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Law and Legislation Committee
Sacramento, CA

Honorable Members in Session:

SUBJECT: SACRAMENTO SERVICE STATION FAIR DEALING ORDINANCE

LOCATION: Citywide

SUMMARY

This report, requested by Councilmember Serna, presents for Law and Legislation Committee review the "Sacramento Service Station Fair Dealing Ordinance." The Ordinance would require service station franchisors and franchisees to act toward each other "fairly and reasonably with due consideration for the effect that the act may have on the other party."

RECOMMENDATION

It is recommended that the Law and Legislation Committee review the proposed "Sacramento Service Station Fair Dealing Ordinance" and take action as the Committee deems appropriate.

BACKGROUND

Councilmember Serna asked the City Attorney to review the "Sacramento Service Station Fair Dealing Ordinance" in order to determine whether the City of Sacramento has the authority to enact the ordinance. Our office has concluded that the City has the authority to enact the ordinance, and that the subject matter of the ordinance is not preempted by federal or state law.

As proposed the ordinance would:

(1) Make findings about the importance of service stations to the public interest, the vastly superior economic and bargaining power held by petroleum franchisors in relation to their franchisees, and the increased attrition rate of independent franchisees.

(2) Provide that no party in a service station franchise relationship shall act toward the other party other than fairly and reasonably with due consideration for the effect that the act may have on the other party.

(3) Provide that any party in a franchise relationship may sue the other party for injunctive relief and actual damages within two years after the alleged failure to act fairly and reasonably.

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(4) Set forth rules of interpretation for a judge or jury to consider when determining whether the duty to act fairly and reasonably has been violated.

(5) Provide that the rights and obligations described in the ordinance may not be waived or released.

The ordinance is supported by the California Service Station and Automotive Repair Association, and its local affiliate, led and represented by John V. Hawthorne.

We are aware of the following opponents: ARCO, California Manufacturers Association.

FINANCIAL IMPLICATIONS

None.

POLICY CONSIDERATIONS


The type of regulation contained in this ordinance is not ordinarily dealt with at the local government level. Federal and state regulations govern the termination and transfer of service station franchises. Bills similar to this ordinance have been considered and rejected at both the federal and state levels. However, the City Council does have the authority to legislate in this area if it desires to do so.

MBE/WBE


None.

Respectfully submitted,

SHARON SIEDORF CARDENAS
City Attorney

By: 
DIANE B. BALTER
Deputy City Attorney

RECOMMENDATION APPROVED:


DAVID R. MARTINEZ,
Deputy City Manager

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Diane Balter, Deputy City Attorney
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Law and Legislation Committee
August 25, 1992
All Districts

ORDINANCE NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL

ON DATE OF _____

AN ORDINANCE ADDING CHAPTER _____ TO THE SACRAMENTO CITY CODE, RELATING TO SERVICE STATION FRANCHISE FAIR DEALING

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Chapter _____ is hereby added to the Sacramento City Code, to read as follows:

SACRAMENTO SERVICE STATION FRANCHISE FAIR DEALING ORDINANCE

§ ____ .101 Title.

This ordinance shall be known as the "Sacramento Service Station Franchise Fair Dealing Ordinance."

§ ____ .102 Findings.

The Sacramento City Council finds and declares each of the following:

- (a) That the distribution and sale of petroleum and related products through franchise marketing relationships in the City is vital to the general economy of this City and the public interest, welfare, and safety, and that it is therefore necessary to preserve, protect, and strengthen these relationships by defining more clearly the rights and obligations of the parties thereto.
- (b) That there is vastly superior economic and bargaining power held by petroleum franchisors in relation to their franchisees which has resulted in abuses of franchisees and other undesirable consequences, including onerous franchise requirements, unfair

treatment, financial hardship, and a high attrition rate among franchisees. This disparity of economic and bargaining power has also adversely impacted the public welfare and safety by decreasing the quality, variety, and extent of products, services, and other amenities, including the availability of emergency road and repair services, available to people of this City and the motoring public. Particularly affected by this disparity have been the elderly, the handicapped, and other members of the public who regularly depend on the services offered by service station franchisees.

