

Gale's Wilbraham Chamber of Commerce Speech
Delivered Friday, October 17, 2003 at the Elmcrest Country Club

LEVEL PLAYING FIELD LEGISLATION: HOUSE 1430

There continues to be much discussion about our country losing jobs overseas. You may remember the jokes about NAFTA and its predecessor, the GATT. When governmental policy is pursued purely on economic terms, then lowering tariffs and trade barriers without additional protections is fine but there are other important considerations, too, like the millions of jobs lost in this country. For these and other reasons, the jury is out on whether these legislative efforts are promoting a global economy helps or hurts us as a nation in the short and long term. However, there is no question that jobs have been lost.

But, closer to home we're losing jobs right here in the Commonwealth and right here in Hampden County. I'm not talking about the inevitable, cyclical loss of jobs occasioned by the current recession or sea changes such as the loss of all our manufacturing base to countries with cheap labor, I'm talking about something more pervasive—something so ingrained now in our everyday lives that we don't think or talk about much but maybe should be talking about more and unlike things beyond the state legislature, may be able to do something about—at least where certain small business owners are concerned.

It's no secret that small business is the backbone of the American Economy. Small Business owners make America strong. Small businesses account for the 60-70% of the new job creation yearly and we heard the President speak about the importance of small business just last week. But are our small businesses on the endangered species list? Are the big chain, so called 'big box', mega retailers driving smaller businesses out? Beyond question this happens everyday.

This is not news: After all, more than 30 years ago we watched downtown shopping districts disappear from city after city, the then emerging chain stores and malls put the 5 and 10's out of business, mom and pop grocery stores are largely long gone and forgotten except in ethnic neighborhoods, local hardware stores are struggling as are local drug stores. Salon services, car insurance, etc., the mega retailers now do it all! All are victims of the free market which ostensibly has benefited the ultimate consumer.

The latest groups of small business owners battling for survival are the local, independent gas retailers; there are approximately 2600 gasoline and diesel fuel stations in Massachusetts. Most of these stations are independently owned and many are small, family-owned businesses. They offer customers competitive prices, services and convenience. Some of the big chains have, long ago, gone into tire sales and auto repairs, in direct competition with independent service stations, but those Independents were able to stay afloat by providing better service and pumping gasoline. However, big chains are now pumping gasoline and pricing it as a loss leader, undercutting virtually every independent retailer in the target area.

Several western Mass independent station owners have tried to fight back by cutting the price of gasoline at their pumps and advertising the cheapest gas in the area. In fact there was a piece of news the other night about a station on Springfield Street in Agawam, where the owner had cut the price of gasoline to \$1.31 per gallon, the cheapest gas for many miles around. Of course, there were lines at his pumps. People from Connecticut, Springfield, all over in fact were filling up. Various people interviewed thought it was splendid. One young woman, who appeared to be about 20 years old was the only person interviewed to express concern about what would happen to the price of gas when the station across the street went out of business. The other question is how long the independent Agawam station owner can afford to sell gasoline at that price? Does anyone seriously think he can outlast the mega chain selling below cost gas?

But again, loss leaders are not a new marketing tool. For decades businesses have been putting items on sale at or below cost simply to bring people into their store with the hope that they will buy regular and overpriced items. However, the world of marketing has changed in those decades and the question is now whether a fairly common marketing tool in the hand of a small, independent retailer becomes a bludgeon in the hands of a mega retailer. Perhaps we need to consider the nature of the product being sold below cost. Are all loss leaders the same? Are the same interests at stake when a supermarket sells brand products below cost as when a mega retailer sells gasoline below cost? Is there something different about selling gasoline, a non-renewable resource that literally drives our economy? A product everyone needs everywhere in the country all the time? A product tied to national security? Should selling paper towels as a loss leader be treated the same as selling gasoline as a loss leader under anti-trust law?

