12 are vital to a healthy, competitive marketplace and are unable to survive
13 financially in competition with subsidized, below-cost pricing at the retail level by
14 others who have other sources of income. UNFAIR COMPETITION IN THE
15 MARKETING OF MOTOR FUEL OCCURS WHENEVER COSTS ASSOCIATED
16 WITH THE MARKETING OF MOTOR FUEL ARE RECOVERED FROM OTHER
17 OPERATIONS, ALLOWING THE REFINED MOTOR FUEL TO BE SOLD AT
18 SUBSIDIZED PRICES. THOSE SUBSIDIES MOST COMMONLY OCCUR IN ONE
19 OF THREE WAYS: WHEN A REFINER USES PROFITS FROM REFINING OF
20 CRUDE OIL TO COVER BELOW NORMAL OR NEGATIVE RETURNS EARNED
21 FROM MOTOR FUEL MARKETING OPERATIONS; WHEN A MARKETER WITH
22 MORE THAN ONE LOCATION USES PROFIT FROM ONE LOCATION TO
23 COVER LOSSES FROM BELOW-COST SELLING OF MOTOR FUEL AT
24 ANOTHER LOCATION; AND WHEN A BUSINESS USES PROFITS FROM NON-
25 MOTOR FUEL SALES TO COVER LOSSES FROM BELOW-COST SELLING OF
26 MOTOR FUEL. The legislature believes that subsidized, below-cost pricing is a
27 predatory practice that is not conducive to fair trade. INDEPENDENT MOTOR
28 FUEL MARKETERS, INCLUDING DEALERS, DISTRIBUTORS, JOBBERS, AND
29 WHOLESALEERS, ARE UNABLE TO SURVIVE PREDATORY SUBSIDIZED
30 PRICING. The legislature finds that below-cost pricing laws are effective in
31 protecting independent and small retailers and wholesalers in other jurisdictions
32 from subsidized pricing, which is inherently unfair and destructive and reduces
33 competition in the motor fuel marketing industry and is a form of predatory
34 pricing. The purpose of [this act] is to prevent and eliminate subsidized pricing

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1 of petroleum and related products.

2 NEW SECTION. Section 3. Definitions. As used in [this act], unless the
3 context requires otherwise, the following definitions apply:

4 (1) "AFFILIATE" MEANS A PERSON WHO, OTHER THAN THROUGH A
5 FRANCHISE OR MARKETING AGREEMENT, CONTROLS, IS CONTROLLED BY,
6 OR IS UNDER COMMON CONTROL WITH ANY OTHER PERSON.

7 (2) "COST OF DOING BUSINESS", IN THE ABSENCE OF PROOF OF
8 LESSER COST, IS 3% OF THE DELIVERED COST OF MOTOR FUEL FOR
9 WHOLESALE SALES AND 6% OF DELIVERED COST OF MOTOR FUEL FOR
10 RETAIL SALES, AND IN OTHER CASES MEANS AND INCLUDES ALL COSTS
11 INCURRED IN THE CONDUCT OF BUSINESS, INCLUDING BUT NOT LIMITED
12 TO:

13 (A) LABOR INCLUDING SALARIES OF EXECUTIVES AND OFFICERS;

14 (B) RENT THAT IS NOT LESS THAN THE FAIR MARKET VALUE BASED
15 ON CURRENT USE;

16 (C) INTEREST ON BORROWED CAPITAL;

17 (D) DEPRECIATION;

18 (E) SELLING COST;

19 (F) MAINTENANCE OF EQUIPMENT;

20 (G) LOSSES DUE TO BREAKAGE OR DAMAGE;

21 (H) CREDIT CARD FEES, OR OTHER CHARGES;

22 (I) CREDIT LOSSES; AND

23 (J) ALL LICENSES, TAXES, INSURANCE AND ADVERTISING.

24 ~~(1) "Cost to retailer" means the current MOST REGENT invoice cost of~~
25 ~~motor fuel to the retailer within 30 days prior to the date of sale or the~~
26 ~~replacement cost of the motor fuel to the retailer, whichever is lower:-~~

27 ~~(a) less all trade CUSTOMARY discounts FOR CASH except customary~~
28 ~~TRADE discounts for cash; and-~~

29 ~~(b) plus:-~~

30 ~~(i) any federal or state excise taxes imposed on the motor fuel;-~~

31 ~~(ii) any cost incurred for federal or state mandated insurance programs and~~
32 ~~underground storage tank programs;-~~

33 ~~(f) cost of doing business as defined in 30-14-202 ANY FEDERAL OR~~
34 ~~STATE EXCISE TAXES IMPOSED ON THE MOTOR FUEL;-~~

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1 ~~(iii)(II) any cost incurred for transportation;~~

2 ~~(iv)(III) any other charges not otherwise included in the invoice cost or the~~
3 ~~replacement cost of the motor fuel; and~~

4 ~~(v)(IV) a markup to cover a proportionate part of the cost of doing business.~~
5 ~~In the absence of proof of a lesser cost, the additional markup must be 6% of~~
6 ~~the MOST RECENT INVOICE cost to the retailer.~~

7 ~~(2) "Cost to wholesaler" means the current MOST RECENT invoice cost of~~
8 ~~motor fuel to the wholesaler within 30 days prior to the date of sale or the~~
9 ~~replacement cost of the motor fuel to the wholesaler, whichever is lower:~~

10 ~~(a) less all trade CUSTOMARY discounts FOR CASH except customary~~
11 ~~TRADE discounts for cash; and~~

12 ~~(b) plus:~~

13 ~~(i) any federal or state excise taxes imposed on the motor fuel prior to the~~
14 ~~sale at retail;~~

15 ~~(ii) any cost incurred for federal or state mandated insurance programs and~~
16 ~~underground storage tank programs;~~

17 ~~(1) cost of doing business as defined in 30-14-202 ANY FEDERAL OR~~
18 ~~STATE EXCISE TAXES IMPOSED ON THE MOTOR FUEL PRIOR TO THE SALE~~
19 ~~AT RETAIL;~~

20 ~~(iii)(II) any cost incurred for transportation;~~

21 ~~(iv)(III) any other charges not otherwise included in the invoice cost or the~~
22 ~~replacement cost of the motor fuel; and~~

23 ~~(v)(IV) a markup to cover a proportionate part of the cost of doing business;~~
24 ~~except for sales at wholesale between wholesalers. In the absence of proof of a~~
25 ~~lesser cost, the additional markup must be 3% of the MOST RECENT INVOICE~~
26 ~~cost to the wholesaler.~~

27 ~~(3) "CUSTOMARY DISCOUNT FOR CASH" MEANS AN ALLOWANCE,~~
28 ~~WHETHER PART OF A LARGER DISCOUNT OR NOT, MADE TO A~~
29 ~~WHOLESALE OR RETAILER WHEN A PERSON PAYS FOR MOTOR FUEL~~
30 ~~WITHIN A LIMITED OR SPECIFIED TIME.~~

31 ~~(4) "DELIVERED COST OF MOTOR FUEL" MEANS:~~

32 ~~(A) FOR A DISTRIBUTOR OR RETAILER, THE LOWER OF THE MOST~~
33 ~~RECENT COST OF MOTOR FUEL TO THE DISTRIBUTOR OR RETAILER OR~~
34 ~~THE LOWEST REPLACEMENT COST OF MOTOR FUEL TO THE DISTRIBUTOR~~

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1 OR RETAILER WITHIN 5 DAYS PRIOR TO THE DATE OF SALE, IN THE
2 QUANTITY LAST PURCHASED, WHETHER WITHIN OR BEFORE THE 5-DAY
3 PERIOD, LESS ALL TRADE DISCOUNTS EXCEPT CUSTOMARY DISCOUNTS
4 FOR CASH PLUS TRANSPORTATION COSTS AND ANY TAXES THAT MAY BE
5 REQUIRED BY LAW IF NOT ALREADY INCLUDED IN THE INVOICE COST; OR

6 (B) FOR A REFINER, THAT REFINER'S POSTED RACK PRICE TO THE
7 WHOLESALE CLASS OF TRADE AT THE THE TERMINAL USED BY THE
8 REFINER TO OBTAIN THE MOTOR FUEL PLUS TRANSPORTATION COSTS
9 AND ANY TAXES THAT MAY BE REQUIRED BY LAW. IF THE REFINER
10 DOES NOT REGULARLY SELL TO THE WHOLESALE CLASS OF TRADE AT
11 THAT TERMINAL OR DOES NOT POST SUCH A TERMINAL PRICE, THE
12 REFINER MAY USE AS ITS RACK PRICE THE POSTED PRICE OF ANY
13 OTHER REFINER AT A TERMINAL WITHIN THE GENERAL TRADE AREA THAT
14 HAS PRODUCTS READILY AVAILABLE FOR SALE TO THE WHOLESALE
15 CLASS OF TRADE.

16 (5) "DISTRIBUTOR" MEANS A PERSON ENGAGED IN THE PURCHASE OF
17 MOTOR FUEL FOR RESALE TO A RETAIL MOTOR FUEL OUTLET.

18 ~~(3)(6)~~ "Motor fuel" means gasoline, gasohol as defined in 15-70-201, and
19 special fuel as defined in 15-70-301.

20 ~~(4)(7)~~ "Person" means an individual, a sole proprietorship, a partnership, a
21 corporation, any other form of business entity, or any individual acting on behalf
22 of any of them.

23 (8) "POSTED RACK PRICE" MEANS THE F.O.B. TERMINAL PRICE FOR A
24 PARTICULAR MOTOR FUEL THAT A REFINER, PRODUCER, OR PERSON
25 OFFERS MOTOR FUEL FOR SALE OR TRANSFER TO ITSELF OR ANY
26 RELATED OR UNRELATED PERSON.

27 (9) "REFINER" MEANS A PERSON ENGAGED IN THE PRODUCTION OR
28 REFINING OF MOTOR FUEL, WHETHER THE PRODUCTION OR REFINING
29 OCCURS IN THIS STATE OR ELSEWHERE, AND INCLUDES ANY AFFILIATE
30 OF THE PERSON.

