

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

2389

2005 SENATE TRANSPORTATION

SB 2389

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2389

Senate Transportation Committee

Conference Committee

Hearing Date 2-04-05

Tape Number	Side A	Side B	Meter #
1	x		3445-end
1		x	5660-6250
Committee Clerk Signature <i>Mary K Monson</i>			

Minutes:

Chairman Trenbeath opened the hearing on SB 2389 relating to unfair trade practices in the marketing and selling of motor fuel.

Senator Mutch (District 19) As a sponsor, he introduced SB 2389. He explained that what this purports to do is establish a down stop on the pricing of gasoline and relate that to the wholesale cost of the product to the dealer.

Senator Wardner (District 37) Prime Sponsor of SB 2389. He testified that this bill makes things fair. It is a fair trades practices law. They are asking that entities cannot sell gasoline below the cost of what they paid for it. He pointed out that Section 1 of the bill talks about what costs mean. (Meter 3730) He felt that was the part the committee has to deal with. Section 2 lays out the unfair trade practices. Section 3 explains the claim for relief by a person. It talks about the damages, attorney's fees, jurisdiction, and that type of thing. Section 4 clears some things up about applicability of the chapter. It talks about, "This chapter does not apply to sales."

and it talks about some things that are not considered to be unfair practices. Section 5 talks about competitive sales. The bill simply states that the gas retailer cannot sell gas below cost. It sets up some definitions and guidelines for that. It does not create a set price for gasoline statewide. It does not insure a profit for anyone selling gas. It does not prohibit anyone from pricing their gas competitively.

Senator Espegard (Meter 4093) asked how a new gas station just starting out could compete with an established business.

Senator Wardner said this does not put a cap on how high he can go on the price. It just says he cannot go below cost.

Russ Hanson (ND Petroleum Marketers Association and ND Retail Association) See attached testimony in support of SB 2389 and packet of related information.

Senator Warner (Meter 4935) expressed concern with intense spikes in gasoline prices due to a crisis. When the crisis passes and the price of wholesale fuel drops retailers are stuck with some very high priced inventory that they need to be selling based on new fuel coming into the system. He asked if they would be in violation of this law.

Russ Hanson said that instances like that certainly are not the intent of this legislation. The intent is to combat and prevent long term sustained efforts to price a product in a predatory way.

Matt Bjornson (Bjornson Oil Company, Cavalier) Testified in support of SB 2389.

(Meter 5207) He said one of the keys in this bill that is very important is the ability of any marketer to match competition and not be in violation of the law. In the case of a new station, it is a business decision by that owner. If he is going to be competitive in the marketplace, he is not going to have to be in violation of the law because he can match his competitors price. If you get

stuck with high priced inventory, it will be a business decision whether to maintain the volume or to reduce the price to match competition. He went on to answer the question, "Why gasoline?". Gasoline comprises around 70% of a typical retail outlet's total sales. No retailer can survive in business selling 70% of their products below cost. Mega retailers have been using gasoline across the country as a loss leader to draw customers in to their large stores. This affects the rest of the businesses on small main streets throughout North Dakota. They are not going after the gas customers so much as they are going after the local hardware store, grocery store, and any other main street business.

Boil this law down and it says that it is illegal to sell gasoline below the cost of the most efficient marketer in any given market. It does not insure any profit. It does not set the price of gas. It does not prohibit competitive gas prices. Both the State and Federal Government have recognized the importance of preventing predatory pricing practices. The problem with the Federal FTC is that they only get involved after a business is gone. A market in which a large retailer prices in a predatory manner is not a free market.

Senator Trenbeath said that Matt had made a point in that some place like Wal-Mart, using gasoline as a loss leader, hurts all the local businesses. The idea is not to sell gas, but to sell hardware etc.

Matt Bjornson replied that it doesn't make sense to sell a product consistently below cost unless there is an upside on something else.

Senator Bercier asked how Matt would address a situation in reference to page 2 of the bill where someone can come in and buy an unlimited amount of gas.

Matt Bjornson replied that the intent of that portion of law would be to not limit quantities.

(Meter 5815)

Paul Goulding (Petroleum Dealer, Edmore) Testified in support of SB 2389. (Meter 5945) He emphasized that this bill does not create a price that gasoline has to be set statewide. It doesn't create a profit margin for anyone. It tells us what retailers cannot do, and they cannot sell gas below cost. Cost is identified and there is a remedy to that process. The bill does not increase the gas prices. (Tape 1 side B) Small towns cannot stand to lose more business to large retailers. With an entree of gasoline to draw people into the store it would be detrimental to the rural areas of ND.

Mike Rud (Owner of a convenience store in Garrison) See attached testimony in support of SB 2389. (Tape 1 Side B Meter 77)

John Job (Division Manager, AMCON Distributing Company, Bismarck) See attached testimony in support of SB 2389.

Patrick Crotty (Consumer, speaking on his own behalf) See attached testimony in opposition to SB 2389.

Greg Jacobs (Citizen from Bismarck) Spoke in opposition to SB 2389. He said it is unnerving that a person can drive 200 miles and see the gasoline prices go down ten cents/gallon. It probably isn't the retailers in Bismarck or in the central part of the state that are getting this ten cents/gallon. It is more likely the wholesalers. He feels if competition is brought in somebody that is willing to use gasoline as a loss leader we will get more even pricing in gasoline across the state. He said he feels the wholesalers do not have the competition in this area that they could have. (Meter 800) He said that the number of pumps at a Wal-Mart or Target etc. would pull

some of the business away from other stations. But he felt, in the long run, it would bring the average price of gasoline in the area down.

Mike Brandvik (Citizen from Bismarck) (Meter 1235) He said that Wal-Mart is not in the gas business. They just lease their sites to oil companies. There are some requirements that must be met. The cost of gas is determined by the wholesaler and the retailer has the margins.

Joe Weimerskirch testified on his own behalf. He noted that the proponents promised that the gas price won't go up. He wanted them to promise that it would go down. He also noted that they promised that if someone does come in and does happen to be able to buy gas at less price, they can cut that price and still be in compliance with this law. In his travels, he doesn't see a vacancy of gas stations on other corners in those communities with Wal-Marts. The competition is there. The gas prices in Bismarck are too high. He feels competition should be brought in.

The hearing on SB 2389 was closed.

The following was submitted for the record:

Written testimony from Woody Barth (North Dakota Farmers Union)

Written testimony from Bill Butcher (State Director, National Federation of Independent Business)

(Side B Meter 5660)

There was some general discussion on gas prices and competition in different markets.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2389

Senate Transportation Committee

Conference Committee

Hearing Date 2-11-05

Tape Number	Side A	Side B	Meter #
2	x		20-145
Committee Clerk Signature <i>Mary K Monson</i>			

Minutes:

Chairman Trenbeath open SB 2389 for discussion.

Senator Nething motioned a **Do Pass**. Seconded by **Senator Warner**.

As per Chairman Trenbeath the vote was held open.

Final roll call vote 6-0-0. **Passed**. Floor carrier is **Senator Mutch**.

Date: 2-11-05
Roll Call Vote #: _____

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO 2389

Senate TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. Nething Seconded By Sen. Warner

Senators	Yes	No	Senators	Yes	No
Senator Espegard	✓		Senator Bercier	✓	
Senator Mutch	✓		Senator Warner	✓	
Senator Nething	✓				
Senator Trenbeath, Chairman	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Mutch

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 15, 2005 8:50 a.m.

Module No: SR-30-2907
Carrier: Mutch
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2389: Transportation Committee (Sen. Trenbeath, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2389 was placed on the
Eleventh order on the calendar.

2005 HOUSE TRANSPORTATION

SB 2389

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2389

House Transportation Committee

Conference Committee

Hearing Date March 11, 2005

Tape Number	Side A	Side B	Meter #
1	X		0-52.7
2	X		0-52.6
2		X	4.5-17.6
Committee Clerk Signature <i>DeLoe Albrink</i>			

Minutes:

Chairman Weisz opened the hearing on SB 2389 A Bill for an Act to create and enact four new sections to chapter 51-10 of the North Dakota Century Code, relating to unfair trade practices in the marketing and selling of motor fuel; and to amend and reenact subsection 1 of section 51-10-01 of the North Dakota Century Code, relating to unfair trade practices.

Senator Wardner: Russ Hanson will go through the details of the bill. I would like to say this bill does three simple things: 1) It states that gas retailers can not sell gas below cost. 2) Sets up definitions for cost of each individual business 3) Allows a business who has higher costs than its competitors to be able to come down below cost to compete against them. There are many people out there that are very upset about the price of gasoline. To pin it on the retailers as the one who is setting prices and this type of thing is wrong. They buy their petroleum from the supplier; the price is dictated at the rack, not at the retailer. I will give you an example of one retailer in my town of Dickinson showed me the slip as the tanker left. They paid \$1.43 ½ a gallon for the

petroleum. It was regular. He took me out and showed me the marque and the price out there was \$1.92.9. Take \$1.43 ½ cents add the tax to it you now come up with \$1.84 ½ cents. When you subtract the \$1.92.9 you come up with 8.4 cents margin of profit for selling the gasoline on that unit. If you use the credit card that cost them another 3 percent that comes off so buy the time you take a look at it is about 5 cents a gallon. Went through discussion on costs involved. For the retailer there isn't alot of markup. They really don't make alot of money on the gas. This bill simply levels the playing field for the petroleum marketer. If someone comes in that can sell below cost that does create a problem for the retailer.

Rep. Ruby(5.8) Why is this bill being brought now when for years we have had situations where bulk suppliers have owned stations as well as delivered bulk to other stations and the if what you are talking about is needed it should have been needed a long time ago.

Senator Wardner:(6.1) I think times are changing. I think we are getting into situations where companies and business and corporations they own the rack, the distributorship right to the retail are moving into the state of ND so because of that change I think the industry is being proactive to try to help the small business is not completely run out of business.

Senator Warner:(6.8) I will not speak into great length. I think ultimately the consumer is best served by having a thriving market place with alot of players. I would like to encourage you to seriously look at the concepts in this bill and give it a do pass.

Rep. Kasper:(7.4) Competition that is what drives a free enterprise system. You do have prices that vary and consumers gain. However, when competition is impeded for whatever reason you have no longer a fair market place and no longer have an opportunity for some businesses to compete. I think you have a bill before you that is attempting to say to this committee and

attempting to put into statues in the market place which will continue to foster competition.

When a company gets so big that it can control the price then you have no competition. If a company can go to the manufacturer and state to the manufacturer I do not care what you sell your product for to other companies, but my price is going to be 10% below what you sell to them or I will not buy from you. When that competitor such a huge market share that competitor can control the pricing you have no opportunity for other businesses to compete. When a competitor in the market place is so large that they can under cut the pricing that they pay for a product the people that buy from the producers must pay more. If they must pay more than their pricing at the pump has to be more regardless of how they try to compete. That eliminates competition. I urge a careful look at this bill and a do pass.

Ruses Chanson: (10.0) (see attached testimony #1) I would like to point out we are close to two states, Minnesota and Wisconsin, have fair competition laws. They have a defined minimum mark up of wholesale. The state of Minnesota has a 6 percent or 8 cent above wholesale cost and Wisconsin has a 6% or 9 % depending on whether their wholesaler retailer or retailer only. This legislation does not set a number, name a defined mark up in this legislation.

Rep. Weiler(12.7) Are there currently any laws in ND that prohibit any body from selling anything below costs?

Russ Hanson: We do have an unfair trade practices statue which addresses all products and the pricing of those products and if those products are sold in a manner that can be proven to injure competition. There is an opportunity to address that but whether it addresses below costs selling I am not sure.

Rep. Bernstein(13.4) Second three would you please elaborate on threatened violation. Would you define threatened violations?

Russ Hanson:(13.6) In subsequent testimony one of the testifiers is going to get into the right of action and we will be addressing that and give a couple of examples.

Rep. Dosch(13.8) Since the cost basis would be different for every station out there according to how the bill is written who do you envision enforcing this and determining on a station by station basis what their cost is and frequently would that be reviewed?

Russ Hanson: In the definition of cost in section 1 of the bill there are specific elements in there that define cost and as the bill is written right now there would be two ways to define it. 1) If a marketer felt that someone else was violating the law they could address it if enacted to a private right of action or they could do it via the attorney generals office amending the current unfair trade practices law. The intent of this law is for addressing long term sustains efforts to control competition. The intention is not to get into action any time there is a gas war.

Chairman Weisz(14.9) Where you are talking on Section A n page 1; having to do within three days before the date of sale; if you have a marketer who had the capacity and he purchased three weeks worth of fuel and it goes up 20 cents, he could not sell that 5 cents over cost because under this he would have to use the cost price that was current within 3 days of where the market was at. Is that correct?

Russ Hanson: Your first statement is correct. I would like to defer that to someone that markets on a daily basis.

Rep. Ruby(15.5) We were talking about competition and competition is usually determined by somebody offering more service for the same price or finding efficiencies that allow them to

offer the same service for a lesser price. Do you see this as possibly prohibiting somebody from trying to find the most efficient way to deliver a product?

Russ Hanson: (15.9) We don't. We see this as an avenue to do both and allow a very competitive market place and at the same time setting definitions so that somebody can't go into a market place and sell a product below cost and control the market.

Rep. Ruby Unfair trade practices, isn't that covered under anti trust laws at this time?

Russ Hanson: There is an unfair trade practices law. The marketers feel that it is been in affect since 1941. The marketers feel it is vague and difficult to enforce and believe by addressing it this way we can put some specificity to the issue and address it that way.

Rep. Price (16.6) Does every wholesaler out there charge the same price for gas right now?

Russ Hanson: A couple of the marketers who purchase daily would be better to get into those specific areas.

Rep. Price My further part of that is in Minot we only have two stations that ever sell at a different price from all the rest in two. They are always 2 cents lower regardless of what the price is and are you saying that WalMart is going to pay the same price for their gas because their costs. Volume discounts are in every business including mine. We may not pay the same load for the semi load of lumber as somebody that buys 6 semi's at the same time so I have the question of where you are going to find the cost difference.

Russ Hanson: (17.5) The wholesale price of petroleum is very easy to determine. If they buy it at a certain terminal it is a posted price so the marketers and certainly further explain how that would work, but I think it is a little different than other products and it is easy to define and determine what those wholesale prices are.

Rep. Delmore (18.0) If we look at this bill I believe you need a super WalMart gas station to do the selling?

Russ Hanson: You are asking how it is going to affect an area? We believe that the price and trade area is fairly big. There will be a map here in a few minutes to illustrate how we feel it will affect things geographically not only in the petroleum business but other business as well.

Rep. Schmidt(19.1) I see in section 4 there they have that it wouldn't apply to anybody having a clearance sale. What would stop a retailer from having a clearance every 6 months like the furniture dealers do?

Russ Hanson: The key definition is Bona fided sale. If one had a clearance sale and continued in trade it could be proven that it wouldn't be a bona fide clearance sale. It is illegal to sell liquor below costs too.

