Approved: April 9, 2002
Date

MINUTES OF THE HOUSE TRANSPORTATION.

The meeting was called to order by Chairperson Gary Hayzlett at 1:40 p.m. on April 3 , 2002 in Room 519-S of the Capitol.

All members were present except:
Representative John Ballou, excused
Representative Nile Dillmore, excused
Representative Bruce Larkin, excused
Representative Judith Loganbill, excused
Representative Dennis McKinney, excused

Committee staff present:
Bruce Kinzie, Office of the Revisor
Hank Avila, Legislative Research Department
Ellie Luthye, Committee Secretary

Conferees appearing before the committee:
Tom Palace, Petroleum Marketers and Convenience Store Association of Kansas
Robert Alderson, Casey's General Stores, Inc.
Kevin Brown, President, T & E Oil Company, Hutchinson
Mark Augustine, Triplett Oil Company, Salina

Others attending:
See attached sheet

Substitute SB 62 - constitutional awareness act

Chairman Hayzlett opened hearings on **SB 62** and explained to the committee this bill came out of Fed and State, which is an exempt committee, and is the vehicle in the Transportation Committee as a carrier for **SB 573**. He then called on Tom Palace, PMCA of Kansas, to present his testimony as a proponent of **Substitute SB 62.**

Mr. Palace introduced Kevin Brown, President of T & E Oil in Hutchinson, who told the committee of some of the problems being faced by small businesses with below cost selling of motor fuel. Currently he is selling his gas at 7 cents a gallon below cost. He said fair marketing laws would not keep him in business unless he had a good operation but he would only ask for a level playing field.

Mark Augustine, Triplett Oil in Salina, said he has been fighting below cost selling of gasoline since 1999. He is now selling 4-5 cents under cost. He stated, according to a recent article in USA, 80% of the working people are employed by small businesses. He concluded that when large retailers force small businesses to close their doors who will be there to support the community. He urged passage of legislation that would make the business less competitive.

Tom Palace presented testimony explaining the terms used, petroleum distribution chain, tax rates on motor fuel, copy of litigation in Alabama and copy of articles from various reports showing how Kroger and Wal-Mart pricing is destroying small competitors. He said the practice of selling motor fuel "below" cost has but one goal: the elimination of competition. Independent marketers can show that the competition they face sell their gasoline at 2-12 cents below cost and a small retailer cannot compete with that kind of pricing. The problem is exacerbated when competing on the borders of Kansas because on the Kansas side they not only compete with the discount retailers, they also have to contend with a 4 cent price disparity due to lower state tax rates. He concluded that many marketers throughout the state are closing locations because they cannot compete with the large corporation retailers. Motor fuel sales account for 60 plus percent of the product they sell compared to less than 1 percent for discount retailers. (Attachment 1)

There were no other opponents.

Robert Alderson, Casey's General Stores, Inc. presented testimony in opposition to **substitute SB 62.**

He said Casey's opposes legislation which prohibits below cost selling of motor fuels as they believe that free market competition should establish motor fuel prices without government interference. He then quoted comments made by the Federal Trade Commission relating to proposed legislation in Virginia that sought to prohibit retailers from selling motor fuels "below cost" to eliminate the possibility of "predatory pricing". and included a copy of this opinion with his testimony. He asked the committee to give this report careful consideration in analyzing any proposed legislation prohibiting the below-cost selling of motor fuels in Kansas. (Attachment 2)

There were no other opponents. Following questions from the committee Chairman Hayzlett closed hearings on **substitute SB 62.**

Sheila Walker presented the committee with information they had requested on the 26th of March concerning dealer licensing fees. (Attachment 3)

The minutes of the House Transportation Committee for March 25th and March 26th were presented for approval or corrections. Representative Long made a motion to accept the minutes as presented, seconded by Representative Phelps and the motion carried.

Chairman Hayzlett adjourned the meeting at 2:30 p.m. The next meeting of the House Transportation Committee will be Thursday, April 4th at 1:30 p.m.

HOUSE TRANSPORTATION COMMITTEE GUEST LIST

DATE: April 3, 2002

NAME	REPRESENTING
Bob Alderson	Casey's General Stores
Curt Wright	Taylor Oil, Inc
Wayne Reed	Bennington Oil Co Inc
Terry Presta	Presto-C-Stores
Marcia Cline	Fredonia, KS
Ken Peterson	KS Petroleum Council
[illegible]	Phillips Petroleum Company
Steve Kearney	PMCA of KS. INC.
Gary Davenport	KS Motor Carriers Assn
Marcia Stambaugh	KDOT

Testimony:	House Transportation Committee
From:	Thomas M. Palace
Date:	April 3, 2002
RE:	Substitute SB 62

Mr. Chairman and members of the House Transportation Committee:

My name is Tom Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas), a statewide trade association representing over 360 independent Kansas petroleum companies and convenience store owners throughout Kansas.

We appreciate the opportunity to appear before you as a proponent to Substitute SB 62.

I have attached a bill summary that I would like to discuss. (See attachment)

The Problem

The practice of selling motor fuel "below cost" has but one goal: the elimination of competition. The evolution of the "big box retailers" or discount retailers is taking its toll on the small independent gas station marketer that has served its community for years. The consumer has long been the benefactor of price wars, over supply of gasoline, an inflation proof commodity and now the "big box" retailer. In today's environment, consumers chase price, and discount retailers use gasoline as a "loss leader" to get more people into their stores to purchase other items that have higher profit margins. Independent marketers can show you that the competition they face comes down to gasoline being sold at 2-12 cents below cost. A small retailer cannot compete with that kind of pricing. In many cases, a retailer is unable to even purchase fuel at the price their competitor is charging.

Below cost selling of gasoline has occurred for years and is usually specific in nature and on-going in certain areas of the state. I would be remiss if I did not say that some of our PMCA members have been guilty of lowering the price of fuel occasionally to gain more market share. But they do not and cannot continue this practice over an extended period of time. Discount pricing does occur at grand openings, on anniversaries, customer appreciation days and when a retailer is trying to gain market share. However, since Wal-Mart and grocery stores have added fuel pumps at their sites, special promotions appear every day over a prolonged period time and such activity affects almost every county in the state...or will when a discount retailer comes to town. This problem is exacerbated when competing on the borders of Kansas. Cross border marketers are currently hampered by a 4 cent disparity (5 cents in '03) in cost in both Missouri and Oklahoma on gasoline. Marketers must make difficult decisions on pricing because on the Kansas side they not only compete with the discount retailers, they also have to contend with a 4 cent price disparity due to lower state tax rates.

Petroleum Marketers and Convenience Store Association of Kansas
201 NW Highway 24 • Suite 320 • PO Box 8479
Topeka, KS 66608-0479
785-233-9655 Fax: 785-354-4374

House Transportation Committee
April 3, 2002
Attachment 1

In "An Economic Analysis of Motor Fuel Fair Marketing Laws;" David R. Kamerschen, Ph.D, Professor of Economics at the University of Georgia, writes about maintaining a viable independent sector and states that "Fair Marketing laws can be an effective way to halt the decline of independent dealers and distributors of motor fuel caused by retail price subsidization. The downward trend in retail gasoline outlets is an accepted fact. One should differentiate, however, between normal competitive forces at work causing this downward trend (larger more efficient retail outlets replacing smaller less efficient ones) from the abnormal forces created by subsidized pricing. I am NOT interested in protecting small, inefficient retail dealers who have failed to give consumers what they want (i.e., self-service convenience at low prices), but I am concerned about protecting smaller equally-efficient retailers who may be suffocated by subsidized pricing. The critics of fair marketing laws ignore that distinction.

"The empirical data indicate that the independent segment in motor fuel marketing industry is crucial to competitive motor fuel markets. This is also the sector most at risk from subsidized pricing. A recent economic study by Leffler and Pulliam analyzed why California's gasoline prices were far above the national average. Although California's gas is more expensive to produce, Leffler and Pulliam specifically found that a primary cause for California's high prices is the weak independent sector in California, both at the refining and marketing levels." I site this comment to make it clear that this bill will not guarantee the future livelihood of a business that is run poorly. The bill simply rules out the most ridiculous cases where below cost selling occurs.

Opponents of fair marketing laws make the following claims: (1) fair marketing laws protect competitors and not consumers; (2) fair marketing laws cause gasoline prices to be higher to the detriment of consumers; and (3) fair marketing laws have not benefitted consumers by keeping the number of retail outlets from declining; therefore, below cost selling laws have not enhanced competition.

As to the first claim, even if fair marketing laws do protect some competitors, it is not at the expense of other competitors. Fair marketing laws do not give one group of competitors a competitive advantage over another group. Rather, the stated purpose and effect of such laws are to eliminate harm to independent gasoline retailers caused by subsidized retail pricing. By protecting all competitors from below-cost pricing, competition will be more diverse and vigorous in the long run. As to the second claim, to date, there is no reliable data showing that fair marketing laws have increased retail gasoline prices above normal levels over time. The studies cited by critics are incomplete and not statistically reliable. The third claim that fair marketing laws have been a regulatory failure because they have not halted the historical decline of retail outlets, the date does not support this claim.

