

**MINUTES**

**MONTANA SENATE  
52nd LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON BUSINESS & INDUSTRY**

Call to Order: By Chairman J.D. Lynch, on March 22, 1991, at  
10:00 a.m.

**ROLL CALL**

**Members Present:**

J.D. Lynch, Chairman (D)  
John Jr. Kennedy, Vice Chairman (D)  
Betty Bruski (D)  
Eve Franklin (D)  
Delwyn Gage (R)  
Thomas Hager (R)  
Jerry Noble (R)  
Gene Thayer (R)  
Bob Williams (D)

**Members Excused:** None

**Staff Present:** Bart Campbell (Legislative Council).

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

**Announcements/Discussion:** None

**HEARING ON HOUSE BILL 261**

**Presentation and Opening Statement by Sponsor:**

Representative Tom Kilpatrick, sponsor of the bill, stated that this bill is the result of the joint interim committee on market fuel. It is by the request of the attorney general, he asked that the Robertson Patman act, which is what this is referring to, be put into state law. These are cases that were tried in the federal court that could be tried in the state court. When this bill first came out, it had about a three quarter of a million dollar fiscal note. Since that time, we took out the areas instructing the department of justice, department of commerce, so now it is just from private litigation. He referred to page two of the bill, line four, this is what the bill is all about.

**Proponents' Testimony:**

Senator Esther Bengtson, stated that she chaired the interim

committee on marketing of motor fuels and is in strong support of this bill.

John Taggart, the president of the automotive trades of Montana the service station association, stated that during the testimony at the hearing this summer, the refiners admitted that they arbitrarily raised the price of gasoline ten cents a gallon in the spring. They were selling gas at the old price to the other refiners, and then the wholesalers, the independent businessmen, and the dealers were stuck with the ten cent a gallon increase. They were put in a non competitive position all summer long. This is one of the examples of price discrimination.

Ron Leland, representing the automotive trades of Montana, stated that HB 261 is federal law that we are trying to put into state law, so that a Montana dealer can go to the state of Montana courts. HB 261 is an anti trust bill.

Annie Bartose, chief legal counsel at the department of commerce, stated that the department supports HB 261 for the reasons stated by Representative Kilpatrick.

Beth Baker, representing the department of justice, stated that this law is similar to federal law that prohibits price discrimination. However, it is useful to have this type of legislation in Montana, because the federal law has very stringent requirements about proof of interstate commerce. In this law, we simply bring it to the state level. We do have some concerns about the remedies. She proposed an amendment to the bill (See Exhibit 1).

Steve Visocan, representing the western petroleum marketers association for Montana, stated that they support this piece of legislation, but ask the committee to include a differentiation for a class of trade. The bill currently says if you sell fuel to different parties, you have to use the same price. We have sub jobbers of smaller wholesalers who buy fuel and resell it. Without an ability to buy that fuel at cost, or very close to cost in order for them to stay in business, it makes them non competitive with their suppliers.

#### Opponents' Testimony:

None

#### Questions From Committee Members:

Senator Thayer stated that Representative Kilpatrick stated that there was no fiscal impact.

Representative Kilpatrick stated that the statement of intent on page one was cut out. On page five and six that section was cut out.

Annie Bartose stated that with the amendments that are presenting in this bill, it does provide for private enforcement action. If the individual believes that he has been violated, that he may retain private counsel and recover private damages and attorney fees if he is successful in that action.

Senator Gage asked Beth Baker what title thirty, chapter

fourteen deals with.

Beth Baker replied title thirty, chapter fourteen, contains Montana's unfair trade practices act, the consumer protection act, the uniform trade secrets act, and the motion picture fair trade practices act. It has a wide variety of remedies. As the bill is drafted right now, it says that title thirty, chapter fourteen may apply to this, it is unclear which provisions of this chapter would apply.

Senator Gage asked if the definition of commodity is in the code.

Beth Baker replied that there is not a definition of commodity in the codes.

Senator Lynch asked Beth Baker what her feelings on the amendments from Steve Visocan.

Beth Baker stated that she would hesitate putting the amendment in, because with the bill that it is presently worded you can rely on the federal law to help us interpret it.

#### Closing by Sponsor:

Representative Kilpatrick closed by saying that it was noted that this originally started off with oil and petroleum products. Mr. Browning was here, and he had an amendment that he wanted to submit he had to leave to Representative Kilpatrick submitted it to Bart Campbell. Senator Bengtson will carry the bill to the floor if it passes.

### HEARING ON HOUSE BILL 538

#### Presentation and Opening Statement by Sponsor:

Representative Dorothy Bradley, sponsor of the bill, stated that this is a repeat of what was brought before this committee two years ago. At that time, there was a study done for what appeared to be below cost sales taken place for retail motor fuels area in the state of Montana. Section 30-14-201 states that it is unlawful in the state to sell an article of commerce of less of the cost if it is for the purpose of injuring competitors and destroying competition. The sole intent of the bill is to try to figure out what below cost is.

#### Proponents' Testimony:

Senator Esther Bengtson stated that she was the chairman of the interim committee. We became convinced that this was the least that they could do. This is not a price setting, profit fixing bill. It merely defines the cost of doing business. So there is a person or business who feel that they have been injured they can take it to court. This is a fair and reasonable consumer piece of legislation.

Ronna Alexander, representing the Montana petroleum marketing association, stated that there was a lot of background to the study that was done in this committee (See Exhibit 2).

John Taggart, representing the service station association,

stated in the hearing that they had last summer the refiners were unable to successfully defend their positions on pricing. One refiner that they took to task, they pulled all of his stations on interstate ninety on a specific day, and the Montana price for a Billings refinery was ninety four cents a gallon retail, the same company in Spokane, Washington on the same day was selling the Billings refined gas at a retail price of seventy seven cents per gallon.

Larry Fosbender, representing the Montana council of cooperatives, stated this legislation is important as far as the long term is concerned that it be put into place to protect the consumers.

Steve Visocan, past president of the western petroleum marketer's association, he passed out a fact sheet that answers some of the important questions in regards to this bill (See Exhibit 3).

