



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

The Honorable Fran Ulmer
Alaska State Legislature
House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Dear Ms. Ulmer:

The staff of the Federal Trade Commission⁽¹⁾ is pleased to offer this comment on the issues raised by H.B. No. 237, a proposal in the last legislative session to regulate competition among marine pilots in Alaska. We understand that a similar bill is likely to be introduced in the next legislative session. We believe that legislation limiting the number of pilots and regulating their rates is likely to lead to poorer service or higher prices than would appear in a competitive market, and that the public interest in safety might be promoted more effectively by laws addressing safety matters directly.

I. Interest and Experience of the Staff of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽²⁾ Consistent with this statutory mandate, the Commission and its staff work to identify restrictions that hinder competition and increase costs without providing countervailing benefits to consumers. The FTC and its staff have investigated and studied the competitive effects of restrictions on the business practices of state-licensed professionals.⁽³⁾ In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.⁽⁴⁾ These have included comments to state government bodies about regulation of harbor pilotage.⁽⁵⁾

II. Description of the Current Law and Proposed Amendments.

A bill, H.B. No. 237, in the last legislative session would have authorized the state Public Utilities Commission to set pilotage tariffs (not just a maximum tariff ceiling) and required pilots to adhere to those tariffs. In addition, it would have required the Alaska Board of Marine Pilots (the "Board") to establish, by regulation, limits on the number of pilots in each region. It is anticipated that a similar bill will be introduced in the next session in 1995.

Alaska law requires a ship navigating Alaska's inland or coastal waters to use a pilot licensed by the state.⁽⁶⁾ The pilot must be an independent contractor, not an employee of the shipowner.⁽⁷⁾ The Board regulates pilotage, "to assure the protection of shipping, the safety of human life and property, and the protection of the marine environment."⁽⁸⁾ The Board licenses pilots, sets criteria for training and licensing, defines the regions for which licenses are issued, and establishes other regulations. The Board had been authorized to establish maximum pilotage tariffs; however, that authority has recently sunsetted.⁽⁹⁾

The Board supervises the regional pilots' organizations through which pilots offer their (individual) services. These organizations, which coordinate dispatch and billing, must be open to any qualified pilot and must also offer programs to train new pilots.⁽¹⁰⁾ As of 1993, a pilot must belong to such an organization.⁽¹¹⁾ Board recognition of a pilots' organization is conditioned on the organization's uniform and nondiscriminatory application of its own rules, its compliance with applicable laws, and its effectiveness in promoting efficient, reliable, and professional services, maintaining sufficient qualified pilots, and promoting approved training programs.⁽¹²⁾

Board-recognized pilot organizations are granted a limited exemption from state antitrust law. Recognized pilot organizations are classed with labor unions and agricultural cooperatives created for “mutual help” and “not conducted for profit”; the state antitrust law does not forbid their existence or operation or forbid or restrain their members from “lawfully carrying out the legitimate objectives” of the organizations, and the organizations are not to be considered conspiracies in restraint of trade.(13) Except for this exemption, the law contemplates competition, for the Board may not adopt regulations or take actions that would result in anticompetitive activities.(14) The legislature in 1991 apparently rejected recommendations that the Board be authorized to regulate more strictly;(15) instead, the Board was given authority only to set maximum tariffs and was denied authority to limit the number of licensed pilots for the purpose of controlling competition.

III. Competition in Pilotage Services in Alaska.

Alaska’s original piloting law, enacted in 1970, established the Board to license pilots but otherwise did not set out detailed requirements.(16) In each region an association of pilots provided services, facing no competition in its own area. Conditions changed during the 1980’s when the cruise ship industry boomed in the southeast part of the state and the bottomfishing industry expanded in the southwest. The new demand created niches for new groups and configurations.(17) Some pilots broke with the established associations to operate independently or form new groups. There are now four recognized pilotage regions in Alaska, and in two of them, the southeast and southwest, two organizations compete head to head for business.(18) This competition has brought increased responsiveness in provision of pilot services. In the southwest, for example, the new organization, Alaska Marine Pilots, has adopted a different business format (a proprietorship, rather than a joint venture partnership) and has set up new dispatch points closer to fishing grounds in the Aleutian Islands than the traditional dispatch point, which is said to be more convenient for the oil tanker business.(19)

