

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON BUSINESS & ECONOMIC DEVELOPMENT

Call to Order: By REP. BOB BACHINI, CHAIRMAN, on February 15, 1991, at 7:00 a.m.

ROLL CALL

Members Present:

Bob Bachini, Chairman (D)
Sheila Rice, Vice-Chair (D)
Joe Barnett (R)
Steve Benedict (R)
Brent Cromley (D)
Tim Dowell (D)
Alvin Ellis, Jr. (R)
Stella Jean Hansen (D)
H.S. "Sonny" Hanson (R)
Tom Kilpatrick (D)
Dick Knox (R)
Don Larson (D)
Scott McCulloch (D)
Bob Pavlovich (D)
John Scott (D)
Don Steppler (D)
Rolph Tunby (R)
Norm Wallin (R)

Staff Present: Paul Verdon, Legislative Council
Jo Lahti, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: Executive action would be taken on bills previously heard, and then HB 587, HB 725, HB 538 and HB 261 would be heard.

EXECUTIVE ACTION ON HOUSE BILL 258

REP. BACHINI asked VICE-CHAIR SHEILA RICE to take the Chair.

Motion/Vote: REP. BACHINI moved amendment #2 on EXHIBIT 1 be adopted. Amendment #2 was unanimously adopted. He further moved amendment #1 be adopted. This second amendment was requested by Navistar. He asked Steve Turkiewicz, Montana Auto Dealers Association, to better explain #1. The amendment intends to exempt trucks 10,000 GVW from the warranty conditions being provided trucks. REP. WALLIN explained a 10,000 GVW truck is a light duty truck. In their lines an F-600 would be a medium duty truck, which is a farm truck. The big semis are heavy duty. REP.

RICE said the amendment in concept is to exempt trucks having 10,000 GVW or over rating. Motion carried unanimously.

REP. BACHINI moved another amendment requested by the recreational vehicle industry to exclude such items as refrigerators, stoves, furnaces, recreational appliances from HB 258. Motion carried unanimously.

Motion REP. BACHINI moved HB 258 DO PASS AS AMENDED.

REP. PAVLOVICH asked who gets the money from the flyers he receives in the mail offering extended service contracts depending on how many miles you want. REP. WALLIN explained those are extended warranties paid for by the dealers providing there is availability. That money goes back to Ford to buy the insurance policy.

REP. BACHINI explained the fiscal note. Because the motor vehicle manufacturers rely primarily on private attorneys rather than the Attorney General, the fiscal impact under HB 258 would be minimal.

Vote HB 258 DO PASS AS AMENDED carried unanimously.

REP. BACHINI resumed as Chairman.

EXECUTIVE ACTION ON HB 541

HB 541 adds a New Section 5 - Annual disclosure report containing a bank's Community Reinvestment Disclosure Report to the State Banking Board showing areas to which they have made loans.

Motion: REP. STELLA JEAN HANSEN moved HB 541 DO PASS.

Motion: REP. BENEDICT moved to amend HB 541. He said REP. KADAS indicated he would not be averse to eliminating the first part of Section 4 on page 6, lines 15 through 21. We don't want to mandate what the banks will do with their money, all we want to do is get the reporting procedures in place. This section leaves it too open as to whether a bank has to loan out money in certain areas. Mr. Verdon said the rest of that section defines the first Section and should also be eliminated, thereby eliminating Section 4 entirely.

REP. HANSON said he is against the bill. Banks are already required to do this. Any bank that has federal deposit insurance will still have to provide the information. REP. BENEDICT said state chartered banks have to comply with FDIC reporting regulations, but not actually how they loan their money. REP. HANSON said FDIC requires the Community Reinvestment Act (CRA) be adhered to; and a state-chartered bank covered by FDIC is required to comply. CRA is emphatic about what can be done.

Vote The amendments were adopted unanimously.

Motion REP. SHEILA RICE moved to strike everything on page 7, Section 5, from line 2(1) through line 23. Subsection (3) would be the only remaining part of Section 5.

Vote The amendment was adopted unanimously.

Motion REP. BACHINI moved HB 541 DO PASS AS AMENDED.

Mr. Verdon mentioned on page 8, line 20 there is a reference to lower income neighborhood.

REP. KILPATRICK said Section (3) provides for notification so people can get this information. He called all the banks in his area, and everybody says this information is available. It is an extra bit of paper work. They are posting it in the lobby. They have to provide this information on demand. Somebody is being a bit less than truthful in their statements. You are hearing the banks say the public can get this information anytime they want; other people are saying the banks won't give it to them. He thinks this is adding more paper work. He will have to vote against this.

REP. STELLA JEAN HANSEN said she has worked with People's Action. She will vote for the bill. Those requesting this information are people who are pulling themselves up by their bootstraps. Some of them have gone to college to help themselves to do that. Some have been refused this information when they asked the banks for it. The banks are already doing this reporting, and could easily give a copy to anyone interested.

REP. BACHINI said he had visited with the banks in his district. They said they were already complying and the information is available. He is in accord with REP. KILPATRICK'S viewpoint.

REP. WALLIN said it has been his experience when he sat on a bank board the board was always conscious of their obligation that a certain amount of the deposits had to be loaned in the community. The banks would work together to plow some of the money back into the community. The banks are community oriented. He will vote against the bill.

REP. SHEILA RICE said there are banks that don't comply with FDIC and won't let a person have that report when requested to do so. This bill will put a law in the codes that will make it mandatory. She will vote for the bill.

REP. BACHINI said 85% of the banks now already do this; 15% they say do not. He wondered about the relationship. Perhaps that 15% could grow. He questioned if passing HB 541 is the right thing to do.

REP. LARSON is concerned that all the bill requires is an annual disclosure report on where they loan their money. It doesn't say anything about changing the bank board. The title doesn't say

anything about changing the bank board. Is there an attempt to add a low income member? Mr. Verdon reminded the membership is indicated in the title.

REP. RICE thought the disclosure part is the important part. There probably wouldn't be any problem with striking Section 1 that changes the membership of the bank board.

Motion/Vote REP. BENEDICT made a substitute motion to TABLE HB 541. Motion carried 10-6 with REPS. SONNY HANSON, SHEILA RICE, SCOTT McCULLOCH, STELLA JEAN HANSEN, JOHN SCOTT, TIM DOWELL VOTING NO.

EXECUTIVE ACTION ON HB 590

Motion REP. SCOTT moved HB 590 DO PASS.

REP. HANSON said he will vote against this bill. Jim Kembel's organization does not know what building permits some houses are required to have when they are built outside the city limits. It is very questionable how an insurance company would know what permits would be required since they are completely different five miles out of the city limits. There is no way they will know. What happens when an individual builds his own house. There are no codes in some areas. The only requirement is an electrical permit and inspection. This says without proper inspection they cannot get any insurance because they have done the building themselves. The Uniform Building Code and the Mechanical Code are not required outside cities. The cities adopt the state building codes, and which can apply up to four and one-half miles outside city limits in some places. Some houses are in the required inspection areas and others are not. Page 1, line 14 says 'unless the insured demonstrates that the necessary construction permits have been applied for or obtained'. That is the basis of HB 590. He thinks this would stir up the whole industry.

REP. ELLIS agrees with REP. HANSON. He built a building on his ranch, but because all the buildings are on a main electric breaker, he would not have had to get an electrical permit. However he talked to an inspector before making the installation. Someone could get in the position of having to take off the drywall in order to get an electrical permit so the building could be insured. HB 590 appears to make insurance agents liable to check whether proper building permits had been requested and issued.

REP. BACHINI thought this bill was requested because of a lack of inspectors. If there were a proper number of inspectors, this bill would not be needed.

REP. SCOTT favors the bill. There are implied things that won't be affected by this bill. By law you have to get an electrical permit. It doesn't mean you have to hire an electrician or plumber if you are doing work on your own home. These insurance

agents who would have to ask for proof of application for permits are not knowledgeable about doing inspections. They are not being asked to inspect. They are being asked to see if permits have been obtained. He thinks they are going after the person who does not get permits. This is a way to help the Building Codes Division to know if permits have been applied for or obtained. A private individual does not have to hire a licensed electrician or plumber. He can do his own work as long as he is not doing it for money.

REP. BENEDICT thought Mr. Kembel thought it would be a real help to him to alleviate state or local building inspections through the use of unqualified insurance agents. If there is a problem with inspectors, it should be taken care of at the government level. We have too many insurance codes to pile building codes on the backs of insurance agents. He is not in favor of this bill.

REP. DOWELL said the issue here is safety. It is making sure places being built are inspected. It is not about loading up insurance agents; it is not about not being able to build your own home. Although he did a great deal of building for himself, he took it upon himself to find out what codes were required. He built to those codes and had an inspector come out. This bill does not ask the insurance people to go on a job and be experts. All they are doing is looking at a sheet to see if a checkmark is in a box. He doesn't have to be an expert to see that.

REP. CROMLEY said this is a safety issue. Basically an understaffed issue. This transfers safety aspects from the public sector to the private sector.

REP. KILPATRICK thinks this is a consumer bill. When houses are built the framing is put up, the electricians come in to put up the wiring before the drywall is put up. If you decide to sell and there is faulty wiring causing a fire the house burns down, there could be problems. The trade industry brought this in; they are looking at a safety factor. The insurance agents aren't doing the inspecting. He thinks it is a good bill.

REP. McCULLOCH felt this is condoning those people who are not obtaining permits. There is no expertise required except to see if a checkoff on required permits has been made. He will vote in favor of the bill.

REP. BACHINI agrees this is shifting the responsibility from the government sector to the private sector. That is not the right way to do this. This was brought out during the testimony yesterday by Don Burke who said if they had enough inspectors they wouldn't need this bill. There is a liability here, too.

REP. STEPPLER said in his county you have to apply for an electrical and a building permit. If you are an insurance agent, you will have to keep track of how many permits are required depending on what area you are doing business. In Richland County

some are doing business in a 7, 8, 9 county area. It could be a burden to insurance agents to keep track of all this.

Motion/Vote REP. STEPPLER made a substitute motion to TABLE HB 590. Motion to TABLE HB 590 carried 12-6 with REPS. SCOTT, PAVLOVICH, DOWELL, KILPATRICK, McCULLOCH, HANSEN voting NO.

HEARING ON HOUSE BILL 587

Presentation and Opening Statement by Sponsor

REP. ROYAL JOHNSON, HD 88, Billings, presented HB 587 on behalf of the Board of Medical Examiners. This bill would provide the date for annual renewal of a nutritionist license be set by the Board of Medical Examiners (BME). It will change the date for imposing an additional fee for late renewal of applications and amend 37-25-307, MCA. All of the renewals have been set up to be renewed at the same time of the year, usually at the end of the year. This puts a strain on the staff. The BME would be allowed to figure a way whereby they can consider the renewals for MDs at one time, the nutritionists at another time, PEs another time, and spread the workload out throughout the whole year. He asked support for HB 587 to help the Department of Commerce, the BME, and the people who work on the licensing issues.

Proponents

Gene Huntington, Montana Dietetic Association, has consulted and worked with the staff of the BME and supports HB 587.

Opponents None

Questions from the Committee None

Closing by Sponsor REP. JOHNSON closed.

EXECUTIVE ACTION ON HB 587

Motion/Vote REP. PAVLOVICH moved HB 587 DO PASS. Motion carried unanimously.

HEARING ON HOUSE BILL 725

Presentation and Opening Statement by Sponsor

REP. WILBUR SPRING, HD 77, Belgrade, sponsor of HB 725, said it is a small loan bill. It extends the permissible loan term for loans in excess of \$1,000 by consumer loan businesses, amends 32-5-302, MCA. It extends the length of time to pay back a \$1,000 up to \$2,500 loan from 37 months to 48 months.

Proponents

Jerry T. Loendorf, Montana Consumer Finance Association, an association of consumer finance companies, said HB 725 will increase terms for loans from \$1,000 to \$2,500 by increasing repayment time from 37 months to 48 months. This is a practical matter. There are very few loans made in these amounts for a term of 48 months. This request is made because a few people would like to extend small loans for a longer term thereby reduce the monthly payment. You can't do that for a loan that small without a law because it increases the risk substantially. An example is an automobile loan for \$2,500, which is the only amount that can be codified although a loan can be as low as \$1,000. For something that doesn't have a very long life, 48 months is quite a long time. An aluminum boat could last another 10 or 20 years and would be eligible for an extended repayment time. This bill is one that is going to apply only in a few situations.

Opponents None

Questions from the Committee

REP. BENEDICT asked Mr. Loendorf if he is for or against the bill because he at first talked for the bill and then talked about the risk of extending loan time for something that did not have a very long life. Mr. Loendorf answered he is for the bill. The lending institution would have to make that judgment. No other lending institutions under this old law have any type of limitation like that. They take the risk. HB 725 forces them to do so.

Closing by Sponsor

REP. SPRING closed. He said this is an O.K. bill and recommended a Do Pass.

EXECUTIVE ACTION ON HB 725

Motion/Vote REP. PAVLOVICH moved HB 725 DO PASS. Motion carried unanimously.

HEARING ON HOUSE BILL 538

Presentation and Opening Statement by Sponsor

REP. DOROTHY BRADLEY, HD 79, Bozeman, sponsored HB 538 which is an act to regulate the price of retail motor fuel at wholesale and retail levels; provide for penalties and remedies for sales in violation of established prices; prohibit unfair practices in the sale of retail motor fuel; and provide an immediate effective date. She asked her constituents to teach her what predatory pricing problems there are in the state. At that time Montana did not have a definite case but there were a number of indicators to her that their suspicions were very possibly based on things that were going on. A 1985 study in the State of Washington found that predatory pricing was taking place. A whole array of proposals

came out of that study that were far more drastic and far more severe in their actions than a below-cost pricing measure. The Washington study resulted in legislation that was enacted there in 1986, and that law was the model for bills that were rejected by Montana's 1987 and 1989 legislators. There are other indicators as well, such as the fact that the wholesale price being paid by some of the independent dealers was actually higher than the retail price that was posted in some of the service stations just a little ways down the street. When you see something like that happening, there probably are some unfair practices being carried out. There is a lot of protection of these records. They are hard to get your hands on because of the trade rules. It doesn't take long to look at information like this to see that something is amiss.

There was also a period of time where the overall price on oil internationally was dropping and the consumer prices at the gas pumps were going up. This whole combination led us to look at an array of proposals that could be brought before the Legislature. One is known as divorcement which is fairly severe. In order to make sure there is no vertical integration taking place from the refinery to the distributor to the retail outlet, you simply separate the refining segment from the marketing segment of this industry. You can't have them be one and the same. They decided that probably was a bit too severe, or went a little further than they needed to go, so they looked at the alternative which was prohibiting the below-cost sales when that bill was introduced. If there were no predatory pricing taking place in the State, then this bill should not be a matter of concern to anybody. If there is predatory pricing taking place, then it behooves the State, the County Attorney, Department of Commerce, the Attorney General to do something about it.

This bill went through the House in 1989 with a fairly good vote, went to the Senate, side by side with a request from the State. The Senate took the route of acting on the cautious side, decided to leave the bill at the wayside and do a study in the interim which resulted in the report which resulted in the "Motor Fuel Pricing Problem". It starts out with language that there have been profound changes taking place in motor fuel marketing in the last two decades; that there is a mass exodus of independent dealers disappearing from local neighborhood stations. The result was the recommendation of two bills. One is HB 538 prohibiting below-cost sales.