Beth Baker, representing the department of justice, stated that she has the same concern for this bill as she did for the previous one. There is a prohibition for below cost sales already in the unfair trade practices act. With this bill providing a second remedy provision, there may be some confusion or overlapping remedies. She proposed to put this bill into the unfair trade practices act (See Exhibit 4).

Ron Leland, representing the automotive trades of Montana, stated that the service station dealers in Montana is a small business.

#### Opponents' Testimony:

Janelle Fallan, executive director of the Montana petroleum association, spoke in opposition of the bill (See Exhibit 5 and Exhibit 5A).

Bill Dermott, consumer and regulatory affairs manager for the Exxon company, spoke in opposition of the bill (See Exhibit 6).

Kay Norenberg, representing women involved in farm economics (WIFE) and the Montana cattle women, stated that agriculture has been having a difficult time. If this bill was to pass, it would cause even higher costs for agriculture. It allows for the raising of the prices for the consumer as high as the operator wants, but restricts how low he can sell his product. This is an anti-consumer piece of legislation.

Senator Larry Tveit stated that HB 538 will raise prices to the consumer. It will raise the price for agriculture, and he doesn't think that is necessary.

Charles Brooks, executive vice president of the Montana tire dealer's association, spoke in opposition of the bill (See Exhibit 7).

James Tutwiler, Montana chamber of commerce, stated that if we select this bill it will concern jobs in Montana. They find no compelling evidence that the jobs are at stake. In the absence of a clear problem, we are looking at a legislative remedy which crosses the line and says that we are going to take the legislative process and we are going to regulate how prices

are set in one particular industry.

Dan Whyte, appearing on behalf of Ward Shanahan who lobbies for chevron corporation, stated that they oppose this bill for the reasons given by the other opponents.

Questions From Committee Members:

Senator Williams asked if Beth Baker's office conducted a investigation in the below cost selling.

Beth Baker stated that last year they conducted an investigation into discriminatory pricing in different locations of the state. Because of the vagaries of that law and the lack of resources, they never did pursue that investigation further. They have not conducted an investigation in low cost sales.

Senator Thayer asked isn't it true within the past few years the retailer have gone to the convenience stores to track people in when they sell their gas and they can also by milk, beer, cigarettes, etc. That has been a trend in the industry. You set the price of gasoline, and it has to have a certain mark up, what is to prevent the reverse of happening. The people can market the other products down to next to nothing to drive the volume of their gasoline sales up.

Steve Visocan replied that you can take the price down on anything. The bill says that you can sell the gasoline as low as your cost. If you're selling gasoline as well as a number of other items and if you can take your gasoline down to cost, and you can take all of your other items well below cost, then that is something that you can obviously do. The consumer protection act currently says that you aren't allowed to sell anything under cost. This bill doesn't change that law. This bill defines to the petroleum industry what cost is.

Senator Lynch asked if Representative Bradley feared that this bill would raise the price of gasoline.

Representative Bradley stated that this over the long run is one of the few assurances we have that it will stay down.

Senator Kennedy asked how they would prove the intent to drive somebody out of business.

Representative Bradley stated that when you start to drop way down there, it is pretty self evident as to what you are doing.

Senator Bruski stated that in business the more business that you do, you normally get a bigger discount on your wholesale price, does that hold true in gasoline too.

Steve Visocan replied that this bill only addresses retail gasoline prices. This bill only addresses wholesale sales to retail outlets.

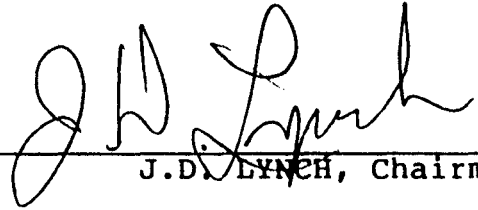
Closing by Sponsor:

Representative Bradley closed by saying that the fiscal note is irrelevant, because they did add language. The concern expressed from agriculture was incorrect. There is a much greater likelihood with the passage of this that agriculture

prices could go down. The real question is: Is this kind of thing happening? If this is happening, is this the right way of dealing with it? It was studied. The information from the studies shows the problem is there. Something should be done.

ADJOURNMENT

Adjournment At: 12:10 a.m.



J.D. LYNCH, Chairman



DARA ANDERSON, Secretary

JDL/dia

ROLL CALL

BUSINESS AND INDUSTRY COMMITTEE

DATE 3/22/91

52ND LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
SENATOR BRUSKI	X		
SENATOR FRANKLIN	X		
SENATOR GAGE	X		
SENATOR HAGER	X		
SENATOR NOBLE	X		
SENATOR THAYER	X		
SENATOR WILLIAMS	X		
SENATOR KENNEDY	X		
SENATOR LYNCH	X		

Each day attach to minutes.

DATE 3/27/91

COMMITTEE ON BUSINESS & INDUSTRY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Charles R. Brooks	MT TIRE DEALERS	538		X
CAROL MOSHER	MT. CATTLE WOMEN	538		X
JOHN D. TAGGART	A.T.O.M	538	X	
BETTIE F. TAGGART	A-TOM STAFF	538	X	
Kay Aremberg	WIFE	538		✓
Jan White for Wash <del>State</del>	CHEVRON	538	AMEND	
Tom Wilford	H. D. 89	261	✓	
Jerry Noble	SD 21	538		X
BETH BAKER	DEPT OF JUSTICE	261 538		
SP Visigan	WPMA	538	✓	
Janette Fallon	MT Petroleum	538		X
Larry Tasbender	MT. Council of Coops	538	✓	
Sandra Alexander	mt Petroleum Marketers	538	X	
Bill Dermott	Exxon Company, U.S.A.	538		X
John Augustus	DuPont Crocker Inc	538		X
Steve Browning	Anheuser Busch	261	X with amendment	
JAMES Twissler	UT CHAMBER	H 3 538		✓

(Please leave prepared statement with Secretary)



VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Row Le land	A.T.O.M.	HB 261	X	
JOHN D. TAGGART	A.T.O.M.	261	X	
BETTIE F. TAGGART	ATOM STAFF	261	X	

(Please leave prepared statement with Secretary)

PROPOSED AMENDMENT TO HB 261  
Prepared by Beth Baker  
Department of Justice

SENATE BUSINESS & INDUSTRY  
EXHIBIT NO. 1  
DATE 3/22/91  
BILL NO. HB 261

Page 8, strike lines 17-25.