What are other states doing

Currently there are 14 states that have fair marketing laws. All have faced, or are facing, tough court battles seeking injunctions to stop below cost selling. Two states that have been successful in this endeavor are Alabama and Oklahoma. In a court case of Home Oil Company (the plaintiff) vs Sam's East (defendant), the Magistrate Judge ruled in favor of the plaintiff and

found Sam's East in violation of the Alabama Motor Fuel Marketing Act. The ruling reads, "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." In a similar case in Oklahoma, Star Fuels Marts (plaintiff) has filed for temporary injunctions against Murphy Oil, Wal-Mart/Sam's Club (to abide by 6% minimum markup law which has been on the books since 1949). Currently they are in negotiations for settlement prior to a court hearing date.

The states that have below cost selling laws share similar language in their statutes, the major difference being the definition of cost. PMCA narrowed the definition to make the law easier to understand as it relates to: product cost, freight cost and taxes. We have not included minimum markup or cost of doing business (includes overhead, salaries, insurance etc.) in this bill in an effort to keep the bill easier to understand and implement.

Conclusion

In closing, Mr. Chairman, I want to thank you and the committee for allowing PMCA to open the line of communication on an issue that is affecting every small independent gas station in Kansas. If allowed, we could have heard hours of testimony from marketers throughout the state that are considering closing locations or going out of business because they cannot compete with the "big box" retailers. Motor fuel sales accounts for 60 plus percent of the product we sell compared to less than one percent for discount retailers.

In 1998, when underground storage tanks, by law, had to be upgraded at an average cost of $50,000 per location, there were a number of small communities that lost their local fueling station because the small marketer could not justify the cost. We are seeing a similar trend with the "big box" retailers forcing the little guy in small towns out of business because they cannot compete with the largest corporation in the world.

Thank You.

Definition of terms

Applicable taxes and fees:

Kansas motor fuel tax: 21 cents per gallon (gasoline); 22 cents per gallon (effective 7/1/03)
Federal motor fuel excise tax: 18.4 cents per gallon (gasoline)
Kansas Environmental Assurance Fee: 1 cent per gallon

Discounts: loyalty cards used by card holders to by gasoline at prices lower than street/pump prices (Dillon's cards, Sam's cards, etc.)

Freight/ transportation cost: cost of hauling fuel from terminal to retail location by common, private carrier

Invoice price: The terminal (or rack) prices that refiners change independent wholesalers (marketers) on any given day at a refinery or terminal loading rack.

Marketer (also distributor, jobber, wholesaler): purchasers of refined petroleum products from suppliers for resale at the wholesale and/or retail level.

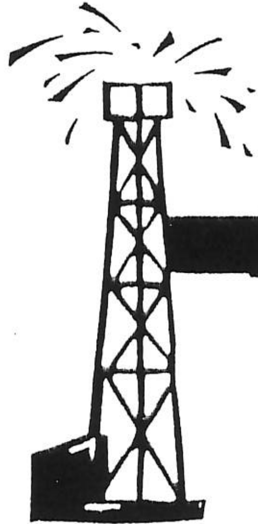
Posted price/ meter price: the retail price charged the consumer; posted on the street sign and on the pump face

Retailer: a retail petroleum site operator who either owns the station, leases it or operates it for an integrated oil company

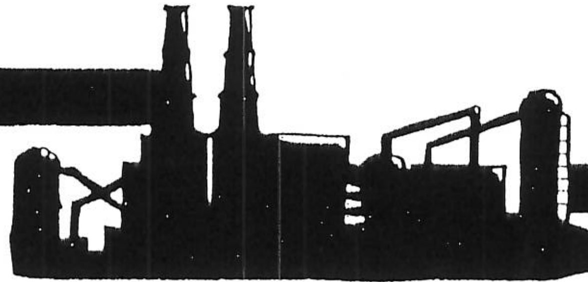
Supplier: major oil company

PETROLEUM DISTRIBUTION CHAIN

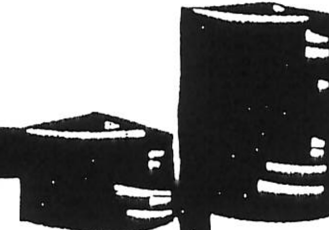
OIL PRODUCTION



REFINERY

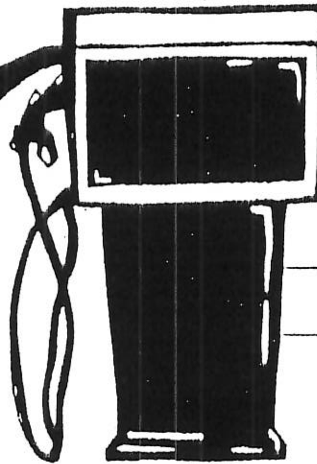


PIPELINE TERMINAL



TANKWAGON

INDEPENDENT BULK PLANT

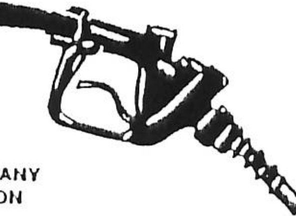


MAJOR OIL COMPANY OPERATED STATION

MAJOR OIL COMPANY SUPPLIED STATION

WHOLESALER-OWNED STATION

WHOLESALER-SUPPLIED STATION



CARRIER

SERVICE STATION

CONSUMER

TAX RATES ON MOTOR FUEL - September 2001[1]

OCTOBER 2001 (CENTS PER GALLON) TABLE MF-121T SHEET 1 OF 2

STATE	GASOLINE		DIESEL		LIQUEFIED PETROLEUM GAS		GASOHOL 2/		
	RATE	EFFECTIVE DATE	RATE	EFFECTIVE DATE	RATE	EFFECTIVE DATE	RATE	EFFECTIVE DATE	EXEMPTION
Alabama *	18	06/01/92	19	06/01/92	17	06/01/92	18	06/01/92	-
Alaska	8	07/01/61	8	07/01/61	-	-	8	07/01/97	-
Arizona *	18	07/01/90	26	07/01/00	18	07/01/90	18	07/01/90	-
Arkansas *	20.5	07/01/00	22.5	07/01/00	16.5	04/01/91	20.5	07/01/00	-
	21.5	07/01/01					21.5	07/01/01	
	21.7	09/01/01	22.7	09/01/01			21.7	09/01/01	
California *	18	01/01/94	18	01/01/94	6	01/01/76	18	01/01/94	-
Colorado *	22	01/01/91	20.5	01/01/92	20.5	01/01/92	22	01/01/91	-
Connecticut *	25	07/01/00	18	09/01/91	-	07/01/96	24	07/01/00	1
Delaware *	23	01/01/95	22	01/01/95	22	01/01/95	23	01/01/95	-
Dist. of Col.	20	10/01/94	20	10/01/94	20	10/01/94	20	10/01/94	-
Florida *	13.6	01/01/01	25.9	01/01/01	16.0	01/01/98	13.1	01/01/99	-
Georgia	7.5	07/01/71	7.5	07/01/71	7.5	07/01/71	7.5	07/01/71	-
Hawaii	16	07/01/91	16	07/01/91	11	07/01/91	16	07/01/91	-
Idaho *	25	04/01/96	25	04/01/96	18.1	04/01/96	22.5	07/01/94	2.5
Illinois *	19	01/01/90	21.5	01/01/90	19	01/01/90	19	01/01/90	-
Indiana *	15	04/01/88	16	04/01/88	-	-	15	04/01/88	-
Iowa	20	01/01/89	22.5	01/01/89	20	01/01/89	19	01/01/89	1
Kansas *	20	07/01/99	22	07/01/99	19	07/01/99	20	07/01/99	-
	21	07/01/01	23	07/01/01	20	07/01/01	21	07/01/01	
Kentucky *	16.4	07/15/94	13.4	07/15/94	15	07/01/86	16.4	07/15/94	-
Louisiana *	20	01/01/90	20	01/01/90	16	07/01/93	20	01/01/90	-
Maine	22	08/01/99	23	08/01/99	21	08/01/99	22	08/01/99	-
Maryland	23.5	05/01/92	24.25	07/01/93	23.5	07/01/93	23.5	05/01/92	-
Massachusetts *	21	01/01/91	21	01/01/91	14.9	04/01/01	21	01/01/91	-
Michigan *	19	08/01/97	15	01/01/84	15	01/01/84	19	08/01/97	-
Minnesota *	20	05/01/88	20	05/01/88	15	07/01/95	20	05/01/88	-
Mississippi *	18.4	07/01/93	18.4	07/01/93	17	01/01/89	18.4	07/01/93	-
Missouri *	17	04/01/96	17	04/01/96	17	04/01/96	17	04/01/96	-
Montana *	27	07/01/94	27.75	07/01/94	-	-	27	07/01/94	-
Nebraska *	23.9	01/01/00	23.9	01/01/00	23.9	01/01/00	23.9	01/01/00	-
	24.5	07/01/01	24.5	07/01/01	24.5	07/01/01	24.5	07/01/01	
Nevada	24.75	01/01/97	27.75	01/01/97	22.00	07/01/97	24.75	01/01/97	-
New Hampshire *	19.5	07/01/95	19.5	07/01/95	18	06/16/91	19.5	07/01/95	-
New Jersey *	10.5	07/01/88	13.5	07/01/88	5.25	07/01/88	10.5	01/01/92	-
New Mexico *	18.5	10/01/00	19.5	10/01/00	6	01/01/98	18.5	10/01/98	-
New York *	22	01/01/01	20.25	01/01/01	8	01/01/01	22	01/01/01	-
North Carolina *	24.3	01/01/01	24.3	01/01/01	24.3	01/01/01	24.3	01/01/01	-
	24.1	37073.00	24.1	37073.00	24.1	37073.00	24.1	37073.00	
North Dakota *	21	07/01/99	21	07/01/99	21	07/01/99	21	07/01/99	-
Ohio *	22	07/01/93	22	07/01/93	22	07/01/93	22	07/01/93	-
Oklahoma *	17	07/01/89	14	07/01/89	17	07/01/89	17	07/01/89	-
Oregon *	24	01/01/00	24	01/01/00	24	01/01/00	24	01/01/00	-
Pennsylvania *	26	01/01/01	30.9	01/01/01	19	01/01/01	26	01/01/01	-
Rhode Island *	29	07/08/94	29	07/08/94	29	07/08/94	29	07/08/94	-
South Carolina	16	01/01/89	16	01/01/89	16	01/01/89	16	01/01/91	-
South Dakota *	22	04/01/99	22	04/01/99	20	04/01/99	20	04/01/99	2
Tennessee *	20	04/01/89	17	04/01/90	14	04/01/89	20	04/01/89	-
Texas *	20	10/01/91	20	10/01/91	15	01/01/87	20	10/01/91	-
Utah *	24.5	07/01/97	24.5	07/01/97	24.5	07/01/97	24.5	07/01/97	-
Vermont *	20	08/01/97	26	07/01/00	-	-	20	08/01/97	-
Virginia *	17.5	07/01/92	16	07/01/92	16	01/01/94	17.5	07/01/92	-
Washington *	23	04/01/91	23	04/01/91	-	-	23.00	05/01/94	-
West Virginia *	25.65	01/01/01	25.65	01/01/01	25.65	01/01/01	25.65	01/01/01	-
Wisconsin *	27.3	04/01/01	27.3	04/01/01	20	04/01/01	27.3	04/01/01	-
Wyoming *	14	07/01/98	14	07/01/98	-	-	14	07/01/98	-
Mean	19.966		20.149		14.948		19.679		
Weighted Avg.	19.067		19.725		13.94		19.777		
Federal Tax	18.4	10/01/97	24.4	10/01/97	13.6	10/01/97	13.1	01/01/01	5.3