31 ~~(5) "Replacement cost" means the cost, computed as specified in~~
32 ~~subsection (1) or (2), at which motor fuel sold could have been bought by the~~
33 ~~retailer or wholesaler at any time within 30 days prior to the date of sale if~~
34 ~~bought in the same quantity as the retailer's or wholesaler's last purchase of~~

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1 ~~motor fuel.~~

2 ~~(6)(10) "Retailer" means a person engaged in the business of making sales~~
3 ~~to the general public within this state or, in the case of a person selling at both~~
4 ~~retail and wholesale, only the retail portion of the business SELLING MOTOR~~
5 ~~FUEL AT A RETAIL MOTOR FUEL OUTLET.~~

6 ~~(11) "RETAIL MOTOR FUEL OUTLET" MEAN A PLACE OF BUSINESS~~
7 ~~WHERE MOTOR FUEL IS SOLD AND DELIVERED INTO THE TANKS OF~~
8 ~~MOTOR VEHICLES REGARDLESS OF WHETHER THE SELLING AND DELIVERY~~
9 ~~OF THE FUEL IS THE PRIMARY SOURCE OF REVENUE OF THAT BUSINESS.~~

10 ~~(7)(12) "Sale at retail" means a transfer, GIFT, SALE, OFFER FOR SALE,~~
11 ~~OR ADVERTISEMENT FOR SALE IN ANY MANNER OR BY ANY MEANS of~~
12 ~~motor fuel, for valuable consideration, made in the ordinary course of trade or in~~
13 ~~the usual course of the retailer's business, to the purchaser for consumption or~~
14 ~~use other than resale or further processing INCLUDING A TRANSFER OF~~
15 ~~MOTOR FUEL BY A PERSON TO HIMSELF OR TO HIS AFFILIATE.~~

16 ~~(8) "Sale at wholesale" means a transfer of motor fuel for valuable~~
17 ~~consideration, made in the ordinary course of trade or in the usual course of~~
18 ~~the wholesaler's business, to a retailer or purchaser for resale or further~~
19 ~~processing.~~

20 ~~(9) "Supplier" means a person who manufactures motor fuel or who is a~~
21 ~~controlled subsidiary of a manufacturer of motor fuel and who is engaged in the~~
22 ~~business of selling motor fuel to wholesalers, retailers, and consumers.~~

23 ~~(13) "TRANSFER PRICE" MEANS THE PRICE USED BY A PERSON TO~~
24 ~~TRANSFER MOTOR FUEL TO HIMSELF OR TO AN AFFILIATE FOR RESALE~~
25 ~~AT A RETAIL MOTOR FUEL OUTLET.~~

26 ~~(10) (14) "TRANSPORTATION COST" MEANS THE ACTUAL COST OF~~
27 ~~TRANSPORTATION OF MOTOR FUEL OR, IN THE ABSENCE OF PROOF OF~~
28 ~~ACTUAL COST, THE COMMON CARRIER RATES FIXED BY THE PUBLIC~~
29 ~~SERVICE COMMISSION FOR THE IMMEDIATE MARKET AREA CONCERNED.~~

30 ~~(10)(11) "Vertically integrated producer" means a producer who controls all~~
31 ~~phases of petroleum production and sale from the well through wholesalers and~~
32 ~~retailers.~~

33 ~~(11)(12) (15) "Wholesaler" means a person engaged in the business of~~
34 ~~making sales at wholesale or, in the case of a person selling at both retail and~~

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1 ~~wholesale, only the wholesale portion of the business~~ OF MOTOR FUEL TO A
2 RETAIL MOTOR FUEL OUTLET.

3 NEW SECTION. Section 4. Below-cost sale prohibited. (1) A retailer
4 WHOLESALER may not sell or offer or advertise a sale at retail at less than the
5 ~~cost to retailer~~ MOTOR FUEL TO A RETAIL MOTOR FUEL OUTLET AT LESS
6 THAN THE DELIVERED COST OF THE MOTOR FUEL PLUS THE COST OF
7 DOING BUSINESS if the effect is to injure or destroy competition or substantially
8 lessen competition, ~~unless the sale is:~~

- 9 (a) ~~an isolated transaction and not made in the usual course of business;~~
10 (b) ~~a bona fide, advertised clearance sale;~~
11 (c) ~~for charitable purposes or to an unemployment relief agency; or~~
12 (d) ~~excepted under 30-14-213.~~

13 (2) A retailer may not refuse to sell or limit, restrict, or condition the sale at
14 ~~retail of petroleum distillates~~ MOTOR FUELS stored at the retail outlet in 100-
15 gallon or larger containers to another retailer at the same or lower price as
16 offered, advertised, or sold to the public if the petroleum distillates MOTOR
17 FUELS are offered, advertised, or sold to the public MOTOR FUEL at less than
18 the DELIVERED cost OF THE MOTOR FUEL to retailer. The burden of proving
19 an exemption from the provisions of this subsection is upon the retailer claiming
20 his sales are exempt PLUS THE COST OF DOING BUSINESS IF THE EFFECT
21 IS TO INJURE OR DESTROY COMPETITION OR SUBSTANTIALLY LESSEN
22 COMPETITION.

23 (3) A ~~vertically integrated producer or wholesaler~~ may not sell or transfer a
24 petroleum distillate MOTOR FUEL to its ITSELF OR AN AFFILIATE FOR RESALE
25 ~~own~~ AT A retail MOTOR FUEL outlet at a TRANSFER price THAT IS BELOW
26 COST OR lower than the price at which that petroleum distillate THE
27 WHOLESALER CHARGES ANOTHER RETAIL MOTOR FUEL OUTLET THAT
28 PURCHASES A LIKE QUANTITY WITHIN THE SAME COMPETITIVE AREA IF
29 THE EFFECT IS TO INJURE OR DESTROY COMPETITION OR SUBSTANTIALLY
30 LESSEN COMPETITION ~~is offered for sale by the vertically integrated producer~~
31 ~~or wholesaler to a retailer operating in the same competitive area served by the~~
32 ~~retail outlet of the vertically integrated producer or wholesaler. Retail sales under~~
33 ~~this provision by a vertically integrated producer or wholesaler must comply with~~
34 ~~all provisions of [this act].~~

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1 ~~(4) For retail sales by a vertically integrated producer or by a supplier-~~
2 ~~operated retailer who obtains fuel products from other producers or suppliers;~~
3 ~~the minimum allowable cost to the vertically integrated producer or the supplier-~~
4 ~~owned retailer is the price at which the other DELIVERING producers' or~~
5 ~~suppliers' wholesalers sell to their retailers or to other retailers whom they~~
6 ~~supply plus 8% 9% of that price as the cost of doing business.~~

7 (4) THE PROVISIONS OF [THIS ACT] DO NOT APPLY TO A SALE AT
8 WHOLESALE OR A SALE AT RETAIL MADE:

9 (A) IN AN ISOLATED TRANSACTION NOT IN THE USUAL COURSE OF
10 BUSINESS;

11 (B) IF MOTOR FUELS ARE ADVERTISED, OFFERED FOR SALE, OR SOLD
12 IN A BONA FIDE CLEARANCE SALE FOR THE PURPOSE OF DISCONTINUING
13 TRADE IN THE MOTOR FUEL, AND THE ADVERTISING, OFFER TO SELL, OR
14 SALE STATES THE REASON FOR THE SALE AND THE QUANTITY OF THE
15 MOTOR FUEL ADVERTISED, OFFERED FOR SALE, OR TO BE SOLD;

16 (C) IF THE MOTOR FUEL IS ADVERTISED, OFFERED FOR SALE, OR SOLD
17 AS IMPERFECT OR DAMAGED, AND THE ADVERTISING, OFFER OF SALE, OR
18 SALE STATES THE REASON FOR THE SALE AND THE QUANTITY OF THE
19 MOTOR FUEL FUEL ADVERTISED, OFFERED FOR SALE, OR SOLD;

20 (D) IF MOTOR FUEL IS SOLD UPON THE FINAL LIQUIDATION OF A
21 BUSINESS; OR

22 (E) IF MOTOR FUEL IS ADVERTISED, OFFERED FOR SALE, OR SOLD BY
23 A FIDUCIARY OR OTHER OFFICER UNDER THE ORDER OR DIRECTION OF A
24 COURT.

25 (5) NOTICE REQUIRED UNDER [THIS SECTION] IS NOT SUFFICIENT
26 UNLESS THE SUBJECT OF THE SALE IS KEPT SEPARATE FROM OTHER
27 STOCKS AND CLEARLY AND LEGIBLY MARKED WITH THE REASON FOR
28 THE SALE AND ANY ADVERTISEMENT OF THE GOODS INDICATES THE
29 SAME FACTS AND THE QUANTITY TO BE SOLD.

30 (6) A WHOLESALER OR RETAILER MAY ADVERTISE, OFFER TO SELL, OR
31 SELL MOTOR FUEL AT A PRICE MADE IN GOOD FAITH TO MEET THE
32 PRICE OF A COMPETITOR WHO IS RENDERING THE SAME TYPE OF
33 SERVICE AND IS SELLING THE SAME ARTICLE AT COST. THE PRICE OF
34 MOTOR FUEL ADVERTISED, OFFERED FOR SALE, OR SOLD UNDER THE

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1 EXCEPTIONS IN SUBSECTION (4) MAY NOT BE CONSIDERED THE PRICE OF
2 A COMPETITOR AND MAY NOT BE USED AS A BASIS FOR ESTABLISHING
3 PRICES BELOW COST, AND THE PRICE ESTABLISHED AT A BANKRUPT
4 SALE MAY NOT BE CONSIDERED THE PRICE OF A COMPETITOR UNDER
5 THE PROVISIONS OF [THIS SECTION].

6 (7) IF A WHOLESALER SELLS MOTOR FUEL TO ANOTHER WHOLESALER,
7 THE FORMER IS NOT REQUIRED TO INCLUDE IN HIS SELLING PRICE TO
8 THE LATTER COST OF DOING BUSINESS AS DEFINED IN [SECTION 3], BUT
9 THE LATTER WHOLESALER, UPON RESALE TO A RETAILER, IS SUBJECT TO
10 THE PROVISIONS OF [THIS SECTION].