The bottom of page 5, Section 4, says the wholesaler can't sell motor fuel to a retailer at less than the delivered cost plus the cost of doing business. Also a retailer can't sell motor fuels to a consumer at less than the delivered cost plus the cost of doing business. That is really the heart of the bill. The only complicated problem is figuring out what the cost of doing business is. In Montana this is a fairly routine kind of calculation. In many states there seems to be a fair amount of agreement by the public body and the Legislature, what a fair

cost of doing business is. Guaranteeing a big profit is not the intent. The intent is to stop the selling of product at below-cost. When it is subsidized, it comes up the pipe, and a smaller percentage of businesses cannot stand that kind of competition. They will continue to drop out of business. An uncontrollable monopoly then increases prices without competitive restraints. Say you start with a wholesaler; the distributor in Bozeman has to deliver at cost which includes loading up the truck at a rack with a posted rack price, delivering it to one of their outlets, say in Townsend, so they include the cost of that freight which is also easily calculable, (the common carrier freight rate is regulated by the Public Service Commission) plus taxes. That is the delivered cost, plus the cost of the labor, and plus the cost of doing business.

The definition lays out what the cost of doing business is. It is one percent for the wholesaler unless it is proved less. You always have that opportunity, but the estimate for a distributor is one percent including labor, rent, depreciation, and such aspects as are part of doing business. You simply say what they are limited to is an accountable low in the delivered cost plus one percent which is the cost of doing business. The same calculation is done for the retailer. They have to calculate their delivery cost plus their cost of doing business, which has been set at six percent. They can't go below that; however, they can go lower if they can prove themselves. For purposes of definition they start with six percent. Obviously it is higher than a distributor's cost. You have a building, overhead, more labor costs, rental costs, housing, more interest, more maintenance, credit card fees, etc.

The third thing this measure does is say a wholesaler cannot sell or transfer motor fuel to his own retail outlet at a lower cost than he sells to other retailers. There are exceptions to this rule shown on Page 7, Sections (6) and (7), current sale, sale of damaged product, liquidation, etc. that shouldn't have to come under this rule. Page 8 talks about penalties, remedies, the involvement.

They have waited two years for this bill, it had a very good chance of passage last session, there was a lot of support for it. There is a great deal of concern at the local level. It was decided not to act in haste, but to study it in a thoughtful way through an interim study, and are now armed with that study's recommendations. She hoped it would be given a Do Pass.

Proponents

SEN. ESTHER BENGSTON, SD 49, Shepherd, who was chairman of the Joint Interim Subcommittee on Motor Fuel Pricing, said REP. BRADLEY had explained the Interim Committee Study thoroughly. She is a supporter of HB 538. The Interim Subcommittee had to learn a new language. They studied many reports and felt they came up with a common sense approach. There were several bills on

divorcement, another bill on open supply, a dealers' bill of rights, and concluded this bill was the least that could be done for consumers. It is probably like closing the barn door after the horse has got out. It puts some teeth in the bill so if there is an aggrieved dealer, he can take it to court. Even though it is not perfect, it is impossible to respond to all the editorials and articles that came out about the oil industry being accused of profiteering and price gouging at the gas pump, it's a response of this Legislature that we at least recognized there are independent dealers out there who are having a tough time.

You will be doing the right thing by passing this bill. It is a common sense approach. She hoped the committee would bear in mind that it was not easy for the Interim Committee members to learn the language necessary. That Committee was not unanimous, there were two negative votes, so there is opposition. You will hear all kinds of it. The Interim Committee did recommend HB 538 and HB 261, which incorporates into Montana law the language of the federal Robinson-Patman Act, should pass.

Ronna Alexander, Director of the Montana Petroleum Marketers Association, the members of which are about 90 wholesalers and distributors of petroleum products. Along with their bulk operations a number of the marketers own their own retail locations. Some background information on the study itself. The study resulted when the great changes in the marketplace took place, and there was departure of a great many independent dealers in the retail marketplace. Retail service stations have disappeared in droves, and although there are several reasons for that, there was evidence that unfair and illegal price effects contributed to this. The committee started meeting in March and concluded in September. They did recommend these two pieces of legislation. HB 538 would not create a whole new law if adopted. She handed out a copy of 30-14-209. EXHIBIT 2. That is the Unfair Trade Practices law that prohibits selling product below cost in order to injure competition. It is lacking however and you will hear more about this from the Attorney General's office in that there is not an adequate definition there in relation to determining motor fuel costs. HB 538 will provide that definition, and hopefully provide a vehicle of proof for determining what the cost is. There are 23 states that have general fair trade laws on their books, 11 states have addressed motor fuels specifically in trying to ensure a level, equitable playing field. The laws they reviewed have some general things that apply to this case. They prohibited predatory pricing. They do recognize the need to meet price reductions. They allow retailers below pricing by a competitor in the same market, and they also recognize the difference in cost attributable to legitimate economic factors.

She handed out EXHIBIT 3, an article from the Salt Lake Tribune. Several years ago Utah enacted similar legislation and is now testing it. The Attorney General there has taken a strong stand to achieve what he feels is conserving competition. It is

happening all over. Some states currently also have legislation of this type pending. The reason is that this is a universal problem. The big question is, is motor fuel being sold below cost? One of the things the Interim Committee was charged with was to conduct a study to look at pricing around the state using the formula to see if this was actually occurring. On April 24 a statewide phone survey was taken which compiled the lowest street price in 92 cities for regular, unleaded and diesel fuel. She handed out graphs showing the results of that study EXHIBITS 3A. The first set of graphs showed the cities represented individually by the margin by cents per gallon, and then the average. The other set of graphs showed the margin by cents per gallon and then the numbers of cities that followed those respective margins. If you look closely at them, you will see that there actually were two markets selling in the minus area. Also you will see the average market of the majority of the cities was 8 to 9 cents. The Committee also was asked to inquire from the motor fuels retailers what the breakeven requirements were for their respective businesses. There were four categories, truck stops, convenience stores, full service stations, stations that were retailers. The last page EXHIBIT 3B shows the Motor Fuels Dealers' break-even margin requirements varied from 8 cents to 17 cents for a full service station to just break even. She felt the Committee did a good job in looking at this issue. It is a complicated industry. This is a consumer bill, and the answer has to be that if this practice is allowed to continue, there will be less competition in Montana.

Mark Racicot, Attorney General, said they have been involved with these bills. They have some concern with the enforcement mechanism. They have more experience than anyone else in dealing with this particular topic. There is a serious, very deep seated feeling. On the one hand when you read the word antitrust, there are those in open commerce who tend to exaggerate on these; on the other hand, in talking about ignoring it, there are those who believe that passing this will create certain panaceas for civil actions that will allow very, very serious problems to be addressed. He provided information to the Committee and offered some advice because there are a number of different avenues of approach being undertaken here. In reference to what is occurring in the Senate, and what is occurring in the House, we have SB 190 talking about dealing with antitrust from the perspective of a number of different interests, and also HB 717 creating an antitrust unit in the Department of Justice. We have been acting in concert with those who have requested our assistance. Those developments are not within the confines of the Department of Justice. HB 538 and HB 261 will be heard this morning. There are certain funding mechanisms and people provided for in HB 261 which may be subject to some amendment to remove them because the fiscal note is so high they are worried about deleting the provisions of that bill. HB 538 has the Department of Commerce and the County Attorney involved in handling mechanisms there. There is no private remedy in HB 538. There are private remedies in SB 190, so as a consequence it may take some time to work out

some sort of cohesive strategies to address this particular problem. This kind of investigation is extraordinarily difficult.

HB 538 specifies the event. In essence, it prohibits the wholesalers from selling motor fuel to a retail motor fuel outlet at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competition or substantially lessen competition. It further prohibits a retailer from selling motor fuel at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competition or substantially lessen competition. This terminology is defined in the bill in a much better fashion.

He was not aware that the Attorney General or the Department of Justice would be involved in some fashion with the amendments to important portions of HB 538. The County Attorney and DOJ should not be involved. He didn't mean it to be a negative observation. That is something that could reasonably be considered when provisions coming before this committee are presented. The language is extremely amorphous and establishes an extraordinarily high burden of proof necessary to establish a legal action. It also takes an incredible amount of investigative time. These are very, very labor intensive investigations. During the last year attempts to look at some practices discrimination suits were made. They looked over the course of a year at a number of different activities occurring in the State of Montana. Quite frankly, they did not have a lot of resources to dedicate to that investigation. Over the course of a year they realized that an event that occurred on one day in one year decrees a lot of time to try to find. It is necessary to start securing company records and pricing information as well as cost of transportation and every other cost of doing business, analyze all of those documents and make a determination as to whether or not they were prohibited by the statute. Those things take a great deal of time and expense. On the one hand those who panic about the discussion of antitrust enforcement are in some ways overly concerned about the opportunities to create some mischief with this type of provisions, whether they are in SB 190 or HB 538 or HB 261, because very, very high standards of proof have to be established that require a very, very large amount of investigation and time. Secondly, as seen from that same process, it will not provide a panacea for those who are concerned about these kinds of things. It is very, very complex. Any antitrust enforcement is extraordinarily complex.

He suggested sitting down with SB 190, HB 717, HB 538, HB 261, to try to take all those various pieces of legislation that are involving themselves in some form of antitrust investigation or enforcement concerning essentially two things, whether or not this Legislature wants to provide government to aid in private remedies to address antitrust; and which agencies are going to be involved in enforcement. It is probably not in their best interests to have the DOC, DOJ, and County Attorneys all involved

at the same time. The County Attorney's offices are literally, totally and completely unprepared to take on any kind of antitrust enforcement. The AG's office is unprepared at this time to take on meaningful antitrust enforcement for consumer protection. On dealing with the DOC a number of times, they likewise are just simply not in a posture to do this, so some very monumental choices need to be made whether or not to apply governmental remedies as well as private remedies, and who is going to be responsible for those duties. They are expensive, they are necessary in many instances. They do have the opportunity to run into these problems on a continual basis. Their office gets called on every single day with some complaint about petroleum products, or an antitrust question. There is a lot of concern about this particularly in the spring and again in the fall when people are stocking up on winter fuels, and in the summertime there is involvement in recreation. It covers a wide spectrum from meat packing to petroleum products to other kinds of concerns in the State of Montana that deserve some antitrust examination. However, they have not been involved in antitrust legislation since 1981 at the state level. We have not been effecting an advantage because often service has applied to the citizens who are screaming or yelling about some sort of unjustified intrusion into legitimate business affairs of the people of Montana. At the same time if we don't exercise self-vigilance of these kinds of practices, we end up placing consumers and the people of Montana at a substantial disadvantage. He strongly recommends the Committee consider and they would be more than happy to be available at every opportunity to sit down with representatives from Commerce, this Committee, and the industries that are affected, to arrive at some systematic approach to apply these kinds of services without going overboard.

Stephen D. Visocan, Past President of the Western Petroleum Marketers Association, is a jobber which is the term used for wholesaler. He operates in Helena, Great Falls, and Dillon. He is talking about the specific language in the bill because he participated in the Interim Study. A lot of that has been covered by REP. BRADLEY. Currently there is a consumer protection law on the books, and it says that you can't sell product below cost. HB 538 better defines what cost is for the petroleum industry. As indicated by the Attorney General, it is very difficult with the existing law to determine what it costs to buy petroleum. If you look at refiners you have to look at how much it costs for crude oil, how much it costs refine it, what the value of the asphalt that comes out is, what the value of the heating oil is, all those things are components in determining what the cost of the product is. HB 538 says first of all there is a base cost to start with -- the cost of the raw material at the rack which is the location where it is picked up, the terminal of the refinery. Everybody has a rack price. There are different rack prices, so in order to assist in the enforcement of this situation, rack prices are the cost of the raw material.

Second is the freight cost. Common carrier freight charges are determined by the Public Service Commission (PSC) and are readily available. Then you know what the cost of the freight is. The cost of doing business gets difficult. That is where it really gets difficult for an attorney or Attorney General or anyone else to say what it costs to operate a Super America station, or what it costs to operate a Pop Shoppe; the cost to operate other stations or stores. The costs include interest, personnel, utilities, a variety of things, before that person could even begin to make a profit. In order to simplify, this bill has some standards that can be applied. For a wholesaler in the absence of proven costs, a 1% markup over the delivered costs can be used as a basis for determining what the cost of doing business is. For a retailer it is 6%. In Montana many jobbers use the rate of 1% and very similar when they sell to large transport owners. There isn't much fuel traded any less than that. That is a good basis. Other states that have similar laws use a higher number. As originally written, the bill showed 3%. It was based on Wisconsin's margin which was 3 and 6%. In Montana a jobber doesn't make 3%. It is closer to 1% to which this bill is lowered. That is representative of their cost. Idaho uses 2%, Rhode Island uses 2%, Utah doesn't have any combined wholesaler cost, Wisconsin uses 3%. In the absence of proof of a lesser cost, a retailer can use 6% which is also used by Idaho, Rhode Island, Utah and Wisconsin. Another state is currently considering the same basic legislation and it has just passed committee. The vote was very much in favor of the legislation, and they are using a 9% combined margin for wholesale and retail. The numbers of 6 and 1 are representative of Montana's costs, but are low compared to other states. It should be representative of cost. This bill is to stop people from selling below cost.

Mr. Visocan passed out amendments. EXHIBIT 1 Some of these are housekeeping type amendments. The second amendment recommends cost of doing business as defined for a wholesaler be changed from 3% to 1% which is representative of costs in Montana. Page 7 paragraph (6), this particular line is meant as a means of meeting competition. If someone else can operate cheaper, that clause is necessary when selling in the absence of proof of a lower cost. If you can operate cheaper, then you can sell your product. We are not trying to guarantee profits for anybody. If the other guy can operate cheaper, and he is selling below your cost, you can meet his price if you choose. Which is an important thing.

The other change proposed in these amendments is the change in the enforcement of the provisions in this bill. As the Attorney General indicated, having two different departments and the County Attorney involved in enforcement may be more costly. This provision eliminates the involvement of the DOC and it also simplifies the verbiage. Basically Section 7 has been eliminated from the bill. The enforcement provision, amendment 6 changes Section 6 to read: (2) "Upon presentation by an offended party of evidence of a violation of section 4, the department of justice

or a county attorney shall issue to the suspected retailer or wholesaler a demand by certified mail to cease the violation. If the violation is not corrected within 24 hours after the suspected retailer or wholesaler receives the notification, the department or the county attorney may bring an action to enjoin the violation. Upon conviction, a retailer or wholesaler is subject to a civil penalty of not more than \$1,000 a day for each day that the violation occurs." Then it goes on to say "An action under this section must be commenced in the county where the motor fuel is sold." If the action is brought by the department of justice, one-half of the amount of the penalty must be deposited in the general fund in the county where the action is brought, and the remainder in the state general fund; or if the action is brought by a county attorney, the entire amount of recovery must be deposited in the general fund of the county where the action is brought. To simplify enforcement an offended party doesn't have to go to court to begin some action. The county attorney needs to write a letter to the offending party for the first violation in order to get the offender to reduce his out-of-line price. If that is done, then things will be taken care of and the person would no longer be selling below cost. If not, then it would be necessary to take additional legal action. Below-cost selling does go on in Montana. He hopes the committee will vote for this bill.

Ron Leland, Independent Sinclair Dealer and also a member of Automotive Trades of Montana, an association for the service stations, said one question has not really been brought out. Has below-cost selling really happened in the State? An Interim Committee survey taken showed at that time it was happening right here in Helena. In Helena when he bought a gallon of gasoline to resell, he paid \$1 for it. The street price was 98.5 cents. It does happen. If this happens for one or two days, he could live with that. But in the gas industry, once the price is down, it may take a long time for that market to recover, so for weeks or months the profit margin will be very slim for independent dealers. The greatest amount of money he ever lost on selling gasoline was a nickel a gallon. If he bought it for \$1, the street price was selling for 95 cents. It is impossible to stay in business doing that. How can multi-stations companies stay in business doing that? They can't. They are subsidized from other areas or other states. He cannot do that. This bill intends to make a level playing field for everybody concerned. He is not looking for a guaranteed profit or a large markup. Remember the percentage that has been brought out here is one and six. That is to keep anyone from selling below cost. He urged support for HB 538.