And, in fact, these are the arguments the independent gasoline retailers are making. They allege that the big chains' use of gasoline as a loss leader is predatory, anti-competitive conduct, which translated means the mega marketers are using their enormous power to sell gasoline below cost with the express intent of putting the independents out of business. If true, this would be a clear violation of federal and state anti-trust law. Independent gasoline retailers complain that the mega marketers don't cut prices across the board but rather start by studying communities and targeting those, initially in rural areas, where they think they can gain control.

The independents point to California where there was a two-year-long gasoline price war. For two years a major refiner declared war on the independents under very suspect circumstances. During those two years, Californians enjoyed among the lowest gasoline prices in the country. Once the independents were gone and market dominance was established, predictable, prices rose, and the California gasoline prices are now among the highest in the nation.

The reality is that small business petroleum marketers in Massachusetts and around the country are being threatened and in some cases devastated by predatory pricing. Well, one "western" Mass legislator, Paul Kujawski of the 8th Worcester

(Webster) has filed legislation that attempts to help the Commonwealth's independent gasoline retailers by putting teeth into the existing law.

House 1430, "An Act Further Regulating the Unfair Retail Sale of Motor Fuel at Prices Below Cost" also known as the "level playing field legislation" does not prohibit the big boxes from selling gasoline nor does it fix a retail price for gasoline. It just provides additional enforcement mechanisms and guidelines for existing law. In fact, it has been against the law in Massachusetts for more than 50 years to sell gasoline at a price below the cost to the retailer (MGL Chapter 94 Sec. 295P). But with the advent of the mega marketers and increasing vertical integration, the definition and identity of a retailer and computing what is below cost is no longer clear. This by itself would create enforcement problems and law without enforcement is no law at all.

What House 1430 does is create a rebuttable presumption that the cost of doing business is 15% of the retail dealer's acquisition cost and that the acquisition cost of the gasoline plus 15% of this cost should be the legal minimum retail price for gasoline in the Commonwealth; the law does not lock any retailer into selling gasoline at this specific figure. Remember it is a rebuttable presumption, which means that any retailer may set a lower price upon offering evidence that his cost of doing business is actually lower than 15%. Then, the sale price would be set accordingly. The bill attempts to ensure that there is an honest accounting of the actual retail cost of gasoline. If the bill is passed, will it help? Given the economies of scale enjoyed by mega marketers, perhaps they will easily prove their cost of doing business is below 15%.

Ensuring that small businesses survive and prosper is an important public policy objective. Small businesses are the lifeblood of our economy and their independence makes them the guardians of our democracy. Small business owners generally stay very close to their elected officials and, unlike many executives in large corporations, have no qualms about telling their representatives what they're doing wrong. But to preserve small businesses, we may have to rethink our notions about how a free market should operate, first, on a local level, when we stop to think that 50% of all gasoline sold in Massachusetts is sold by independent retailers. If anyone thinks these independents can go the way of the dinosaur without fundamentally changing our local Mass economies and our lives, they are wrong. And second, on a national level, where cheap gas—and we have the cheapest gasoline prices in the world—thwarts conservation efforts and encourages our dependence on foreign oil, a dependence which has brought our nation great heartache on more than one occasion.

Lastly, the concept of a "free" marketplace embraces the notion that businesses that are non-competitive because they are poorly run or inefficient should close their doors and it is in the consumers' best interests when they do so. The concept of a "fair" marketplace embraces the notion that the 800-pound gorilla should not be able to destroy otherwise efficient, well-run businesses simply because it is bigger and wealthier. It is long established that ultimately, the 800-pound gorilla will turn on the consumer too! Once competitors are gone or significantly weakened, customer choice and the competitive pressure to manage efficiently and maintain low prices and better service will

be gone. Remember, in our free market model, the consumer is supposed to be the winner every time but not just in the short term. The business practices of mega marketers will challenge our notions about free and fair marketplaces well in the 21st century. I would be interested in what you think about this issue and this proposed legislation. And I thank the Chamber for the opportunity to be here this morning and Elmcrest for the great breakfast!