Efforts to meet the increased demand through new ways to provide piloting services have been accompanied by contention and litigation, among the pilots and their associations and between pilots (and would-be pilots) and the Board.(20) Self-regulation broke down as newer pilots questioned the “old-boy” networks of the traditional pilot associations.(21) Legal challenges by would-be pilots and ship operators seeking more or lower-cost piloting services threatened the associations with liability over denial of access to membership, training opportunities and dispatching services, and over internal discipline of those encouraging dissent or competition.(22) Board decisions denying licenses or license upgrades have also been challenged.(23)

Increased competition has also raised questions about whether the public interest in safety and environmental protection would be adequately served in a more competitive setting.(24) Critics contend that competition will undermine the pilots’ primary duty to the public interest.(25) According to the Governor’s Report, the issue is “directly related” to the number of pilots licensed in each region: if there are “too many” licensees, the association cannot accept them all, and they will compete by cutting rates and following steamship company orders that compromise safety requirements.(26)

IV. Effects of Proposals to Eliminate Competition.

Requiring pilots to adhere to tariffs fixed by regulation and limiting by law the number of pilots permitted to offer services would eliminate competition in pilotage and replace it with a regulated cartel.(27) Pilotage has only a limited history of competitively provided service.(28) Still, the economic effects of price and entry restrictions on pilotage are likely to be similar to those in other markets. Restricting output, by limiting the number of pilots, is likely to lead to higher prices and poorer service. Fixing prices reinforces the effects of restricting output, inhibiting responses to changes in supply and demand and leading to inefficient allocation of resources. These economic considerations are distinguishable from safety concerns. Regulation to promote safety may well be necessary to protect vessels, harbors, waterways, the environment and the public from the damage that navigational mishaps can cause. These comments do not extend to regulation aimed specifically at navigation safety. But they do examine whether eliminating competition would necessarily improve safety.

Alaska's recent experience with entry by new pilot organizations suggests that the well-understood processes of a competitive market could be expected to work in piloting as they generally work in other industries. Absent barriers or impediments to entry,(29) markets ordinarily tend to adjust supply to meet changing demand. In a market setting, an increase in traffic could increase demand for pilotage services. This happened in Alaska, as increasing demand for cruise ship and fishing traffic led to efforts to increase the supply of pilots, which sparked the recent controversies as incumbent pilots resisted the prospect of competition.(30) Normally, incumbent pilots could be expected to respond to the increased demand by raising their prices, and, as a result of higher prices, new pilots would be attracted into the business. As more pilots entered, upward pressure on the price of piloting services would diminish and prices would be expected to stabilize at a new, competitive level. For example, in the Alaska piloting markets, increased demand for piloting services apparently was not adequately met by the existing pilot organizations and thus led to efforts to set up new pilot service arrangements, potentially at lower prices than the incumbent pilots were charging.(31) Conversely, a decline in demand would tend to result in a decrease in the price and the exit of some pilots from the business.

Under regulatory programs such as that proposed in H.B. 237, limits on the number of pilots have been accompanied by regulation of their rates. If the number of suppliers is capped by regulation, opportunities for new suppliers to enter the market may be curtailed and incumbents may be able to charge higher prices than would prevail in a competitive market.(32) Harbor pilotage does not appear to be a "natural monopoly," that is, an industry in which it would always be most efficient for a single firm to supply all of the demand in the market.(33) In the absence of the cost conditions that lead to natural monopoly, price regulation can exacerbate problems of resource misallocation produced by limiting entry.(34)

In Alaska to date, neither entry nor rates have been completely controlled by regulation. Alaska law provided only for fixing maximum prices (before even that authority recently sunsetted), and thus has permitted pilots to compete by offering to cut their rates. As long as entry and rates are not artificially constrained by law or by other means, pilots in Alaska should have the usual market-based incentives to compete for customers through lower prices, innovation, and increased efficiency.