11 ~~NEW SECTION. Section 5. Discrimination prohibited. (1) (a) A supplier or~~
12 ~~wholesaler of motor fuel may not enter into an agreement or arrangement in~~
13 ~~which, directly or indirectly, discrimination is made in the price at which the~~
14 ~~supplier or wholesaler sells motor fuel to wholesalers or retailers if the~~
15 ~~discrimination substantially lessens competition or tends to create a monopoly or~~
16 ~~to injure, destroy, or prevent competition with a person in the marketing of motor~~
17 ~~fuel in the community where the supplier or wholesaler is selling at a lower~~
18 ~~price.~~

19 ~~(b) A discrimination in price is justified if the difference in the cost to~~
20 ~~wholesaler or retailer to whom the supplier or wholesaler sells at a lower figure~~
21 ~~is only commensurate with an actual difference in the quality or quantity of~~
22 ~~motor fuel sold to the wholesaler or retailer or in the transportation charges or~~
23 ~~other expenses of marketing involved in the sale to the wholesaler or retailer. A~~
24 ~~supplier or wholesaler is not prevented from showing that his lower price was~~
25 ~~made in good faith to meet an equally low price of a competitor.~~

26 ~~(2) A person whose business or any part of which is the sale of motor fuel~~
27 ~~to wholesalers may not sell motor fuel for ultimate consumption or use at a~~
28 ~~price lower than that at which he sells to a wholesaler unless the lower price is~~
29 ~~justified as provided in subsection (1)(b).~~

30 ~~NEW SECTION. Section 6. Coercion prohibited. A supplier or wholesaler~~
31 ~~of motor fuel may not threaten a customer with price discrimination or use any~~
32 ~~form of coercion in order to change or maintain the customer's resale price.~~

33 NEW SECTION. SECTION 5. VOIDANCE OF EXISTING CONTRACTS. A
34 CONTRACT, EXPRESS OR IMPLIED, MADE BY A PERSON IN VIOLATION OF

Gray HB 464 -- Unofficial
March 14, 1989

1 A PROVISION OF [THIS ACT] IS VOID AND NO RECOVERY MAY BE HAD ON
2 THAT CONTRACT.

3 NEW SECTION. Section 6. Penalty. (1) A violation of [section 4] is an
4 unfair trade practice and upon conviction a retailer or wholesaler is subject to a
5 civil penalty of not more than \$1,000 a day for each day that the act or
6 omission occurs.

7 (2) The department of commerce or a county attorney may bring an action
8 for a violation of [section 4].

9 NEW SECTION. Section 7. Civil remedies. (1) The department of
10 commerce may issue a cease and desist order requiring a wholesaler or
11 retailer to cease violating the provisions of [section 4]. The department or a
12 county attorney may commence an action on behalf of the state for failure to
13 comply with an order. A civil penalty of not less than \$200 or more than
14 \$5,000 may be recovered in the action.

15 (2) The department or a county attorney may bring an action to enjoin a
16 violation of [section 4].

17 (3) An action under this section must be commenced in the county where
18 the motor fuel is sold.

19 ~~NEW SECTION. Section 8. Exemption. [This act] does not apply to a:~~
20 ~~(1) sale at wholesale or retail when the motor fuel selling price is set in~~
21 ~~good faith to meet an existing price of a competitor and is based on evidence~~
22 ~~in the possession of the retailer or wholesaler in the form of an advertisement;~~
23 ~~proof of sale, or receipted purchase; OR~~

24 ~~(2) BULK SALE AT EITHER THE WHOLESALE OR RETAIL LEVEL TO A~~
25 ~~PERSON ENGAGED IN AGRICULTURE IF THE FUEL IS USED FOR~~
26 ~~AGRICULTURAL PURPOSES.~~

27 NEW SECTION. Section 8. Saving clause. [This act] does not affect rights
28 and duties that matured, penalties that were incurred, or proceedings that were
29 begun before [the effective date of this act].

30 NEW SECTION. Section 9. Severability. If a part of [this act] is invalid, all
31 valid parts that are severable from the invalid part remain in effect. If a part of
32 [this act] is invalid in one or more of its applications, the part remains in effect
33 in all valid applications that are severable from the invalid applications.

34 NEW SECTION. Section 10. EFFECTIVE DATE. [THIS ACT] IS

Gray HB 464 -- Unofficial
March 14, 1989

1 EFFECTIVE ON PASSAGE AND APPROVAL.

2 -END-

3

Amendments to House Bill No. 464
Third Reading Copy

Requested by Representative Bradley
Gray Bill Contents (Edited)
Including Individual Amendment of Pg 7 of Gray Bill

Prepared by Paul Verdon
and Lee Heiman
March 10, 1989

1. Title, line 5.
Following: "OF"
Insert: "RETAIL"

2. Page 1, line 13.
Strike: "Petroleum Trade Practices"
Insert: "Retail Motor Fuel Marketing"

3. Page 1, line 14.
Following: "Purpose."
Insert: "(1)"

4. Page 1, line 20.
Following: "income."
Insert: "(2) The legislature finds that unfair competition in the marketing of motor fuel occurs whenever costs associated with the marketing of motor fuel are recovered from other operations, allowing the refined motor fuel to be sold at subsidized prices. Those subsidies most commonly occur in one of three ways:
(a) when a refiner uses profits from refining of crude oil to cover below normal or negative returns earned from motor fuel marketing operations;
(b) when a marketer with more than one location uses profit from one location to cover losses from below-cost selling of motor fuel at another location; and
(c) when a business uses profits from sales other than motor fuel sales to cover losses from below-cost selling of motor fuel.
(3)"

5. Page 1, line 22.
Following: "trade"
Insert: "; and independent motor fuel marketers, including dealers, distributors, jobbers, and wholesalers, are unable to survive predatory subsidized pricing.
(4)"

6. Page 2, line 2.
Following: "pricing."
Insert: "(5)"

7. Page 2, line 8 through page 4, line 1.
Strike: subsections (1) and (2) in their entirety

Insert: "(1) "Affiliate" means a person who, other than through a franchise or marketing agreement, controls, is controlled by, or is under common control with any other person.

(2) "Cost of doing business", in the absence of proof of lesser cost, is 3% of the delivered cost of motor fuel for wholesale sales and 6% of delivered cost of motor fuel for retail sales. In other cases, the term means and includes all costs incurred in the conduct of business, including but not limited to:

(a) labor, including salaries of executives and officers;

(b) rent that is not less than the fair market value based on current use;

(c) interest on borrowed capital;

(d) depreciation;

(e) selling cost;

(f) maintenance of equipment;

(g) losses due to breakage or damage;

(h) credit card fees or other charges;

(i) credit losses; and

(j) all licenses, taxes, insurance, and advertising."

(3) "Customary discount for cash" means an allowance, whether part of a larger discount or not, made to a wholesaler or retailer when a person pays for motor fuel within a limited or specified time.

(4) "Delivered cost of motor fuel" means:

(a) for a distributor or retailer, the lower of the most recent cost of motor fuel to the distributor or retailer or the lowest replacement cost of motor fuel to the distributor or retailer within 5 days prior to the date of sale, in the quantity last purchased, whether within or before the 5-day period, less all trade discounts except customary discounts for cash plus transportation costs and any taxes that may be required by law if not already included in the invoice cost; or

(b) for a refiner, that refiner's posted rack price to the wholesale class of trade at the terminal used by the refiner to obtain the motor fuel plus transportation costs and any taxes that may be required by law. If the refiner does not regularly sell to the wholesale class of trade at that terminal or does not post such a terminal price, the refiner may use as its rack price the posted price of any other refiner at a terminal within the general trade area that has products readily available for sale to the wholesale class of trade.

(5) "Distributor" means a person engaged in the purchase of motor fuel for resale to a retail motor fuel outlet."

Renumber: subsequent subsections

8. Page 4, line 8.

Strike: subsection (5) in its entirety

Insert: "(8) "Posted rack price" means the f.o.b. terminal price for a particular motor fuel at which a refiner, producer, or person offers motor fuel for sale or transfer to itself or

any related or unrelated person.

(9) "Refiner" means a person engaged in the production or refining of motor fuel, whether the production or refining occurs in this state or elsewhere, and includes any affiliate of the person."

Renumber: subsequent subsections

9. Page 4, line 15 through line 17.

Following: "of" on line 15

Strike: remainder of line 15 and through "business" on line 17

Insert: "selling motor fuel at a retail motor fuel outlet.

(11) "Retail motor fuel outlet" means a place of business where motor fuel is sold and delivered into the tanks of motor vehicles regardless of whether the selling and delivery of the fuel is the primary source of revenue of that business."

Renumber: subsequent subsections

10. Page 4, line 18.

Strike: "at retail"

Following: "transfer"

Insert: ", gift, sale, offer for sale, or advertisement for sale in any manner or by any means"

11. Page 4, lines 19 through 22.

Strike: lines 19 through 21 in their entirety and through "processing" on line 22

Insert: ", including a transfer of motor fuel by a person to himself or to his affiliate"

12. Page 4, line 23 through page 5, line 5.

Strike: subsections (8) and (9) in their entirety

Insert: "(13) "Transfer price" means the price used by a person to transfer motor fuel to himself or to an affiliate for resale at a retail motor fuel outlet."

Renumber: subsequent subsections

13. Page 5, line 9.

Strike: "FOR THE IMMEDIATE MARKET AREA CONCERNED"

14. Page 5, lines 10 through 12.

Strike: subsection (11) in its entirety

Renumber: subsequent subsection

15. Page 5, lines 14 through 16.

Following: "sales" on line 14

Strike: remainder of line 14 through "business" on line 16

Insert: "of motor fuel to a retail motor fuel outlet"

16. Page 5, line 18.

Strike: "retailer"

Insert: "wholesaler"

17. Page 5, lines 18 and 19.

Following: "sell" on line 18

Strike: remainder of line 18 through "retailer" on line 19
Insert: "motor fuel to a retail motor fuel outlet at less than
the delivered cost of the motor fuel plus the cost of doing
business"

18. Page 5, line 21 through page 6, line 2.
Following: "competition" on line 21
Strike: remainder of line 21 through "30-14-213" on line 2

19. Page 6, line 3.
Strike: "refuse to"

20. Page 6, lines 3 through 9.
Following: "sell" on line 2
Strike: remainder of line 2 through "public" on line 9
Insert: "motor fuel".

21. Page 6, line 9.
Following: "than the"
Insert: "delivered"

22. Page 6, lines 9 through 12.
Following: "cost" on line 9
Strike: remainder of line 9 through "exempt" on line 12
Insert: "of the motor fuel plus the cost of doing business if the
effect is to injure or destroy competition or substantially
lessen competition"

23. Page 6, line 13.
Strike: "vertically integrated producer or"

24. Page 6, line 14.
Strike: "a"

25. Page 6, line 15.
Strike: "its own"
Insert: "itself or an affiliate for resale at a"
Following: "retail"
Insert: "motor fuel"
Following: "at a"
Insert: "transfer"
Following: "at a price"
Insert: "that is below cost or"

26. Page 6, lines 15 and 16.
Following: "the price" on line 15
Strike: remainder of line 15 through "that" on line 16

27. Page 6, line 16.
Following: "~~distillate~~"
Insert: "the wholesaler charges another retail"

28. Page 6, lines 16 through 22.
Following: "FUEL" on line 16
Strike: remainder of line 16 through "act]." on line 22

Insert: "outlet that purchases a like quantity within the same competitive area if the effect is to injure or destroy competition or substantially lessen competition.