Rep. Weiler(20.0) In your handout, item #4, your first line. Explain how this will work?

Russ Hanson: We think it will encourage competition by setting a definition to allow all marketers to compete fairly and given those facts that will encourage everyone to have a fair playing field.

Rep. Price(20.8) Section 2 you say this is the attorney generals preview. Who pays for the cost of doing this monitoring because in discussion with discussion in other states there are costs associated with this.

Russ Hanson:Your questions is a good one. The Attorney General's office is going to address that and some ideas of how that would work and actually propose some amendments to address that.

Rep. Price Under the credit card fees and other charges etc. On credit card fees are you going to use an average because credit card fees depend on the company you use and also your volume. It goes down as your volume goes up?

Russ Hanson: We would envision that to be on a case by case basis because if this bill is passed, truly what the marketers are doing is they will be opening their books for everyone to see. A credit card fee would be different one from another.

Rep. Ruby(22.0) Your industry is in favor of opening your books for this?

Russ Hanson:You did hear me correctly. That is a big step for us. Yes, that is something they are willing to do because they see the issue to be that large.

Rep. Price(22.5) I have gotten calls on this bill and there is a charge that there is one station in this state who buys gas in Canada, drives down Highway 52 to Fargo and drops gas on the way and gas is sold cheaper in Fargo than the places they drop it?

Russ Hanson: I am not able to answer that but I think that the people that will follow me will be able to.

Rep. Price That was an antidote, but opening the books would certainly answer that charge.

Rep. Vigesaa (23.3) In section 1 subsection C where it talks about determining the cost of doing business. If we are talking about a major corporation that has several locations all over the country. When you determine the cost of that are you going to take an individual store or are they going to be able to use their entire corporation and average that out over the whole country when determining the cost at one particular store?

Russ Hanson: It would be an individual store in an individual given market.

Rep. Ruby(23.9) That was an interesting answer because in here it includes executives and officers so how could it not be the whole corporation?

Russ Hanson: If that would be the determination we certainly could address that, but that was not the intent. We are looking at addressing a given geographic area.

Dan Gilligan:Petroleum Marketers Assoc. of America: (24.8)(see attached testimony #2) For 10 years I worked at the Indiana State legislature and I loved it. I did come here today to testify in favor of the bill and explain the federal side of the equation. Many states are considering below cost legislation. New York just passed a bill last year. One of the issues has arisen in that discussion is what the federal governments roll is and in many cases the federal trade commission has submitted letters to state legislative committees recommending against the adoption of this bill because what the FCC says is that we govern predatory pricing and states, you really don't have to do anything. We have it covered. The other thing they say is that in their judgment these kinds of below cost laws could in fact potentially increase the retail price of gasoline. It bothers us that the FTC says tries to infer that somehow these could have an affect on consumer prices when in fact their own study determines that it does not have any affect on consumer pricing. We think FTC is heavily favored by big business and we question why the FTC put so much effort into these below cost initiatives? Discussing predatory pricing. The federal law was really written for Bethlehem Steel to sue US Steel for selling steel below costs. It is really a big business type of law. It is totally useless to small business. What the federal law says is the business has to go out of business. They have to initiate a legal action against the company that put them out of business and they have to prove intent. Last of all the things you have to prove the company was able to recoup their losses by charging a higher price later. Total

impossible for a small businessman to do.(Discussed Ladco being put out of business) I want to speak about below cost strategy and how it is used. When a mega retailer comes to town they will drop their costs from 10-15 cents below costs. They do that long enough to clear out some competitors. Maybe they get to the point they get rid of 3 or 4. Then they become the dominant player in the market place. Then they, once in control, begin to discipline their competitors. This works like this; then I control my competitors by using below cost strategies because what I do, if I raise my price 5 cents and the competitors don't go up, guess what, I drop my price 10 cents to teach them a lesson. To send them a message that says, look I am in control in this market and if I raise my price 5 cents you better go up 5 cents with me or else. They have the ability to sell at a loss longer than anyone else in the market place. I think it is a bad thing for ND, but it is certainly going to come. Essentially, what is being proposed here is mega retailer come to ND we like to have you in the business, but play fair. Don't use below cost schemes. Don't use below costs tactics to gain control of the local gasoline market place.

Rep. Delmore(34.1) Will every city in ND be affected by this competition? Geographically most of these people are not going to come into the small towns in ND. Is this a state wide problem we are trying to solve or is this only a big city problem.

Dan Gilligan:(34.9) They will draw people from a 30-40 mile area. People will drive that far to save or achieve a bargain. (Discussion on how people drive a long ways to save a few cents on gasoline).

Rep. Delmore We have other businesses too that have strong competition and seem to have no protection. Why is it so important we protect this industry?

Dan Gilligan: Gasoline is a product that touches so many American lives and it is such a draw and when your business is so dependent on the little bit of gassing market you can achieve it makes allot of difference. Large volume products like tobacco and gasoline has a unique ability to affect consumers.

Chairman Weisz(37.3) How are you going to determine whatever they say is their overhead cost for that gas which might be a small percentage of their sales of that store if they are adding in all their other products?

Dan Gilligan:(37.5) Usually the rack price is one of your most important quotations. People think mega retailers can buy gasoline at a substantially lower price than smaller businesses. That is not generally true. The difference might be one or two cents depending at what point in the market place. They cannot get a 10 cent a gallon benefit over their competitors. So it is a conscious decision that they will dominate this market place by selling the product below costs. They intentionally sell it below costs and take a loss on it.

Chairman Weisz Under section C it talks about all the overhead costs, labor, salary, interest, rent, appreciation etc. Who is going to determine that for example on a super Wal Mart? Granted rack prices, I understand, is still the vast majority of price of gas. But if we are talking 5-6 cents obviously those overhead costs would be dramatic.

Dan Gilligan: The practical reality is mega retailers don't want to open their books. They don't want to have this examined so they stay at costs. They don't want to be hassled with this kind of stuff so they stay at costs and stay right there just to stay out of that. It would be my guess that this formula you are looking at will never be used because the mega retailers don't want to have their books opened.

Rep. Ruby(40.4) I understand the big issue here is below cost and that is on the top end. I read in Section 5 starting on line 31; the retailer may advertise, offer to sell motor fuel at a price made in good faith to meet the price of a competitor that is selling the same article at cost to the competitor. That is allowing other retailers to sell below their costs to meet competition.

Dan Gilligan: That is a common feature. You can sell below costs to meet competition. The way it would work is this. A competitor in a town decided to go below costs and there was a complaint filed, but in those weeks it takes to get an initiative dealt with you could loose and incredible amount of business. The person they find that started the below cost would be held responsible even though others were doing it then.

Rep. Ruby It just seems contradictary to say everyone else can sell below their costs to meet the other one, but that one can't sell below costs. The scenery that you talked about earlier and I can understand the fear; however, I am also remember in Minot many years ago and KMart moved to town and the malls moved in that everyone talked about how down town couldn't compete because they couldn't keep people to go down there and shop any more. The reality is as KMart opened up, the Target came in; then WalMart came in and pretty soon you had more competition than KMart was able to handle a few years ago. Yes, it is competition, but it is a change in competition in a way. One found deficiencies to compete against the other.

Dan Gilligan: They can't compete against a big company that is willing to loose millions of dollars of business. Big companies have put lots of small companies out of business and you have the change to take action to protect smaller groups here before they come in.

Rep. Ruby (45.7) They have been operating in other states for many years. Can you point to any states where competition was completely ran out and now they are starting to work that market up?

Dan Gilligan: There are instant's in every state where a mega retailer is disciplining the local market place. It tends to be not happening in states the have below costs laws. It is not happening in Alabana, Florida, New York. Certainly Tennessee tried to go to federal court to block predatory pricing. The court determined they had to use the federal threshold, which is described to you earlier.

Rep. Ruby(47.4) That didn't really answer my question. My questions wasn't what states they have punished offenders. Which ones have they completely run them out and now that they have the full market now are raising the prices.

Dan Gilligan: (47.8) That does not happen. Where they completely eliminate all competitors. They have a few stick around. Most of the mega retailers get to a 30% control of the market. In no case has all the retailers been destroyed.

Rep. Bernstein (49.1) Everyone assumes this is WalMart and Sam's Club that is going to have this. Don't they as corporation lease out the gas business to Murphy Oil?

Dan Gilligan:(49.5) There is an arrangement between Murphy and WalMart and I think it is a mistake for anyone to think this is connected to one big company. I am talking about mega retail corporations that in many instances are gasoline chains as well that have used this as well. I think it is a mistake to think in terms of one company. Any company that has the deep pockets will use those strategies and in some cases Maryland had this problem and the state of Maryland has stopped them.(Sheets is a big operation on the east coast).

Rep. Bernstein Murphy has most of the gas at WalMart. Is that correct?

Dan Gilligan: Yes

Rep. Bernstein Now Murphy Oil goes all the way back to the refining. They have their own refineries. So if they can save a few cents all along the line they still sell for costs and be far below of what the other retailers could so.

Dan Gilligan: They can sell at cost and maybe be 2 cents below the lowest price that an independent can sell. You don't get complaints filed about people being 2 cents below price.

(52.7)

Tape 2, Side A

Rep. Price(0) We have a refinery right here in town and we don't see any difference between those gas stations and the Cenex station in price. Section 1 is pretty complicated. You have all these things and if you are telling me that WalMart or Murphy Oil or whatever is not going to be that much cheaper wholesale, why not just use the wholesale invoice price and make it cleaner?

Dan Gilligan: That is a questions I can not answer. I think that is a good questions, but I can't answer it. I don't know why you wouldn't do it?

Rep. Price (.6) Russ made it clear that this is not a minimum markup bill, but what you said made me think maybe we should have a minimum and maximum markup? You want to discuss that.

Dan Gilligan: Indian, my home state, considered that. Being president of the national association I follow the gasoline and diesel business very closely. The pricing in this industry is extremely complicated. It took me years to study it and understand what drives prices and what moves prices. You have a refiner right here in ND, but the decisions going on in New York

mercantile exchange really determines the prices all Americans are paying at a wholesale level. The speculators on wall street are creating huge volatile swings in the price of gasoline. It is a very complicated business and very hard to attack it from that side.

Rep. Price I do understand that by having a cabinet manufacturing company that has done work in 26 states and Japan I think I know a little bit about what we do in some of the pricing. I wish something had been around when Maynards, Lowels and Home Depot came in, but that is competition. We need to really look at this, but we have to look at our consumers too.

Rep. Iverson I am looking in Section 3 on page 3, line 4, it talks about if a plaintiff takes an action, they don't necessarily have to prove it; they can just acquiesce these mega retailers without having the damages proven to them.

Dan Gilligan:(2.6) I don't know and I am sure someone will speak to that. I would only speak in a general way. If the rack price of a gallon of gasoline is a \$1 with taxes and your price is \$1.83 and the guy across the street is selling a \$1.73 you don't need alot of proof that he is selling below cost.

Rep. Dosch (3.1) Dan, you made the comment that selling below cost is bad. I just got to think that in ND where we are an agricultural state many of our farmers are producing below their cost levels and are subsidized by the government; are you then saying that perhaps we should eliminate all government subsidized to our farmers?

Dan Gilligan: No, I am not saying that at all. I am saying mega retailers that have the deep pockets and can dominate the market and put the discipline the independents.

Rep. Dosch Dan, what in your definition, defines a big company as far as a percentage of the market?

Dan Gilligan: (3.9) I tend to think of big companies as 500 or more employees.

Rep. Dosch No, in Bismarck what would you say is the percentage of the market you are in?

Dan Gilligan: I don't know. It would be between 30-50%. I would think that would be a pretty sizable influence.

Rep. Dosch So Dan, what you are saying, then perhaps in any given community there should be no company that is allowed to have more than a 30% of the market?

Dan Gilligan:No, I can't say that because in a rural state like ND you may only have one station in town. If it is the only station in town he has 100% of that particular town.

Rep. Dosch Dan, if he has 100% of the market then he can control those prices and there is no competition so that is bad so I am just trying to follow your logic when you say a big company that comes in and controls their market in their specific community is bad. How do you address in these small communities where there is one gas station that controls 100% of their local market?

Dan Gilligan:(5.2) I am not sure I can address it adequately but I do believe that consumers are knowledgeable and if a small town gas station is extremely over market I think they hear it from their customers. They don't gouge their hometown customers. I do think that a company that is three states away making decisions about ND could care less about gouging people.

Matt Bjornson:(6.2) (See attached testimony #3)

Rep. Weiler:(12.2) On top of the second page you said approximately 70 percent of our sales.

Matt Bjornson: In the business for in store merchandise we often have goals for in store percent profit. In the gasoline and petroleum we look at the cent per gallon. We all have a good idea of what we need to meet overhead in a percent per gallon. You can see our margins vary. I will be

totally honest with you. Today in the Fargo market where we have a store, wholesales dropped; the nimax dropped last night on replacement cost we would have 15 cents margin today. That is not our margin on what's in the tank because we had high priced product in the tank. Visa and Mastercard gets a third of that margin. I think on an average probably 10-15% in a larger market. In a smaller town where volumes are lesser you might see margins slightly higher. I would say to you very few businesses post your prices and very few business compete on the level that we do. I was asked on the radio a couple weeks ago; how could that be? Your prices are all the same. I told him, simply, in Fargo, ND our manger gets up extra early and she drives around town and has a double spaced two column sheet writes down all the competitors prices and faxes it to me. When I call her, I tell her what prices are going to be that day. If they have gone up, we go up. If they have gone down, we go down. Our prices aren't a secret. People are sensitive to the price of gas and we don't like these prices anymore than the consumer does. But the fact is we have to live with what we are dealt with. It is not our fault prices are high.

Rep. Weiler(14.6) So the percent of profit from gasoline varies. Four or five years ago I was talking to a retailer and it was brought to my attention that they don't make money. They basically break even. Where they make their money is from all the stuff that they sell inside the store.

Matt Bjornson:(15.3) There are two ways you can look at it. Allot of people look at the gasoline portion of our business and hope that it will cover the bulk of our overhead of that store, which is significant. They hope that the profit from the store would be equated from the inside sales.

Rep. Delmore (15.7) From AAA with the prices you have; can you tell me how many of the 10 lowest price states have enacted legislation like this. You mentioned Alabama, out of the top 10 how many have enacted this type of legislation to help to set a lower price for our consumers.

Matt Bjornson: Of the seven lower states than Alabama I believe five also have legislation similar to this. There are two types of laws which was explained before. Minnesota has a minimum markup law. Frankly, when the ND Petroleum Marketers had a problem with this when we said we wanted a law that guaranteed someone a profit. The problem with the Minnesota law, it is not market specific so if you are in Minneapolis and your store sells 10,000 gallons a day their law equates that you are going to make some money. If you are in Bamji, the way the law is written it is worthless. I come from Cavalier. Obviously, I don't think a law that provides some sort of backstop for big cities is appropriate and that is why we thought Alabama is so appropriate because it is market specific.