Summary of Senate Bill 573

An act prohibiting the below cost selling of motor fuels in Kansas

1. No marketer or retailer shall sell motor fuel at a price below cost, unless:
    1. the sales are made during a grand opening;
    2. the sales are made to introduce a new or remodeled business;
    3. the sales are made during special promotions (no more than 3 days per year), or
    4. the sales are made in good faith to meet an equally low price (net any discounts) of a competitor in the same or adjacent municipality.

2. "Cost" means:
    1. cost of product (motor fuel);
    2. cost of freight or transportation;
    3. applicable taxes and fees; or
    4. if such costs are not available, then cost means the lowest terminal price that day from the terminal from which the most recent supply was delivered to the retail location.

3. The Division of Weights and Measures of the Kansas Department of Agriculture shall be the investigative body for receiving complaints and requiring the violator to raise the price of motor fuel to comply with this act. The Division will:
    1. investigate the purported violation within 10 days;
    2. take pumps out of service if the alleged violator does not provide the Division with all records and documentation, and
    3. provide the Kansas Attorney General with all records and documentation if the Division determines that a violation has occurred.

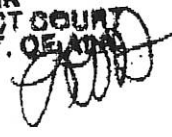
4. The Attorney General may bring an action:
    1. to obtain a declaratory judgment that a violation has occurred;
    2. to obtain a restraining order against the marketer or retailer who has violated this act;
    3. to recover any penalty provide in the act, and
    4. to recover reasonable expenses incurred by the Division and the Attorney General.

5. Any violation of this act shall render the violator liable for a civil penalty of $5,000 for each violation.

6. Any marketer or retailer of motor fuel aggrieved by a violation may bring an action:
    1. to obtain a declaratory judgment;
    2. to enjoin or obtain a restraining order against the violator, and
    3. to recover court costs and, if possible, attorney fees.

FILED

JAN 1 4 2002



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

HOME OIL COMPANY, INC.,)
)
Plaintiff,)
) CIVIL ACTION NO. 01-T-1251-S
v.)
)
SAM'S EAST, INC.)
)
Defendant.)

RECOMMENDATION OF THE MAGISTRATE JUDGE

Home Oil Company, Inc., an Alabama corporation which owns and operates a Chevron-branded gasoline station in Dothan, seeks preliminary injunctive relief to prevent Sam's East, Inc., an Arkansas corporation[1] from selling gasoline at its Dothan retail facility below cost, in violation of the *Alabama Motor Fuel Marketing Act*, *Ala. Code* § 8-22-1, *et seq.* (1975). The Court conducted an evidentiary hearing on November 16, 2001.[2] After a careful consideration of the testimony and other evidence admitted at the hearing along with the pleadings, pre-hearing and post-hearing briefs and arguments of counsel, and the relevant law, it is the Recommendation of the Magistrate Judge that Plaintiff's Motion for Preliminary Injunction, filed November 2, 2001 (Doc.

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[1]Sam's East, Inc. is a wholly owned subsidiary of Wal-Mart Stores, Inc., d/b/a Sam's Wholesale Club, the originally designated defendant. With the Defendant's concurrence the Court granted Plaintiff's motion for substitution of defendants by Order filed November 19, 2001 (Doc. No. 16).

[2]Separate court reporters recorded the morning and afternoon sessions of the hearing. For ease of reference, the 132-pp. transcript of the morning session is identified herein as *TR.No. 1*, and the 94-pp. transcript of the afternoon session is referred to as *TR. No.2*.

23

1-8

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.

II.

DISCUSSION

A. ADEQUACY OF BASIS FOR EQUITY JURISDICTION

Preliminarily, Sam's challenges the propriety of the Court's exercise of equitable jurisdiction, pointing first to the alleged adequacy of legal remedies and next to its current compliance with the applicable statute. These contentions merit no extensive analysis but will be addressed seriatim.

1. *Adequate Legal Remedy*

Notwithstanding Home Oil's express disavowal of any claim for the money damages authorized by the AMFMA,[12] Sam's suggests that preliminary injunctive relief is inappropriate because "no reference [in the AMFMA] is made to preliminary injunctive relief during the pendency of the action." Instead, Sam's contends, §8-22-17(a) "provides for damages and injunctive relief only where violations or threatened violations of the AMFMA are **"established."** (Def.'s Brief at 10). The contention is patently at odds with the express language of §8-22-17(a), which provides in its entirety:

> *Any person injured* by any violation, or who would suffer injury from any threatened violation, of this chapter *may maintain an action in any court of equity jurisdiction to prevent, restrain, or enjoin such violation or threatened violation.* If in such action a violation or threatened violation of this chapter shall be established, the court shall enjoin and restrain, or otherwise prohibit, such violation or threatened violation and, in addition thereto, the court shall assess in favor of the plaintiff and against the defendant the costs of suit, including reasonable attorney's fees. *In such action it shall not be necessary that actual*

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[12] The verified complaint at ¶ 6 declares: "Plaintiff seeks no monetary damages as otherwise allowed under §8-22-17(a)."

1-9

Jobbers: below-cost laws today ward off higher prices tomorrow

While lawyers and economists argue the toss about below-cost laws, small branded jobbers and dealers say it is they who have felt the bruising effect of competition from discount chains and private branders.

Just ask Miami marketer Max Alvarez.

"RaceTrac opened a new unit across the street from me 18 months ago and I started losing volume from Day One," says the Citgo jobber. "RaceTrac was buying unbranded from Marathon and Champlin and was 15cts below market on regular. Within 30 days, my sales dropped from 120,000 to just 60,000 gallons."

For a while, Alvarez tried to stay within 2cts of RaceTrac, but each time he dropped his price, RaceTrac would drop further. Eventually, he gave up. He now takes an 8cts margin, while RaceTrac is posting just 2cts above his laid-in cost. "But I'm lucky," says Alvarez. "That station is already paid for, so I'm not losing any money. But the average guy is not in my shoes. The little marketers around here are trying to sell up because they realize that they can no longer compete on 'gas' or inside the store either."

Paul Ashton is not as lucky. A Chevron dealer in Utah, his jobber supplier is engaged in a pricing contest with Rockies C-store chain Maverick and Ashton says he's the one who's paying for it. While the jobber is meeting Maverick, he is charging his retailers 2cts-4cts more for fuel than the price he posts at his own units, says Ashton. "My jobber supplies 20 outlets and he's using his dealers to subsidize his units, although we don't compete directly with Maverick," he says. Currently, the Maverick outlets are posting $1.19 for no-lead, with a 2cts discount for cash. Ashton is at $1.29/gal. While Utah has a below-cost law, state Attorney General Jan Graham has refused to enforce it, he says. (See p.8).

Nowhere is the split between branded and unbranded marketers more evident than in Pennsylvania, Sheetz's home state. There, jobbers and small C-store marketers are pushing a bill to amend a 1941 below-cost statute. The bill would allow for a right of private action against below-cost marketers and uses as a basis for cost the average posted terminal price, says Chick Meutzel, an Exxon and BP Amoco jobber.

"If you want to see the effect discount chains have on the market, go to Indiana County, just east of Pittsburgh -- with the exception of a couple of small repair outlets, Sheetz is about the only retailer left in many areas," says Muetzel. "But it's not just Sheetz, it's Wal-Mart and all the other hypermarketers," he adds.