(4) the provisions of [this act] do not apply to a sale at wholesale or a sale at retail made:

(a) in an isolated transaction not in the usual course of business;

(b) if motor fuel is advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in the motor fuel and the advertising, offer to sell, or sale states the reason for the sale and the quantity of the motor fuel advertised, offered for sale, or to be sold;

(c) if the motor fuel is advertised, offered for sale, or sold as imperfect or damaged and the advertising, offer of sale, or sale states the reason for the sale and the quantity of the motor fuel advertised, offered for sale, or sold;

(d) if motor fuel is sold upon the final liquidation of a business; or

(e) if motor fuel is advertised, offered for sale, or sold by a fiduciary or other officer under the order or direction of a court.

(5) Notice required under this section is not sufficient unless the subject of the sale is kept separate from other stocks and clearly and legibly marked with the reason for the sale and any advertisement of the goods indicates the same facts and the quantity to be sold.

~~(6) A wholesaler or retailer may advertise, offer to sell, or sell motor fuel at a price made in good faith to meet the price of a competitor who is rendering the same type of service and is selling the same article at cost.~~
Nothing in [this act] prevents a wholesaler or retailer from advertising, offering to sell, or selling a motor fuel at a price made in good faith to mee an equally low price of a competitor. [Change made by individual amendment presented at hearing] The price of motor fuel advertised, offered for sale, or sold under the exceptions in subsection (4) may not be considered the price of a competitor and may not be used as a basis for establishing prices below cost, and the price established at a bankrupt sale may not be considered the price of a competitor under the provisions of this section.

(7) If a wholesaler sells motor fuel to another wholesaler, the former is not required to include in his selling price to the latter the cost of doing business as defined in [section 3], but the latter wholesaler, upon resale to a retailer, is subject to the provisions of this section."

29. Page 6, line 23 through page 8, line 10.

Strike: subsection (4) and sections 5 and 6 in their entirety

Insert: "NEW SECTION. Section 5. Voidance of existing contracts.

A contract, express or implied, made by a person in violation of a provision of [this act] is void and no recovery may be had on that contract."

Renumber: subsequent sections

30. Page 9, lines 5 through 14.
Strike: section 9 in it entirety
Renumber: subsequent sections

-END-

ATOM

Automotive Trades of Montana
P.O. Box 1238, Helena, MT 59624 • Phone: 442-6409

SENATE HIGHWAYS
EXHIBIT NO. 2
DATE 3-14-89
BILL NO. HB 464

NAME: RON LELAND

OCCUPATION: SINCLAIR DEALER
FRIENDLY'S EAST
HELENA, MONTANA

SUPPORT: HB464 MONTANA RETAIL MOTOR FUEL MARKETING ACT

REASONS: 1: TO SUPPORT THE CLAYTON ACT TITLE 15, SUBSECTION 13
(a) IN ORDER TO HELP DEFINE COST OF MOTOR FUELS

A: THE CLAYTON ACT STATES IT IS UNLAWFUL
TO DISCRIMINATE IN PRICING TO LESSEN
COMPETITION IN ORDER TO CREATE A MONOPOLY

2: TO HELP INSURE COMPETITION IN THE MARKET PLACE

A: ON JANUARY 31, 1989 THE STREET PRICE WAS
\$.849 AND MY COST WAS \$.840.

B: IT TAKES \$.006/GALLON TO PAY ELECTIC BILL
IT TAKES \$.036/GALLON TO PAY WAGES
IT TAKES \$.003/GALLON TO PAY WORKMANS COMP
IT TAKES \$.020/GALLON TO PAY RENT
AND ETC

IT TAKES A TOTAL OF \$.075/GALLON PLUS ALL
OTHER RELATED SALES TO BREAK EVEN

3: TO PRESERVE THE INDEPENDENT MONTANA STATION OWNER
AND HELP CREATE A MORE STABLE MARKET - MONTANA IS
LOSING APPROXIMATELY 100 STATIONS PER YEAR NOW.

A: LOSS OF STATIONS MEANS A LOSS OF JOBS
IF 5 JOBS PER STATION ARE LOST THAT MEANS
500 JOBS PER YEAR AND AT \$5.00 PER HOUR
WAGE RATE WOULD MEAN A LOSS OF \$5,200,000.00
USING A TURNOVER RATE OF 5 TIME - MONTANA
LOSES \$26,000,000.00 A YEAR.

B: ON THE OTHER HAND, THERE ARE ABOUT 1800
STATIONS IN MONTANA OF WHICH ABOUT 1300 ARE
INDEPENDENTS. USING THE SAME RATIO AS ABOVE
THE INDEPENDENTS PRODUCE \$13,500,000.00 IN
WAGES ROTATING 5 TIMES OR \$67,500,000.00 IN
THE MONTANA ECONOMY.

4: TO HELP PRESERVE THAT THE AFTER TAX PROFITS REMAIN
IN THE LOCAL COMMUNITIES

- 5: THE INDEPENDENT DEALER CANNOT SUBSIDIZED MOTOR FUEL PROFITS FROM OTHER SOURCES BECAUSE HE DOES NOT HAVE THE FINANICAL MEANS.
- 6: ULTIMATELY THE ONE THAT WILL SUFFER WILL BE THE CONSUMER. WITH NO COMPETITION THE PRICES WILL BE HIGHER



ASHLAND OIL, INC. • 1240 W. 98th Street • Bloomington, Minnesota • 55431 • (612) 887-6100

JAMES R. BUTLER
Public Affairs Manager

December 13, 1988

Honorable Dorothy Bradley
919 West Lamme
Bozeman, MT 59715

Dear Representative Bradley:

Last month when we met in Bozeman, Mr. Taggart of the gasoline dealers group argued that SuperAmerica should be prevented from continued direct operation of its stores in Montana through enactment of divorcement legislation. His justification for this action was the fact that SuperAmerica's parent company operates oil refineries that allow SuperAmerica to compete unfairly with other Montana retailers. We totally reject that charge because each business segment within Ashland Oil, the parent company, operates as an independent business and because all gasoline sold by SuperAmerica in Montana is purchased on the open market--just like Mr. Taggart and other retailers.

To illustrate the competitive nature of the wholesale gasoline market in Montana, I am attaching the December 12 edition of the "Price Monitor" section for the Rocky Mountain States of U.S. OIL WEEK, an oil industry publication. The newsletter shows the three Montana reporting points are about the middle of the range for prices in the western states and indicate a healthy gross profit margin at current retail levels in the state.

Since this publication shows prices, exclusive of all taxes and transportation, an example can best show the correct market conditions:

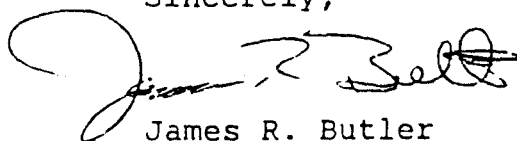
Current Average Retail Price On Regular Unleaded Self-Service Gasoline.....	\$.959
Average Wholesale Gasoline Price In Montana.....	.510
Montana Motor Fuel Tax.....	.200
Federal Motor Fuel Tax.....	.091
Transportation (Truck Transport Bulk Terminal To Retail Outlet).....	<u>.020</u>
Total Wholesale Price.....	<u>.821</u>
Gross Margin.....	\$ <u>.13^f</u>

We recognize that at times gasoline margins do fluctuate, but that is due to local competitive factors and not any plan to eliminate competition. I would be happy to further discuss the dynamics of gasoline marketing if you wish.

I am also attaching a copy of the 1988 Annual Report of Ashland Oil to show how Ashland separates its business segments. You will note SuperAmerica is discussed on pages 12 and 13.

Thank you for your willingness to hear SuperAmerica's side of this question:

Sincerely,

A handwritten signature in black ink, appearing to read "James R. Butler". The signature is stylized with a large initial "J" and a long horizontal stroke.

James R. Butler

JRB:kl

Enclosures

cc: Bob Cichosz
(Bozeman SuperAmerica Store Manager)

JOHN MELCHER
MONTANA

SENATE HIGHWAYS

EXHIBIT NO. 4

DATE 3-14-89

BILL NO HB 464

16
HB 464
2/6/89

United States Senate

December 22, 1987

DATE RECEIVED

DEC 29 1987

John Taggart
President
Automotive Trades of Montana (ATOM)
P. O. Box 1238
Helena, Montana 59601

Dear John:

Thanks for getting in touch with me through my office in Bozeman in support of S. 1111.

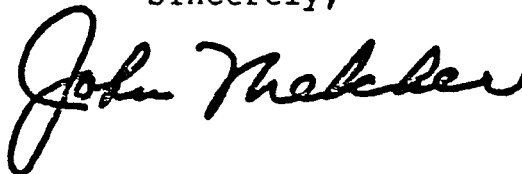
This bill, the Motor Fuels Sales Competition Improvement Act of 1987, was introduced by Senator Metzenbaum on April 29, 1987. Since I'm not a member of the Judiciary Committee, my first review of the bill will come if it reaches the Senate floor. So far, no hearing on the bill has been scheduled.

I have reviewed briefly a copy of the bill and will watch its progress carefully.

I appreciate knowing of your interest in this legislation.

Best wishes for the holidays!

Sincerely,



MAX BAUCUS
MONTANA

15
HB 464
2/6/89
WASHINGTON, DC
(202) 224-2651
MONTANA TOLL FREE NUMBER
1-800-332-6106

United States Senate
WASHINGTON, DC 20510

SENATE HIGHWAYS
EXHIBIT NO. 5
DATE 3-14-89
BILL NO. HB 464

May 11, 1987

Mr. John D. Taggart
Box 1238
Helena, Montana 59624

Dear Mr. Taggart:

Thank you for sharing your support for legislation concerning retail divorcement in the oil industry.

One of the original goals of the Petroleum Marketing Practice Act of 1978 was to establish some ground rules for negotiations between the big oil companies and the service stations that sell their products under a franchise agreement. However, under present law the producers retain the right to make changes in franchise agreements, or even abandon any agreements they decide are no longer serving their interests. I share your concern that this arrangement can leave the gas station operator little, if any, recourse but to go out of business.

To clarify the terms of renewal for franchise in the petroleum industry, Representative Walgren introduced H.R. 1842, the "Gas Station Dealers Bill." This legislation strengthens the dealer's negotiating position by requiring that all franchise agreements be "fair and reasonable." H.R. 1842 is pending in the House Energy Committee. There is no Senate version of the bill, but you may be certain I will keep your concerns in mind should this issue arise in the Senate.

Again, thank you for expressing your support for retail divorcement. Be assured of my efforts to create a fair balance between large oil companies and independent neighborhood service stations.

With best personal regards, I am

Sincerely,

Max Baucus

MAX BAUCUS
MONTANA

17
#B464
2/6/89
WASHINGTON, DC
(202) 224-2651
MONTANA TOLL FREE NUMBER
1-800-332-6106

United States Senate

WASHINGTON, DC 20510

December 22, 1987

SENATE HIGHWAYS

IBIT NO. 6

3-14-89
HB 464

DATE RECEIVED

DEC 29 1987

John D. Taggart, President
Automotive Trades of Montana
P.O. Box 1238
Helena, MT 59624

Dear John:

Thank you for your letter urging me to support S. 1111, the Motor Fuel Sales Competition Improvement Act of 1987.