Neva Hassanein, Northern Plains Resource Council staff, said they don't have a specific injury from this bill. They have been working on this kind of legislation because of their concern about the growing monopoly in the beef and lamb packing industries. They support efforts by citizens and by the State to create fair and free competition in the marketplace whatever that

marketplace may be. They support this bill.

John Taggart, President of Automotive Trades of Montana, said this bill was supported by them two years ago. He pointed out that below cost sales are made over 90% of the time. That infers the refineries are selling below their cost. The gasoline is being sold below the wholesaler cost at retail or is being sold below the dealer's cost. They did not mean to infer that the refiners ever sold gasoline below their cost. This bill was recommended by the Interim Subcommittee, they did review these facts all summer long. He thanked REP. BRADLEY for her stamina, and asked the committee to vote Yes for this bill.

Opponents

SEN. JERRY NOBLE, SD 21, Great Falls, said the vote on the Interim Subcommittee was 6-2. He pointed out it has been said it is a consumer bill. If there was an anti-consumer bill, this is it. If we are going to put a bottom price on motor fuel, then there should be a top price on it, too. He would like to fill his trucks up at a below-cost station if there is one. Everybody has different costs of doing business. Pepsi-Cola is sold for various prices. Should Pepsi-Cola be on here? This is a very complex problem. Maybe this exists in all types of businesses. There already is a statute in the codes since 1933. The Supreme Court threw it out. The Legislature changed some wording in 1935, and it was adopted, but nobody has ever been prosecuted under it. The attorney general testified that it is very, very difficult and time consuming to try to enforce this type of legislation. Costs of doing business - let's say on a given 2 or 3 days the operator of a service station decides to get into the marketplace and sell some fuel to create some traffic, so he lets all his employees go, turns out his lights, turns down the power to save money, and does everything he can do for two or three days to forego expenses. He sells the fuel for whatever he wants to sell it for - which is his given right - that is called free enterprise. Somebody turned in a complaint that he is selling fuel below cost. Several weeks later somebody, an attorney from the Justice Department, started checking records. How would they ever figure out what happened? So the cost of doing business is different every place we go. Some service stations sell milk and bread, some sell beer and wine, some sell cigarettes, some fix tires, some do big mechanic jobs. They can price their fuel so that they hopefully won't lose money. Some sell auto fuel, farm fuel, some don't sell so much. It is impossible to legislate anything that is going to correct this situation. There is a study of the prices that are charged all over in the Study Committee book. Some people made 18% profit, some made 3%, just all over the ballpark. It's the cost of doing business.

Free competition is when we are able to do what we want in the marketplace and not be restricted by government. If we are going to put a bottom price on this fuel, we are certainly not contributing to free enterprise, free competition, or are for the

consumer. It is a very, very complex problem and there is a very short time to study this. Call your fuel distributors and service stations and ask them how they feel. Two last points - these two gentlemen represent ATOM which is an association with around 30-35 members. There are some 1300 service stations in Montana.

On Page 3, line 6 of the bill, it says "all taxes", does this include the state and federal gasoline taxes which are 34.1 cents per gallon. The dealer doesn't pay this tax. The tax is paid by the consumer. Why is this included in the cost? The committee should give this a very good study and do what they think is best.

REP. JOHN PHILLIPS, Great Falls, said he served on the Interim Subcommittee. This proposal is self-serving for a few people. He reiterated there are some 1300 service stations. If this were a big problem there would be many more people in attendance at this hearing. All of us are involved in fuel prices. In Great Falls fuel prices went up a dime before the troops got to the Palace. The rack prices didn't change a dime. The gas in the tanks hadn't changed a dime, but the price jumped up, and it kept going up. A friend told him to fill his tank before 4 o'clock one day because it was going up 6 cents, and it did. There is no collusion here? But everybody went up at once. Except for one station. He pulled in, filled up his tank and asked why his price wasn't up to what the others were. He was not a part of the collusion, but he checked the others, and soon caught up. This is how these people play games. A friend returned from Los Angeles and asked why gas in Southern California was \$.99 and \$1.01, and it is \$1.29 up here. Is there that much difference in transportation costs? You all know that Montana gas prices are the highest throughout this so-called oil shortage although there never has been a shortage. We are running well above the rest of the nation. The point is people can set the price for whatever they want. He proposed an amendment for the committee to adopt, that if there is to be control of the bottom price, there has to be control of the top end also. Paul Verdon has that amendment. It would help keep prices down instead of letting everybody set them arbitrarily. It's no problem on record keeping, since a record has to be kept anyway, to keep someone from selling below cost.

Janelle Fallan, Executive Director of the Montana Petroleum Association, submitted written testimony, EXHIBIT 4. They do not support predatory pricing, nor price gouging. They do support a free, open, fair competitive market, believing that is the best way to deliver product to the consumer at the best price. There has to be protection of small businesses. HB 538 says to Montanans that we are going to establish a floor on the price of motor fuel and thus guarantee a profit for a small group of people at the expense of Montana consumers who depend on motor fuel for their livelihood. Out of the 1300 service stations, about 50 of them are owned by companies that also own refineries. Other than that it is the independent wholesalers and retailers who would be guaranteed a profit margin. It protects them from

their own competition. She had not seen the amendments, so her testimony referred to the 3% and 6% margins. She commented on the fiscal note. If a floor is to be set on prices, adding three FTEs to the DOC is an understatement. If you are going to place government in an arena that has previously been controlled by protective forces in the marketplace, more than three people would be needed. Also consider the effect of this bill on local governments. The fiscal note doesn't say anything about this. Passage of this bill will lead to higher motor fuel prices for consumers. She handed out 'Gasoline Marketing in the 1980s: Structure, Practices, and Public Policy' and 'Empirical Examination of Allegations of "Below-Cost" Retail Selling of Gasoline by Refiners'.

Charles Brooks, Executive Vice President of the Montana Tire Dealers Association, opposes HB 538. He talked about some principles involved, and experiences as a retailer of general merchandise and of gasoline operating under a price control structure. EXHIBIT 4A. Anyone involved in the selling of merchandise should have the freedom to compete and price his merchandise as he chooses. He urged HB 538 be given a do not pass recommendation.

Jan Cool, Public Affairs representative for Exxon Company, U.S.A., submitted testimony EXHIBIT 5. Exxon is opposed to this bill because it attempts to guarantee profits for a small group of marketers at the expense of higher motor fuel prices in Montana. Right now the marketers can keep the traffic flow below cost. This bill penalizes that efficient marketer because if there is a floor under the prices that retailers, wholesalers and integrated refiners must charge their customers, retailers must mark up retail fuel they sell by 6%, and wholesalers by at least 1%. The money to pay for these increased margins is not going to come from the industry, it will be paid by Montana consumers. This legislation will not provide any additional long term benefits to those who support it. The committee was urged to reject HB 538.

Dan White, on behalf of Ward Shanahan who represents Chevron Corporation, presented a written statement from Mr. Shanahan. EXHIBIT 6. He read the statement in opposition to HB 538. This kind of legislation is anti-consumer and anti-competitive. They suggested some proposed amendments and would be available to work with the sponsor or the Committee to make the appropriate changes.

James Tutwiler, Montana Chamber of Commerce, said he did not think this was a role for the Montana Chamber of Commerce because of the problems of enforcement, the inadequacy of anti-trust legislation. Technical aspects are the best way to compute price of fuel. He spoke from the standpoint of the Montana Chamber which represents over 1,000 businesses throughout Montana and a wide variety of businesses, and probably businesses that either oppose or support this legislation. Their concern with this kind

of legislation is that as they read the bill and listened to the testimony this morning, it is clear that it is a cost-fixing price setting for a floor setting type of legislation. They don't believe that trying to regulate or mandate or legislate prices in the free marketplace is an approach that in the long run will benefit Montana businesses and Montana consumers. They are concerned because they feel that there is a constant effort, a constant ongoing stream of ideas of legislation and rules to do this sort of thing, and if you pass over the very significant landmark legislation and direction, you are really communicating to Montanans and to businesses outside of Montana that within the State we are willing to let forces other than the marketplace itself intervene in how consumers are served. This is a very complex subject. He is impressed by reasons explained in the Interim Subcommittee report. There has been a lot of hard work put into this subject. There has been some diversion among the people who worked on that Committee. REP. BRADLEY has worked hard to make this bill a good bill and she has been a champion of economic development for the State. He doesn't think with all due respect that this particular bill gets the job done for making business better for Montana, or business better for consumers. He urged the committee to not support HB 538.

Annie Bartos, Chief Legal Counsel for the Department of Commerce, said the Department was present to provide information to the Committee. They are neither a proponent nor opponent of HB 538. The Attorney General's concerns are somewhat the same concerns of the Department. There are a number of bills that were mentioned that pertain to the Unfair Trade Practices Law.

Questions from the Committee

REP. PAVLOVICH asked to speak to Jan Cool. He explained he was here two years ago when this bill came up. Every Monday morning when he came over from Butte a service station was charging \$.98. On Saturday it would be down to \$.88. This happened every week. What is the rationale for that? Ms. Cool answered the organization she works for maintains no control over those prices. The price charged is the decision of whoever owns that station. The consumer can make the decision to buy his gas on Friday. She did not know who owned the gas station in question nor which brand of gas was sold. There are several wholesalers who sell Exxon to the State of Montana. The biggest distributor is Exxon Company. REP. PAVLOVICH wanted to know why Exxon gas is \$.10 higher in Butte than it is in Helena, Missoula, Bozeman, or Anaconda. Ms. Cool said prices are set in the market by individual marketers. It is extremely difficult for her to comment on why prices are higher. Prices are determined by many different factors, transportation costs, costs at the rack.

REP. KILPATRICK asked John Taggart since he has been accused of being a self-serving non-consumer because you put a minimum on it, and they say there is no example of predatory pricing, if he would like to answer to some of those charges. Mr. Taggart said

one thing regarding pricing that has been glossed over is the fact that when you think of the distribution system of motor fuels, it is a chain of command, and Mr. Visocan used the term 'rack price' which is a term that we all use at the point at which the gasoline changes ownership from the refiners to the wholesalers, who in turn sell it to the dealers. Therefore, you have to realize the refiners are the ones who set the base price of the motor fuel. There is a problem in Montana for our gasoline is \$.20 a gallon higher than Idaho, Washington, or wherever. There is an absence of pursuit of refiners in Montana. There is no consumer organization in Montana that addresses the refiners in essence asking them to justify why their prices are so much higher. This was heard in some hearings. The Super America representative had written a letter to REP. BRADLEY explaining to her that they buy gas from the rack just like he does. When the dealers asked Super America to justify the fact that the wholesalers and the dealers got a \$.07 a gallon increase the next morning from the Exxon refinery, why didn't the Super America stations have an increase. We accused them of having a baloney increase making the wholesalers and the dealers subsidize their stations. That is kind of where we are at. The Super America representative said they were able to buy futures on gasoline. This is the kind of testimony for the next bill. The difference that was brought before the committee during the summer was that they say one thing and do another. Conoco and Exxon had already stated in the summer hearings that they arbitrarily without justification raised the price of gasoline in the spring \$.10 a gallon, and that the other refiners can jump in and buy the whole summer's supply at that point and the wholesalers and dealers are left at \$.10 higher all summer long. This is what they are addressing. The dealers don't do the predatory pricing. The dealers don't set the price. The 50 stations that the American Petroleum Institute representative alluded to that were refinery operated stations, are price setters in the marketplace. The wholesalers and the dealers have to follow those prices because we're talking bare bones.

REP. KILPATRICK further asked for an example of predatory pricing in Montana. Have you ever been acquainted with one? Mr. Taggart answered yes. ARCO is probably one of the greatest examples. The chain marketers and refinery co-ops have sold in Helena below dealer costs innumerable times. Ron Leland could help with this. The point is that if the refiners are able to sell to the public at a price below the wholesalers' or dealers' cost, certainly they can sell it to the dealers for that price, which they are not doing. Somebody needs to take them to task and ask them why they do that. There is a principle in American law that says if you are doing business with somebody, they do not take aggressive action to put you out of business. If you are an Exxon branded dealer, for example, you would normally think in American law that your franchisor would not take aggressive action to put you out of business. He submits this is not true in this situation.

REP. BACHINI said to REP. BRADLEY, we heard during testimony from

the opponents that during the Interim Study Committee there was no evidence found in this price fixing. What is your comment and do you agree with the wholesalers as far as that comment? REP. BRADLEY said she wasn't on that Committee. She has read the report and the information, and when Ms. Fallan said there was no evidence of predatory pricing, her response is that it is her understanding it is a matter of terminology because there was evidence of retail outlets selling at less than the rack prices. It just depends on what you want to call it, but it is her impression that came right out of that Study, and there is evidence exactly of that. In defense of the Study she said this was a last minute study that was added onto the list. Only three studies were funded and this was number three in priority, so not much money was put into it. It is not like the incredibly extensive study that came out of the State of Washington where documents were subpoenaed and examined. This was a matter of public testimony. We can't expect as much detail to have come out of it when we didn't put as much money into it to seek out that information. Yes, I call that predatory pricing.

REP. BACHINI asked REP. BRADLEY if this would prohibit what we know as gas wars within the State of Montana? One station will drop his price two or three cents, will that prohibit this from going on in the State anywhere. She replied she didn't think it would stop that. There is language in the bill that is printed out in good faith to try to meet competitors when they drop their price. There also are all kinds of exclusions that allow you to do business.

REP. BACHINI asked about the language on Page 6, line 21, that says 'if motor fuel is advertised, offered for sale, or sold as imperfect or damaged' - how can you determine imperfect or damaged fuel? Mr. Visocan said that is a very unusual situation, but occasionally fuel will be accidentally blended. Someone may drop diesel into a gasoline tank, or gasoline into a diesel tank. Then you have an imperfect fuel. REP. BACHINI asked how that can be sold as a gasoline? Mr. Visocan explained that gasoline is sold back to the refinery where it is reprocessed in order to return it to regular gasoline or diesel fuel. The sale of imperfect fuel is not made to the consumer, but the sale still has to take place so it is sold back to the refinery. If you look at the graphs that Ronna Alexander passed out, they show what the price is in 92 cities. Those are the actual survey numbers. If you look at the gasoline chart, in some cities gas was actually sold at less than the rack price. It was sold at less than the cost of the raw material. That did not include cost for any overhead or anything else. At the time the study was taken, gas was being sold in Montana for less than the raw material cost.

REP. BACHINI asked Ms. Fallan if she was the person who testified that there was no evidence found? Ms. Fallan said she did make that comment. One thing that is very important in gasoline pricing, and she urged the Committee to consider this in all issues and in response to REP. PAVLOVICH'S question, too, if you

want to know what is going on, you need to look at averages over time. A one day snapshot can give you a very inaccurate picture. You may find a situation on one day that could raise some questions. Probably need to know up front of the grievance the reasons behind that, so we have some real concerns about what kind of evidence you have. The Committee was pretty hamstrung by the amount of funding. Mr. Verdon tried to do the very best he could with the resources available. We just don't believe the necessary evidence is there.

