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

Bureau of Competition
Bureau of Economics
Office of Policy Planning

January 29, 2004

The Honorable Demetrius C. Newton
Speaker Pro Tempore
Alabama State House of Representatives
Alabama State House
Montgomery, AL 36130

Re: The Alabama Motor Fuels Marketing Act

Dear Speaker Newton:

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 Alabama's Motor Fuels Marketing Act.(1) The Act prohibits any person from selling motor fuel below cost, or from selling motor fuel to different persons at different prices, where the effect is to injure competition, and where "competition" is defined as a single competitor. The Act provides for fines and private actions against violators.

In your letter of November 18, 2003, you asked us to comment on the Act, and especially the Act's impact on consumers. You also included the text of a draft bill that would repeal the Act. A summary of our comments appears below:

- Low prices benefit consumers. Consumers are harmed only if below-cost prices allow a dominant competitor to raise prices later 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.
- The federal antitrust laws deal with below-cost pricing that has a "dangerous probability" or a "reasonable prospect" of leading to monopoly. The FTC, the Department of Justice's Antitrust Division, state attorneys general, and private parties can bring suit under the federal antitrust laws against anticompetitive below-cost pricing and price discrimination. 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.
- Current Alabama law discourages competitive pricing. The Act subjects vendors to civil liability - including treble damages and a $10,000 fine per violation - for cutting prices even if there is no likelihood of harm to market-wide competition. Further, by focusing on total unit costs rather than marginal costs, the Act subjects a greater range of prices to liability in comparison to federal antitrust law. As a result, many vendors likely avoid procompetitive price-cutting.

For these reasons, we believe that the Act likely harms consumers and restricts competition. Moreover, the Act is unnecessary because the federal antitrust laws already protect against anticompetitive predatory pricing and price discrimination.

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.(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 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.(3)

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,(4) and of gasoline price increases in West Coast markets.(5) 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.(6) Commission staff also filed public comments with the Environmental Protection Agency concerning "boutique fuel" regulations.(7) 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 fuel below cost.(8)

Analysis of Alabama's Motor Fuels Marketing Act

The AMFMA prohibits vendors from selling motor fuel below cost or engaging in price discrimination with respect to motor fuel sales:

It shall be unlawful for any person . . . to sell or offer to sell motor fuel below cost *or* to sell or offer to sell it at a price lower than the seller charges other persons on the same day and on the same level of distribution, within the same market area, where the effect is to injure competition.(9)

The Act defines "cost" to include the lesser of "the invoice or replacement cost of the motor fuel . . . less all trade discounts except customary discounts for cash," plus applicable taxes and fees and "the cost of doing business."(10) The cost of motor fuel is defined as the lower of "(i) the invoice cost of the motor fuel . . . or (ii) the lowest replacement cost of motor fuel . . . within five days prior to the date of sale, in the quantity last purchased."(11) The Act defines the "cost of doing business" as including the following components:

labor (including salaries of executives and officers), rent (which rent must be no less than fair market value based on current use), interest on borrowed capital, depreciation, selling cost, maintenance of equipment, transportation or freight cost, losses due to breakage or damage; credit card fees, or other charges; credit losses, all types of licenses, taxes, insurance, and advertising.(12)

The plain text of the AMFMA and subsequent judicial interpretation make clear that the Act equates injury to "competition" with injury to a single "competitor." For example, the Act defines "competition" to "[i]nclude[] any person who competes with another person in the same market area at the same level of distribution."(13) Likewise, the legislative declaration of intent states that the "sale of motor fuel below cost . . . with the intent of injuring *competitors* or destroying or substantially lessening competition is an unfair and deceptive trade practice."(14) The Supreme Court of Alabama has interpreted the AMFMA such that proof of "a sale below cost and an injurious effect on competition" establishes a *prima facie* case under the Act.(15) And importantly, Alabama's Supreme Court also has held that "injury to a competitor suffices to establish a violation of the AMFMA" because "the legislature specifically defined 'competition' for the purposes of the AMFMA to include *any person who competes*."(16)

The Act includes certain limited exceptions, including ones for clearance sales and meeting the competition.(17) Further, the Act allows differential pricing based on cost differentials.(18)

We believe that, if followed by retailers, the Act is likely to restrict competition and may lead to higher prices for consumers. Unlike federal antitrust law, the Act aims to protect individual competitors, not competition, thereby discouraging procompetitive price-cutting. Moreover, the Act defines "cost" in a way that lacks a firm economic foundation. Again, this definition likely deters firms from cutting prices by subjecting a range of prices that are consistent with vigorous competition to liability under the Act. 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.