You raise some important points in your letter. We need to carefully guard against actions that may jeopardize our free enterprise system.

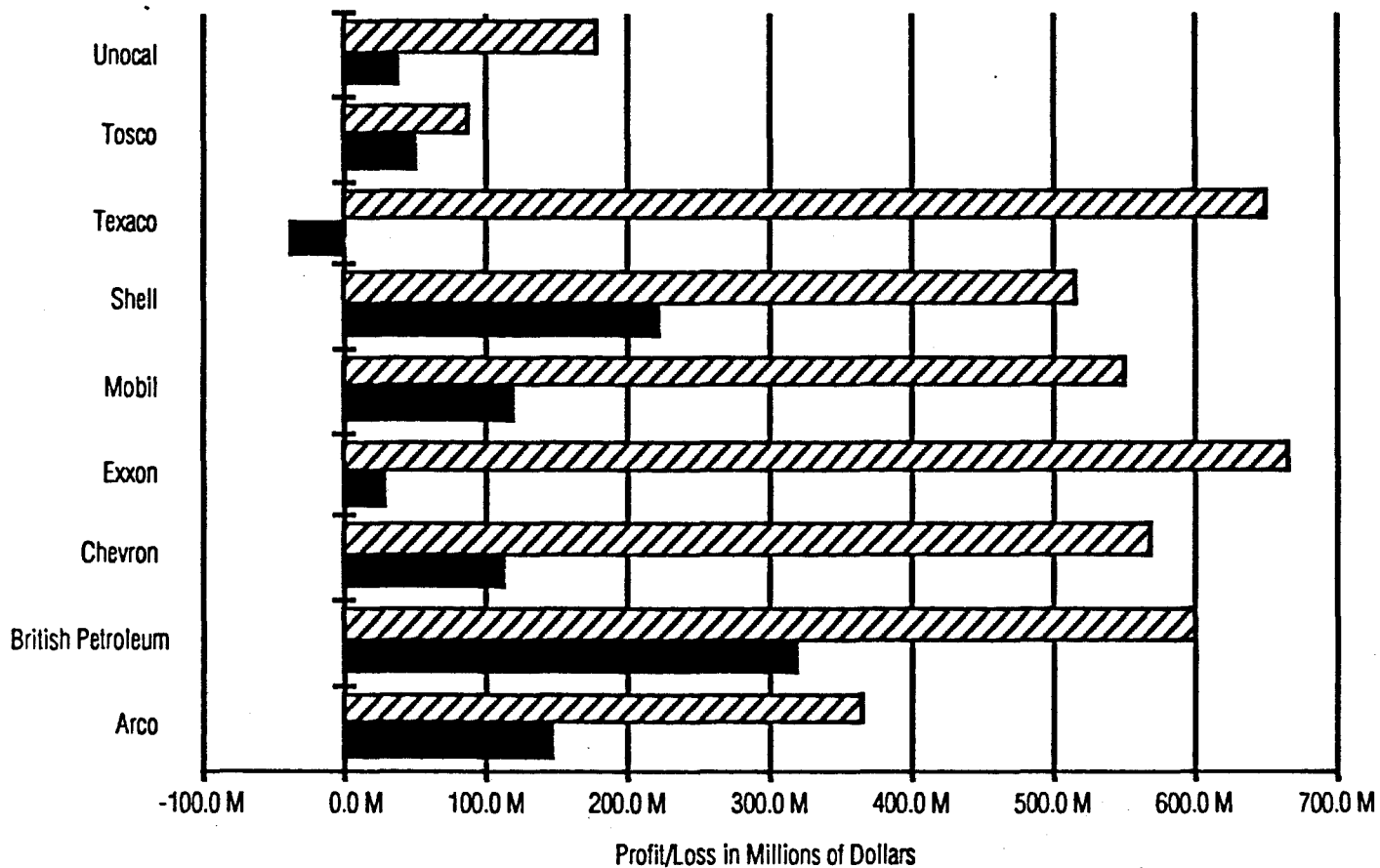
The Motor Fuel Sales Competition Improvement Act of 1987 would amend the Antitrust laws to promote wholesale and retail competition in the gasoline market. It prohibits an oil refiner from requiring any gasoline dealer to purchase more than a specified percentage of its fuel from a particular refiner. S. 1111 currently is awaiting consideration by the Senate Subcommittee on Antitrust, Monopolies and Business. Please be assured that I will keep your views in mind if this legislation comes before the full Senate for a vote.

Again, thanks for writing. As always, I appreciate knowing your organization's concerns.

With best personal regards, I am

Sincerely,

MAJOR OIL REFINERS' DOWNSTREAM PROFITS 1987 and 1988



Source: U.S. Oil Week
Feb. 27, 1989
Note: British Petroleum 1987 Profits
are Pre-Tax.

■ 1987
▨ 1988

Downstream Profits are based off of refining and marketing returns, and do not reflect any profit/loss impact of crude oil production.

Sen. Larry Tveit, Chairman

HB 464 - REGULATING THE PRICE OF MOTOR FUEL

Minimum mark-up legislation like HB 464 is truly an act to regulate the price of motor fuel. A bill such as HB 464 is both anti-competitive and anti-consumer. Statutes such as this are proposed to protect small businesses. In reality, the intent is to "protect" a small group of retailers from the effects of free and open competition. **MINIMUM MARK-UP LEGISLATION WILL FORCE CONSUMERS TO PAY HIGHER PRICES.**

*** Since decontrol of gasoline prices in 1981, there have been significant changes in the way gasoline is marketed. Consumers have increasingly sought out the most competitive prices available usually at high volume, self serve outlets. This has forced refiners, resellers, jobbers and retailers to change the way they do business or risk loss of market share. While most marketers have adapted to a new operating environment, some have responded by asking for government protection from their competitors. They support minimum mark-up legislation as a means of forcing prices upward. This legalized price fixing is clearly not in the interest of the consumer.

*** A law of this type is a throwback to "fair trade" legislation. Fair Trade laws were designed during the depression to combat inflationary pressures. These laws were repealed at the federal level in 1976 and virtually all states have repealed or declared such laws as invalid. They were deemed anti-competitive, inflationary and burdensome on consumers. HB 464 will succeed only in subjecting consumers to pay higher prices to subsidize inefficient operators.

*** Governmental regulation of gasoline prices by laws like HB 464 are arbitrary and discriminatory ways to fix prices. They fail to take into account the differences in overhead and operating costs between various types of retail establishments and simply force prices up to a level that will subsidize the least efficient operators.

*** Protection from predatory pricing is presently provided by federal anti-trust laws, the Federal Trade Commission Act, the Petroleum Marketing Practices Act and state franchise acts. Additional protection is unnecessary.

THE CONSUMER BENEFITS FROM PRICE COMPETITION. THE CONSUMER IS HARMED BY LEGISLATION THAT FIXES PRICES AT AN ARTIFICIAL LEVEL

MONTANA HB 464
REGULATING THE PRICE OF MOTOR FUEL
AT WHOLESALE AND RETAIL LEVELS

COMMENTS BY CONOCO INC.

Conoco Inc. opposes minimum markup legislation as proposed in HB 464 because in our view it:

- is anti-competitive and anti-consumer
- is an arbitrary and discriminatory device to fix prices
- restricts the right of a seller to price competitively
- protects high-cost operations
- will force consumers to pay higher prices for the purpose of subsidizing inefficient operators
- fails to consider differences in overhead and operating expenses between different types of retail outlets

Since decontrol of gasoline prices in 1981, there have been significant changes in the way gasoline is marketed. Consumers have increasingly sought out the most competitive prices available, which are usually found at high volume, self serve outlets. This has forced refiners, jobbers and retailers to change the way they do business or risk loss of market share. While most gasoline marketers have adopted to the new operating environment, some have responded by asking for government protection for their competitors. They support minimum markup legislation as a means of forcing prices upward in order to subsidize inefficient marketing practices.

Protection from alleged predatory pricing is presently provided by federal anti-trust laws, the Federal Trade Commission Act and the Petroleum Marketing Practices Act. Additional protection is not necessary.

THE CONSUMER BENEFITS FROM PRICE COMPETITION OCCURRING IN THE FREE, UNREGULATED MARKET PLACE AND IS HARMED BY LEGISLATION SUCH AS HB 464 THAT FIXES PRICES AT ARBITRARY LEVELS.

EXHIBIT NO. 10
DATE 3-14-89 Part 2

BILL NO. HB 464 Price Discrimination

82-15-201. Standard petroleum product defined. The term "standard petroleum product" as used herein refers to and includes gasoline, fuel oil, distillates, greases, and lubricating oils.
History: En. Sec. 2, Ch. 111, L. 1935; re-en. Sec. 4193.2, R.C.M. 1935; R.C.M. 1947, 60-402.

82-15-202. Purpose. This part is intended to compel a person, firm, company, association, or corporation doing business in the state of Montana and engaged in the selling of and dealing in standard petroleum products to treat a customer in one part of the state of Montana on an equal basis with a customer in another part of the state or in the nearest adjoining state and to promote the uniform application of the law of the state of Montana providing a tax on gasoline used by a motor vehicle when traveling over a public highway. This part shall be liberally construed to accomplish those purposes.
History: En. Sec. 3, Ch. 111, L. 1935; re-en. Sec. 4193.3, R.C.M. 1935; R.C.M. 1947, 60-403; and. Sec. 8, Ch. 201, L. 1979.

Cross-References
Gasoline and vehicle fuels taxes, Title 15, ch. 70.

82-15-203. Discrimination in price of petroleum products. (1) Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the state of Montana and engaged in the selling of any standard petroleum product that shall demand or collect from any person or customer a higher price for any standard petroleum product in one part of the state of Montana than the price being demanded or collected at substantially the same time by such person, firm, company, association, or corporation from other persons or customers in another part of the state of Montana or in the nearest adjoining state for a like article of standard petroleum product shall be guilty of discrimination which is hereby declared to be a fraud and the agents or officers of such person, firm, company, association, or corporation participating, guilty of a misdemeanor.