Page 9, strike lines 1 and 2.

30-14-209

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 product preference provisions, Title 18, ch. 5, part 3.  
18-1-112.

Montana Small Business Purchasing Act,

**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 Petroleums 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.

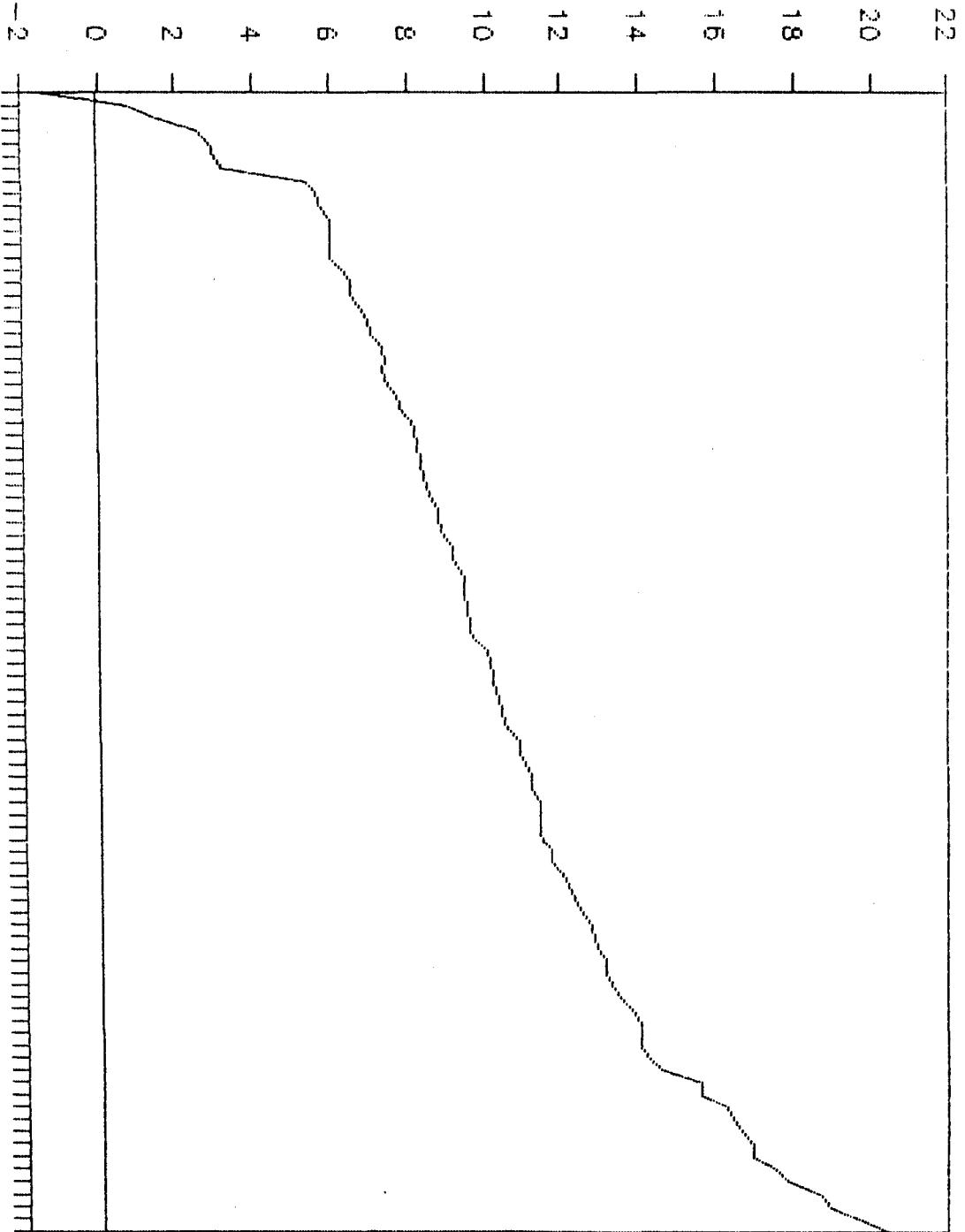
Government Settles With Families  
Of P...