Inside store sales at Sheetz's 3,000 sq. ft. outlets are so great that Sheetz can operate on a 3-4cts/gal margin, while the average jobber, with only 1,800 sq. ft. of store space, needs 12cts/gal, he says. The problem is, many marketer lots, at about one acre, are so small that they can't build a Sheetz-sized store.

"Our company will be obsolete in five years unless we can install those types of stores. We're operating on a 9-10cts margin, when we need 12-14cts to be profitable. The law we're trying to pass is a survival bill. It's not a panacea, it won't stop extreme competition, but it will stop below-cost sales," he says. If Sheetz had to abide by the law today, it would lose 2-3cts of margin, says Muetzel.

Louie Sheetz, exec VP of the Altoona-based Sheetz chain, has been quoted as saying that he hates the bill. While he would support a measure that curbs predatory pricing, this bill does not do that, he has said.

According to Sheetz, it is not his company's policy to sell below cost. It does so only to match competition, he says. "When we open, we'll lead with an aggressive price, but always above cost," he told a C-store magazine in February.

(During the Go-Mart trial in West Virginia in 1995, a Sheetz exec acknowledged under cross-examination that he was aware of the state below-cost law when he set pump prices at a new store. He also said that Sheetz had found that below-cost pricing works better than other grand opening promotions in attracting customers, according to the trial transcript. He set the price of regular at 11cts below cost, midgrade at 9cts below, and premium 7cts below, a spread that Sheetz used at other grand openings, he said. Questioned by his company's own legal team, the exec noted that the 89cts price Sheetz posted for regular was a price it would have used, regardless of what the cost of gasoline was).

According to Louie Sheetz, the problem for many marketers is that they cling to business formulas that are rapidly becoming outdated. They have a business model that requires 10-12cts

1-10

profit margins, while other retailers have found ways to be successful at much lower margins. Marketers must figure out ways to change their business model, make do with less, or think about closing the store, Sheetz told the C-store magazine. (Sheetz declined comment for this article).

However, most marketers do not have the approximately $2 million in merchandise sales that Sheetz can use to withstand a protracted price war. "That's the heart of our model. The more profitable you can make the in-store facility, the less dependent you are on gasoline to make that profit," Sheetz was quoted as saying.

Sheetz's goal is to shrink its break-even point on gasoline sales to 0.0cts/gal in 2006, company president Stan Sheetz told an employee meeting earlier this year. Break-even for the chain in 1998 was 6.39cts/gal, and it wants to cut that number to 4.8cts this year, said Stan Sheetz (OE 3/29).

That doesn't mean Sheetz will actually sell at a loss or at a 0.0cts margin, says Michael Cortez, a company lawyer. "Sheetz has in the past, and will continue in the future, to sell its 'gas' at fair, legal prices," he said in a recent letter to Oil Express.

State AG won't enforce Utah below-cost law

Many states are loath to enforce below-cost laws and in Utah the issue has split lawmakers to the point where Attorney General Jan Graham has gone to court to defend her right not to prosecute under the law, says dealer Paul Ashton.

Utah passed a gasoline-specific below-cost law in 1981 and it was successfully used to prosecute Flying J in the late '80s. But since then, successive AGs have said they can't enforce it.

The law defines cost as lowest invoice price, plus a 6% mark-up, unless a marketer can show his cost of doing business is lower or he is meeting competition. In 1995, jobber Black Oil Inc., filed a complaint against chain marketer Maverick, alleging below-cost sales at a store in Moab for 15 days in March of that year.

The state's consumer protection division investigated and found Maverick had a 2-11cts price edge over three competitors, so it clearly wasn't matching a rival. However, rather than bring suit against Maverick, Graham set up a special committee to study the company's pricing. Maverick told the committee that its costs were lower than those of other marketers, and therefore its mark-up could be lower than 6%, Ashton says.

In a December 1995 report, the AG's committee concluded that it couldn't prove Maverick had sold below-cost without doing a full audit of Maverick's financial dealings, and such an audit was beyond its authority and resources, it said.

However, the committee noted that "it is suspicious that Maverick's allocation methods result in consistent profits for their 'gas' operations and consistent losses for their store operations." It was not convinced that all relevant overhead expenses had been allocated to store-level financial statements but, absent a complete audit, its concerns were based more on suspicion than reliable financial evidence, it said. Maverick had not met the burden of proof that it sold fuel at a profit and, "in the spirit of goodwill and voluntary cooperation," the veracity of its responses was not thoroughly tested. The committee said it believed Maverick did not set out to injure competition, however.

After the committee's findings were made public, the consumer protection division told marketers in a February, 1996 letter that it was placing all fuel marketing complaints on "in-active status" until "enforceability and other issues" were resolved. The committee had decided that the law "was not technically enforceable" because of its definition of cost. The Attorney General had also cited other issues, including problems with defining "competition, public perceptions, and the constitutional issues of free trade," said the letter.

After a legislative hearing in January, state lawmakers, backed by Republican Gov. Mike Leavitt, passed a bill that said Attorney General Jan Graham could not pick and choose which laws she would enforce. Graham has now sued to get that law declared unconstitutional, says Ashton, a proponent of below-cost laws.

"All we want is for a judge and jury to decide if the (below-cost) law is constitutional," he says.

Montana law repealed

Consumers believe below-cost laws are anti-competitive, at least in Montana. The state passed a below-cost measure in 1991 but it generated such hostility that the issue was put on the ballot last November. The referendum passed and the law was repealed.

Judge rules that Murphy's Wal-Mart pricing is "destroying" small competitors

Murphy Oil's pricing tactics at a Wal-Mart store in Florida have just earned the independent refiner a preliminary injunction banning the company from continuing to sell below-cost.

"Competition by smaller independent retailers is being destroyed by the marketing program currently being used by Murphy Oil," said Circuit Court Judge Burton C. Conner in a ruling handed down last week..

Murphy claimed that it was only meeting competition from Shell and others whose credit card programs offer discounts, but Judge Conner disagreed -- Murphy was just driving down the price of 'gas,' he said. It is the second time that Murphy has been enjoined for below-cost sales in less than four months (12/20/99).

Before the court was a case brought by a Chevron jobber and two dealers. Town Star Food Stores operates some 18 units in southern Florida, five in Okeechobee County. Dealers Fast Break Inc. and Entry Brothers Inc. have one store each.

Murphy opened an 84-square-foot kiosk unit at the Wal-Mart SuperCenter in Okeechobee on Oct. 1 last year. The lease agreement between Murphy and Wal-Mart provided that the pair would cross-promote a gift card program that would allow Wal-Mart customers to receive at least a 3cts/gal discount off the street price of Murphy's gasoline.

The lease specifically says Murphy and Wal-Mart's "goal" is to allow gift card customers to fuel **"at a price that is lower than other competitive branded, unbranded or independent gasoline marketers that are priced lowest in each station's retail market or trade area."** The only proviso: that Murphy will not be required to price unlawfully in markets with below-cost laws.

However, that's just what Murphy did, thanks to Wal-Mart's gift card program, said the judge.

The gift card program helps Wal-mart because it allows Wal-Mart's customers not only to buy merchandise but also to get discounts at the pump. It benefits Murphy because more than 90% of its fuel customers are Wal-Mart shoppers, and over 43% of the retail sales made at its kiosk during the first four months of operation were gift card sales.

During the first month of operations at Okeechobee, Murphy gave gift card customers a 5cts/gal discount, subsequently cut to 3cts. During the 146 days from Oct. 1 to Feb. 22 this year, there were only 22 days when Murphy sold regular at a price above its cost, even though market conditions were such that it could have undercut its competitors by 2-3cts/gal and still not have breached Florida's below-cost law, said the judge.

Murphy testified that it regards Shell as its primary branded competitor in Okeechobee and Citgo, Coastal and Speedway as its main unbranded competitors. Shell's credit card offers customers a 5% discount on gasoline purchases, while the Discover card, accepted by many independent dealers, offers a 1% discount. Murphy contended that it developed the gift card program "as a systematic way" of competing with discounts offered by the credit card companies that would otherwise be hard to monitor at street level.

But the evidence did not "bear out" Murphy's contention, said Judge Conner.

When Murphy opened the Wal-Mart unit, it sold at 2-3cts under its lowest competitor, and then offered a further 5cts discount. Shell's credit card discount was worth 6cts at the time. While it matched Shell for nine days, much of the time Murphy's price was up to 20cts under Shell's. When other dealers cut their prices, Murphy in turn used that to justify reducing its street price. "By greater weight of the evidence, it appears that Murphy was driving the price of regular gas down in the Okeechobee market, rather than meeting competition," he said.

Murphy argued that Clayton Act antitrust law should apply in its case. But Judge Conner noted that the U.S. Supreme Court has held that pricing "systems" must be developed to combat a specific act by a competitor, rather than a general system of competition. "The facts of this case do not support Murphy Oil's contention that its gift card discount system in good faith meet competition," he said. He ordered Murphy not to sell below-cost unless it was in good faith meeting the price of a competitor within 15 miles of its unit. Murphy must also charge 65.7cts/gal for labor and rental costs, as defined by Florida law, he said.