(2) In the trial of an action under the provisions of this part, in the determination of the justification of the price demanded or collected by a person, firm, company, association, or corporation charged with a violation of the provisions of this part, transportation, quantity of sales, emergencies, cost of doing business, or similar differences under the respective conditions may be offered as a matter of defense or justification for the differences in price demanded or collected. When competent evidence is offered in the trial of any action under this part of a demand for or the receipt of a higher price for any standard petroleum product in the state of Montana by any person, firm, company, association, or corporation than such person, firm, company, association, or corporation demanded, collected, or received at substantially the same time for the same or a similar article of standard petroleum product in another part of the state of Montana or in the nearest adjoining state, the burden of proof shall then be upon such person, firm, company, association, or corporation or agents or officers on trial to prove that the difference in the price demanded or collected was justified.

complaint shall be made to the attorney general that any person, firm, company, association, or corporation is guilty of discrimination as defined by this part, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit or license of such person, firm, company, association, or corporation, as the case may be, and to permanently enjoin such person, firm, company, association, or corporation from doing business in this state. If in such action the court shall find that such person, firm, company, association, or corporation is guilty of discrimination as defined by this part, such court shall annul the charter or revoke the permit or license of such person, firm, company, association, or corporation and may permanently enjoin it or them from transacting business in this state.
History: En. Sec. 4, Ch. 111, L. 1935; re-en. Sec. 4193.4, R.C.M. 1935; R.C.M. 1947, 60-404.

82-15-205. County attorney to prosecute violations. If any person shall present to the county attorney of any county in the state of Montana, in which county such discriminatory acts of any person, firm, company, association, or corporation shall have been committed, a sworn written statement of the price paid, the date, and the parties selling and buying and reasonably reliable information of the price demanded or collected by such person, firm, company, association, or corporation for a corresponding or similar article of standard petroleum product sold or offered for sale in another part of the state of Montana or in the nearest adjoining state by such person, firm, company, association, or corporation, then it shall be the duty of such county attorney to promptly investigate and either commence and prosecute an action or furnish the informant with a written statement of his reasons for not commencing and prosecuting an action under this part.
History: En. Sec. 4-A, Ch. 111, L. 1935; re-en. Sec. 4193.5, R.C.M. 1935; R.C.M. 1947, 60-405.

82-15-206. Penalty. Any person, firm, company, association, or corporation violating any of the provisions of this part shall be guilty of a misdemeanor and shall be punishable by a fine of not exceeding \$500.
History: En. Sec. 5, Ch. 111, L. 1935; re-en. Sec. 4193.6, R.C.M. 1935; R.C.M. 1947, 60-406.

Cross-References
Criminal responsibility of corporations, 45-2-312.
Accountability for conduct of corporation, 45-2-311.
Disposition of fines and forfeitures, 46-18-603.

82-15-207. Liability for civil and exemplary damages. In addition to the penalty above prescribed, any customer of such person, firm, company, association, or corporation may bring a civil action in any county in which such offending person, firm, company, association, or corporation may be doing business and recover therein not only actual damages for violation of this part but also exemplary damages for such reasonable sum as the jury may deem proper punishment for the unlawful practice of discrimination as herein defined.
History: En. Sec. 6, Ch. 111, L. 1935; re-en. Sec. 4193.7, R.C.M. 1935; R.C.M. 1947, 60-407.

STATEMENT OF MARK STAPLES
REPRESENTING EXXON COMPANY, U.S.A.
ON HOUSE BILL 464
BEFORE THE SENATE HIGHWAYS COMMITTEE
MARCH 14, 1989

MR. CHAIRMAN AND COMMITTEE MEMBERS. MY NAME IS MARK STAPLES. I AM HERE ON BEHALF OF EXXON COMPANY, U.S.A. THIS STATEMENT IS SUBMITTED FOR THE HEARING RECORD ON HOUSE BILL 464 WHICH WOULD PLACE A FLOOR UNDER PRICES PAID BY MOTORISTS WHEN THEY BUY GASOLINE FROM ANY SOURCE, WHETHER FROM A RETAILER, WHOLESALER, OR AN INTEGRATED REFINER. EXXON IS OPPOSED TO THIS BILL BECAUSE IT REPRESENTS AN ATTEMPT TO GUARANTEE THE PROFITS OF A SMALL GROUP OF MARKETERS AT THE EXPENSE OF HIGHER MOTOR FUEL PRICES FOR THE MOTORING PUBLIC AND THE REST OF THE BUSINESS COMMUNITY. FURTHER, THE DEALERS AND DISTRIBUTORS WHO SUPPORT THIS LEGISLATION ARE NOT LIKELY TO BENEFIT FROM THESE HIGHER PRICES FOR VERY LONG. FINALLY, THE BILL IS UNNECESSARY TO PROTECT THE LEGITIMATE INTERESTS OF MONTANA DEALERS AND DISTRIBUTORS AND IT WOULD BE OPERATIONALLY UNWIELDY FOR ALL THE MARKETERS TO WHOM IT MIGHT BE APPLIED.

ATTEMPT TO GUARANTEE PROFITS. THE MAJOR PREMISE BEHIND THIS BILL APPEARS TO BE THE ASSUMPTION THAT THERE IS SOMETHING WRONG WITH THE WAY MOTOR GASOLINE IS PRICED IN MONTANA. EXXON BELIEVES THAT THE MONTANA MOTOR FUEL MARKET IS HIGHLY COMPETITIVE AND THAT THIS COMPETITION BENEFITS THE CONSUMER. IN A COMPETITIVE MARKETPLACE, THERE WILL BE WINNERS AS WELL AS LOSERS, THOSE WHO OPERATE EFFICIENTLY EARNING A REASONABLE PROFIT AND THOSE WHO

OPERATE INEFFICIENTLY, EVENTUALLY FALLING BY THE WAYSIDE. THIS IS THE BASIC NATURE OF COMPETITION AND ITS RESULTS HAVE, OVER TIME, PROVIDED OUR CITIZENS WITH THE HIGHEST QUALITY PRODUCTS AND SERVICES AT THE LOWEST POSSIBLE COST.

THIS BILL INTRUDES UPON THE EFFICIENT WORKING OF THE MARKETPLACE BY PLACING A FLOOR UNDER THE PRICES THAT RETAILERS, WHOLESALERS, AND INTEGRATED REFINERS MAY CHARGE THEIR CUSTOMERS. IN ESSENCE, RETAILERS WOULD BE REQUIRED TO MARK UP THE MOTOR FUEL THEY SELL BY AT LEAST 6% AND WHOLESALERS BY AT LEAST 3%. CLEARLY, THE BILL'S INTENT IS TO REPLACE THE GIVE AND TAKE OF COMPETITION IN THE MOTOR FUEL MARKETPLACE WITH A RIGID SET OF REGULATIONS THAT GUARANTEE A MINIMUM MARGIN FOR MOST MARKETERS.

RAISE MOTOR FUEL PRICES. AS A RESULT, THE LIKELY OUTCOME OF ENACTMENT OF THIS BILL WILL BE HIGHER MOTOR FUEL PRICES FOR CONSUMERS AND SMALL BUSINESSES. A 1985 STUDY BY THE U.S. DEPARTMENT OF ENERGY CONCLUDED THAT SUCH LAWS COST THE CONSUMER OVER \$600 MILLION IN 1982 ALONE.

A MORE RECENT STUDY OF THE IMPACTS OF STATE BELOW COST SELLING LAWS IN ALABAMA, GEORGIA AND FLORIDA WAS COMPLETED BY THE AMERICAN PETROLEUM INSTITUTE IN DECEMBER, 1987. BRIEFLY, IN A BEFORE AND AFTER COMPARISON OF RETAIL GASOLINE PRICES IN THE STATES WITH NEIGHBORING STATES WITHOUT BELOW COST SELLING PROHIBITIONS, THE STUDY CONCLUDED THAT SUCH LAWS RAISED THE RETAIL PRICE OF GASOLINE SOLD BY REFINERS BETWEEN 1.4 AND 2.1 CENTS PER GALLON. PRICES CHARGED BY DISTRIBUTORS ROSE BETWEEN 1.9 AND 5.7 CENTS PER GALLON IN THE TWELVE MONTHS FOLLOWING ENACTMENT OF EACH STATE'S BELOW COST SELLING PROHIBITION. SHOULD SIMILAR

INCREASES OCCUR IN MONTANA, THIS BILL COULD COST THE STATE'S MOTORISTS AS MUCH AS \$24 MILLION ANNUALLY.

WON'T PROVIDE ANY BENEFITS. IN OUR VIEW, THIS LEGISLATION WILL NOT PROVIDE ANY ADDITIONAL LONG TERM BENEFITS TO THOSE WHO SUPPORT IT. ACCORDING TO A DOE STUDY OF DEREGULATED GASOLINE MARKETING, THE HIGHER PRICES RESULTING FROM BELOW COST SELLING LAWS WOULD NOT BENEFIT THE EXISTING DEALERS AND DISTRIBUTORS IN THE LONG RUN BECAUSE HIGHER THAN COMPETITIVE PRICES WOULD ATTRACT MORE COMPETITION WHICH WOULD REDUCE THE VOLUME SOLD BY EXISTING MARKETERS. WHILE HIGHER CONSUMER PRICES AND HIGHER UNIT MARGINS FOR DEALERS AND DISTRIBUTORS WOULD LIKELY REMAIN, ANY INCREASE IN PROFITS FOR MARKETERS WOULD QUICKLY VANISH DUE TO LOWER VOLUMES.

UNNECESSARY. THIS BILL IS CLEARLY UNNECESSARY TO PROTECT THE LEGITIMATE BUSINESS INTERESTS OF INDEPENDENT MOTOR FUEL MARKETERS. THESE MERCHANTS ARE ALREADY PROTECTED AGAINST UNFAIR PRICING OR OTHER UNFAIR MARKETING PRACTICES OF THEIR SUPPLIERS BY A LARGE BODY OF LAW INCLUDING THE MONTANA UNFAIR TRADE PRACTICES ACT, THE SHERMAN ACT, CLAYTON ACT, ROBINSON-PATMAN ACT, AND THE FEDERAL TRADE COMMISSION ACT WHICH PROHIBIT ACTIONS TO CONTROL PRICES AND SUPPLY.

SOME MARKETERS HAVE MAINTAINED THAT THESE EXISTING LAWS DO NOT WORK. THIS IS SIMPLY NOT THE CASE. WHEN GOVERNMENT AGENCIES BELIEVE THAT ANTI-COMPETITIVE ACTIONS ARE TAKING PLACE, THEY HAVE NOT BEEN RELUCTANT IN THE PAST TO INITIATE LITIGATION. USING PRESENT LAWS, THE FEDERAL TRADE COMMISSION, VARIOUS STATE ATTORNEYS GENERAL, AND INDIVIDUAL DEALERS HAVE WORKED WITHIN THE ADMINISTRATIVE AND COURT SYSTEMS TO SEEK REDRESS. WITH ALL OF

THESE LAWS ALREADY ON THE BOOKS, THERE IS NO NEED FOR ADDITIONAL LEGISLATION.

