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JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE AND
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REBECCA M. WYKE
COMMISSIONER
DOMNA GIATAS
DEPUTY COMMISSIONER

August 11, 2003

Honorable Margaret Rotundo
Honorable Janet L. McLaughlin
Joint Standing Committee on State and Local Government
Cross Office Building, Room 216
Augusta, ME 04333

Dear Senator Rotundo, Representative McLaughlin and Members of the Committee:

The Advisory Committee on Fair Competition with Private Enterprise was established to hear complaints related to issues of fair competition when government agencies produce goods or deliver services that compete with the private sector.

Having reviewed a complaint by Acheron Environmental Laboratory against the Health and Environmental Testing Laboratory claiming unfair competition, the Advisory Committee submits this report, as required by statute, outlining our findings and conclusions on this matter.

The Advisory Committee is not authorized to submit legislation, but only to inform the Governor and Legislature of its findings. Should any legislation be considered on this issue, the Advisory Committee would make a representative available for questions.

If I can provide any additional information as to the Advisory Committee's activities, please do not hesitate to contact me.

Sincerely,

Domna Giatas
Deputy Commissioner

cc: Advisory Committee Members
John A. Krueger, HETL
William B. Ball, Acheron

**Report of the Advisory Committee on Fair Competition
with Private Enterprise
Regarding a Complaint by Acheron Laboratory against HETL**

Background

In April 2002, Acheron Environmental Laboratory (Acheron) filed a written complaint against the Health and Environmental Testing Laboratory¹ (HETL) claiming the services provided by HETL to the public resulted in direct and unfair competition with Acheron and other small laboratories. Acheron and HETL provided numerous written materials to the Advisory Committee and appeared before the Advisory Committee on three separate occasions to present testimony and answer questions from committee members.

The Advisory Committee heard presentations from both parties on September 19, 2002 and deliberated with the participation of the parties on December 6, 2002 and January 14, 2003. Based upon these presentations and deliberations, the Advisory Committee made a preliminary finding that there was competition between HETL and private laboratories. While the Advisory Committee made an initial determination that this competition did not appear to be unfair, it withheld issuing a final decision and provided Acheron with an opportunity to submit additional information illustrating the unfair competition. In response, on January 28, 2003, Acheron submitted correspondence outlining what it considered to be the unfair practices by HETL.

At a May 22, 2003 meeting the committee reviewed all the information provided in the case; recapped the points previously made by both sides; and considered the issues raised by Acheron in its supplemental correspondence of January 28, 2003. The Advisory Committee's concerns centered around the pricing of the water tests by HETL that appeared to produce an artificial ceiling on water test pricing in the private market; the name brand recognition enjoyed by HETL as a government agency; and the marketing of HETL water tests by HETL and other agencies to the exclusion of certified private in-state laboratories. (The Advisory Committee took note that only certified out-of-state laboratories were listed on the Water Testing Program web site.²)

The Advisory Committee concluded that additional information from both parties would be beneficial before finalizing its decision. Toward that end, HETL and Acheron Laboratory were asked to provide additional information on those specific issues identified by the committee and invited to participate at the Advisory Committee's June 26, 2003 meeting.

At the June 26, 2003 meeting the Advisory Committee reviewed the information provided by Acheron and HETL on the issues of market share, test pricing and brand recognition. Both parties were provided with an opportunity to present testimony to supplement the written information. Committee members asked questions to clarify any outstanding issues. The Advisory Committee's discussion and deliberations led to the following findings and conclusions.

¹ HETL is a Division within the Bureau of Health, Department of Human Services.

² Once this issue was brought to the attention of HETL the listing was immediately corrected to include in-state laboratories. The web site in question is not under the direct control of HETL. HETL indicated that it was an inadvertent and unintentional error, as the information on in-state laboratories had been provided for inclusion on the site.

Findings and Conclusions of the Advisory Committee

Public Health and Primacy

The Advisory Committee acknowledges the important role HETL plays in ensuring the public's health and safety.³ HETL is the full service laboratory for the state and therefore is responsible for meeting any and all testing needs to ensure the health and safety of Maine's citizens.⁴ In its original complaint, Acheron claims of unfair competition included all tests conducted by HETL to the public (non-state agencies) for a fee. Upon review of the information provided, the Advisory Committee identified HETL's drinking and waste water tests as having the most direct competition with private laboratories. Therefore, the Advisory Committee's focus in its discussions, and in its findings and conclusions, are limited to these tests.