I. Legal and scholarly analysis of predatory pricing and price discrimination

A. Federal antitrust law condemns below-cost pricing and price discrimination that harm competition

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 and price discrimination.(19) The federal government has launched several predatory pricing investigations and predatory unilateral conduct cases during the past several years.(20) The government also has investigated incidences of price discrimination.(21) In addition, private plaintiffs and state attorneys general have the right to bring predatory pricing and price discrimination 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.(22) State attorneys general, acting as *parens patriae*, also may bring such actions.

Although below-cost pricing and price discrimination that harm competition are illegal, the United States Supreme Court has cautioned that antitrust law should not prevent procompetitive price-cutting. Congress designed the antitrust laws for "the protection of competition, not competitors," and vigorous competition allows consumers to reap the benefits of lower prices, greater variety, and higher quality goods and services.(23) 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."(24) Thus, unless conduct threatens to lead to lower output, higher prices, lower quality, or less variety, it is of no concern to the antitrust laws.(25)

ii. Only below-cost prices 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. . . . 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."(26) 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."(27)

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."(28) 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.(29)

iii. Below-cost pricing and price discrimination can harm consumers only in limited circumstances

Below-cost pricing has the potential to injure consumers only if it allows a firm subsequently to engage in sustained supracompetitive pricing. As the Supreme Court has noted in regard to predatory pricing:

[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.(30)

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."(31) Otherwise, the below-cost pricing strategy, which requires that the firm incur losses on every sale, will not succeed. As a practical matter, the recoupment test can be satisfied only when the price-cutter enjoys substantial market power so that it can affect prices through a contraction in its output, and when there are significant barriers to entry and reentry so that the price-cutter's supracompetitive prices will not be undercut by new entrants.(32)

When a firm is unable to recoup its short-run losses later through supracompetitive pricing, 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."(33)

Like the case of below-cost pricing, the circumstances in which charging different prices to different buyers can harm consumers are very limited. The consumer welfare effects of price discrimination are ambiguous at worst, and often price discrimination can lead to lower average prices.(34) And clearly, whenever a lower price expands output by attracting new customers who otherwise would not have purchased at the higher price, total welfare is increased. Additionally, an upstream supplier generally gains from vigorous downstream competition because lower markups downstream mean more of its product is sold.(35)

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."(36)

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."(37) Predation sometimes occurs,(38) but not nearly as frequently as claimed.(39)

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."(40) 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 . . . ."(41)

C. Past studies show that anticompetitive below-cost sales of motor fuel 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 fuel. 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.(42)

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 fuel in Arizona. "The marketplace for petroleum products is very competitive in Arizona," the Committee concluded. (43) 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. (44)

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. (45)

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.

II. The AMFMA likely restricts competition and harms consumers

To the extent that motor fuel sellers adjust their behavior to comply with the Act, the AMFMA likely restricts competition and leads to higher prices for consumers. First, the Act protects competitors, not competition. Second, the Act defines "cost" in a way that lacks a firm economic foundation and likely discourages procompetitive price-cutting. 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 instances of below-cost pricing and price discrimination.

A. The Act protects competitors, not competition

Unlike federal antitrust law, the Act protects competitors, not competition. The plain text of the AMFMA and subsequent judicial interpretation make clear that the Act equates injury to "competition" with injury to a single "competitor." 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, and even where there is no danger that the price-cutter subsequently will recoup its losses by charging higher prices.(46) Following the same interpretation of "competition," the Act also condemns a vendor that charges different prices to different customers if the disfavored customer loses business. Again, this is the case even though lower prices offered to the favored customer likely expand output, and upstream suppliers of motor fuel generally gain from thriving downstream competition. In these situations, there is no risk that consumers will suffer anticompetitive effects.

