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Testimony in Support of LD 1815, An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers

Senator Curry, Representative Roberts, and honorable members of the Joint Standing Committee on Innovation, Development, Economic Advancement and Business, my name is Christina Moylan, I'm an Assistant Attorney General and the Chief of the OAG's Consumer Protection Division. I am here today to testify in partial support of L.D. 1815, An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers. I want to thank the sponsor for engaging with us in the development of this bill and including several provisions that we requested to enhance our ability to enforce these laws." Additionally, L.D. 1815 proposes to establish an "abuse of dominance" standard for illegal antitrust conduct, which my office is neither for nor against.

Section 1 – Federal Premerger Notification to the Attorney General

Section 1 of the bill would require any person conducting business in Maine that must provide a premerger notification to federal antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act (commonly referred to as an HSR Notice) to simultaneously provide notification to my office. An HSR Notice is required if the value of the transaction exceeds a certain threshold, currently $111.4 million. My office supports Section 1, as it would facilitate our review of larger transactions in conjunction with review by federal antitrust enforcers. My office does have one request with respect to Section 1: that it be located within the antitrust chapter of Title 10, preferably as a new section 1102-B, rather than within Title 5, Chapter 9.

Sections 3 and 5 – Increases to Maximum Civil Penalty Amounts

Sections 3 and 5 of the bill were included at the request of my office and would increase the maximum civil penalty amounts for violations of antitrust laws. Section 3 increases the maximum civil penalty for violations of 10 M.R.S.A. §§ 1101 and 1102 from $100,000 to $250,000. The amount was last increased over 30 years ago in 1991. Section 5 increases the maximum penalty for violating 10 M.R.S.A. § 1109, which requires the buyer of a retail heating oil or gasoline business to provide notice to the Attorney General of the intended acquisition at least 30 days prior to closing, from $10,000 to $50,000. This amount has never been increased since adoption in 1989. Increasing these civil penalty amounts will encourage compliance and help offset the costs of my office's antitrust investigations and actions for noncompliance.

Section 4 – Increasing the Notice Period for Retail Heating Oil and Gasoline Business and Asset Acquisitions

Section 4 of the bill was also requested by my office. This section amends 10 M.R.S.A. § 1109 to require 90 days' prior notice of the intended acquisition of a retail heating oil or gasoline business. The current requirement is only 30 days. Although 10 M.R.S.A. § 1109 does not require the Attorney General to reach a conclusion within 30 days (or at all), the current 30 days often leads to an expectation that the review can and will be completed in that 30-day window, which is not always possible. A 90-day period more accurately reflects the time needed to conduct a thorough review of the potential anticompetitive effects of an acquisition.

Section 6 – Creating an "Abuse of Dominance" Antitrust Standard

Section 6 would create an "abuse of dominance" antitrust liability standard. The "abuse of dominance" concept is based on European competition law and has not yet been adopted in any U.S. jurisdiction (federal or state). Maine would therefore be the first and perhaps only state to have such an antitrust law. Although my office does not take a position on Section 6, I do note that some of the covered conduct is unlawful under existing antitrust law. However, practices that are not illegal under existing antitrust law may become unlawful under the "abuse of dominance" standard for certain larger businesses.

Perhaps the most impactful provision of Section 6 of the bill is new section 1120-K(7) which would establish that evidence of procompetitive effects is not a defense to an abuse of dominance claim and does not offset or cure harm to competition. This is a departure from existing antitrust law, which requires courts to consider pro-competitive impacts or justifications when determining whether the conduct of a monopolist is unlawful.

Importantly, this bill would not displace or modify Maine's existing anti-monopoly law, 10 M.R.S.A. § 1102, or the "unfair methods of competition" prong of the Unfair Trade Practices Act, 5 M.R.S.A. § 207. LD 1815 would therefore supplement but not replace the existing laws that provide my office with strong tools to combat unlawful antitrust conduct by businesses with dominant market positions. Thanks for your time and consideration.