Dick Gold Wi-

Margin in cents per gallon

# Margin on Unleaded Gasoline

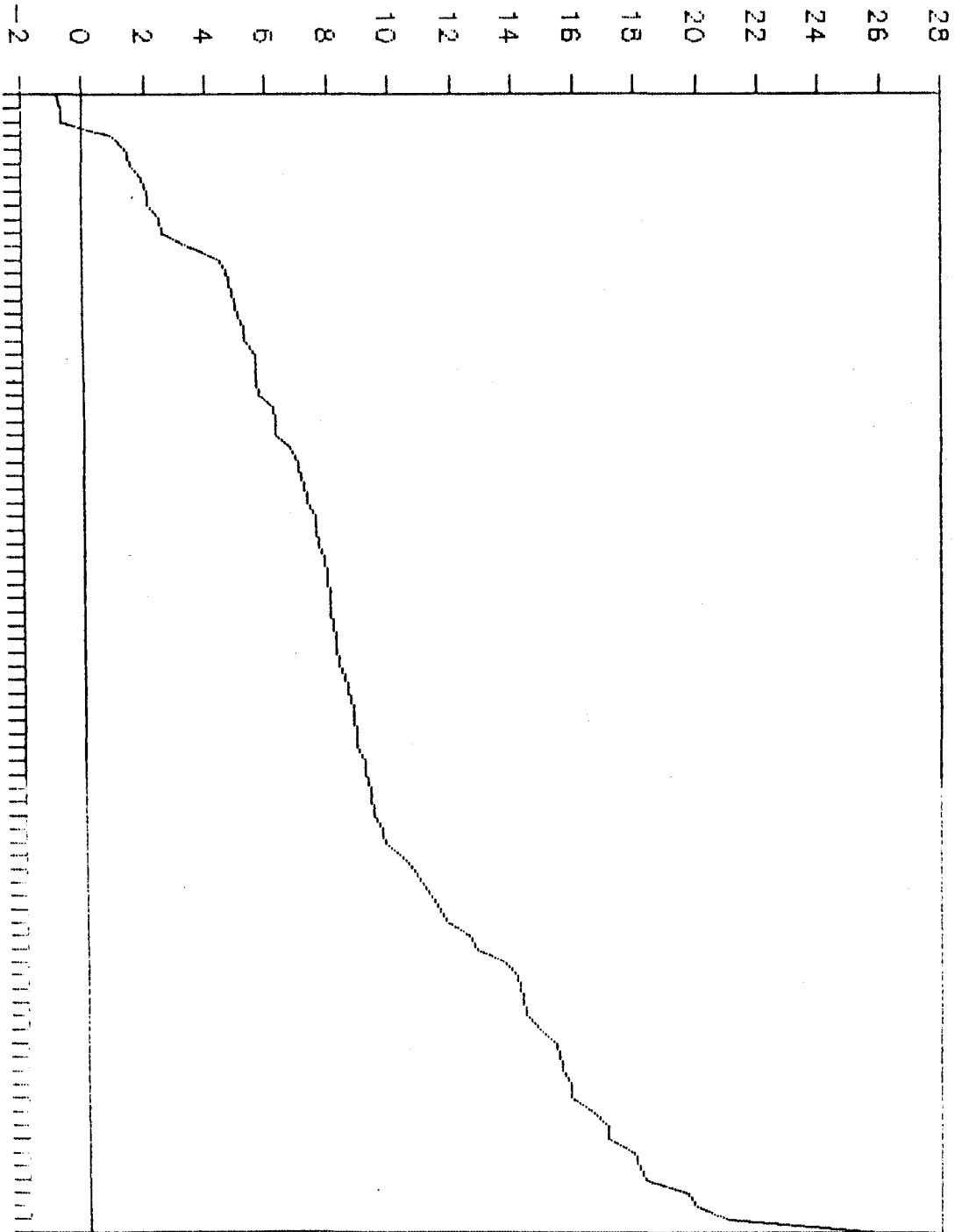
In 92 Cities in Montana



Cities Represented Individually

Margin in cents per gallon

Margin on Diesel Fuel  
in 85 Cities in Montana

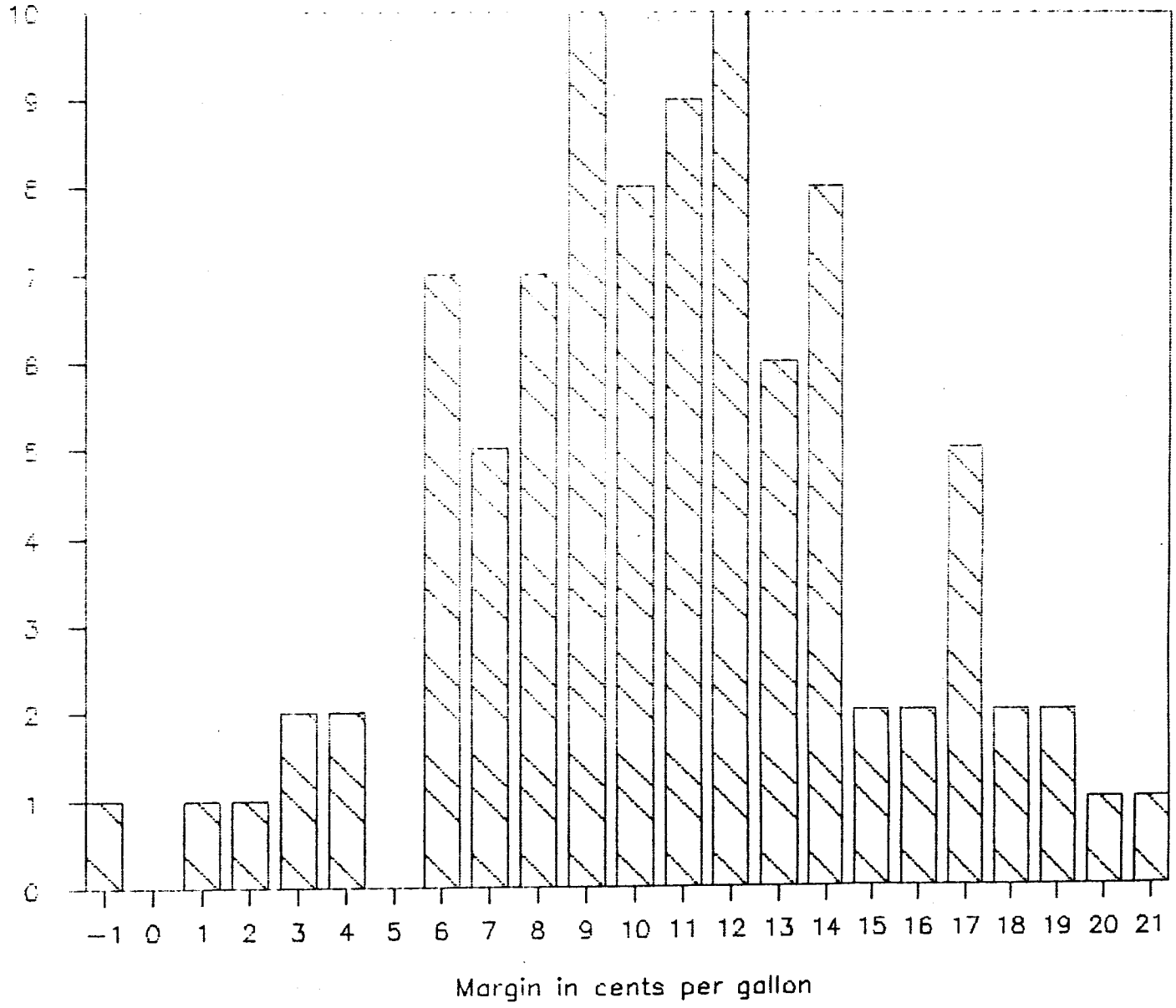


Cities Represented Individually

# Margin on Unleaded Gasoline

in 92 Cities in Montana

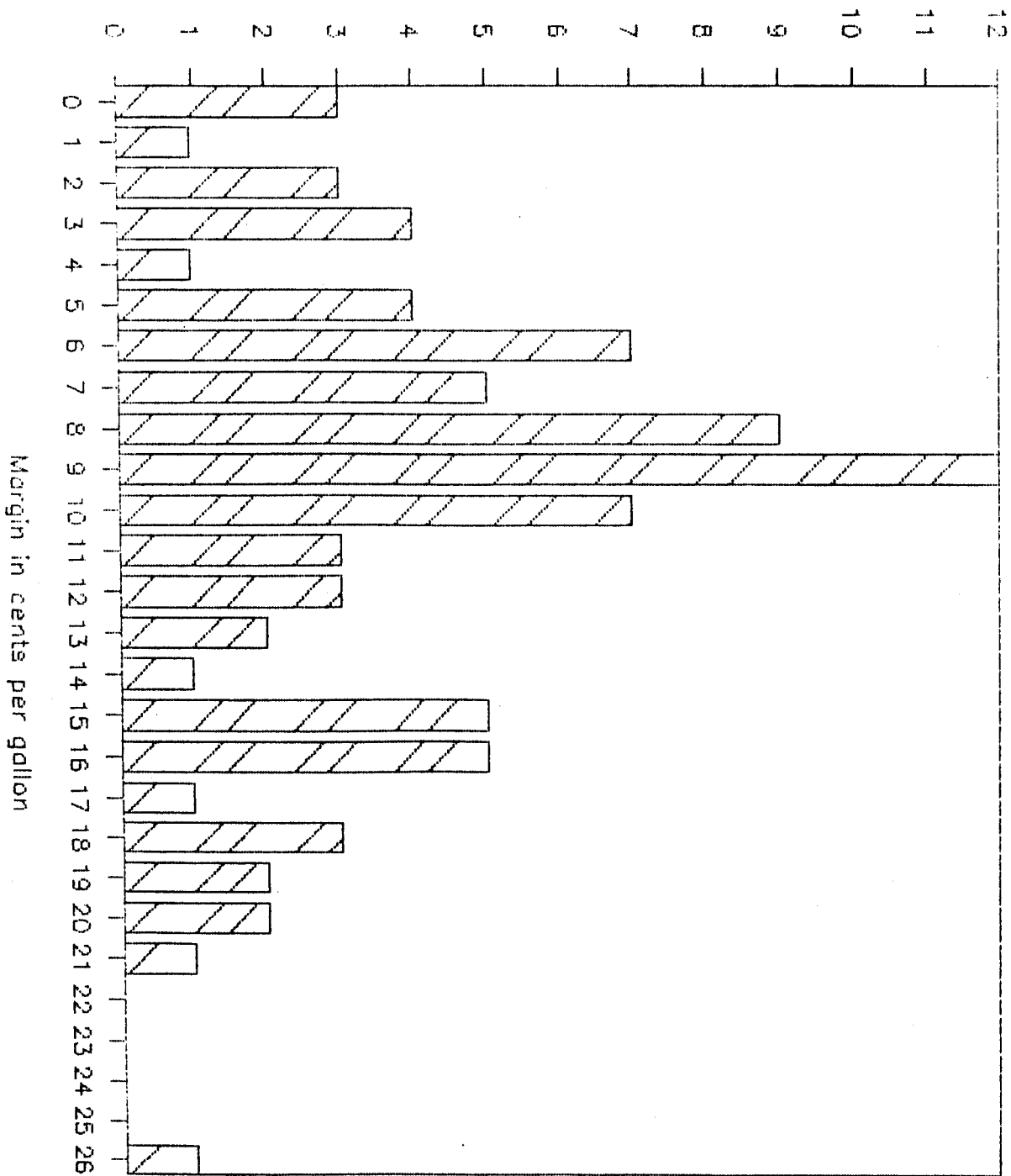
Number Of Cities With Respective Margin



Number Of Cities With Respective Margin

Margin on Diesel Fuel

in 85 Cities in Montana





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

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

**Full Service Stations:**

\$ Margin Needed	No. of Stations
.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:**

\$ Margin Needed	No. of Stations
.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

HOUSE BILL 538

AS REQUESTED BY THE JOINT INTERIM COMMITTEE STUDY ~~SENATE~~ BUSINESS & INDUSTRY  
THE SYSTEM OF MARKETING MOTOR FUEL IN MONTANA

EXHIBIT NO. 3

QUESTIONS AND ANSWERS

DATE 3/22/91

BILL NO. HB538

WHAT IS THE ISSUE BEING ADDRESSED? Motor fuel is sold at less than cost in Montana. Obviously this doesn't happen all the time or in every town. However, pricing motor fuel under cost with the intention of driving competition out of the market is a practice that has been employed in various markets throughout the state.

WHO DOES THIS AFFECT? First of all it affects small businessmen who can only sell below cost for a period of time before they go broke. The company selling fuel below cost will make money in other towns or on other businesses to offset their profit loss on fuel so they can stay in business. Second it affects consumers because competition is eliminated when the small businessman is out of business and the consumer has less choices for where they buy their fuel.

IS THIS PROBLEM UNIQUE TO MONTANA? No, it has been a problem in other states and they have passed legislation to protect the small businessman and the consumer. Twenty three states including Montana have general fair trade laws on the books prohibiting this kind of marketing. Additionally, eleven states have addressed petroleum products specifically. Several others are proposing legislation at this time.

WHY DOES MONTANA NEED ADDITIONAL LEGISLATION? The Unfair Trade Practices and Consumer Protection Act makes it illegal to sell products below cost. However, this act does not provide adequate definition of cost as it relates to motor fuels. Therefore enforcement is difficult at best. The Attorney General has indicated that with the current law his staff does not have adequate resources to research and litigate a complaint. He has indicated that better definition would certainly be helpful and would reduce the overall cost of litigating these situations.

