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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

September 24, 2010

Hon. Raymond J. Lesniak
New Jersey State Senate
985 Stuyvesant Avenue
Union, NJ 07083

Re: New Jersey Senate Bill 484

Dear Senator Lesniak:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition are pleased to provide our comments on Senate Bill 484.[1] The Bill would modify current law to allow gasoline retailers to set their prices below cost to meet competition.

FTC staff encourages the New Jersey legislature to pass Senate Bill 484. If adopted, the Bill would permit gasoline retailers to meet a rival's price even if that price falls below the retailer's costs. In this manner, the Bill likely would encourage more aggressive price competition, which would benefit New Jersey consumers through lower gasoline prices.

Interest and Experience of the Federal Trade Commission

The FTC is charged 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. FTC staff has previously assessed the competitive impact of regulations and business practices in the gasoline industry. For example, in 2004 we provided guidance to the Alabama, Kansas, and Michigan legislatures that recommended against proposed legislation to prohibit below-

[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize us to submit these comments.

[2] *See* Federal Trade Commission Act, 15 U.S.C. § 45.

cost pricing of retail gasoline, because such a rule could prevent lower gasoline prices to consumers.[3]

Discussion

Current New Jersey law prohibits a "retail dealer" from selling "motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses."[4] In some circumstances, below-cost pricing by a dominant firm may raise competitive concerns. For example, the Supreme Court has recognized that a monopoly's below-cost pricing can be anticompetitive if it causes a reduction in competition such that the firm can later raise prices high enough to recoup what it lost on the below-cost pricing scheme, and still be profitable.[5]

In many other circumstances, however, below-cost pricing can benefit consumers. In fact, the Supreme Court has made it clear that as a general matter low prices are "a boon to consumers."[6] As the Supreme Court stated, "[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured."[7]

[3] *See* Letter from FTC Staff to Demetrius Newton, Alabama House of Representatives (Jan. 29, 2004) (analyzing an Alabama statute (similar to New Jersey's P.L.1938, c.163 (C.56:6-2) prohibiting the retail sale of gasoline below cost and a proposed bill to repeal that statute; staff explained that the statute was unnecessary to protect consumers, restricted competition, and on balance likely harmed consumers), *available at* http://www ftc.gov/be/v040005.shtm; Comments of the FTC Staff to Lee Donovan, Assistant Majority Leader, Kansas Senate, concerning Kansas House of Representatives Bill No. 2330 (Mar. 12, 2004) (suggesting that the legislature reject a bill that would prohibit below-cost gasoline pricing), *available at* http://www ftc.gov/be/v040009.pdf; Comments of the FTC Staff to Gene DeRossett, Michigan House of Representatives, concerning the Michigan Petroleum Stabilization Act, H.B. 4757 (June 17, 2004) (same), *available at* http://www ftc.gov/os/2004/06/040618staffcomments michiganpetrol.pdf; *see also* Letter from FTC Staff to District of Columbia Councilmember Mary M. Cheh (June 8, 2007) (encouraging the Council of the District of Columbia to repeal a portion of a statute that prohibited retail gasoline station ownership by jobbers, producers, refiners, and manufacturers of petroleum), *available at* http://www ftc.gov/os/2007/06/V070011divorcement.pdf; Letter from FTC Staff to Rep. Christopher Stone, Connecticut House of Representatives (May 2, 2007) (suggesting that the legislature reject a bill that would prohibit certain forms of price competition among gasoline retailers), *available at* http://www ftc.gov/be/V070008.pdf. In recent years, the Commission has also conducted numerous investigations of mergers and conduct in the petroleum industry.

[4] P.L.1938, c.163 (C.56:6-2).

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

[6] *Brooke Group,* 509 U.S. at 224 (also explaining that low prices "benefit consumers regardless of how those prices are set"); s*ee 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).

[7] *Brooke Group*, 509 U.S. at 224.

The proposed legislation changes New Jersey law to allow below-cost pricing to meet competition, as long as such prices are not set "with intent to injure competition or destroy or substantially lessen competition."[8] Federal competition principles and enforcement experience indicate that price reductions are unlikely to harm consumers in such circumstances. In fact, by giving retailers the ability to better compete through more aggressive pricing, this change will likely help New Jersey consumers, who should benefit from lower prices from gasoline retailers.

Accordingly the staff of the Federal Trade Commission encourages the New Jersey Legislature to pass Senate Bill 484.

Respectfully submitted,

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Director, Office of Policy Planning

Joseph Farrell
Director, Bureau of Economics

Richard A. Feinstein
Director, Bureau of Competition

[8] SB 484. The proposed legislation would modify the current law to read (with new language underlined):

> (b) No retail dealer shall sell motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses, <u>except to meet competition. Notwithstanding the provisions of this subsection, it shall be unlawful and a violation of P.L.1938, c.163 (C.56:6-1 et al) for any retail dealer with intent to injure competition or destroy or substantially lessen competition to sell motor fuel at a price which is below the net cost to the retail dealer</u>.

We note that under federal antitrust standards, liability is predicated on likely harm to the competitive process rather than on intent alone. *See, e.g.*, *Brooke Group,* 509 U.S. at 225 (for antitrust liability, below-cost pricing "must be capable, as a threshold matter, of producing the intended effects on the firm's rivals"); *see also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1984) (Breyer, J.) ("But 'intent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses.").