REP. HANSON asked Mr. Visocan if a retailer had some surplus of super premium in a tank in which gasoline has been stored for quite awhile, it hasn't been moving, and they want to get it moving, so they drop the cost below rack cost because they want to get it out of their tank. How does this bill cover that situation? Mr. Visocan answered he is not honestly aware of that happening. This bill has nothing in it to cover that. It would be difficult to prove what position they were in. They don't want to get into the position of having to say they have an excess of gasoline, so am I allowed to drop my price. You don't want to get to where you have to prove what you have in order to effect the price that you are able to sell it for. If a person is going out of business or has an improper product, this says they can lower the price, but not because they have an excess of product. REP. HANSON asked if you are telling him that if I have a 5,000 gallon tank buried under there, and I have it full of super premium, and it has been there for four weeks, and trade in that area has suddenly stopped, there is no real problem and you don't want to unload it and clean it out and then replace it, that those circumstances would not count? Mr. Visocan said you can sell that at cost. You can't sell it below cost. That would be at the current replacement cost, so if the value of the product has decreased, you can take the price down to that, but it doesn't say that you can sell the product for less than cost, or less than current replacement cost. He pointed out that in today's market, people don't sit there with 5,000 gallons of fuel. People estimate how much fuel they are going to sell in a reasonable period of time. Volumes don't fluctuate that much.

REP. STELLA JEAN HANSEN asked REP. BRADLEY about Ms. Fallan's statement there is no definition of independent and small dealers. Is that defined in the bill? Wholesalers and retailers definitions don't take care of that. How would you define independent and small dealers? REP. BRADLEY felt the definitions which have been worked over for three years and are now in the bill do the trick. There is no question the definitions in the bill are alright. REP. HANSEN asked if she thought the cost of doing business figures in the bill is improper? REP. BRADLEY answered she did not think so. They have surveyed the prices that other states have come up with for estimated costs of doing business. It is her feeling it is very much on the low side compared to what other states are actually using. REP. HANSEN said she was assuming from the testimony given that the one or three percent arrived at would be only the cost of doing

business. REP. BRADLEY said that is correct. For a wholesaler that is now one and for a retailer it is six cents, which is a total of seven.

REP. ELLIS asked the Chevron representative, Ward Shanahan, if Chevron is a refinery. It is not. All their stations are handled through jobbers. They generally oppose price fixing legislation. REP. ELLIS explained this legislation is a means to get at refiners in this State who are providing unfair competition to other outlets. Mr. Shanahan explained they have a number of stations that are licensed through jobbers.

REP. CROMLEY asked if there are stations today who are selling below cost in Montana. Ms. Cool could not answer whether that is happening today, but it has occurred in the past. REP. CROMLEY asked if those selling below cost are selling other products or service. Mr. Visocan answered they are not talking about people who sell other products as a means of offsetting their losses from gasoline. We are talking about predatory pricing where someone intends to sell gasoline at a low price in order to drive somebody else out of business. There isn't enough profit in today's market to set up a convenience store or a full service gas station where you are selling gas. You have to make some money on the gas in order to stay in business. This bill says that you can sell gas at your cost and break even on it. It is not addressing the fact that some stations sell a different line of products and therefore make different amounts. The bill specifically says if you can do business cheaper because you operate a car wash or you sell bread, or you sell liquor, that you can consider that, and that's part of your way of lowering your cost of doing business, and therefore you can sell right down to whatever your cost is. REP. CROMLEY asked if the cost of groceries would be included in the cost of doing business. They would be Mr. Visocan answered.

REP. BACHINI asked if you are a station or convenience store operator selling gas. Mr. Visocan said he is involved in several phases of the operation. He is a wholesaler first of all, so he buys product directly from the refiners of Exxon and Conoco. He also operates convenience stores and gas stations. He has three full service gas stations and four convenience stores, so he is involved in all phases.

REP. BENEDICT asked if a convenience store had enough profit in that particular segment of their business to offset what they lose in their gas business, they can sell gas for whatever they want or is there a low below which they cannot go? Mr. Visocan answered they can allocate cost to the other functions of their business, but they still would have to allocate costs to their gas function in order to define that as a cost of doing business. An out-of-state example: Wal-Mart in Texas which has huge 'micro squirts' with gas pumps down on the corners of their places, and sold gas significantly below what jobber prices were at that time and obviously the Wal-Mart store was profitable. They don't show

profits but Mr. Wal-Mart appears very profitable. They were selling gas significantly below cost. It says you would have to include cost of operating the gasoline facility in your determination of costs. That does mean there is a floor under which they can't sell based on what they pay for their gas.

REP. CROMLEY said you have the convenience stores selling gas and groceries. It has been his experience that gas at stores selling other products is a little cheaper. He did not see the problem. Why couldn't they sell gas really cheap? Mr. Visocan said some of the things talked about here have indicated there isn't a lot of profit in gas. The margins are very, very small. Gas is more competitive than some people think. Some people have told him they just stop at the same gas station everyday and they don't even look at the price. Volumes are significantly impacted by the price that is charged. This industry is known for putting the price right out on the street so you know what you are going to pay for gasoline. Montgomery Ward is allowed to sell gasoline for half of what someone else who is relying on gasoline to make a living sells it for; then in a very short period of time they have all of the volume. After a short period of time the others would be out of business. Once they have all the volume, there would no longer be an incentive for them to keep the price of gasoline down since it now becomes a profit making business for them. At that point in time the price of gasoline would rise. That same example has gone on in other states, and is going on in Montana. You see people who have gone out of business because large marketers of petroleum products, be they refiners, multiple service stations, have chosen to take one particular area of the state, take the price way down, keep it down for a long period of time. Several dealers and/or jobbers in those towns then go out of business, making for several less competitors and then the price of gas went up.

REP. BACHINI commented that Mr. Visocan has the best of two worlds with this bill. You are wholesaler, retailer, convenience store operator. It seems that you could price fix as wholesaler, you have a retail outlet. Mr. Visocan said the bill is written to eliminate that capability. Mr. Taggart supports this bill and is very much interested in that. The bill says that I as a wholesaler have to charge the same price to my outlets as I charge to other people. I have to increase the price that I sell to my own outlets to include my cost of doing business as a wholesaler; and then as a retailer, I have to base the selling price on my cost of doing business as the retailer, so I have the same cost.

REP. BACHINI asked if he is a primary service station dealer or operator, or are you a convenience food operator with gas pumps down front? Mr. Taggart categorizes himself as being a service station operator, but is in fact a convenience store owner. He does not service cars or change oil. REP. BACHINI asked about the rest of the people who belong to the ATOM group. Are they operating the same way? Mr. Taggart said their vice-president in

Billings, for example, is a fast food operator and operates a conventional service station that repairs vehicles.

REP. BRADLEY told the committee when she was here two years ago, it wasn't for ATOM, for the independent dealers, or for the distributors, it was for the consumers because if we actually don't do anything, she fears the number of independents that have been forced out of work will be increased. The mass exodus as the study described it will ultimately be a very bad situation for Montana consumers. This is a complicated matter, but already Montana rule of law is there shall be no predatory or below-cost pricing if it is designed to ruin your competition. That was stated to you, and 30-14-209 says that. This is common law in every single state that says it is unlawful to sell at less than cost if it is for the purpose of injuring or destroying competition. That is what this country runs on. The problem we had utilizing that provision that is on the books was because people would say 'what is the cost?' So how do we know that it is less than the cost? All we are trying to do is put some teeth in this. It is pretty much in agreement in the country right now how cost is figured. You can go up and down above it, you can have all kinds of competition in there, but you can't subsidize this to kill your competition.

It was stated by some of the opposition this would be costly to enforce. If we have a stronger set of tools, we won't have to worry about enforcing it. Maybe just the availability of enforcement will be sufficient. Experience elsewhere in other states showed that is not the case. It is a serious problem and those tools are needed. We are not talking about Coca-Cola; we're talking about gasoline which is a basic necessity for every individual, every family, every business. That is why maintaining competition is so crucial. Again, as soon as they provided the tools in Arizona, the attorney general in that state says this is the first in a series of cases where we are going to show there is a move afoot by certain retailers to really eliminate competition. It is a three-pronged investigation in that allegations about below-cost selling, price gouging and price fixing will be looked into. They have stated that they are using the six percent markup for retailers exactly as we are.

Nevada was considering far more drastic legislation than this milder approach. That was the divorcement approach. Michael Calahan stated we believe that after reviewing the facts any reasonable lawmaker would reach the conclusion that we have. Franchise gas dealers of Nevada need protection, and they need it now. If further proof is needed to support the legislation, the retailers claim that ARCO and other refiners will skyrocket gas prices and petroleum products when not controlled. When we examined the strategic coal plan, and reviewed ARCO franchised dealers, they show federal documents that there was a very calculated move by ARCO to simply regroup in order to squeeze out their own retailers so they could get control, make this a monopoly and have price control.

Colorado has studied this matter. They are taking action on it at this time. They considered introducing legislation taking the two approaches which we also considered, one being divorcement, the more radical approach, and the other the more compromising approach which is the below-cost approach. Divorcement was never produced because it was kind of a tradeoff, and so the below-cost bill which incidentally started out at 10% instead of our 7%, is now down to 9%. Still way above 7%. They are way ahead of us in considering the cost of doing business. This is truly a compromise so we didn't even come in with divorcement. We have a very low posture business that is included in this measure. What is really interesting is that the measures from that committee from that state didn't even bring forth opposition. She assumed that was because they were very happy not to have to deal with the whole issue of divorcement. That is what the arrangement was. Divorcement doesn't come in so the measure stays silent when talking about what the cost of doing business shows. We tried not to do that.

They talked about having different approaches - to come in with a very sound bill that they believe is right and one that was recommended by the Committee. She was sorry she didn't bring some others and have a little bit more bargaining power, but she hoped the committee would stay with her on this. They waited two years. It is the product of the Committee and its recommendation. It is already a very good compromise.

HEARING ON HOUSE BILL 261

Presentation and Opening Statement by Sponsor

REP. TOM KILPATRICK, HD 85, Laurel, sponsor, explained HB 261 is an act prohibiting a business from discriminating in the price charged to different purchasers of commodities of like grade and quantity; it provides a method of enforcement; and provides for penalties and remedies for price discrimination; amends several sections; and provides an applicability date. The intent is to make it unlawful to discriminate on a price charged by distributors for commodities of like grade, quality and quantity sold to different purchasers if the effect is to eliminate competition, hurt somebody or create a monopoly. He was a member of the Committee that studied motor fuel pricing and that is where this bill began, but it does not only apply to motor fuel.

The basic idea is on page 1, line 22. It inserts the federal Robinson-Patman Antidiscrimination Act into state law. Attorney General Racicot came to the Interim Committee and said if the federal law could be made a state law, it would help him immeasurably. This is what he wanted. It allows prosecution to be taken in a state court rather than in federal court.

There is a problem with the fiscal note which shows a cost of almost 2/3 of a million dollars a biennium. The first page of the fiscal note, assumption #2, shows the Department of Justice wants

an additional attorney, an investigator, and a clerical position. The Department of Commerce, #5, wants two attorneys with expertise in prosecuting cases, one investigator, one paralegal secretary, associated expenses. Appropriations would not accept this, so he asked Mr. Verdon to amend out the Department of Justice and the rule-making authority, and hopefully the bill would be accepted and would allow the right of private action. He didn't want that amendment, but if it goes to appropriations it would be killed. He handed out proposed amendments, EXHIBIT 7 HB026101.APV.

Proponents' Testimony:

John Taggart, President of Automotive Trades of Montana, said they are certainly proponents of HB 261. He said REP. KILPATRICK had given a good synopsis of this bill. He handed out a Billings Gazette newspaper clipping, EXHIBIT #8 regarding the Interim Committee hearings this summer. The dealers were fortunate enough to be able to fly in Jim Dascal, legal counsel for Service Station Dealers of America from Washington, D.C. who has appeared before the U.S. Supreme Court. He files briefs with them. He was instrumental in the Hasbrouck vs. Texaco case that was decided by the U.S. Supreme Court in favor of the dealers and he was very helpful to the Committee this summer. The Robinson-Patman Anti-Discrimination Act has the greatest precedent due to the fact that it is existing law of the United States of America.

This is not something new, it is not something the dealers invented. The problem is the service station dealers and a whole lot of wholesalers are not such affluent people that they can go to federal court on any whim when aggrieved. The intent regarding the Robinson-Patman Act will be to take the existing language from the federal law and insert it in the Montana codes, so the Robinson-Patman Act is applicable law that will be available to aggrieved Montana citizens. The refiners allow other refiners to buy at a point in time all their gasoline supplies for the summer, and then the refiners set the price at which the wholesalers must buy, and then the next step is the dealers. If they are able to offer it to one another at a certain price and exclude the wholesalers and the dealers from that buying level, isn't that restraint of trade? They are locking in a situation where they are the only players with viable prices. If they can afford to sell to each other at that price to retail it, they should be able to sell to the wholesalers and dealers at that price, especially when they are franchised distributors or dealers of their product. Basically, that is the whole outline of the Robinson-Patman Act. It is not a lengthy thing that you have to go into for hours. It is existing federal law and it will be beneficial to small business people in Montana. It would shape things up in the market.

REP. BACHINI returned as Chairman.

Steve Visocan, Past President of the Western Petroleum Marketing

Association, is a jobber, wholesaler and retailer and supports this legislation. It doesn't define a class of trade. Currently if he sells a case of motor oil to a gasoline station, he sells it to him at a cheaper price than he sells that same case of motor oil to a consumer who comes in, so he is not in direct competition with his retail customer. He still needs to be able to do that. In order for the retailer to survive when they are competing directly with the wholesaler, there needs to be a differentiation in the wholesale price and the retail price. That is commonly referred to as differentiation of classes of trade where you have different prices for wholesale and retail levels.

Beth Baker, Department of Justice, said HB 261 parallels federal law and because of that it may be suggested that this legislation is unnecessary. Why need it in Montana law when it is available under federal law? The interstate commerce requirements of the federal Robinson-Patman Act are very strict, more stringent than the other anti-trust laws. Proof of a violation under the federal Act requires a showing that the violator is engaged in interstate commerce, that the price discrimination occurred in the course of interstate commerce, and that either or any of the purchasers involved are in commerce. There was one case in Montana where the federal court ruled that a Montana gasoline retailer could not maintain against a Montana wholesaler under the federal Act because the wholesaler as a dealer purchased his products from a Montana terminal and it was exclusively a Montana gasoline retailer; therefore, because the wholesale dealer was an independent distributor the flow of commerce between the out-of-state manufacturer and the local retailer was local and there was no interstate commerce. That is an example indicating there may be situations where price discrimination occurred in Montana, but it does not come under federal law.

She echoed the Attorney General's previous comment about enforcement and enforcement concerns. The amendments offered take enforcement out of this bill and that may leave it as a private remedy. The Attorney General feels there should be a consistent policy on how enforcement of antitrust violations should be handled. The fiscal note probably is somewhat inflated because present law fragments enforcement between the Department of Commerce and the Department of Justice. Each of them made the assumption on the fiscal note that they were going to be responsible for enforcement and since both agencies probably shouldn't be responsible for enforcement but each shows their expected expense, that is why the fiscal note is inflated.

Another appropriate area to examine is whether we want government enforcement of antitrust and which agency should be doing it, or leave it up to the local government or private citizens. She said they would be willing to work with the committee on this and on other bills as well. HB 190 deals with enforcement also.

Neva Hassanein, on the staff of the Northern Plains Resource Council, said they are interested in hospital antitrust

practices. This bill is significant in the sense that we are seeing around the country that states are going to have to take a more active role in enforcement of antitrust laws. The U.S. Antitrust Division was cut by one-half since 1980, and between 1980 and 1986 the volume of mergers increased 300% while federal enforcement during that period decreased to one-fifth of its pre-1980 level. The National Association of Attorneys General and others have suggested the states are going to have to take a more active role in the enforcement of the antitrust laws. We are seeing a surge of bills here that relate to this because of the increased market share by large corporations whose anticompetitive practices affect small businesses. Montana is made up of small businesses, and it is important that we have a law on the books to encourage competition in these arenas. Opposition had said these bills are not probusiness, they are not for fair competition. This country has had a history of monopolistic practices. These are things you should be concerned about, in fact, these are very important considerations. She urged support for HB 261.