May 29, 2000

Murphy targets Wal-Mart supercenters for growth

Murphy Oil says its ongoing partnership with Wal-Mart [illegible] be tied to future development of the discount chain's "superce[illegible]

"By the end of this year, most of the conventional Wal-Mart sites that can handle a service station will have one," says Murphy spokesman Kevin Fitzgerald. "A lot of their regular sites are strip centers that are too small to handle stations. So after this year, we'll be putting in the stations as Wal-Mart puts in supercenters."

Meanwhile, Murphy is looking to expand its relationship with Wal-Mart to other states. It currently has a 21-state marketing deal with the chain, covering most of the Southeast and much of the Midwest. Murphy would be "interested in talking to Wal-Mart about extending the contract into other regions," says Fitzgerald.

Wal-Mart has made the "supercenter" the main focus of its expansion efforts, converting many of its outlets to the format. As of April 30, it had 1,784 traditional discount units and 753 "supercenters," with plans to open 40 conventional stores and 165 supercenters (including 107 conversions/relocations) during the fiscal year.

Murphy currently operates 153 stations in Wal-Mart parking lots, with another 23 under construction and 47 in the permitting stage. In April, the company unveiled plans to open 150 new units on Wal-Mart sites, 100 to be built in the Southeast and 50 in the upper Midwest. It plans to have 600 Wal-Mart stations by 2003.

June 5, 2000

roger's plans to expand gasoline sales to Atlanta

Within a year, new Kroger stores built in metro Atlanta will have ations out front, and some existing units may also be retrofitted to ll fuel. The chain has 104 stores in Atlanta and will market the asoline under its own brand name. It is also promising customer loyty programs that will reward shoppers with discounts on groceries ter a certain number of fill-ups. The fuel locations are expected to over about 10,000 square feet on quarter-acre sites will have kiosks ffering candy, snacks, ice, sodas, lottery tickets and cigarettes.

Kroger started marketing fuel in 1998, opening a test site in Louislle. Last year, it opened a location in Barboursville, W. Va., placing ewspaper ads that offered the first 500 customers to buy an eight allon fill-up a free grocery item, such as a loaf of bread or a package napkins, for each day of the week (OE 2/15/99). Local marketers ied the chain last September, alleging it had been selling 1-2cts bew rack since January (OE 9/13/99).

April 17, 2000

Murphy to accelerate store openings at Wal-Mart

Independent refiner and marketer Murphy Oil says it will speed up the development of new stations at Wal-Mart outlets. It will add 150 new outlets this year and plans to have opened nearly 600 by 2003, says CEO Claiborne Deming. The company currently has 145 stations in Wal-Mart parking lots, primarily in the Southeast, he told a New Orleans energy conference recently.

Some 50 of the new outlets will be built in upper Midwest markets after Murphy signed a deal with Wal-Mart to enter Ohio, Michigan, Wisconsin, Indiana, Illinois, Iowa and Minnesota last year, as first reported OE 11/1/99. The remaining 100 units will be built at Wal-Mart stores in the Southeast. Each unit is expected to cost in the $500,000 range. Most of Murphy's sites move 200,000 gals/mo or more but the company's pricing at the kiosk stations has led to lawsuits alleging that it breaches below-cost laws (OE 4/10, 12/20/99).

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**LICENSED TO PRACTICE IN KANSAS AND MISSOURI

TESTIMONY OF BOB ALDERSON

ON BEHALF OF CASEY'S GENERAL STORES, INC.

IN OPPOSITION TO LEGISLATION PROHIBITING

BELOW COST SELLING OF MOTOR FUELS

April 3, 2002

Chairman Hayzlett and Members of the House Transportation Committee:

I am Bob Alderson, an attorney in private practice in Topeka, and I am appearing today on behalf of Casey's General Stores, Inc. ("Casey's"). Casey's has 104 convenience stores located in Kansas, and these stores employ in excess of 780 people with an annual payroll of more than $8 million. In 2001, these stores paid Kansas property taxes of more than $615,000 and they remitted sales taxes in excess of $2.8 million.

As a general principle, Casey's believes that free market competition should establish motor fuel prices without government interference, and for this reason, Casey's opposes legislation which prohibits below cost selling of motor fuels. Casey's has been confronted with proposed legislation of this type in a number of the other states in which it does business. Due to the complexity and the interaction from the various components of these proposed laws, Casey's has determined that there are often unintended consequences that would end up not only harming Casey's and other marketers of motor fuels, but more importantly, would end up injuring consumers.

The consequences of below cost selling legislation can best be illustrated by comments of the U.S. Federal Trade Commission ("FTC") dated February 15, 2002, which were filed with the Commonwealth of Virginia's House of Delegates (at its request).

These comments related to proposed legislation in Virginia that sought to prohibit retailers from selling motor fuels "below cost" to eliminate the possibility of "predatory pricing." A copy of those comments are attached to my testimony.

The attached comments preface the FTC's analysis of the pending Virginia legislation as follows:

> "We believe such legislation is unnecessary and has a significant potential to be anticompetitive. At best, it merely duplicates existing protections against 'predatory pricing' found in federal antitrust law; at worst, it may discourage or even prevent competitive pricing."

Following that statement, the FTC's comments indicate that its analysis of the pending legislation in Virginia can be summarized by the following five points:

"• Anticompetitive below-cost pricing is already illegal under the federal antitrust laws. The FTC and the Department of Justice's Antitrust Division continue to investigate allegations of predatory conduct.
"• Scholarly studies and court decisions suggest that anticompetitive below-cost pricing rarely happens.
"• Past studies suggest that anticompetitive below-cost sales of motor fuels are especially unlikely.
"• The bill would penalize some forms of price cutting that benefit consumers.
"• If enforced vigorously, the legislation would likely harm consumers by increasing the price of motor fuels."

I would urge each of you to read the FTC's comments in their entirety. I think they will provide great insight as to the consequences of legislation attempting to regulate the price of motor fuels. However, to facilitate your review of those comments, I would call to your attention pertinent observations of the FTC with respect to each of the above-quoted points of its analysis of the Virginia legislation.

<u>Anticompetitive below-cost pricing is already illegal under federal antitrust laws.</u>

The FTC notes that the United States Supreme Court, in several important antitrust decisions, "has been absolutely clear that consumer welfare is the linchpin of the antitrust laws, and that low prices, as a general matter, are 'a boon to consumers.'" Accordingly, the FTC notes that "[i]t is axiomatic that the antitrust laws are intended for 'the protection of competition, not competitors.'" The FTC's comments go on to note that the federal antitrust laws "are intended to promote and maintain legitimate, vigorous price competition, irrespective of how individual competitors may fare in the face of such competition."

Recognizing that vigorous price competition compels a minimization of costs and prices to increase quality, the FTC states that, through this dynamic, "consumer welfare is maximized because consumers reap the benefits of lower prices, greater variety, and higher quality goods and services."

Regarding this same point, the FTC states that below-cost pricing "by itself" is insufficient under the federal antitrust laws to constitute a violation. Further, it notes that, in evaluating below-cost selling legislation,

> "the pertinent comparison is to the *price-cutter's* cost, not the costs of its rivals. If the price-cutter has lower costs, and thus is more efficient, than its rivals, no predatory pricing occurs when it prices above its own costs, irrespective of whether those prices are below its rivals' cost."

In concluding its remarks on this issue, the FTC states as follows:

> "Given the strong stance of the Supreme Court in favor of the benefits of low prices and the care it has devoted to explaining what types of price cutting are illegal under the antitrust laws, it is doubtful that new legislation is necessary to prevent the same harms to consumers."

Scholarly studies and court decisions suggest that anticompetitive below-cost pricing rarely happens.

Here, the FTC quotes from a Seventh Circuit Court of Appeals case which found that the scholarly studies done on this issue are consistent with the results of actual litigation, and also that "courts routinely find that there has been no predation."

The FTC's comments also observed that the U.S. Supreme Court is consistent with the scholarship on this point, finding that "'there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.'" For this reason, the Court "emphasized the need to take great care to distinguish between procompetitive price cutting and anticompetitive predation because 'cutting prices in order to increase business often is the very essence of competition.'" Further, the FTC cautions that, to conclude that the

> "'antitrust laws protect competitors from the loss of profits due to price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.'"

•Past studies show that anticompetitive below-cost sales of motor fuels are especially unlikely.

As the caption on this issue suggests, the FTC states that the studies which have been done have concluded that anticompetitive below-cost pricing is particularly unlikely in the retailing of motor fuels. Several states, including the states of Arizona, Washington, and Pennsylvania, have conducted studies in the past two decades which have reached this conclusion. Based on these studies, the FTC has found that laws prohibiting below-cost selling of motor fuels

> "may serve to deter, rather than enhance, competition. The reason for such deterrence is that it may open up firms who engage in low, but non-predatory, pricing to litigation. Seeing the threat of litigation, such firms may change strategy and charge consumers higher prices."

On this point, the FTC concluded that, to date, "no systematic study has produced evidence that gasoline is any more susceptible than any other product to predatory pricing."

The bill (Virginia Senate Bill No. 458) could penalize some forms of price-cutting that benefit consumers.

Here, the FTC notes that federal antitrust laws already prohibit anticompetitive price-cutting. For that reason, the FTC entered a caution regarding the Virginia legislation that should be offered in connection with any Kansas legislation that would prohibit below-cost selling, by stating that the proposed Virginia law "would outlaw more types of pricing behavior than federal antitrust laws do, and so it runs the risk of penalizing procompetitive price-cutting that benefits consumers." Moreover, the FTC suggested that, even if the Virginia legislation would closely parallel the federal antitrust standards, "the uncertainty of a dual enforcement regime, with potentially different standards, would likely chill procompetitive price-cutting that would otherwise benefit consumers."