The possibility that such competition would compromise safety standards has sometimes been cited as a reason to permit, or even require, pilots to form a cartel insulated from competitive pressure, as well as to prohibit ships from hiring pilots as employees.(35) It has been feared that pilots would compete along the margin of risk-taking and shipowners would hire any pilot willing to take risks.(36) Our knowledge of actual safety records in Alaska is limited to what appears in the reports that are cited in this comment. This comment takes no position about whether safety standards and requirements are adequately defined, observed, or enforced in Alaska. The Board and others more familiar with Alaska's particular experiences are obviously in a better position to make that determination. Rather, this comment reviews studies of experiences in other piloting areas and other industries in examining whether the incentives of a competitive market are necessarily inconsistent with safety concerns.

We have found no systematic studies of the differences in safety between pilots in monopoly-like cartels and those subject to greater "commercial" pressures. Studies have compared the safety records of pilots with state licenses and pilots with federal licenses.(37) The basic data used in these studies show that the safety records of pilots with both kinds of licenses appear to be essentially equivalent.(38) Pilots who are supposedly insulated by their cartel membership from commercial pressure to take excessive risk have occasionally caused serious accidents.(39) On the other hand, there may also have been accidents caused by inexperienced pilots called into service by competitive demands. It is difficult to identify any trends or to correlate the accidents with differing commercial or competitive situations.

Regardless of the regulatory scheme, the parties involved have incentives not to ignore safety concerns. Pilots under all regulatory schemes are still subject to professional discipline and loss of license for incompetence. Agents may be able to exercise some choice over which pilots they use even from a monopoly pilots' association; thus, an individual pilot might be concerned to avoid a reputation for unsafe conduct, or might be thought to benefit from reputation for taking chances. The ships' agents that hire pilots may well want to complete voyages quickly, but at the same time

they would want to avoid loss or delay because of accidents or lawsuits for damages to harbors and waterways. Private parties concerned about profits will also be concerned about safety; the policy question is whether they will be as concerned as the public interest requires.

Policies designed to promote competition should not compromise legitimate safety concerns, but safety is not necessarily inconsistent with a competitive market setting. In other transportation industries, it was also feared that permitting competition would lead to unsafe operations, as firms interested in cost-cutting would take chances to improve productivity. Those fears have not been borne out. Interstate trucking and airlines have been economically deregulated for many years now, and during the deregulated period safety has improved, not deteriorated.⁽⁴⁰⁾ In piloting ships, as in piloting airplanes, safety concerns need not be addressed only indirectly, through economic regulation. Rather, it might be more effective to address them directly. If safety concerns justify requiring all ships to use pilots of proven qualifications, those concerns can be vindicated through discipline against unsafe practices, application of competency-based pilot licensing standards, and sanctions against shipowners that fail to obey mandatory piloting requirements.

V. Marine Pilotage and the Antitrust Laws.

Pilots in Alaska and elsewhere may offer their services through joint ventures. Some have expressed concern that the antitrust laws may be applied to inhibit joint activities among pilots.⁽⁴¹⁾

The antitrust laws preserve competition in the market place by preventing restraints on competition imposed by competitors. The antitrust laws do not prohibit all joint activities among competitors, only those that restrain competition unreasonably. For example, even though they may restrict some aspects of competition, joint ventures or other cooperative efforts that enable an industry to function efficiently or to produce new services or products may not violate the antitrust laws. Some joint activity among competitors would appear to pose little risk of restraining competition. For example, a centralized billing service that does not facilitate price fixing or allocate customers among competitors may pose little threat to competition.

But actions taken by groups of competitors that unreasonably restrain competition may be unlawful. For example, a joint refusal by competitors to deal with others may be unlawful.⁽⁴²⁾ Agreements among competitors to fix prices or allocate customers traditionally have been considered unlawful. Exclusive contracts between a seller and its customers may promote competition by ensuring the availability and continuity of supply, but exclusive contracts used by a dominant firm to exclude its competitors may be unreasonable and unlawful.⁽⁴³⁾

We do not intend here to offer any opinion about the legality of specific practices of associations or joint ventures in the marine piloting industry. The application of the antitrust laws will depend on an analysis of the likely competitive effects of particular conduct in the context in which it occurred.⁽⁴⁴⁾

