

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON BUSINESS & ECONOMIC DEVELOPMENT

Call to Order: By **CHAIRMAN STEVE BENEDICT**, on January 28, 1993,
at 9:00 A.M.

ROLL CALL

Members Present:

Rep. Steve Benedict, Chair (R)
Rep. Sonny Hanson, Vice Chair (R)
Rep. Bob Bachini (D)
Rep. Joe Barnett (R)
Rep. Ray Brandewie (R)
Rep. Vicki Cocchiarella (D)
Rep. Fritz Daily (D)
Rep. Tim Dowell (D)
Rep. Alvin Ellis (R)
Rep. Stella Jean Hansen (D)
Rep. Jack Herron (R)
Rep. Dick Knox (R)
Rep. Don Larson (D)
Rep. Norm Mills (R)
Rep. Bob Pavlovich (D)
Rep. Bruce Simon (R)
Rep. Carley Tuss (X) (D)
Rep. Doug Wagner (R)

Members Excused: All Present

Members Absent: None

Staff Present: Paul Verdon, Legislative Council
Claudia Johnson, Committee Secretary

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

Committee Business Summary:

Hearing: HB 216, HB 237 AND HB 222
Executive Action: NONE

HEARING ON HB 237

Opening Statement by Sponsor:

REP. ED GRADY, House District 47, Canyon Creek, said he was asked
by the Department of Health and Environmental Sciences to sponsor

HB 237 for the purpose of clarifying public swimming and bathing places of licensed establishments. He said HB 237 will clarify the types of establishments that qualify for the reduced fee of licensure for a public swimming pool or bathing place. **Rep. Grady** distributed a fact sheet that shows the reduction of the annual fee for public swimming pool and bathing places from \$75 to \$50. The issue of business equity for similar services offered to the public and the same license fee reduction was raised by business operators within high districts with homes in operation with public campgrounds and trailer courts in conjunction with a public swimming pool. Clarification occurs for public accommodations on page 1, line 19 - 21. Estimated revenue impact based upon the 1992 licensure would be a revenue loss of approximately \$552 for local government and \$97 to the Department of Health. This would be a minimum revenue loss for local and state activities in a chain for responsiveness of government to equally apply the law to similar types of operations. HB 237 focuses on one issue and resolves it with very clear language. **Rep. Grady** said passage of HB 237 sends a message of fairness for all. **EXHIBIT 1**

Proponents' Testimony:

Mitzi Schwab, Department of Health and Environmental Sciences, said the department requested this bill on the issue of fairness and equity for the business community. During the 1991 Legislature there was testimony on this same bill regarding the fee reduction of \$25 for those who operated their pools in conjunction with previously licensed facilities of the Department of Health. She said the discussion was centered around hotels and motels and other businesses that serve tourists that come into the state of Montana. At the time of the discussion last session, it was not known how many businesses were associated with campgrounds and trailer courts that have pools. She said the department feels that by listing the types of establishments it would be fair to give these places the same fee reduction as the rest of the industry. She said by listing the types of licensed establishments that are already defined by statutes, it declares entirely which businesses receive the fee reduction rather than a policy interpretation by the department. **EXHIBIT 2**

Robert Dunlop, owner of trailer court, went through a list of fees he has to pay because of ownership. Food purveyor license for store \$60, campground/trailer court \$40, pool is \$75, because it is separate from a licensed public accommodation license. He said that the motel up the road has an enclosed pool and operates 12 months out of the year and pays only \$50, he only operates 3 months out of the year. He urged the committee to pass HB 237.

Stuart Doggett, Montana Innkeepers, stated they supported this bill in 1991 and they support it now. It is a good effort to clarify the law. He urged the committee's support in passage of HB 237.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

Rep. Pavlovich asked if the committee could change the fee from \$50 to \$25 for the campgrounds that only operate 3 months out of the year. Rep. Grady said this is a fairness issue to lower the fee from \$75 to \$50.

Closing by Sponsor:

Rep. Grady closed stating he didn't know why this wasn't taken care of in the last legislative session except there probably wasn't enough evidence or input to look into the difference of the types of pools. He urged the committee to pass HB 237.

HEARING ON HB 216Opening Statement by Sponsor:

REP. ED GRADY, House District 47, Canyon Creek, said HB 216 is an act to revise the motor fuel marketing unfair practices law and providing proposals to extend and amend the law in response to an interim study conducted in 1990 to look at fund pricing in Montana. Two bills were recommended out of this study HB 538 sponsored by Dorothy Bradley and HJR 12. The intent of the law was to prevent the predatory pricing of motor fuels when the intent is to drive another competitor out of business. Retail motor fuel marketing is a very competitive business both in Montana and throughout the country. Competition is encouraged by the fact that there are many sellers who are concerned and try to maintain or increase their sales volume. The business of selling gas is a very narrow profit margin and voluntarily some large companies have chosen to drive their competitors out of business. The interim committee found pricing practices that were occurring and were questionable. HB 538 that passed last session by a 63 to 31 margin in the House and passed the Senate with a termination clause attached. HB 216 removes that termination clause and offers language to strengthen the apportionment which would be plain. Rep. Grady distributed a report prepared by Paul Verdon for the 52nd Legislature, and a copy of amendments. EXHIBITS 3 and 4

Proponents' Testimony:

Steve Visocan, wholesale and retail of motor fuel, Helena, MT said the retail motor fuel marketing act became law in the last session because large companies in Montana were selling gas below cost in order to drive their competition out of business. He said the way they do this is to take the price down in one market to drive competitors out and raise prices in other markets or of products to offset the undercut and would still be able to

maintain their business without a loss. **Mr. Visocan** said the main content of this bill states that a wholesaler or retailer may not sell motor fuel at less than the delivered costs of the motor fuel plus the cost of doing business if the effect is to injure or destroy competition. The bill defines the delivered cost of motor fuel as the cost that is paid for the fuel plus the cost of freight to bring it from place of outlet, plus taxes. He said the bill sets a prima facie case that states in the absence of proof of a lesser cost one percent for the cost of doing business as wholesaler, and six percent for the cost of doing business as a retailer. **Mr. Visocan** said in a case in Helena, Judge Sherlock pointed out the difficulty in defining what is competition. He made a recommendation or suggestion in his decision that this might be changed if the Legislature was so inclined. He urged passage of HB 216.

Ronna Alexander, Executive Secretary of the Petroleum Marketers Association, said they are the wholesalers and distributors of petroleum products in Montana. In addition to their bulk operations, most of the individuals own their own retail station. She said there are currently 100 members in the association who are also the majority of the distributors in the state which include most of the licensed distributors. She talked to the committee about the language and additions made to the bill and why they are needed. She referred to the court case here in Helena that **Mr. Visocan** alluded to regarding Lewis and Clark County vs. Gasmat. Judge Sherlock dismissed the complaint, not because sale below costs was occurring, but the state had failed to prove the injury to competition. **Ms. Alexander** said that Judge Sherlock recommended that the Legislature amend the act and he cites the Oklahoma law which is similar to Montana's to give "rise to an inference" of damaged competition. She said this is alleviating the burden of proof and making it more enforceable. **Ms. Alexander** distributed a court case decision from the supreme court of Alabama which ruled that injury to a competitor is sufficient to establish injury to competition. This is a landmark decision that was received in January, and reinforces what Judge Sherlock was concerned about. **EXHIBIT 7**

Beth Baker, Department of Justice, said last session the attorney general appeared in support of HB 538 in response to unfair competition in the retail motor fuel industry. Since the law was enacted, the department has provided 15 written responses to inquiries about the law and dozens of telephone calls about potential violations. Those inquiries have dwindled to a trickle since Judge Sherlock's decision which basically states that the act is unenforceable as presently written. She said the department is in support of the termination of the sunset provision because there has not been enough experience to know if it really works. The department has not participated in any enforcement of this act because the fiscal note from the last session didn't leave them the capabilities to enforce it.

Bill Nooney, President of Montana Petroleum Marketers Association, reiterated previous testimony that the association supports HB 216.

Larry Fasbender, Lobbyist for Montana Council of Cooperatives, said he was asked by the cooperatives to inform the committee and members they support HB 216 and the amendments.

Rep. Grady asked the people in the audience who didn't get up to testify for HB 216 if they would stand to show the committee their support.

Opponents' Testimony:

Bill Dermott, Marketing Director for Exxon Company U.S.A., said that Exxon is in opposition to HB 216. He distributed written testimony. **EXHIBIT 8**

Janelle Fallan, Executive Director of Montana Petroleum Association, said that the major oil companies do not own or operate gas stations in Montana. Anyone operating under the sign i.e. Exxon and Conoco is not owned by the corporations of the same names. The refineries in Montana are suppliers and do not market directly to the public. She said this is an important point because, who are the big companies and who are the little companies. The business of selling motor fuel in Montana is in the hands of wholesalers and retailers, the people who testified in support. She said there are many ways to compete in this highly competitive market, some by selling videos, others might have slot machines, and etc.. She said the people that testified in support of this bill are not the consumers, but the people that are protected in their business dealings by this legislation who are guaranteed a "floor" of their prices. She distributed several clippings from the Billings Gazette that said state prosecutors have decided that gasoline has to cost more at Billings pumps (see exhibit 9). She said her membership does not benefit from this legislation, nor the price the refineries charge. She distributed a Missoulian newspaper article by Robert G. Natelson, a professor of law at the university. She read "the Retail Motor Fuel Marketing Act is an anti-consumer price-fixing arrangement of the kind generally illegal under federal antitrust law", (see exhibit 10). **Ms. Fallan** closed reading a quote from Theodore Roosevelt, "It is not the function of government to see that every citizen is dealt a winning hand, it must be government's role though to assure the deal is fair". **EXHIBIT 9 and 10**

Carl Schweitzer, Montana Contractors Association, is not in support of HB 216. He said the contractors use a lot of fuel in their operations and would like to have a fair and competitive market.