Chairman Weisz Would you list those five states.

Matt Bjornson: We will get the list to you later.

Rep. Bernstein(18.2) Mr. Gilligan testified that Tennessee was one of the worst states because of the predatory pricing. If I understand you said that Tennessee was in the five lowest. There is a contradiction.

Matt Bjornson: (18.6) Tennessee does have a below cost law and what happened was the case I was referring to they went to court and the court used the federal definition for defining below cost and lost. So Tennessee does have a below cost law but it is much like the law you have now on the books. It is too general and it was not useful in that case.

Rep. Schmidt(19.1) Matt the district that I serve is mostly rural. We don't have hardly any railroad. Ruby has a railroad, but the rest of us have to truck our gas in. Now WalMart came into Minot and they evidently would have the train to bring their gas in. What is the difference between truck rates and train rates on gas?

Matt Bjornson: I have never shipped petroleum by train. I wouldn't necessarily assume that they would train their gas in. The Minot market is tightly controlled by terminal owner. There are not allot of common carrier providers of product at that terminal like our terminal in Grand Forks, Fargo and Jamestown. You will often see gasoline being trucked from Grand Forks to Minot. They can pay the freight and still have a lower laid in cost than what the local rack is.

Rep. Owens(20.5) Matt, I just want to clarify something. You were talking about lowering the cost and the cost in the tank when the price goes down on the market and everything, but you have already higher cost gas in the tank so naturally you can't lower that because you have already paid for it. Then you turned around and said that each day you drive around to see what the market is and if it goes up somewhere else was I to understand that that same gas you have in the tank; then you would raise the price up if it went up around town so you can raise it, but you can't lower it?

Matt Bjornson: Most of us buy by the tanker load and we watch the mimax and we try without running our tanks out we try to best guess what the market is doing when we are going to fill our tank. Many times we will guess right and we fill the tank before the market goes into an up swing. Many times we will guess wrong. We often sell the product for less than what we paid for it to be competitive in the market place so we have swings up in margin and we have swings

down. It is no different than a farmer trying to guess when is the best time to sell my grain.

Good luck, if you can guess that you are in good shape.

Paul Goulding: (22.1)(See attached testimony #4)

Chairman Weisz (26.6) Over the years we have seen various price wars go on over gasoline in Fargo, Jamestown and Bismarck and other communities for reasons obviously, we don't know.

Would this law prohibit those types of activities that have been going on in the past?

Paul Goulding: I guess I don't think it would. As a marketer I see now reason to sell a product below cost. I am in it to make a profit and be able to pay my employees and pay my taxes. If someone else in my market place were to lower their prices I have to do something to maintain my share of the market, I would probably match them. This bill allows me to do that. As Matt said this bill allows the market to sink to the price or the cost of the most efficient marketer in the market. The market efficiency is coming out of that, that you are having an efficient market setting prices.

Rep. Price (27.7) I still find Section C really confusing and expensive to administrator etc. Even for the mega retailers. Why can't we just use the wholesale invoice.

Paul Goulding: Actually, I think it says that. We would just use the wholesale price as opposed to putting any costs in there.

Rep. Price Everyone has cost differences and a whole variety of things that determine your overhead costs etc. People run their businesses and services to what they think the people want. Whether is it full service or whatever. The wholesale prices aren't that different. Why can't we just use them?

Paul Goulding: We could. If that would make it easier. This is not something that a business would provide, I think it would be easy for them to do. Gives the courts a view of what is really predatory pricing with the mega wholesalers.

Rep. Price (29.4) Could you define who the salaries and officers are for example in your business, Mr Bjornson's business and your business versus the mega retailer. Who is included in that. That is pretty wide, if you have multi stores in different cities, how are you going to prorate them out. How do you expect the mega retailers to do it?

Paul Goulding: (29.7) I am sure they have a way of attributing overhead to various stores to come up with a profitability of any unit. I am sure they do that. I do that and I only have two stores and I attribute my overhead to each store.

Rep. Price It is going to be hard to go up the chain on the mega retailer that is in every state.

Paul Goulding:(30.5) If they show the costs of doing business at that store or however the courts assume that or assess that.

Mike Rud: (31.1) (See attached testimony #5)

Chairman Weisz (38.7) In the interest of time I would ask that any further testimony in support of this bill be as brief as possible. We need to give adequate time for opposition.

Woody Barth: (39.2) (See attached testimony #6)

Rep. Vigesaa (40.4) I would like to have you address this scenario. We are 90 miles out of Fargo and we have two stations in our community and they are both usually between 15-25 cents higher than Fargo. How is anything going to be any different for those two stations if this bill would be passed when they are already most of the time a quarter above the Fargo price?

Woody Barth: (41.2) We believe that selling it below cost in the mega retailers in the large cities will only hurt the small town retailers. I come from a small town of Flasher, to allow mega retailers to sell below costs that would only hurt them as they drive into Bismarck and Mandan to do business they can fill up their vehicles and have a week supply of gas and then come back to the rural communities a week later and do the same thing. We think this will help them to sell their gasoline products in rural communities at a fair market price.

Marlan "Hawk" Haakenson: (42.5) Former Mayor of Bismarck and I was a county commissioner for 12 years. I am the owner of Hawk's Pit Stop, the most independent station you will run into for 33 years. That has put me in a prime position to hear the citizens thoughts. I support the passage of this bill. If this bill does not pass, I guarantee the unfair undercutting of gas prices will cause other closings of small businesses around town. I urge a do pass recommendation on this bill and I would appreciate your support.

Rep. Weiler (45.4) Could I get your figures from you. You are selling it for \$2.05 and your cost is \$2.04 if you purchase it today. If you let somebody come in and use a credit card you are getting close to breaking the law.

Marlan Haakenson: No, I have never accepted credit cards.

Rep. Price What about all the other costs of doing business on top of page 2?

Chairman Weisz: The overhead costs that are referenced in section C., when you factored in the salaries and overhead costs would you be below costs?

Marlan Haakenson: No, because we own everything there and it is family run now and we have very little overhead and that is the reason we have been able to stay in business 33 years.

Rep. Ruby(48.2) You talk about being family owned. According to the way the bill is written you would have to include the income and costs you would still have to show that and if it is only a penny difference all those costs of doing business must be more than a penny.

Marlan Haakenson: True, right now we are 4 cents below everyone in Bismarck and we always have been so if we had to go up 1 cent we would do that.

Tom Woodmansee: ND Grucer's Ass'n. Our board of directors went on record of supporting this bill. We have had the advent of big box stores for a long time. We have allot less grocery stores than we did five years ago.

Rep. Dosch I am surprised that the ND Grocery is supporting this bill. How do you justify your industry doing this for years and now wanting to prevent someone else from doing the same thing?

Tom Woodmansee:(51.3) All my board of directors are from around the nation. Discussed advertising and promos. Basically we give Thanksgiving Turkeys away at Thanksgiving all the time. The single more item in our store is not turkeys.(52.6)

Tape 2, Side B 4.5

I work for a board of directors and I don't know if I will be here next session. I don't think so. We have discussed this and we are learning how to deal and compete with them in other areas. I would say at this point no we would not.

Dennis Carlson: Local Farmer from Mandan (5.2) The car I drove here today has 265,000 miles on it and I put allot of gas in it and I don't want to pay any more for gasoline than I have to. Having said that I know it is not the local retailers who are responsible for today's high prices. These people are my neighbors and friends and they live in ND, they pay taxes and they sponsor

local events and they contribute to local charities and I want that to continue. I want to profit to stay in ND. I am a producer, not a retailer and I think I think it is an unfair comparison saying I have sold below cost. There are laws in ND to keep corporations like WalMart from competing with me.

Rep. Weiler Give me an example of one of those laws that keeps big corporations from competing with you.

Dennis Carlson:(6.2) There is an anti corporate farming law in ND, isn't there.

Chairman Weisz (6.8) We will now take opposition to SB 2389.

Parrell D. Grossman:(7.0) (See attached testimony #7) This is just for information. Not in opposition to the bill.

Rep. Hawken (9.6) What other section of the code would be appropriate?

Parrell D. Grossman: Probably you could place it in the same Title 51 as a separate Chapter so there isn't any confusion that it is part of the current chapter 51-10.

Rep. Price Please walk us through if gas station A and gas station B is selling below cost. How would it proceed from that point and where would the state become involved and what would it cost us?

Parrell Grossman:(10.3) I could certainly try that, but I am not an expert on this statue. It was our anticipation from the very beginning that the attorney general would not have the resources to enforce the statue so I can't say I have done a critical analysis of this bill. I think this will be a resource intensive process to enforce this statue and I think this is the Attorney Generals concern.

Chairman Weisz The AG gets involved when there is actual injury to competition.

Parrell Grossman: That is correct. We could become involved under the current below cost statue.

Chairman Weisz Even if we pass this bill with your proposed amendments, when is it determined from your office when there is actual injury to competition. When is that determined that you then get involved?

Parrell Grossman: Those allegations would have to be made and raised to our office.

Rep. Meyer Under section 51-10 it is so vague that it will be impossible to enforce.

Parrell Grossman: I don't think we have ever enforced anything under this section and I think certainly there is some aspect of the current law that is vague. There are also some circumstances where you can demonstrate the harm to competition and the injury to competition and to appropriately prosecute a case under the standards that exist in that law. Certainly it is not as specific as the proposed legislation and would likely be easier under that proposed language.

Rep. Delmore (12.4) What would be the criminal sanction for someone in violation?

Parrell Grossman: It would be a Class A Misdemeanor as is currently contained in Section 51-10-05. A court upon finding guilt could impose a maximum fine of \$2,000 and up to 1 year in prison.

Rep. Dosch (13.2) Because this would require businesses to open up their books does that become public information?

Parrell Grossman: Now that is an excellent question. I believe if that business provided records to the attorney general as part of his request and authority in the office. Then, I believe that information would still have confidentiality protection if it met the current requirements of the statute if it were a trade secret or proprietary information there is

some fairly strict requirements for something to be exempt from open records or for it to be confidential. Under this particular statute, if the attorney general were removed from it or not enforcing it, I don't think those particular applications apply. It would depend on the particular type of information and whether the business that produced those records is legitimately claiming the confidentiality of those records.

Chairman Weisz Anyone here in opposition of SB 2389? There was none.

Hearing closed (14.6)

Reopened hearing:

George Bullinger: From Mandan and am a retired employee from MDU after 36 years. My wife and I are here just as an interested party. We look at these gas costs and go down to Fargo once every three weeks and for the last few years I have always paid from 5-20 cents less down there. I don't understand why that is. They say it is competition and if competition is the thing lets leave competition the way it is at. Stations there are growing down there and they are building new ones and there seems to be no problem with competition. Why do we need this bill then? I understand now some of the major bulk dealers are buying up some of the Tesoro stations in the Mandan area and that just happened recently. My feeling I hope you people really consider this and leave it as competition and don't pass it.

Rep. Price (16.4) Sometimes the public doesn't realize that we like to hear the public testify more than we like to hear from the lobbyist. Any written emails or letters can be entered into the record if someone doesn't want to get up and testify. We definitely want their input.

George Bullinger: I am surprised that more people were not here to testify against this bill because that is all we heard around town. (done 17.6)

2005 HOUSE STANDING COMMITTEE MINUTES

BILL NO. SB2389

House Transportation Committee

Conference Committee

Hearing Date March 18, 2005

Tape Number	Side A	Side B	Meter #
2	X		3.8-33.3
Committee Clerk Signature <i>DeLoe D. Sherrick</i>			

Minutes:

Chairman Weisz reopened the hearing on SB 2389. Any suggested amendments that anyone has?

Rep. Delmore(5.1) I do have proposed amendment that was offered to me by Rep. Nelson, whose name is on it. (Passed out proposed amendment). There is a feeling from some people that this is a mandate from the same people that opposed the mandate on 1308. There are regulations in here that are following and what this amendment does is actually is any establishment that has more than one pump has one balanced with ethanol. He gave me a copy of the rack rates today and the future tax gas was \$1.56.8 plus transportation; and the ethanol rack price was \$1.33.63.

Motion Made By Rep. Delmore, Seconded By Rep. Thorpe on the proposed amendment.

Rep. Kelsch(6.7) I think there were some pretty hard feelings on Rep. Nelson's part over the fact that the same people that are lobbying in favor of this bill are the same people that came out and

said they did not believe in mandates. Rep. Nelson truly believes this bill is a mandate. It is important for the committee to understand why this amendment is before us.

Chairman Weisz Remember we are just voting on the amendment, not on the bill.

Tried voice vote; could not tell how it went so did a roll call. Do Pass On The Amendment

6 Yes 7 No 2 Absent Motion Failed.

Chairman Weisz If there are no other amendments, we have the bill in front of us.

Motion Made By Rep. Weiler Seconded By Rep. Bernstein

Do Not Pass

Rep. Meyer(9.3) I hope we could resist that motion and try to pass this out. We have heard allot of talk about being consumer friendly. (Discussed problems with small towns and what happens when a Super WalMart comes in to a town. Consumer friendly bill)

Rep. Ruby(10.8) I would have to disagree. People are still going to use their local stations. I think this bill sets a bad precedence for government as a whole. For this industry and then pretty soon we are going to come into many different industries think it is inconsistent where it talks about not selling below costs and then in section 5 it talks about if a competitor is below cost it can go below cost. So is below cost bad or isn't it bad? I am going to support the motion.

Rep. Thorpe(11.4) If we are going to price fix on one end; then maybe we should price fix on the top end with the profit they are going to have off the gas, but that isn't going to apply either. I am gong to support the do not pass.

Rep. Bernstein I look at this bill and I don't see it as consumer friendly. When you say consumer it equates to constituents. Many of my emails were not in favor of this. As far as selling gas cheaper, I live on the north end of Fargo and we have a discount card for a station down on main

for 5 cents. I am not going to drive down on main if I am not going that way to fill up with gas. It takes more time, energy, for the price.

Rep. Schmidt (12.8) As an auctioneer for 50 years I saw what WalMart did to our small communities by Devils Lake. When they advertise everything in their store from the US; you can't find anything in their store from the US. I am voting for this bill.

Rep. Weiler(13.6) I grew up in Dickinson. My parents use to own a stand alone car wash. There us to be several stand alone car washes. There use to be several stand alone convenience stores. They are not there anymore because the retailers came in and built the bigger stores, put a car wash on it; put gas pumps on it and that is where we are today. They did the same things to those independent businesses that they think are going to be done to them today and now they want protection. I think it is wrong and I am going to vote no on the bill.

Rep. Thorpe(14.2) Rep. Weiler echoed what I was gong to say.

Rep. Meyer I think when you look at the consumer; not just today and tomorrow, but two or three years down the road. I challenge any of you. Look what happened in your small towns in Nebraska. When the WalMart Superstores came in there it literally closed all the small gas stations and closed allot of other stores too. In our area I don't want to have to drive 50 miles to go to the WalMart superstore. What retailer can you expect to stay open.(Discussed consumer pricing).

