

**BEFORE THE  
BUSINESS & LABOR INTERIM COMMITTEE OF THE  
UTAH LEGISLATURE**

**MAY 18, 2011**

**COMMENTS OF THE OFFICE OF THE UTAH ATTORNEY GENERAL  
REGARDING THE SUNSET REVIEW OF THE  
UTAH MOTOR FUEL MARKETING ACT**

1. The Attorney General recommends that Utah follow the majority of the States, which do not have below-cost motor fuel marketing statutes, and allow the Utah Motor Fuel Marketing Act (“UMFMA”) to sunset.
2. In a letter to the Utah Department of Commerce dated January 29, 1992, the FTC said that the UMFMA “is likely to be anticompetitive, and that its likely result may be that Utah consumers and visitors could pay higher prices for gasoline.”
3. The FTC has issued similar letters and comments over a period of more than twenty years with respect to below cost motor fuel marketing statutes in twelve other States, consistently stating that below-cost gasoline statutes can significantly increase the cost of motor fuel, are anti-competitive and have a significant potential to harm consumers.<sup>1</sup>
4. In a 2005 report on gasoline prices, the FTC made the following statements about the effects of below-cost sales laws on consumers

*Bans on Below-Cost Sales Appear to Raise Gasoline Prices*

About 11 states have a type of below-cost sales or minimum mark-up laws, which typically either prohibit a gas station from making sales below a certain defined cost or require a gas station to charge a minimum amount above its wholesale gasoline cost. These laws are likely to harm consumers by depriving them of the lower prices that more efficient (e.g., high volume) gas stations can charge.<sup>2</sup>

5. In this same Report, the FTC noted that in addition to high volume convenience store gasoline retailers “large retailers of general merchandise and grocery items such as Wal-Mart and Safeway . . . have begun to sell gasoline . . . [at] substantial economies of scale

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<sup>1</sup> See FTC letters and comments to Alabama, Arkansas, Colorado, Hawaii, Kansas, Louisiana, Michigan, New Jersey, New York, North Carolina, Virginia and Wisconsin between 1989 and 2010, listed chronologically in Attachment A hereto.

<sup>2</sup> Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand and Competition*, June 2005, Executive Summary at xv, emphasis in original, posted at <http://www.ftc.gov/opa/2005/07/gaspricefactor.shtm> (last visited April 13, 2010).

[that] generally enable them to sell significantly great volumes of gasoline at lower prices.”<sup>3</sup>

6. The FTC has also stated that below-cost motor fuel sales statutes are unnecessary because the Federal Sherman Antitrust Act prohibits predatory, below-cost, pricing by those who have monopoly power. This prohibition is included in the Utah Antitrust Act, which is patterned after the Sherman Act.<sup>4</sup>

7. The enforcement obligations of the Attorney General under the provisions of the UMFMA prohibiting the “below cost” marketing of motor fuels are in conflict with the obligations of the Attorney General under § 76-10-923 of the Utah Antitrust Act giving the Attorney General “the authority and responsibility to advocate the policy of competition before all political subdivisions of this state and all public agencies whose actions may affect the interests of persons of this state” and the provisions of Art. 12, §20 of the Utah Constitution adopting a “free market system” for trade and commerce in Utah “to promote the . . . general welfare of all of the people . . .”

8. The United States Supreme Court has held that Congress designed the federal antitrust laws for “the protection of competition, not competitors.” *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 488 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Courts have held that to be illegal, conduct under the Federal Sherman Antitrust Act must “harm the competitive *process* and thereby harm consumers” and that “harm to one or many *competitors* will not suffice . . .” *Dickson v. Microsoft Corp.*, 309 F. 3d 193, 206 (4<sup>th</sup> Cir. 2002), quoting *United States v. Microsoft Corp.*, 253 F. 3d 34, 58 (D.C. Cir. 2001), emphasis in original.

9. Attorney General enforcement of the UMFMA against conduct that injures “competitors” but does not injure “competition” and harm consumers is inconsistent with the Attorney General’s responsibility to protect “competition” under Section 76-10-923 of the Utah Antitrust Act and the “free market system” under Art. 12, § 20 of the Utah Constitution.