Questions From Committee Members and Responses:

Rep. Brandewie asked about the study on the cost of \$9 million to the consumers of Montana. Bill Dermott said he would make this available to the committee.

Rep. Simon asked Rep. Grady if he could take one customer away from the competitor down the street would it be injuring the competition. Rep. Grady said yes. In some cases it would be an unethical practice to drop the price below cost. Rep. Simon said he was not pertaining to unethical practice. Rep. Grady replied no, that it happens all the time. Rep. Simon wanted to know how many stations have gone out of business in the last 10 years. Rep. Grady said a number of stations have gone out of business in the rural areas, but not so much in the city.

Rep. Larson asked Beth Baker how many cases have been dropped by county attorneys because of this legislation and what are the county attorney's position on this legislation. Ms. Baker said there haven't been many cases filed, and she only had knowledge of the Gasmat case. She said a few of the reasons for this are; 1) cases like this are time consuming to enforce; and 2) the law was written to require the injured competition to come up with proof of injury unless there is some kind of inference that can be drawn by the below cost selling sale. She said this is not a novel piece of legislation, Montana has a Trade Practice Act that prohibits below cost selling of any article of commerce, particularly with the petroleum industry it is difficult to determine what the cost is. The law was designed to allow that kind of proof to be established.

Rep. Larson asked Bill Dermott about the study that showed Montana's prices were 3¢ gallon higher than Wyoming. He wanted to know about the study and to bear in mind that Montana is 11¢ higher on gasoline tax? Mr. Dermott said they contract with Lundberg Survey out of California, a nationwide firm that is in the business of retail and wholesale price surveys. The firm used the Billing's market to look at the retail prices, then as a control market the retail prices in the Cheyenne, Wyoming area who doesn't have a low cost selling legislation like the type of prohibitions here in Montana. He said they look at the raw data and adjust for the fact that there is a difference in state excise tax in Cheyenne which is 9¢ a gallon compared to Montana's twenty-one cents a gallon. He said when those figures are taken out and they look at the movement in retail prices over an average of twelve months, the prices in Montana are about 2.8¢ higher than Cheyenne, WY. Mr. Dermott said one of the effects with HB 538 and current legislation, is on a broad basis across the state of Montana people tend to pay more. The reason for this is when a floor is set on prices and sell at wholesale which is one percent or retail which is six percent higher. He said it wouldn't reduce prices or competition and have some upward drive on the market which is hard to measure. He said they thought it was important since they had given the indicator this could

happen and to take a look at it because of the time frame with Legislature.

Rep. Ellis asked **Chuck Brooks** to answer the same question. **Mr. Brooks** said he opposed this legislation in the 1991 Legislature. He has clients in the business who informed him to remain neutral on this hearing today. He said the reason is because they have seen their profits go up very nicely and he was here as an observer.

Rep. Pavlovich asked **Janelle Fallan** about the "big guys" and "little guys" that she had referred to in previous testimony. He said that years ago there were stations that just sold gas and oil and serviced a person's car, now there are convenient stores that sell everything and have poker and keno machines along with the gas and that makes them the big guys, is that fair to the "little guys". Shouldn't they be able to set their prices any way they want? **Ms. Fallan** replied it is their choice if they chose to compete. She said that no one is telling the "little guy" that they cannot put in a laundromat or vacuum cleaner to clean cars. It is a competitive world whether gas is being sold or renting movies. The way the consumer is best served is if the people have the opportunity to compete the way they can best serve their customers. She said, how can a person tell the difference between the "big guy" and the "little guy". This bill is protecting all of them, it is placing a floor under the prices that all stations charge, big or little.

Rep. Brandewie asked **Janelle Fallan** for information of delivery price per gallon per mile on petroleum products in Montana? **Ms. Fallon** said she would get this information to the committee.

Rep. Bachini asked **Beth Baker** if she could get information to the committee on what the cost is to the county attorney and the Department of Justice to follow up on case of the Gasmat. **Ms. Baker** said this bill allows several different means of enforcement: 1) it allows a private action by the injured person; and 2) allows enforcement by the Department of Justice for the county attorney. She said the bill allows the recovery of attorney fees so the injured party is spared the expense if the lawsuit is carried out.

Rep. Simon listed a number of businesses in Helena that are fierce competitors with each other with many different products. He asked **Ronna Alexander** if she thought in order to protect the merchants that there should be laws that prohibit sales below cost on each product and on other things that guarantee a markup on every single retail product out there? **Ms. Alexander** said there is currently an Unfair Trade Act that prohibits that kind of marketing in all industries. The problem with motor fuels is defining what that cost is.

Rep. Cocchiarella said she was confused by the opponent's testimony in regard to Judge Sherlock's decision. **Ronna**

Alexander said she would get that decision to the committee members. She noted that during her previous testimony regarding the decision, she quoted exactly what Judge Sherlock had said. The fact where Judge Sherlock states that the Legislature may want to amend this act to strengthen it, meant to her a recommendation to do that.

Rep. Mills asked **Beth Baker** with the present laws that Montana has why can't they be applied here and why is there a need for a new law instead of fixing the old law if it isn't working? **Ms. Baker** said this law was studied by an interim committee who determined it would be of benefit of all concerned if the dept. could spell out what the cost was, delivered cost, etc. She said this bill does make it more clear. The current statute could have been amended, but would have resulted in what is before the committee now. **Rep. Mills** asked if one gas station has a car wash and the one down the block doesn't, isn't that part of an unfair practice? **Ms. Baker** said it depends on the reason it is done. The Anti Trust Laws do not prohibit activity unless it injures competition. She said one thing the committee could consider with this bill if they are too concerned, is to leave out the amendment having to do with injury to competitors, but retaining the part pertaining to prim facie case of injury to competition. All Anti Trust Laws pertain to one thing, destroying competition that results in driving prices up.

Rep. Simon asked if it is true that the difficulty in the enforcement with regard to the Unfair Practice Act, that a person cannot prove the intent of sales below cost to destroy competition. **Beth Baker** said one of the grievances is the overall failure to enforce the Anti Trade Practice Laws.

Closing by Sponsor:

Rep. Grady closed stating that one of the key points was Judge Sherlock's decision to take the case because he felt that unfair practices were taking place, but could not rule on the issue at that time because he said the Legislature needs to define and make clear language as to what is actually hurting that individual or business. The amendments that are different came out in the last session and felt it should be addressed in this bill. He said the attorney would not have taken the case if he had felt there wasn't any wrong doing. **Rep. Grady** stated that he did not know of any laundromat connected to a gas station and felt it was not a good comparison. Gas is a necessity that people need to get to work, etc. He urged the committee for a do pass recommendation on HB 216.

HEARING ON HB 222

Opening Statement by Sponsor:

Rep. Wayne Stanford, House District 62, Stevensville, said HB 222 is an act revising licensure requirements for persons selling,

installing, and servicing fire protection equipment. He said there is a fiscal note to go with this bill. He said it has a question mark at the bottom of it, and hoped it would be answered with the following testimony. The fire marshal office has been required since 1967 to license persons who service and install fire extinguishers, fire alarm systems and fire extinguishing systems. The licensing system that is in place is outdated and the fire marshal's rule making authority needs to be clarified. The license program was studied by the fire prevention investigation advisory council; after receiving comments by the industry, the council decided to include licensing of businesses that sell, service, and install fire protection system. This bill does not apply to businesses that sell only fire extinguishers. The purpose of this bill is to update the statutes pertaining to licensing the fire protection equipment businesses, and clarify the department's rule making authority with respect to licensing, and provide a fee structure that will allow the fire prevention investigation bureau to ensure the qualification of license applicants maintain the fire safety standards required by law.

Proponents' Testimony:

Béth Baker, Department of Justice, said HB 222 is a request by the department and represents a product of considerable effort by the state fire prevention and investigation advisory council, the Department of Justice, and representatives of the respective industry. The bill is designed to modernize and streamline the licensing function of the state fire marshal's office with respect to fire prevention equipment. She distributed a fact sheet briefly describing the history of the program and the reason for the proposed changes. She pointed out the rule making authority to implement the licensing program. She said both the rule making authority and the misdemeanor penalties which are set forth in section 1 were in the 1967 statutes that created this licensing program. When the fire marshal's statutes were split and re-codified, the rule-making provision and misdemeanor penalties went into one chapter, and the licensing program into a different chapter. She addressed the fiscal note that states the bill does not create a special revenue account to account for the fees. She said the bill may need to be amended at a later date; she said they do have another bill before the House Taxation Committee that does create a special revenue account. She said it is their intent to coordinate this bill with the one in taxation. If it fails, there would have to be some appropriation from some other source, i.e., general fund etc. **EXHIBIT 11**

Mike Maroney, Palmer Electrical Contracting, Missoula, said he has been in the fire alarm business for 25 years and is a member of the IBEW, and disaster supervisor for Seattle, King County, Washington. In that capacity he responds to a lot of fires. He said one of the last fires he responded to in Seattle there were 5 deaths, three children and two adults, because the fire alarm system was put in by an unlicensed installer. In the last month

he found two nursing homes in the Missoula area that do not meet the electrical codes nor were wired properly. He is in favor of HB 222, but feels it needs to go further with the fire alarm licensing by placing it under the state licensing electrical board. He said in Washington, each city has their own licensing, not state controlled and their licensing fees are much higher than Montana.

Kelly Flaherty, Leasing, Inc., Helena, said they have been in the fire protection business for 27 years. She said they specialize in wet and dry chemical systems that are installed in kitchen exhaust hoods, commercial kitchens, offroad vehicles, etc. She said this legislation will put an end to the uninsured, untrained and unprofessionals in the state. She said the fire prevention and investigation bureau needs this money and legislation if they are to protect the consumer from the fraudulent practices that are now occurring in Montana. She urged the committee to pass HB 222.