Rep. Iverson(15.6) I have WalMart, Super WalMart, Target and more and I don't see these guys going out of business in my district. Granted I am in Southwest Fargo and it is growing, but competition is good. It is good for every body. There is more at work other than WalMart 50 miles away that is affecting rural North Dakota. It is not just Walmart. Minot they have Target,

and farm supply stores. I was going to vote for this bill, but now I am going to have to vote against it now.

Rep. Dosch (16.3) I would contend that Walmart or any super center has never put anyone out of business. Who puts the small communities out of business is the people. The consumers will decide where they want to shop. The consumers aren't supporting their small communities, if they are coming to Bismarck or where ever to shop it is that consumer that ultimately that makes the decision where he or she is going to spend their money. If people are leaving small communities to come here to shop it is that consumer that is not supporting their local communities.

Rep. Kelsch (17.0) I wasn't here for the hearing, but I read the newspaper the next day. I live in Mandan, and I won't travel 7 miles to buy a penny cheaper gas. I buy my gas in Mandan. Typically I buy my gas in Mandan because I am loyal to the community and that is the way I feel. I don't see there are going to be a ton of people traveling to go to WalMart just to buy the gas. (Discussed number one issue is our consistants. This has been the hottest issue that they have been talking to me about.)

Chairman Weisz I had a conversation with one of our local business people. He was complaining about why people don't support their local businesses. Then he drives away, but I noticed he was driving a vehicle that he purchased in Minot. We as consumers has been guilty of not supporting our local communities. Then we all shed tears when our local businesses go out of business.

Rep. Meyer(19.6) Everybody is broke in my area. We hold down two jobs so we can keep farming and ranching. Why we do that I don't know. They go there because they are on tight

budget dollars. The local communities, every time they have an event everyone goes and supports them. Discussed community supporting activities. Walmart gave me a \$5 gift certificate to the WalMart store. Discussing looking at big picture of loosing small businesses.

Rep. Vigesaa (21.7) Nobody is more sensitive to rural businesses than myself. I represent a rural district and I own a business in a small rural community and we face tremendous competition because all the advertising comes from those big stores and they advertise hundred of thousands of dollars below invoice. I face it every day in my business. We have been at our location for 45 years. We have had to adjust and make changes that keep us competitive and consumer friendly so we can retain our local folks in our community and survive. With relationship to the gas stations in our community, we have two and they are two blocks apart and they are usually are about 5-10 cents difference between the two stations within a two block area and they have been there for a long time. They are about 15 to 25 cents higher than Fargo and I guess I just don't know how that is going to affect our local area if WalMart comes in with gas pumps when prices are already up to a quarter higher? I agree the customer makes the ultimate decision and I don't want any businesses to close. Those people that run those businesses are my customers so I want to see them survive. I don't like the fact that they could potentially run someone out of business. But I don't think that will happen.

Rep. Thorpe(23.7) I don't see that this is going to stop WalMart. The retailers that are pushing for this, that organization also put some small gas businesses out of business and no body said anything then.

Rep. Bernstein Being someone who was in business the better part of 30 years and had to fight competition. Competition can be cruel and down right nasty, but ladies and gentlemen, that is

the name of the game. If you are going to be in business and want to turn a profit you will find a way to compete so I will support the Do Not Pass Motion.

Rep. Delmore (25.5) I would like to put on the attorney generals amendments. I don't think we want to send a bill out of committee assuming what the floor will do.

Chairman Weisz (28.0) He hasn't actually given us a set of amendments. He wants the amendments to remove the criminal part of sanctions 5110.05. Basically he wants to take it out of the unfair trade part. If anyone who violates this potentially would be subject to criminal prosecution. Section 2 of the bill makes below costs sales a violation of section 5110.05 subject to criminal sanctions. The GA does not believe alleged violators should be subject to criminal penalties.

Chairman Weisz Russ, was it your intend there would be a criminal sanction or not?

Russ Hanson: No, the Attorney General states if this bill is to pass he did not want it in that code. We are comfortable with this amendment.

Chairman Weisz(29.8) The bill does state the Attorney General will continue to enforce Chapter 5110 regarding low costs sales that requires injury competition, but it will take out the criminal penalty part.

Chairman Weisz To look at this amendment we will have to have the motion for do not pass would have to be pulled back. Whatever the committee wishes.

Rep. Weiler I will withdraw my motion and Rep. Bernstein too.

Motion Made By Rep. Delmore Seconded by Rep. Weiler To accept the amendment

Chairman Weisz (31.0) We are taking off the criminal penalty by the AG office.

Voice vote carried.

Page 7

House Transportation Committee

Bill Number SB 2389

Hearing Date March 18, 2005

Motion Made By Rep. Weiler Seconded by Rep. Bernstein

DO NOT PASS As Amended 10 Yes 3 No 2 Absent Carrier: Rep. Weisz

done (33.3)

PROPOSED AMENDMENTS TO SENATE BILL NO. 2389

Page 1, line 1, after "enact" insert "a new section to chapter 19-10 and"

Page 1, line 2, after the first "to" insert "the sale of gasoline blended with ethanol and" and
remove the second "and"

Page 1, line 4, after "practices" insert "; and to provide an effective date"

Page 1, after line 5, insert:

"SECTION 1. A new section to chapter 19-10 of the North Dakota Century Code is created and enacted as follows:

Retail sale of gasoline blended with ethanol. Any establishment that has more than one pump at which fuel for use in motor vehicles is offered for sale at retail must offer for sale from at least one pump gasoline that has an octane rating of eighty-seven and which is blended with ethanol at the rate of ten percent.

Page 4, after line 2, insert:

"SECTION 7. EFFECTIVE DATE. Section 1 of this Act becomes effective on January 1, 2006."

Renumber accordingly

Date: 3-18-05
 Roll Call Vote #:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2389

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken As Passed As Amended #1

Motion Made By Rep Delmore Seconded By Rep. Thorpe

Representatives	Yes	No	Representatives	Yes	No
Rep. Weisz - Chairman	✓		Rep. Delmore	✓	
Rep. Hawken - Vice Chair.	<i>absent</i>		Rep. Meyer		✓
Rep. Bernstein	✓		Rep. Schmidt	✓	
Rep. Dosch		✓	Rep. Thorpe	✓	
Rep. Iverson		✓			
Rep. Kelsch		✓			
Rep. Owens		✓			
Rep. Price	<i>absent</i>				
Rep. Ruby		✓			
Rep. Vigesaa	✓				
Rep. Weiler		✓			

Total (Yes) 6 No 7

Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Failed

To He
2 PM
3/23/05

PROPOSED AMENDMENTS TO SENATE BILL NO. 2389

Page 1, line 1, replace "four new sections to chapter 51-10" with "a new chapter to title 51"

Page 1, line 2, replace "unfair trade practices" with "below-cost sales" and remove "; and to"

Page 1, remove line 3

Page 1, line 4, remove "relating to unfair trade practices"

Page 1, line 6, replace "AMENDMENT. Subsection 1 of section 51-10-01" with "A new chapter to title 51"

Page 1, line 7, replace "amended and reenacted" with "created and enacted"

Page 1, remove lines 8 through 13

Page 1, line 14, replace "'costs'." with "Definitions. 1." and remove the underscore under "For motor fuel offered for sale by posted pricing or indicating meter by a"

Page 1, remove the underscore under lines 15 through 24

Page 2, remove the underscore under lines 1 through 10

Page 2, after line 10, insert:

2. "Retailer" means any person engaged in the business of making sales at retail within this state. In the case of a person engaged in the business of making sales at retail and sales at wholesale, the term applies only to the retail portion of such business.
3. "Sell at retail", "sales at retail", and "retail sale" mean any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing.
4. "Sell at wholesale", "sales at wholesale", and "wholesale sales" mean any transfer for valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing.
5. "Wholesaler" means any person engaged in the business of making sales at wholesale in this state. In the case of a person engaged in the business of making both sales at wholesale and sales at retail, the term applies only to the wholesale portion of the business."

Page 2, remove lines 11 and 12

- Page 2, line 13, remove the underscore under "Certain motor fuel marketing practices", replace "as unfair trade practice" with "prohibited", and remove the underscore under "An offer for resale"
- Page 2, remove the underscore under line 14
- Page 2, replace lines 15 and 16 with "this chapter is a violation of this chapter"
- Page 2, line 17, remove "section 51-10-05.1 to prevent any violation of this section" and remove the underscore under "A retailer that sells motor fuel at the"
- Page 2, remove the underscore under line 18
- Page 2, line 19, remove the underscore under "not in violation of this" and replace "section. Unfair competition in the marketing of motor fuel occurs when a" with "chapter. A"
- Page 2, line 20, remove the underscore under "marketer with more than one location", replace "uses" with "may not use", and remove the underscore under "profits from one location to cover losses from"
- Page 2, line 21, remove the underscore under "below-cost selling of motor fuel at another location", replace ", when refiners use" with ". Refiners may not use", and remove the underscore under "profits from refining crude"
- Page 2, line 22, remove the underscore under "oil to cover below normal or negative returns earned from motor fuel marketing operations" and replace ", and" with a period
- Page 2, line 23, replace "when a business uses" with "A business may not use" and remove the underscore under "profits from nonmotor fuel sales to cover losses from below-cost selling"
- Page 2, remove the underscore under line 24
- Page 2, remove lines 25 and 26
- Page 2, remove the underscore under lines 27 through 31
- Page 3, remove the underscore under lines 1 through 11
- Page 3, line 12, remove the underscore under "making its award. An action under this", replace "section" with "chapter", and remove the underscore under "must be brought within two years"
- Page 3, remove the underscore under line 13
- Page 3, line 14, remove the underscore under "3. In making an award under", replace "subsection 2" with "this chapter", and remove the underscore under "the court may award court costs and"
- Page 3, remove the underscore under lines 15 through 17
- Page 3, remove lines 18 and 19
- Page 3, remove the underscore under lines 20 through 25
- Page 3, remove lines 26 and 27
- Page 3, remove the underscore under lines 28 and 29

Page 3, line 30, remove the underscore under "service and is selling the same article at", remove "cost to", remove the underscore under "the competing", replace "wholesaler" with "wholesaler's cost", and remove the underscore under "as defined in this"

Page 3, remove the underscore under line 31

Page 4, line 1, remove the underscore under "meet the price of a competitor that is selling the same article at", remove "cost to", remove the underscore under "the competing", replace "retailer" with "retailer's cost", and remove the underscore under "as"

Page 4, remove the underscore under line 2

Renumber accordingly

Date: 3-18-05
 Roll Call Vote #:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 5B2389

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass as Amend

Motion Made By Rep. Weiler Seconded By Rep. Bernstein

Representatives	Yes	No	Representatives	Yes	No
Rep. Weisz - Chairman	✓		Rep. Delmore	✓	
Rep. Hawken - Vice Chair.	<u>absent</u>		Rep. Meyer		✓
Rep. Bernstein	✓		Rep. Schmidt		✓
Rep. Dosch	✓		Rep. Thorpe	✓	
Rep. Iverson	✓				
Rep. Kelsch	✓				
Rep. Owens		✓			
Rep. Price	<u>absent</u>				
Rep. Ruby	✓				
Rep. Vigasaa	✓				
Rep. Weiler	✓				

Total (Yes) 10 No 3

Absent 2

Floor Assignment Rep. Weisz

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2389: Transportation Committee (Rep. Weisz, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO NOT PASS (10 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). SB 2389 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "four new sections to chapter 51-10" with "a new chapter to title 51"

Page 1, line 2, replace "unfair trade practices" with "below-cost sales" and remove "; and to"

Page 1, remove line 3

Page 1, line 4, remove "relating to unfair trade practices"

Page 1, line 6, replace "AMENDMENT. Subsection 1 of section 51-10-01" with "A new chapter to title 51"

Page 1, line 7, replace "amended and reenacted" with "created and enacted"

Page 1, remove lines 8 through 13

Page 1, line 14, replace "'cost'." with "Definitions. 1." and remove the underscore under "For motor fuel offered for sale by posted pricing or indicating meter by a"

Page 1, remove the underscore under lines 15 through 24

Page 2, remove the underscore under lines 1 through 10

Page 2, replace lines 11 and 12 with:

2. "Retailer" means any person engaged in the business of making sales at retail within this state. In the case of a person engaged in the business of making sales at retail and sales at wholesale, the term applies only to the retail portion of such business.
3. "Sell at retail", "sales at retail", and "retail sale" mean any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing.
4. "Sell at wholesale", "sales at wholesale", and "wholesale sales" mean any transfer for valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing.
5. "Wholesaler" means any person engaged in the business of making sales at wholesale in this state. In the case of a person engaged in the business of making both sales at wholesale and sales at retail, the term applies only to the wholesale portion of the business."

Page 2, line 13, remove the underscore under "Certain motor fuel marketing practices", replace "as unfair trade practice" with "**prohibited**", and remove the underscore under "An offer for resale"

Page 2, remove the underscore under line 14

Page 2, replace lines 15 and 16 with "this chapter, is a violation of this chapter"

Page 2, line 17, remove "section 51-10-05.1 to prevent any violation of this section" and remove the underscore under ". A retailer that sells motor fuel at the"

Page 2, remove the underscore under line 18

Page 2, line 19, remove the underscore under "not in violation of this" and replace "section. Unfair competition in the marketing of motor fuel occurs when a" with "chapter. A"

Page 2, line 20, remove the underscore under "marketer with more than one location", replace "uses" with "may not use", and remove the underscore under "profits from one location to cover losses from"

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Page 4, remove the underscore under line 2

Renumber accordingly

2005 TESTIMONY

SB 2389



NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION

1025 N. 3rd St. • P.O. Box 1956 • Bismarck, ND 58502
Telephone 701-223-3370 • ndpetroleum.org • Fax 701-223-5004

REPRESENTING:

Bulk Oil Jobbers
Convenience Stores
Service Stations
Truck Stops

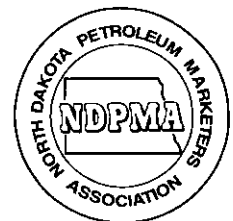
**Testimony – SB 2389
Senate Transportation Committee
February 4, 2005**

Mr. Chairman and members of the Senate Transportation Committee, my name is Russ Hanson and I am the president of the North Dakota Petroleum Marketers Association (NDPMA). NDPMA represents the service station dealers, convenience stores, bulk oil jobbers, and truck stops. Our 310 member companies represent approximately 650 of the 850 retail locations in the state.

SB 2389 was introduced at our request and we strongly support it. It is modeled after the Alabama statute which has been in effect since 1984. Twelve states currently have statutes addressing fair competition of motor fuels to varying degrees. In addition, the states of Indiana, Michigan, and Kansas are currently attempting to address this issue similarly to North Dakota in their respective legislatures.