## ATTACHMENT A

(FTC Letters and Comments Referred to in Footnote 2)

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<sup>3</sup> Ibid. In Utah, large general merchandise retailers (also referred to as “hypermarketers”) such as Costco and grocery chains such as Albertson’s and Smith’s also sell motor fuels.

<sup>4</sup> See, for example, FTC statement in its letter to the Hon. Demetrius C. Newton, Speaker *Pro Tempore*, Alabama State House of Representatives, cited in Attachment A, item 9.

1. FTC Staff Comments dated June 5, 1989, responding to request of the Hon. Francis C. Heitmeier, Member of the House Commerce Committee, Louisiana House of Representatives, posted at <http://www.ftc.gov/opa/predawn/F89/louisgas.txt> (last visited May 12, 2011).
2. Letter dated March 22, 1991, from the FTC to the Hon. W.D. Moore, Jr., Chairman of the Insurance and Commerce Committee, Arkansas State Senate, posted at <http://www.ftc.gov/be/healthcare/docs/V910008arpetrol/PDF> (last visited May 12, 2011).
3. FTC Staff Comments dated April 22, 1992, of the FTC before the State, Veterans, and Military Affairs Committee of the Colorado State Senate, posted at <http://www.ftc.gov/opa/predawn/F93/colorado-8.htm> (last visited May 12, 2011).
4. Letter dated February 15, 2002, from the FTC to the Ho. Robert F. McDonnell, Virginia House of Delegates, posted at <http://www.ftc.gov/be/V020011.htm> (last visited May 10, 2011).
5. Testimony of Jerry Ellig, Deputy Director, Office of Policy Planning, FTC, Before the State of Hawaii Joint Hearing, House Committee on Energy and Environmental Protection, Senate Committee on Energy and Environment, House Committee on Consumer Protection and Commerce, Senate Committee on Commerce, Consumer Protection, and Housing, House Committee on Transportation, Senate Committee on Transportation, Military Affairs, and Government Operations, January 28, 2003, posted at <http://www.ftc.gov/be/v030005.shtm> (last visited May 10, 2011).
6. Letter dated May 19, 2003, from the FTC to Roy Cooper, Attorney General of North Carolina, posted at <http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf> (last visited May 12, 2011).
7. Letter dated July 24, 2003, from the FTC to Eliot Spitzer, Attorney General of New York, posted at <http://www.ftc.gov/be/nymfmpa.pdf> (last visited May 12, 2011).
8. Letter dated October 15, 2003 from the FTC to Representative Shirley Krug, Wisconsin House of Representatives, posted at <http://www.ftc.gov/be/v030015.shtm> (last visited April 13, 2010).
9. Letter dated January 29, 2004, from the FTC to the Hon. Demetrius C. Newton, Speaker *Pro Tempore*, Alabama State House of Representatives, posted at <http://ftc.gov/be/v04005.shtm> (last visited May 10, 2011).
10. Letter dated March 12, 2004 from the FTC to the Hon. Les Donovan, Assistant Majority Leader, Kansas State Senate, posted at <http://www.ftc.gov/be/v040009.pdf> (last visited May 12, 2011) and at <http://www.ftc.gov/opa/2004/03/kansasgas.shtm> (last visited May 10, 2011). *See also*, FTC Staff Comments dated February 27, 1992, submitted at the request of the Hon. Bill Morris, Chairman, Senate Transportation and Utilities Committee, Kansas State Senate, posted at <http://www.ftc.gov/opa/predawn/F93/kansas-co3.htm> (last visited May 12, 2011).

11. FTC Staff Comments dated June 18, 2004, responding to request from the Hon. Gene DeRossett, Michigan House of Representatives, posted at <http://www.ftc.gov/opa/2004/06/fyi0440.shtm> (last visited May 12, 2011).

12. Letter dated September 24, 2010 from FTC to the Hon. Raymond J. Lesniak, New Jersey State Senate, posted at <http://www.ftc.gov/0s/2010/09/100928gasolineretailers.pdf> (last visited May 12, 2011).