If enforced vigorously, the legislation (Virginia Senate Bill No. 458) could harm consumers by increasing the price of motor fuels.

The FTC suggests that below-cost selling laws are often difficult to enforce or are enforced unevenly. However, it also notes that vigorous and sustained enforcement "could lead to a significant chilling effect on competition that might increase retail gasoline prices."

Based on the foregoing, the FTC found that the proposed Virginia legislation "would be more likely to harm than to promote competition." It found that the proposed legislation addresses a problem

> "that is unlikely to occur. To the extent that anticompetitive below-cost pricing is a danger in the retail gasoline market, federal antitrust laws are adequate to deal with the problem, and the additional sanction of the proposed bill could significantly deter procompetitive price-cutting and lead Virginia consumers to pay more at the gas pump."

I would respectfully suggest that the comments of the FTC with respect to the proposed Virginia legislation should be given careful consideration in analyzing any proposed legislation prohibiting the below-cost selling of motor fuels in Kansas.

Thank you for the opportunity to testify on this matter. I will be pleased to respond to any questions members of the Committee may have.

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

Bureau of Competition
Office of Policy Planning

February 15, 2002

The Honorable Robert F. McDonnell
Commonwealth of Virginia
House of Delegates
Richmond, VA

Dear Delegate McDonnell:

The staff of the Office of Policy Planning and the Bureau of Competition of the Federal Trade Commission welcome the opportunity to submit this letter in response to your request for comments on Senate Bill No. 458, "Below-Cost Sales of Motor Fuels."[1] The bill seeks to prohibit a retailer from selling motor fuels "below cost," where cost is defined as the sum of the retailer's actual cost of fuel or the lowest terminal of origin price at the terminal from which the fuel was delivered to the retailer, plus all applicable taxes and fees, plus one of two alternative measures of transportation costs.

We believe such legislation is unnecessary and has a significant potential to be anticompetitive. At best, it merely duplicates existing protections against "predatory pricing" found in federal antitrust law; at worst, it may discourage or even prevent competitive pricing. Our analysis can be summarized in five points:

- Anticompetitive below-cost pricing is already illegal under the federal antitrust laws. The FTC and the Department of Justice's Antitrust Division continue to investigate allegations of predatory conduct.
- Scholarly studies and court decisions suggest that anticompetitive below-cost pricing rarely happens.
- Past studies suggest that anticompetitive below-cost sales of motor fuels are especially unlikely.
- The bill would penalize some forms of price cutting that benefit consumers.
- If enforced vigorously, the legislation would likely harm consumers by increasing the price of motor fuels.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Under this statutory mandate, the Commission seeks to identify business practices that impede competition or increase costs without offering countervailing benefits to consumers. In particular, Commission staff have had considerable experience assessing the competitive impact of regulations and business practices in the petroleum industry.[3] On numerous occasions, the Commission has offered comments on proposed state laws that would ban sales of motor fuels below cost or prevent "unfair" competition between refiner-owned and independent gas stations.[4]

II. Anticompetitive below-cost pricing is already illegal under federal antitrust laws.

Proponents of Senate Bill 458 suggest that the legislation is necessary to prevent large retail and convenience store chains from slashing gasoline prices below cost, driving independent service

stations out of business, and then raising prices to monopoly levels once the competition has been eliminated.[5] However, such anticompetitive below-cost pricing ("predatory pricing") is already illegal under federal antitrust laws.[6]

The federal antitrust laws are fundamental to national economic policy. We, as a nation, have determined that the economic needs of the American people are best served by competitive markets. Under our free market system, the wants and desires of consumers, as expressed by their dollar votes in the marketplace, determine what gets produced, how much gets produced, and who gets the reward from that production. The antitrust laws are instrumental to our free market system because they ensure that markets remain competitive, efficient, and dynamic.

The antitrust laws have performed exceptionally well ever since the enactment of the Sherman Act in 1890. The U.S. economy is the most competitive and the most vibrant economy in the world, and indeed is the envy of the world. The antitrust laws and their enforcement are a major part of that success.

Under these laws, both the Federal Trade Commission and the Antitrust Division of the United States Department of Justice may bring enforcement actions against predatory pricing. The federal government has launched several predation investigations and cases during the past several years. Notable examples include *American Airlines*, *Intel*, and *Microsoft*.[7] In addition, private plaintiffs and state attorneys general have the right to bring predatory pricing cases. Under Section 4 of the Clayton Act, any person who has been injured in his business or property as a result of conduct forbidden by the antitrust laws can seek treble damages for that injury.[8] State attorneys general, acting as *parens patriae*, may also bring such actions.

Although predatory pricing is illegal, the United States Supreme Court has taken great pains to ensure that antitrust law is not used to prevent procompetitive price-cutting. It is axiomatic that the antitrust laws are intended for "the protection of competition, not competitors."[9] That is, the federal antitrust laws are intended to promote and maintain legitimate, vigorous price competition, irrespective of how individual competitors may fare in the face of such competition.[10] Vigorous price competition forces producers to minimize costs and prices and to increase quality. Through this dynamic, consumer welfare is maximized because consumers reap the benefits of lower prices, greater variety, and higher quality goods and services. Indeed, the Court, in several important antitrust decisions, has been absolutely clear that consumer welfare is the linchpin of the antitrust laws, and that low prices, as a general matter, are "a boon to consumers."[11]

Indeed, the Court has spoken directly and definitively to the lawfulness of low pricing strategies. In *Brooke Group*, the seminal case that originated here in the Fourth Circuit, the Supreme Court left no doubt that a decrease in a plaintiff's profits from a reduction in the defendant's prices, by itself, is not unlawful under the antitrust laws. "Low prices benefit consumers regardless of how those prices are set."[12] Rather, to be unlawful, the low prices minimally must be predatory. "[S]o long as they are above predatory levels, [low prices] do not threaten competition. ... We have adhered to this principle regardless of the type of antitrust claim involved."[13] "[W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws."[14]

The Court has defined predatory pricing, in turn, as "pricing below an appropriate measure of [the defendant's] cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[15] Although the Court has not stated what the appropriate measure of cost should be, prominent antitrust scholars and several federal circuit courts have concluded that the price-cutter's marginal costs, or a close proxy such as average variable costs, should be the yardstick.[16]

It is important to keep in mind that, whatever cost measure is chosen, the pertinent comparison is to the *price-cutter's* cost, not the costs of its rivals. If the price-cutter has lower costs, and thus is more efficient, than its rivals, no predatory pricing occurs when it prices above its own costs, irrespective of whether those prices are below its rivals' costs. "To hold that the antitrust laws

protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share."[17]

Below-cost pricing by itself, however, is insufficient under the antitrust laws to constitute a violation. Consumers are not harmed by below-cost pricing *unless* they will see sustained above-cost prices later on:

> [T]he short-run loss 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.[18]

Thus, even if a below-cost pricing strategy succeeds in temporarily reducing the number of competitors, the price-cutter must be able to find a way to keep competitors from returning after it tries to raise prices again. Otherwise, the below-cost pricing strategy, which requires that the firm incur losses on every sale, will not succeed. When a firm is unable to recoup short-run losses (from sales at below-cost prices) in the long-run, consumers enjoy a windfall. And, without harm to consumers, an antitrust violation does not occur. "The second prerequisite to holding a competitor liable [under the federal antitrust laws] for charging low prices is a demonstration that the competitor had a dangerous probability of recouping its investment in below-cost prices. ... Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition...That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured."[19]

Given the strong stance of the Supreme Court in favor of the benefits of low prices and the care it has devoted to explaining what types of price cutting are illegal under the antitrust laws, it is doubtful that new legislation is necessary to prevent the same harms to consumers.

III. Scholarly studies and court decisions suggest that anticompetitive below-cost pricing rarely happens.

To assess whether this bill is necessary, Virginia legislators may find it helpful to consider the extensive scholarship and court decisions on anticompetitive below-cost pricing. In an exhaustive discussion of the topic, Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit noted that "[s]tudies of many industries find little evidence of profitable predatory practices in the United States or abroad. These studies are consistent with the result of actual litigation; courts routinely find that there has been no predation."[20]

More recent analyses largely confirm Easterbrook's conclusion. A leading textbook on industrial organization economics notes, "Given all the problems in identifying predatory pricing, it is not surprising that economists and lawyers have found few instances of successful price predation in which rivals are driven out of business and prices then rise. Although predation is frequently alleged in law suits, careful examination of these cases indicates that predation in the sense of pricing below cost usually did not occur."[21] Predation sometimes occurs[22], but not nearly as frequently as claimed.

Because it is difficult to profit from anticompetitive below-cost pricing, the Supreme Court, in keeping with scholarship on this point, has found that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[23] Therefore, the Court has emphasized the need to take great care to distinguish between procompetitive price cutting and anticompetitive predation because "cutting prices in order to increase business often is the very essence of competition..."[24] "To hold that the antitrust laws protect competitors from the loss of profits due to ... price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."[25]

In short, the proposed legislation appears to address a problem that not only is already covered under federal antitrust law, but also is relatively unlikely to occur in any event.