Of equal importance has been the negative impact upon the existence and growth of independent, small businesses. The increased attrition rate of these independent franchisees has harmed the economy of the City by decreasing its tax revenue, increasing unemployment, and decreasing the availability of skilled and personalized service which tends to result when service station franchisees have remained in business over a course of time. Of potentially even greater harm, however, is the reduction of the social and political benefits to be derived in a society which fosters and encourages the growth of small and independent businesses.

- (c) That in a franchise relationship, both the franchisor and the franchisee contribute to and benefit from the overall viability and profitability of the business, and that if widespread abuses and other undesirable consequences are to be avoided and the petroleum franchise relationship is to function successfully, each party in the relationship must act in a fair and reasonable manner towards the other and have confidence that he or she will in turn be treated fairly and reasonably.
- (d) That there exists between the parties in a petroleum franchise relationship mutual obligations under which each party has a duty to act fairly and reasonably with due consideration for the effect that his or her act may have on the other party.

§ ____ .103 Definitions.

For purposes of this Ordinance, the following terms shall have the meanings set forth below:

- (a) **"Act"** means any act or omission, practice, course of conduct, implementation of policy, or any other behavior having an impact or effect upon the other party or potentially having the impact or effect.
- (b) **"Affiliate"** means any person who, other than by means of a franchise, controls, is controlled by, or is under common control with, any other person.
- (c) **"Distributor"** means any person, including any affiliate of such person, who:

- (1) purchases motor fuel for sale, consignment, or distribution to another; or
 - (2) receives motor fuel on consignment for consignment or distribution to his or her own motor fuel accounts or to accounts of his or her supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.
- (d) **"Franchise"** means any contract between a refiner and a distributor, between a refiner and a retailer, between a distributor and another distributor, or between a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by the refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits the use. The term "franchise" includes any of the following:
- (1) Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark owned or controlled by the refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits the occupancy.
 - (2) Any contract pertaining to the supply of motor fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned, or distributed under a trademark owned or controlled on that date by a refiner.
 - (3) The unexpired portion of any franchise, as defined by subdivisions (1) and (2) of this subsection, which is transferred or assigned as authorized by the provisions of the franchise or by any applicable law which permits the transfer or assignment without regard to any provision of the franchise.
- (e) **"Franchise relationship"** means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise and includes the respective obligations and responsibilities which result from any agreements or arrangements, in addition to the franchise, between the franchisor and franchisee which provide for, or relate to, the sale of goods or services to the public.

- (f) **"Franchisee"** means a retailer or distributor who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.
- (g) **"Franchisor"** means a refiner or distributor who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.
- (h) **"Motor fuel"** means gasoline, diesel, and any other fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads and highways.
- (i) **"Party"** means a party in a franchise relationship.
- (j) **"Refiner"** means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of those persons.
- (k) **"Service station"** means any establishment where motor fuel is sold to the general public for ultimate consumption.

§ ____ .104 Duty to Act Fairly and Reasonably.

No party in a franchise relationship shall act towards the other party other than fairly and reasonably with due consideration for the effect that the act may have on the other party.

§ ____ .105 Right of Party to Bring Action.

Any party in a franchise relationship who has been injured, or who would suffer injury by reason of a violation of Section ____ .104, may maintain an action in any court of competent jurisdiction for appropriate relief, including an action for a declaratory judgment, injunctive relief to prevent, restrain, or enjoin such violation or threatened violation and for actual damages. Any action under this section shall be brought within two (2) years after the alleged violations occurred.

§ ____ .106 Rules of Interpretation: Factors Employed in Determining Whether Act is Violative of Duty to Act Fairly and Reasonably.