Yet, the risk of damages and substantial civil penalties likely deters vendors from cutting prices. The penalties include a fine of up to $10,000 per violation and private litigation that could result in treble damages.(47) Indeed, a growing body of empirical economic research from the past two decades generally finds that state "sales below cost" laws on retail gasoline prices raise gasoline prices or leave them unchanged.(48)

B. The Act defines "cost" in a manner inconsistent with federal court decisions and scholarly analysis

The Supreme Court has defined predatory pricing 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." (49) And, as discussed *supra*, the price-cutter's marginal cost (or a close proxy such as average variable cost) is widely used as the benchmark. (50) Marginal costs are those costs associated with producing an additional unit of output. In the case of motor fuel sales, marginal costs likely include the direct inventory or replacement cost of the motor fuel plus additional labor and materials costs incurred for selling an *additional* unit of motor fuel.(51)

For purposes of the Act, however, a vendor's costs include both marginal costs and overhead expenses, many of which are fixed costs that do not vary with the level of sales in the short run, such as rent, salaries, depreciation, and interest on capital.(52) In this manner, the Act appears to require firms to price at average total cost to avoid liability. This is significant because short-run output and price levels are set rationally by profit-maximizing firms in relation to marginal cost, not average total cost. Indeed, there are many common circumstances in which pricing at or above marginal cost, but below average total cost, is consistent with the normal functioning of a competitive market.(53) Because vendors risk violating the Act unless they take into account more costs than they otherwise would when making short-run output and pricing decisions, the Act likely harms consumers with higher motor fuel prices and concomitantly lower output levels.

C. The Act is unnecessary

Aside from the problems with the Act's definitions and focus discussed supra, the Act simply is unnecessary. The Act addresses two problems - anticompetitive below-cost pricing and price discrimination - that already are covered by the federal antitrust laws, and that are 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, the AMFMA is not necessary to protect consumers.(54)

Conclusion

For these reasons, the staffs of the FTC's Bureau of Competition, Bureau of Economics, and Office of Policy Planning believe that the Alabama Motor Fuels Marketing Act harms competition. The Act addresses a problem that is unlikely to occur. To the extent that anticompetitive below-cost pricing and price discrimination are dangers in the retail gasoline market, federal antitrust laws are sufficient to address the problem. Moreover, we believe that the Act most likely deters procompetitive price-cutting and causes some vendors to raise their prices, to the detriment of Alabama's consumers.

Respectfully submitted,

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Endnotes:

1. Ala. Code § 8-22-1 et seq. (hereinafter "AMFMA" or "the Act"). 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* Valero Energy Corp., Docket C-4031 (Feb. 19, 2002); Chevron Corp., Docket C-4023 (Jan. 4, 2002); Exxon Corp., Docket C-3907 (Jan. 26, 2001); British Petroleum Co. p.l.c., 127 F.T.C. 515 (1999); Shell Oil Co., 125 F.T.C. 769 (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 Susan Creighton, Director, FTC Bureau of Competition, et al. to Wisconsin State Rep. Shirley Krug (Oct. 15, 2003), at http://www.ftc.gov/be/v030015.htm. Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Eliot Spitzer, Attorney General of New York (July 24, 2003), at http://www.ftc.gov/be/nymfmpa.pdf; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, 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.htm; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, 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. Ala. Code § 8-22-6 (emphasis added). Similarly, § 8-22-7 makes it a violation of the Act for a person to "sell or transfer motor fuel to itself or an affiliate for resale at another marketing level of distribution at a transfer price that is below cost or lower than the price it charges a person who purchases for resale on the same day and at the same distribution level, within the same market area, where the effect is to injure competition." The Act defines "person" as "[a]ny person, firm, association, organization, partnership, business trust, joint stock company, company, corporation, or legal entity." § 8-22-4(1). Further, it appears that the Act is directed at sales made by refiners, wholesalers, and retailers. *See* §§ 8-22-2(2), 8-22-3. To make out a *prima facie* case, the Act does not require a plaintiff to show the defendant acted with intent. However, a defendant can raise lack of intent as an affirmative defense. Lack of intent can be shown by satisfying one of the enumerated exceptions in §§ 8-22-12, 8-22-13, or "generally . . . if the facts do not specifically fit one of the stated exceptions - for example, an honest mistake in calculations." Galanos v. Mapco Petroleum, Inc., 519 So. 2d 1275, 1286-87 (Ala. 1987). *See also* McGuire Oil Co. v. Mapco, Inc., 612 So. 2d 417, 422-23 (Ala. 1992); Campbell & Sons Oil Co. v. Thrasher Oil Co., Civ. Act. No. CV-99-S-3176-NE, 2001 U.S. Dist. LEXIS 25127, at *19 (N.D. Ala. May 7, 2000).