Ben Loranzo, Missoula Fire Equipment, said he is a state representative for NAFD (National Association Fire Equipment Distributors). Less than fifty percent of his business is hand portable fire extinguishers. He said Montana needs this licensing law to govern not only the service, but the sale of fire extinguishers. He said HB 222 is way out of line in its fees for the sale of the fire extinguisher industry. He said the fees should be looked at by the committee, but he does favor the rest of the bill.

Ken & Terry Olson, Northern Tier, York, said they are the new kids on the block. They have seen portable fire extinguishers date back to 1946 that have not been checked and a lot more that have factory seals that are 18 and 19 years old. He said there isn't anyone out there to check if the work is being done properly. He said if they are to put this law in they need the fee to fund it to have the ability to inspect and make sure the job is being done right. He urged passage of HB 222.

Daniel Figgins, Bozeman Fire Marshal, said he started back in 1965 when most fireman fought fires. As time went on, their job has integrated into more of a code enforcement and regulatory agency. He said in reading the codes today, he has found ambiguity as far as uniform fire codes and building codes. He said this bill would give the fire marshals some credibility, legitimacy and consistency to determine who is qualified to do this type of work. He urged the committee to pass HB 222.

Lynn Perkins, Fire Suppressant System Inc., has helped with this kind of state legislation in the states of Texas and Tennessee. He is in favor of HB 222, providing the money be used to implement enforcement.

Vern Erickson, Montana State Firemen's Association, said they support all the previous testimony heard and urged the committee's to pass HB 222.

Bob Murphy, Business Manager of Local 185, said he is in favor of HB 222. He said they need this legislation for licensed personnel only to work on the fire alarm systems.

Larry McCann, Fire Marshal for the city of Billings, said he was the chairman of the committee that put HB 222 together. He urged the committee's support for this bill.

Lyle Nagle, Member of the Fire Prevention Investigation Bureau Advisory Board, said at the Chief's annual conference last September the resolution was introduced and passed unanimously to urge this committee to pass this legislation.

Bud Ladd, Bud's Extinguisher Service, Helena, said he supports this bill, but not in the way it was written, because there are some things in it that are wrong. He had asked the state Fire Marshal's Office how many shops they had in the state of Montana and they didn't know, he wanted to know how many people were licensed and what they are licensed for, and they didn't know. He said they have the information, but cannot get it. He wanted to know how the fees are based when they do not know how much they will bring in. He was told they had 700 shops, but the fiscal statement says it is based on 350 shops. This bill was designed for three things: 1) sprinkler systems; 2) fire alarm systems; and 3) overhead systems. He is a one man shop and has to pay a fee of \$500, a shop with three licensed people pays a total of \$500. He feels the same way as Mr. McCann who said, let the fees be charged accordingly to the work that they do and not a flat charge. He said this bill should be based on each and every licensed holder and a charge for each licensed person.

Informational Testimony:

A fax was received from C. John Hirschfelder, President of Northern Sound & Communication, in favor of HB 222. **EXHIBIT 12**

Opponents' Testimony:

Jack Martinz, Superior Fire Apparatus, said he is an opponent with the way the fees are, and the way the bill is written is another example of the anti-business climate in the state of Montana. He said Montana doesn't need more fees or ways of circumventing I-105, just more people paying the existing taxes that Montana has. **Mr. Martinz** said as he reads the bill he cannot believe what it states in regard to fees; it states the fee may not exceed \$50 for each license, permit or certificate issue; there's an annual fee of \$300 for license; an annual \$250 fee for each endorsement required; the fees may not be pro-rated in the year of the first application; and there's an additional

fee equal to the cost of processing the application. He feels the problem has not been properly addressed.

Sonny McLain, Big Sky Fire Equipment, Lewistown, said he opposes the bill the way it is written and the way the fees are charged. He asked that HB 222 be killed.

Questions From Committee Members and Responses:

Rep. Simon asked about the people that have to take the tests as an individual how does a corporation take a test, is it individuals being licensed or an entity? **Mr. McCann** said this could be addressed better, but each person has to take the test to receive their license.

Rep. Simon said the fiscal note indicates that the current license fee is \$700, and the maximum fee under current law is \$50. He said when only 14 entities are being licensed, under the fiscal note it anticipates as much as 350 entities will have an annual license fee of \$300, and asked if the department was going to charge \$2, \$350 or \$50 for the 14 entities. **Beth Baker** replied the fiscal note is misleading because the department hasn't had an annual renewal. She said there are 758 more licensees not on the log because the law in the past has not provided the department with rule making authority. She said it may be more feasible to have a lesser fee for the portable fire extinguishers because they are not involved in businesses.

Rep. Sonny Hanson asked **Larry McCann** if the fire marshals in the communities at this time have the authority to go in and inspect the various buildings and check to see if the pressurized extinguishers are up to date. **Mr. McCann** said that was correct.

Rep. Stella Jean Hansen asked **Jack Martinz** what he thought would be an appropriate fee. **Mr. Martinz** said he wasn't in a position to answer for everyone else, but he felt it should be a punitive fee.

Chairman Steve Benedict announced that he is placing HB 222 into a subcommittee. He said **Rep. Brandewie** would chair, and **Rep. Larson** and **Rep. Bachini** would join him.

Closing by Sponsor:

Rep. Wayne Stanford closed. He said it is good to have this taken care of by the Legislature rather than city by city. Local fire chiefs are doing the inspections at this time, but have very little training.

ADJOURNMENT

Adjournment: 11:00 A.M.



STEVE BENEDICT, Chair



CLAUDIA JOHNSON, Secretary

SB/cj

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

ROLL CALL

DATE

1-28-93

NAME	PRESENT	ABSENT	EXCUSED
REP. ALVIN ELLIS	✓		
REP. DICK KNOX	✓		
REP. NORM MILLS	✓		
REP. JOE BARNETT	✓		
REP. RAY BRANDEWIE	✓		
REP. JACK HERRON	✓		
REP. TIM DOWELL	✓		
REP. CARLEY TUSS	✓		
REP. STELLA JEAN HANSEN	✓		
REP. BOB PAVLOVICH	✓		
REP. VICKI COCCHIARELLA	✓		
REP. FRITZ DAILY	✓		
REP. BOB BACHINI	✓		
REP. DON LARSON	✓		
REP. BRUCE SIMON	✓		
REP. DOUG WAGNER	✓		
REP. SONNY HANSON, VICE CHAIRMAN	✓		
REP. STEVE BENEDICT, CHAIRMAN	✓		

HB 237 FACT SHEET
PUBLIC SWIMMING POOL AND BATHING PLACE LAW REVISION

1. Decreases annual license fee from \$75 to \$50 for public swimming pool and bathing place establishments operating in conjunction with a licensed campground, trailer court, work camp, youth camp, hotel, motel, roominghouse, boardinghouse, retirement home, or tourist home.

Notes:

"Public accommodation" language in current law, 50-53-203 (1) (b) is undefined within public swimming pool and bathing place laws. Addition of a list of specific licensed establishments defined by law clarifies which establishments receive a license fee reduction.

2. Public Swimming Pool Licensure Fee Facts

- a. 85% of annual public swimming pool and bathing place license fees are deposited in the state special revenue account (local board inspection fund) for reimbursement to local government for inspection and enforcement.

Local government receives \$63.75 of a \$75 licensure fee.
Local government receives \$42.50 of a \$50 licensure fee.
Local revenues are reduced by \$21.25 for each establishment reduced license fee.

- b. 15% of annual public swimming pool and bathing place license fees are deposited in the state special revenue account (DHES) for state program support (travel, training, contracted services, rules, inspection forms, supplies, etc.)

DHES receives \$11.25 of a \$75 licensure fee.
DHES receives \$7.50 of a \$50 licensure fee.
DHES revenues are reduced by \$3.75 for each establishment reduced licensure fee.

3. Annual revenue impact estimate

Based upon 1992 establishment licensure information,
approximately 26 additional establishments would receive an annual licensure fee reduction.

Estimated total local government revenue reduction would be \$552.5 with an estimated maximum revenue loss for any county of \$85.

Estimated total DHES revenue reduction would be \$97.50.

DEPARTMENT OF
HEALTH AND ENVIRONMENTAL SCIENCES

COGSWELL BUILDING



STATE OF MONTANA

HELENA, MONTANA 59620

Testimony Concerning House Bill 237
Before the House Business and Economic Development Committee
January 28, 1993

Chairman Benedict and Committee Members:

Licensure of public swimming pools and bathing places was authorized in the 1991 Legislative Session, becoming effective in calendar year 1992. A public swimming pool or bathing place operator's licensure application fee was set at \$75. The current law gives a license fee break of \$25 to swimming pools or bathing places that are operated in conjunction with a "public accommodation", a phrase that is not defined in the swimming pool licensure laws.

The license fee break of \$25 was requested by the Montana Innkeepers Association for public swimming pools or bathing places operated in conjunction with lodging establishments already licensed and inspected through the Department of Health and Environmental Sciences and local public health agencies.

During the 1991 Legislative Session hearing process, no one represented the operators of public swimming pools or bathing places operated in conjunction with campgrounds, trailer courts, work camps or youth camps. By type of licensed operation, these establishments offer lodging to the public, similar to services offered by hotels, motels, and tourist homes.

To clarify which establishments receive the license fee break of \$25, the Department of Health and Environmental Sciences request deletion of the phrase "public accommodation" and insertion of the list of specific types of establishments which are already defined and licensed under 50-51 and 50-52, MCA.

The Department of Health and Environmental Sciences requests the committee to approve this bill on the basis of equity to the business community. A "do pass" committee report would be appreciated.