VI. Conclusion.

Alaska has promoted competition in piloting by permitting pilots to offer lower prices and by allowing as many pilots to offer their services as can obtain certification of their competence. The difficulties, animosities, and litigation that have attended the promotion of competition are not necessarily evidence that competition cannot work in this market; rather, they may be evidence of an established cartel's efforts to prevent or avoid it. Agreements to prevent competition through boycotts, price fixing, and market division may run afoul of the antitrust laws. But cooperation and coordination among pilots about dispatching and training could be permissible under the antitrust laws, and indeed might even be procompetitive. Establishing a monopoly in piloting, by limiting the number of pilots and setting their rates by regulation, is likely to result in higher prices or poorer service, but does not appear necessary to promote the public interest in safety.

Sincerely,

Charles A. Harwood

Director, Seattle Regional Office

(1) These comments are the views of the staff of the Seattle Regional Office and the Bureau of Economics of the Federal Trade

(3) See, e.g., *American Medical Ass'n*, 94 F.T.C. 701 (1979); *Iowa Chapter of American Physical Therapy Ass'n*, 111 F.T.C. 199 (1988) (consent order); *Wyoming State Board of Chiropractic Examiners*, 110 F.T.C. 145 (1988) (consent order); *Connecticut Chiropractic Ass'n*, 114 F.T.C. 708 (1991) (consent order); *American Psychological Ass'n*, C-3406 (consent order issued December 16, 1992, 58 Fed. Reg. 557 (January 6, 1993)); *Texas Board of Chiropractic Examiners*, C-3379 (consent order issued April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)); *National Ass'n of Social Workers*, C-3416 (consent order issued March 3, 1992, 58 Fed. Reg. 17411 (April 2, 1993)); *California Dental Ass'n*, D-9259 (administrative complaint issued July 9, 1993); *McLean County Chiropractic Ass'n*, C-3491, 59 Fed. Reg. 22163 (April 29, 1994) (consent order), and C. Cox and S. Foster, T

(4) See, e.g., Comments to The Honorable Marlin D. Schneider, Wisconsin State Assembly, (September 13, 1993) (funeral and cemetery regulation); Katharine M. Carroll, New Jersey Board of Medical Examiners (September 7, 1993); Kay E. Gunter, Montana Board of Chiropractic Examiners (December 11, 1992); South Carolina Legislative Audit Council (February 26, 1992) (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners); Jeffrey W. Moran, Commerce and Regulated Professions Committee, General Assembly of New Jersey (April 11, 1991) (dispensing and sale of prescription drugs by physicians); see also testimony to the Washington legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometry)

(5) See Comments to Martha G. Wellman, Office of the Auditor General, State of Florida (November 28, 1990); and George L. Schroeder, Director, Legislative Audit Council, State of South Carolina (November 7, 1989).

(6) Alaska Statutes §08.62.160. Some vessels are exempted from this requirement: those that are required by federal law to use a federally licensed pilot, fishing vessels registered in the United States or Canada, certain vessels shorter than 65 feet, certain other vessels registered in the United States engaged in river or coastal service (those of less than 300 gross tons or owned by the state of Alaska itself), certain Canadian vessels to the extent Canada grants a reciprocal exemption, and pleasure craft. Alaska Statutes §08.62.180. The penalties for failing to use a pilot where one is required and available, which were substantially strengthened in 1991, are a fine of \$5,000-\$15,000 for a first offense and \$10,000-\$30,000 for repeat offenses. Alaska Statutes §08-62-190(a). The Board of Marine Pilots may determine by regulation when a pilot is "available."

(7) Alaska Statutes §08.62.163. This requirement was added in 1991; previously, the pilot could be an employee. Pilots serving under Coast Guard licenses, in situations that require federal, not state, licensing, may be employees. The federally-licensed pilots on Alaska's state-run ferry system are employees.

(8)" Alaska Statutes §08.62.040.

(9) Alaska Statutes §08.62.045.

(10) Alaska Statutes §08.62.175(c)(4), (5). These requirements were added to the law in 1991.

