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Federal and State Anti-Trust Laws Relating to The Oil Industry

(Prepared as background to LD 2148

"An Act to Establish the Petroleum Market Share Act")

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TO: Members, Joint Standing Committee on Business Legislation

FROM: John B. Knox, Legislative Analyst

SUBJ: LD 248, "An Act to Clarify the Procedures by Which Fees are Collected under the Petroleum Market Share Act

On March 1st you will be hearing the above referenced bill. This bill is a fairly minor revision to a piece of controversial and complex legislation that this committee passed last year.

In the interest of bringing new members up to date I am enclosing information on that bill. Some of it I passed out at last year's hearing but most was too complex to be researched at that time and is a result of some work on the subject that I did last summer.

Because of its length, I am sending this material to you prior to the hearing so that you may have time to look it over at your leisure.

#4459LHS

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Background

I. LD 2148

The Attorney General's Office submitted LD 2148, "An Act to Establish the Petroleum Market Share Act", to the 2nd Regular Session of the 115th Legislature. This bill passed as amended and became Public Law 1991, chapter 836.

On May 4, 1991 Attorney General Michael Carpenter, who is from northern Maine, was quoted in the Bangor Daily News as being concerned that three wholesalers who had voluntarily provided data at his request were obtaining excess profits in northern Maine from a failure to reflect at retail a decline in crude oil pricing. Mr. Carpenter proposed requiring wholesalers to provide price information to his office and prohibiting distributors from owning retail outlets.

The original version of LD 2148 required wholesalers and retailers of heating oil and fuel oil to report gallonage information by municipality to the Attorney General. According to the Statement of Fact, the Attorney General was to use this information to determine whether additional legislation is needed to limit or curtail the activity of refiners in operating retail outlets.

In his testimony the Attorney General stated that the fear of market dominance and ensuing price increases were his reasons for introducing this bill. At the time of his testimony, the Attorney General introduced an amendment which prohibited refiners of home heating oil having over a 25% market share from acquiring additional outlets or increasing their customers by more than 30%. This provision was to expire October, 1994. The amendment was revised to prohibit a refiner from securing control of additional gasoline stations within 2 miles of one of its existing outlets unless the Attorney General decided that such an acquisition would not decrease competition. There was no expiration date.

In his statement the Attorney General made the point that one company, Irving Oil, was the only refiner owning retail stations in Maine. This refiner was then in a position to use its size, its vertical integration and the margins from the refining aspect of its business to obtain a substantial competitive advantage.

The only data presented by the Attorney General's office in support of the bill was a comparison of gasoline prices in Canadian cities with those in Maine cities. The conclusions drawn from this data have been questioned by experts knowledgeable in the field because there are so many other differences between these cities that it is not valid to attribute the observed price differences to monopolistic activities of the Irving Oil Co.

In opposing the bill, Irving Oil made the point that its growth was achieved by legitimate good business practices. They stated that ease of entry made dominance of the home heating oil market impossible. Irving further stated that smaller companies have access to wholesale pricing which coupled with low overhead, gives them advantages over larger competitors. In the case of gasoline service stations, Irving stated that they felt that the costs of mandated tank replacement and environmental costs made it impossible for the small, independent stations to be successful. Further, they felt that suppliers were

reluctant to supply stations over which they had no control in the light of the liability created by these regulations.

The Director of the State Planning Office also opposed the bill on behalf of the Administration. The point made was that there were currently surveys of heating & fuel oil prices and neither these surveys nor the volume of public complaint indicated high prices in these categories to be an issue. That office felt that the lack of evidence of a problem as indicated by these surveys or as presented by the Attorney General, plus the existence of price surveys as a measure of any future problem, made the cost of producing and analyzing sales and share data unnecessary.

No oil company or proponent of the oil company position presented any data in support of arguments against passage of this bill.

The bill was amended by Committee to require reporting only by county, and, on the floor, to require reporting only by suppliers and to prohibit unfair competitive or trade practices, with those terms to be defined by the Attorney General.

II. Irving Oil's Marketing Activities

As indicated in the previous section, neither the proponents nor the opponents of LD 2148 presented data to validly support their positions.