Sincerely,

Mitzi Schwab, Chief
Food and Consumer Safety Bureau
Health Services Division
444-2408

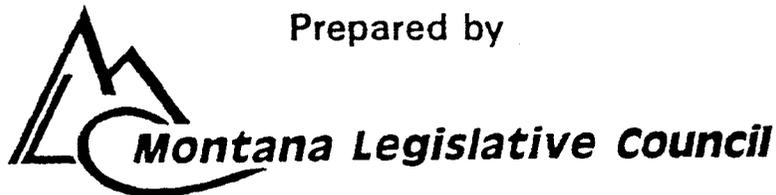
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MOTOR FUEL PRICING PROBLEM

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October 1990

Prepared by



Montana Legislative Council
State Capitol, Room 138
Helena, Montana 59620
(406) 444-3064

EXHIBIT 4
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Amendments to House Bill No. 216
First Reading Copy

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

Prepared by Greg Petesch
January 27, 1993

1. Page 1, line 24.
Following: "to"
Insert: "injure or destroy competitors or to"

2. Page 2, line 6.
Following: "to"
Insert: "injure or destroy competitors or to"

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Part 8

Retail Motor Fuel Marketing

30-14-801. (Temporary) Short title. This part may be cited as the "Montana Retail Motor Fuel Marketing Act". (*Terminates July 1, 1993—sec. 9, Ch. 499, L. 1991.*)

History: En. Sec. 1, Ch. 499, L. 1991.

Compiler's Comments

Effective Date — Termination: Section 9, Ch. 499, L. 1991, provided: "[This act] is effec-

tive on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

30-14-802. (Temporary) Purpose. The legislature recognizes that independent and small dealers and distributors of retail motor fuel are vital to a healthy, competitive marketplace and are unable to survive financially in competition with subsidized, below-cost pricing at the retail level by dealers and distributors who have other sources of income. The legislature believes that subsidized, below-cost pricing is a predatory practice that is not conducive to fair trade. The legislature finds that below-cost pricing laws are effective in protecting independent and small retailers and wholesalers in other jurisdictions from subsidized pricing, which is inherently unfair and destructive, reduces competition in the motor fuel marketing industry, and is a form of predatory pricing. The purpose of this part is to prevent and eliminate predatory pricing of retail motor fuel. (*Terminates July 1, 1993—sec. 9, Ch. 499, L. 1991.*)

History: En. Sec. 2, Ch. 499, L. 1991.

Compiler's Comments

Effective Date — Termination: Section 9, Ch. 499, L. 1991, provided: "[This act] is effec-

tive on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

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

(6) A wholesaler or retailer may advertise, offer to sell, or sell motor fuel at a price made in good faith to meet the price of a competitor who is selling the same or a similar product of like grade and quality. The price of motor fuel advertised, offered for sale, or sold under the exceptions in subsection (4) may not be considered the price of a competitor and may not be used as a basis for establishing prices below cost, and the price established at a bankruptcy sale may not be considered the price of a competitor under the provisions of this section.

(7) If a wholesaler sells motor fuel to another wholesaler, the former is not required to include in his selling price to the latter the cost of doing business as defined in 30-14-803, but the latter wholesaler, upon resale to a retailer, is subject to the provisions of this section. (*Terminates July 1, 1993—sec. 9, Ch. 499, L. 1991.*)

History: En. Sec. 4, Ch. 499, L. 1991.

Compiler's Comments

Effective Date — Termination: Section 9, Ch. 499, L. 1991, provided: "[This act] is effective on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

tive on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

30-14-805. (Temporary) Voidance of existing contracts. A contract, express or implied, made by a person in violation of a provision of this part is void and no recovery may be had on the contract. (*Terminates July 1, 1993—sec. 9, Ch. 499, L. 1991.*)

History: En. Sec. 5, Ch. 499, L. 1991.

Compiler's Comments

Effective Date — Termination: Section 9, Ch. 499, L. 1991, provided: "[This act] is effective on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

tive on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

30-14-806. (Temporary) Penalty — disposition — relief. (1) A violation of 30-14-804 is an unfair trade practice.

(2) Upon presentation by an offended party of evidence of a violation of 30-14-804, 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 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, is liable for attorney fees, and is subject to injunctive relief.

(4) The department of justice or a county attorney may bring an action for a violation of 30-14-804. 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 county where the action was brought.

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

(6) A person injured as a result of an act or practice that violates 30-14-805 may bring a civil action for appropriate relief, including an action for declaratory judgment, injunctive relief, and actual damages. (*Terminates July 1, 1993—sec. 9, Ch. 499, L. 1991.*)

History: En. Sec. 6, Ch. 499, L. 1991.

Compiler's Comments

Effective Date — Termination: Section 9, Ch. 499, L. 1991, provided: "[This act] is effective on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

tive on passage and approval [approved April 19, 1991] and terminates July 1, 1993."

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FILE NO. 216



DEC 18 1992
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SUPREME COURT OF ALABAMA

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1911143

McGuire Oil Company, et al.

v.

Mapco, Inc., and Mapco Petroleum, Inc.

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

(CV-91-7235)

KENNEDY, JUSTICE.

McGuire Oil Company, Delta Oil Company and Diamond Gasoline Stations, sued the defendants, Mapco, Inc., and Mapco Petroleum, Inc., alleging violations of the Alabama Motor Fuel Marketing Act ("AMFMA"), §8-22-1 et seq., Ala Code 1975. Berwick Oil Company subsequently replaced Delta Oil by stipulation of the parties. The

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defendants removed the case to a federal court, based on diversity grounds, and counterclaimed against the plaintiffs, claiming violations of the Sherman Anti-Trust Act, 15 U.S.C. § 1 et seq.; the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 et seq.; the AMFMA; and the Alabama Unfair Trade Practices Act, § 8-10-1 et seq. The parties stipulated to the dismissal of Mapco, Inc.

The district court entered a summary judgment in favor of the defendant on the plaintiffs' AMFMA claim and entered a summary judgment in favor of the plaintiffs on the defendant's counterclaims. The plaintiffs filed a motion for sanctions under Rule 11, F.R.Civ.P., which was denied by the district court. The Eleventh Circuit Court of Appeals affirmed the district court's grant of the summary judgment on the defendant's counterclaim and the denial of the plaintiffs' Rule 11 motion. The Eleventh Circuit certified to this Court the following four questions of law:

- "(1) DOES THE AMFMA REQUIRE INJURY TO COMPETITION AS A PREREQUISITE TO LIABILITY UNDER THAT ACT, OR DOES INJURY TO COMPETITORS SUFFICE TO ESTABLISH LIABILITY?
- "(2) IF INJURY TO COMPETITION RATHER THAN TO COMPETITORS IS A PREREQUISITE TO LIABILITY UNDER THE AMFMA, WHAT IS THE RELEVANCE OF A DEFENDANT'S MARKET SHARE IN DETERMINING THE EXISTENCE OF INJURY TO COMPETITION?
- "(3) IS LACK OF INTENT TO INJURE COMPETITION AN AFFIRMATIVE DEFENSE, PERMITTING SUMMARY JUDGMENT ON THAT ISSUE UNDER THE AMFMA?
- "(4) CAN A DEFENDANT UNDER THE AMFMA INVOKE THE 'MEETING COMPETITION' DEFENSE CONTAINED IN SECTION 8 OF THAT STATUTE WHEN THE DEFENDANT PRICES MOTOR FUEL ONE OR TWO CENTS BELOW THE PRICE SET BY ITS COMPETITORS?"

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FACTS

In order to facilitate a better understanding of the issues before us, we must give a brief explanation of the petroleum industry and the parties involved. Most Alabama businesses selling gasoline are "jobbers" or "dealers." Traditionally, a jobber was a wholesaler of gasoline who purchased gasoline from a major oil company or refiner and then resold the gasoline to independent businesses, called dealers, who sold gasoline to the public. Today, many jobbers also sell gasoline at the retail level through their own outlets, which are primarily "convenience stores." Dealers are usually independent Alabama businesses operating service stations or convenience stores and buying gasoline either from a jobber or directly from a major oil company. The dealer is an independent businessman who must compete with other retailers and sometimes with its own supplier.

All of the plaintiffs are jobbers engaged in the wholesale and/or retail sale of gasoline. Plaintiff McGuire Oil sells Phillips 66 and Citgo gasoline to a number of retail outlets at various locations in the Mobile area. McGuire makes certain sales on consignment and also owns at certain gas stations pumps that it leases to the gas station operators. Plaintiff Berwick Bay distributes Amoco and Shell supplies to retail facilities in Mobile. Berwick Bay sells these major brand gasolines at its 30 "Delta Mart" convenience stores. Plaintiff Diamond Gasoline sells unbranded gasoline at retail under the trade name "Diamond."

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The defendant Mapco is an independent or non-brand name gasoline refiner. Mapco also sells non-branded gasoline at the wholesale and retail levels. When this lawsuit began, Mapco had four retail stations in the Mobile area. Two of the stations were charged with violating the AMFMA.

The plaintiffs allege that the defendant sold motor fuel below cost in violation of § 8-22-6, part of the AMFMA. Specifically, the plaintiffs claim that between May 1, 1984, and December 31, 1988, the defendant sold gasoline "below cost" for 596 days at its Old Shell Road retail location and for 821 days at its St. Stephens Road retail location. The plaintiffs estimated their losses due to the conduct of Mapco at \$250,000.

A violation under the AMFMA occurs when one party sells gasoline "below its costs." At oral argument, the plaintiffs presented the following chart. We will not discuss the accuracy of these figures, because that issue is not before us.