(11) Alaska Statutes §08.62.80n.

(12) Alaska Statutes §08.62.175(d).

(13) Alaska Statutes §45.50.572(a). This 1991 addition to the law may be in part a response to a ruling in a private antitrust suit that pilot associations were not exempted as labor organizations. *Spence v. Southeastern Alaska Pilots'*

Association, 798 F.Supp. 1007 (D.Alaska 1990). The 1991 revisions also granted pilots a limitation on their personal liability, of \$250,000; this limitation does not apply in cases of gross negligence.

(14) Alaska Statutes §08.62.040(d). Implicitly recognizing that limiting the number of pilots would be anticompetitive, H.B. 237 would have added a proviso to this section of the law to make clear that the Board would nonetheless issue regulations and take “other actions” to restrict the number of pilot licenses issued.

(15) See Office of the Governor, Division of Policy, *Improving Alaska’s Marine Pilotage System* (1990) (“*Governor’s Report*”), Appendix B, for such recommendations from pilots themselves.

(16) See *Governor’s Report*; for other background on conditions in the Alaska piloting industry, see Division of Legislative Audit, *Audit Report: Department of Commerce and Economic Development, Board of Marine Pilots* (November 4, 1993) (“*Audit Report*”); and Alaska Board of Marine Pilots, *Fiscal Year 1994 Annual Report* (“*Board Report*”).

(17) *Governor’s Report* at i-ii, 11-12.

(18) *Audit Report* at 5.

(19) *Governor’s Report* at 14.

(20) *Governor’s Report* at i-ii, 1, 11-13; *Board Report* at 3-4, 13.

(21) *Governor’s Report* at ii, 11.

(22) The types of legal claims are summarized in the *Governor’s Report*, Appendix D at 6-7. See also *Audit Report* at 36, for description of refusal to provide training trips in the southeast because of concern about the economic consequences of increased competition.

(23) The Division of Legislative Audit found that, because the Board had granted licenses to unqualified applicants, other unqualified applicants could not legally be denied them. *Audit Report* at 36.

(24) *Governor’s Report* at 11-12.

(25) On the other hand, critics of the established system complained that it led to coverups of pilot incompetence. See *Governor’s Report* at 12-13.

(26) *Governor’s Report* at 18-19.

(27) See *Board Report* at 10, encouraging “reform” of statute to “eliminate competition within regions” and establish fixed tariffs.

(28) Some degree of competition between different pilot organizations has been reported in Oregon, Connecticut, Hawaii, some ports in California, and some ports in Florida. See *Audit Report* at 10. In the ports of Los Angeles and Long Beach, California, piloting services are provided by a public agency, rather than by a private cartel.

(29) Barriers to entry are long-run costs that an entrant into a business must incur, but that are not incurred by incumbent firms. Impediments to entry are conditions that necessarily delay entry into a market for a significant period. See *B.F. Goodrich Co.*, 110 F.T.C. 207, 295-97 (1988).

(30) See *Governor’s Report* at 11.

(31) One difficulty reportedly encountered in this process has been the reluctance of incumbent pilots to afford potential competitors the training opportunities they need to become qualified under state law. See *Board Report* at 12, 14-15. Alaska law now requires pilot associations to establish or participate in Board-approved training programs. Alaska Statutes §08.62.175(b)(5). Even without that legal requirement, ships' agents and operators, which have a direct interest in promoting competition, might protect that interest by permitting or even requiring that the pilots they hire help train new ones.

(32) A study by the Commission's Bureau of Economics concerning restrictions on entry into the taxi market, which appear to be in many ways analogous to regulations restricting entry into the pilotage market, is particularly instructive. Among other things, the study concluded that entry restrictions enable incumbent firms to exercise market power and thus to charge higher than competitive fares. See M. Frankena & P. Pautler, *An Economic Analysis of Taxicab Regulations* (FTC Bureau of Economics, 1984).

