

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

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”); 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).

⁷ *Brooke Group*, 509 U.S. at 224.

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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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