Annie Bartos, Chief Counsel, Department of Commerce (DOC), said the Department believes competition and fairness as a commonly accepted practice shouldn't be prohibited. There are many provisions for state enforcement by the DOC or by the Department of Justice (DOJ). If the bill were enacted and codified, it would be codified under Title 30, part 14, which is the present Unfair Trade Practices Act. Section 30-14-205 remains in the Act. This provision requires the DOC to conduct an investigation if a complaint is filed, and if probable cause is determined to exist, the DOC must conduct an administrative hearing, and if the finding is true, issue a cease and desist order for any further violation in the law. If it is the intent of this bill to remove state enforcement action, this provision of the Unfair Trade Practices Act must also be included so as not to require a state agency to conduct investigation in due process.

Opponents:

Ward Shanahan, Chevron Corporation, Chevron U.S.A., said he had not seen the proposed amendments and was concerned about their effect. There might have to be some kind of accordance between these two bills. He would like to be a party to such a discussion.

Questions from the Committee:

REP. CROMLEY asked Mr. Visocan if he had a concern about the impact of selling gasoline below levels. Mr. Visocan said he had two sets of prices. He has a price that he sells to a retailer for oil. He has another set of prices that he uses to sell to a consumer who comes in the door. The reason that he needs both of those prices is that his dealer is an extension of his own business, although he sells to the same customers on his own. The dealer also competes with him in trying to sell similar products,

so he sells cheaper to his dealer in order for him to be able to compete. That happens in a lot of businesses. **REP. CROMLEY** said there is a provision in the law that allows for different prices for different methods or quantities of commodities sold. **Mr. Visocan** said that doesn't cover him. He still has the customer who comes in to buy a case of oil. Where he is competing directly with the dealer is differentiation of prices. It is not unique to the petroleum industry. It is coddling to have a different set of prices at the wholesale level. Then you have it at the retail level. In some industries, wholesalers don't sell directly to consumers. They are protecting their dealers. In his industry they have people who sell the same products at both wholesale and retail levels.

REP. BENEDICT asked **Ms. Baker** about the funding. If you took this bill and the Senate bill and HB 261, are we still talking about creating a new antitrust department in the DOC, and do you have any idea what that would cost? She said they had been asked to prepare a figure for creating a bare bones antitrust enforcement bureau. The figure that presently appears in HB 717 which came from appropriations, has the same calculation as in HB 261. The reason it was included in HB 261 fiscal note as well is because they presently have no staff on antitrust enforcement and no funding for that. A three-person bureau would be bare bones. If they had one attorney, he could investigate gas pricing, meat packing, whatever comes up. They do not have enough experience with it now to know what would be needed.

REP. BENEDICT explained the fiscal note doesn't apply to just HB 261, but to an antitrust bureau that would handle different areas of antitrust, not just oil and gas retail problems.

Sponsor close:

REP. KILPATRICK said this bill does not affect just petroleum products, this is for all commodities. He referred to the amendments that would remove the DOC. He would like to have them stay in, but it won't happen. **Annie Bartos** had commented to him that their Department doesn't have the expertise to handle antitrust matters and would refer a complaint to a private attorney who could handle such cases under HB 261. He hoped this could be funded later but the fiscal note showing \$630,000 is just not realistic. He approves of the amendments.

The Attorney General said there are four bills floating around. The Senate bill is in the House now which will be heard after transmittal. Maybe all the bills can be considered in a conference committee. When you take 1% or 2% above cost, especially in the oil and gasoline industry, you are not going to make a living on that. A full service station has to have seven cents a gallon to make it. Convenience stores can go to five cents a gallon and break even. It runs up to fifteen cents a gallon. **EXHIBIT 3.** HB 261 assures that somebody does not establish a monopoly and put someone else out of business. He

hoped the bill would receive a do pass recommendation so it could get moving.

EXECUTIVE ACTION ON HOUSE BILL 261

Motion: REP. CROMLEY moved HB 261 DO PASS. REP. KILPATRICK moved the proposed amendments be adopted. EXHIBIT 9

Discussion: REP. CROMLEY thought Section 7 penalty might run into trouble because of the financial burden. Ms. Bartos said if it is a criminal violation, the County Attorney would be required to prosecute the case and it would come out of his budget since his office is already mandated to enforce the Uniform Trade Practices Act. A state agency cannot prosecute a criminal act.

REP. HANSON raised two points: at the end of the first paragraph of the proposed amendments it says... 'It is not necessary to allege or prove actual damages to the plaintiff.'; and in paragraph #2 it says 'In addition to injunctive relief, the plaintiff may recover three times the amount of actual damages'. There seems to be a conflict. He said he was basically against this because he didn't think it would do any good other than clutter up what has been going on. Several years ago we had an antitrust division in the Attorney General's office run by Jerome Cate, an attorney from Billings. He had two attorneys, two investigators, and some secretaries. It was funded by the federal government. He spent from three to four years, and to his knowledge nothing ever came out of that. It was dissolved because the state would not pick up the funding. REP. KILPATRICK said if nothing else, to know that it is in Montana law would be a deterrent. He felt it should remain in the amendments.

Motion/Vote: The motion for adoption of the amendments carried 12-6 with REPS. HANSON, BENEDICT, LARSON, BARNETT, ELLIS, TUNBY VOTING NO.

REP. BACHINI said the motion is now HB 261 DO PASS AS AMENDED.

REP. STELLA JEAN HANSEN asked about a definition for commodities. Is merchandise included? Mr. Verdon said he did not see a definition of commodity in Title 30, Chapter 14. Ms. Bartos said that was correct. Under section 30-14-202 Articles of Commerce includes a definition, but is not limited to any commodity, product, service or output of a service, trade, or any product of the soil. 'Commodity' remains undefined under this particular Act. It may be well for this committee to define commodity and to amend the definition section of the statute as well. The UCC law may contain a commodity definition that could be referred to. REP. HANSEN commented she supposed if her competitors wanted to put her out of business they could because they buy clothing on specials when they go to market and are able to sell below the price of her competitors. She was told this is covered on Page 2, Section 1, (2)(c).

REP. BARNETT said he was in opposition to this bill because it lacks enforcement which could bring about disrespect for the law.

REP. ELLIS said the commodities futures market covers a wide range of products, minerals, energies, agricultural products. He feels that in most cases people are best served by interaction of the business community. He realizes there can be predatory practices. REP. KILPATRICK said this is to lessen competition to create a monopoly in any line of commerce or to injure, destroy, or prevent competition. Down the line this will most likely be enforced. However, HB 261 would allow you to bring the law in if you are being aggrieved by an unfair competitor.

Mr. Verdon said if there is a problem with 'commodities', the bill could be amended on page 2, line 5 to strike 'commodities' and insert 'Article of Commerce as defined in 30-14-202'. That is a pretty general definition, but it covers almost every service, commodity or trade. A new section 5 could be added.

Motion/Vote: REP. KILPATRICK moved an amendment as explained by Mr. Verdon be adopted. The proposed amendment was adopted with REPS. HANSON, STEPPLER, TUNBY, ELLIS voting NO. Motion was adopted.

MOTION: REP. BACHINI said the motion now is HB 261 DO PASS AS AMENDED. Further discussion.

REP. CROMLEY said this bill doesn't prevent anyone from selling below cost to you and above cost to someone else. So this doesn't set any minimum prices. REP. HANSON remarked he could think of a lot of ways it would be to his advantage to sell cheaper to someone who, for instance, paid his bill within a 10-day period. An attorney decides to sit on it for 60 days, it costs more, therefore there is a two-price arrangement. I give him the benefit of the doubt, so I charge you more. This says I can't do that. REP. CROMLEY said you shouldn't be doing that anyway. You would be discriminating.

REP. TUNBY asked if it isn't common practice in any business, if you have an extremely large volume to buy and sell at a lesser price. REP. BACHINI advised that is taken care of in this bill.

REP. WALLIN thought there are some situations where enforcement could not be applied. They had a case of Prestone which can be purchased from several different vendors. Their wholesale price on Prestone was much higher than they could pay retail at the local grocery store, but they don't have the option of buying at that source, they have to pay retail to their distributor.

REP. HANSEN said when she buys sugar by the carload it is three or four cents cheaper per pound than when she buys in smaller quantities. If she charged her charge customers more than the cash customers, that is just a cost of doing business.

HOUSE BUSINESS & ECONOMIC DEVELOPMENT COMMITTEE

February 15, 1991

Page 33 of 33

REP. CROMLEY said you can do that. It is very significant. There was a lot of opposition to HB 538, and this bill had basically no opposition. This is not a controversial bill. It is existing federal law.

VOTE: HB 261 AS AMENDED DO PASS. Motion carried 13-5 with REPS. STEPPLER, BENEDICT, BARNETT, ELLIS, HANSON voting NO.

ADJOURNMENT 10:45 a.m.



REP. BOB BACHINI, CHAIRMAN



JO LAHTI, SECRETARY

BB/jl

BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

DATE Feb. 15, 1991

[illegible]

HOUSE STANDING COMMITTEE REPORT

February 15, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 258 (first reading copy -- white) do pass as amended .

Signed: 
Bob Bachini, Chairman

And, that such amendments read:

1. Page 3, line 10.

Strike: "The"

Insert: "Except as regards household appliances, including but not limited to ranges, refrigerators, and water heaters, in a recreational vehicle, as defined in 61-1-132, and except as regards a truck rated at more than 10,000 pounds gross vehicle weight, the"

2. Page 3, line 18.

Following: "manuals"

Insert: "if the dealer uses the manual as the basis for computing charges for both warranty work and retail work"

1.35
2-15-91
JDB

HOUSE STANDING COMMITTEE REPORT

February 15, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 587 (first reading copy -- white) do pass.

Signed: Bob Bachini DO
Bob Bachini, Chairman

2:35

2-15-91

~~2-15-91~~
JDB

HOUSE STANDING COMMITTEE REPORT

February 15, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 725 (first reading copy -- white) do pass.

Signed: _____

Bob Bachini
Bob Bachini, Chairman

HOUSE STANDING COMMITTEE REPORT

February 18, 1991

Page 1 of 2

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 538 (first reading copy -- white) do pass as amended .

Signed: Bob Bachini
Bob Bachini, Chairman

And, that such amendments read:

1. Page 1, line 15.
Page 2, lines 6 and 9
Page 6, line 11
Page 8, line 4
Strike: "7"
Insert: "6"
2. Page 2, line 15.
Strike: "3"
3. Page 7, lines 13 and 14.
Following: "is" on line 13
Strike: remainder of line 13 through "is" on line 14
4. Page 7, line 14.
Following: "same"
Strike: "article at cost"
Insert: "or a similar product of like grade and quality"
5. Page 8, line 6.
Following: "Penalty"
Insert: "-- disposition"
6. Page 8, line 7.
Strike: ", and upon"
Insert: "."

(2) Upon presentation by an offended party of evidence of a violation of [section 4], the department of justice or a county attorney shall issue to the suspected retailer or wholesaler a demand by certified mail to cease the violation. If the violation is not corrected within 24 hours after the suspected retailer or wholesaler receives the notification, the department or the county attorney may bring an action to enjoin the

violation.

(3) Upon "

Renumber: subsequent subsection

7. Page 8, line 10.

Following: "occurs"

Insert: ", is liable for attorney fees, and is subject to
injunctive relief"

8. Page 8, line 11.

Strike: "commerce"

Insert: "justice"

9. Page 8, line 12.

Following: "4]."

Insert: "If the action is brought by:

(a) the department of justice, one-half of the amount
of the penalty must be deposited in the general fund of the
county where the action was brought and the remainder in the
state general fund; or

(b) a county attorney, the entire amount of the penalty
must be deposited in the general fund of the county where
the action was brought."

10. Page 8, lines 13 through 22.

Strike: lines 13 through 22 in their entirety

Renumber: subsequent sections

CLERICAL

Bill No. 535

Date: 2/18

Time: 4:00 p.m.

(Legislative Council Staff)

☒ 6/15/2003 - John DeL
S / H Standing Committee

(Chairman) Bachini

☐ S / H Committee of the Whole

(Sponsor)

In accordance with the Rules of the Montana Legislature, the following clerical errors may be corrected:

1. Reinsert subsequent corrections in original

An objection to these corrections may be registered by the Secretary of the Senate, the Chief Clerk of the House, or the sponsor by filing the objection in writing within 24 hours after receipt of this notice.

HOUSE STANDING COMMITTEE REPORT

February 15, 1991

Page 1 of 2

Mr. Speaker: We, the committee on Business and Economic Development report that House Bill 261 (first reading copy -- white) do pass as amended .

Signed: Bob Bachini
Bob Bachini, Chairman

And, that such amendments read:

1. Title, lines 10 and 11.

Following: "DISCRIMINATION;" on line 10

Strike: remainder of line 10 through "MCA;" on line 11

2. Page 1, lines 14 through 24.

Strike: statement of intent in its entirety

3. Page 3, lines 24 and 25.

Following: "interpretation" on line 24

Strike: remainder of line 24 through "(1)" on line 25

Insert: "."

4. Page 4, lines 8 through 14.

Strike: subsection (2) in its entirety

5. Page 4, line 24 through page 7, line 16.

Strike: sections 5, 6, 7, and 8 in their entirety

Insert: "NEW SECTION. Section 5. Recovery on illegal contracts forbidden. A contract, express or implied, made by a person in violation of the provisions of [section 1] is an illegal contract, and no recovery may be had on the contract.

NEW SECTION. Section 6. Injunctions -- damages -- production of evidence. (1) A person who is injured by a violation of [section 1] may maintain an action to enjoin a continuance of an act in violation of [section 1] and to recover damages. A court, upon finding that the defendant is violating or has violated the provisions of [section 1], shall enjoin the defendant from continuing the violation. It is not necessary to allege or prove actual damages to the plaintiff.

(2) In addition to injunctive relief, the plaintiff may recover from the defendant three times the amount of actual damages sustained plus attorney fees and costs of

suit.

(3) A defendant in an action brought under this section may be required to testify under the Montana Rules of Civil Procedure. In addition the books and records of a defendant may be brought into court and introduced into evidence by reference. Information so obtained may not be used against the defendant as a basis for a misdemeanor prosecution for a violation of [section 1].

NEW SECTION. Section 7. Penalties. A person, whether acting as a principal, agent, officer, or director, who violates a provision of [section 1] is guilty of a misdemeanor for each violation and upon conviction shall be fined not less than \$100 or more than \$1,000 or imprisoned for a term not to exceed 6 months, or both."

Renumber: subsequent sections

6. Page 7, lines 18 and 21.

Strike: "4"

Insert: "7"

7. Page 7, lines 19 and 20.

Strike: "part 2,"

CLERICAL

Bill No. 201

Date: 2/10/91

Time: 10:00

HR
(Legislative Council Staff)

☒ BUSINESS & CON. DEPT
S / H Standing Committee
Bob Beahm
(Chairman) Bechini

☐ S / H Committee of the Whole

(Sponsor)

In accordance with the Rules of the Montana Legislature, the following clerical errors may be corrected:

AMENDMENT #3 to HJR 101 (to HJR 101)

SECTION 1. Section 1, HJR 101,

is amended to read:

A

An objection to these corrections may be registered by the Secretary of the Senate, the Chief Clerk of the House, or the sponsor by filing the objection in writing within 24 hours after receipt of this notice.