HOW WILL HB538 WORK? HB538 makes it illegal for anyone to sell motor fuel at less than cost if the effect is to injure or destroy competition or substantially lessen competition. Cost is defined as the cost of the fuel at the terminal or refinery plus freight to the retail outlet plus the cost of operating the businesses selling the fuel. Operating cost is defined as the actual cost of operating the business, or in the absence of proof of a lesser cost it is determined to be 1% for wholesalers and 6% for retailers.

HOW WILL THIS AFFECT MOTOR FUEL PRICES IN MONTANA? If you believe that persons are currently upholding the law and not selling motor fuel for less than cost, then this bill will obviously have no effect. However, if you believe existing law is sometimes broken and that motor fuel will not be sold below cost if this bill is passed, you can expect to see prices come up in those illegal markets and down in markets where unfair competitors have been gouging customers to offset losses in below cost markets. Overall we do not expect the average price for Montana to change in the short term. If this bill is not passed we expect prices to go up over the long term as small businesses are run out of business and the few remaining marketers raise their prices in a noncompetitive marketplace.

PROPOSED AMENDMENTS TO HB 538  
Prepared by Beth Baker  
Department of Justice

Page 8, line 5: Strike lines 5 through 25.

Page 9, line 1: Strike lines 1 through 8, and lines 19 through 24.  
Insert:

NEW SECTION. Section 5. Codification instruction. [Sections 1 through 4] are intended to be codified as an integral part of Title 30, chapter 14, part 2, and the provisions of Title 30, chapter 14, part 2, apply to [sections 1 through 4].



**MONTANA PETROLEUM ASSOCIATION**  
 A Division of the  
 Rocky Mountain Oil and Gas Association

Helena Office  
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 Helena, Montana 59601  
 Phone (406) 442-7582  
 Fax (406) 443-7291

Janelle K. Fallan  
 Executive Director

**SENATE BUSINESS & INDUSTRY**

EXHIBIT NO. 5  
 DATE 3/22/91  
 BILL NO. HB 538

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  
 Senate Business and Industry Committee  
 March 22, 1991**

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 subcommittee 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.

**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 1, 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 8 and 9 (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 17-19, p. 2.)? Are 1% 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, and 3% on wholesale and 6% 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 22-25 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.

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. Even though fuel prices seem to have been coming down in recent weeks, I respectfully submit that your constituents may not support higher gasoline prices.

SENATE BUSINESS & INDUSTRY  
EXHIBIT NO. 5A  
DATE 3/22/91  
BILL NO. H8538

**ISSUE:**  
**BELOW-COST GASOLINE SELLING  
AND MINIMUM MARKUP**

**S**hould state legislatures and other governmental bodies become involved in setting the prices their constituents pay for gasoline? That's what some special interest groups want. They believe legislation should be enacted to prohibit selling gasoline "below cost" and require minimum markups for wholesale and retail businesses.

The forces involved in this proposed legislation—and how such laws might affect the cost of gasoline—are discussed inside.



MONTANA PETROLEUM ASSOCIATION  
*A Division of the  
Rocky Mountain Oil and Gas Association*

2030 11th Avenue, Suite 23  
Helena, Montana 59601  
(406) 442-7582

**Q** What is typically proposed in legislation to prohibit below-cost gasoline selling and require minimum markups?

**A** Generally such legislation would prohibit sales below "cost." Cost would be artificially defined and include an arbitrary cost of doing business. Legislation typically would permit below-cost selling to meet competition.

**Q** Who supports this legislation?

**A** This type of legislation is usually proposed by organizations of wholesale gasoline marketers, called "jobbers" or "distributors," and, occasionally, by groups of independent service station operators called "dealers."

**Q** How do they justify the need for such legislation?

**A** These groups claim they need these laws to prevent predatory pricing by, in some cases, larger marketers. Proponents claim convenience stores subsidize their gasoline sales with groceries. It's also alleged that refiners and some jobbers subsidize gasoline sales with upstream or wholesale profits. In other cases, the very efficient private brander is the target.

Some jobbers and dealers claim such legislation would keep large refiners and

suppliers from maintaining "monopolistic control" of the gasoline marketplace.

**Q** Is that a real danger?

**A** Not according to the Department of Justice. It ranks petroleum refining and retailing as "unconcentrated" industries. Petroleum refining, distribution, and retailing are all very competitive businesses.

**Q** Who opposes below-cost selling and minimum markup legislation?

**A** Petroleum refiners and their trade associations oppose such legislation. State departments of commerce and consumer protection offices have also opposed such laws. The Federal Trade Commission has spoken against such laws. And, the U.S. Department of Energy has said that such laws are designed to protect high-cost firms from competition, with the result being higher prices to consumers.

**Q** Why do refiners oppose this legislation?

**A** Three reasons. First, it has been shown to raise gasoline prices to consumers. Second, refiners believe legislation is discriminatory because it usually applies only to the petroleum industry. Third, refiners believe that laws such as the Petroleum Marketing Practices Act, the

Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Acts, and various state laws already provide adequate protection for petroleum marketers and consumers.

**Q** Are there any states with petroleum-specific below-cost selling and minimum-markup laws on the books?

**A** Yes. In recent years Alabama, Florida, Georgia, New Jersey, North Carolina, and Tennessee have enacted such legislation. The Georgia Supreme Court invalidated that state's law.

**Q** What have been the results of this legislation in these states?

**A** The American Petroleum Institute examined the effects of such legislation in Alabama, Georgia, and Florida (before the law was invalidated in Georgia). Gasoline prices in these states were compared to prices in neighboring states, both before and after the law was implemented.

The result was an increase in the price of gasoline to consumers, varying from 1.39 cents to 5.75 cents per gallon, depending on the state and who sold the gasoline, a refiner or a reseller. Refiners generally held their price increases below those of resellers.



**Q** How much did this legislation cost the states in the form of higher gasoline prices?

**A** In Alabama, the API estimated that below-cost selling legislation cost consumers approximately \$37 million during the 12 months following implementation. The costs to Georgia and Florida consumers were about \$43 million and \$57 million, respectively.

**Q** Does this legislation really protect oil jobbers and dealers?

**A** Not according to a Department of Energy study of deregulated gasoline marketing. It concluded that higher prices resulting from below-cost selling laws would not benefit dealers and jobbers in the long run. The reason is that higher-than-competitive prices would attract more competition, reducing the volume sold by existing marketers. Any increase in profits would quickly vanish due to lower volumes.