This writer, as part of his research, attempted to fill this gap through his own research. This effort was greatly hampered by the fact that the Irving Oil Company does not provide data to any of the usual sources of industry information in the United States or Canada.

In December 1987, the Maine Times and the Kennebec Journal ran concurrent stories on the Irving Oil Company. The Times estimated Irving's share of the gasoline market to be 10%. They stated that the leading supplier of heating oil was the Dead River Company with 12-15% of the market. The article stated that the problem with Irving's activities were not that they were illegal but that they gave the company too much control and that they would eventually dominate the State's economic climate as they did the climate in New Brunswick, their home province.

The Kennebec Journal article described the Irvings as being the 6th richest family in the world. (A 1989 McLeans magazine article described the company's founder as being the 3rd richest non-monarch in the world and the company as being the largest privately owned conglomerate in North America.) The article stated that the Company was in a position to become involved in price cutting but did not do so. The article stated that the concern with Irving was not its illegal conduct but its size and aggressiveness.

A September, 1991 article in Canadian Business magazine estimated Irving as having 20% of the Maine "gasoline industry".

Lastly, the Canadian magazine Octane in its fall 1992 issue made estimates of Irving's share of gas stations in the Canadian provinces in which it operates. That data is shown below:

	Irving's Share of All Gas Stations	Pump Price of All Gas Stations
Quebec	14%	60.4¢
New Brunswick	47%	56.7¢
Nova Scotia	27%	59.0¢
Prince Edward Island	17%	60.6¢
Newfoundland	5%	61.1¢

III. Legislative History

LD 2148 represents the latest and most impactful in a series of measures considered or adopted by the Legislature going back to at least 1975. A brief summary of these measures follows:

A. 1975-76

In July 1975 the Legislative Council approved a study of how to reduce the cost of gas and to review Maine's excess profit law. This study was conducted by the Energy Committee. A draft report was available December 1975 with the final report, for some reason, not available until December 1976. The study found that distributors were beginning to enter the retail market and, because of the cost advantages available to them, their pricing threatened to drive other types of stations out of the market. The study resulted in the following bills which were heard by the Energy Committee:

1. "An Act to Prohibit the Sale of Gasoline Below Cost to Destroy Competition". LD 560.
2. "An Act to Prohibit Producers, Refiners and Distributors of Motor Fuels from Engaging in the Retail Sales of Gasoline". LD 972
3. "An Act to Restrict Oil Firms to One Phase of the Oil Industry". LD 1052

The first LD died between houses and the last two received an ought not to pass.

B. 1980-81

In 1980 Democratic legislators attempted without success to pass a resolution requiring the Attorney General to investigate excess profits of major oil companies. The Attorney General was quoted as saying that he had received no such complaints, that such a study went beyond the resources of his department and that the matter should be left to the federal government.

In 1981 "An Act to Prohibit Refiners and Distributors from Selling Motor Fuel at Retail", LD 1253, was heard by the Energy Committee. It

prohibited refiners from owning retail outlets. The bill was replaced by "AN Act to Amend the Unfair Sales Act", LD 1610. That bill, which passed, allowed the Attorney General to require testimony on costs of operation when it is suspected that a refiner or distributor is selling to a vendor below cost and required wholesalers to report to the Attorney General when they sold gasoline at stations which they operated for less than the price charged to independent stations that they supplied.

C. 1987

In 1987 the Energy Committee heard "Resolve, to Study Heating Oil, Gasoline and Propane Gas Pricing Factors in the State", LD 1190. This report received an ought not to pass vote. It appears that this study may have been related to a charge made by the Director of the State Office of Energy Resources a year earlier that retail gasoline and heating oil prices were not reflecting the precipitous drop in crude oil prices.

D. 1988

An offer by the Irving Oil Company to buy the Texaco Company's Maine service stations resulted in a proposal for a bill which would prohibit oil refiners or producers from operating company-owned stations in Maine. This idea was replaced by "Resolve, Directing the Attorney General to Study the Trade Practices of the Motor Fuel Sales Industry", LD 2689 which received an ought not to pass vote by the Business Legislation Committee and was then replaced by the passage of "Joint Resolution Requesting the Attorney General to Study the Trade Practices of the Motor Fuel Sales Industry", S.P. 1034. According to newspaper reports, the use of a resolution was occasioned by the large fiscal note attached to the resolve and to the fact that a resolution does not require the Governor's signature.