Amendments to House Bill No. 258
First Reading Copy

EXHIBIT 1

215-91

258

For the Committee on Business and Economic Development

Prepared by Paul Verdon
February 15, 1991

1. Page 3, line 10.

Strike: "The"

Insert: "Except as regards household appliances, including but not limited to ranges, refrigerators, and water heaters, in a recreational vehicle, as defined in 61-1-132, and except as regards a truck rated at more than 10,000 pounds gross vehicle weight, the"

2. Page 3, line 18.

Following: "manuals"

Insert: "if the dealer uses the manual as the basis for computing charges for both warranty work and retail work"

DATE 2-15-9130-14-209 HB 538 TRADE AND COMMERCE

360

a regularly established dealer or preventing the competition of any person who in good faith intends or attempts to become such dealer, discriminates between different persons or localities of this state by purchasing any article of commerce at a higher rate or price in one locality than in another, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution and for the difference in the grade and quality of such article, is guilty of unfair discrimination, which is prohibited and unlawful.

(2) Proof that any person has paid a higher rate or price for any article of commerce in one locality than in another, after making due allowance for the difference in the actual cost of transportation and for the difference in the grade and quality of such article, shall be prima facie evidence of a violation of this section.

(3) The payment of a higher rate or price in one locality than in another, after making such allowance provided above, is not unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such locality. The burden of proof of such fact is upon the person charged with unfair discrimination.

History: En. 51-508 by Sec. 8, Ch. 518, L. 1977; R.C.M. 1947, 51-508.

Cross-References

Montana Small Business Purchasing Act,
Montana product preference provisions, Title 18, ch. 5, part 3.
18-1-112.

30-14-209. Sales at less than cost forbidden. It is unlawful for a vendor to sell, offer for sale, or advertise for sale any article of commerce at less than the cost thereof to the vendor or to give, offer to give, or advertise the intent to give away any article of commerce for the purpose of injuring competitors and destroying competition.

History: En. 51-509 by Sec. 9, Ch. 518, L. 1977; R.C.M. 1947, 51-509.

Cross-References

Unlawful practices, 30-14-103.

30-14-210. Cost survey as evidence of cost. Whenever a particular trade or industry, of which the person complained against is a member, has an established cost survey for the locality in which the offense is committed, such cost survey is competent evidence to be used in proving the costs of the person complained against.

History: En. 51-510 by Sec. 10, Ch. 518, L. 1977; R.C.M. 1947, 51-510.

30-14-211. Establishing cost survey. (1) The department shall, whenever application has been made by 10 or more persons within a particular trade or business, establish the cost survey provided for in 30-14-210. When petition for a cost survey has been so presented to the department, the department shall, as soon as possible, fix a time for a public hearing upon the question of whether the cost survey should be established and, if so, upon the matter of establishing such cost survey. The hearing shall be held at the office of the department and upon that notice which the department may require by rule. However, notice of the hearing shall be published for at least 2 successive weeks in the daily newspaper or newspapers as the department may designate as most commonly circulated in the counties to be affected by the

Flying J Sold Fuel Too Cheap, Says Van Dam

By Cherrill Crosby
Tribune Staff Writer

The Utah Attorney General's Office filed a civil lawsuit Wednesday against Flying J Petroleum Inc., alleging the company violated the Utah Motor Fuel Marketing Act in June by selling gasoline and diesel below cost.

"This is the first in a series of cases, I believe, where we're going to show there is a move afoot by certain retailers to really do harm to the independents and therefore eliminate competition," said Attorney General Paul Van Dam.

The complaint filed in 3rd District Court is the first in a three-pronged investigation into allegations of below-cost selling, price gouging and price fixing, said Art Strong, chief of the office's Fair Business Enforcement Unit.

"We have a couple more cases where the investigation is nearly complete. And they could result in additional actions being filed," Mr.

Strong said.

The suit alleges Flying J, which is headquartered in Brigham City, sold gasoline and diesel fuel below cost — the wholesale prices of fuel with a 6 percent markup — on several days in June through an Ogden retail outlet just off Interstate Highway 15.

The sales injured the Delaware corporation's competitors by forcing them to choose between losing money by also selling below cost, or continuing to sell at or above cost and losing revenues from reduced sales, Mr. Strong said.

Flying J operates an oil refinery in North Salt Lake and retail fuel outlets in Utah and neighboring states.

The complaint seeks a permanent injunction against further below-cost sales and a fine of not more than \$5,000 for each retail sale of fuel below cost.

State prosecutors contend Flying J's sales would eventually force competitors to abandon the retail gasoline and diesel fuel business, especially small competitors who cannot use profits from sales in other markets to offset losses incurred from meeting Flying J's below-cost prices.

"I don't want people to think that our office objects to gasoline dealers giving motorists a better price on gasoline," Mr. Van Dam said. But, if

fuel is sold below cost, "it is going to be very clearly disadvantageous" to small independents whose profit margin is determined by the volume they sell.

"In order to preserve competition, everybody's got to at least play on that level playing field where, there is a [minimum] 6 percent markup," he said.

The suit contends Flying J's below-cost pricing would force small fuel retailers, not affiliated with any company operating an oil refinery, out of the retail fuel industry before larger retailers or ones affiliated with a refinery are forced from the marketplace.

Government Sues With Families Of

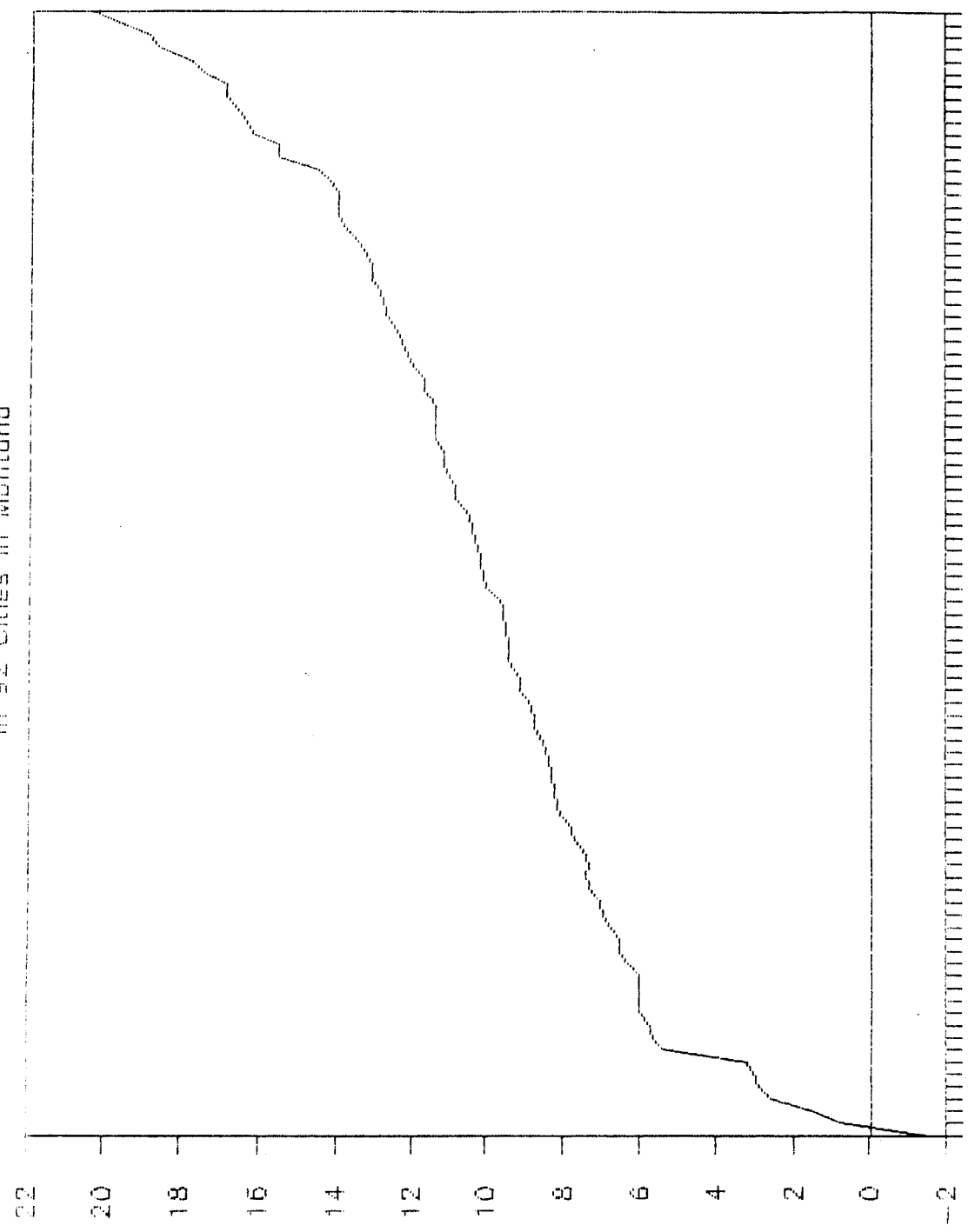
DEAD W:-

EXHIBIT 3
DATE 2-15-91
HB 538

Exhibit #2

Exhibit 3A

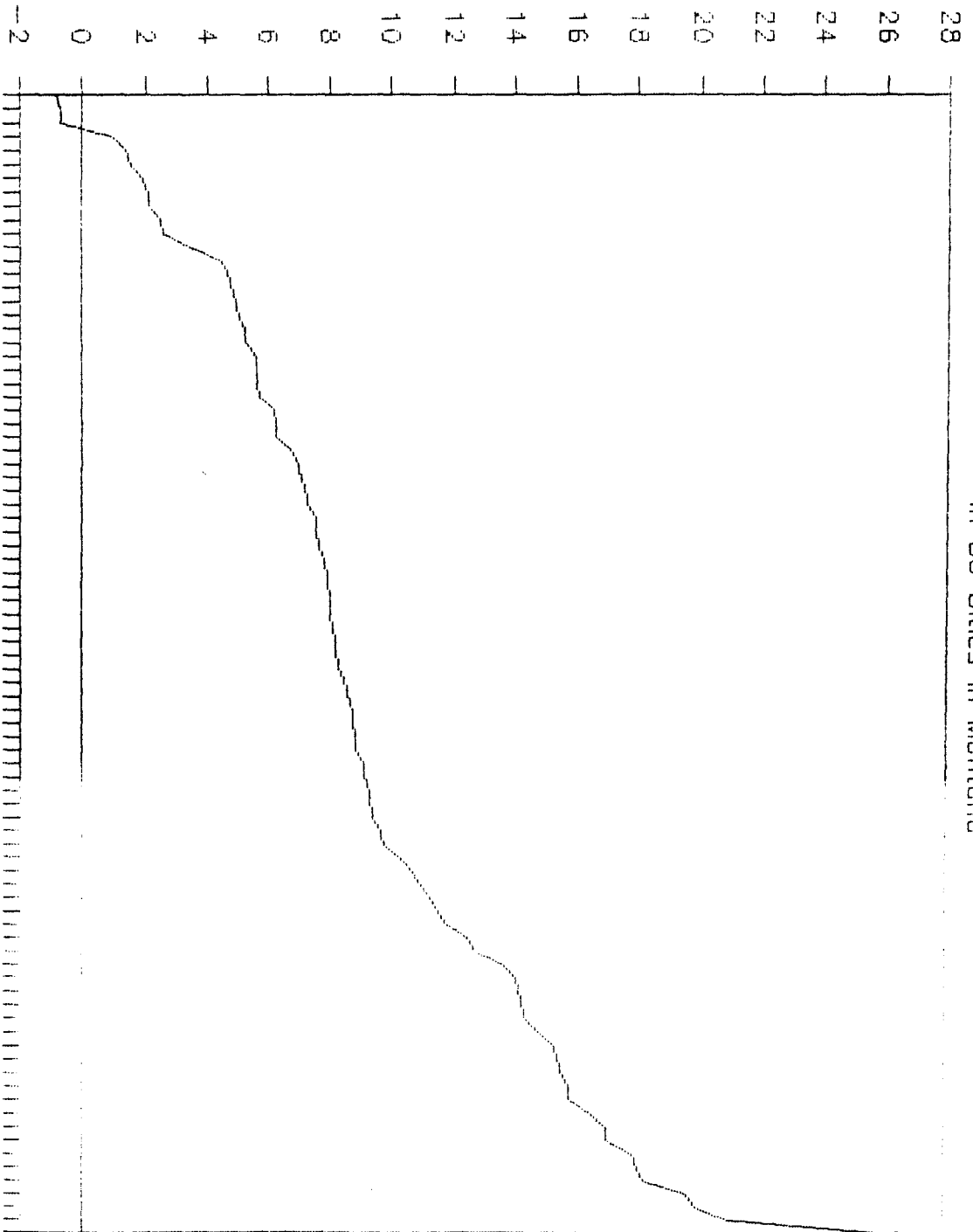
Margin on Unleaded Gasoline
in 92 Cities in Montana



Cities Represented Individually

EXHIBIT 3
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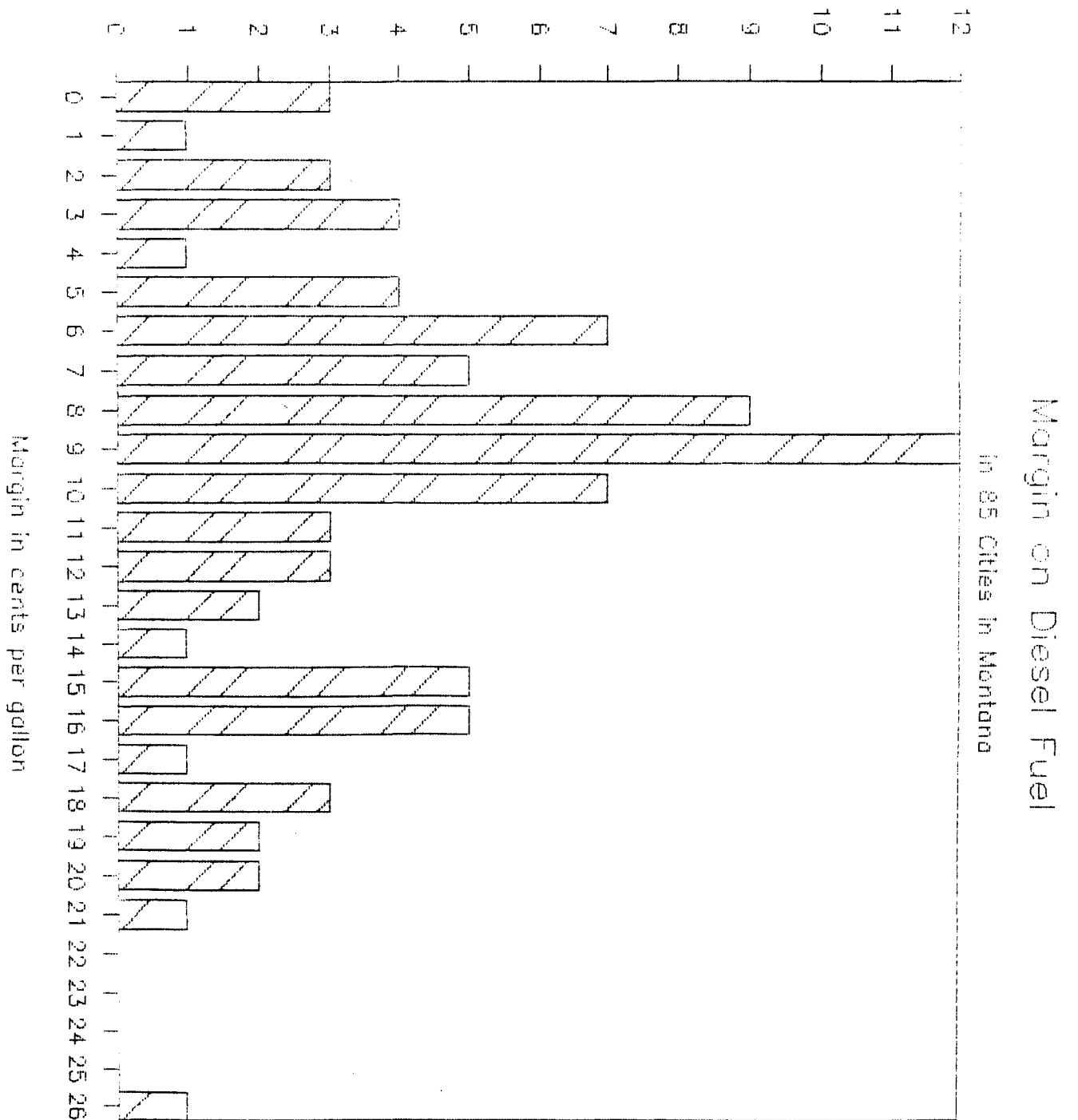
Margin in cents per gallon