(33) Normally, one reason for price regulation is to prevent industries that are "natural monopolies" from exploiting their market power. See S. Breyer, *Regulation and Its Reform* 15- 18 (1984); Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J.L. & Econ. 269, 272-76 (1978). Some studies have questioned whether regulation of public utilities, which are often thought to be natural monopolies, has actually resulted in lower prices than would have prevailed without regulation. See, e.g., R. Braeutigam, *Optimal Policies for Natural Monopolies*, in 2 *Handbook of Industrial Organization* 1289-1346 (R. Schmalensee and R.D. Willig, eds., 1989).

(34) Because associations in Alaska are now required by law to admit any qualified pilot, entry can be prevented only by Board decisions about issuing licenses.

(35) See *Board Report* at 12; *Governor's Report* at 18.

(36) *Id.*

(37) R.D. Leis, *A Comparative Assessment of State Pilot Safety* (1989) (report prepared by Battelle under contract for the American Pilots Association, Inc.); Booz-Allen & Hamilton, *A Comparative Safety Assessment of State and Federal Pilots* (1991) (response to the Battelle report, prepared under contract for the American Institute of Merchant Shipping); R.D. Leis, *A Critique of Two State Pilot Safety Studies* (1992) (response to the Booz-Allen & Hamilton report). All of these studies relied on the same set of Coast Guard data about ship movements and accidents.

(38) The basic accident rate over the period studied was about one "dynamic vessel casualty" per 1700 ship movements, or per 10.5 million tons of cargo moved. Booz-Allen report, p. I-4. Unsurprisingly, in view of their sponsors' interests, the two reports do not reach the same conclusions about which pilots are safer. The report for the pilots' association, which advocates preserving their regulated monopoly status, claims that state-licensed pilots are much safer. The report for the merchant shippers, which prefer greater competition and lower costs, claims that federally-licensed pilots are at least as safe as state-licensed ones, and maybe more so. To reach these widely divergent conclusions from the same basic facts, the two reports differ in their assumptions and assignments of weights to differing conditions and types of ship movements.

(39) Two incidents of pilot error in Florida in 1980 led to sinking a Coast Guard cutter in a collision, killing 12 people, and destroying one span of the Tampa Bay bridge in the fog, killing 35. Yet Florida has extremely stringent qualification requirements for obtaining a pilot's license and has tried to eliminate competition by fixing the number of individuals granted licenses.

(40) See N. Rose, *Fear of flying? Economic Analyses of Airline Safety*, 6 J. Econ. Perspectives 75-94 (1992); and Office of Economics, Interstate Commerce Commission, *The U.S. Motor Carrier Industry Long After Deregulation* 60-67 (1992).

(41) See *Board Report* at 3.

(42) For examples of situations in which antitrust law has been applied to refusals to deal and “boycotts,” see *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986) (refusal to supply x-rays for insurers’ cost-control review); *Klor’s, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (refusal to supply competing discounter); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (refusal to sell gas for use in competitor’s burners); *Medlin v. Professional Rodeo Cowboys Ass’n*, 1992-1 Trade Cas. [CCH] ¶69,787 (D.Colo. 1991) (barring cowboys who had competed in non-sanctioned events).

(43) See *Beltone Electronics Corp.*, 100 F.T.C. 68, 204 (1982); see also *United States v. Dairymen, Inc.*, 1985-1 Trade Cas. [CCH] ¶66,638, at 66, 156 (6th Cir.), *cert. denied*, 474 U.S. 822 (1985); *Kohler Co. v. Briggs & Stratton Corp.*, 1986-1 Trade Cas. [CCH] ¶67,047 (E.D.Wis. 1986).

(44) In the Commission’s analysis, a practice is considered “inherently suspect” if it appears likely, absent an efficiency justification, to restrict competition and decrease output. When such a practice is identified, the Commission then asks whether there is a plausible efficiency justification for it; if not, it will be found illegal. If there appears to be a plausible efficiency justification, that is, a claim that the practice might actually enhance competition by reducing costs, creating a new product, or improving the operation of a market, then the Commission will examine that claim in more detail to determine whether it is valid. If it is not, then the practice will be found illegal. If the efficiency claim is found to be valid, the Commission will undertake a complete “rule of reason” analysis to identify and compare the practice’s likely anticompetitive and procompetitive effects. See *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 604 (1988).