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Minnesota Commerce Committee

Opposition to HF 4143 for Putting the Interests of Corporations Ahead of Consumers

Rep. Zack Stephenson, Chair
Commerce Committee
Minnesota House of Representatives

Dear Chair Stephenson & Members of the Committee:

Thank you for the opportunity to submit testimony. We respectfully ask that you vote **against** HF 4143.

Including Defined Terms

We applaud the bill's sponsor for including defined terms. As any antitrust aficionado will tell you, antitrust laws are often written broadly with unclear terms. But HF 4143 bucks this trend and defines key terms like "monopoly power."

Equally commendable is the bill's incorporation of case law. Notably, the bill's definition of monopoly power carefully tracks well-established antitrust principles that have been reaffirmed by the Supreme Court many times over.[1]

But the bill's definitions could benefit from further amendment. While the bill's definition of monopoly power incorporates case law and economic learning, the other definitions do not. In particular, the bill's definition of "monopsony power" is far too broad and imprecise. To remedy this, the definition should be modeled after the definition of monopoly power.[2]

Promoting Consumer Welfare

The bill is ostensibly aimed at "updating" Minnesota's unilateral conduct statute, but it unfortunately undercuts the law's pro-consumer emphasis—making the viability of corporations, not benefits to consumers, the primary concern. For example, in Section 4, the bill amends the state's anti-monopoly law to prohibit consideration of "procompetitive effects." Since procompetitive effects are by definition consumer benefits, this provision guts the law's proconsumer substance.

Under existing law, monopoly power is not unlawful. Instead, antitrust laws outlaw the use of anticompetitive practices to gain, maintain, or grow monopoly power. In other words, our antitrust regime isn't concerned with a business's size; it's concerned with its conduct. And so long as its conduct benefits consumers, the monopolist doesn't run afoul of the

[1] *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as "the power to control prices or exclude competition").
[2] It is also unnecessary to define monopsony power because it is subsumed by monopoly power. For example, the Supreme Court has held that monopsonization is merely the mirror image of monopolization but on the buyer-side of the market. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007).

law. That sensible line encourages businesses to compete ruthlessly for the number one spot, benefiting consumers immensely in the process.

But HF 4142 throws that away completely. To be sure, it sensibly prohibits use of procompetitive evidence as a defense to nakedly illegal price-fixing conduct. But it sweeps far too broadly by excluding procompetitive considerations from *any* use of "monopoly or monopsony power to ***affect*** competition."

Because the bill doesn't define what "affect competition" means, and doesn't limit consideration to anticompetitive effects, it will punish successful businesses, opening them up to meritless lawsuits from rivals who claim they "affect[ed] competition." This in turn will require the courts to develop a new body of case law, since American antitrust law condemns only anticompetitive conduct.

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While HF 4143 sensibly retains much of Minnesota's existing antitrust law, which protects consumers, it unfortunately undermines the law's consumer protections through unnecessary changes. To ensure the law protects consumers and the benefits they deserve from competitive marketplaces, Committee members should **not** advance HF 4143.

We thus respectfully ask that the Committee vote **against** HF 4143.

Thank you for the opportunity to testify, and please contact me if you have any questions or concerns.

Respectfully submitted,

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