

## MEMORANDUM

TO: Karlene Fine, Executive Director, Industrial Commission

FROM: Dean J. Haas, Assistant Attorney General

DATE: April 18, 2006

ISSUE: Whether State contributions to funding a study of Williston Basin oil price differentials gives rise to anti-trust liability for the State.

CONCLUSION: Probably not.

The Northern Alliance of Independent producers seeks state funding to study “factors that have influenced or limited the movement of North Dakota [oil] product to market, so appropriate responses (regulatory, public policy changes or otherwise) can be implemented.”<sup>1</sup> Producers in the Williston basin have been receiving about \$30 per barrel below NYMEX posted price. The price differential is blamed on a host of factors, including “loss of refining capacity in the Gulf Coast and Denver, increased production in the Williston Basin, soft seasonal markets for refined products in the region, and importation of Canadian crude.”

“The delivery system for oil products has a host of constraints and market factors that influence price. The delivery system is in large part a regulated activity. ... Much of the crude oil produced in North Dakota is transported by pipeline to the Tesoro refinery in Mandan, and other markets outside the state. Truck transportation is also a significant part of the transportation system and is less regulated. Trucks transport Canadian crude *into* North Dakota, while other Williston Basin crude is transported by truck back to Canada. ... [T]he negative consequences of the constraints are real ... and [it is believed] that a careful examination of the forces that are creating these price differentials is essential for carefully crafted solutions.”

State funding toward the study itself probably does not violate antitrust law because there is no unlawful purpose.<sup>2</sup> The State, like the federal government, is probably

---

<sup>1</sup> The study proposes to evaluate: “[1] the manner in which crude oil products are shipped in the region[;] [2] the markets to which ND crude oil is shipped, and influences upon those markets [;] [3] the manner in which allocation of capacity is made [;] [4] the current capacity to ship product and means of doing so [;] [5] the potential for future impacts on existing capacity [;] [6] the current response to transportation bottlenecks, the adequacy of those responses and recommendations of additional alternatives to consider[;] and, t]he engineering firm would do an assessment of all relevant factors and provide a report regarding its findings and its recommendations of possible responses.” NAIP March 31, 2006 Study Proposal, at 1.

<sup>2</sup> See *United States v. Container Corp.*, 393 U.S. 333, 337 (1969). While a civil violation occurs on proof of *either* an unlawful purpose *or an anticompetitive effect*, the State can probably protect itself by requiring contractual language noting that the purposes of the study are pro-competitive, and further establish a line of demarcation between the funding and implementation of solutions. And, intent must be shown in order to prosecute the matter criminally. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978).

immune<sup>3</sup> from liability for evaluating options that are legitimate object of study. See *Vest v. Waring*, 565 F.Supp. 674, 686 (D.C.Ga. 1983) (members of the National Eye Institute and the National Advisory Eye Council were considered to be federal employees and acted within scope of their authority as such in passing resolution calling radial keratotomy an experimental procedure and urging restraint in its use and, thus, were entitled to absolute immunity from liability in antitrust action in which it was alleged that they, along with other defendants, conspired to restrict ability of private ophthalmic surgeons to provide the surgery to willing patients.)

The Fifth Circuit explicitly held that the Sherman Act's prohibition on the making of agreements in restraint of trade is not applicable to the federal government in the exercise of its legitimate governmental functions. *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672, 675 (5th Cir.1968).

The State is probably immune from anti-trust liability for participating in a study—through funding—of the factors contributing to oil price differentials for producers in the Williston Basin.

---

<sup>3</sup> The state probably has several valid defenses to a suit for simply funding a study of the matter, including lack of proximate cause, and immunity. See N.D.C.C § 32-12.2-02(3)(b) (immunizing the state from liability for claims “based upon a decision to exercise or perform ... a discretionary function.”)