

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

**October 15, 2003**

Shirley Krug  
State Representative  
12th Assembly District  
Post Office Box 8952  
Madison, WI 53708

Re: Wisconsin's Unfair Sales Act

Dear Representative Krug:

The staffs of the Federal Trade Commission's Bureau of Competition, Bureau of Economics, and Office of Policy Planning are pleased to respond to your request for comments on Wisconsin's Unfair Sales Act. [\(1\)](#) The Act prohibits the retail sale of motor fuel below a statutory definition of "cost," where "cost" includes a minimum markup "to cover a proportionate amount of the cost of doing business." The Act provides for fines and private actions against violators.

In your letter of May 14, 2003, you asked us four questions about the Act. Your questions, and a summary of our answers, appear below:

- **Does the law harm consumers by significantly raising prices to consumers?**

Most likely yes. Minimum markup laws likely deter pro-competitive price cutting and can ultimately lead to higher prices for consumers. They can prevent efficient vendors from passing on savings to consumers, and they can discourage entry from new competitors that may be more efficient. Moreover, when compared to other states with similar laws, the Act exacerbates these problems by employing one of the steepest minimum markups on retail fuel sales in the country.

- **Does the current Wisconsin law duplicate existing protections against "predatory pricing" found in the federal antitrust law?**

The federal antitrust laws deal specifically with below-cost pricing that has a reasonable prospect or dangerous probability of leading to monopoly. The FTC, the Department of Justice's Antitrust Division, state attorneys general, and private parties can sue under these laws in response to anticompetitive below-cost pricing. The Act, however, does more than duplicate these protections; it exceeds them in ways that do not benefit

consumers. Federal law prohibits pricing that could harm competition and consumers, not just competitors, whereas the Act prohibits pricing that could harm competitors even if there is no harm to consumers.

- **Does the current Wisconsin law discourage or encourage competitive pricing?**

Current Wisconsin law discourages competitive pricing. The Act forbids below-statutory cost price cutting that has the intent or effect of diverting trade from a competitor. Thus, unlike federal antitrust law, the Act focuses on harm to competitors rather than harm to competition. In fact, the Act subjects vendors to civil liability - including treble damages and a \$5,000 fine per violation - for cutting prices even if there is no likelihood of harm to competition, such as if they price below statutory cost on a single occasion, and even if the vendors have no intent to engage in anticompetitive conduct. Furthermore, the Act defines "cost" in a way that lacks a firm economic foundation and likely leads to higher prices. As a result, many vendors likely avoid pro-competitive price-cutting altogether.

- **Are there any scholarly studies or court decisions in recent years that address the effect of "below-cost" pricing in relation to the creation of monopolies?**

Yes. Because low prices benefit consumers, consumers are harmed by "below-cost" pricing only if, because of low prices, a dominant competitor is able later to raise prices to supracompetitive levels. Economic studies, legal studies, and court decisions indicate that below-cost pricing that leads to monopoly occurs infrequently. Below-cost sales of motor fuel that lead to monopoly are especially unlikely.

For these reasons, we believe that Wisconsin's Unfair Sales Act likely harms consumers and restricts competition. Moreover, at best, the Act is unnecessary because the federal antitrust laws already protect against predatory pricing.

### **Interest and Experience of the Federal Trade Commission**

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>(2)</sup> 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 often assessed the competitive impact of regulations and business practices in the petroleum industry. In recent years, the Commission has investigated, among others, the mergers of several diversified energy companies: Chevron and Texaco; Exxon and Mobil; BP and Amoco; petroleum refiners Valero Energy and Ultramar Diamond Shamrock; and the combination of the refining and marketing businesses of Shell, Texaco, and Star Enterprises.<sup>(3)</sup>

The Commission and its staff have also investigated, conducted workshops, and commented on proposed regulations regarding motor fuel pricing. In 2001, the Commission completed investigations of spikes in reformulated gasoline prices in several Midwestern states,<sup>(4)</sup> and of gasoline price increases in West Coast markets.<sup>(5)</sup> In the last two years, the Commission held two public conferences to examine factors that affect prices of refined petroleum products in the

United States.<sup>(6)</sup> Commission staff also filed public comments with the Environmental Protection Agency concerning "boutique fuel" regulations.<sup>(7)</sup> On many occasions, Commission staff has offered comments on proposed state laws covering various aspects of gasoline sales, including laws that would ban sales of motor fuels below cost.<sup>(8)</sup>