Steven Wessler, Chief of the Consumer and Anti-Trust Division of the Attorney General's Office was quoted as saying that Maine already had enough safeguards against monopolies and that his office always reviews mergers for possible anti-trust violations. As near as can be determined, the requested study was never reported to the Legislature.

Detailed Report

Preface

This section will present material dealing with the four major provisions of LD 2148 as follows:

I. A review of current federal and state anti-trust law.

This addresses the issue of whether further anti-trust law is necessary in Maine.

II. Current laws dealing with government's right to obtain reports.

This address the reporting requirement of the bill.

III. Retail Divorcement Studies.

This addresses the provision of the bill that prohibits acquisitions within a 2 mile radius of current company-owned service stations.

IV. Unfair Trade Practices - The Federal Trade Commission Act.

This addresses the floor amendment to the bill that prohibits unfair trade practices, with that term to be defined by the Attorney General. This is a slight extension of the authority of the Attorney General under the Maine Unfair Trade Practices Act. The FTC Act is the closest federal law in terms of mirroring the authority given the Attorney General under the Unfair Trade Practices Act.

I. Statutory Law

A. Monopoly

Federal: Section 2 of the Sherman Act. This section prohibits monopoly or attempts at monopoly.

Maine: 10 MRSA Section 1102. This section is the same as the Sherman Act.

B. Acquisitions

Federal: Section 7 of the Clayton Act prohibits acquisitions if the result might be a substantial lessening of competition or a tendency to create a monopoly.

Maine-pre LD 2148: 10 MRSA Section 1102-A. This section is the same as the Clayton Act.

Maine-LD 2148: 10 MRSA Section 1676. This section prohibits a refiner from securing control of a retail outlet within 2 miles of one of its existing outlets unless the Attorney General indicates that such action will not decrease competition. The Irving Oil Company is currently the only refiner owning retail stations in Maine. Irving is not integrated in the sense that it does not develop its own crude oil. Irving's refining capacity is 250,000 barrels per day.

Other states: Three states, Connecticut, Delaware and Maryland, prohibit a refiner from operating a retail station. One state, Nevada, allows a refiner to operate up to 15 stations. One state, Virginia, prohibits a refiner from operating a retail outlet within 1 1/2 miles of an outlet operated by any franchised dealer but no divestiture was required. The same state enacted a 1-year hiatus on a refiner purchasing land, building and operating a retail station.

In looking at this type of legislation, which is often called retail divorcement legislation, several states and the federal government considered restricting it to larger refiners, i.e. those with capacities of over 175,000 or 325,000 barrels or those that produce at least 70% of their crude oil needs. (Interestingly, various related studies have found that it is generally the small refiners that operate service stations.) Currently, Irving franchises no stations in Canada, and, it is believed, franchises none in the United States.

C. Predatory Pricing

Federal: None specifically.

Maine: 10 MRSA Section 1105. This section makes it illegal to exact or demand an unjust or unreasonable profit in the sale of gas or fuel.

10 MRSA Section 1204-A. This section makes it illegal to sell merchandise at less than cost for the purposes of injuring or destroying competitors.

D. Price Discrimination

Federal: The Robinson-Patman Act. This Act makes it illegal to discriminate in price between different purchasers when the effect may be to substantially lessen competition or to tend to create a monopoly.

Maine: None

Other states: Specific prohibition against geographic price discrimination.

E. Unfair Competitive Trade Practices

Federal: The Federal Trade Commission Act. This Act makes unlawful unfair methods of competition and unfair acts or practices affecting commerce.

Maine-pre LD 2148: 5 MRSA Section 207. This section is the same as the Federal Trade Commission Act.

Maine-LD 2148: 10 MRSA Section 1676, sub-§5. This section makes it unlawful for a person engaged in the heating or fuel oil business to engage in unfair methods of competition or unfair acts or practices.

II. Reporting

Federal: Section 7-A of the Clayton Act. This Act requires that companies planning an acquisition report that fact to the Attorney General at least 30 days prior to its happening.

