



House of Representatives

General Assembly

File No. 143

February Session, 2010

Substitute House Bill No. 5220

House of Representatives, March 25, 2010

The Committee on General Law reported through REP. SHAPIRO of the 144th Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

AN ACT CONCERNING COMPETITION IN THE MOTOR FUEL INDUSTRY.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective January 1, 2011*) (a) Any person
2 conducting business in the motor fuel industry in this state that files
3 merger, acquisition or any other information regarding market
4 concentration in the motor fuel industry in this state with the Federal
5 Trade Commission or the United States Department of Justice shall
6 simultaneously file a copy of the same information with the Attorney
7 General of this state. For purposes of this section, "motor fuel" shall
8 have the same meaning as defined in section 14-327a of the general
9 statutes and "person" shall have the same meaning as used in
10 subsection (k) of section 1-1 of the general statutes.

11 (b) After reviewing information filed pursuant to subsection (a) of
12 this section, the Attorney General may measure the market
13 concentration and changes in market concentration in the motor fuel
14 industry in this state due to such merger, acquisition or any other

15 information. Such measurement shall include the use of the
16 Herfindahl-Hirschman Index.

17 (c) If the Herfindahl-Hirschman Index score determined pursuant to
18 subsection (b) of this section is: (1) Between one thousand and one
19 thousand eight hundred points and increases by more than one
20 hundred points due to information disclosed pursuant to subsection
21 (a) of this section, or (2) equal to or greater than one thousand eight
22 hundred points and increases by more than fifty points due to
23 information disclosed pursuant to subsection (a) of this section, the
24 Attorney General may issue in writing and cause to be served upon
25 any person, by subpoena duces tecum, a demand requiring such
26 person to submit to him or her documentary material relevant to the
27 scope of the Attorney General's investigation. For the purposes of this
28 section, "documentary material" includes, but is not limited to, any
29 information in a written, recorded or electronic form.

30 (d) Such demand shall (1) state the nature of the investigation, (2)
31 describe the class or classes of documentary material to be reproduced
32 with such definiteness and certainty as to be accurately identified, and
33 (3) prescribe a date that allows a reasonable time to assemble such
34 documentary material for compliance.

35 (e) (1) All documentary material furnished to the Attorney General,
36 his or her deputy or any assistant attorney general designated by the
37 Attorney General, pursuant to a demand issued under subsection (c) of
38 this section, shall be held in the custody of the Attorney General, or the
39 Attorney General's designee, and shall not be available to the public.
40 Such documentary material shall be returned to the person furnishing
41 such documentary material upon the termination of the Attorney
42 General's investigation or final determination of any action or
43 proceeding commenced thereunder.

44 (2) All documentary material or other information furnished
45 voluntarily to the Attorney General, his or her deputy or any assistant
46 attorney general designated by the Attorney General that relates to an
47 investigation of the Attorney General pursuant to this section and the

48 identity of the person furnishing such documentary material or other
49 information shall be held in the custody of the Attorney General, or the
50 Attorney General's designee, and shall not be available to the public.
51 Such documentary material or other information shall be returned to
52 the person furnishing such documentary material or other information
53 upon the termination of the Attorney General's investigation or final
54 determination of any action or proceeding commenced thereunder.

55 (f) No such demand shall require the submission of any
56 documentary material, the contents of which would be privileged or
57 precluded from disclosure if demanded in a grand jury investigation.

58 (g) The Attorney General, his or her deputy or any assistant
59 attorney general designated by the Attorney General may, during the
60 course of an investigation of any antitrust violations by any person, (1)
61 issue in writing and cause to be served upon any person, by subpoena,
62 a demand that such person appear before him or her and give
63 testimony as to any matters relevant to the scope of the alleged
64 violations. Such appearance shall be under oath and a written
65 transcript made of the same, a copy of which shall be furnished to such
66 person appearing and shall not be available for public disclosure; and
67 (2) issue written interrogatories prescribing a return date that allows a
68 reasonable time to respond, which responses shall be under oath and
69 shall not be available for public disclosure.

70 (h) In the event any person fails to comply with the provisions of
71 subsections (c) to (g), inclusive, of this section, (1) the Attorney
72 General, his or her deputy or any assistant attorney general designated
73 by the Attorney General may apply to the superior court for the
74 judicial district of Hartford for compliance, which court may, upon
75 notice to such person, issue an order requiring such compliance, which
76 shall be served upon such person; and (2) the Attorney General, his or
77 her deputy or any assistant attorney general designated by the
78 Attorney General may also apply to the superior court for the judicial
79 district of Hartford for an order, which court may, after notice to such
80 person and hearing thereon, issue an order requiring the payment of

81 civil penalties to the state in an amount not to exceed five thousand
82 dollars.

83 (i) The Attorney General shall cooperate with officials of the federal
84 government and the several states, including, but not limited to, the
85 sharing and disclosure of information and evidence obtained under
86 the purview of this section.