## **Analysis of Wisconsin's Unfair Sales Act**

The Unfair Sales Act prohibits vendors from selling motor fuel below a statutory definition of "cost":

Any sale of any item of merchandise . . . at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition ... Such sales are prohibited. Evidence of any sale of any item of merchandise by any [vendor] at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

Wis. Stat. Ann. § 100.30(3) (West 2003). The Act defines "cost" in several ways depending on the vendor, although none of the definitions focus solely on the vendor's own costs. In general, the Act defines "cost" with reference to the greater of (1) the vendor's invoice or replacement cost (adjusted for various factors such as transportation costs and taxes), or (2) the "average posted terminal price" at the terminal nearest the retail sale in question, plus a minimum markup of 3%, 6%, or 9.18% to "cover a proportionate part of the cost of doing business." The Act provides for both fines of up to \$5,000 per violation, and private causes of action with treble damages or \$2,000 per violation, whichever is greater. The Act permits a handful of exceptions, including ones for clearance sales and meeting the competition.

We believe that, if followed by retailers, the Act restricts competition and likely leads to higher prices for consumers. Unlike federal antitrust law, the Act aims to protect individual competitors, not competition, thereby discouraging pro-competitive price-cutting. Moreover, the Act defines "cost" in a way that lacks a firm economic foundation and likely leads to significantly higher prices. Finally, we believe that the Act is unnecessary, both because scholarly studies and court decisions indicate that anticompetitive below-cost pricing happens infrequently, and because the federal antitrust laws already prohibit anticompetitive below-cost pricing.

### **A. Anticompetitive below-cost pricing is already illegal under federal antitrust law**

#### **i. Antitrust law protects consumers, not competitors**

The federal antitrust laws are fundamental to national economic policy and our free market system. The antitrust laws ensure that markets remain competitive, efficient, and dynamic. Under these laws, both the FTC and the Department of Justice's Antitrust Division may bring enforcement actions against anticompetitive below-cost pricing. The federal government has launched several predatory pricing investigations and predatory unilateral conduct cases during the past several years.<sup>(9)</sup> 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.<sup>(10)</sup> State attorneys general, acting as *parens patriae*, also may bring such actions.

Although anticompetitive below-cost pricing is illegal, the United States Supreme Court has cautioned that antitrust law should not prevent pro-competitive price-cutting. Congress designed the antitrust laws for "the protection of competition, not competitors."<sup>(11)</sup> In other words, the federal antitrust laws promote and maintain legitimate, vigorous price competition, irrespective of how individual competitors may fare. Vigorous price competition allows consumers to reap the benefits of lower prices, greater variety, and higher quality goods and services. In several important antitrust decisions, the Court has been absolutely clear that consumer welfare is the linchpin of the antitrust laws, and that as a general matter, low prices are "a boon to consumers."<sup>(12)</sup>

## **ii. Only prices below the price-cutter's cost can be predatory**

The Supreme Court has directly addressed low-pricing strategies. In *Brooke Group v. Brown & Williamson Tobacco Corp.*, the leading case in this area, the Court expressly held that a defendant does not violate the federal antitrust laws by cutting prices merely because the low prices decrease a competitor's profits. "Low prices benefit consumers regardless of how those prices are set."<sup>(13)</sup> To be unlawful, the low prices must, at a minimum, 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."<sup>(14)</sup> The Court noted that "[we] 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."<sup>(15)</sup>

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."<sup>(16)</sup> 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.<sup>(17)</sup>

It is critical to note that, whatever measure of cost is chosen, the pertinent comparison is to the price-cutter's costs, not to some external benchmark, such as a rival's costs, which does not necessarily reflect the costs actually incurred by the price-cutting firm itself. "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."<sup>(18)</sup>

## **iii. Not all below-cost pricing harms consumers**

By itself, below-cost pricing does not violate the federal antitrust laws. Under federal law, below-cost pricing must also injure or threaten to injure consumers, and consumers are injured by below-cost pricing only if sustained above-cost prices occur later:

[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.<sup>(19)</sup>

Thus, even if a below-cost pricing strategy succeeds in temporarily reducing the number of competitors, the price-cutter must keep competitors from returning after it tries to raise prices again: "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 reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."<sup>(20)</sup> Otherwise, the below-cost pricing strategy, which requires that the firm incur losses on every sale, will not succeed. When a firm fails 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. "[U]nsuccessful predation is in general a boon to consumers . . . That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured."<sup>(21)</sup>

## **B. Scholarly studies and court decisions suggest that predatory below-cost pricing happens infrequently**

In recent years, many scholars have studied anticompetitive below-cost pricing. In an exhaustive discussion, Frank Easterbrook, now sitting on 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 litigation; courts routinely find that there has been no predation."<sup>(22)</sup>

Other analyses largely confirm Easterbrook's conclusion. A leading textbook on industrial organization economics notes that "[g]iven 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 lawsuits, careful examination of these cases indicates that predation in the sense of pricing below cost usually did not occur."<sup>(23)</sup> Predation sometimes occurs,<sup>(24)</sup> but not nearly as frequently as claimed.<sup>(25)</sup>

The Supreme Court has endorsed this scholarship. Because it is difficult to profit from anticompetitive below-cost pricing, the Supreme Court has observed that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."<sup>(26)</sup> 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 . . ."<sup>(27)</sup>

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

Several studies suggest that anticompetitive below-cost pricing is especially unlikely in gasoline retailing. During the past two decades, many government agencies have investigated laws to prevent anticompetitive below-cost pricing of motor fuels. The issue originally arose in the 1980s, when various parties expressed concern that major oil companies were selling gasoline below cost to drive independent stations out of business. Numerous states considered enacting legislation to ban below-cost pricing of motor fuel. The U.S. Department of Energy (USDOE) comprehensively investigated these allegations.

In 1984, USDOE released a final report to Congress examining whether vertically integrated refiners were "subsidizing" their retail gasoline operations in a way that was predatory or anticompetitive. The study relied on extensive pricing data and internal oil company documents. USDOE found no evidence of predation or anticompetitive subsidization. Instead, the agency concluded that the decline in the overall number of retail outlets and intensified competition among gasoline marketers resulted from decreased consumer demand for gasoline in some areas and a continuing trend toward the use of more efficient, higher-volume retail outlets.[\(28\)](#)

Several states have conducted their own studies. In 1987, Arizona's Joint Legislative Study Committee recommended no new legislation to restrict the pricing of motor fuels in Arizona. "The marketplace for petroleum products is very competitive in Arizona," the Committee concluded.[\(29\)](#) Similarly, in 1986, the Washington State Attorney General studied whether refiners were subsidizing company-owned service stations in an anticompetitive manner. Washington gathered information on the practices of all eight of the major companies in the state 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% of the time.[\(30\)](#)

More recently, in 2000, the Commonwealth of Pennsylvania studied a variety of proposals for bills 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 could harm consumers:

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.[\(31\)](#)

Competitors will, of course, often 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. To date, however, no systematic study has produced evidence that predatory pricing is a significant problem in retail gasoline markets.

#### **D. The Unfair Sales Act likely restricts competition and harms consumers**

We believe that, if followed by retailers, the Act likely restricts competition and leads to higher prices for consumers. In several critical respects the Act, which was first enacted in the 1930s,

breaks from federal antitrust law and prohibits conduct that benefits consumers. In particular, the Act protects competitors, not competition, and the Act defines "cost" in a way that lacks a firm economic foundation and discourages pro-competitive price-cutting. Moreover, we believe that the Act is unnecessary, both because scholarly studies and court decisions indicate that anticompetitive below-cost pricing happens infrequently, and because the federal antitrust laws already prohibit anticompetitive below-cost pricing.

### **i. The Act protects competitors, not competition**

Unlike federal antitrust law, the Act protects competitors, not competition. The Act states that "any sale" below-statutory cost with the intent or effect of "unfairly diverting trade from a competitor" impairs and prevents "fair competition." Accordingly, the Act bans all below-statutory cost sales that take business from a single competitor, even if those sales result in lower prices for consumers.[\(32\)](#)

For these reasons, the Act likely discourages pro-competitive price-cutting. The Act subjects a vendor to liability for pricing below the statutory definition of cost on a single occasion if a single competitor is hurt, even if there is no danger that the vendor would be able to recoup its lost profits, and even if there are dozens of other competitors in the relevant market. Moreover, because the Act imposes liability if there is an intent or effect to divert business from a competitor, a vendor could be held liable for pricing below statutory cost inadvertently, even on a single occasion. Similarly, the Act prohibits pro-competitive below-cost pricing, such as special promotions or below-cost pricing that may accompany the launch of a new retail outlet. The penalties include a fine of up to \$5,000 and private litigation that could result in treble damages or a \$2,000 penalty *per violation*, whichever is greater.

In all these situations, there is no risk to consumers of monopolization or any other anticompetitive effects, because there is no risk that the vendor could later recoup its losses. The risk of damages and a substantial civil penalty, however, likely deter vendors from cutting prices. Likewise, the mere threat of litigation may deter vendors from selling gasoline at prices that are legal and above cost, but low enough to prompt complaints from competitors.

### **ii. The Act defines "cost" to include a minimum markup**

In addition, the Act defines "cost" in a manner inconsistent with most antitrust precedent and economic and legal literature. The Act defines "cost" to include costs other than average variable costs, including a minimum markup of 3%, 6%, or 9.18%, depending on the vendor's identity and location. The markup's stated purpose is "to cover a proportionate part of the cost of doing business."

The minimum markup most likely leads to significantly higher prices for Wisconsin's consumers. In the first place, if vendors have a lower "cost of doing business" than the minimum markup percentage, the Act prevents those vendors from passing on the savings to consumers. Some efficient vendors may have a "cost of doing business" less than 6% or 9.18%, while other vendors may prefer to adopt lower prices and increase their profits through greater volume. The Act prevents these vendors from offering lower prices, with no benefits to consumers. Instead,

the minimum markup simply protects the profit margins of vendors, efficient and inefficient alike. One study found that, when penalties for violating the Act were increased in 1998, the average markup of retail gasoline increased by two to three cents per gallon.<sup>(33)</sup> This study is consistent with a growing body of empirical economic research from the past two decades that 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.<sup>(34)</sup>

Moreover, the Act discourages entry by new participants that may be more efficient. Some potential entrants, including those with alternative station formats, may have lower average fixed costs per gallon than older stations, and these competitors could pass on their lower costs to consumers. The Act discourages such potential competitors from ever competing in the marketplace.

The Act exacerbates these problems by employing one of the steepest minimum markups on retail fuel sales in the country. A few other states have minimum markup provisions specifically targeting motor fuel retail sales, but the highest outside Wisconsin is typically 6%.<sup>(35)</sup> Wisconsin's minimum markup of 9.18% exceeds that rate by more than 50%. Furthermore, the Act's use of the 9.18% measure - as well as the 3% and 6% measures - appears completely arbitrary. FTC staff could locate no support for these measures from any authority on competition policy, including Supreme Court precedent, federal antitrust law, basic economic theory, or empirical studies. In fact, the minimum markup percentages do not, as the Act suggests they should, accurately reflect a "proportionate part of the cost of doing business." Because the Act ties operating costs to the wholesale price, the dollar value of the minimum markup rises if wholesale prices rise. Operating costs, however, generally do not increase with increases in the wholesale price. For example, rent is an operating cost that does not vary with the wholesale price. Nevertheless, when wholesale prices rise, the Act increases the amount of money consumers have to pay for a "proportionate part of the cost of doing business," even if those costs remain unchanged. This link likely leads to even higher retail prices, with no attendant benefits for consumers or competition.

### **iii. The Act defines "cost" by reference to other competitors' costs**

The Act defines "cost" in another way that discourages pro-competitive price-cutting. Although the Act's definition of "cost" varies with the location and identity of the vendor, the Act typically defines "cost" to include the greater of (1) the vendor's invoice or replacement cost (adjusted for various factors such as transportation costs and taxes), or (2) the "average posted terminal price" at the terminal nearest the retail sale in question, plus a minimum markup. As a result, the Act defines "cost" in a way that focuses not on the price-cutter's cost, but on the "average" costs faced by the price-cutter's competitors.

This standard directly contravenes established antitrust doctrine. The federal courts, basic economic principles, and virtually all prominent antitrust scholars agree that the relevant measure of cost should be that of the vendor, not its competitors. If the vendor has lower costs than its competitors and prices at or above those costs, consumers will benefit from the vendor's greater efficiency. Predatory pricing can only occur when vendor prices are below some measure of its own costs, even if those prices are below its rivals' costs.



