

Motor Vehicle Fuel Interim Committee Meeting - November 4, 2005

Comments of William L. Brauch, Special Assistant Attorney General, Director-Consumer Protection Division

1. Recent Actions of Office of the Attorney General.

We have taken dozens of complaints from consumers about retail gas prices in the wake of Hurricane Katrina, but fewer than many other states. We are working with other states in looking into the reasons retail gasoline prices spiked as they did at the time of Hurricane Katrina.

We are further investigating one Iowa retailer regarding reports of gasoline quality problems. However, I am not free to go into detail at this time regarding that matter. We are also investigating why consumers' checking accounts are tied up for varying amounts when they use their debit cards to buy gasoline. The problem is that significant amounts are being blocked on their accounts – apparently to ensure for the retailer that enough money is in the account to cover the bill – but without disclosure to consumers that this is occurring. Consumers are complaining that they are bouncing checks in that up to \$100 is being blocked on their checking accounts for days at a time without their knowledge. They have enough to cover the actual bill, but not enough to cover the higher blocked sum.

2. Legislative Proposals to Set Minimum Motor Fuel Prices.

The concern of those who support legislation to set minimum retail motor fuel prices is certainly real, and legitimate, that concern being that large retailers can spread their costs more efficiently and, therefore, can charge lower prices than can smaller retailers – in other words, that they can use retail gas prices as a loss leader, and sell the gas under cost, making up the difference in the other things that consumers purchase at the retail establishment, whether it be WalMart, Cosco, or some other retailer. The concern is further that this practice will eventually drive the smaller retailers out of business and leave consumers at the mercy of the only remaining retailer, who will then raise prices through the roof.

A. Iowa law

Iowa law is clear on this subject. Iowa Code chapter 551 makes it unlawful for a seller to offer merchandise at a price in one community that is lower than the price at which the seller offers the merchandise in another community for the purpose of destroying a competitor's business or establishing a monopoly. Proving a violation of this section would be a very heavy burden. First, to prove a pricing decision was made to destroy another business or establish a monopoly requires an extraordinary level of proof – likely testimony from insiders or the proverbial "smoking gun" e-mail or memo stating the purpose for the pricing. Additionally, violations are crimes and, therefore, the state would have to establish that proof beyond a reasonable doubt – the state could not rely on a lesser preponderance or clear and convincing standard.

Thoughts might differ as to whether establishing such a heavy burden is appropriate. Some might argue that attacking a company's decision to offer merchandise at lower prices is not an action one would normally argue as being unfair and, thus, a very high level of proof is necessary to establish that it is unfair to do so.

B. Position of the Federal Trade Commission

The Federal Trade Commission enforces federal competition laws and, in that role, has been asked to comment on state legislative proposals that make it unlawful to sell gasoline at prices below cost. The FTC's position is that laws barring below cost prices are generally anticompetitive and ultimately lead to higher prices for consumers with no countervailing benefit to the marketplace. Some of the FTC's comments in a letter to a Michigan representative in 2004 are indicative of its position:

1) Economic studies, legal studies, and court decisions indicate that below cost prices that leads to monopolies occurs infrequently. Below cost sales of motor fuel that lead to monopoly are especially unlikely.

2) The letter also expressed concern about legislation that focuses on harm to an individual competitor of the alleged bad actor, as opposed to harm to competition generally.

3) One final comment about the FTC: The FTC will argue that even if competitors are driven from a market, leaving only one seller, if there are no bars to entry of other competitors, the pricing practices of the remaining retailer should not be considered predatory.