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).