87 (j) Service of subpoenas ad testificandum, subpoenas duces tecum,
88 notices of deposition and written interrogatories, as provided in this
89 section, may be made by: (1) Personal service or service at the usual
90 place of abode; or (2) registered or certified mail, return receipt
91 requested, a duly executed copy thereof addressed to the person to be
92 served at such person's principal place of business in this state or, if
93 such person has no principal place of business in this state, at such
94 person's principal office or such person's residence.

95 (k) A violation of subsection (a) of this section shall be deemed an
96 unfair or deceptive trade act or practice under subsection (a) of section
97 42-110b of the general statutes.

98 Sec. 2. Section 42-234 of the general statutes is repealed and the
99 following is substituted in lieu thereof (*Effective January 1, 2011*):

100 (a) As used in this section:

101 (1) "Energy resource" shall include, but not be limited to, middle
102 distillate, residual fuel oil, motor gasoline, propane, aviation gasoline
103 and aviation turbine fuel, natural gas, electricity, coal and coal
104 products, wood fuels and any other resource yielding energy;

105 (2) "Seller" shall include, but not be limited to, a supplier,
106 wholesaler, distributor or retailer involved in the sale or distribution in
107 this state of an energy resource;

108 (3) "Abnormal market disruption" refers to any stress to an energy
109 resource market resulting from weather conditions, acts of nature,
110 failure or shortage of a source of energy, strike, civil disorder, war,

111 national or local emergency, oil spill or other extraordinary adverse
112 circumstance;

113 (4) "Margin" means, for each grade of product sold, the percentage
114 calculated by the following formula: One hundred multiplied by a
115 fraction, the numerator of which is the difference between the sales
116 price per gallon and the rack price per gallon and the denominator of
117 which is the rack price per gallon;

118 (5) "Notice" means a posting made by the Attorney General
119 pursuant to subsection (d) of this section announcing the inception and
120 end date of any abnormal market disruption or the reasonable
121 anticipation of any imminent abnormal market disruption.

122 (b) No seller during any period of abnormal market disruption or
123 during any period in which an imminent abnormal market disruption
124 is reasonably anticipated shall sell or offer to sell an energy resource
125 for an amount that represents an unconscionably excessive price.

126 (c) Evidence that (1) the amount charged represents a gross
127 disparity between the price of an energy resource that was the subject
128 of the transaction and the price at which such energy resource was
129 sold or offered for sale by the seller in the usual course of business
130 immediately prior to (A) the onset of an abnormal market disruption,
131 or (B) any period in which an imminent abnormal market disruption is
132 reasonably anticipated, and (2) the amount charged by the seller was
133 not attributable to additional costs incurred by the seller in connection
134 with the sale of such product, shall constitute prima facie evidence that
135 a price is unconscionably excessive.

136 (d) The Attorney General shall post a notice on the home page of the
137 Internet web site of the office of the Attorney General announcing the
138 inception and end date of any abnormal market disruption or the
139 reasonable anticipation of any imminent abnormal market disruption.

140 (e) Notwithstanding the provisions of subsections (b) and (c) of this
141 section, it shall not be a violation of this section if a seller sells or offers

142 to sell motor gasoline during an abnormal market disruption or any
 143 period in which an imminent abnormal market disruption is
 144 reasonably anticipated if the seller's average margin for such motor
 145 gasoline during the longer of the following: (1) Any such period of
 146 abnormal market disruption or imminent abnormal market disruption,
 147 or (2) thirty days following the date notice was provided by the
 148 Attorney General pursuant to subsection (d) of this section, is not
 149 greater than such seller's maximum margin on the sale of such motor
 150 gasoline during the ninety-day period prior to the onset of the
 151 abnormal market disruption or period in which an imminent abnormal
 152 market disruption is reasonably anticipated.

153 [(d)] (f) This section shall not be construed to limit the ability of the
 154 Commissioner of Consumer Protection or the courts to establish
 155 certain acts or practices as unfair or unconscionable in the absence of
 156 abnormal market disruptions.

This act shall take effect as follows and shall amend the following sections:		
Section 1	January 1, 2011	New section
Sec. 2	January 1, 2011	42-234

GL *Joint Favorable Subst.*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 11 \$	FY 12 \$
Consumer Protection, Dept.	GF - Revenue Gain	Potential	Potential

Note: GF=General Fund

Municipal Impact: None

Explanation

The bill results in a potential revenue gain to the state due to potential violations of the Connecticut Unfair Trade Practices Act (CUTPA) associated with the submittal of information concerning market concentration.

The Out Years

The potential revenue gain identified above would continue into the future subject to the number of violations.

OLR Bill Analysis

sHB 5220

AN ACT CONCERNING COMPETITION IN THE MOTOR FUEL INDUSTRY.

SUMMARY:

This bill requires any person conducting business in the motor fuel industry that files merger, acquisition or any other information regarding market concentration in this state with the Federal Trade Commission or the U.S. Department of Justice to simultaneously provide the same information to the attorney general. Failure to comply is an unfair trade practice.