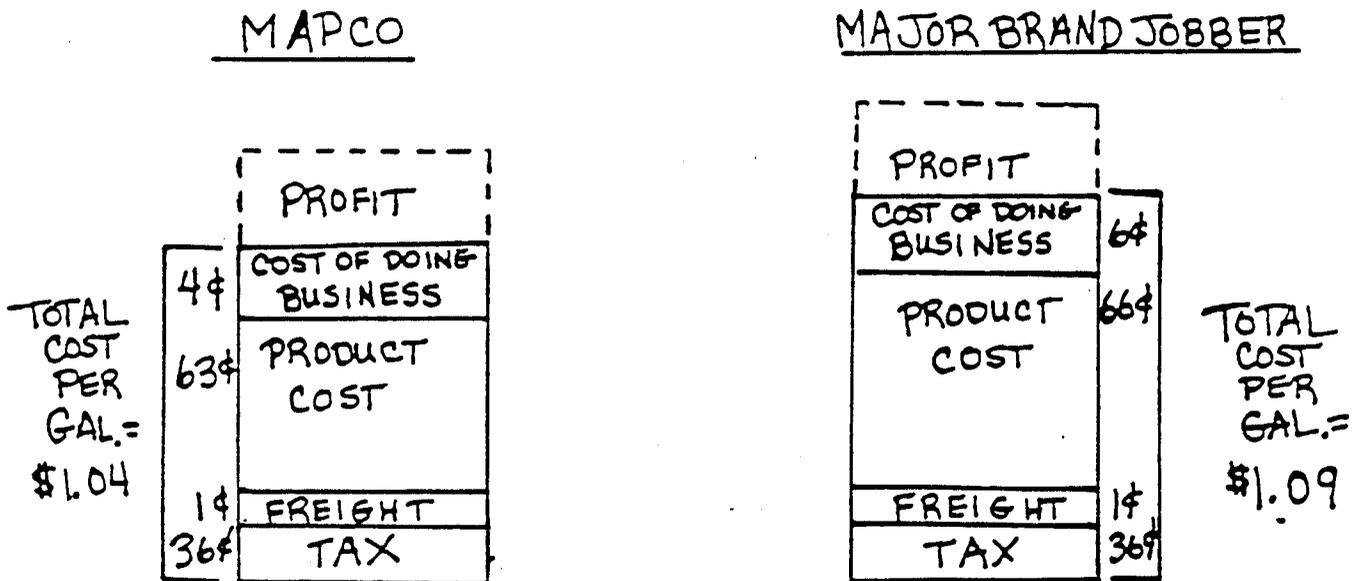


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In the chart, Mapco's costs are \$1.04 per gallon and McGuire's costs are \$1.09. Note that the AMFMA would not apply unless one of the parties sold gasoline below its own costs.

(1) DOES THE AMFMA REQUIRE INJURY TO COMPETITION AS A PREREQUISITE TO LIABILITY UNDER THAT ACT, OR DOES INJURY TO COMPETITORS SUFFICE TO ESTABLISH LIABILITY?

The plaintiffs argue that § 8-22-4(13), which defines "competition" for the purposes of the AMFMA as including "any person who competes with another person in the same market area at the same level of distribution," clearly protects individual competitors from predatory pricing practices.

The plaintiffs also argue that this Court has construed "injury to competition" to include "injury to a competitor," citing State ex rel. Galanos v. Mapco Petroleum, Inc., 519 So.2d 1275 (Ala. 1987), (hereinafter "Galanos v. Mapco"). The plaintiffs contend that Alabama courts have allowed plaintiffs to recover damages under the AMFMA based on proof of injury to competitors. Money Back, Inc. v. Gray, 569 So.2d 325 (Ala. 1990); Star Service & Petroleum Co. v. State ex rel. Galanos, 518 So.2d 126 (Ala.Civ.App. 1986). They also argue that the imposition of a more stringent "injury to competition" standard would defeat the clear purpose of the legislature in enacting the AMFMA.

The defendant argues that § 8-22-6 and § 8-22-9 provide that the sale of motor fuel below cost is unlawful only "where the effect is to injure competition." The defendant also argues that

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Galanos v. Mapco provides that "an injurious effect upon competition" is an essential element of an AMFMA violation, as opposed to a mere intent to injure individual competitors.

The legislature made the following findings of fact when it enacted the AMFMA:

"(1) Marketing of motor fuel is affected with the public interest;

"(2) Unfair competition in the marketing of motor fuel occurs whenever costs associated with the marketing of motor fuel are recovered from other operations, allowing the refined motor fuel to be sold at subsidized prices. Such subsidies most commonly occur in one of three ways: when refiners use profits from refining of crude oil to cover below normal or negative returns earned from motor fuel marketing operations; where a marketer with more than one location uses profits from one location to cover losses from below-cost selling of motor fuel at another location; and where a business uses profits from nonmotor fuel sales to cover losses from below-cost selling of motor fuel;

"(3) Independent motor fuel marketers (i.e., dealers, distributors, jobbers and wholesalers) are unable to survive predatory subsidized pricing at the marketing level by persons when all of an independent's income comes from marketing operations.

"(4) Subsidized pricing is inherently predatory and is reducing competition in the petroleum industry, and if it continues unabated, will ultimately threaten the consuming public."

§ 8-22-2.

In enacting the AMFMA, the legislature stated its intent:

"To encourage fair and honest competition, and to safeguard the public against the creation of monopolies or unfair methods of

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competition, in transactions involving the sale of, or offer to sell, or inducement to sell motor fuel in the wholesale and retail trades in this State. It is further declared that the advertising, offering for sale, or sale of motor fuel below cost or at a cost lower than charged other persons on the same marketing level with the intent of injuring competitors or destroying or substantially lessening competition is an unfair and deceptive trade practice."

§ 8-22-3.

This Court stated in Galanos v. Mapco, 519 So.2d at 1285, "[s]ection [8-22-3] declares that the sale of motor fuel below cost 'with the intent of injuring competitors or destroying or substantially lessening competition is an unfair and deceptive trade practice.'"

Section 8-22-4 provides that "the following terms shall have the meanings ascribed to them in this section unless otherwise stated and unless the context or subject matter clearly indicates otherwise." Section 8-22-4(13) defines "competition" as "includes any person who competes with another person in the same market area at the same level of distribution."

Section 8-22-6 provides "it shall be unlawful for any person engaged in commerce in this state to sell or offer to sell motor fuel below cost or to sell or offer to sell it at a price lower than the seller charges other persons on the same day and on the same level of distribution, within the same market area, where the effect is to injure competition." Section 8-22-9(1) states that it is unlawful "for any person engaged in commerce in this state to

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sell or offer to sell motor fuel at wholesale or retail, as the case may be, where the effect is to injure competition."

In construing a statute, the intent of the legislature, as expressed in the statute is ascertained and effectuated, and that intent may be gleaned from considering the language used, the reason and necessity for the act, and goals sought to be accomplished. McClain v. Birmingham Coca-Cola Bottling Co., 578 So.2d 1299 (Ala. 1991). Words in a statute should be given their plain, ordinary, and commonly understood meaning, unless there is a specific statutory definition. Childers v. Morgan County Bd. of Education, 465 So.2d 428 (Ala.Civ.App. 1985).

In § 8-22-4(13), the legislature specifically defined "competition" for the purposes of the AMFMA to include any person who competes. Applying that definition of competition to § 8-22-6 and § 8-22-9, it is clear that the legislature included injury to a competitor as part of the definition of competition.

Recent decisions interpreting the AMFMA have found violations of the AMFMA when the injury was to a single competitor. In Star Service, supra, 518 So.2d 126, two of Star Service's competitors testified that their businesses had been injured by Star Service's below-cost pricing. Although Star Service argued that injury to one or two of its competitors was insufficient to establish a violation of the AMFMA, the Court of Civil Appeals held that it was unnecessary to discuss this argument, because, it said injury to competition necessarily includes injury to competitors.

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In Money Back, supra, 569 So.2d 325, the trial court held that the plaintiff's business had been injured when the defendant sold gasoline below cost. Although the specific issue of whether injury to a single plaintiff establishes a violation of the AMFMA was not the question before the Court, we affirmed the trial court's finding that the single plaintiff in that case had been injured by the defendant and, therefore, that the AMFMA had been violated.

Therefore, we hold that injury to a competitor suffices to establish a violation of the AMFMA.

- (2) IF INJURY TO COMPETITION RATHER THAN TO COMPETITORS IS A PREREQUISITE TO LIABILITY UNDER THE AMFMA, WHAT IS THE RELEVANCE OF A DEFENDANT'S MARKET SHARE IN DETERMINING THE EXISTENCE OF INJURY TO COMPETITION?

Because injury to a competitor is sufficient to establish a violation of the AMFMA, the defendant's market share is not relevant in determining the existence of injury to competition.

- (3) IS LACK OF INTENT TO INJURE COMPETITION AN AFFIRMATIVE DEFENSE, PERMITTING SUMMARY JUDGMENT ON THAT ISSUE UNDER THE AMFMA?

The plaintiffs argue that lack of injurious intent is an affirmative defense under the AMFMA. They further argue that the evidence of lack of an injurious intent must be weighed by the trier of fact and, therefore, that a summary judgment cannot be entered on the basis of this defense. The defendant argues that if all the evidence shows that a defendant possessed no harmful intent in its pricing practices, then a summary judgment is appropriate.

"It may readily be seen that the legislature has in explicit terms prohibited only sales below cost where the effect is to

injure competition. We think that to read the intent provision of §8-22-3 into these provisions so as to place a burden on the State to prove intent would be manifestly contrary to the terms of the Act. However we do think that the various provisions of the Act can be read together in a way that will save their constitutionality. It is quite consonant with the spirit and terms of the Act to construe it as providing that the State proves a prima facie case when it proves a sale below cost and an injurious effect on competition, and yet as allowing the defendant to prove lack of a harmful intent either in avoidance of liability or in mitigation of any penalty, as the trier of fact shall determine.