10. Ala. Code § 8-22-4(15) (cost to wholesaler); Ala. Code § 8-22-4(16) (cost to retailer).

11. *Id*. at § 8-22-4(14).

12. *Id*. at § 8-22-4(17).

13. *Id*. at § 8-22-4(13).

14. *Id*. at § 8-22-3 (emphasis added).

15. *Galanos*, 519 So. 2d at 1286.

16. *McGuire Oil*., 612 So. 2d at 422. See also Star Service & Petroleum Co. v. Alabama, 518 So. 2d 126, 129 (Ala. Civ. App. 1986) (affirming the trial court's finding that the defendant's below-cost pricing had injured competition when competitors testified that they were "actually losing money" and that defendant's pricing "definitely injured my business"); Home Oil Co. Inc. v. Sam's East, Inc., 252 F. Supp. 2d 1302, 1308-11 (M.D. Ala. 2003) (interpreting Alabama law and holding that a genuine issue of material fact exists as to whether defendant's actions injured competition under the AMFMA when plaintiff adduced evidence that its sales volumes were lower every month for the 12-month period after defendant opened than they were for the corresponding month during the 12-month period prior to defendant's opening).

17. *See* Ala. Code §§ 8-22-8(b), 8-22-12, 8-22-13.

18. Ala. Code § 8-22-8(a).

19. Predatory pricing claims generally are brought as violations of either Sherman Act § 2 (15 U.S.C. § 2) or as "primary-line" violations of the Robinson-Patman Act (15 U.S.C. § 13(a)). Price discrimination is challenged under the Robinson-Patman Act (15 U.S.C. § 13(a)).

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

21. See McCormick & Co., Docket No. C-3939 (May 2, 2000) (consent order), available at <http://www.ftc.gov/os/2000/05/mccormick.do.htm>.

22. 15 U.S.C. § 15.

23. 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)).

24. 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). After *Brooke Group*, it is clear that a plaintiff must show injury to competition in a primary-line case under the Robinson-Patman Act. *See Brooke Group*, 509 U.S. at 222-23. Although not a universally adopted position, several courts have held that a plaintiff in a Robinson-Patman Act price discrimination case must show harm to competition, not merely harm to a competitor. *See* Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144-48 (D.C. Cir. 1988); Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986) ("The Act refers not to the effect upon competitors, but to the effect upon competition in general. . . . [A]nalysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses."); Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 395 (10th Cir. 1985) ("[T]he naked demonstration of injury to a specific competitor without more is not sufficient to show that price discrimination may substantially lessen competition; the test must always focus on injury to competition.") (internal citations and quotations omitted); Bob Nicholson Appliance, Inc. v. Maytag Co., 883 F. Supp. 321, 326 (S.D. Ind. 1994) (extending the reasoning of *Brooke Group* to secondary-line actions and "requir[ing] actual injury to competition"). *See also* Great Atl. & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80 n.13 (1979) (Robinson-Patman Act "should be construed consistently with broader policies of the antitrust laws"); H. Hovenkamp, Antitrust Law ¶ 2342d (1999) ("*Brooke Group's* strictures clearly apply to both [primary and secondary-line Robinson Patman Act actions]. . . ."). *But see* George Haug Co. v. Rolls Royce Motor Cars, 148 F.3d 136, 143 (2d Cir. 1998) (no need to show harm to competition for purposes of secondary-line price discrimination under Robinson-Patman Act); Chroma Lighting v. GTE Products Corp., 111 F.3d 653, 655 (9th Cir. 1997) (same); J.F. Feeser v. Serv-A-Portion, 909 F.2d 1524, 1533 (3d Cir. 1990) (same); Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990) (same).

25. *Cf. Brooke Group*, 509 U.S. at 224 ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*.") (internal quotations and citations omitted) (emphasis in original).