It authorizes the attorney general to measure the market concentration and changes in concentration due to the merger or acquisition with the Herfindahl-Hirschman Index (HHI) (see BACKGROUND). If the HHI raises market concentration concerns the attorney general can request more information, which must remain confidential. Failure to comply with the investigation could result in civil penalties or court orders for compliance.

The bill requires the state to cooperate in its investigation with the federal government and other states, including sharing information and evidence it obtained. It prescribes the acceptable methods of providing service of the legal documents.

It also sets conditions on gasoline sales during abnormal market disruptions created by weather conditions, emergencies, and other adverse conditions.

EFFECTIVE DATE: January 1, 2011

HERFINDAHL-HIRSCHMAN INDEX (HHI)

Under the bill, if the HHI score (see BACKGROUND) raises antitrust concerns, the attorney general may investigate.

ATTORNEY GENERAL INVESTIGATION

The attorney general may demand, by subpoena, documentary material that includes written, recorded, or electronic information. The demand must state: (1) the nature of the investigation; (2) the types of documentary material to be reproduced, specific enough to allow the material to be accurately identified; and (3) a date that allows reasonable time to assemble materials for compliance. The attorney general cannot require any information that would be privileged or precluded from disclosure if demanded in a grand jury investigation.

The material submitted to the attorney general, whether by subpoena or voluntarily, must be held in the attorney general's custody and not be disclosed to the public. The material must be returned when the investigation ends or on final determination of any action or proceeding.

During an antitrust investigation under the bill, the attorney general may subpoena individuals to testify in matters relevant to the scope of the alleged violations. Such an appearance must be under oath, with a written transcript made. The transcript must be furnished to the person appearing, but not be publically disclosed. The attorney general may also issue written interrogatories with a reasonable time for response. These interrogatories must be also answered under oath and not made public.

The attorney general may apply to Hartford Superior Court for an order (1) requiring an individual to comply with the investigation or (2) imposing a civil penalty of up to \$5,000 on an individual who fails to comply. The court may order compliance upon notifying, and serving the order on, the person. It may impose the penalty after giving notice and conducting a hearing.

Subpoenas, notices of deposition, and written interrogatories may be served (1) on the person or at his usual residence or (2) by

registered or certified mail, return receipt requested, with a copy addressed to the person to be served at his or her (a) principal place of business in Connecticut, (b) principal office, or (c) home.

ABNORMAL MARKET DISRUPTION

The bill requires the attorney general to post a notice on his or her website announcing the beginning and end of any abnormal market disruption or a reasonably anticipated imminent abnormal market disruption.

By law, an “abnormal market disruption” refers to any stress to an energy resource market resulting from weather conditions, acts of nature, failure or shortage of a source of energy, strike, civil disorder, war, national or local emergency, oil spill, or other extraordinary adverse circumstance.

Under current law, sellers may not sell gasoline for an unconscionably excessive price during a period of abnormal market disruption or reasonably anticipated period of abnormal disruption. Prima facie evidence that a price is unconscionably excessive exists when the price is grossly disparate to the price charged in the usual course of business immediately before the disruption or anticipated disruption, and the price increase is not attributable to the seller’s costs related to sale of the product.

Under the bill, a seller may sell gasoline during an abnormal market disruption or when an abnormal market disruption is reasonably anticipated if his average margin during the longer of either (1) the abnormal market disruption or imminent disruption or (2) 30 days following the attorney general’s notice date, is no greater than the seller’s maximum margin during the 90 days prior to the abnormal disruption or imminent disruption.

The bill defines “margin” to mean, for each grade of product sold, the percentage calculated by the following formula: 100 multiplied by a fraction, the numerator of which is the difference between the sales price per gallon and the rack price per gallon and the denominator of

which is the rack price per gallon. "Rack price" has the same meaning as wholesale price.

BACKGROUND

Herfindahl-Hirschman Index (HHI)

The HHI is a commonly accepted measure of market concentration. It takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases, with a maximum score of 10,000, which is a pure monopoly. (U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* § 1.151 (1997)).

Markets in which the HHI is between 1000 and 1800 points are considered moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in moderately concentrated markets and 50 points in concentrated markets raise antitrust concerns.

Connecticut Unfair Trade Practices Act (CUTPA)

The law prohibits businesses from engaging in unfair and deceptive acts or practices. CUTPA allows the Department of Consumer Protection commissioner to issue regulations defining what constitutes an unfair trade practice, investigate complaints, issue cease and desist orders, order restitution in cases involving less than \$5,000, enter into consent agreements, ask the attorney general to seek injunctive relief, and accept voluntary statements of compliance. It also allows individuals to sue. Courts may issue restraining orders; award actual and punitive damages, costs, and reasonable attorneys fees; and impose civil penalties of up to \$5,000 for willful violations and \$25,000 for violation of a restraining order.

COMMITTEE ACTION

General Law Committee

Joint Favorable Substitute

Yea 19 Nay 0 (03/16/2010)