"....

"Considering the 'intent' provision of §8-22-3, we deem it consistent with these provisions to allow a general defense of lack of injurious intent even if the facts do not specifically fit one of the stated exceptions [§8-22-12 and §8-22-13]--for example, an honest mistake in calculations. Such a defense would of course be a matter for the trier of fact and would be given such weight as the trier of fact deems appropriate...."

Galanos v. Mapco, 519 So.2d at 1286-87 (emphasis added).

Certainly, a summary judgment may be permissible based on the affirmative defense of lack of injurious intent. However, as a practical matter, a summary judgment would often be inappropriate, because in many instances a genuine issue of material fact would exist as to the defendant's intent.

- 4) CAN A DEFENDANT UNDER THE AMFMA INVOKE THE "MEETING COMPETITION" DEFENSE CONTAINED IN SECTION 8 OF THAT STATUTE WHEN THE DEFENDANT PRICES MOTOR FUEL ONE OR TWO CENTS BELOW THE PRICE SET BY ITS COMPETITORS?

We note that this situation would arise when a defendant has lowered its price below cost and a plaintiff has matched that price

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under the "meeting competition" defense. The defendant argues that once the plaintiff has met its below-cost price, it too should be able to invoke the "meeting competition" defense and again lower its price below the plaintiff's price.

The plaintiffs argue that under the AMFMA, a defendant cannot invoke the "meeting competition" defense when the defendant prices motor fuel one or two cents below the price set by a competitor. According to the plaintiffs, the meeting competition defense gives a marketer the right to lower its price below cost in a good faith attempt to meet the competitor's equally low price. The meeting competition defense, the plaintiffs argue, is not available to a defendant who undercuts the below-cost pricing of its competitors by any amount.

The defendant argues that it is "meeting competition" when it lowers its below-cost price by one or two cents because as an independent or non-brand name gasoline company, it must sell its gasoline at a lower price in order to be competitive with the major brand gasoline companies, as major brand gasolines have greater brand acceptability and stronger customer preference. The defendant points out that the major brand gasoline companies have higher built-in costs than do independents because of the high cost of marketing and brand name gasoline credit cards. The defendant contends that the role of the independent or non-brand name gasoline company has been to offer gasoline that is lower in price relative to what the sellers of major brand names charge, because

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of the higher costs built into the major brand name gasoline (i.e., meeting competition, according to the defendant, actually means beating competition).

Section 8-22-8(b) provides as follows:

"It is not a violation of this chapter if any price is established in good faith to meet an equally low price of a competitor in the same market area on the same level of distribution selling the same or a similar product of like grade and quality or is exempt under §8-22-13."

If the language of a statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County, 589 So.2d 687 (Ala. 1991).

We do not agree with the defendant's interpretation that meeting competition means beating competition. Section 8-22-8 is clear and unambiguous. The statute cannot be read so as to allow one defendant-competitor to undercut another plaintiff-competitor's prices and then contend that by doing so it is meeting competition. Section 8-22-8 should not be used offensively to ensure that a defendant's price of gasoline will always be below its competition. Therefore, the meeting competition defense is not available to a defendant that knowingly sets its prices below those of its competitor.

QUESTIONS ANSWERED.

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Hornsby, C. J., and Almon, Shores, Adams, Houston, Steagall,
and Ingram, JJ., concur.

Maddox, J., dissents.

**Flying J, state
settle suit
alleging below
cost fuel sales**

Oct
91'

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Utah's Division of Consumer Protection has settled a suit it filed last year against Brigham City-based Flying J Petroleum Inc., in which the state alleged that Flying J sold gasoline and diesel fuel below cost in violation of the Utah Motor Fuel Marketing Act at one Flying J retail outlet in Ogden.

Flying J both denied violating the statute and claimed that the law violates the Utah State Constitution's price fixing prohibition.

The Utah Motor Fuel Marketing Act bars sales of motor fuel below "cost." At the time of the alleged violation, "cost" was defined as the lowest invoice cost to the retailer within 15 days of the alleged below-cost sale together with taxes, freight, other expenses and a reasonable cost of doing business. The statute provides that a retailer's overhead is presumed to be a margin of six percent of the posted retail price unless the retailer does not violate the statute by selling below cost to meet a competitor's lowered price.

Flying J contends it was meeting the lower prices offered by a competitor, the complainant in the case. Flying J maintains the competitor offered under-the-counter discounts to selective customers, and that Flying J responded by offering prices, meeting competition prices to all of its customers.

The state disputes that such discounts were given, but if they had been, the state contends Flying J should have offered the lower prices only to those customers who were receiving the competitor's under-the-counter discounts.

Under terms of the settlement, Flying J has paid \$15,000 to the state in exchange for dismissal of the lawsuit. Flying J and the division have also entered into an agreement in which Flying J agrees to the assessment of a \$5,000 penalty per day if a final judgment is entered against

Oct. 91'

Flying J pays \$15,000 to settle below-cost charges

Big rockies marketer Flying J has agreed to pay the state of Utah \$15,000 to settle charges that it violated the state's below cost selling law.

Last October, Flying J was sued by Utah Attorney General Paul Van Dam, who alleged that the rockies refine was selling gasoline and diesel below cost -- defined as the wholesale price plus a 6% mark-up -- during several days in June at a station in Ogden (OE/10/29/90). Flying repeatedly denied those charges, claiming that it was meeting other marketer's "unadvertised discounts."

The state disputes Flying J's claim. Even if it was meeting under-the-table discounts of competitors, Flying should only have offered its discounts to the customers receiving the competitors' discounts, the state says.

Under the settlement, Flying J has agreed to pay penalties of \$5,000/day if it is found selling below cost at any station in the state during the next three years.

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**Statement of
William D. Dermott
Legislative & Regulatory Affairs Manager
for
Exxon Company, U.S.A.
before the
Business Committee
of the
Montana House of Representatives
regarding
House Bill 216**

Mr. Chairman, members of the Committee, my name is Bill Dermott and I am the Legislative and Regulatory Affairs Manager for the Marketing Department of Exxon Company, USA. I'm here today to express Exxon's opposition to House Bill 216, which would modify the existing below cost selling prohibition enacted in 1991 as HB 538 and make it a permanent part of Montana law.

Exxon is not a direct marketer in Montana. All of the Exxon branded gasoline we sell in Montana is sold through branded wholesalers, also known as distributors, who in turn, resell it to the public through independent retail dealers or through outlets they operate with their own employees. Exxon has no company-operated outlets or direct supplied dealers in the state.

Exxon is opposed to House Bill 216 for the same reasons we opposed the 1991 legislation: it will result in higher gasoline prices to Montana motorists and it is unnecessary to protect the legitimate interests of the wholesalers and retailers who market gasoline in the state.

One of the questions I was asked when we opposed the 1991 bill, and have been asked again this year, is why does Exxon oppose the bill since we have no direct marketing in the state and, to our reading, this statute doesn't apply to the wholesale prices we charge to our only branded customers' in the state -- our distributors. The answer is simply, we don't believe it is in the best interest of our distributors, their ability to compete in the marketplace, and through them, our own ability to remain a viable competitor in Montana.

But beyond that self-interest, we are opposed to HB 216 because this type of law is basically incompatible with our economic system where competition in the marketplace determines who succeeds. Once you begin to legislate pricing in a competitive marketplace, it is very difficult to adjust or stop -- even if the problem you were trying to solve no longer exists. This was made clear in the federal price and allocation controls that went into effect during the '73-'74 shortage and continued in some fashion until 1981.

Impact of Existing Law

When I testified against HB 538 in 1991, I told the Senate Committee that experience in other states which passed similar laws, as well as comments by the Federal Trade Commission and the U S Department of Energy, all indicated that the bill would be likely to raise gasoline prices in the state.

Based on data developed by the Lundberg Survey, this may well have been the case. An examination of the impact of the current Montana law, which has been in effect for some 18 months, shows that the statute may have raised retail gasoline prices by as much as two or three cents per gallon, costing motorists as much as \$9 million per year as a result. This money has come from Montana motorists and flowed not to refiners like Exxon, but into the hands of the wholesalers and retailers who market here.

As such laws go, the Montana statute is not as onerous as some other below cost selling prohibitions. Yet this statute has cost motorists a little less than 3 cents per gallon. This cost came despite the fact that in the only case brought under the statute, against Gasamat, the State District Court Judge held that no violation occurred since the law did not prohibit injury to an individual competitor.

HB 216, however, not only tries to make the existing statute a permanent part of Montana law, but seeks to amend it to get around the Gasamat decision by making the harming of a single competitor a violation. Such a prohibition can only add to the upward pressure the existing law has already placed on gasoline prices. Further, it goes well beyond the traditional antitrust law concept of protecting the competitive process from abuse by providing a legal insulation of an individual merchant from the every day forces of competition. While antitrust laws enhance competition by making sure the process operates in the interest of consumers, this statute as proposed will harm competition by providing gasoline merchants with an immunity from its impact.

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Additional Protection Unnecessary

My Company doesn't believe there is any justification for requiring Montana motorists to pay more than they otherwise would because some marketers are afraid of competition. Existing laws make this bill clearly unnecessary to protect the legitimate business interests of independent motor fuel marketers. They are already protected against unfair pricing or other unfair marketing practices of their suppliers by the same large body of law that protects other similar merchants.

That group of laws includes 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. Since these laws appear adequate to protect other merchants, we fail to see why petroleum distributors need additional guarantees.

Finally, petroleum marketing is so competitive that it would be virtually impossible for any one competitor to get such a large share of the market that invoking any of these laws is likely to be necessary. Gasoline is so readily available and so widely traded that almost anyone with the interest and capital can enter the wholesale gasoline marketplace.