Furthermore, the "average posted terminal price" may not accurately reflect the prices available to vendors. For example, the average posted terminal price does not reflect discounts that jobbers and retailers may receive. A jobber or retailer who negotiates a lower price cannot legally pass on that price to consumers. Vendors sometimes negotiate volume-based discounts, but under the law's definition of cost, such vendors may be unable to put gasoline on sale at the end of the month to achieve volume-based savings. Consumers most likely pay higher prices as a result.

Timing presents another problem. A vendor may decide, for procompetitive reasons, to charge a lower price based on the cost of gasoline when purchased, rather than the current average posted terminal price. As a result, if the average posted terminal price subsequently increases, a vendor could violate the law by selling gasoline above its own costs, but below subsequent prices. There is no consumer benefit to punishing vendors in this situation.

Inversions present yet another problem. Jobbers and retailers usually pay a higher price for branded than for unbranded gasoline; inversions occur when the unbranded price for gasoline exceeds the branded price. When gasoline supplies are tight, the unbranded price rises and can surpass average branded prices (and implicit branded wholesale prices paid by lessee-dealers and company operated outlets). In this situation, branded stations could violate the proposed law during a price inversion, even if the vendors charged prices that exceeded their actual costs.

Finally, the terminal at which a retailer's marginal cost of a gallon of gasoline is lowest may not be "the terminal closest to the retail station." For example, if a retailer has lower laid-in costs from a different, more distant terminal, it will be more profitable for him to buy gas at that terminal.

#### **iv. The Act is unnecessary**

Aside from the problems with the Act's definitions and focus, the Act is simply unnecessary. The Act addresses a problem, anticompetitive below-cost pricing, that is already covered by the federal antitrust laws, and that is unlikely to occur in any event. Given the strong stance of the Supreme Court in favor of low prices and the care the Court has devoted to explaining the types of price cutting that are illegal under the antitrust laws, Wisconsin's Act is not necessary to protect consumers.

### **Conclusion**

For these reasons, the FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics believe that Wisconsin's Unfair Sales Act harms competition. The Act 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 sufficient to address the problem. Moreover, we believe that the Act most likely deters pro-competitive price-cutting and causes some vendors to raise their prices, to the detriment of Wisconsin's consumers.

Respectfully submitted,

Susan A. Creighton, Director  
Bureau of Competition

Luke M. Froeb, Director  
Bureau of Economics

Todd J. Zywicki, Director  
Office of Policy Planning

## **Endnotes:**

1. Wis. Stat. Ann. § 100.30 (West 2003). This letter expresses the views of the FTC's Bureau of Competition, Bureau of Economics, and Office of Policy Planning. 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. *See Chevron Corp.*, Docket C-4023 (decision and order 2002); *Exxon Corp.*, Docket C-3907 (decision and consent order 2001); *British Petroleum Co. p.l.c.*, Docket C-3868 (decision and order 1999); *Valero Energy Corp.*, Docket C-4031 (decision and order 2002); *Shell Oil Co.*, Docket C-3803 (decision and order 1998). All of these orders are available at the FTC's website.

4. FTC, Final Report, Midwest Gasoline Price Investigation (Mar. 29, 2001), at <http://www.ftc.gov/os/2001/03/mwgasrpt.htm>.

5. *FTC Closes Western States Gasoline Investigation*, FTC Press Release (May 7, 2001), at <http://www.ftc.gov/opa/2001/05/westerngas.htm>.

6. *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry*, FTC Press Release (July 12, 2001), at <http://www.ftc.gov/opa/2001/07/gasconf.htm>; *FTC to Hold Second Public Conference on the U.S. Oil and Gasoline Industry in May 2002*, FTC Press Release (Dec. 21, 2001), at <http://www.ftc.gov/opa/2001/12/gasconf.htm>.

7. FTC Staff comments, *Study of Unique Gasoline Fuel Blends, Effects on Fuel Supply and Distribution and Potential Improvements*, EPA 420-P-01-004, Public Docket No. A-2001-20 (Jan. 30, 2002), at <http://www.ftc.gov/be/v020004.pdf>.