The Advisory Committee also recognizes that having safe drinking water is an important public issue in which the State of Maine has a legitimate responsibility. The HETL was instituted 100 years ago to ensure the quality of the public's drinking water. It has established primacy in the area of drinking water testing by meeting the federal requirements. In order to maintain its federal certification, the Advisory Committee acknowledges that HETL must conduct a certain amount of tests.⁵ As part of its public mission, HETL is also required to conduct water testing at no charge for those who are unable to pay.

While there is a statutory and regulatory requirement for HETL to test drinking and waste water, this is not an exclusive authority. Many private laboratories have been conducting these tests, especially in the last 30 years with the increased number of clean up sites that were identified through the Superfund. Drinking water tests are conducted for public entities and private individuals. HETL estimates that it conducts 80% of all the public drinking water testing in the state. Neither HETL nor Acheron could provide the Advisory Committee with any estimates on the amount of private (e.g., residential wells) drinking water testing conducted by HETL or the private laboratories.⁶

Pricing of Water Tests

Originally, HETL processed drinking water tests at no cost to the public. In 1972, a nominal handling fee was charged and around 1976 the Maine Legislature mandated a charge for the services. HETL currently prices its tests based upon the "the average cost" of the all tests conducted by the lab, as required by statute.⁷ Prices are set through rulemaking under the Administrative Procedures Act, which has a process for public notice and hearing on any proposed rules. With the advent of the Internet, HETL has begun to provide information regarding drinking water testing, including prices, online.

³ It is noted that no one, including Acheron, questions the quality of HETL's work and the valuable public health functions and protections it provides for the citizens of Maine.

⁴ HETL is also responsible for certifying all other laboratories in the State of Maine for a variety of testing functions.

⁵ The Advisory Committee did not reach a consensus on the number of tests that were required for the certification. It was HETL's contention that at least 800 blind tests were needed to be completed correctly.

⁶ Public drinking water testing must be reported to the HETL, regardless of who conducts them, thereby allowing for this approximation. There is no similar reporting requirement for private drinking water testing.

⁷ Title 22 MRSA Section 2602.

The Advisory Committee acknowledges that HETL's methodology for setting the price for drinking water tests, as required by statute, is establishing a price that may not be reflective of the actual cost of performing the test.⁸ In order to remain competitive, private laboratories cannot exceed the HETL price. Based upon Acheron's representations, the HETL prices are lower than the cost to private laboratories. The Advisory Committee recognizes that this results in an artificial ceiling on the price of drinking water tests for private laboratories. It was the determination of the Advisory Committee that this pricing methodology provides an advantage to HETL.

Competition

The Advisory Committee does determine that there is competition by HETL with the private laboratories in the particular area of drinking water testing. This competition has an adverse effect on the private laboratories seeking to gain a foothold in this testing area. The lack of fair market pricing and the readily available information over the Internet coupled with HETL's long standing reputation as the state's public laboratory, provides an advantage to HETL that Acheron and other private laboratories cannot overcome by other marketing means or enhancements (e.g., faster service). HETL also derives some benefit that comes with being a state agency, including not paying taxes, a lower overhead and some subsidy from the General Fund.

HETL acknowledged that the fees from the drinking water testing offset the pricing for other tests that are not as common and many times more expensive.⁹ While troublesome to some of the committee members, HETL has conducted its pricing as required by law. Any determination to change this structure is a policy issue that would need to be addressed through the legislative process.

Conclusion

In outlining these findings, the Advisory Committee has attempted to weigh the public health policies that are an important part of HETL's mission with Acheron's contentions that HETL's practices result in adverse effects to private competition. HETL remains the entity required to monitor and address issues regarding the public health, including those related to drinking and waste water. The value and importance of this mission cannot be overstated. However, Acheron has established some adverse competitive impact to private laboratories from HETL's participation in the testing of drinking water.

As the procedural background demonstrates, the Advisory Committee has wrestled with these issues. It is the Committee's conclusion that it can best fulfill its role by documenting its findings (as set forth above) and allowing the policy decisions implicit in any resolution to be determined by those with this authority.

⁸ It is HETL's contention that lower prices encourage citizens to take part in testing and this best serves the public welfare by identifying potential health and safety issues.

⁹ Additionally, HETL is specifically required to perform some tests at no charge to those who cannot afford to pay.