SB 2389 addresses fair competition in motor fuels and to amend the current unfair trade practices law which has been in effect since the 1940's. In essence, we are not attempting to create a new statute – rather to clarify an existing law to have it specifically address gasoline sales.

Included with this testimony is a summary of what **SB 2389** provides and, perhaps more importantly, what it does not provide. Essentially, **SB 2389** provides for the definition of motor fuel, a definition for determining the cost of each individual business, and allows for business to legally challenge another marketer who they believe is in violation of the law.



SB 2389 does not create a defined minimum mark-up of the product to ensure a defined profit. The states of Minnesota and Wisconsin have laws requiring gas to be priced at a defined minimum mark up and we want it to be eminently clear that **SB 2389 does NOT provide for such a defined mark up.**

We have several marketers who have committed their careers to the petroleum marketing industry who will testify and address the specific definitions of SB 2389, how it would work, why it is necessary, and also will address several misconceptions about this concept.

Mr. Chairman and members of the committee, thanks for the opportunity to testify today. We ask for your favorable consideration for **SB 2389** and I would be happy to address any questions you may have before turning the podium to the petroleum marketers who will delve into the "nuts and bolts" of the legislation.

ND Petroleum Marketers Predatory Pricing Proposal: Promoting Competition and a Fair Marketplace

1. Why are we acting? To ensure a fair marketplace and long-term competitive business climate.

- We know that mega retailers like Wal Mart are making plans to sell gas at Super Centers in North Dakota. Based on their tactics in other states, we know they will use unfair predatory pricing tactics.
- These tactics are unfair, anticompetitive and they will kill local businesses like ours that derive 70 percent of our total sales from gas.
- No retailer, not even Wal Mart, can survive by selling 70 percent of their products below cost.

2. What does our proposal do? Three simple things:

1. States that gas retailers cannot sell gas below cost.
2. Sets up definitions for determining cost for each individual business.
3. And allows businesses that believe a competitor is selling below cost to challenge them legally.

Our proposal does not:

- Create a set price for gas that is the same statewide.
- Does not ensure a profit for anyone selling gas.
- Does not prohibit anyone from pricing their gas competitively.
- Will not increase gas prices statewide. Ex: In Alabama, the state we modeled our legislation after, gas is typically among the top five lowest prices in the nation.

3. Why should North Dakotans care? We are vital to the economy:

- North Dakota has 850 retail gas outlets, many of them in rural areas.
- Our small businesses employ more than 8,000 people with payroll of \$85 million.

4. This legislation is pro-consumer.

- This legislation promotes a fair playing field that will encourage competition.
- Predatory pricing of gasoline has proven to destroy small businesses.
- Consumers will pay more if competition is destroyed.
- Predatory pricing of gas will hasten losses in all smaller retailers because cheap gas will be the magnet to attract customers away from small towns or local merchants and into Mega Stores for hardware, food, clothing, etc.

5. This is not a new law, rather a clarification of existing unfair trade practice law.

- Government has a legitimate role to play in regulating a fair business climate and protecting the consumer's interest long term.
- A large retailer pricing in a predatory manner does not constitute a "free market."
- Federal law already provides a remedy, but action is too slow. We need a local measure to provide more rapid relief.

Daily Fuel Gauge Report

AAA's Most Sited For Real Gasoline Prices

Intro Averages:

Select A Market

Prices updated: 2/3/2005 3:20:11 AM

Data provided in cooperation with **OPIS Energy Group** and **Wright Express, LLC**
Media are encouraged to localize fuel price stories by contacting their local AAA club media representative.

Current State Averages: Click on state for detailed information

*Prices Are In US Dollars Per Gallon.

- [National Average](#)
- [State by State Average](#)
- [What's Moving the Market](#)
- [National Media Contacts](#)
- [Local AAA Club Media Contacts](#)
- [Local AAA Clubs](#)
- [Methodology](#)

NEW Get The Current Fuel Costs For A Trip

State	Regular	Mid	Premium	Diesel
Alaska	\$1.900	\$2.011	\$2.126	\$2.012
* Alabama *	\$1.859	\$1.987	\$2.046	\$2.003
Arkansas	\$1.838	\$1.939	\$2.063	\$1.978
Arizona	\$1.902	\$1.984	\$2.098	\$2.127
California	\$2.048	\$2.180	\$2.216	\$2.243
* Colorado *	\$1.853	\$1.982	\$2.071	\$2.038
Connecticut	\$2.002	\$2.172	\$2.229	\$2.285
District of Columbia	\$1.963	\$2.091	\$2.153	\$2.194
Delaware	\$1.900	\$2.018	\$2.107	\$2.133
* Florida *	\$1.958	\$2.121	\$2.160	\$2.163
Georgia	\$1.842	\$1.980	\$2.068	\$1.987
Hawaii	\$2.415	\$2.553	\$2.601	\$2.658
Iowa	\$1.872	\$1.971	\$2.065	\$2.007
Idaho	\$1.880	\$1.984	\$2.039	\$2.072
Illinois	\$1.948	\$2.096	\$2.161	\$2.154
Indiana	\$1.917	\$2.063	\$2.121	\$2.012
Kansas	\$1.904	\$1.955	\$2.031	\$2.029
Kentucky	\$1.884	\$2.020	\$2.112	\$1.967
Louisiana	\$1.849	\$1.971	\$2.063	\$1.979
* Massachusetts *	\$1.925	\$2.069	\$2.148	\$2.211
* Maryland *	\$1.916	\$2.037	\$2.089	\$2.141
Maine	\$1.968	\$2.123	\$2.182	\$2.225
Michigan	\$1.985	\$2.103	\$2.187	\$2.047
* Minnesota *	\$1.914	\$1.991	\$2.042	\$2.050
* Missouri *	\$1.817	\$1.891	\$2.001	\$1.907
Mississippi	\$1.847	\$1.948	\$2.035	\$1.946
Montana	\$1.894	\$1.975	\$2.070	\$2.052
North Carolina	\$1.878	\$1.993	\$2.081	\$2.040
North Dakota	\$1.925	\$1.992	\$2.063	\$2.082

<u>Nebraska</u>	\$1.947	\$1.990	\$2.046	\$2.046
<u>New Hampshire</u>	\$1.907	\$2.065	\$2.139	\$2.180
✕ <u>New Jersey</u> ✕	\$1.823	\$1.954	\$2.028	\$2.050
<u>New Mexico</u>	\$1.871	\$1.992	\$2.078	\$2.024
<u>Nevada</u>	\$2.003	\$2.112	\$2.189	\$2.116
<u>New York</u>	\$2.040	\$2.183	\$2.229	\$2.320
<u>Ohio</u>	\$1.911	\$2.038	\$2.119	\$2.060
<u>Oklahoma</u>	\$1.831	\$1.894	\$1.999	\$1.902
<u>Oregon</u>	\$1.894	\$1.998	\$2.028	\$2.128
<u>Pennsylvania</u>	\$1.955	\$2.061	\$2.152	\$2.222
<u>Rhode Island</u>	\$1.969	\$2.095	\$2.164	\$2.252
✕ <u>South Carolina</u> ✕	\$1.805	\$1.919	\$2.012	\$1.966
<u>South Dakota</u>	\$1.927	\$2.051	\$2.135	\$2.041
✕ <u>Tennessee</u> ✕	\$1.849	\$1.957	\$2.051	\$1.991
<u>Texas</u>	\$1.834	\$1.940	\$2.010	\$1.958
<u>Utah</u>	\$1.825	\$1.924	\$2.008	\$2.034
<u>Virginia</u>	\$1.854	\$1.945	\$2.019	\$2.015
<u>Vermont</u>	\$1.940	\$2.087	\$2.177	\$2.259
<u>Washington</u>	\$1.886	\$1.954	\$2.051	\$2.186
✕ <u>Wisconsin</u> ✕	\$2.001	\$2.078	\$2.174	\$2.091
<u>West Virginia</u>	\$1.964	\$2.053	\$2.156	\$2.147
<u>Wyoming</u>	\$1.775	\$1.851	\$1.971	\$1.925

AAA's Daily Fuel Gauge Report is updated each business day and is the most comprehensive retail gasoline survey available. Everyday over 60,000 self-serve stations are surveyed.

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Hanson

Russ Hanson

From: Dave Froelich [dfroelich@mvpinc.net]

Sent: Friday, January 14, 2005 3:18 PM

To: 'Russ Hanson'; 'Matt'; 'Loren Dusterhoff'; 'Mike Rud'; 'Julie Liffrig'; John Olson; mzander@spfenergy.com

Subject: wal mart

WAL-MART AND WALTONS FINANCE BID TO REPEAL BELOW-COST LAW

Wal-Mart and members of its founding family, the Waltons, are doling out dollars to lawmakers in Wisconsin as they try again to get the state's below-cost sales law repealed.

Latest ploy of the coalition of groups that want to kill the measure is to push for a one-year suspension of the law. Their rationale: If no predatory pricing occurs, then that shows there is no need for the law, and therefore it should be repealed, says State Sen. Dave Zien (R), who is leading the charge.

The issue is expected to heat up in spring after budgetary matters have been dealt with and a new legislature is seated, says Bob Bartlett, exec of the Wisconsin Petroleum Marketers Assn..

Wisconsin's Unfair Sales Act requires a minimum 9.18% markup over rack. A 1999 study financed by opposition groups, using data from four cities, claimed that the measure costs consumers 4cts/gal more at the pump, for a total \$50 million to \$70 million a year.

But a more recent study commissioned by Wisconsin marketers debunks the 1999 report, saying it used too small a sample of cities. That report, which looked at pump prices in all states, concluded that states with below-cost laws have lower fuel prices over the long term. Within 10 years of enacting the laws, consumers in those states typically save more than 1ct/gal. For Wisconsin motorists, that represents at least \$25 million a year.

So far, the marketer group has spent roughly \$266,000 lobbying to save the law, according to state records. But they are being heavily outspent by Wal-Mart, Murphy Oil, and AAA, among others, who are bankrolling a repeal effort fronted by a recently formed "Coalition for Lower Gas Prices." The Coalition has spent \$296,488 on lobbying against the law, records disclose.

The Coalition's backers have also splashed out individually.

Leading members of the Walton family have contributed more than \$53,000 to the coffers of state legislators over the past two election cycles, according to records examined by Oil Express. Chief family contributors are John, Christy, Jim and Lynne Walton. Another \$29,300 was spent by Wal-Mart Stores over the past year on lobbying against the law.

Murphy Oil, which operates fueling sites at Wal-Mart stores, spent \$120,574 on lobbying during the 2003-2004 legislative session, while AAA spent a total \$169,395 fighting the law and other measures it disliked. Total spent just on publicly disclosed lobbying is more than \$615,757, and that doesn't include any unregulated "soft money" amounts - in 2001, rumors floated around the state Capitol that Wal-Mart had pledged to contribute "six figures" in soft money to the party that repealed the law (OE 7/23/01).

Meanwhile, as jobbers prepare to defend their pricing law yet again, a Pewaukee, Wis., dealer has sued a competitor for \$16,000, plus legal costs, for allegedly selling gasoline 15 cts/gal below cost during the summer.

The dealer, who operates Dave's on Silvernail sued the Waukesha Quik Mart and owner Dwarika Singh in circuit court, alleging that Singh sold

gasoline for less than \$1.90/gal while minimum cost under state law would
have been \$2.04/gal.
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1/15/2005



PETROLEUM
MARKETERS
ASSOCIATION OF
AMERICA

Hanson

101 N. FORT MYER DRIVE • SUITE 500 • ARLINGTON, VA 22209-1604 • 703-351-8000 • FAX 703-351-9160

August 9, 2004

Mr. Russell Hanson
President
North Dakota Petroleum Marketers Association
1025 North 3rd Street
Bismarck, ND 58502

Re: FTC Study Indicates Below Cost Laws Do Not Increase Gasoline Prices.

Dear Russell,

The truth is buried on page 11. I am referring to the August 8, 2002 letter sent by the Federal Trade Commission (FTC) to New York Governor George Pataki concerning pending legislation restricting below cost gasoline retailing tactics. In this letter to Governor Pataki, the FTC advises: "The most carefully-controlled (below cost) study, conducted by a senior economist in the FTC's Bureau of Economics, found that the (below cost) laws had no effect on retail prices." Also on page 11, the FTC wrote that most (below cost) studies had methodical problems and arrived at varying conclusions.

Another truth is that nearly anyone can make a statistical study support their desired conclusions and big business has more resources to buy more studies than small business. Based on the recent letters sent by the FTC to states facing unfair gasoline competition, big business has won the support of the FTC. Small business owners must turn to state legislators to combat unfair competition because the FTC has clearly chosen sides.

I hope North Dakota legislators will follow their "common sense" instincts and not be intimidated by big business interests who seek to dominate North Dakota gasoline retailing.

Sincerely,

Dan Gilligan
President

Matt Bjornson partner in Bjornson Oil of Carleton,
a 3rd generation family business which my
grand father started in 1931

- Why Gasoline

- It comprises around 70% of a typical gasoline outlet
- ① Mega retailers have been using gasoline as a loss leader in many areas of the country
- ② No retailer, no matter how large, can survive in business selling 70% of their product below cost
- Gasoline is used as a conduit to draw consumers into their large stores, thus attacking the rest of the small town retailers
- Boil this 'law down and it says that it is ~~always~~ illegal to sell gasoline below the cost of the most efficient marketer in any given market
 - it does ensure any profit
 - it does not set the price of gas
 - it does not prohibit competitive gas prices

Matt Bjornson
Sen. K. E. ...

Both the state & federal government have recognized the importance of preventing predatory practices.

The problem w/ the federal FTC is that they only get involved when businesses have been run out. - They are the corner of the federal government

A market in which a large retailer prices in a predatory manner is not a free market.

Chairman Trenbeath and Transportation Committee Members:

My name is Mike Rud. My wife Melissa and I own a mom-and-pop convenience store in Garrison. I thank you for allowing us the chance to present our case concerning the fair competition amendment.

There are about 850 gas retail outlets in North Dakota. We are proud to say we employ over 8000 people with annual payroll in the neighborhood of 85 million dollars, making us a vital part of our state's economy.

However, about one-half of these gas outlets pump a half million gallons a year or less. In a store like ours, about 70% of our total revenues are generated from gasoline sales. So as a business owner from Garrison, you can see my concerns. The number of c-stores will start shrinking in a hurry if a big box retailer starts marketing gas at or below cost. No business, not even Walmart could afford to sell 70% of its products at or below cost for an extended period of time.

This is why we're seeking your support. We believe government has a legitimate role to play in regulating a fair business climate and protecting the long term interests of the consumer. A large mega retailer pricing gas in a predatory manner with the intent purpose of driving out the competition doesn't constitute a free market system. Without this fair competition amendment, such a scenario would have a devastating effect on the economic well-being of rural North Dakota.