SUMMARY. IN SUMMARY, EXXON BELIEVES THESE AMENDMENTS ARE MISGUIDED, UNNECESSARY, AND ALMOST CERTAIN TO RESULT IN HIGHER MOTOR FUEL PRICES TO MOTORISTS WITHOUT ANY LONG TERM BENEFIT TO THOSE WHO SUPPORT IT. WE URGE THE COMMITTEE TO REJECT HOUSE BILL 464.

THANK YOU.

SENATE HIGHWAYS
EXHIBIT NO. 12
DATE 3-14-89
BILL NO. HB 464

STATEMENT BY MMCA on HB 464 to SENATE COMMITTEE on
HIGHWAYS AND TRANSPORTATION

Mr. chairman, members of the committee. For the record, I'm Ben Havdahl, Executive Vice President of the Montana Motor Carriers Association.

MMCA is opposed to House Bill 464. We're opposed to the philosophy of the Bill and to the impact it will have on truckers as consumers of diesel fuel.

MMCA has some 325 carrier members. The majority of whom are small trucking companies varying in size from one truck operators to carriers with a dozen or fewer units, on up to fleets of 300 plus. Many of these carriers are operating on the brink of economic depression and are hanging on virtually by the skin of their teeth.

I'm sure that many of our carrier members as well as suppliers, would think that the basic idea outlined in HB 464 is a very good one. Because they too are competing with tough competition including the private motor carriage of fuel by distributors in their own vehicles, as well as other for-hire carriers. They would like to be guaranteed a 6% profit or a 3% profit or whatever on their freight charges. There are no guarantees to any of the truckers in Montana.

As a matter of fact, MMCA could very well be supportive of HB 464 if this committee will see fit to amend the bill to include a guaranteed mark-up to struggling truckers.

As a matter of legislative public policy, truckers and the transportation service they provide Montanans, can be no less vital to a healthy competitive economic environment in the state than are dealers and distributors of fuel.

Why not guarantees for all businesses in Montana?

The minimum guaranteed price of diesel fuel prescribed in HB 464 represents an increase in the price of diesel fuel now being paid by truckers at retail. It removes any advantage that truckers may now have as major consumers that the competition in marketing of fuel under the free enterprise system now offers.

As an example of what I mean, I've attached a breakdown comparing current advertised prices of #1 diesel fuel at two establishments in Helena with the prescribed price of #1 diesel as required in HB 464. As the figures show, as much as 17 cents per gallon savings is reflected....a savings for truckers.

MMCA does not think that the precedent for involving the State of Montana in the free enterprise system now controlling fuel prices or the prices of any other business is in the best interest of the state.

NUMBER ONE DIESEL FUEL PRICE AS PRESCRIBED IN HB 464
COMPARED TO CURRENT HELENA PRICE

.663 Per Gallon, Current Rack Price #1 Diesel 3/14/89
.020 Transportation Cost
.683 Subtotal
.200 Montana State Diesel Fuel Tax Per Gallon
.883 Subtotal
.151 Federal Diesel Fuel Tax
1.034 Subtotal
.031 Wholesale Minimum Mark-up in HB 464 - 3%
1.065 Subtotal
.064 Retail Minimum Mark-up in HB 464 - 6%
1.129 Minimum Price at Retail as Prescribed in HB 464 based on Rack Price
of 3/14/89

Current Retail Advertised Price (cash) #1 Diesel Helena

<u>TOWN PUMP</u>	\$.989 per gallon, 14 cents difference
* <u>HUSKY TRUCK STOP</u>	\$.959 per gallon, 17 cents difference

* Posted price on pump, Husky Truck Stop, \$1.129 gal. exactly equal to price as prescribed in HB 464.

(S) HIGHWAYS AND TRANSPORTATION COMMITTEE
HEARING: March 14, 1989

HB 464: Testimony of Ward A. Shanahan

Mr. Chairman and Members of the Committee:

My name is Ward Shanahan; I am a registered lobbyist for Chevron, U.S.A. We are opposed to HB 464.

HB 464 is written in such a way that all retailers in Montana must account for a minimum of 6 percent of the invoice price as the cost of doing business. Vertically integrated producers or supplier-owned retailers, however, are discriminated against. The base cost for these marketers is the price at which other suppliers' wholesalers sell to retailers. To this amount must be added a full 9 percent which represents both the wholesale and retail markups for the cost of doing business.

The effect of this provision, of course, would be to put vertically integrated producers and supplier-owned retailers at a severe competitive disadvantage when competing with other retailers in a given market.

Notable by their absence are comparable provisions for jobbers. If parallel provisions were enacted for this class of trade, a jobber, when selling at retail through its salary-operated stations, should be required to take as its base cost the price charged by its supplier to the supplier's retail accounts. To this amount should be added a 9 percent markup as the appropriate cost of doing business. The bill contains no provision of this type for jobbers.

There is a similar omission in regard to sales by jobbers at wholesale to retail dealers. The bill states that the presumed markup for wholesalers is 3 percent. This provision is not implemented. There is nothing in the bill stating that it is a sale below cost for a jobber or distributor to resell to dealers at less than 3 percent over the invoice price for which the product was purchased. In other words, jobbers and distributors may resell at any price that they choose.

The bill is an anti-consumer measure. The minimum markup provisions would require all retailers to boost prices at the pump to at least 6 percent over invoice.

Hardest hit would be consumers who buy the lowest priced gasoline for their cars. In many markets, this grade of gasoline is resold at cost or a cent or so above cost. Dealers

make more money on other grades of gasoline and on their full serve operations.

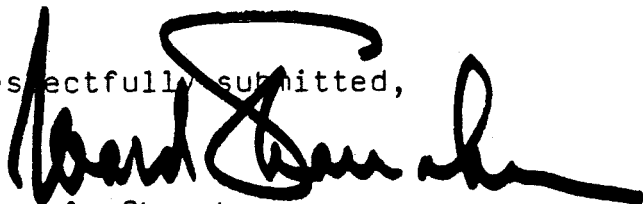
The bill is highly discriminatory. Dealers in general must account for a 6 percent markup to cover the cost of doing business. As noted earlier, retail sales made by a vertically integrated producer or a supplier-operated retailer (not including jobber operated retailers) would have a 9 percent markup to cover the cost of doing business. The effect of this discriminatory provision would be to put the retail operations of such marketers at a severe competitive disadvantage or in some cases, to put them out of business.

Many jobbers have integrated operations which cover both the wholesale and retail functions. But jobbers in connection with their retail operations are not selling below cost so long as they sell at a minimum of 6 percent over invoice. Furthermore, jobbers are not selling below cost if they sell at less than 3 percent over invoice when selling to retail dealers. In other words, jobbers are free to price much more competitively than others. Jobbers benefit in two ways: First, since their competitors will have a higher cost base, jobbers can realize greater margins. Second, jobbers can also benefit by pricing just a little bit lower than others' marked-up prices and thereby obtain additional gasoline volume at the expense of their competitors.

The best way to expose the "preference" this bill would create is to compare New Section 4(3) with New Section 4(7). Jobbers are exempt. From this it seems evident that the bill was written by jobbers for jobbers. There can be no reasonable basis for such lopsided legislation. The bill is said to be needed to protect small business. Most jobbers, however, conduct multimillion dollar operations.

Finally, the bill is unnecessary. Other trade regulations laws protect the competitive process and do so without discriminating in favor of one trade class against others. These laws include the Sherman Act, the Robinson Patman Act, and the Montana provisions against sales below cost and price discrimination.

Respectfully submitted,



Ward A. Shanahan

WAS/skh
7244W



BUREAU OF COMPETITION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

F-011478
SENATE HIGHWAYS
EXHIBIT NO. 14
DATE 3-14-89
BILL NO. HR 464

Gay Woodhouse, Esq.
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

Dear Ms. Woodhouse:

I am writing in response to your letter of September 17, in which you described your interest in updating the Wyoming statute that governs below-cost sales. The staff of the Federal Trade Commission appreciates this opportunity to give you some information about our own statutes and also to comment more generally about this subject.¹

We believe that every state should be circumspect in enacting prohibitions against below-cost pricing. Statutory prohibitions against pricing below cost can chill price competition that would be beneficial to consumers, due to the difficulty of distinguishing between below-cost pricing and vigorous competition. Moreover, after having reviewed many allegations of such conduct, we believe that firms will rarely engage in genuine below-cost pricing, because they typically know that they cannot count on a later period of monopoly power during which they can raise prices above their costs and recoup their earlier losses.

The remainder of this letter is divided into two sections. In the first I set out some general thoughts about the difficulties of applying predatory pricing laws without harming consumers in the process, and propose an interpretive rule that you may want to consider in administering any statute in this area. In the second section I address the specific questions that you asked about our experiences with our own predatory pricing statutes.

¹ This letter sets out the views of the FTC's Bureaus of Competition, Consumer Protection, and Economics, and not necessarily those of the Commission itself or of any individual Commissioner. The Commission, however, with Commissioners Bailey and Strenio dissenting, has voted to authorize us to submit these comments to you.

Gay Woodhouse, Esq.

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I. General comments on below-cost pricing

The theory of below-cost or predatory pricing is that a firm could price its products below the actual costs of producing them, for a prolonged period of time, and could eventually drive its less well financed rivals from the market. The original firm would then be in a monopoly position and would seem to be able to raise prices, perhaps high enough to make up all the initial losses and still show an overall profit on the venture.

We believe, however, that predatory pricing is difficult to accomplish and is therefore quite rare. At least two obstacles stand in its path. First, the predator must absorb relatively large losses, since, as it acquires an ever-larger market share, it must bear per-unit losses on an ever-larger number of units. This means that the predator's financial losses will be much larger than those of its putative victims. Second, the predator cannot count on having a period of monopoly power within which to recoup these losses. When the predator begins to raise prices, the market will become attractive and firms will once more enter in response to the new profitability of the industry. This competitive response may be lessened if the predator can raise prices in a piecemeal or hidden way, or if the market is protected by barriers to the entry of new firms. In the absence of significant problems of this sort, however, we can expect that entry will in fact occur rather rapidly, and that it will ensure that prices do not remain above competitive levels.