8. *See* Letter from Todd Zywicki, Director, FTC Office of Policy Planning, et al., to Eliot Spitzer, Attorney General of New York (July 24, 2003), at <http://www.ftc.gov/be/nymfmpa.pdf>; Letter from Zywicki, et al., to Roy Cooper, Attorney General of North Carolina (May 19, 2003), at <http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf>; *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing House Comm. On Energy and Environmental Protection et al.*, (Jan. 28, 2003) (testimony of Jerry Ellig, Deputy Director, FTC Office of Policy Planning) at <http://www.ftc.gov/be/v030005.shtm>; Letter from R. Ted Cruz, Director, FTC Office of Policy Planning, et al., to Gov. George E. Pataki of

New York (Aug. 8, 2002) at <http://www.ftc.gov/be/v020019.pdf>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, and R. Ted Cruz to Hon. Robert F. McDonnell, Commonwealth of Virginia House of Delegates (Feb. 15, 2002) at <http://www.ftc.gov/be/V020011.htm>. See also Letter from Ronald B. Rowe, Director for Litigation, FTC Bureau of Competition, to Hon. 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 Hon. 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 Hon. W.D. Moore, Jr., Arkansas State Senate (Mar. 22, 1991); Letter from Jeffrey I. Zuckerman, Director, FTC Bureau of Competition, to Hon. Jennings G. McAbee, Chairman, Other Taxes and Revenues Subcomm., Ways and Means Comm., South Carolina House of Representatives (May 12, 1989). All of these letters are on file at the FTC.

9. One notable example is *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

10. 15 U.S.C. § 15.

11. *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)).

12. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). See also *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).

13. *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield*, 495 U.S. at 340).

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

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

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

17. 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. 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) (holding that plaintiff must show that "either (1) a competitor is charging a price below his 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; Phillip Areeda and Donald Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). In *Brooke Group*, the parties both agreed that average variable cost should be the appropriate measure.

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

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

20. *Brooke Group*, 509 U.S. at 224.

21. *Id.* at 224, 226.

22. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 313-14 (1981) (citations omitted).

23. Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* 342 (3d ed. 2000).

24. See Jeffrey Church and Roger Ware, *Industrial Organization: A Strategic Approach* 659 (2000).

25. P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 723a (2d ed. 2002) ("as the Supreme Court has observed, although competitors allege predation frequently, it is probably quite uncommon").

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

27. *Id.* at 594.

28. USDOE, *Deregulated Gasoline Marketing: Consequences for Competition, Competitors, and Consumers* (Mar. 1984); Dr. James B. Delaney and Dr. Robert N. Fenili, U.S. Dep't of Energy, *Final Report: The State of Competition in Gasoline Marketing* (Jan. 1981).

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

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

31. Commonwealth of PA. Legislative Budget and Finance Comm., *Factors Affecting Motor Fuel Prices and the Competitiveness of PA's Motor Fuels Market, A Report in Response to H.R. 451*, 35 (Oct. 2000).

32. *Gross v. Woodman's Food Mkt., Inc.*, 655 N.W.2d 718, 737 (Wis. Ct. App. 2002) (holding that the Act "prohibits a sale at less than statutory cost if there is either the intent or effect of injuring a competitor").

33. James Brannon and Frank Kelly, *Pumping Up Gas Prices in Wisconsin: The Effects of the Unfair Sales Act on Retail Gasoline Prices in Wisconsin*, 12 Wisconsin Policy Research Inst. Rep. No. 7 (1999).

34. See, e.g., Rod Anderson and Ronald Johnson, *Antitrust and Sales-Below-Cost Laws: The Case of Retail Gasoline*, 14 Rev. of Ind. Org. 189, 203 (1999); Robert Fenili and William Lane, *Thou Shalt Not Cut Prices! Sales-Below-Cost Laws for Gas Stations*, 9 Regulation 31, 32-32 (Sept./Oct. 1985). One study, currently in draft form, finds that these laws increase gasoline prices initially and lower them (relative to pre-enactment levels) in subsequent years. The authors, however, do not fully report the statistical significance of the price changes in subsequent years. See M. Skidmore, J. Peltier, and J. Alm, "Do Motor Fuel Sales-Below-Cost Laws Lower Prices?," unpublished manuscript, University of Wisconsin-Whitewater. 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, found that the laws had no effect on retail prices. Michael G. Vita, "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies," 18 J. of Reg. Econ. 217, 217-233 (2000). One possible explanation for these varied findings is that such laws are often difficult to enforce or are enforced unevenly. Therefore, the mere existence of such a law may have only a limited effect on retail gasoline prices. Vigorous and sustained enforcement, however, could significantly chill competition and increase retail gasoline prices.

35. See, e.g., Minn. Stat. Ann. § 325D.01, 325D.04 (lesser of 6% or 8 cents).