Cities Represented Individually

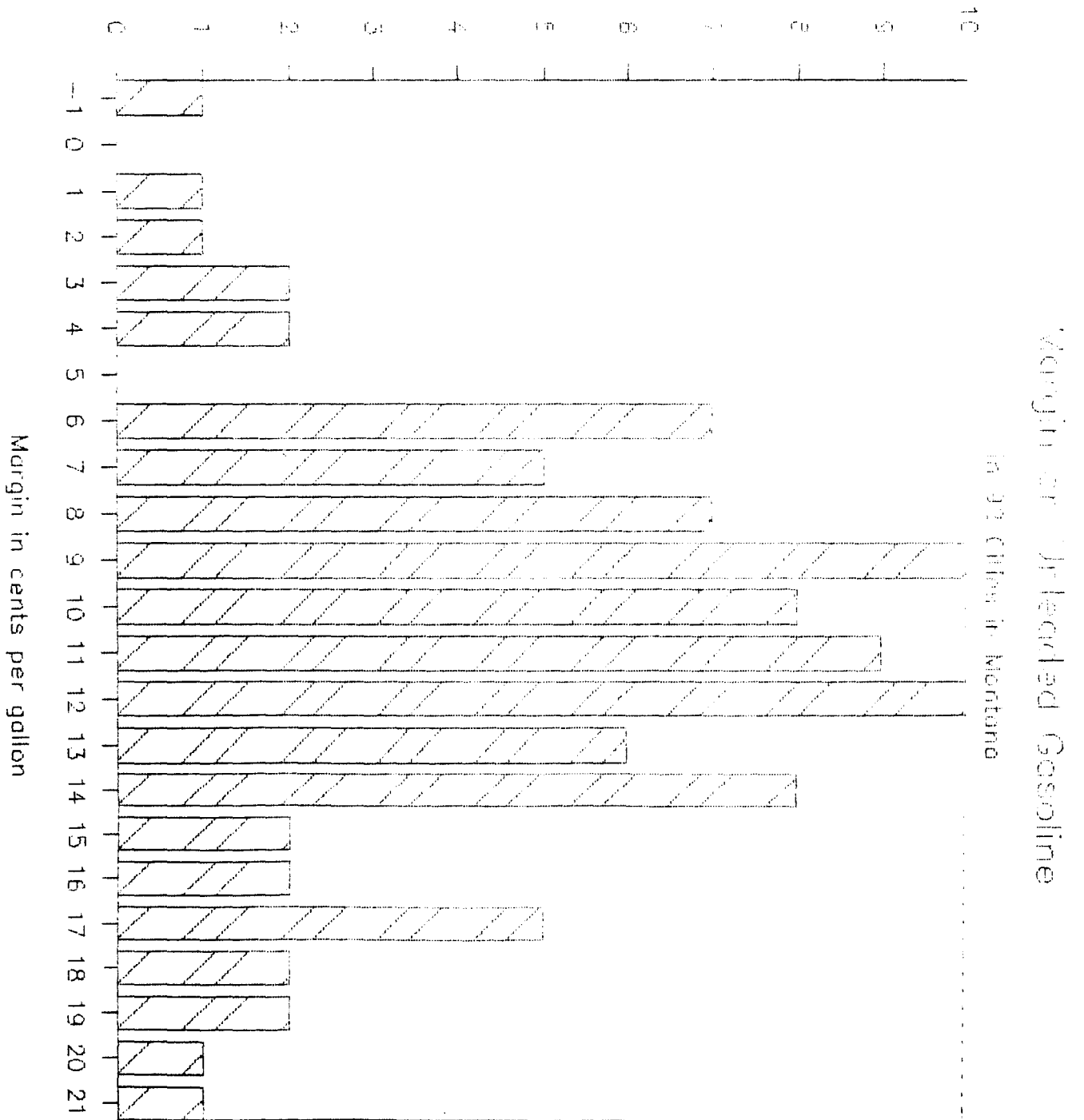
Number Of Cities With Respective Margin

EXHIB. 3
 DATE 2-18-91
 HB 538



Number Of Cities With Respective Margin

EXHIBIT 3
 DATE 2-15-91
 HB 538



AVERAGE PER GALLON MARGINS REPORTED
BY GASOLINE DEALERS

As Compiled from Returns in May 1990 Survey

Exhibit #3A
EXHIBIT 3A
DATE 2-15-91
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\$ Per Gallon

Regular Gasoline

	Margin Reported 4/24/90
Billings	.0744
Bozeman	.0554
Butte	.0718
Choteau	.0738
Culbertson	.1249
Cut Bank	.0754
Deer Lodge	.0838
Drummond	.1328
Glasgow	.0598
Glendive	.0539
Great Falls	.0054
Hamilton	.1137
Hardin	.0847
Havre	.0300
Helena	-.0146
Kalispell	.0680
Laurel	.0844
Lima	.1789
Livingston	.0498
Malta	.0778
Miles City	.0573
Missoula	.0734
Polson	.0289
Shelby	.1098
Sidney	.0533
Thompson Falls	.1114
West Yellowstone	.1564
Whitefish	.0647
Wisdom	.1859
Wolf Point	.0729

EXHIBIT 3B
DATE 2-15-91
HB 538

Exhibit 3B

**MOTOR FUELS DEALERS'
BREAK-EVEN MARGIN REQUIREMENTS**

Source: Responses to mail survey, May 1990, of selected
representative dealers throughout Montana

Full Service Stations:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.073	1
.080	1
.100	6
.120	2
.146	1
.148	3
.150	3
.160	1
.200	2
.260	2
.300	5

.173 Average

Convenience Stores:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.050	1
.053	1
.055	1
.059	1
.060	3
.068	3
.070	1
.076	4
.080	2
.083	4
.084	1
.085	4
.100	34
.120	3
.128	2
.150	2

.090 Average

Truck Stops:

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.060	1
.070	1
.078	1
.080	1
.104	1
.110	1
.150	2

.100 Average

Other Retail Outlets

<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.060	6
.070	4
.080	5
.100	8
.110	1
.118	2

.080 Average

[Through June 8 returns]



MONTANA PETROLEUM ASSOCIATION

A Division of the
Rocky Mountain Oil and Gas Association

Helena Office
2030 11th Avenue, Suite 23
Helena, Montana 59601
Phone (406) 442-7582
Fax (406) 443-7291

Janelle K. Fallan
Executive Director

EXHIBIT 4
DATE 2-15-91
HB 538

Exhibit #4
Billings Office
The Grand Building, Suite 510
P.O. Box 1398
Billings, Montana 59103
Phone (406) 252-3871
Fax (406) 252-3871

**Testimony by
Janelle Fallan
Montana Petroleum Association
In opposition to HB 538**

This bill is an attempt to regulate the price of gasoline. It is simply unnecessary and it establishes a dangerous precedent in public policy in Montana.

This bill will say to Montanans that we are going to establish a floor on prices of motor fuel and thus guarantee a profit for a small group of people at the expense of Montana consumers who depend upon motor fuel for their livelihood.

An interim committee looked into the issue of predatory pricing and found no evidence. The Attorney General investigated charges of discriminatory pricing during 1990 and found no evidence.

Motor fuel marketing is a highly competitive business. It is that competition that best serves the consumer, assuring that supplies are available and at a competitive price.

This legislation would penalize the efficient operator, who may not need the government to set prices to be profitable. The efficient business operators under this bill will have to prove his innocence from accusations of predatory pricing to be able to charge the consumer less at the pump.

The bill in its present form is vague and needs amendment if you are to approve it. The questions I will raise should be resolved or the bill will certainly have tough sledding in this body, the Senate and likely the courts.

QUESTIONS

+The purpose clause references "independent and small dealers," but there is no definition of just who these people are.

+There is also no definition of "subsidized pricing" referenced on line 3, p. 2.

Along those same lines, isn't guaranteeing a profit for undefined independent and small dealers subsidized pricing for them at the expense of the customer or consumer?

+The purpose section also states that subsidized pricing reduces competition in the motor fuel marketing industry. However, if a floor is established -- a minimum profit guaranteed -- wouldn't this bring in more competition to the so-called independent and small dealers and thus drive many of them out of business?

+Next, consider the sentence in lines 6 and 7 (p.2) which says: The purpose of (Sections 1-7) is to prevent and eliminate predatory pricing of retail motor fuel."

This sentence appears to assume that predatory pricing exists and this bill will both prevent it and eliminate.

As to the bill itself -- how was the formula derived to obtain the so-called "cost of doing business" (lines 14-19, p. 2.)? Are 3% and 6% standard numbers or were they arbitrarily placed in the bill? The subcommittee also considered margins of 1% on wholesale and 8% on retail.

The words "in the absence of proof of lesser cost" -- what does this mean? Who proves it? How is this mechanism triggered?

+P. 5. New section 4 of the bill:

Lines 22-24 are part of the formula prohibiting below-cost sales. However, the words "if the effect is to injure or destroy competition or substantially lessen competition" raise a number of questions. The language is inconsistent, awkward and vague. The same holds true for subsections 2 and 3.

+Sections 6 and 7, page 8, are most confusing and we ask the following questions:

-Who determines the enforcement of this act?

-In the case of the Department of Commerce, who will investigate and determine that action occur?

-What mechanism exists in the Department of Commerce to comply with this section? How many people will investigate? Who determines when to bring charges? What role will the County Attorney have? Will he investigate? Will the state reimburse him for investigation and prosecution?

Since the decontrol of oil prices at the federal level in 1981, there have been significant changes in the way gasoline is marketed. Consumers have increasingly sought the most competitive prices available, which are usually found at high volume, self serve outlets. This has forced those who sell motor fuel to change the way they do business or risk loss of market share.

While most gasoline marketers have adapted to the new operating environment, some have responded by asking for government intervention and protection from their competitors. They ask for and support legislation of this kind as a means of forcing prices upward in order to subsidize inefficient operating practices.

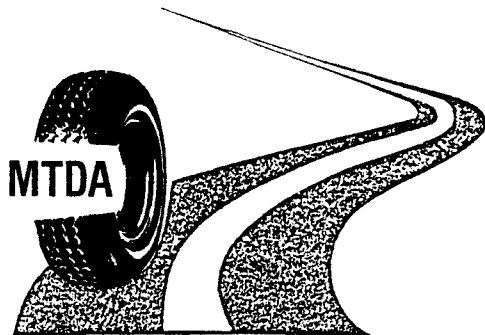
As I noted earlier, the interim subcommittee found no evidence of predatory pricing. If there should be problems of this kind in the future, protection is already provided by federal anti-trust laws. the Federal Trade Commission and the Federal Petroleum Marketing Practices Act.

If there is so-called predatory pricing, who is doing it? Most of the marketing in Montana is by independent wholesalers and retailers, -- not by major oil companies. This bill guarantees those wholesalers and retailers a profit margin. It protects these wholesalers and retailers from their own competition.

This bill:

- + fails to consider differences in overhead and operating expenses between different types of retail outlets.
- + 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 the high-cost operator.
- + will force Montanans to pay higher prices to subsidize inefficient operators.

In conclusion, there is good evidence that passage of this bill will lead to higher motor fuel prices for Montanans. I respectfully submit that your constituents may not support higher gasoline prices.



Service is our only product!

MONTANA TIRE DEALERS ASSOCIATION

318 N. Last Chance Gulch

P.O. Box 440

Helena, Montana 59624

(406) 442-3388

1-800-527-8065

TESTIMONY

FEBRUARY 15, 1991

ROOM 312-3

HB 538

EXHIBIT 4A

DATE 2-15-91

HB 538

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

FOR THE RECORD, I AM CHARLES BROOKS EXECUTIVE VICE PRESIDENT OF THE MONTANA TIRE DEALERS ASSOCIATION. I AM HERE TODAY IN OPPOSITION TO HB 538.

THIS PROPOSED LEGISLATION LAYS THE AX AT THE VERY ROOT OF THE FREE ENTERPRISE SYSTEM AND THE FREE MARKET PLACE. BY LEGISLATION WE ARE MOVING FROM A FREE MARKET PLACE SYSTEM TO A GOVERNMENT CONTROLLED MARKET PLACE. BY MANDATING CERTAIN PROFIT LEVELS. IT HAS NOT WORKED IN THE PAST AND I SUGGEST TO YOU THAT IT WILL NOT WORK NOW ARE IN THE FUTURE. LET ME SHARE WITH YOU MY EXPERIENCE AS A RETAIL MERCHANT OPERATING WITH PRICE CONTROLS. IN THE 1970'S RETAILERS COULD NOT SELL MERCHANDISE BELOW 5% ABOVE COST. WE WERE JUST GETTING OUR BUSINESS STARTED AND NEEDED TO BUILD VOLUME IN A HURRY SO WE BEGAN TO MAKE VARIOUS DEALS WITH MANUFACTURES TO RUN VERY GOOD PRICES ON HIGHLY CONSUMABLE ITEMS. IN SHORT ORDER WE HEARD FROM THE DEPARTMENT OF COMMERCE, THAT A COMPLAINT HAD BEEN FILED AGAINST OUR PRICING PRACTICES THAT WE WERE SELLING BELOW THE 5% LAW. THEY ASK FOR RECORDS TO SUPPORT THE PRICE AND OUR ACCOUNTANT WOULD FIND THE NECESSARY RECORDS AND SEND THEM TO HELENA. THEN A LETTER WOULD BE RECEIVED FROM THE DEPARTMENT CLEARING US OF THE VIOLATION. THIS WENT ON FOR SEVERAL YEARS AND ONE DAY I CALLED THE DEPARTMENT AND ASK WHAT WOULD HAPPEN IF WE SOLD MERCHANDISE BELOW THE 5% LAW, AND HIS RESPONSE WAS A LETTER ASKING US NOT TO DO IT AGAIN. SOMETIME IN THE 1970'S THIS LAW WAS REMOVED FROM THE BOOKS. BECAUSE IT DID NOT WORK.

LET ME SUGGEST TO YOU THAT A REVIEW OF THE MILK CONTROL PROBLEM ALSO BE CONSIDERED BEFORE YOU BRING ANOTHER COMMODITY, UNDER GOVERNMENT CONTROL.

THE FREE COMPETITIVE ENTERPRISE SYSTEM BUILT THIS GREAT NATION OF OURS - A FREE MARKET PLACE HISTORICALLY HAS BENEFITED BOTH THE MERCHANT AS WELL AS THE CONSUMER. THE FREE MARKET PLACE CONTINUES TO BE THE BEST PLACE TO SET PRICE OF GOODS AND SERVICES.

MANY OTHER MERCHANTS ARE COMPETING IN FIELDS WHERE PROFIT MARGINS ARE VERY THIN, SHALL WE ALSO ASSURE THEN A SET PROFIT MARGIN??? I WOULD SUGGEST TO YOU THAT A NUMBER OF GOVERNMENTS HAVE TRIED IT, AND HAVE FAILED. BY LEGISLATION OR REGULATIONS WE ARE ATTEMPTING TO REMOVE ALL THE RISK OF DOING BUSINESS AND ASKING SOMEONE ELSE TO PAY THE BILL, AND IN THIS CASE THE CONSUMER WILL PICKUP THE TAB.