Perhaps it is this high level of competition and ease of entry that has caused some market participants to seek legislative protection. While that motivation is understandable, enacting protections like this can only come at a cost to the citizens of the state in the form of higher prices. It comes down to whether to protect the few at the expense of the many. In this case, I hope you'll choose the many over the few and reject HB 216 by deciding the competitive marketplace is the best protection for both marketers and consumers.

Billings Gazette

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Billings, Montana 59103

Friday, February 21, 1992 B

107th Year, No. 292

Law increases gas prices

Act designed to protect independent retailers

By RITA MUNZENRIDER
Of the Gazette Staff

Gasoline has to cost more at Billings pumps — it's the law, according to state prosecutors.

Yellowstone County Attorney Dennis Paxinos said Thursday that local service station owners must raise their prices by Friday or they will be in violation of a state law designed to protect independent retailers.

Paxinos said the 96.9 cents a gallon for unleaded gasoline that most area service stations have been charging motorists this week was 3 cents below what it should be according to a formula established in the "Montana Retail Motor Fuel Marketing Act."

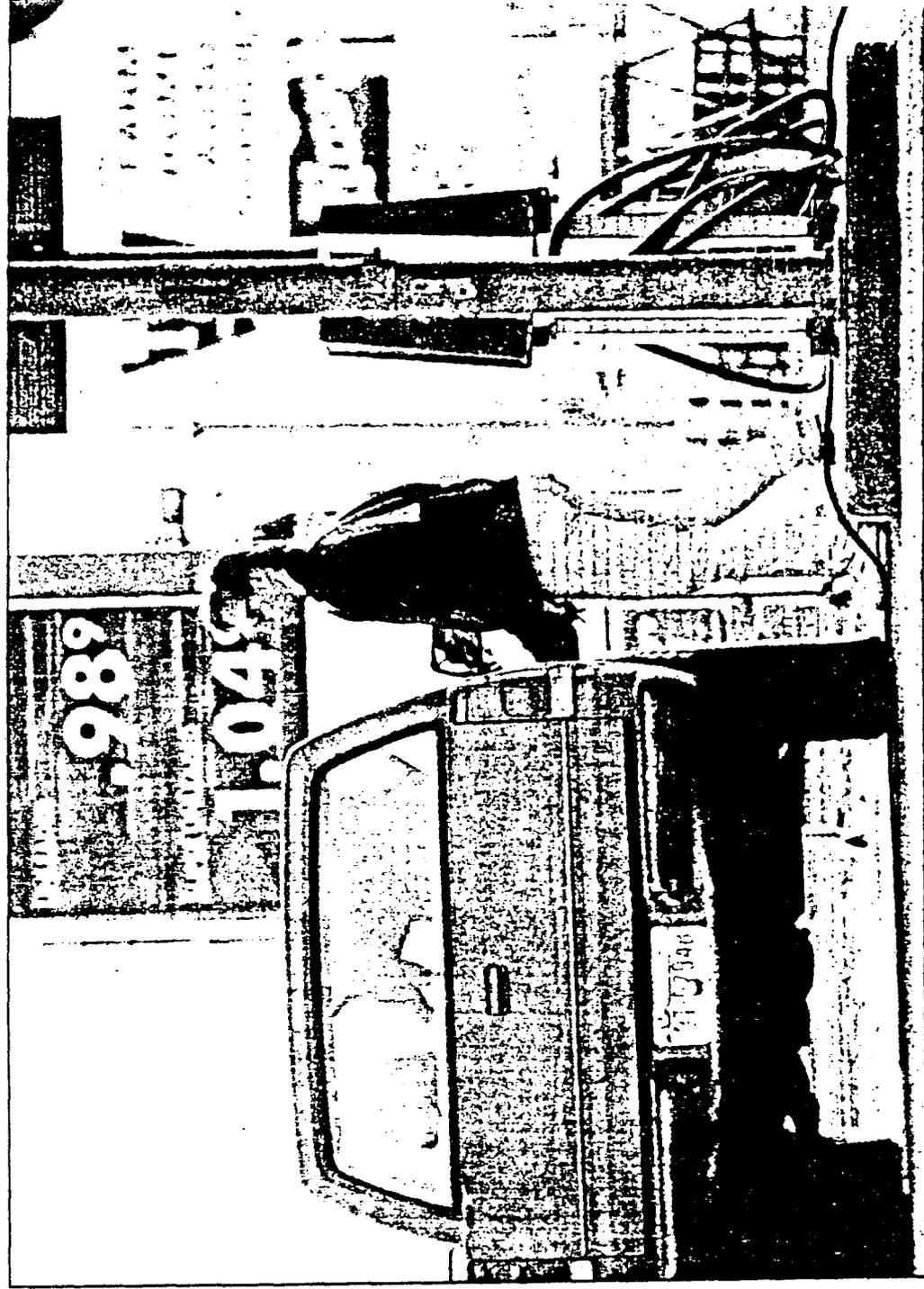
The formula, which determines what gasoline actually should cost per gallon, guarantees a minimum of 7 percent profit for retailers. It takes into account the wholesale cost, a 1-cent freight charge and 34.1 cents in federal and state taxes.

Paxinos said the price of gasoline could change frequently for consumers, since the wholesale price often fluctuates daily. He said he based his calculations on the wholesale or "rack" price his office was able to obtain on Wednesday, when a gallon of gas cost retailers 57.75 cents.

Passed by the 1991 Montana Legislature, a portion of the law reads, "The legislature believes that subsidized, below-cost pricing is a predatory practice that is not conducive to fair trade."

Paxinos said he first knew of the law last Friday when he received a letter from Attorney General Marc Racicot informing him of a complaint he received from a Billings independent retailer about price undercutting.

Meanwhile, Dick Skewis, owner of Dick's 24th Street Conoco, said he raised his prices to \$101.9 a gallon for unleaded gas Thursday morning, but not because of the



Continued story

Gasoline

From Page One

county attorney's warning. He said he had been losing money selling gasoline at 96.9 cents a gallon even before his cost for wholesale gasoline went up Thursday morning.

"I can't stay in business any longer giving it away," said Skewis, the past vice president of Automotive Trades of Montana (ATOM), which represents the independent service station owners. "I have employees I don't want to lay off."

Skewis said he was forced to lower his gasoline prices for unleaded fuel to 96.9 cents a gallon recently to keep up with competitors throughout the city. Lower prices then forced him to cut eight full-time employees' work hours by four hours a week.

"This stuff isn't fun and games," Skewis said. "It's not something that's being made up by the little people. It's not going to do the citizens of Billings any good if I go out of business."

Skewis said ATOM was in favor of the bill, and Sen. Esther Bengtson, D-Shepherd, was one of its sponsors. He said several states have similar laws.

Bengton said the law was designed to protect the "little guy," although she wasn't sure there are many little guys left in the gas-station business.

"It was designed to be in compliance with antitrust laws which prohibit below-cost selling, and to avoid price wars," Bengton said. "It's against the law to sell below cost with the intent to put someone out of business. It's a protection for any legitimate business to stay in business."

Skewis said the state law doesn't prohibit gas wars, but it prevents below-cost selling and unfair competition.

"We've always had price wars, but lately, they've been wars fought at below our cost," Skewis said.

The law gives prosecutors the authority to take civil or criminal action against service stations that don't comply with the law.

Paxinos said his office has received telephone calls from local service station owners who want to make it clear that they weren't the ones who lowered the price first.

"Everybody's pointing the finger at everybody else," Paxinos said.

Skewis said there were rumors circulating about who started the latest decline in gas prices.

"I know it's not me," Skewis said. "I'm just trying to run a good, honest business and keep people at work in the city."

A sampling of other local service stations Thursday showed that owners were confused by Paxinos' announcement and weren't sure whether prices would increase Friday. At least one downtown retailer said he was still making just over 7 percent profit by selling gas at 97.9 cents a gallon.

Jean Jantzen, director of public affairs for Cenex in St. Paul, Minn., said: "We have received no communication from the county attorney or the state attorney general at this point. We certainly will comply with the law. It's too early to tell how prices will be affected, and our intent will be to remain competitive."

Paxinos, however, said he was using the local media to get the word out to service station owners because it would cost the county too much to notify each of the hundreds of area retailers individually. He said service station owners in Livingston also were ordered recently to comply with the law.

EXHIBIT 9
DATE 1/27/93
HB 216

OPINION/LETTERS

EXHIBIT 10DATE 1-28-93HB 216

FUEL RULES

Bradley's gas legislation gyps Montana motorists

By ROBERT G. NATELSON

Montana consumers staggering under high gasoline prices can lay some of the blame on a recently enacted state law sponsored by Rep. Dorothy Bradley. The Bradley Bill, adopted last year as the Montana Retail Motor Fuel Marketing Act, effectively orders service stations to raise prices charged at the pump. In turn, the Bradley gubernatorial campaign has benefited from financial contributions from the special interests promoting the bill.

The Retail Motor Fuel Marketing Act is an anti-consumer price-fixing arrangement of the kind generally illegal under federal antitrust law. But unless and until invalidated by the courts, the act prohibits service stations from selling gasoline or gasohol for less than 6 percent over wholesale price and prohibits wholesalers from selling for less than 1 percent over the refiner's "rack price." There are qualifications to these rules, but they are of little practical importance.

The act also provides that any seller "guilty" of offering the consumer a better price is to be prosecuted. If convicted, the "guilty" party is subject to fines of up to \$1,000 per day and must pay the prosecuting attorneys' fees.

Although one cannot calculate precisely how much extra Montana consumers and businesses are paying for this price-fixing scheme, it is clear the cost is high. Earlier this year, for example, the Yellowstone County attorney threatened local service stations with prosecution if they did not jack up gasoline prices by three cents a gallon.