These views are consistent with the Supreme Court's recent opinions in two cases involving predatory pricing, Matsushita Electric v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), and Cargill v. Monfort, 107 S. Ct. 484 (1986). These decisions contain the Court's first discussion of the issue since 1967² and reflect the substantial developments in the legal and economic analysis of predatory pricing that have occurred in the past two decades. The Matsushita case involved allegations that Japanese television manufacturers had engaged in a complicated conspiracy to raise prices in their home market and use the profits to subsidize predatory pricing here. A motion for summary judgment raised the question of whether there were any genuine issues of fact for trial. Concluding that predation was unlikely on the facts alleged, the Supreme Court observed that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more

² See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

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rarely successful." 106 S. Ct. at 1357-58. The Cargill case raised similar issues. There a meat-packing company had challenged a merger between two of its competitors, alleging that this would give the merged firm the financial resources to engage in predatory pricing. Although relying on technical grounds to reverse a ruling for the plaintiff, the Court indicated more generally that the mere possibility of such harm, without any more specific evidence, was too speculative to support an injunction against the merger. The Court said that "[c]laims of threatened injury from predatory pricing must, of course, be evaluated with care," and that "the obstacles to the successful execution of a strategy of predatory pricing are manifold, and . . . the disincentives to engage in such a strategy are accordingly numerous." 107 S. Ct. at 495 n.17.³

Underlying these decisions is a belief that the success of any predatory pricing effort is inherently uncertain:

(T)he short-run loss [from predatory pricing] is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Matsushita, 106 S. Ct. at 1357-58.

³ In Cargill the Court stated: "Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." 107 S. Ct. at 493 (footnote omitted). Accord, Matsushita, 106 S. Ct. at 1355 n.8. The Court found it unnecessary to consider "whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation." Cargill, 107 S. Ct. at 493 n.12. Commentators and courts continue to differ on the exact measure of cost to be used in defining below cost pricing. Id. To some extent the definition of the cost benchmark will determine the incidence of predation. The divergent technical positions on the cost question, however, do not undermine the consensus that predation, however defined, occurs infrequently.

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Several factors contribute to the uncertainty of outcome. One is the need for entry barriers, as the Matsushita Court discussed. Entry barriers are essential if a predatory scheme is to work, yet, in our open economy, a market generally is not insulated from competition long enough to permit recoupment of the initial losses. Another problem for the rational predator is that future profits must be discounted. By dropping prices below cost the predator forgoes profits in current dollars, whereas any recoupment will necessarily be in discounted future dollars. Still another source of uncertainty is the fact that recoupment may be affected by intervening changes in business, technological, or regulatory conditions. Accordingly, we believe that predatory pricing statutes address a rare problem.

In addition, we believe that such statutes may be affirmatively harmful to consumers. If the statutory definition of the offense is overbroad (making it too easy to prove) or if the offense is so vaguely defined that erroneous public and private applications of the statute are probable, businesses may be deterred from vigorous but legitimate price competition. Deterrence from competition is a particular problem because firms have an incentive to complain about the successful competitive efforts of their rivals, however proper those efforts may be.

These risks can be seen in the mix of complaints that are brought to the Commission. During one recent five-month sample period we received nineteen complaints of predatory pricing. Commission attorneys followed up on all of these by calling the complainants to request additional and more specific information. In fourteen of the nineteen cases the complainants had no data to support their charge; they simply "felt" that their competitors were pricing too low. In most of these cases it appeared more probable to our investigators that the alleged predators were achieving operational efficiencies that would legitimately allow them to charge lower prices. In support of this they observed that most of the industries had low entry barriers, which would tend to rule out a strategy of predatory pricing.

To screen out those cases in which predatory pricing is unlikely, we consider the structural characteristics of the market before reaching questions of costs and prices. This initial inquiry focuses on whether a market is so structured and so sufficiently protected by entry barriers that predation is a realistic possibility. The Commission has followed this

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approach in its own most recent predatory pricing cases.⁴ In dismissing the charges in these cases, the Commission found it unnecessary to reach a detailed examination of evidence relating to either intent or conduct. Rather, the Commission observed in each case that the market structure and the vigor of current competition precluded any dangerous probability that below cost pricing, if it had occurred, could have led to sustained monopoly power.

This phased approach permits careful evaluation of predatory pricing complaints, yet also reduces the resources necessary to assess them, because market information typically is more available and less ambiguous than evidence regarding an individual firm's cost levels or intent to monopolize. In addition, reliance on market evidence limits the risk that a law enforcement investigation might chill legitimate price competition. By using such evidence to weed out improbable predatory pricing claims, competitive firms are not subjected to intrusive and potentially expensive inquiries into their motives, cost structures, and business plans.

II. Specific questions

Our answers to your specific questions are as follows:

1. Do you have a selling below cost statute or "discrimination" statute?

No statute enforced by the Commission prohibits below-cost pricing directly. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13, prohibits discrimination in price between different purchasers of commodities of like grade and quality under certain conditions. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization and attempts to monopolize. The Commission has

⁴ International Telephone & Telegraph Corporation, 104 F.T.C. 280 (1984) ("ITT"); General Foods Corp., 103 F.T.C. 204 (1984) ("General Foods"). In ITT, the Commission determined that sales "at prices that equal or exceed average variable cost should be strongly, often conclusively, presumed to be legal." 104 F.T.C. at 403. The Commission also concluded that sales "at prices below average variable cost for a significant period of time should be rebuttably presumed to be anticompetitive." Id. at 404. Finally, the Commission determined that sales "at prices that equal or exceed average total cost should be conclusively presumed to be legitimate." Id. In ITT and General Foods, Commissioner Bailey disagreed with the Commission's definition of predation.

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no authority to bring actions under the Sherman Act directly, but Sherman Act standards can be applied to actions brought under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. Please send a copy of your law.

Copies of the statutes cited above are attached.

3. If you do not have a sales below cost statute, how does your state deal with problems in this area?

Not applicable.

4. Do you consider your statute effective?

We believe that the statutes cited above provide effective means of challenging predatory pricing.

5. How workable is your statutory definition of "cost?"

"Cost" is not defined in the statutes enforced by the Commission, and the definition of the term remains unresolved. See, e.g., Matsushita, 106 S. Ct. at 1355, nn. 8 & 9.

6. How is your law enforced (attorney general, county attorney, administrative agency, private action)?

Section 5 of the FTC Act is enforced by the Commission. The Sherman Act is enforced by the Department of Justice and by the Federal Trade Commission through Section 5 of the FTC Act. The Robinson-Patman Act is enforced by both the Commission and the Department of Justice. In addition, private actions may be brought under the Sherman Act and the Robinson-Patman Act. State attorneys general may also bring suit as *parens patriae*. 15 U.S.C. § 15c.

7. How effective are the private remedies in your statute?

A plaintiff in a private action who proves injury to his business or property may recover treble damages. 15 U.S.C. § 15.

8. What are the penalties for selling below cost?

The Commission is empowered to issue cease-and-desist orders. A court may award injunctive relief as well as damages.

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9. How many actions has you office filed in the past 5 years for sales below cost?

a) Number of criminal actions?

Not within our jurisdiction.

b) Number of civil actions for injunction?

The Commission filed no such actions in this period. It decided two such cases, ITT and General Foods, cited above in footnote 4.

c) Number of civil actions to revoke a corporate charter?

Not within our jurisdiction.

d) Description and number of other actions?

Our remedies are limited to issuing cease-and-desist orders.

10. Who investigates complaints under your below cost sales act?

The predatory pricing complaints that appear to warrant investigation are studied by the agency's own staff. The primary responsibility for antitrust matters lies with our Bureau of Competition.

11. What type of staff does the agency have to investigate these cases? What is the budget for this agency?

Investigatory teams include both economists and lawyers, with paralegal assistance sometimes available as well. The total budget of the FTC is \$69.7 million, with \$31.4 million of that designated for all antitrust matters. We do not have a separate line item in the budget for predatory pricing matters.

12. How many attorneys in your office are assigned to enforcing below cost sales statutes?

Attorneys are assigned to monitor particular industries rather than to enforce certain statutes. Therefore, there are no attorneys specifically designated for predatory pricing matters.

13. Has the constitutionality of your law been upheld?

Yes. See Atlas Bldg. Products v. Diamond Block & Gravel, 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843

Gay Woodhouse, Esq.

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(1960) (Robinson Patman Act § 2(a)); Sears, Roebuck & Co., 258 F. 307 (7th Cir. 1919) (FTC Act); Standard Oil v. United States, 221 U.S. 1 (1911) (Sherman Act).

14. Are there any rules or regulations promulgated pursuant to this statute?

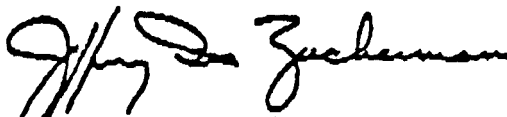
There are none dealing specifically with the issue of below-cost pricing.

Conclusion

The Commission staff believes that predatory pricing statutes, while not intrinsically without merit, can do more harm than good. We therefore recommend that they be drafted and applied with care. In particular, we believe that revisions intended to make the law stricter and enforcement actions easier to bring should be carefully considered. We also recommend that any analysis of a predatory pricing claim begin with a threshold inquiry into market structure.

Thank you again for the opportunity to comment on these issues. We hope you find our observations helpful. Please don't hesitate to get back in touch if we can give you any further information. In particular, we would be happy to comment, at your request, on any specific legislative proposal that you might draft.

Sincerely yours,



Jeffrey I. Zuckerman
Director

WITNESS STATEMENT

NAME: Row Leland DATE: 3/14/89

ADDRESS: 640 Stadler Helena, MT

PHONE: 458-9512 442-6401

REPRESENTING WHOM? Automotive Trades

APPEARING ON WHICH PROPOSAL: HB-464 HJR-12

DO YOU: SUPPORT? AMEND? OPPOSE?

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

COMMITTEE ON HIGHWAYS AND TRANSPORTATION

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
RON LELAND	AUTOMOTIVE TRADES	HJR 12 HB 464	X X	
JOHN TAGGART	AUTOMOTIVE TRADES OF MT	HB 464 HJR 12	X X	
BETTIE TAGGART	" " "	HB 464 HJR 12	X X	
KATHY SPARR	GLENDIVE FORWARD	HJR 17	X	
LES ALLERMAN	GLENDIVE MAYOR	HJR 17	X	
JIM TUTWILER	MT CHAMBER COMM	HJR 17	✓	
Charles Brooks	MT. RPT. / ASSOC	HB 464		X
WARD SHAWHAN	CHEVRON U.S.A	HB 464		X
WALT MAGUIRE	CHEVRON U.S.A	HB 464		X
Ben Hardam	MT MOTOR CARRIERS ASSN	HB 464		X
Joe Kyets	MT Chamber of Commerce	HB 464		X
PEARSON	HN 97	HB 621	X	
Riley Johnson	ATOM	464	X	
Bonnie Lynn	Ashland Oil	464		X
Jenny Bults	Ashland Oil, Inc	464		X
Paulle Jellan	MPA	464		X
Mark [unclear]	Exon	464		X
Stephen D. Visica	Montana Petroleum Mfrs	464	X	
John Augustine	CONOCO	464		X