Federal: The Federal Trade Commission Act. This allows the Commission to require that a business provide virtually any type of information that the Commission requests.

Maine-pre LD 2148: 10 MRSA Section 1109. This section requires a person who is planning an acquisition in the gasoline or heating oil industry to report that fact to the Attorney General.

Maine-pre LD 2148: 10 MRSA Section 1209. This section requires a wholesaler to file a report with the Attorney General when the price of gasoline at a wholesaler operated station is less than the price charged an independent retailer located within a mile of the wholesaler's station.

Maine-LD 2148: 10 MRSA Section 1673. This section requires wholesalers of heating oil and motor fuel to report gallonage sold to each retail outlet.

III. Retail Divorcement Studies

The laws against operating gas stations are called retail marketing divorcement laws. Maine's new law is a very modified version of a divorcement law, in that the Attorney General can prohibit operation only if he finds that such a practice affects competition. As of 1988, the last year for which data is readily available, 41 states and the federal government had proposed retail divorcement legislation. Five states currently have such legislation. Four of these statutes were passed in the 1970's as a result of the oil embargo during that decade. In the 1980's the Federal Trade Commission, the Department of Energy and the U.S. Department of Justice all came out strongly against such legislation and only one state law has been passed since 1980, although each year many are considered. The U.S. Senate currently has such a bill under consideration.

Since there are no federal divorcement laws from which case law commentary has developed, this section will deal with the 5 state studies on this subject that have come to this writer's attention.

The consensus in all but one of these states is that there is no evidence of refiners utilizing station operation to engage in predatory pricing and that prohibition of refiner operation results in higher consumer prices. All these states were influenced in their conclusion by the findings of the previously mentioned federal agencies, all of which oppose retail divorcement for the reasons mentioned and because they feel current laws are adequate to deal with the problem. The one state favoring divorcement did not mention federal agency findings. None of the five states has passed, or in the case of one, added to their divorcement laws.

A brief summary of the studies follows:

Oregon, 1981 - "It is uncertain whether divorcement laws serve the interests of consumers or of various special interest groups within the industry".

Minnesota, 1981 - "It must be recognized that divorcement would not totally effect the change that is desired by its advocates. The refiner marketer is not the sole problem faced by the dealer. The price competitive independent segment of the market must be reckoned with.

Divorcement on the state level could have a supply effect. The independent refiners make an important contribution to the supply of petroleum products in Minnesota. The passage of divorcement legislation in this state could jeopardize these volumes.

Neither state or federal divorcement law gets at the crux of the matter. The nonbranded independent marketing category, especially the national retail merchandizer, is at least as competitive as the refiner marketer. All evidence suggests that the national retail merchandisers are extremely price competitive and a major contributing factor to the competitive woes of the traditional service station dealer".

Washington, 1986 - "Our conclusion from the facts mentioned above and those presented during the course of the study is that the market is heavily dominated by the major refiners and that the presence of company-operated stores provide these major corporations with the means to further entrench upon the market shares of independent gasoline dealers. It has been stated by all parties involved that the lessening of competition will have an adverse effect on consumer prices in the future".

Arizona, 1988 - "The State Attorney General's Office, Antitrust Division, and the Federal Trade Commission, Bureau of Competition, testified that they have no knowledge or evidence of mischief or predatory pricing practices in this State. The Attorney General's Office further stated that current laws are more than adequate to handle any possible case involving predatory pricing or anticompetitive behavior. In addition, evidence supports the fact that any legislation in this area will increase prices".

Virginia, 1991 - "On the issue of divorcement, the subcommittee rejected by a 2 to 1 margin any move toward implementation of full and total retail divorcement in Virginia. The vote of the subcommittee reflected the concern that total retail divorcement would reduce competition in the market place and therefore limit consumers' freedom of choice in the products they buy".

The Department of Fiscal Services in Maryland, the state which in 1979 made effective what is considered to be the prototype divorcement law, concluded in 1988 that "divorcement has resulted in higher gasoline prices for consumers, the magnitude of which can not be quantified".

