



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 1454, H.D. 1, RELATING TO THE PETROLEUM INDUSTRY.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, March 28, 2012 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): David M. Louie, Attorney General, or
Rodney I. Kimura, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General appreciates the intent of providing greater access to affordable fuel, but has significant legal concerns with the bill as drafted.

This bill requires any motor vehicle fuel manufacturer, distributor, refinery, or jobber who sells gasoline using a volume discount to offer the same volume discount to any gasoline service station and/or group of gasoline service stations. To foster the ability of gasoline service stations to obtain the volume discounts, the bill authorizes the use of cooperative purchasing agreements and declares that such agreements and the participants are not in violation of the antitrust laws.

The wording requiring that the "same volume discount" be provided to any gasoline service station raises issues regarding its application. The bill does not prohibit a seller from imposing standard volume requirements in terms of gallons and frequency of deliveries as a condition to obtaining the volume discount. Thus, a gasoline station and even a group of stations may not be able to obtain the discount if their operating conditions do not match those associated with the volume discount.

If the bill is interpreted (or amended) to require that "same volume discounts" means that the discount must be provided regardless of the volume or frequency of deliveries, then the term "same volume discount" is a misnomer because the discount will not be the same as initially administered nor based on volume.

The volume discount provision also raises issues associated with branded versus unbranded gasoline and dealers. For example, if a seller of branded gasoline sells branded gasoline via a volume discount to its branded dealers, is such seller obligated to give the same discounts to unbranded dealers, and if so, for branded or unbranded gasoline?

If a seller of unbranded gasoline sells unbranded gasoline via a volume discount to unbranded dealers, is such seller obligated to give the same discounts to branded dealers, and if so, for what type of gas, unbranded or branded?

We also note that the volume discount requirement assumes that any such discount given today will continue into the future. However, it is not too far-fetched to fathom a seller using some other method of providing a lower price besides a volume discount and thus escaping the reach of this bill.

On the matter of cooperative purchasing arrangements, we are concerned that this bill may not have the desired effect because the conduct it authorizes could still be subject to scrutiny under federal antitrust law.

Both state and federal laws govern what constitutes a violation of the antitrust law. Certain private conduct permitted by state law might violate federal law. However, under the “state action” doctrine, private parties may be immune from federal antitrust scrutiny if their anticompetitive acts are the product of state regulation.

In order for anticompetitive conduct to be shielded from the antitrust laws, this doctrine requires that the conduct be pursuant to a clearly articulated and affirmatively expressed state policy, and actively supervised by the State.

This bill declares that the contemplated agreements and their participants are not in violation of the antitrust laws. It does not, however, provide for any active supervision of the conduct of the participants by the State.

Thus, this bill may leave the agreements and the participants subject to investigation by the United States Department of Justice and the Federal Trade Commission under the federal antitrust laws, and subject to prosecution, depending on the agreements established.

Finally, one of the purposes of the cooperative purchasing agreements is to lower costs to consumers. The bill, however, does not address the extent to which any cost savings realized from the cooperative purchasing agreements must be passed on to consumers in order for the agreements to be deemed compliant. Is it sufficient if a gasoline station only passes on savings for a day in a year, or only five percent of the savings? Is the cooperative agreement invalid if the gasoline station fails to pass on any savings to consumers?

For these reasons, if the Committee choose to move the bill, we respectfully ask it to address the aforementioned concerns.