Many of us in rural America view the big box retailers as magnets. The Supercenters aren't after our gas business.. Instead they are after the customer. However, by using gas as a bargaining chip, the mega retailer will now have Garrison's grocery, hardware, alcohol and possibly prescription drug clients at its front door. When you consider the fact the average dollar turns over 2-3 times in the small town economy, this will create a financial nightmare for rural main streets across our state. Instead of this cash going into the local community banks, it will simply be transferred to a vault in Bentonville, Arkansas.

I'm not afraid of competition. I will market my product and services against anyone as long as we're on an even playing field. Will this fair competition amendment save all the c-stores in our state? Absolutely not. But North Dakota's petroleum marketers are taking a stance on behalf of all small businesses. We urge you to join us in this battle. Do the right thing and protect our state's small business people. Vote YES on SB 2389.

Thank you for your time and consideration



3125 East Thayer Bismarck, ND 58501 (701)258-3618 fax (701)258-0945

Mr. Chairman and members of the Senate Transportation committee, my name is John Job. I am the Division Manager for AMCON Distributing Company located in Bismarck. AMCON is a wholesale distributing company that distributes consumer products to retailers. From the Bismarck distribution center we serve customers in SD, MT, MN, WI, and all over ND. There are 54 employees at our Bismarck distribution center. We specialize in distributing our consumer products to convenience stores. The consumer products we distribute are beverages, candy, snacks, groceries, cigarettes, tobacco, health & beauty care, food service, and store supplies. We do not distribute fuel.

The vast majority of our ND customers are family owned and operated convenience store businesses that have made substantial investments in their stores all over ND in larger cities and smaller towns. Gasoline sales are an important part of our customer's business. I have concerns that if SB 2389 does not pass, there is the potential for unfair trade practices of below cost selling of fuel that will drive a number of our customers into unprofitable situations and perhaps closings of these businesses across the state. These closings would directly affect our distribution business as well as other distributors and suppliers of convenience stores.

I have always felt that competition is good for business when the business playing field is level. SB 2389 addresses below cost selling and does not set a minimum fuel margin such as other states we distribute into have legislated. SB 2389 addresses unfair trade practice of below cost selling of fuel. Below cost selling of fuel is an unfair trade practice of the large attempting to close the small and increase their market share. I recommend a yes vote on SB 2389. This is a vote for small businesses all across our state. In most cases these stores are open 7 days a week providing fuel and convenience needs at a reasonable price. These small businesses also provide jobs, pay taxes, and use wholesale suppliers such as AMCON Distributing Company for their product needs.

Thanks you.

TESTIMONY - PAT CROTTY

I AM HERE TO SPEAK IN OPPOSITION TO SB 2389. I FEEL THIS IS A BILL THAT HAS THE UNINTENDED EFFECT OF DEPRIVING THE AVERAGE NORTH DAKOTA CONSUMER OF THE BENEFITS OF A FREE AND OPEN MARKET PLACE.

GAS PRICES HAVE BECOME A BIGGER BURDEN ESPECIALLY OVER THE PAST YEAR, FOR THE AVERAGE CONSUMER. MANY CONSUMERS WORK TWO JOBS TO MAKE ENDS MEET, AND HIGHER GAS PRICES HAVE PUT ON EVER INCREASING STRAIN ON THEIR BUDGET.

THIS BILL PITS ONE GROUP OVER ANOTHER, THAT SHOULDN'T BE. WHERE WILL IT END? (4/50) WILL ~~BE~~^{WE} REGULATE . OTHER AREAS OF THE ECONOMY, SUCH AS THE PRICE OF OTHER COMMODITIES LIKE FOOD, ETC.?

WE HAVE BEEN TOLD WE CANNOT RAISE THE MIN. WAGE IN ND BECAUSE OF SUPPLY AND DEMAND, YET THAT ARGUMENT GOES OUT THE WINDOW WHEN IT COMES TO GAS PRICES.

I URGE YOU TO REJECT THIS PIECE OF LEGISLATION.

THANK YOU.

North Dakota Farmers Union

PO Box 2136 • 1415 12th Ave SE • Jamestown ND 58401

701-252-2340 • 800-366-NDFU

FAX: 701-252-6584

WEBSITE: www.ndfu.org

E-MAIL: ndfu@ndfu.org



SB 2389

Senate Transportation

Same given to House

Chairman Trenbeath and Members of the Senate Transportation Committee.

My name is Woody Barth; I am here representing over 35,000 members of North Dakota Farmers Union. I am here to testify in support of SB 2389, which relates to unfair trade practices in the marketing and selling of motor fuel.

We support the North Dakota Petroleum Marketers Association's attempt to enact Fair Competition Motor Fuels Legislation, which would prohibit the use gasoline to be defined as a below-cost seller.

North Dakota Farmers Union supports SB 2389 because it:

- States that Gas retailers cannot sell gas below cost
- Defines the determining cost for each individual business
- Allows businesses that believe a competitor is selling below cost to challenge them legally

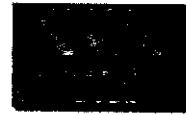
This legislation is pro-consumer and pro-rural community because:

- Predatory pricing of gasoline has proven to destroy small business and surrounding rural communities
- Consumers will eventually pay more if competition is destroyed

If we allow mega retailers to use gasoline as a marketing tool we will soon find that many of our smaller gasoline retailers will no longer be able to compete. Our rural communities will eventually lose a valuable asset.

North Dakota Farmers Union urges a do pass on SB 2389.

Thank you Chairman Trenbeath and members of the Committee, I will answer questions at this time.



Bill Butcher
State Director
NORTH DAKOTA

311 E. Thayer Ave., Suite 119
Bismarck, ND 58501
701-224-8333
Fax 701-224-1097
bill.butcher@nfib.org

NORTH DAKOTA

**Testimony of Bill Butcher, State Director, National Federation
of Independent Business (NFIB) on SB 2389**

NFIB represents approximately 3000 small business owners throughout North Dakota and 600,000 nationwide. Our average members employ three to five workers.

I have never presented neutral testimony before; however, while neutral, I do have information that I think might be of value to the Committee.

NFIB members have always held firmly to the principle of "let the free market work." In member polls we have conducted nationally, over 90% of the respondents have said to keep government out of the marketplace.

In January 2005 the NFIB/ND members were polled on whether or not North Dakota's Fair Trade Practices Act should be amended to specifically make it illegal to sell gasoline at below cost and to provide a penalty for doing so.

40% of our members took the traditional position of small business to let the free market work as it will and voted "No." However, fully 56% said that the sale of gasoline at below cost should be made illegal. Our rules say that a 60% or more vote is required for NFIB to take a position on an issue; however, it is significant that so many small business owners want the government to intervene in this instance. I want the Committee to know that in this case it appears that when principle is weighed against the possibility of being put out of business, the scale tends to tip to survival.

NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION

1025 N. 3rd St. • P.O. Box 1956 • Bismarck, ND 58502
Telephone 701-223-3370 • ndpetroleum.org • Fax 701-223-5004

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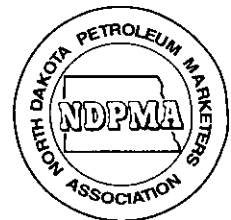
Testimony – SB 2389 House Transportation Committee March 11, 2005

Mr. Chairman and members of the House Transportation Committee, my name is Russ Hanson and I am the president of the North Dakota Petroleum Marketers Association (NDPMA). NDPMA represents the service station dealers, convenience stores, bulk oil jobbers, and truck stops. Our 310 member companies represent approximately 650 of the 850 retail locations in the state. In all, the industry employs approximately 8,000 people with a total payroll of approximately \$85 million.

SB 2389 was introduced at our request and we strongly support it. It is modeled after the Alabama statute which has been in effect since 1984. Twelve states currently have statutes addressing fair competition of motor fuels to varying degrees. In addition, the states of Indiana, Michigan, and Kansas are currently attempting to address this issue similarly to North Dakota in their respective legislatures.

SB 2389 addresses fair competition in motor fuels and to amend the current unfair trade practices law which has been in effect since the 1940's. In essence, we are not attempting to create a new statute – rather to clarify an existing law to have it specifically address gasoline sales.

Included with this testimony is a summary of what SB 2389 provides and, perhaps more importantly, what it does not provide. Essentially, SB 2389 provides for the definition cost of motor fuel, a definition for determining the cost of each individual business, and allows for business to legally challenge another marketer who they believe is in violation of the law.



SB 2389 does not create a defined minimum mark-up of the product to ensure a defined profit. The states of Minnesota and Wisconsin have laws requiring gas to be priced at a defined minimum mark up and we want it to be eminently clear that **SB 2389 does NOT provide for such a defined mark up.**

We have Dan Gilligan, President of the Petroleum Marketers Association of America who is here to testify. In addition, we have several marketers who have committed their careers to the petroleum marketing industry who will testify and address the specific definitions of SB 2389, how it would work, why it is necessary, and also will address several misconceptions about this concept.

In addition to our association, SB 2389 is supported by the North Dakota Grocers, Association, the North Dakota Retail Association, and the North Dakota Farmers Union.

Mr. Chairman and members of the committee, thanks for the opportunity to testify today. We ask for your favorable consideration for **SB 2389** and I would be happy to address any questions you may have before turning the podium to Mr. Gilligan and the petroleum marketers who will delve into the "nuts and bolts" of the legislation.

ND Petroleum Marketers Predatory Pricing Proposal (SB 2389) Promoting Competition and a Fair Marketplace

1. Why are we acting? To ensure a fair marketplace and long-term competitive business climate.

- We know that mega retailers like Wal Mart are making plans to sell gas at Super Centers in North Dakota. Based on their tactics in other states, we know they will use unfair predatory pricing tactics.
- These tactics are unfair, anticompetitive and they will kill local businesses like ours that derive 70 percent of our total sales from gas.
- No retailer, not even Wal Mart, can survive by selling 70 percent of their products below cost.

2. What does our proposal do? Three simple things:

1. States that gas retailers cannot sell gas below cost.
2. Sets up definitions for determining cost for each individual business.
3. And allows businesses that believe a competitor is selling below cost to challenge them legally.

Our proposal does not:

- Create a set price for gas that is the same statewide.
- Does not ensure a profit for anyone selling gas.
- Does not prohibit anyone from pricing their gas competitively.
- Will not increase gas prices statewide. Ex: In Alabama, the state we modeled our legislation after, gas is typically among the top five lowest prices in the nation.

3. Why should North Dakotans care? We are vital to the economy:

- North Dakota has 850 retail gas outlets, many of them in rural areas.
- Our small businesses employ more than 8,000 people with payroll of \$85 million.

4. This legislation is pro-consumer.

- This legislation promotes a fair playing field that will encourage competition.
- Predatory pricing of gasoline has proven to destroy small businesses.
- Consumers will pay more if competition is destroyed.
- Predatory pricing of gas will hasten losses in all smaller retailers because cheap gas will be the magnet to attract customers away from small towns or local merchants and into Mega Stores for hardware, food, clothing, etc.

5. This is not a new law, rather a clarification of existing unfair trade practice law.

- Government has a legitimate role to play in regulating a fair business climate and protecting the consumer's interest long term.
- A large retailer pricing in a predatory manner does not constitute a "free market."
- Federal law already provides a remedy, but action is too slow. We need a local measure to provide more rapid relief.



PETROLEUM
MARKETERS
ASSOCIATION OF
AMERICA

2

1901 N. FORT MYER DRIVE • SUITE 500 • ARLINGTON, VA 22209-1604 • 703-351-8000 • Fax 703-351-9160

March 10, 2005

Honorable Robin Weisz, Chairman
House Transportation Committee
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Chairman Weisz:

When your committee considers Senate Bill 2839, it is likely that the proponents of below cost/loss leader retailing will produce a letter or letters from the Federal Trade Commission (FTC) commenting on the issues. First of all, PMAA believes S.2839 is a North Dakota matter and that the federal government should have no role. Unfortunately, because the "big business oriented" FTC usually supports the mega-retailers position, the mega- retailers will use that to their fullest advantage.

PMAA has reviewed most of the FTC letters written to state officials and it troubles us that often omitted is any mention of the FTC's Vita study published in 2000. This study is the FTC's most carefully controlled study conducted by an FTC senior economist (Michael G. Vita) and it found that below cost laws had no effect on retail gasoline prices.

In a letter to New York Governor George Pataki sent on July 2, 2002, the FTC summarized the conclusion of the Vita study and the relevant pages are attached for your review. Incidentally, after reviewing all of the comments and studies, Governor Pataki decided that a below cost law would be good for the citizens of New York and he signed a measure into law.

The FTC believes that federal prohibitions against predatory pricing are sufficient and that states should defer to the federal government. It is PMAA's position that the FTC definition of "predatory pricing" makes the law useless for small business retailers. A small business owner who has been driven out of business as a result of predatory below cost retailing will never have the finances to pursue and litigate a predatory pricing complaint. Additionally, proving that a competitor acted with predatory intent is nearly impossible.

The most powerful weapon mega-retailers can use to eliminate or discipline smaller competitors is a well financed campaign to sell below cost. We hope you will support legislation to deny big business the use of this weapon.

Sincerely,

Dan Gilligan
President

cc. Russ Hanson



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

Bureau of Competition
Office of Policy Planning

August 8, 2002

Governor George E. Pataki
The State of New York
New York State Capitol
Albany, NY 12224

Re: Bill No.S04522 (New York Motor Fuel Marketing Practices Act); Bill No. A06942 (An Act to Amend the General Business Law, in Relation to the Operation of Retail Service Stations)

Dear Governor Pataki:

The staff of the Office of Policy Planning and of the Bureau of Competition of the Federal Trade Commission welcome the opportunity to submit this letter in response to your request for comments on the "New York Motor Fuel Marketing Practices Act" (the MFMPA"), Bill No. S04522, and the amendment to Section 199-a of the General Business Law (the "Amendment"), Bill No. A06942.¹ The MFMPA would prohibit, *inter alia*, refiners and nonrefiners of motor fuel from selling motor fuels below refiner or nonrefiner cost respectively, where the effect is to injure competition. The Amendment would prohibit a crude oil producer or refiner from directly competing with its own franchised dealers within certain geographic areas.

We believe if both pieces of legislation are signed into law, they have a significant potential to harm consumers. Gasoline is a significant consumer expenditure; given constant demand, even a one cent increase in the retail price of gasoline would cost New York consumers approximately \$57 million annually.²

¹ This letter expresses the views of the Bureau of Competition and of 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 See U.S. Energy Information Administration data available at http://www.eia.doe.gov/emcu/states/oilsales_trans/oilsales_trans_ny.html (showing New York daily

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 predatory pricing is likely to be a significant problem in retail gasoline markets.

D. If enforced vigorously, the legislation could harm consumers by increasing the price of motor fuels.

As noted above, anticompetitive price-cutting is already illegal under federal antitrust laws. We believe that this legislation could outlaw more types of pricing behavior than federal antitrust laws do, and therefore it runs the risk of penalizing procompetitive price-cutting that benefits consumers.