IV. Past studies show that anticompetitive below-cost sales of motor fuels are especially unlikely.

A series of studies suggests that anticompetitive below-cost pricing is especially unlikely in gasoline retailing. Laws to prevent anticompetitive below-cost pricing of motor fuels have been debated extensively during the past two decades. The issue originally arose in the 1980s, when various parties expressed concern that major oil companies were selling gasoline below cost in order to drive independent stations out of business. Aside from the identity of the alleged predator, the issues and debate were rather similar to the discussion occurring in Virginia today. Numerous states considered enacting legislation similar to the bill under consideration in Virginia. The U.S. Department of Energy (USDOE) conducted an extensive investigation of predatory pricing allegations in gasoline markets.

In 1984, USDOE released a final report to Congress examining whether vertically integrated refiners were "subsidizing" their retail gasoline operations in a way that might be predatory or anticompetitive. The study was based on an extensive study of pricing data and internal oil company documents subpoenaed by the USDOE. USDOE found that there was no evidence of predation or anticompetitive subsidization. The agency concluded that increased pressures on gasoline retailers were not caused by anticompetitive behavior on the part of the major oil companies. Rather, the decline in the overall number of retail outlets and the intensification of competition among gasoline marketers were attributable to decreased consumer demand for gasoline and a continuing trend toward the use of more efficient, higher-volume retail outlets.[(26)]

Since 1996, the Commission has extensively investigated the pricing practices of virtually every major oil company, and Commission staff have found no convincing evidence of predatory pricing in the retail gasoline market. In several recent investigations, the FTC has expressed concern about unduly high concentration levels in certain gasoline markets. In these cases, however, the Commission was concerned that concentration, among other things, could lead to higher, not predatory, gasoline prices.

Several states have also conducted their own studies. In 1987, a Joint Legislative Study Committee created by the Arizona legislature recommended that no new legislation be enacted to restrict the pricing of motor fuels in Arizona. "The marketplace for petroleum products is very competitive in Arizona," the committee concluded.[(27)]

In 1986, the Washington State Attorney General initiated a study of motor fuel pricing to determine whether refiners were engaged in anticompetitive subsidization of company-owned service stations. Information was gathered on the practices of all eight of the major companies in Washington for a three-year sample period. The Washington study found that lessee-dealers paid essentially the same prices as company-owned stations more than 99 percent of the time.[(28)]

More recently, the Commonwealth of Pennsylvania conducted a study examining a variety of proposals for legislation affecting retail gasoline sales in the state. The report extensively analyzed "sales below cost" laws and declined to recommend that Pennsylvania enact one. In fact, the Pennsylvania study raised significant doubts about the theory that gasoline retailers were engaging in anticompetitive below-cost pricing, and it warned that a "sales below cost" law might harm consumers more than it would help them:

Unfortunately, such laws may serve to deter, rather than enhance, competition. The reason for such deterrence is that it may open up firms who engage in low, but non-predatory, pricing to litigation. Seeing the threat of litigation, such firms may change strategy and charge consumers higher prices.[(29)]

Competitors will, of course, sometimes complain that the competition charges prices that are too low. Competitors have an incentive to do so if they believe such complaints will lead to legislation

that will allow them to charge higher prices. Thus far, no systematic study has produced evidence that gasoline is any more susceptible than any other product to predatory pricing.

V. The bill could penalize some forms of price-cutting that benefit consumers.

Anticompetitive price-cutting is already illegal under federal antitrust laws. Senate Bill 458, however, would outlaw more types of pricing behavior than federal antitrust laws do, and so it runs the risk of penalizing procompetitive price-cutting that benefits consumers.

Under the bill, a retailer must "cease and desist" upon notification by the Commissioner of the Department of Motor Vehicles that the retailer sold fuel below cost and does not qualify for any of the exemptions listed in the bill. The Commissioner can also impose a civil fine of $5,000 for the first violation and $10,000 for each subsequent violation if the unlawful sales "caused a disruption in the motor fuel market, or some segment thereof" or "have caused or are likely to cause a substantial reduction in competition."

Put somewhat differently, the bill would allow the Commissioner to order a retailer to cease below-cost sales even if such sales posed no danger of causing a reduction in competition. Similarly, a retailer could be subject to monetary fines even if its below-cost pricing posed no danger to competition; the retailer's pricing need only cause a "disruption" in the motor fuel market.[30] "Disruption" is not further defined, but the term could easily be read to include price wars or other forms of intensified competition that are a boon to consumers but "disruptive" from a competitor's perspective. The antitrust laws are designed to protect and encourage some forms of "disruption" in markets, when the disruption benefits consumers. Some competitors will be harmed by strong and effective competition. That is not a reason to discourage such competition. Congress long ago decided that the American economy would be built around competition.

A more consumer-friendly approach would be to provide that the Commissioner can issue a cease and desist order and/or monetary fines *only if* the Commissioner determines that the retailer's below-cost pricing has caused or is likely to cause a substantial reduction in competition. This change would make the bill's standard for determining illegality more closely parallel to the standing requirement under federal antitrust law that a private plaintiff demonstrate "antitrust injury," that is, injury to competition.[31] Even so, the uncertainty of a dual enforcement regime, with potentially different standards, would likely chill procompetitive price cutting that would otherwise benefit consumers.

VI. If enforced vigorously, the legislation could harm consumers by increasing the price of motor fuels.

During the past two decades, a growing body of empirical economic research has assessed the impact of state "sales below cost" laws on retail gasoline prices. Most studies find these laws raise gasoline prices or leave them unchanged. Some suggest that the laws raise retail gasoline prices by one or two cents per gallon.[32] One study currently in draft form finds that these laws increase gasoline prices initially and lower them in subsequent years, but it is not clear whether these findings meet economists' customary standards for statistical significance.[33] Many of the studies suffer from methodological problems that make it unclear whether they are measuring the impact of sales below cost laws or something else. The most carefully-controlled study, conducted by a senior economist in the FTC's Bureau of Economics, has found that the laws had no effect on retail prices.[34]

The most likely explanation for these varied findings is that such laws are often difficult to enforce or are enforced unevenly. Therefore, it is possible that the mere existence of such a law has limited effect on retail gasoline prices. Vigorous and sustained enforcement, however, could lead to a significant chilling effect on competition that might increase retail gasoline prices.

VII. Summary and Conclusions

For the reasons stated above, we believe that Senate Bill 458 would be more likely to harm than to promote competition. The legislation addresses a problem that is unlikely to occur. To the extent that anticompetitive below-cost pricing is a danger in the retail gasoline market, federal antitrust laws are adequate to deal with the problem, and the additional sanction of the proposed bill could significantly deter procompetitive price-cutting and lead Virginia consumers to pay more at the gas pump.

Sincerely,

Ted Cruz, Director
Jerry Ellig, Deputy Director
Office of Policy Planning

Joseph Simons, Director
Theodore A. Gebhard, Attorney
Bureau of Competition

Endnotes:

1. This letter expresses the views of the Bureau of Competition and the Office of Policy Planning of the Federal Trade Commission. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

2. Federal Trade Commission Act, 15 U.S.C. § 45.

3. In recent years, the Commission has investigated, among others, the mergers of Chevron and Texaco, Exxon and Mobil, and BP and Amoco - the three largest oil mergers in history - and the combination of the refining and marketing businesses of Shell, Texaco and Star Enterprises to create what was, at the time, the largest refining and marketing company in the United States. Last fall, the Commission investigated the proposed merger of petroleum refiners Valero Energy and Ultramar Diamond Shamrock. *See Valero Energy Corp.*, C-4031 (Dec. 18, 2001) (proposed consent order), *Chevron Corp.*, C-4023 (Dec. 18, 2001) (consent order); *Exxon Corp.*, C-3907 (Jan. 30, 2001) (consent order); *British Petroleum Company p.l.c.*, C-3868 (Apr. 19, 1999) (consent order); *Shell Oil Co.*, C-3803 (Apr. 21, 1998) (consent order).

The Commission has also conducted nonmerger investigations and workshops involving gasoline markets, and participates in relevant public comment opportunities. In March 2001, the Commission, using the competition analysis principles in the Merger Guidelines, completed an investigation of a spike in reformulated gasoline (RFG) prices in several Midwest states in the spring and summer of 2000. Midwest Gasoline Price Investigation, Final Report of the Federal Trade Commission (Mar. 29, 2001). Also in 2001, the Commission concluded its investigation of gasoline price increases in West Coast markets. *FTC Closes Western States Gasoline Investigation*, FTC Press Release (May 7, 2001). In addition, in August 2001, the Commission held an initial public conference to examine factors that affect prices of refined petroleum products in the United States. *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry*, FTC Press Release (July 12, 2001). A second public conference is scheduled for May 2002. *FTC to Hold Second Public Conference on the U.S. Oil and Gasoline Industry in May 2002*, FTC Press Release (Dec. 21, 2001). Commission staff also recently filed public comments with the Environmental Protection Agency concerning "boutique fuel" regulations. Comments of the Staff of the General Counsel, Bureaus of Competition and Economics, and the Midwest Region of the Federal Trade Commission, *Study of Unique Gasoline Fuel Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution and Potential Improvements*, EPA 420-P-01-004, Public Docket No. A-2001-20 (Jan. 30, 2002).