26. *Brooke Group*, 509 U.S. at 223 (internal quotations and citations omitted).

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

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

29. Marginal costs are those costs associated with producing an additional unit of output. *See* United States v. AMR Corp., 335 F.3d 1109, 1116 (10th Cir. 2003) (marginal cost and average variable cost are relevant in determining whether prices are predatory); 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); Int'l 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 & H. Hovenkamp, Antitrust Law ¶ 724; P. Areeda & 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 both agreed that average variable cost should be the appropriate measure.

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

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

32. *See Brooke Group*, 509 U.S. at 226 (citing entry barriers, market concentration, and capacity constraints as factors to guide the recoupment inquiry).

33. *Id*. at 224.

34. See D. Carlton & J. Perloff, Modern Industrial Organization 289-90 (3d ed. 2000). See also Luke Froeb, Price Discrimination and Competition: Implications for Antitrust, Speech Before the American Bar Association's Fall Forum, National Press Club, Washington, DC (Nov. 19, 2003), at <http://www.ftc.gov/speeches/other/031118froeb.pdf>; B. Klein & J. Wiley, *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 Antitrust L.J. 599, 613 n.29 (2003) (observed price discrimination by a firm does not indicate a unilateral ability to affect the market price; rather, price discrimination is common in competitive differentiated product markets).

35. As the leading antitrust treatise observes with regard to price discrimination:

[T]he manufacturer is best off when its distribution system as a whole distributes the largest possible output at the lowest possible markup . . . . [T]he manufacturer cannot profit by making its distribution system more costly or less competitive, or by restricting the volume of sales it is capable of making.

H. Hovenkamp, Antitrust Law at ¶ 2342b.

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

37. Carlton & Perloff, *supra* note 34, at 342.

38. *See* J. Church & R. Ware, Industrial Organization: A Strategic Approach 659 (2000).

39. P. Areeda & H. Hovenkamp, Antitrust Law at ¶ 723a ("as the Supreme Court has observed, although competitors allege predation frequently, it is probably quite uncommon").

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

41. *Id*. at 594.

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

43. Staff of Ariz. Joint Legislative Study Committee, Final Report on Petroleum Pricing and Marketing Practices and Producer Retail Divorcement, at 35 (Dec. 1988)

44. Wash. Attorney General, Final Report to the Washington State Legislature on the Investigation of Retail Gasoline Marketing, at 14 (Aug. 12, 1987).

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

46. *See* note 16, *supra*.

47. Ala. Code §§ 8-22-16, 8-22-17.

48. *See, e.g.*, R. Anderson & R. Johnson, *Antitrust and Sales-Below-Cost Laws: The Case of Retail Gasoline*, 14 Rev. Ind. Org. 189, 203 (1999); R. Fenili & W. Lane, *Thou Shalt Not Cut Prices! Sales-Below-Cost Laws for Gas Stations*, 9 Regulation 31, 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. M. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. Reg. Econ. 217 (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.

49. *Cargill*, 479 U.S. at 117.

50. *See* note 29, *supra*.

51. *See, e.g.*, Carlton & Perloff, *supra* note 34, at 28. In the context of motor fuel sales, the appropriate unit with which to define the margin may vary depending on the circumstances.

52. As the Tenth Circuit noted:

Costs can generally be divided into those that are "fixed" and do not vary with the level of output (management expenses, interest on bonded debt, property taxes, depreciation, and other irreducible overhead) and those that are "variable" and do vary with the level of output (materials, fuel, labor used to produce the product). Marginal cost, the cost that results from producing an additional increment of output, is primarily a function of variable costs because fixed costs, as the name would imply, are largely unaffected by changes in output.

United States v. AMR Corp., 335 F.3d 1109, 1115 (10th Cir. 2003). *See also Anderson & Johnson*, *supra* note 48, at 192.

53. For example, fluctuations in supply and demand can lead to optimal short-run prices that are greater than or equal to marginal cost, but below average total cost. Further, a new firm may want to lower the price of its product below average total cost as a means to attract customers who are unsure of the quality of the new firm's product, or to expand sales and thereby move down its learning curve more quickly. *See* Carlton & Perloff, *supra* note 34, at 341-42.

54. *See* note 24, *supra*.