**Q** Doesn't below-cost selling legislation protect (or attempt to protect) the most inefficient marketers?

**A** That's what refiners and many petroleum marketers believe. In a competitive marketplace, there are always winners and losers. Those who operate efficiently earn a reasonable profit; those who operate inefficiently will likely falter unless they make their operations more efficient.

Statement of  
W. D. Dermott  
Consumer and Regulatory Affairs Manager  
for  
Exxon Company, U.S.A.  
to the  
Business and Economic Development Committee  
of the  
Montana Senate  
on  
House Bill 538  
March 22, 1991

Mr. Chairman, members of the Committee, my name is Bill Dermott and I am Exxon's Consumer and Regulatory Affairs Manager. I'm here today to express my company's opposition to House Bill 538, which would place a floor under prices paid by Montana motorists. 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.

The bill is unnecessary to protect the legitimate interests of Montana dealers and distributors.

Attempt to Guarantee Profits

The major premise behind this bill appears to be the assumption that there is something wrong with the way motor gasoline is priced in Montana. Exxon believes that the Montana motor fuel market is highly competitive and that this competition benefits the consumer. In a competitive marketplace, there will be winners as well as losers, those who operate efficiently earning a reasonable profit and those who operate inefficiently, eventually falling by the wayside. This is the basic nature of competition and its results have, over time, provided our citizens with the highest quality products and services at the lowest possible cost.

This bill intrudes upon the efficient working of the marketplace by placing a floor under the prices that retailers, wholesalers, and integrated refiners may charge their customers. In essence, retailers would be required to mark up the motor fuel they sell by at least 6% and wholesalers by at least 1%. Wholesalers and retailers would be required to abandon the market-based pricing which has benefitted consumers, and replace it with cost-based pricing, which 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 cost 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 by the U.S. Department of Energy concluded that such laws cost the consumer over \$600 million in 1982 alone.

A more recent study of the impacts of state below cost selling laws in Alabama, Georgia, and Florida was completed by the American Petroleum Institute in December 1987. Briefly, in a before and after comparison of retail gasoline prices in 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¢ and 2.1¢ per gallon. Prices charged by distributors rose between 1.9¢ and 5.7¢ 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 interests of independent motor fuel marketers. These merchants are already protected against unfair pricing or other unfair marketing practices of their suppliers by a large body of law including the Montana Unfair Trade Practices Act, the Sherman Act, Clayton Act, Robinson-Patman Act, and the Federal Trade Commission Act which prohibit actions to control prices and supply.

SENATE BUSINESS & INDUSTRY

EXHIBIT NO. 7

DATE 3/22/91

FILE NO. 46538

MONTANA TIRE DEALERS ASSOCIATION

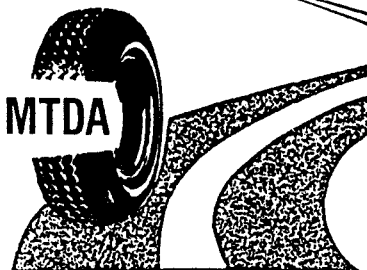
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*Service is our only product!*

TESTIMONY  
MARCH 22, 1991  
ROOM 410  
HB 538

SENATE BUSINESS AND INDUSTRY  
COMMITTEE

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 MANDATING CERTAIN PROFIT LEVELS AND MOVING FROM A FREE MARKET PLACE SYSTEM, TO A GOVERNMENT CONTROLLED MARKET PLACE IN THE SELLING OF MOTOR FUELS. THIS TYPE OF CONTROL HAS NOT WORKED IN THE PAST AND I SUGGEST TO YOU THAT IT WILL NOT WORK NOW ARE IN THE FUTURE.

THIS LEGISLATION HAS BEEN SET FORTH AS A PRO BUSINESS BILL TO PROTECT THE SMALL DEALER OF MOTOR FUELS. I SUGGEST TO YOU THIS IS A ANTI-CONSUMER BILL. LATTER I WILL SET FORTH REASONS FOR THIS OBSERVATION. HOWEVER, LET ME FIRST SHARE WITH YOU MAY 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 MANUFACTURERS TO ADVERTISE 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, WE WERE SELLING BELOW THE 5% LAW. THEY ASK FOR RECORDS TO SUPPORT THE PRICE AND OUR ACCOUNTANT WOULD PROVIDE THE NECESSARY RECORDS AND SEND THEM TO HELENA. THEN A LETTER WOULD BE RECEIVED FROM THE DEPARTMENT CLEARING US OF ANY VIOLATIONS. THIS WENT ON FOR A NUMBER OF MONTHS AND ONE DAY I CALLED THE DEPARTMENT AND ASKED WHAT WOULD HAPPEN IF WE SOLD BELOW THE 5% LAW AND THE RESPONSE WAS, A LETTER ASKING US NOT TO DO IT AGAIN. SOMETIME IN THE 1970'S THIS LAW WAS REMOVED FROM THE BOOKS. I RECOGNIZE THAT THIS PROPOSED LEGISLATION HAS A ENFORCEMENT PROCEDURE THAT WAS NOT IN THE LAW OF THE 1970'S.

LET ME SHARE WITH YOU SOME FACTS ABOUT THIS LEGISLATION AS I SEE THEM.

1. THIS IS A ANTI-CONSUMER BILL. WHY DO I SAY THIS ? LET ME SHARE WITH YOU TWO PHONE CALLS I RECEIVED ON THIS BILL. THE FIRST ONE WAS FROM A MEMBER WHO OPERATES A NUMBER OF C-STORES THAT SELL MOTOR FUELS. WE ARE OPPOSED TO PRICE CONTROLS, HOWEVER WE WILL

SIT ON THE SIDELINES ON HB 538. THE REASON GIVEN, OUR PROFITS WILL GO UP, IF HB 538 BECOMES LAW.

2. I RECEIVED A CALL FROM A WHOLESALE DISTRIBUTOR AND HE REQUESTED WE NOT OPPOSE THE BILL. THE REASON, THIS PROPOSED LEGISLATION WILL GIVE US ADDITIONAL PROFITS.