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.³⁰ 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.³¹ 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.³²

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 a

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 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).

³¹ M. Skidmore and J. Peltier, "Do Motor Fuel Sales-Below-Cost Laws Enhance Competition and Lower Prices?," unpublished manuscript, University of Wisconsin-Whitewater.

³² See Michael G. Vita, "Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies," *18 J. of Reg. Econ.* 217 (2000).

Written Testimony
SB2389
House Transportation Committee
Matt Bjornson
3-11-05

Chairmen Weisz and Members of the Committee, my name is Matt Bjornson. I am a partner in Bjornson Oil Company of Cavalier. Our company is a third generation business. I am here today to urge this committee to make a "do pass" recommendation on SB 2389.

Based on what has happened in other parts of the country, we know that out-of-state big box businesses have chosen to use a generic product -- petroleum -- as a loss leader. The big box stores often price petroleum below cost in a predatory manner to drive customers to their big box stores. The problem with this predatory pricing scheme, which they like to refer to with the more gentle term of "loss leader", is that it drives small businesses out of business. This legislation is your chance to prevent that from happening in North Dakota not by protecting a special interest but by promoting fair competition.

Many people have asked me, "Why a law just for petroleum? If we do this, what's next?" I want to spend a few minutes this morning talking about this specific issue because it is really at the heart this matter. In working on this issue for the last six months, I have found that most people agree with this legislation after they think about and better understand the marketing of gasoline.

Petroleum is a uniquely marketed product and here are three reasons why:

First, gasoline is a relatively generic product. Unlike say a particular branded tire or computer, where the store has an opportunity to gain additional revenue from accessories sales or services, gasoline is often a generic stand alone purchase.

Second, we post our prices on big signs for the entire world to see. No other product is sold or marketed this way. It enables consumers to compare prices without ever entering our stores -- which greatly reduces our ability to differentiate our prices based on service.

Third, petroleum represents approximately 70 percent of a typical convenience store's sales. That bears repeating: 70 percent of our total sales come from one product: GAS. Now, I ask you to think about that in terms of a "loss leader." It's true; mega retailers often sell a few items at an extremely low price to draw consumers. But they easily recoup those losses with larger margins on hundreds of other products. I submit to you today that none of the 850 retail gas stations in this state can possibly make up a 20 cents per gallon loss on gas by charging higher margins on Gatorade or gum in our stores. Nor can ever draw in enough customers to make up this loss by giving away free donuts or hot dogs. Not even a big box store can stay in business selling 70 percent of their products below cost. The simple reality is, if we are forced to match the gas prices of a big box retailer that is using gas as a loss leader, we cannot and will not survive.

Gasoline is a uniquely marketed, generic commodity that is an essential purchase for virtually everyone -- that's why we believe prohibiting the predatory pricing of this product is not only legitimate, but vital for competition long term.

North Dakota would not be alone in taking action on this issue. Twelve states have already enacted legislation similar to this. If you look at the 12 states that have addressed this serious problem, Alabama has a statute that has been on the books for over 20 years and has been a great success. That's why it was used as a model for this legislation. Alabama has some of the lowest gas prices in the nation. In fact on the recent AAA study that I have enclosed with my testimony, you can see that Alabama is tied for the 7th lowest price in the nation. Other studies have shown that states with fair competition laws do not have higher gas prices. While some consumers will oppose this legislation today and argue that it will increase gas prices. We argue and have proof that that is not the case. The purpose of this legislation is not to limit competition but to encourage competition in the long term by limiting the ability of large chains to run the competition out of business.

Predatory pricing has long been recognized as detrimental to consumers. Your predecessors recognized that fact some 60 years ago when North Dakota enacted the fair trade practices law in 1941, the problem with the original statute is that it is too vague and has no private right of action. This private right of action will allow the civil courts to address this issue when the need arises.

SB 2389 states that it is illegal to sell below the wholesale cost, plus freight, plus taxes, plus the actual costs of doing business. The legislation does not provide for any profit. Plainly put, the most efficient marketer of petroleum in any given market can sell at their actual cost forever, and not be in violation of this law. In addition, the law provides for the right to match competition and not be in violation. One of the most important aspects of the law is the right of private action. We as business people are saying that to defend an open and free market; we are willing to open our books in a court of law.

For anyone to characterize SB 2389 as government control of pricing is simply inaccurate. SB 2389 does not set prices. In fact the legislation as applied is market specific. It ensures a competitive marketplace in each specific market.

In closing, it has long been recognized that government has a legitimate role in ensuring a fair business climate that promotes competition and thus protects the long-term interests of the consumers. This bill will ensure a fair and open marketplace. This bill is in the best long-term interests of North Dakota.

A large multi-national company pricing in a predatory manner does not constitute a free market, in fact it destroys the free market. I'm asking for you to make a "do pass" recommendation on this bill and for your yes vote on SB 2389.

Thank you and I'd be happy to answer any questions.

Daily Fuel Gauge Report

AAA Local AAA Retail Gasoline Prices

Metro Averages:

Select A Market

Prices updated: 3/9/2005
3:02:29 AM

Data provided in cooperation with OPIS Energy Group and Wright Express, LLC
Media are encouraged to localize fuel price stories by contacting their local AAA club media representative.

[National Average](#)

[State by State Average](#)

[What's Moving the Market](#)

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Current State Averages: Click on state for detailed information

**Prices Are In US Dollars Per Gallon.*

State	Regular	Mid	Premium	Diesel
Alaska	\$1.975	\$2.091	\$2.210	\$2.103
Alabama	\$1.921	\$2.054	\$2.115	\$2.119
Arkansas	\$1.933	\$2.039	\$2.169	\$2.123
Arizona	\$2.047	\$2.135	\$2.258	\$2.313
California	\$2.257	\$2.402	\$2.442	\$2.489
Colorado	\$2.014	\$2.154	\$2.251	\$2.214
Connecticut	\$2.020	\$2.192	\$2.250	\$2.345
District of Columbia	\$2.010	\$2.140	\$2.204	\$2.238
Delaware	\$1.927	\$2.048	\$2.138	\$2.222
Florida	\$2.007	\$2.174	\$2.214	\$2.235
Georgia	\$1.906	\$2.049	\$2.140	\$2.099
Hawaii	\$2.400	\$2.538	\$2.586	\$2.637
Iowa	\$1.966	\$2.070	\$2.169	\$2.142
Idaho	\$2.000	\$2.111	\$2.169	\$2.484
Illinois	\$2.037	\$2.191	\$2.259	\$2.266
Indiana	\$2.013	\$2.166	\$2.227	\$2.141
Kansas	\$2.017	\$2.071	\$2.152	\$2.175
Kentucky	\$1.961	\$2.103	\$2.198	\$2.075
Louisiana	\$1.900	\$2.025	\$2.119	\$2.100

 [Get The Current Fuel Costs For A Trip](#)

3/9/2005

<u>Massachusetts</u>	\$1.952	\$2.099	\$2.178	\$2.273
<u>Maryland</u>	\$1.963	\$2.087	\$2.140	\$2.227
<u>Maine</u>	\$2.000	\$2.157	\$2.217	\$2.267
<u>Michigan</u>	\$2.071	\$2.193	\$2.281	\$2.200
<u>Minnesota</u>	\$2.009	\$2.090	\$2.144	\$2.194
<u>Missouri</u>	\$1.935	\$2.013	\$2.131	\$2.062
<u>Mississippi</u>	\$1.913	\$2.017	\$2.108	\$2.077
<u>Montana</u>	\$2.046	\$2.133	\$2.236	\$2.348
<u>North Carolina</u>	\$1.934	\$2.053	\$2.143	\$2.135
<u>North Dakota</u>	\$2.050	\$2.121	\$2.197	\$2.200
<u>Nebraska</u>	\$2.053	\$2.099	\$2.158	\$2.184
<u>New Hampshire</u>	\$1.945	\$2.107	\$2.182	\$2.240
<u>New Jersey</u>	\$1.836	\$1.968	\$2.043	\$2.131
<u>New Mexico</u>	\$2.004	\$2.134	\$2.226	\$2.200
<u>Nevada</u>	\$2.212	\$2.332	\$2.417	\$2.380
<u>New York</u>	\$2.068	\$2.212	\$2.259	\$2.369
<u>Ohio</u>	\$2.030	\$2.165	\$2.251	\$2.219
<u>Oklahoma</u>	\$1.936	\$2.002	\$2.113	\$2.053
<u>Oregon</u>	\$2.083	\$2.198	\$2.231	\$2.670
<u>Pennsylvania</u>	\$1.992	\$2.100	\$2.192	\$2.310
<u>Rhode Island</u>	\$1.991	\$2.119	\$2.188	\$2.300
<u>South Carolina</u>	\$1.862	\$1.979	\$2.075	\$2.061
<u>South Dakota</u>	\$2.032	\$2.162	\$2.251	\$2.188
<u>Tennessee</u>	\$1.921	\$2.033	\$2.131	\$2.096
<u>Texas</u>	\$1.890	\$1.999	\$2.071	\$2.094
<u>Utah</u>	\$1.956	\$2.063	\$2.153	\$2.319
<u>Virginia</u>	\$1.891	\$1.984	\$2.060	\$2.124
<u>Vermont</u>	\$1.969	\$2.118	\$2.210	\$2.348
<u>Washington</u>	\$2.084	\$2.159	\$2.266	\$2.725
<u>Wisconsin</u>	\$2.067	\$2.146	\$2.245	\$2.229
<u>West Virginia</u>	\$2.041	\$2.133	\$2.240	\$2.243
<u>Wyoming</u>	\$1.926	\$2.008	\$2.139	\$2.157

AAA's Daily Fuel Gauge Report is updated each business day and is the most comprehensive retail gasoline survey available. Everyday over 60,000 self-serve stations are surveyed.

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**Testimony – SB 2389
House Transportation Committee
March 11, 2005**

Mr. Chairman and members of the House Transportation Committee, my name is Paul Goulding and I am president of Goulding's Oil and Propane, of Devils Lake. Goulding's is a family business started by my grandfather in 1917.

Thank you, for this opportunity to testify for SB 2389. I feel very strongly about this bill. It will protect North Dakotans from the devastating effects of predatory pricing in its motor fuels marketplace. We believe this bill is pro-consumer because it provides a fair playing field for all and will encourage competition, not limit it.

Predatory pricing by its nature does not encourage competition but destroys smaller business competitors and thus diminishes competition. Any business authority would define predatory pricing as simply, the practice of pricing so low as to drive out or eliminate competition. Then what? Then when competition has disappeared, prices are raised in a manner to recoup losses and then some.

In other states, there this debate has occurred. Some big box retailers have tried to deny using gas as a loss leader. Attached are two articles that clearly point out they do. In Michigan, gas was sold below cost at one location for 424 out of 573 days. In Colorado, it was documented that gas was sold below cost for 171 days of 365.

Competition is good. It makes a marketplace more efficient thereby promoting fair prices for the consumer and the marketer. Unfair competition, as in predatory pricing, is bad. It will destroy a marketplace and ultimately destroy the viability of a small towns' existence.

There are two commodities with a 98% household penetration, that consumers go out of their way to purchase at least once a week, milk and gasoline. These two products represent the two most commonly used in predatory pricing. The world's largest big box retail chains use below cost selling of these products to bring customers to their parking lots. They do this with the expectation that customers will come into their stores to purchase the discounted item and then also purchase heavily marked up goods from which they take a handsome profit.

These big box chains, no matter what they claim, do not support the local community or the state. They ship their own products in and ship our money out. Period.

Unfortunately, there has been a public misperception promoted about this bill. It has been fed by stories such as one, which appeared in last Sunday's Grand Forks Herald. The article was titled, "Gas too cheap to bear". It stated "In reality, its not necessarily clear whether the law would keep a corporation from ruining small businesses or whether these small businesses are using the legislature to discourage competition."

Is this a clear and true representation of SB 2389? I would say no! How can a bill that allows a marketer to sell gasoline at any price it wishes, except below cost and in a predatory manner, be construed to discourage competition? So what is so confusing about this bill?

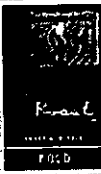
- It does not set prices.
- It does not ensure any profit.
- It does not prohibit a marketer from pricing gasoline competitively.
- It will not increase prices.
- **It will ensure a fair market!**

There is a saying that fits this discussion completely.

*What's right is not always popular,
What's popular is not always right.*

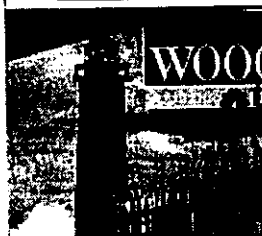
This bill is right for North Dakota. Those who take time to study this issue and understand this bill know that it protects consumers and preserves free enterprise in our state. I encourage your support with a yes vote for SB 2389.

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February 28, 2005

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Some say Murphy USA gas stations practicing predatory pricing

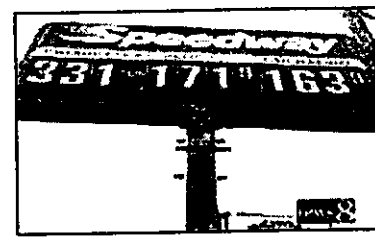
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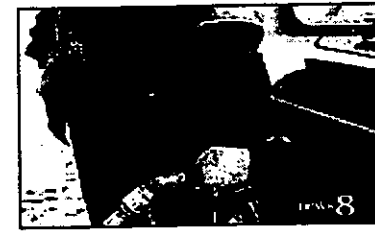
VIDEO (Fremont, February 23, 2005, 9:04 a.m.) A gas war is underway in Newaygo County. At the Murphy USA gas station in Fremont, drivers can pull into the Wal-Mart parking lot and fill up for the low price of \$1.63 per gallon. How can stations sell gas at such a low price?



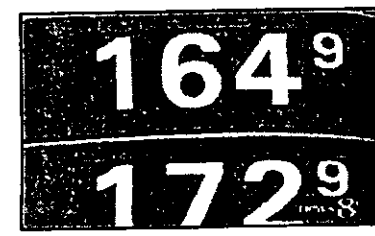
Fremont gas stations are scrambling to compete, posting similar prices or losing business. While the low prices are great for customers, the manager of the Wesco gas station says he is losing money and business to the Murphy/Wal-Mart one-two punch.



When 24 Hour News 8 informed the Michigan Petroleum Association of the price, we were told this is a clear case of predatory pricing - selling gasoline below cost to drive out competition.



Marc Griffin is president of MPA and says the average wholesale cost of a gallon of gasoline in Michigan is currently \$1.84. That means Murphy USA is selling a gallon of gas at 21-cents below cost.