I WOULD LIKE NOW TO ADDRESS A SECTION OF THE BILL. PAGE 8
SECTIONS 6 AND 7. WE ARE REQUIRING THE DEPARTMENT OF COMMERCE OR
A COUNTY ATTORNEY TO ENFORCE THIS PROPOSED LEGISLATION. WE MUST
ASK THE QUESTION WILL EITHER OF THESE OFFICES HAVE THE TIME, MAN
POWER OR BUDGETS TO HANDLE THIS TYPE OF ENFORCEMENT ??? I THINK
NOT. THEN IS THIS LEGISLATION REAL NECESSARY???

I URGE YOU TO GIVE THIS BILL A DO NOT PASS.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY.

EXHIBIT 5
DATE 2-15-91
HB 538

Exhibit 5

Exxon Statement on HB 538
Before the Montana House of Representatives
Committee on Business and Economic Development
February 15, 1991

This statement is submitted by Exxon Company, U.S.A. for the hearing record on HB 538, regulating the price of retail motor fuel at wholesale and retail levels. This bill 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 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 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%. Wholesalers and retailers would be required to abandon the market-based pricing which has benefitted consumers, and replace it with cost based pricing, which ignores market forces and, ultimately, discourages efficiency. While no marketer can sell below cost over the long run and remain in business, in the short run all marketers must set their prices at marketplace levels and find a way to control their costs in order to make a profit.

Clearly, the bill's intent is to replace the give-and-take of

competition and the efficiency motivation of today's motor fuel marketplace, with a system that requires marketers to recover today's costs with today's prices and gives little incentive for improved efficiency. The only beneficiaries of such a change will be inefficient marketers, while the price of their inefficiency will be paid by Montana motorists.

Raise Motor Fuel Prices

The likely outcome of enactment of this bill will be higher motor fuel prices for consumers and small businesses. A 1985 study the U.S. Department of Energy (DOE) 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 these 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 cents and 2.1 cents per gallon. Prices charged by distributors rose between 1.9 cents 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 motorist as much as \$24 million dollars 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 interest 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.

Some marketers have maintained that these existing laws do not work. This is simply not the case. When government agencies believe that anticompetitive actions are taking place, they have not been reluctant to initiate investigations and, eventually, litigation. Using present laws, the Federal Trade Commission,

DATE 2-15-91

HB 538

various state attorneys general including Montana's, 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 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 538.

DMS

2/8/91

Presented by Dan White

COMMENTS OF CHEVRON CORPORATION
IN OPPOSITION TO HB538

EXHIBIT 6

DATE 2-15-91

HB 538

Exhibit #6

Mr Chairman and members of the committee on Business and Economic Development. My name is Ward Shanahan I represent Chevron Corporation. Chevron opposes HB 538 because legislation of this kind is anti-competitive and anti consumer.

While the bill is styled as a "sales below cost measure designed to prevent subsidized below cost pricing at the retail level by dealers and distributors who have other sources of income" its real purpose is to shield service station dealers from price competition.

Montana already has an Unfair Trade Practices Act(Section 30-14-201 M.C.A. et seq) which includes aprohibition of sales below cost"for the purpose of injuring competitors or destroying competition." HB 538 is specifically directed against refiners who are included in its definition of "wholesaler". In addition it "fixes" the cost of doing business for wholesalers at 3% and for retailers at 6% unless "proof" of actual costs is made. However this is proof is not the "actual costs" but only those costs specified in the bill.

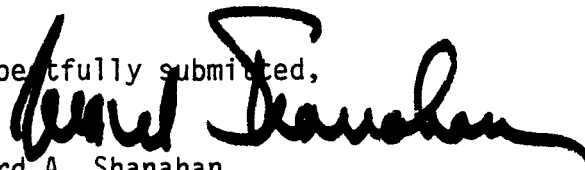
While Chevron opposes price fixing legislation, if the committee is intent on passing this bill, then the following amendments should be made:

- (a) The present Unfair Trade Practices Act should be repealed and replaced with this bill. To do otherwise is to create confusion in an already complicated area of the law.
- (b) Section 7 of the bill should be amended to give the refiner or "wholesaler" prior notice and an opportunity to be heard before the Department of Commerce issues a cease and desist order. Oil Companies should have due process rights also.
- (c) Refiners and other sellers should be allowed an adequate "meeting competition" defense. The following language should be included:

"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."

We will be available to work with the sponsors or the committee to make the appropriate changes.

Respectfully submitted,



Ward A. Shanahan
for Chevron Corporation
301 First Bank Building
P.O. Box 1715
Helena, Montana 59624
Tel: (406) 442-8560

EXHIBIT 6A
DATE 2-15-91
HB 538

Empirical Examination of Allegations of "Below-Cost" Retail Selling of Gasoline by Refiners

RESEARCH STUDY #038
OCTOBER 1986

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005



Gasoline Marketing in the 1980s: Structure, Practices, and Public Policy

Prepared by

Temple, Barker & Sloane, Inc.

May 1988

Amendments to House Bill No. 261
First Reading Copy

Requested by Representative Kilpatrick
For the Committee on Business and Economic Development

Prepared by Paul Verdon
February 8, 1991

1. Title, lines 10 and 11.
Following: "DISCRIMINATION;" on line 10
Strike: remainder of line 10 through "MCA;" on line 11
2. Page 1, lines 14 through 24.
Strike: statement of intent in its entirety
3. Page 3, lines 24 and 25.
Following: "interpretation" on line 24
Strike: remainder of line 24 through "(1)" on line 25
Insert: "."
4. Page 4, lines 8 through 14.
Strike: subsection (2) in its entirety
5. Page 4, line 24 through page 7, line 16.
Strike: sections 5, 6, 7, and 8 in their entirety
Insert: "NEW SECTION. Section 5. Recovery on illegal contracts forbidden. A contract, express or implied, made by a person in violation of the provisions of [section 1] is an illegal contract, and no recovery may be had on the contract.

NEW SECTION. Section 6. Injunctions -- damages -- production of evidence. (1) A person who is injured by a violation of [section 1] may maintain an action to enjoin a continuance of an act in violation of [section 1] and to recover damages. A court, upon finding that the defendant is violating or has violated the provisions of [section 1], shall enjoin the defendant from continuing the violation. It is not necessary to allege or prove actual damages to the plaintiff.

(2) In addition to injunctive relief, the plaintiff may recover from the defendant three times the amount of actual damages sustained plus attorney fees and costs of suit.

(3) A defendant in an action brought under this section may be required to testify under the Montana Rules of Civil Procedure. In addition the books and records of a defendant may be brought into court and introduced into evidence by reference. Information so obtained may not be used against the defendant as a basis for a misdemeanor prosecution for a violation of [section 1].

NEW SECTION. Section 7. Penalties. A person, whether acting as a principal, agent, officer, or director, who

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violates a provision of [section 1] is guilty of a misdemeanor for each violation and upon conviction shall be fined not less than \$100 or more than \$1,000 or imprisoned for a term not to exceed 6 months, or both."

Renumber: subsequent sections

6. Page 7, lines 18 and 21.

Strike: "4"

Insert: "7"

7. Page 7, lines 19 and 20.

Strike: "part 2,"

City / State

EXHIBIT 8

DATE 2-15-91

Section

B Friday, August 10, 1990

Panel eyes 2 gas price proposals

HELENA (AP) — A legislative panel voted Thursday to consider two measures outlawing "predatory" motor-fuel pricing practices designed to run competitors out of business.

However, the Joint Interim Subcommittee on Marketing of Motor Fuels decided to drop proposals to give service-station owners more leeway in their contracts with gasoline distributors, and to forbid petroleum-refining companies from owning retail service stations.

Committee members said they'll decide Oct. 4 whether the two measures on fuel pricing will be introduced at the 1991 Legislature.

The panel was appointed by the 1989 Legislature to examine whether oil companies in Montana are engaging in "predatory pricing" and other practices that harm independent service stations.

Members of Automotives Trades of Montana, a Bozeman-based group representing independently owned service stations, has ac-

cused the larger oil firms of granting special prices on gasoline to affiliated wholesalers and service stations.

Oil company representatives at Thursday's meeting generally opposed any new legislation, saying it would be unnecessary regulation. They also questioned whether such predatory practices exist in Montana.

"They say 'These guys are predatory, or these guys are trying to run me out of business,' instead of saying we're better businessmen," Doug Klothor of Cenex said of the independent dealers.

The committee voted to consider two potential laws: One that would prohibit "below-cost" retail pricing of gasoline in order to harm competition, and one to prohibit selling the same fuel at lower prices to favored distributors in order to harm competition.

Consideration of each measure was approved on a 5-3 vote. All four Democrats on the bipartisan committee and Rep. Norm

Wallin, R-Bozeman, were in favor.

Earlier Thursday, the committee heard from Attorney General Marc Racicot, who said tougher state antitrust laws won't have much effect because his office doesn't have the manpower to enforce them.

"If you're going to provide us with more prosecutorial tools ... It's not going to do any good unless you provide us with the resources," he said. "We have almost no ability to respond to these types of complaints."

But committee members supporting consideration of the proposals said the enforcement issue could be addressed in the future.

"This is one of the very, very first steps up the ladder, but I think it's a good first step," said Rep. Tom Kirkpatrick, D-Laurel.

Committee members decided against considering two other bills. The most sweeping proposal would have prohibited oil refineries from owning retail service stations.

Oil company representatives said only a

few states have such laws and suggested they may lead to higher prices for consumers.

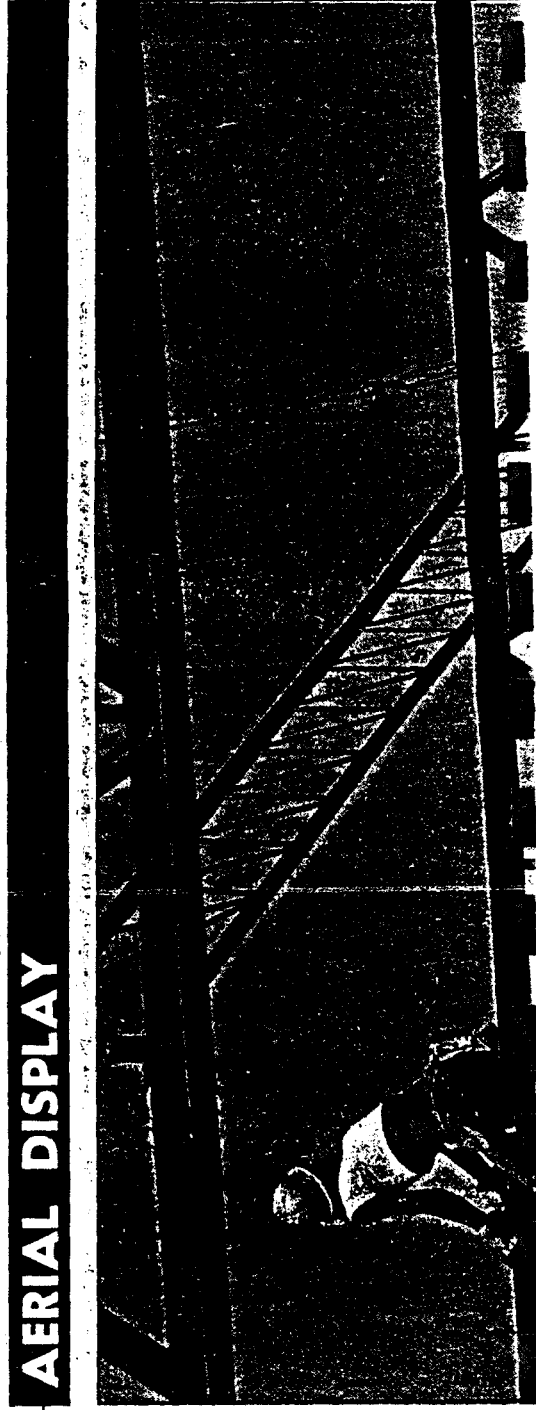
"If someone else took over (our station) and was not as good as we were at operating those stations, they would have to operate at a higher margin," said Jim Butler of Ashland, which operates 22 SuperAmerica stations in Montana.

But John Taggart, president of Automotives Trades of Montana, said the law would harm competition.

"Obviously it's hard to compete with someone who is supplying fuel and selling retail fuel ... and controls both prices," he said.

The committee also dropped a proposal guaranteeing "open supply" of fuel for service station owners. The measure would have prohibited oil companies from forcing a franchised station to purchase their brand of fuel from a certain supplier, even though the same brand of fuel was available from a different supplier at a lower price.

AERIAL DISPLAY



Car salesmen lie about fee, official says

By CLAIR JOHNSON
Of the Gazette Staff

Yellowstone County Treasurer Kevan Bryan Thursday said a few Billings car dealers are misleading customers by telling them the county has a title processing fee.

Exhibit # 9
2-15-91

Amendments to House Bill No. 261
First Reading Copy

Requested by Representative Kilpatrick
For the Committee on Business and Economic Development

Prepared by Paul Verdon
February 15, 1991

1. Title, line 8.
Strike: "COMMODITIES"
Insert: "ARTICLES OF COMMERCE"
2. Title, lines 10 and 11.
Following: "DISCRIMINATION;" on line 10
Strike: remainder of line 10 through "MCA;" on line 11
3. Page 1, lines 14 through 24.
Strike: statement of intent in its entirety
4. Page 2, line 5.
Strike: "commodities"
Insert: "articles of commerce, as defined in 30-14-202,"
5. Page 2, line 14.
Page 2, line 16.
Page 2, line 21.
Strike: "commodities"
Insert: "articles of commerce"
6. Page 3, line 3.
Page 3, line 7.
Strike: "commodity"
Insert: "article of commerce"
7. Page 3, lines 24 and 25.
Following: "interpretation" on line 24
Strike: remainder of line 24 through "(1)" on line 25
Insert: "."
8. Page 4, lines 8 through 14.
Strike: subsection (2) in its entirety
9. Page 4, line 24 through page 7, line 16.
Strike: sections 5, 6, 7, and 8 in their entirety
Insert: "NEW SECTION. **Section 5. Recovery on illegal contracts forbidden.** A contract, express or implied, made by a person in violation of the provisions of [section 1] is an illegal contract, and no recovery may be had on the contract.

NEW SECTION. **Section 6. Injunctions -- damages -- production of evidence.** (1) A person who is injured by a violation of [section 1] may maintain an action to enjoin a continuance of an act in violation of [section 1] and to recover damages. A court, upon finding that the defendant is

violating or has violated the provisions of [section 1], shall enjoin the defendant from continuing the violation. It is not necessary to allege or prove actual damages to the plaintiff.

(2) In addition to injunctive relief, the plaintiff may recover from the defendant three times the amount of actual damages sustained plus attorney fees and costs of suit.

(3) A defendant in an action brought under this section may be required to testify under the Montana Rules of Civil Procedure. In addition the books and records of a defendant may be brought into court and introduced into evidence by reference. Information so obtained may not be used against the defendant as a basis for a misdemeanor prosecution for a violation of [section 1].

NEW SECTION. Section 7. Penalties. A person, whether acting as a principal, agent, officer, or director, who violates a provision of [section 1] is guilty of a misdemeanor for each violation and upon conviction shall be fined not less than \$100 or more than \$1,000 or imprisoned for a term not to exceed 6 months, or both."

Renumber: subsequent sections

10. Page 7, lines 18 and 21.

Strike: "4"

Insert: "7"

11. Page 7, lines 19 and 20.

Strike: "part 2,"

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VISITOR REGISTER

COMMITTEE

BILL NO. HB 587

DATE Feb. 15, 1991 SPONSOR(S) Rep. R. Johnson

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