3. THIS LEGISLATION WILL GIVE THE TOWN PUMPS, THE SUPER AMERICAS, THE C-STORE CHAINS ADDITIONAL PROFITS, WHICH WILL ALLOW THEM TO CONTINUE TO EXPAND AND DOMINATED VARIOUS MARKETS. THE PROPONENTS OF THIS BILL SUGGEST TO YOU, THAT THEY WANT A LEVEL PLAYING FIELD. MY EXPERIENCE IN RETAILING, TAUGHT ME, YOU MAKE A LEVEL PLAYING FIELD BY LEARNING TO COMPETE IN THE MARKET PLACE AND CHANGE WITH THE CHANGING DEMANDS OF THE CONSUMER.

4. IT WOULD BE WISE TO REVIEW THE MILK CONTROL PROBLEM BEFORE YOU BRING ANOTHER COMMODITY, UNDER GOVERNMENT CONTROL. ACCORDING TO BUDGET FIGURES, IT COST THE STATE OF MONTANA \$290,000.00 DOLLARS TO PRICE CONTROL MILK. I WOULD SUGGEST TO YOU WITH OVER 1300 SERVICE STATION IN THIS STATE THE COST TO HANDLE MOTOR FUEL PRICE CONTROLS COULD EXCEED THESE FIGURES, VERY QUICKLY.

5. MANY OTHER MERCHANTS ARE COMPETING IN FIELDS WHERE PROFIT MARGINS ARE VERY THIN, SHALL WE ALSO ASSURE THEM A SET PROFIT MARGIN?? I WOULD SUGGEST TO THOSE WHO SUPPORT THIS LEGISLATION THAT THEY WOULD BE BETTER SERVE AND MORE PROFITABLE, IF THEY SPENT MORE TIME LEARNING TO COMPETE IN THE MARKET PLACE RATHER THAN LOOKING TO GOVERNMENT TO ASSURE THEM A PROFIT. I HAVE A BOOK WHICH I WOULD LIKE FOR REP. BRADLEY TO PRESENT TO THE SUPPORTS OF THIS BILL ENTITLED "STANDING TOE TO TOE TO COMPETITION." BY LEGISLATION OR REGULATIONS WE ARE ATTEMPTING TO REMOVE THE RISK OF DOING BUSINESS AND ASKING SOMEONE ELSE TO PAY THE BILL, AND IN THIS CASE THE CONSUMER WILL PICKUP THE TAB.

6. IN CLOSING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE I HAVE ATTACHED TO MY TESTIMONY COPY OF A LETTER FROM THE FEDERAL TRADE COMMISSION ADDRESS TO SENIOR ASSISTANT ATTORNEY GENERAL OF THE STATE OF WYOMING, WHICH DEALS WITH THIS VERY PROBLEM OF PREDATORY PRICING. I WOULD ASK YOU TO REFER TO PAGE TWO OF THIS LETTER PARAGRAPH 2. JUST ONE STATEMENT I WANT TO SHARE WITH YOU. "WE BELIEVE HOWEVER THAT PREDATORY PRICING IS DIFFICULT TO ACCOMPLISH AND IS THEREFORE QUITE RARE." THE LETTER HAS OTHER INTERESTING OBSERVATION ABOUT PREDATORY PRICING, WHICH I HOPE YOU WILL TAKE TIME TO READ. .

THE FREE COMPETITIVE ENTERPRISE SYSTEM BUILT THIS GREAT STATE AND OUR NATION. 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.

I URGE YOU TO GIVE HB538 A DO NOT PASS RECOMMENDATION.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THIS TESTIMONY.

F-011



BUREAU OF COMPETITION

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

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

Dear Ms. Woodhouse:

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

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

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

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

Gay Woodhouse, Esq.

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### I. General comments on below-cost pricing

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

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

These views are consistent with the Supreme Court's recent opinions in two cases involving predatory pricing, Matsushita Electric v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), and Cargill v. Monfort, 107 S. Ct. 484 (1986). These decisions contain the Court's first discussion of the issue since 1967<sup>2</sup> and reflect the substantial developments in the legal and economic analysis of predatory pricing that have occurred in the past two decades. The Matsushita case involved allegations that Japanese television manufacturers had engaged in a complicated conspiracy to raise prices in their home market and use the profits to subsidize predatory pricing here. A summary judgment raised the question of whether there were any genuine issues of fact for trial. Concluding that predation was unlikely on the facts alleged, the Supreme Court observed that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more

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

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rarely successful." 106 S. Ct. at 1357-58. The Cargill case raised similar issues. There a meat-packing company had challenged a merger between two of its competitors, alleging that this would give the merged firm the financial resources to engage in predatory pricing. Although relying on technical grounds to reverse a ruling for the plaintiff, the Court indicated more generally that the mere possibility of such harm, without any more specific evidence, was too speculative to support an injunction against the merger. The Court said that "[c]laims of threatened injury from predatory pricing must, of course, be evaluated with care," and that "the obstacles to the successful execution of a strategy of predatory pricing are manifold, and . . . the disincentives to engage in such a strategy are accordingly numerous." 107 S. Ct. at 495 n.17.<sup>3</sup>

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

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

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

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



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

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

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

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

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

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

## II. Specific questions

Our answers to your specific questions are as follows:

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

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

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

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

2. Please send a copy of your law.

Copies of the statutes cited above are attached.

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

Not applicable.

4. Do you consider your statute effective?

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

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

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

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

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

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

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

8. What are the penalties for selling below cost?

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

Gay Woodhouse, Esq.

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

a) Number of criminal actions?

Not within our jurisdiction.

b) Number of civil actions for injunction?

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

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

Not within our jurisdiction.

d) Description and number of other actions?

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

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

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

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

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

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

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

13. Has the constitutionality of your law been upheld?

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

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(1960) (Robinson Patman Act § 2(a)); Sears, Roebuck & Co., 258 F. 107 (7th Cir. 1919) (FTC Act); Standard Oil v. United States, 221 U.S. 1 (1911) (Sherman Act).

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

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

### Conclusion

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

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

Sincerely yours,



Jeffrey I. Zuckerman  
Director