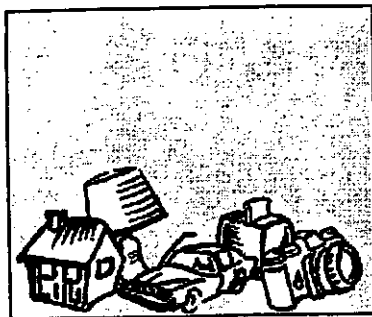
How, then, can this Murphy USA sell gasoline for a \$1.63 per gallon? Murphy USA's vice president says he can sell gasoline at any price, because there is no law in this state that says otherwise. And that's true, at least for now.



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MORTGAGE

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Griffin says when Michigan first introduced the Petroleum Marketing Stabilization Act to protect small retailers, the president of Murphy USA addressed state lawmakers to protest the bill.

"They testified in front of the House Transportation Committee that they seldom, if ever, sell below cost. That's kind of stretching the truth when we have proof right here that in one part of the state they did it for 424 days out of 573. This is clearly an attempt by them to try to control the market place," Griffin says.

Murphy USA officials tell 24 Hour News 8 that it is simply selling gasoline to consumers at a competitive price.

Griffin showed us a report following Murphy USA pricing from July 2001 through April 2003 at one of its locations in Niles. "It's easy to say that it's good competition when you have your foot on the throat of your competitor," he says. "This company has done this all around the country. They've done it in states where it has been illegal and has had many court battles, which they've lost."

Griffin tells us 28 states have some form of a gasoline predatory pricing law. He says Murphy USA has broken those laws in four states: Alabama, Florida, Oklahoma, and Wisconsin. Lawmakers in Michigan will have a chance to review Michigan's version of a predatory pricing law when it is re-introduced sometime this year.

Consumer

Whirlpool dishwashers and "Toy Tunes" both recalled

Spray-on tanning: Healthy alternative to tanning beds?

Recall of Martha Stewart candle set

Recall of hip hammock child carriers

Some say Murphy USA gas stations practicing predatory pricing

Personal bankruptcy rates hit all-time high last year in Michigan

Consumer advocates are upset over some lottery games

Some clinics begin to offer self-referred whole-body scans to the public

Bill would require cell phone users to sign up to be in cell phone directory

Michigan insurers could be banned from using credit scores to determine premiums

Consumer News Headlines

The death of bereavement air fares

One kind of fine print under the magnifying glass

So, you think gasoline prices are high, now

Identity theft alert

Teaser rates -- on mortgages

Bargains by the season

More surprises from mortgage rates

The not-so-simple life

Keeping kids safe in rental cars

A smarter shopping cart

Russ.Hanson

From: Dave Froelich [dfroelich@mvpinc.net]

Sent: Thursday, January 20, 2005 3:31 PM

To: 'Russ Hanson'; 'Matt'; 'Mike Rud'; mzander@spfenenergy.com; 'Loren Dusterhoff'

Subject: Kroger

Any time Bassman is involved it is a big deal.

Dave

Kroger Sued For Selling Gas Below Cost

JANUARY 20, 2005 -- MONTROSE, Colo. -- A lawsuit filed last week in U.S. District Court in Denver claims a City Market store in Montrose, Colo., sold gasoline below cost in December 2003, reports the *Montrose Daily Press*.

Two local gasoline retailers -- Parish Oil Co., a wholesale fuel distributor, and Ray Moore Tire & Petroleum Service Inc., which shut down its gasoline pumps in November -- filed the lawsuit against Cincinnati-based Kroger Co., City Market's parent company, last Friday.

r- [The plaintiffs said in their lawsuit that City Market was selling unleaded regular gas in December 2003 for \$1.269 per gallon when the lowest wholesale price in the area was \$1.357 per gallon.] ~ x

"In December of 2003, City Market embarked on a new pricing program that dropped the price well below the cost," said Bob Bassman, a Washington, D.C.-based attorney who is representing Parish and Ray Moore in the lawsuit. "We have documented that for 171 days out of 365 they sold gas below what the two plaintiffs could buy it from the five refiner racks. On those days, City Market was selling it below cost."

"Ray Moore has suffered serious injury to our reputation in the marketplace as a result of City Market's below-cost pricing," said Gary Moore, one of the owners of Ray Moore. "This is a very important matter, but I don't want to try this in the media, I want to try it in court. There are things that will be public record shortly."

In September, Big John's, another Montrose gas station and convenience store, closed. Majority owner Ron Robertson previously said he closed the gas station because he couldn't compete against large corporations who were selling gas below his cost.

In addition to operating supermarket chains, including City Market, Kroger operates 794 convenience stores in 16 states, under the banners Kwik Shop, Loaf N' Jug Mini Mart, Quik Stop Markets, Tom Thumb Food Stores and Turkey Hill Minit Markets.

1/26/2005

#5

Testimony SB 2389

March 11, 2005 – House Transportation Committee

Chairman Weisz and Transportation Committee Members:

My name is Mike Rud. My wife Melissa and I own a mom-and-pop convenience store in Garrison. The Rud family has been retailing gas for 4 generations. I'm here urging you to make a "do pass" recommendation on SB 2389 and for a "YES" on this important legislation.

For the past four years, Garrison businesspeople like myself have watched helplessly as the water from Lake Sakakawea has been siphoned downstream, taking with it 25% of Garrison's annual taxable sales. Now, small businesses from Garrison and across the state are staring down another potential economic disaster: Cars full of potential rural shoppers zipping by our business districts heading for the "supercenter" where a natural resource as valuable as gas will be sold as a "loss leader". Predatory pricing, treating gas no differently than a pack of toilet paper or a discount case of pop.

WHAT MAKES THIS SCENARIO SO SICKENING IS THE SUPERCENTER ISN'T AFTER THE GAS BUSINESS. NO, IT'S AFTER THE GAS CUSTOMER!!

Many of us in rural America view the big box retailer as magnets. By pricing gas in a predatory manner, the mega retailer will draw Garrison's grocery, hardware, alcohol and drug store customers to its front doors. When you consider the fact the average dollar turns over up to five times in a small town economy, this will create a financial nightmare for independent business owners across the state. Instead of cash going into the local community bank, it will simply be deposited into a vault somewhere in corporate America.

We all know when a small town business is forced to lock its doors, it's usually closed for good.

Today in North Dakota there are 850 retail gas outlets. We are small businesses. We employ more than 8,000 people and have a payroll of nearly \$90 million. Speaking on

behalf of our industry, the number of North Dakota c-stores will start shrinking in a hurry if a big box retailer starts marketing gas at or below cost.

NO BUSINESS, NOT EVEN WALMART, CAN AFFORD TO SELL 70% OF ITS PRODUCT AT OR BELOW COST FOR AN EXTENDED PERIOD OF TIME!

Without passage of **SB 2389** that's what we would likely be forced to do.

All independent business owners in our state have a passion for what they do. This was never more evident than the recent testimony given by a Fargo bar and grill owner. In his testimony supporting the 2 a.m. closing law, owner Ted O'Shaughnessy said he came out of retirement because, "Everything I have spent a lifetime working and saving for is in jeopardy. Our industry is basically a family business. We are not asking for a handout, just a chance to compete fairly."

Many of our marketers come from family businesses as well. And like Mr. O'Shaughnessy, **WE ARE NOT SEEKING A HANDOUT, JUST A CHANCE TO COMPETE FAIRLY AND SURVIVE!!**

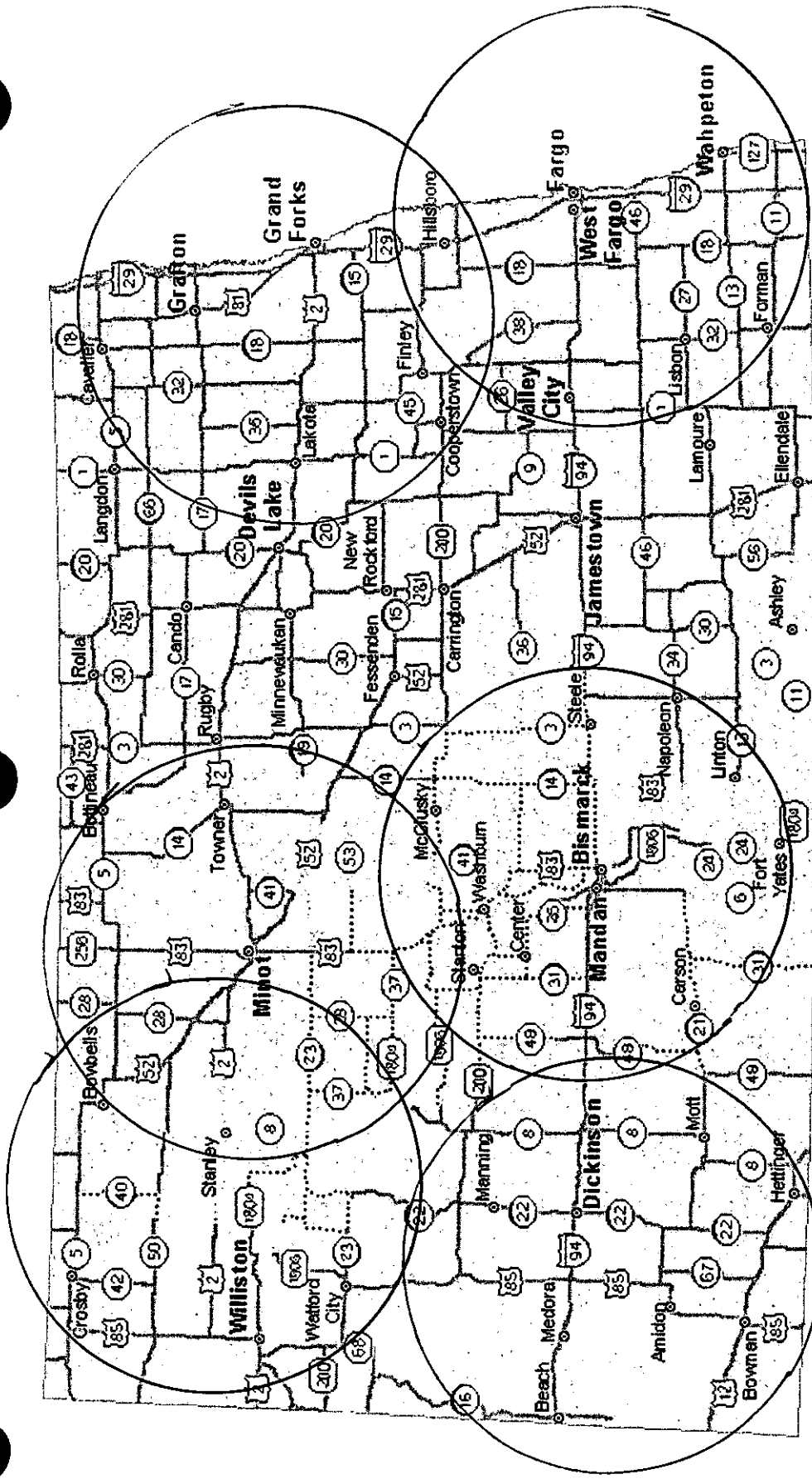
If we can make the playing field even for the bar industry, DOESN'T THE NORTH DAKOTA GAS RETAILER DESERVE EQUAL TREATMENT?

In a few moments, we will hear testimony from consumers opposing our bill because they want lower gas prices. I would like nothing better than to make their wish come true, because as a dealer we're feeling the pinch from \$2.00 gas as well. But in order to enjoy low cost prices long term, a market needs competition. And without this law, I believe competition in the state's retail gas market will be hurt dramatically. And retail services in our state's rural communities will be delivered another deadly blow.

I urge you to DO THE RIGHT THING! VOTE YES ON SB 2389!!

Thank you for your time and consideration.

Mike S. Rud
GARRISON BAY EXPRESS



Map created by North Dakota Department of Transportation

FB Minute for 3-4-05 – Free enterprise – 186 words

Welcome to the North Dakota Farm Bureau minute. I'm Eric Aasmundstad, North Dakota Farm Bureau president.

Today's topic: Free enterprise. Senate Bill 2389, a bill that would regulate the selling price of motor fuel in relation to the dealer's fuel cost flies in the face of everything Farm Bureau believes.

We believe our private competitive enterprise system is one of the most basic principles of Americanism. Senate Bill 2389 severely tramples the rights of the individual to conduct business as they see fit, and operate a business by their own plan and not someone else's. The government should not be involved in price fixing or determining the cost at which a vendor can sell a product.

By compromising the competitive nature of business, Senate Bill 2389 will limit the consumer's ability to capture savings in the market place. Consumers will only benefit when businesses can compete for their dollar.

Senate Bill 2389 addresses motor fuels, however we have to ask; what segment of the North Dakota economy will next fall prey to the heavy hand of bureaucratic manipulation?

For the Farm Bureau Minute, I'm Eric Aasmundstad.

#7

HOUSE TRANSPORTATION COMMITTEE
ROBIN WEISZ, CHAIRMAN
MARCH 10, 2005

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2389

Mr. Chairman and members of the House Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. I appear on behalf of the Attorney General.

The Attorney General has two concerns with this legislation from the standpoint of his office.

First, by placing this law in the unfair trade chapter of the law, anyone who violates its provisions potentially would be subject to criminal prosecution, because Chapter 51-10 contains criminal sanctions for violations of section 51-10-05. Section 2 of this bill makes below cost sales of motor fuels a violation of section 51-10-05, subject to criminal sanctions. The Attorney General does not believe alleged violators should be subjected to criminal penalties.

We do not believe the proponents of this bill intended that there be a criminal sanction for violation of this law, and the Attorney General does not believe criminal sanctions are appropriate for violations of the proposed legislation.

The bill also gives dual enforcement authority to private parties, and also imposes authority in the Attorney General's office to bring an action to enforce this proposed new law.

The Attorney General also does not believe it would be right to use taxpayer dollars -- public funds-- for enforcement of this statute. Again, proponents argue they want a private cause of action, and if such a course is followed, those parties should bear the cost of the dispute. The Attorney General would continue to have authority under the law that has existed since 1941 to pursue cases where there is actual injury.

Therefore the Attorney General proposes amendments to remove this legislation from chapter 51-10 in order to eliminate potential criminal sanctions for violations and to ensure that violations are addressed solely through a private cause of action.

Whether the legislation with those changes is desirable, leaving only a strictly private cause of action for a violation -- is a policy decision for the legislature.

The Attorney General will continue to enforce chapter 51-10 in regard to below cost sales that require injury to competition.

For these reasons, the Attorney General asks this committee, after reviewing his proposed amendments, to adopt those proposed amendments to SB 2389.

Thank you for your time and consideration.

3-14-05

Rep. Weisz and Committee members,

My name is Sophia Preszler I'm a
concerned citizen from District 35, Bismarck.

SB 2389 is a bad bill where the rich
get richer and the poor get poorer and the
little man and the consumer take the rap.

If you can put up the price, you
must be able to lower it.

Please, "Do not pass SB 2389"

Sincerely,

Sophia Preszler
1725 N 5th St
Bismarck, N.D. 58501
1-701-255-0269