Bradley began to promote state price-fixing at least as early as 1989, when she argued that it was needed to curb "predatory pricing" in the Montana motor fuel business. Predatory pricing is the illegal practice by which large suppliers try to drive independent retailers out of business by selling to the suppliers' own outlets for less than they sell to independents.



However, a formal investigation commissioned by the state Legislature uncovered no reliable evidence of such practices in the Montana motor fuel business. Indeed, according to Ron Johnson, a Montana State University economics professor specializing in antitrust, true predatory pricing is very uncommon because perpetrators have learned that it usually causes more financial damage to themselves than to their intended victims. Furthermore, because gasoline and gasohol suppliers control fewer than 4 percent of Montana service stations, they lack the market leverage needed to make predatory pricing work.

Undeterred by such facts, Bradley re-introduced her proposal in the 1991 general legislative session. Testifying with Bradley in favor of the bill were gasoline wholesalers and

(OVER)

the spokesman for a trade group representing about 35 of Montana's 1,300 gasoline retailers. These witnesses offered no hard evidence of predatory pricing in Montana.

One of the proponents' more presumptuous arguments was that they were motivated by a zeal for consumer protection — that keeping non-competitive gas stations in business would protect consumers.

However, the real winners from the Retail Motor Fuel Marketing Act have not been consumers, but a small group of gasoline sellers. The Legislature's research report suggests that some gas station owners felt inconvenienced because low fuel prices were forcing them to serve the public in ways beyond selling fuel — by, for example, offering quick tubes, groceries, and car washes. And as Professor Johnson observes, state price-fixing helps inefficient businesses by locking new competitors out of the market: Price-fixing prevents newcomers from getting consumer attention through lower prices.

Another beneficiary from the Retail Motor Fuel Marketing Act has been the Bradley gubernatorial campaign. According to that campaign's public financial reports, as of June

16 the benefited special interests had contributed about \$2,000. At least a quarter of that sum came from the family of a wholesaler who testified in favor of the price-fixing proposal.

The cost of the Retail Motor Fuel Marketing Act is, of course, borne by efficient gasoline sellers, whose competitiveness is hampered, and by Montana's consumers, farmers, ranchers, and business and working people, all of whom pay higher prices as a result of the act.

The Retail Motor Fuel Marketing Act expires in 1993, but if some brave service station owner challenges it in court we may be rid of it earlier. Price-fixing schemes — even state sponsored ones — generally violate federal antitrust policy. Although a state can protect its scheme by detailed regulatory supervision of prices (as Montana does with milk), the more loosely drawn Retail Motor Fuel Marketing Act may not qualify for this exemption. (Apparently Bradley, a lawyer, never advised the legislature of her bill's potential legal problems.)

This would not be the first time Montana price-fixing has run afoul of federal antitrust policy. Last June, for example, the U.S. Supreme Court struck down this state's system of setting title insurance premiums. In its accompanying opinion, the court pointed out that, "No antitrust offense is more pernicious than price fixing." Montana's victimized motorists might well agree.

Robert Natelson teaches law at the University of Montana. He writes occasional commentaries — reflecting his own views, not those of the Law School — for the Missoulian.

FACT SHEET: HB 222
Department of Justice
January 1993

EXHIBIT 11
DATE 1-28-93
HB 222

Purpose: To revise provisions of Montana law relating to the licensure of businesses that sell, install and service certain fire protection equipment. The legislation aims to protect life and property from uncontrolled fire due to deficient fire protection systems.

Funding Source: State law now requires the Department of Justice to license, certify and register fire safety equipment businesses. The Department is authorized by law to collect fees of up to \$50 for each license, permit or certificate issued. In FY 92, the fees generated only \$700, which was deposited into the general fund.

Under HB 222, the fees would be increased to \$300 for a license and \$250 each for separate endorsements for fire extinguishers, fire alarm systems, special agent fire suppression systems and fire sprinkler systems. Representatives of the fire safety equipment industry participated in preparing this legislation and support the fee increase. The proposed fees are comparable to similar fees collected by neighboring states.

Need: The Fire Prevention and Investigation Bureau of the Department of Justice administers the licensing function. The Uniform Fire Code, which sets the standards for fire protection equipment, is updated every three years, but staff shortages have hampered the Bureau's ability to develop and administer examinations based on contemporary standards. The recording system and testing programs used by the Bureau are at least 20 years old.

This problem was examined by the Fire Prevention and Investigation Advisory Council, a statutorily created council whose function is to advise the Department of Justice on issues affecting fire services. Its members, appointed by the Attorney General, represent the fire service and law enforcement communities as well as the Legislature. The Council received input from the industry and determined that this legislation would provide the best means of ensuring consumer protection and public safety.

With over 20 years of accumulated licensing data, the Bureau's files include approximately 750-850 licenses for fire protection equipment businesses. Although administrative rule requires renewal every two years, many businesses have not requested renewal and probably are no longer active. The proposed legislation will permit adoption of rules that incorporate nationally recognized standards and will provide uniformity and reliability to the program. The Bureau expects to hire one plans reviewer, one deputy state fire marshal and one support staff member with the funds generated by the increased fees.

Relationship of Funding to Services Performed: The fees currently collected do not cover the costs of managing the program. Retention of the fees generated will enable the Bureau to review plans, inspect applicants' facilities, and maintain the fire safety standards required by state law and necessary to ensure public safety.

EXHIBIT 12 P.2/2
DATE 1-28-93
HB 222

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NORTHERN SOUND & COMMUNICATION

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43 Woodland Park Drive
(406)752-3100

Kalispell, MT 59901
FAX (406)257-4890

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January 25, 1993

House Business & Economic Development Committee
Room 104
State of Montana

Gentlemen,

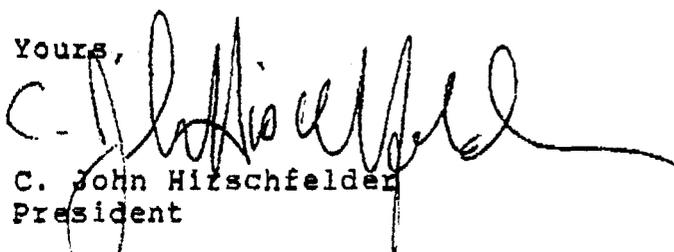
Northern Sound & Communication, Inc. produces approximately one hundred twenty five thousand dollars in gross sales annually of new fire alarm equipment in the State of Montana. An additional portion of our fire alarm revenues is service and additions to existing systems regardless of brand affiliation.

The systems I have seen, which at time of installation, did not meet existing Montana Electrical Codes, National Electrical Codes, and Underwriters Laboratories listings are to numerous to list. These systems are located in all types of building occupancies I.E. Licensed facilities & institutions, Motels/Hotels, Schools, public & private, Industrial applications and retail outlets. In general the unsuspecting building owners and consumers look to "Authorities Having Jurisdiction" to protect them from contractors and service personnel which either do not know code or just did not care enough to do a proper install.

The Department of Justice, Fire Marshals Bureau is that "authority" in a vast majority of the state. They therefore are the logical bureau to handle the state licensing of these "sales organizations & installers".

The fees asked for in the "Bill" are very minimal as a percentage of sales industry wide. Professionals active in the trade need to carry there own weight in these days of troubled financing and out of control budget deficits. To say that the public & consumers need a helping hand is a major under-statement. **Northern Sound & Communication therefore very strongly supports more and better licensing in the state and that includes HOUSE BILL 222.**

Yours,



C. John Hirschfelder
President

cc: file

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Business & Ec. COMMITTEE BILL NO. HB 237
 DATE Jan. 28, 1993 SPONSOR(S) Grady
 PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Robert Dunlop	myself	✓	
M. Schenck	DHES	✓	
Charles R. Brooks	MT Retail Assoc		
Janette Tattan	MT Petroleum Ass'n		✓
Stuart Pappert	MT Trucking	✓	

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HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Business & Economic COMMITTEE

BILL NO. HB 299

DATE Jan. 28, 1993 SPONSOR(S) Stanford

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Daniel Figgins	Bozeman Fire Dept.	✓	
Kelly FLAHERTY	LEASING, INC	✓	
Ben Jarango	Missoula Fire Equip	✓	
MIKE MURPHY	FOLMER ELECTRIC	✓	
Ken Olson	Northern tier Fire Protection	✓	
Terry Olson	Northern tier Fire Protection	✓	
Bruce Sherman	Justice	✓	
Lyle Nagel Simms	MT. ST. FIRE CHIEF ASSN FPIB ADV. COUNCIL	✓	
ANITA VARONE	JUSTICE	✓	
KE McCann	Billings Fire Dept	✓	
W. Jackson	MT State Fireman's Assn	✓	
BETH BAKER	DEPT OF JUSTICE	✓	
Dick Hall	Dick's Fire Dept	✓	
IGNON PERKINS	FIRE SUPPLY SYST INC	✓	

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Robert K. Murphy. LU 155 I B E W

✓

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Business & EC.

COMMITTEE

BILL NO AB 216

DATE Jan. 28/1993 SPONSOR(S)

Trady

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Jeanne Coleman	Green Meadows Mkt	✓	
Bill Nooney Missoula	Mt. Pet. MKTR'S ASSN	X	
BETH BAKER	DEPT OF JUSTICE	✓	
Jim Kember	DOC		
Janelle Fallon	Mt Petroleum Ass'n		X
Bob Burtress	Bals Valley Serv	X	
Tat Burtress	Bals Valley Serv	X	
BILL DERMOTT	EXXON COMPANY, USA		X
Steve Visocan	WOPMA	✓	
Larry Fashender	Mt. Council of Coops	✓	
Ronna Alexander	Mt. Pet MKTR'S	✓	
Carl Schweitzer	Mt. Coun't Assoc		✓

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