4. *See, e.g.*, Letter from Ronald B. Rowe, Director for Litigation, FTC Bureau of Competition, to The Honorable David Knowles, California State Assembly (May 5, 1992); Prepared Statement of Claude C. Wild III, Director, FTC Denver Regional Office, before the State, Veterans, and Military Affairs Committee of the Colorado State Senate (Apr. 22, 1992); Letter from Claude C. Wild III, Director, FTC Denver Regional Office, to The Honorable Bill Morris, Kansas State Senate (Feb. 26, 1992); Letter from Claude C. Wild III, Director, FTC Denver Regional Office, to David Buhler, Executive Director, Utah Department of Commerce (Jan. 29, 1992); Letter from Thomas B. Carter, Director, FTC Dallas Regional Office, to The Honorable W.D. Moore, Jr., Arkansas State Senate (Mar. 22, 1991); Letter from Jeffrey I. Zuckerman, Director, FTC Bureau of Competition, to the Honorable Jennings G. McAbee, Chairman, Ways and Means Committee, Other Taxes and Revenues Subcommittee, South Carolina House of Representatives (May 12, 1989).

5. Dina ElBoghdady, "The High Price of Cheap Gas," Washington Post, February 1, 2002, p. E01.

6. Predatory pricing claims are brought under Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs can also claim anticompetitive predation under the Robinson-Patman Act, 15 U.S.C. § 13(a) (as amended).

7. *United States v. AMR Corp.*, 2001-1 Trade Cas. (CCH) ¶ 73,251 (D.Kan. 2001); *In re Intel Corp.*, No. 9288 (FTC Aug. 3, 1999); *United States v. Microsoft Corp.*, 97 F.Supp.2d 30 (D.D.C.), *judgment entered*, 97 F. Supp.2d 59 (D.D.C. 2000), No. 00-5212 (D.C. Cir. June 13, 2000).

8. 15 U.S.C. § 15.

9. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

10. Many state antitrust statutes require that state courts follow federal precedent in state antitrust cases. Virginia's antitrust law

does not specifically say this, but it does read, "Nothing contained in this chapter shall make unlawful conduct that is authorized, regulated or approved...by an administrative or constitutionally established agency of this Commonwealth or of the United States having jurisdiction of the subject matter and having authority to consider the anticompetitive effect, if any, of such conduct." Code of Virginia, 1950, Title 59.1 Ch. 1.1, § 59.1-9.4(b). This provision appears to say that Virginia courts cannot declare illegal under Virginia's antitrust law any conduct that U.S. courts have declared legal.

11. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

12. *Brooke Group*, 509 U.S. at 223.

13. *Id.* (quoting *Atlantic Richfield Co.*, 495 U.S. at 340).

14. *Id.* (citing *Atlantic Richfield Co.*, 495 U.S. at 340).

15. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986).

16. *See Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989) (finding that "[p]rices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost, are presumed predatory"); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1122-23 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (holding that no predatory intent can be presumed from prices at or above long run incremental cost); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (holding that plaintiff must show that "either (1) a competitor is charging a price below its average variable cost ... or (2) the competitor is charging a price below its short-run, profit maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible"); P. Areeda and H. Hovenkamp, *Antitrust Law*, ¶ 724; P. Areeda and D. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 *Harv. L. Rev.* 697 (1975). (In *Brooke Group*, the parties had agreed that average variable cost should be the appropriate measure.)

17. *Brooke Group*, 509 U.S. at 223 (quoting *Cargill*, 479 U.S. at 116).

18. *Matsushita Elec.*, 475 U.S. at 589.

19. *Brooke Group*, 509 U.S. at 224, 226.

20. Frank H. Easterbrook, "Predatory Strategies and Counter-Strategies," 48 *U. of Chicago L. Rev.* 313 (1981).

21. Dennis W. Carlton and Jeffrey M. Perloff. *Modern Industrial Organization* 342 (Addison-Wesley, 2000).

22. Jeffrey Church and Roger Ware, Industrial Organization: A Strategic Approach 659 (Irwin McGraw-Hill, 2000).

23. *Matsushita Elec.*, 475 U.S. at 589.

24. *Id.* at 594.

25. *Cargill*, 479 U.S. at 116.

26. USDOE, *Deregulated Gasoline Marketing: Consequences for Competition, Competitors, and Consumers* (March 1984); USDOE, *Final Report: The State of Competition in Gasoline Marketing* (1981).

27. Final Report to the Arizona Joint Legislative Study Committee on Petroleum Pricing and Marketing Practices and Producer Retail Divorcement 35 (Dec. 1988).

28. Final Report to the Washington State Legislature on the Attorney General's Investigation of Retail Gasoline Marketing 14 (Aug. 12, 1987).

29. Commonwealth of Pennsylvania, Legislative Budget and Finance Committee, *Factors Affecting Motor Fuel Prices and the Competitiveness of PA's Motor Fuels Market* 35 (Oct. 2000).

30. An additional potential complication stems from the fact that the bill pertains exclusively to below-cost sales of motor fuels, but some price-cutters are large retail and convenience store chains that sell other products and services in addition to gasoline. This focus on a single product may lead the Commissioner of Motor Vehicles to prohibit procompetitive price-cutting that is part of a larger business plan to use gasoline as a "loss leader" strategy or a component of a customer reward program. Loss leaders and customer discount programs are usually methods to compete, not means to injure competition. Significantly, state courts interpreting state antitrust statutes have come to the same conclusion. For example, the Arkansas Supreme Court in *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, 319 Ark. 214, 223 (1995), found, under the Arkansas Unfair Practices Act, that a loss leader strategy employed by a discount store could be "readily justifiable as a *tool to foster competition* and to gain a competitive edge as

opposed to simply being viewed as a stratagem to eliminate rivals altogether" (emphasis added). The defendant, Wal-Mart, regularly sold varying items below cost as "loss leaders" in order to entice customers into its stores and increase traffic. The court found that "[the] strategy of selling below the competitor's price and even below Wal-Mart's own cost, which Wal-Mart admits to, is markedly different from a sustained effort to destroy competition in one article by selling below cost over a prolonged period of time." *Wal-Mart Stores*, 319 Ark. at 221. Importantly, the statute required that, for a violation to occur, below-cost pricing must be practiced *for the purpose of destroying competition. Id.* at 220.

31. *Brunswick*, 429 U.S. at 489.

32. *See, e.g.*, R. Anderson and R. Johnson, "Antitrust and Sales-Below-Cost Laws: The Case of Retail Gasoline," 14 Rev. of Ind. Org. 189 (1999); R. Fenili and W. Lane, "Thou Shalt Not Cut Prices! Sales-Below-Cost Laws for Gas Stations," 9 Regulation 31; J. Brannon and F. Kelly, "Pumping Up Prices in Wisconsin: The Effects of the Unfair Sales Act on Retail Gasoline Prices in Wisconsin," 12:7 Wisconsin Policy Research Institute Report (Oct. 1999).

33. M. Skidmore and J. Peltier, "Do Motor Fuel Sales-Below-Cost Laws Enhance Competition and Lower Prices?," unpublished manuscript, University of Wisconsin-Whitewater.

34. *See, e.g.*, Michael G. Vita, "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies," 18 J. of Reg. Econ. 217 (2000).

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Division of Vehicles

TO:	Chairman Gary Hayzlett Members of the House Transportation Committee
FROM:	Sheila J. Walker, Director of Vehicles *Sheila J. Walker*
DATE:	March 27, 2002
SUBJECT:	SB 458 – Dealer Licensing Fees

Chairman Hayzlett, members of the committee, thank you for the opportunity to clarify some of the questions posed at yesterday's hearing on Senate Bill 458.

To recap, this bill would generally increase dealer licensing fees by $25. Most fees will go up to $75 from $50. A few will increase to $50 from $25, and one fee (for first and second stage manufacturers) increases to $225 from $200.

Kansas' fees would still be lower than our surrounding states:

Missouri - $150
Colorado - $300
Nebraska - $200
Oklahoma - $200 ($60 on renewal)

Again, there are two reasons for requesting an increase in fees:

1. Cover the costs of KBI background checks; and
2. Pay for the ongoing costs of the National Motor Vehicle Title Information System (NMVTIS).

Please see the attached sheet for the benefits of NMVTIS. The following states are currently participating in the program:

Alabama	Georgia	New Hampshire
Arizona	Indiana	Tennessee
Arkansas	Kentucky	Virginia
Florida	Massachusetts	

(more)

It was suggested that the Kansas Highway Patrol's vehicle inspection program (MVE-1) be eliminated with the implementation of NMVTIS. While inspectors do look at the title and its associated title number, as Matt Moser, Manager of Titles & Registrations, pointed out yesterday, the inspectors are not verifying the title number against a state's database (to determine if it's the most recent title issued, whether the title has been surrendered to another state or has been stolen).

Obviously, the inspection assists in detecting stolen vehicles, as does NMVTIS. But there are other benefits of the physical inspection that are not available through NMVTIS. For example, inspectors are able to determine the roadworthiness of rebuilt salvage vehicles. Inspectors also verify that vehicle identification numbers (VINs) are correct, and not tampered with, for assembled vehicles and antique vehicles, in addition to regular vehicles.

In the interest of public safety, we ask the committee to carefully consider all the benefits of the VIN inspection program before taking any measures to downsize it. In addition, there is a substantial negative fiscal impact associated with any reduction of the VIN inspection program that should also be taken into consideration.

We would also appreciate your favorable consideration of our proposed amendment that would allow the display of trucks, truck tractors, semi-trailers and RVs at trade shows.