IV. Unfair Trade Practices - The Federal Trade Commission Act[1]

1. The Commission Mandate

Widespread dissatisfaction with judicial administration of the Sherman Act resulted in the passage of the Federal Trade Commission Act, which established an administrative body patterned upon the highly respected Interstate Commerce Commission. The Federal Trade Commission administers and enforces the Federal Trade Commission Act, which prosecutes unfair methods of competition and unfair or deceptive practices affecting commerce, and certain sections of the Clayton Act. The Federal Trade Commission Act was designed to provide for situations "where governmental control can be secured only by the 'board' or 'commission' form of legislation." The Congressional obligation relative to the Act is satisfied if the law announces the legislative policy and establishes definite "standards while leaving to the commission the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply".

[1] Antitrust Laws and Trade Regulation, J.O. Von Kalinowski, and The Law of Unfair Competition, Trademarks and Monopolies, Rudolph Callman.

Basic rules of administrative law require that the commission's decisions be upheld if supported by substantial evidence. To satisfy the substantial evidence requirement, the Commission must define permissible modes of behavior with clarity and fairness.

In order to provide the basis of substantial evidence required, the Commission issues "industry guides." The guides are a series of rules setting out specific practices and methods of operation which are permissible.

In general, the Federal Trade Commission Act proscribes unfair methods of competition and unfair practices.

Violations of the Sherman or Clayton Acts are violations of the Federal Trade Commission Act.

There is no independent requirement in the FTCA that acts complained of harm or threaten to harm competition.

2. Unfair Methods of Competition

The phrase "unfair methods of competition" is not defined with precision. The impossibility of establishing a precise meaning for the phrase has been recognized by the Supreme Court, which has characterized the concept as one which is "flexible...with evolving content." Congress recognized the inadvisability of cataloging the various competitive practices it deemed unfair. The ingenuity of the unscrupulous rival would defeat the value of any such index. It has been said, in regard to this statute, that: "In the nature of things, it was impossible to describe and define in advance just what constituted unfair competition. In the final analysis unfair competition becomes a question of law after the facts are ascertained".

It is recognized, however, that the phrase "unfair methods of competition" generally embraces any act which violates the antitrust laws and any act which infringes upon the rules of fair competition, as that term is commonly understood. The phrase clearly imparts something broader than the common law doctrine of "unfair competition," a broad area of the law which, itself, has not been clearly delineated by the courts.

The public policy that underlies the Sherman and Clayton Acts is the primary guideline for determining whether specific acts are violations of Section 5 of the Federal Trade Commission Act.

Absent proof of an antitrust violation or evidence of conduct that is collusive, coercive, predatory or exclusionary, business practices are unfair only if they have an anticompetitive purpose or are unsupported by a legitimate business reason.

Summarizing the relationship of Section 5 of the Federal Trade Commission Act to the antitrust laws, especially to the Sherman and Clayton Acts:

(1) Section 5 is intended to overlap the antitrust laws - to allow another administrative body to provide additional enforcement.

(2) Section 5 is also designed to remedy possible loopholes in the antitrust laws, by prohibiting practices that:

(a) have not yet ripened into antitrust violations; or

(b) have the same effect as an antitrust violation, but do not fulfill all the requisites for a specific antitrust violation;

(3) Section 5 may be used to attack practices that appear to violate the public policy and economic principles underlying the antitrust laws, even though such practices have not yet been declared illegal, or would not be held to violate the antitrust laws.

The Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. The Commission need not prove that the act was intentionally unfair or deceptive or that a competitor, a consumer or any other member of the public was injured or endangered by the unfair practice.

3. Investigative Powers

The Commission is authorized to collect information on and investigate the business of any entity.

To these ends, therefore, the Commission is authorized to investigate business conditions and require businesses to file annual or special reports or answer specially prepared questionnaires, under oath or otherwise.

The Fourth Amendment to the Constitution outlaws unreasonable search and seizure, and the Fifth Amendment provides that no person may be forced to testify against himself in any criminal case not be deprived of property without due process of law. Administrative investigations must be designed to achieve a legitimate purpose and must be based upon clear congressional authority.

The filing of a complaint or, at least, the suspicion of a violation of the law has been said to be a condition precedent to the Commission's power to initiate an investigation; but this was never specifically held.

More recently it has been held that the agency's power to seek information concerning wrongs done to consumers does not permit it to seek information concerning the advisability of pursuing a remedy for those wrongs.