In determining whether any act or practice complained of is violative of Section ____ .104, the court or jury, in the case of a jury trial, shall give consideration to all of the following factors:

- (a) Comparative impact on the parties. The comparative impact that the act or practice complained of has, or may have, upon the parties, including not only its economic impact but also its effect upon the parties' safety, health, and welfare.
- (b) Availability of alternatives. Whether the act or practice complained of is necessary to achieve a reasonable business objective which is of material significance to the franchise relationship or whether the objective can be accomplished through alternatives less onerous to the complaining party.
- (c) Reasonable expectations of the parties. In determining what were, or are, the reasonable expectations of the parties, the court or jury, in the case of a jury trial, shall consider each of the following:
- (1) Any written agreements existing between the parties;
 - (2) Any oral agreements existing between the parties and any written or oral representations made by one party to the other party, notwithstanding any written agreement that is contrary to, or which purports to exclude consideration of, the oral agreements or representations;
 - (3) Any past course of dealings which has existed between the parties.
- (d) Longevity of the franchise relationship or business activity. The length that the franchise relationship or particular business activity affected by the act or practice complained of has been in existence.
- (e) Impact on the public. The effect that the act or practice complained of has, or may have, upon the public safety, health, and welfare, including, but not limited to, each of the following:
- (1) Its effect upon the quality, variety, and extent of automotive products and services, including emergency road and repair services, full service islands, and other amenities available to members of the motoring public, including the elderly and handicapped.
 - (2) The need of the motoring public and local community for various automotive products and services, including emergency road and repair services and full service islands, and other amenities;
 - (3) Whether these necessary automotive products, services, and amenities are otherwise available in the vicinity.

- (f) Local rules and ordinances. Pertinent local ordinances, rules, or regulations of this City, and any decisions or determinations made by a local governmental body which may be relevant to any of the issues before the court, or jury, in the case of a jury trial.
- (g) Intent of the ordinance. Whether the decision of the court will aid in furthering the intent of the Sacramento City Council in enacting this Ordinance.

§ ____ .107 Remedies: Attorney's Fees.

In any judicial proceeding under this Ordinance, and upon a judicial determination that a party in the franchise relationship has violated Section ____ .104 by failing to act in a fair and reasonable manner, the court shall:

- (a) Order the offending party to cease and desist from the unfair or unreasonable act;
- (b) Take such affirmative measures, including, but not limited to, awarding mandatory or prohibitive injunctive relief, declaratory relief, restitution, or damages, including punitive damages as may be available under law, as may be necessary to prohibit acts violative of Section ____ .104 or to make whole any party damaged as a result of a violation of Section ____ .104, or both; and in addition thereto, the court shall assess in favor of the plaintiff and against the defendant the costs of suit, including reasonable attorney's fees, unless such award would not be in the interests of justice or would not effectuate the purposes and intent of this Ordinance.

§ ____ .108 Applicability Limited to Motor Fuel Franchises Operating in This City.

This Ordinance shall apply only to parties in franchise relationships involving the retail sale of motor fuel within this City.

§ ____ .109 Ordinance to be applied so as to Avoid Preemption.

This Ordinance shall not be applied in any manner so as to render the application preempted by the Petroleum Marketing Practices Act (15 U.S.C. Sec. 2801, et seq.) or by other Federal and State law.

§ ____ .110 Impairment of Contracts to be Avoided.

This Ordinance shall not be applied so as to impair any contract existing as of the effective date of this Ordinance, in a manner violative of either Section 9 of Article 1 of the California Constitution or Section 10 of Article 1 of the United States Constitution.

§ ____ .111 Act Cumulative to Other Laws; Cumulative Penalties.

The remedies or penalties provided by this Ordinance are cumulative to each other and to the remedies or penalties available under all other applicable laws.

§ ____ .112 Provisions of Act Non-Waivable.

A person cannot, by waiver, release, or other agreement, waive any right or be relieved of any obligation or liability imposed by this Ordinance.

§ ____ .113 Liberal Interpretation of Ordinance.

This Ordinance shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.

DATE PASSED FOR PUBLICATION:

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK