

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
NOTICE OF SUBMISSION OF PROPOSED RULES TO PRESIDING OFFICERS OF
EACH HOUSE OF THE LEGISLATURE

NOTICE IS HEREBY GIVEN, pursuant to s. 227.19(2), Stats., that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection is submitting a final draft of proposed Clearinghouse Rule Number 98-097 to the presiding officer of each house of the legislature for standing committee review. The proposed rule amends Chapters ATCP 102 and ATCP 105 relating to motor vehicle fuel pricing.

Dated this 6 day of ~~December, 1998.~~ ^{Jan., 1999}

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER
PROTECTION

By Ben Brancel
Ben Brancel, Secretary



State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



DATE: December 23, 1998

TO: The Honorable Fred Risser
President, Wisconsin State Senate
Room 405, 119 Martin Luther King Jr. Blvd.
PO Box 7882
Madison, WI 53707-7882

The Honorable Scott Jensen
Speaker, Wisconsin State Assembly
211W, State Capitol
PO Box 8952
Madison, WI 53708-8952

FROM: Ben Brancel, Secretary *Ben Brancel*
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Proposed Rules Relating to Motor Vehicle Fuel Pricing (Clearinghouse Rule 98-097)**

In accordance with s. 227.19(2) and (3), Stats., the Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review. We are enclosing 3 copies of the final draft rule, together with the following report. In accordance with s. 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

Background

The department administers s. 100.30, Stats., known as the "Unfair Sales Act." The Unfair Sales Act prohibits sales below "cost" as defined in the law. The Unfair Sales Act applies to sales of motor vehicle fuel and other products. The department has adopted rules, under ch. ATCP 105, Wis. Adm. Code, to interpret the Unfair Sales Act.

1997 Wis. Act 55 made several changes to the Unfair Sales Act as it applies to sales of motor fuel. These changes took effect on August, 1, 1998:

- **"Cost" of motor vehicle fuel.** The Unfair Sales Act previously defined a retailer's "cost" of motor fuel to mean the retailer's invoice or replacement cost, less trade discounts, plus excise taxes and a presumptive 6% retail markup. (Since wholesalers were required to take a 3% wholesale markup, there was a compound wholesale and retail markup of 9.18%.) Under

Act 55, a retailer's "cost of motor vehicle fuel" is redefined to mean the greater of the following:

- "Cost" as previously defined (with minor changes).
- The "average posted terminal price" for the motor vehicle fuel terminal located nearest to the retail location, plus a markup of 9.18%. The "average posted terminal price" is a price published by a nationally recognized "petroleum price reporting service" plus transportation and excise taxes.
- **Notification requirement.** The Unfair Sales Act prohibits sales of motor vehicle fuel below "cost" as defined in the act. However, a seller may claim, as a defense, that the seller sold motor fuel below cost in order to meet the existing price of a competitor.

Under Act 55, a seller of motor vehicle fuel who wishes to establish a presumptive "meeting competition" defense must notify the department on the same day that the seller lowers the seller's price in response to a competitor's price. The seller must give the notice in the "form and manner required by the department."

- **Private Remedy.** The department may prosecute violations of the Unfair Sales Act. Act 55 also creates a private remedy for competing sellers of motor vehicle fuel who are injured by illegal sales below costs.

Rule Contents

Definitions

This rule clarifies terms used in Act 55 including: "close of business on the determination date," "terminal" and "terminal closest to the retail station."

Meeting Competition Defense

Under s. 100.30(2), Stats., a seller may price and sell merchandise below cost if the seller is acting in good faith to meet an existing price of a competitor. This rule clarifies that a seller may not claim to be meeting competition if the seller's price is lower than the competitor's current price. The department added this provision to the final draft rule in response to hearing testimony.

Average Posted Terminal Price

Under s. 100.30(2), Stats., a retailer's "cost" of motor vehicle fuel is based on the retailer's invoice or replacement cost or the "average posted terminal price" at the terminal located closest to the retailer, whichever is greater. In some cases, however, there is no "average posted terminal price" published for the closest terminal for the grade and type of motor vehicle fuel sold by the

retailer. The department modified the final draft rule to clarify that, in these cases, the retailer must use one of the following:

- The “average posted terminal price,” at the closest terminal, for the next closest grade and type of motor vehicle fuel.
- The “average posted terminal price” for the same grade and type of motor vehicle fuel at the closest terminal for which that price is published.

“Meeting Competition” Notice

This rule prescribes the form and content of the notice which a motor fuel seller must file with the department to establish a presumptive “meeting competition” defense under the Unfair Sales Act.

Under Act 55 and this rule, a person who files a “meeting competition” notice with the department to justify a below-cost selling price must send that notice before the “close of business” on the day that the person begins selling at that price. This rule clarifies that the “close of business” means the seller’s actual close of business or, if the business is open for 24 hours a day, the time at which the business day ends for accounting purposes.

Under this rule, a person must give a “meeting competition” notice in writing, by one of the following methods:

- By telefax. A seller is rebuttably presumed to have sent a telefax notice “before the close of business” if the department receives it by midnight on the same day.
- By electronic mail. A seller is rebuttably presumed to have sent an e-mail notice “before the close of business” if the department received it by midnight on the same day.
- By United States mail. A seller is rebuttably presumed to have sent a mail notice “before the close of business” if the notice is postmarked by midnight of the same day.
- By commercial courier. A seller is rebuttably presumed to have sent notice “before the close of business” if the commercial courier takes custody of the notice by midnight of the same day.
- By personal delivery. A seller is rebuttably presumed to have sent a notice “before the close of business” if the notice is personally delivered to the department by 4:30 PM of the same day.

Under this rule, a person giving a “meeting competition” notice must include all of the following in the notice:

- The person's name, including any trade name under which the person sells motor fuel at the price which the notice purports to justify.
- The address and telephone number of each business location at which the person is offering motor fuel at the price which the notice purports to justify.
- The motor fuel selling price which the notice purports to justify, the date and time that the price became effective, and the identity and grade of motor fuel to which that selling price applies.
- The name of the competitor whose price the person is purporting to meet, and the address at which that competitor is offering that price.
- The competitor's price which the person is purporting to meet, the relevant dates on which the competitor offered that price, and the identity and grade of motor fuel to which that price applies.

A person giving a "meeting competition" notice may not falsify any of the information contained in that notice. The person may not claim that a competitor offered a motor fuel selling price on a specified date at a specified address if the competitor was not open for business on that date at that address.

Markup for Cost of Doing Business

Under current law, persons selling motor fuel at wholesale (or at retail other than at retail stations) must include a 3% markup in their selling price to cover their presumptive "cost of doing business" (overhead and operating costs). However, a seller who proves a lesser "cost of doing business" may use a smaller markup reflecting that lesser "cost of doing business." In response to hearing testimony, this rule specifies that a seller wishing to prove a lesser "cost of doing business" must include both of the following in that cost calculation:

- Overhead and operating costs that are directly attributable to the sale of motor vehicle fuel at wholesale.
- A proportionate allocation of general overhead and operating costs incurred in the seller's business, based on that portion of the seller's overall sales that are sales of motor vehicle fuel at wholesale.

Editorial Changes

This rule includes editorial changes which are designed to make the department's current rules consistent with the Unfair Sales Act as amended by 1997 Wis. Act 55.

Hearing Comments

The department held four public hearings to solicit comments on this draft rule. The hearings were held in Eau Claire, Milwaukee, Appleton and Green Bay. A total of 41 people attended the hearings and eight people spoke. Most of the speakers did not register a position for or against the rule, but commented on specific rule provisions. A summary of hearing comments is attached. The department made a number of changes to the final draft rule in response to hearing comments (see above).

A great deal of hearing testimony focused on the concept of "selling price." The Unfair Sales Act prohibits a business from selling at a price that is below "cost." The statute, the current rule and the proposed rule define "cost" in great detail. However, the statute and current rule do not define "selling price." The concept of "selling price" is complicated by a variety of marketing promotions, and there are substantial differences of opinion on how it should be defined. The department considered, but ultimately decided against, including a definition of "selling price" in the final draft rule. The department may reconsider this issue in the future.

Response To Rules Clearinghouse Comments

The Legislative Council Rules Clearinghouse made one technical comment on the hearing draft rule. That comment has been addressed in the final draft rule.

Attached Documents

The department is enclosing the following documents in addition to the final draft rule:

- A fiscal estimate.
- A small business analysis (Regulatory flexibility analysis).
- A summary of comments received during the public hearings.

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The state of Wisconsin department of agriculture, trade and consumer protection proposes the
2 following order to repeal ATCP 105.007(2) and (note); to renumber ATCP 102.21(2); to amend
3 ATCP 105.003, and 105.005(1) and (2); to repeal and recreate ATCP 102.21(1), and to create
4 ATCP 102.21(5), (6) and (8), and subch. III of ch. ATCP 105; relating to sales below cost and
5 motor vehicle fuel pricing.

**Analysis Prepared by the Department of
Agriculture, Trade and Consumer Protection**

Statutory Authority: s. 93.07(1), Stats. (ATCP 102 and 105),
s. 100.20(2), Stats. (ATCP 102), and
100.30(7), Stats. (ATCP 105)

Statutes Interpreted: s. 100.20, Stats. (ATCP 102) and
s. 100.30, Stats. (ATCP 105)

This rule implements legislation enacted as 1997 Wis. Act 55, related to the pricing of motor vehicle fuel. The legislation modified s. 100.30, Stats., which prohibits sales of motor vehicle fuel and other commodities below cost.

Background

The department administers s. 100.30, Stats., known as the "Unfair Sales Act." The Unfair Sales Act prohibits sales below "cost" as defined in the law. The Unfair Sales Act applies to sales of motor vehicle fuel and other commodities. The department has adopted rules, under ch. ATCP 105, Wis. Adm. Code, to interpret the Unfair Sales Act.

1997 Wis. Act 55 made several changes to the Unfair Sales Act as it applies to sales of motor vehicle fuel. These changes took effect on August 1, 1998.

- **Retailer's "cost" of motor vehicle fuel.** The Unfair Sales Act previously defined a retailer's "cost" of motor vehicle fuel to mean the retailer's invoice or replacement cost, less trade discounts, plus excise taxes and a presumptive 6% retail markup. (Since wholesalers were required to take a 3% wholesale markup, there was a compounded wholesale and retail markup of 9.18%.) Act 55 redefined a retailer's "cost" of motor vehicle fuel to mean the greater of the following:

- * "Cost" as previously defined (with minor changes).
- * The "average posted terminal price" of the motor vehicle fuel at the terminal located closest to the retail location, plus a markup of 9.18%.
The "average posted terminal price" is a price published by a nationally recognized "petroleum price reporting service" (based on sales information collected by that service), plus transportation and excise taxes.
- **"Meeting competition" notice.** The Unfair Sales Act prohibits sales of motor vehicle fuel below "cost" as defined in the act. However, a seller may claim, as a defense, that the seller sold motor vehicle fuel below cost in order to meet the existing price of a competitor. Under Act 55, a seller of motor vehicle fuel who wishes to establish a presumptive "meeting competition" defense must notify the department on the same day that the seller initiates the below-cost selling price in response to a competitor's price. The seller must give the notice in the "form and manner required by the department."
- **Private remedy.** The department may prosecute violations of the Unfair Sales Act. Act 55 also creates a private remedy for competing sellers of motor vehicle fuel who are injured by illegal sales below cost.

Rule Contents

Definitions

This rule clarifies terms used in Act 55 including "close of business on the determination date," "terminal" and "terminal closest to the retail station."

Meeting Competition Defense

Under s. 100.30(6)(a)7, Stats., a seller may price and sell merchandise below cost if the seller is acting in good faith to meet an existing price of a competitor. This rule clarifies that a seller may not claim to be meeting competition if the seller's price is lower than the competitor's current price.

Average Posted Terminal Price

Under s. 100.30(2), Stats., a retailer's "cost" of motor vehicle fuel is based on the retailer's invoice or replacement cost or the "average posted terminal price" at the terminal located closest to the retailer, whichever is greater. In some cases, however, there is no "average posted terminal price" published for the closest terminal for the grade and type of motor vehicle fuel sold by the retailer. In these cases, this rule requires the retailer to use one of the following as the "average posted terminal price:"

- The "average posted terminal price," at the closest terminal, for the next closest grade and type of motor vehicle fuel.

- The “average posted terminal price” for the same grade and type of motor vehicle fuel at the closest terminal for which that price is published.

“Meeting Competition” Notice

This rule prescribes the form and content of the notice which a motor vehicle fuel seller must file with the department in order to claim the “meeting competition” defense under the Unfair Sales Act.

Under Act 55 and this rule, a person who files a “meeting competition” notice with the department to justify a below-cost selling price must send that notice before the “close of business” on the day that the person begins selling at that price. This rule clarifies that the “close of business” means the seller’s actual close of business or, if the business is open for 24 hours a day, the time at which the business day ends for accounting purposes.

Under this rule, a person must give a “meeting competition” notice, in writing, by one of the following methods:

- By telefax. A seller is rebuttably presumed to have sent a telefax notice “before the close of business” if the department receives it by midnight on the same day.
- By electronic mail. A seller is rebuttably presumed to have sent an e-mail notice “before the close of business” if the department receives it by midnight on the same day.
- By United States mail. A seller is rebuttably presumed to have sent a mail notice “before the close of business” if the notice is postmarked by midnight of the same day.
- By commercial courier. A seller is rebuttably presumed to have sent a notice “before the close of business” if the commercial courier takes custody of the notice by midnight of the same day.
- By personal delivery. A seller is rebuttably presumed to have sent a notice “before the close of business” if the notice is personally delivered to the department by 4:30 PM of the same day.

Under this rule, a person giving a “meeting competition” notice must include all of the following in the notice:

- The person’s name, including any trade name under which the person sells motor vehicle fuel at the price which the notice purports to justify.
- The address and telephone number of each business location at which the person is offering motor vehicle fuel at the price which the notice purports to justify.

- The motor vehicle fuel selling price which the notice purports to justify, the effective date and time of that selling price, and the identity and grade of motor vehicle fuel to which that selling price applies.
- The name of the competitor whose price the person is purporting to meet, and the address at which that competitor is offering that price.
- The competitor's price which the person is purporting to meet, the relevant dates on which the competitor offered that price, and the identity and grade of motor vehicle fuel to which that price applies.

A person giving a "meeting competition" notice may not falsify any of the information contained in that notice. The person may not claim that a competitor offered a motor vehicle fuel selling price on a specified date at a specified address if the competitor was not open for business on that date at that address.

Cost of Doing Business; Retail Sales of Motor Vehicle Fuel at Locations Other Than Retail Stations

Under s. 100.30(2)(am)1m.d. and e., Stats., persons making retail sales of motor vehicle fuel from locations other than retail stations must include a 3% markup in their selling price to cover their presumptive "cost of doing business," except that a seller who proves a lesser "cost of doing business" may use a smaller markup reflecting that lesser "cost of doing business."

Under this rule, a seller who wishes to prove a lesser "cost of doing business" under s. 100.30(2)(am)1m.d. or e. must calculate that cost as an average percentage cost per unit volume of motor vehicle fuel sold. The seller's "cost of doing business" must include all of the following:

- Overhead and operating costs that are directly attributable to sales of motor vehicle fuel at locations other than retail stations.
- A proportionate allocation of general overhead and operating costs incurred in the seller's business, based on the proportion of the seller's overall sales that are retail sales of motor vehicle fuel at locations other than retail stations.

Cost of Doing Business; Motor Vehicle Fuel Sales at Wholesale

Under s. 100.30(2)(c)1g. and 1r., Stats., persons selling motor vehicle fuel at wholesale must include a 3% markup in their selling price to cover their presumptive "cost of doing business," except that a seller who proves a lesser "cost of doing business" may use a smaller markup reflecting that lesser "cost of doing business."

Under this rule, a seller who wishes to prove a lesser "cost of doing business" under s. 100.30(2)(c)1g. and 1r. must calculate that cost as an average percentage cost per unit volume of motor vehicle fuel sold. The seller's "cost of doing business" must include all of the following:

- Overhead and operating costs that are directly attributable to sales of motor vehicle fuel at wholesale.
- A proportionate allocation of general overhead and operating costs incurred in the seller's business, based on the proportion of the seller's overall sales that are sales of motor vehicle fuel at wholesale.

Technical and Editorial Changes

This rule includes other technical and editorial changes to make the department's current rules consistent with the Unfair Sales Act as amended by 1997 Wis. Act 55.

1 **SECTION 1.** ATCP 102.21(1) is repealed and recreated to read:

2 ATCP 102.21(1) "Retailer" has the meaning given in s. 100.30(2)(e), Stats.

3 **SECTION 2.** ATCP 102.21(2) is renumbered (7).

4 **SECTION 3.** ATCP 102.21(5), (6) and (8) are created to read:

5 ATCP 102.21(5) "Sell at retail" has the meaning given in s. 100.30(2)(h), Stats.

6 (6) "Sell at wholesale" has the meaning given in s. 100.30(2)(i), Stats.

7 (8) "Wholesaler of motor fuel" has the meaning given in s. 100.30(2)(m), Stats.

8 **SECTION 4.** ATCP 105.003 is amended to read:

9 **ATCP 105.003 Retailers purchasing directly from manufacturers or producers.** A

10 retailer who purchases cigarettes and other tobacco products, fermented malt beverages,

11 intoxicating liquor, or wine or motor vehicle fuel directly from a manufacturer or producer shall

12 compound the wholesaler markup with the retailer markup to determine the total markup on the

13 merchandise.

14 **SECTION 5.** ATCP 105.005(1) and (2) are amended to read:

15 ATCP 105.005(1) **NON-MANUFACTURERS AND NON-PRODUCERS.** In order to

16 determine the selling price to its own retail customers, a non-manufacturing or non-producing



1 retailer of cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor,
2 or wine ~~or motor vehicle fuel~~ who sells to other retailers shall use the selling price for the sales to
3 other retailers plus at least the minimum retailer markup.

4 (2) MANUFACTURERS AND PRODUCERS. In order to determine the selling price to
5 its own retail customers, a manufacturer or producer of cigarettes and other tobacco products,
6 fermented malt beverages, intoxicating liquor, or wine ~~or motor vehicle fuel~~ who acts as both a
7 wholesaler and a retailer shall use its selling price to other retailers plus the wholesaler markup
8 compounded with the retailer markup.

9 SECTION 6. ATCP 105.007(2) and (note) are repealed.

10 SECTION 7. ATCP 105.009(4) is created to read:

11 ATCP 105.009(4) PRICE NOT LOWER THAN COMPETITOR'S PRICE. A seller
12 may not claim to be meeting competition if the seller's price is lower than the competitor's
13 current price.

14 SECTION 9. Subchapter III of ch. ATCP 105 is created to read:

15 **SUBCHAPTER III**

16 **MOTOR VEHICLE FUEL PRICING**

17 **ATCP 105.21 Definitions.** In this subchapter, and under s. 100.30, Stats.:

18 (1) "Average posted terminal price" has the meaning given in s. 100.30(2)(a), Stats.

19 (2) "At the close of business on the determination date," as used in s. 100.30(2)(a),

20 Stats., means the time at which the petroleum price reporting service no longer posts new price
21 data.

22 NOTE: As of May, 1998, this time was 4:00 p.m. eastern time for the largest petroleum
23 price reporting service.

1 (3) "Closest" terminal means the nearest terminal based on straight line distance, not
2 road distance.

3 (4) "Petroleum price reporting service" has the meaning given in
4 s. 100.30(2)(cL), Stats.

5 (5) "Terminal" has the meaning given in ss. 100.30(2)(j) and (2m)(c), Stats.

6 **ATCP 105.22 Average posted terminal price at closest terminal.** For purposes of
7 calculating "cost to retailer" under s. 100.30(2)(am)1m., Stats., the retailer shall use the average
8 posted terminal price at the terminal closest to the point of retail sale except that, if no petroleum
9 price reporting service has published for that terminal an average posted terminal price for the
10 grade and type of motor vehicle fuel sold at retail, the retailer shall use one of the following:

11 (1) The average posted terminal price, at that closest terminal, for the next closest grade
12 and type of motor vehicle fuel.

13 (2) The average posted terminal price, for the grade and type of motor vehicle fuel sold
14 at retail, at the closest terminal for which that price is published.

15 **ATCP 105.23 Notice of price offered to meet competition.** (1) TIME OF NOTICE. A
16 person who purports to justify a motor vehicle fuel selling price by giving notice to the
17 department under s. 100.30(7), Stats., shall send that notice on the same day that the person
18 lowers the price of motor vehicle fuel to that price. The person shall send the notice before the
19 actual close of the person's motor vehicle fuel selling business at the relevant location on that
20 day or, if that business remains open for 24 hours a day, before the time at which the business
21 day ends for accounting purposes.

22 NOTE: Section 100.30(7), Stats., requires a seller of motor vehicle fuel to file a notice
23 on the day that the seller lowers the seller's price to meet a competitor's price.
24 A seller is not required to file a notice on a day when the seller's price does not
25 change, even if the seller is selling motor vehicle fuel below cost in order to

1 meet a competitor's price. The department recommends that sellers conduct
2 daily price surveys (see ATCP 105.009(3)) on days that they are selling motor
3 vehicle fuel below cost to meet competition. (See s. ATCP 105.009(4).)

4 (2) METHOD OF GIVING NOTICE. A person giving notice to the department under s.
5 100.30(7), Stats., shall give that notice in writing. The person shall give the written notice in one
6 of the following ways:

7 (a) Electronically, by transmitting a facsimile to a receiving number specified by the
8 department. Notice under this paragraph is rebuttably presumed to be timely under s. 100.30(7),
9 Stats., if the department receives it by midnight of the day on which the person is required to
10 give the notice.

11 (b) Electronically, by transmitting an e-mail message to an e-mail address specified by
12 the department. Notice under this paragraph is rebuttably presumed to be timely under s.
13 100.30(7), Stats., if the department receives it by midnight of the day on which the person is
14 required to give the notice.

15 (c) By United States mail, to a post office box number specified by the department.
16 Notice under this paragraph is rebuttably presumed to be timely under s. 100.30(7), Stats., if it is
17 postmarked by midnight of the day on which the person is required to give the notice.

18 (d) By commercial courier delivery to the department's headquarters. Notice under this
19 paragraph is rebuttably presumed to be timely under s. 100.30(7), Stats., if the commercial
20 courier takes custody of the notice by midnight of the day on which the person is required to give
21 the notice.

22 (e) By personal delivery to the department's headquarters. Notice under this paragraph is
23 rebuttably presumed to be timely under s. 100.30(7), Stats., if it is delivered to the department's
24 headquarters by 4:30 PM of the day on which the person is required to give the notice.

1 (3) NOTICE CONTENTS. A person giving notice under s. 100.30(7), Stats., shall
2 include all of the following in that notice:

3 (a) The person's name, including any trade name under which the person sells motor
4 vehicle fuel at the price which the notice purports to justify.

5 (b) The address and telephone number of each business location at which the person is
6 offering motor vehicle fuel at the price which the notice purports to justify.

7 (c) The motor vehicle fuel selling price which the notice purports to justify, the effective
8 date and time that the person established that selling price, and the identity and grade of motor
9 vehicle fuel to which that selling price applies.

10 (d) The name of the competitor whose price the person is purporting to meet, and the
11 address at which that competitor is offering that price.

12 (e) The competitor's price which the person is purporting to meet, the relevant dates on
13 which the competitor offered that price, and the identity and grade of motor vehicle fuel to which
14 that price applies.

15 (4) FALSIFIED NOTICE. A person giving notice under this section may not falsify any
16 of the information contained in that notice. The person may not claim that a competitor offered a
17 motor vehicle fuel selling price on a specified date at a specified address if the competitor was
18 not open for business on that date at that address.

19 NOTE: Section 100.30, Stats., prohibits sales of motor vehicle fuel below "cost" as
20 defined in the statute. A seller may claim, as a defense, that the seller sold
21 motor vehicle fuel below cost in order to meet the existing price of a competitor.
22 Under s. 100.30(7), Stats., a seller who wishes to establish a presumptive
23 "meeting competition" defense must notify the department of the below-cost
24 selling price on the day the seller offers that price to meet a competitor's price.
25 The seller must give notice "in the form and manner required by the
26 department." Section ATCP 105.22 spells out the "form and manner" in which
27 a seller must give the required notice. Section ATCP 105.22 does not affect or
28 replace s. ATCP 105.009.

1 **ATCP 105.24 Cost of doing business.** (1) **RETAIL SALES AT LOCATIONS**
2 **OTHER THAN RETAIL STATIONS.** A seller who wishes to prove a lesser "cost of doing
3 business" under s. 100.30(2)(am)1m.d or e., Stats., shall calculate that cost as an average
4 percentage cost per unit volume of motor vehicle fuel sold. The seller's "cost of doing business"
5 shall include all of the following:

6 (a) Overhead and operating costs that are directly attributable to sales of motor vehicle
7 fuel at locations other than retail stations.

8 (b) A proportionate allocation of general overhead and operating costs incurred in the
9 seller's business, based on the proportion of the seller's overall sales that are retail sales of motor
10 vehicle fuel at locations other than retail stations.

11 (2) **SALES AT WHOLESALE.** A seller who wishes to prove a lesser "cost of doing
12 business" under s. 100.30(2)(c)1g. or 1r., Stats., shall calculate that cost as an average
13 percentage cost per unit volume of motor vehicle fuel sold. The seller's "cost of doing business"
14 shall include all of the following:

15 (a) Overhead and operating costs that are directly attributable to sales of motor vehicle
16 fuel at wholesale.

17 (b) A proportionate allocation of general overhead and operating costs incurred in the
18 seller's business, based on the proportion of the seller's overall sales that are sales of motor fuel
19 at wholesale.

1 **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first day
2 of the month following publication in the Wisconsin administrative register, as provided under
3 s. 227.22(2), Stats.

Dated this _____ day of _____, 1998.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE, AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary



LRB or Bill No. / Adm. Rule No. Ch. ATCP 105
Amendment No. (If Applicable)

FISCAL ESTIMATE

DOA-2048 (R 10/94)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

Subject
Amendments to the Unfair Sales Act -- (a prohibition against selling merchandise below cost.)

<p>Fiscal Effect State: <input type="checkbox"/> No State Fiscal Effect Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation</p> <p> <input type="checkbox"/> Increase Existing Appropriation <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Decrease Existing Appropriation <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Create New Appropriation </p>	<p> <input checked="" type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Decrease Costs </p>
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<p>Local: <input checked="" type="checkbox"/> No local government costs</p> <p>1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory</p> <p>2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory</p>	<p>3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory</p> <p>4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory</p>	<p>5. Types of Local Governmental Unit Affected:</p> <p> <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities <input type="checkbox"/> Counties <input type="checkbox"/> Others _____ <input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts </p>
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<p>Fund Source Affected</p> <p> <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input checked="" type="checkbox"/> SEG <input type="checkbox"/> SEG-S </p>	<p>Affected Ch. 20 Appropriations 20.115(1r)</p>
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Assumptions Used in Arriving at Fiscal Estimate

The proposed revisions to Ch. ATCP 105 are in response to 1997 Wis. Act. 55, which was a set of amendments s. 100.30, Wis. Stats., "The Unfair Sales Act." Act 55 will go into effect on August 1, 1998.

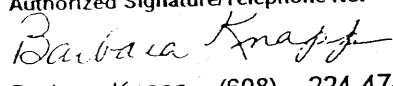
Two provisions of the act will present a material fiscal effect for the department.

First, "cost" to sellers of motor vehicle fuel is now based on the "average posted terminal price." This is an index published by a nationally recognized oil pricing service. This is valuable, proprietary data that is somewhat expensive to obtain. The Department currently subscribes to a service called "Petroscan" by a company called Oil Price Information Service. This service is currently used occasionally to double check information submitted by complainants and respondents. However, under the new provisions of the statute, the department will need to use this service much more often because it will be essential for determining whether or not petroleum sellers are in compliance with the statute. Staff estimates that spending on this service will go from roughly \$2,400 per year to roughly \$6,000 per year.

The second fiscal effect is from a provision of the revised statute that states sellers must "notify the department" before lowering their price to meet the existing price of a competitor. The statute grants immunity for private and state enforcement actions to sellers of motor vehicle fuel who provide this notification. Because of the immunity, the department estimates that it will receive up to 500 notices per day, most of these via fax. If this estimate is correct, the department would need to significantly increase spending on items such as fax supplies (paper, toner & drums) phone lines, fax overflow voice-mail system and document storage. Staff estimates that these items will cost roughly \$2,000 per year

Long - Range Fiscal Implications

Staff expects the annual increases listed above to continue indefinitely

Agency/prepared by: (Name & Phone No) DATCP Kevin LeRoy 224-4928	Authorized Signature/Telephone No.  Barbara Knapp (608) 224-4746	Date 6/4/98
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FISCAL ESTIMATE WORKSHEET

1997 SESSION

Detailed Estimate of Annual
Fiscal Effect
DOA-2047 (R10/94)

ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

LRB or Bill No/Adm.Rule No. Ch. ATCP 105	Amendment No.
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Subject
Amendments to the Unfair Sales Act -- (a prohibition against selling merchandise below costs)
I. One-time Cost or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

II. Annualized Cost:	Annualized Fiscal Impact on State funds from:	
	Increased Costs	Decreased Costs
A. State Costs by Category		
State Operations - Salaries and Fringes	\$	\$ -
(FTE Position Changes)	(FTE)	(- FTE)
State Operations - Other Costs	5,600	-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	\$ 5,600	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S	5,600	-
III. State Revenues -	Increased Rev.	Decreased Rev.
<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>		
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	\$	\$ -

NET ANNUALIZED FISCAL IMPACT

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$ <u>5,600</u>	\$ _____
NET CHANGE IN REVENUES	\$ _____	\$ _____

Agency Prepared by: (Name & Phone No.) DATCP Kevin LeRoy (608)224-4928	Authorized Signature/Telephone No. <i>Barbara Knapp</i> Barbara Knapp (608) 224-4746	Date 6/4/98
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Initial Regulatory Flexibility Analysis

Proposed revisions to ch. ATCP 105, Wis. Adm. Code

The Unfair Sales Act

This rule interprets s. 100.30, Wis. Stats., which prohibits sales below cost. The legislature recently modified this statute with 1997 Wis. Act 55. The department is proposing changes to the rule at this time to bring the rule into conformity with the amended statute. The proposed rule does not include any substantive provisions that are not already addressed in the statute. Therefore, the impact on small business is based on an analysis of Wis. Act 55.

Small businesses in Wisconsin that sell motor vehicle fuels at either wholesale or retail are affected by the statutory change. There will be some increased reporting required and some retailers may need to purchase additional information services. However, these increased burdens on small business may be offset by the potential for increased revenues.

New definitions for "cost"

Under the new law, cost of motor vehicle fuel is based on "the average posted terminal price" of the fuel. This is the average of all the refining companies' selling prices at the petroleum terminal located nearest to the retail station. Under the old law, cost of motor vehicle fuel was based on the seller's invoice cost. The new definitions of cost should help sellers of motor vehicle fuel increase their revenue.

Under the old law, a seller who is able to purchase gasoline at low wholesale cost has two choices. They could either set their price at the minimum and hope to capture increased market share because of a low price, or they could set their price at a medium or high level and enjoy increased profits. If this seller chooses the first option, this forces other sellers with higher wholesale costs to set their price below the minimum markup so they do not lose market share. (This is perfectly legal because of the "meeting competition" exception.) This scenario leads to an equilibrium retail price that is approximately 9.18% over the **lowest** terminal price.

Under the new law, all sellers in a certain area have the **same** "cost" for minimum markup purposes. All sellers must base their price on the **average** terminal price. This change leads to an equilibrium retail price that may be a couple pennies higher per gallon than the scenario discussed above because the 9.18% is over the **average** terminal price. This may result in higher revenues for some gasoline dealers.

Petroleum Pricing Service

The new definitions of cost rely on the "average posted terminal price." This price is valuable proprietary information that, until recently, could only be obtained by subscribing to a reporting

service. The minimum cost of this service is roughly \$55 per month. The service will report motor vehicle fuel prices via fax, e-mail, satellite, or allow their customers to search through the database (requires a modem and computer). Motor vehicle fuel sellers who wish to make their pricing decisions based on statutory costs (as opposed to competition) will need to subscribe to this service.

Shortly after Act 55 went into effect, the Wisconsin Petroleum Marketers Association arranged for one of the services (Axxiss - a Minnesota firm) to provide an 800 number that reports the average posted terminal price. Therefore, small businesses currently are able to obtain this service free of charge. However, it is uncertain whether or not this is a permanent arrangement.

Many petroleum dealers already subscribe to one of the services to determine where and when to buy fuel. At first glance 1997 Wis. Act 55 does not present an additional expense to this group. However, some of the prices received by subscribers may not be relevant for determining the minimum markup. The new law specifies that the average posted terminal price is at the "close of business" on the determination date. Therefore, petroleum dealers who already subscribe to the service must carefully determine whether the information they are already getting is relevant to the Unfair Sales Act. They may have to increase their spending on this service to get the information needed to comply with the statute.

Although this could be a significant cost to the seller, it should be stressed that neither the department nor the new statute requires small business to absorb this expense. Sellers could choose to simply always meet their competitor's prices or estimate the "average posted terminal price" based on their own invoices or price reports pulled earlier in the day. However, if they chose one of these options, they must submit a notice to the department to take advantage of the meeting competition defense. (see below).

Private cause of action

Beginning August 1, 1998, sellers of motor vehicle fuel who are injured or threatened with injury as a result of unfair sales of motor vehicle fuel may bring suit against their competitors who violate the Unfair Sales Act. Maximum damages are treble any monetary loss or \$2,000 per day, whichever is greater, plus attorney fees. Obviously, this could significantly impact small businesses. All businesses who sell gasoline will need to carefully assess their pricing policies and procedures for compliance. In addition there will be costs associated with bringing a suit or successfully defending against a suit.

Notification for meeting competition

The Unfair Sales Act has always granted certain exceptions where sales below cost are acceptable. The exception most widely used by motor vehicle fuel sellers is the "meeting competition defense." It is acceptable to sell fuel below cost if the seller is doing so to meet the price of a competitor. However, under the new statute, sellers who "notify the department" that they are lowering their price below the minimum in order to meet a competitor's price enjoy immunity from liability under private and state enforcement actions.

There will be a cost associated with submitting notifications. The department will accept notices via: fax, e-mail, U.S. mail, courier, or hand delivery. Because of the immunity that sellers will receive if they submit a notice, the department predicts that many sellers will wish to submit a notice on a very regular basis, simply as a risk management precaution. This will involve a significant paperwork burden for small business.

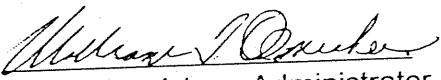
It should be stressed that submitting a notice is decision that the motor vehicle fuel sellers make for themselves. It is not mandated by the department or by the statute. Alternatively, a seller could chose to not sell below the minimum markup -- regardless of what their competitors are doing -- or they could simply take their chances on being sued for selling fuel below the minimum markup. Failing to provide notice does not mean that the seller will automatically lose any case that may be brought against them. However, there is a penalty (forefetur of \$50 to \$200) for failing to provide notice.

Conclusion

It is very difficult to estimate the statute and rule's overall impact on small businesses. There may be a potential for increased revenues. However this could be offset by increases in expenses for a subscription to an oil pricing service and the expense of filing a notification with the department. These potential increases in expenses are entirely at the discretion of the individual businesses.

Dated this 14 day of October , 1998

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND
CONSUMER PROTECTION

By: 
William L. Oemichen, Administrator
Division of Trade and Consumer Protection

**Appendix to Board Memorandum Submitting
Final Draft Rule Relating to Motor Fuel Sales Below Cost
Chapter ATCP 102 and 105**

Hearing Comments

The department held four public hearings to solicit comments on the hearing draft rule. The following is a brief summary of testimony and the number of appearances at each hearing.

Eau Claire

The first hearing was held on August 20, 1998 in Eau Claire. There were eight people at the hearing, two of whom testified. Testifying were Mr. Jim Lamont of Lamont's Service, Abbotsford and Mr. Steve Rush, representing Holiday Companies. Mr. Lamont registered in opposition to the hearing draft rule and Mr. Rush registered as neutral.

Mr. Lamont expressed displeasure at several provisions of 1997 Wis. Act 55. However, he did not have specific comments on ch. ATCP 105 or the proposed hearing draft. Mr. Rush raised a number of questions that he had about the law. He reasoned that if the law was unclear, perhaps these items should be addressed in the rule. Most of the questions which he raised were of a very practical nature.

Milwaukee

The second hearing was held in Milwaukee on September 1, 1998. Eleven people attended this hearing, two of whom testified. The speakers were Jon Day, of Milwaukee, representing Hometown, Inc. and Bernie Nowicki of Sheboygan, representing Quality State Oil. Both Mr. Day and Mr. Nowicki were in favor of the hearing draft rule.

Mr. Day urged the department to be more specific and strict regarding the use of discounts and promotions in connection with retail sales of motor vehicle fuel. For example, he noted promotions such as a free baseball hat, or coupons worth 5 cents off per gallon are not addressed in the administrative code, yet a seller who uses this type of promotion could very well be selling product below cost. Mr. Day believed that the rule should specifically address this type of situation.

Mr. Nowicki had similar comments. Specifically, Mr. Nowicki thought the rule should address how wholesalers should approach the "notification requirement" prescribed in the law. The statute is very clear that "notification" is required for all sales of motor vehicle fuel. However, the specific statutory language pertaining to notification requirements seems to have been written with only retail sales in mind. Mr. Nowicki believed this could be corrected in the rule.

Appleton

The third hearing was held in Appleton, Wisconsin on September 2, 1998. Seven individuals attended this hearing. Two individuals, Ms. Marjorie Young of U.S. Oil Co., Inc. and Mr. Chuck

Van Zeeland of Van Zeeland Oil Co., testified. Ms. Young neither opposed nor supported the proposed rule while Mr. Van Zeeland was in favor of it.

Ms. Young's comments centered on the perceived disadvantage local companies have against national petroleum marketing chains. She observed that customer loyalty discounts (those which are funded by somebody other than the seller) are generally not viewed as a reduction in the selling price and stated this was not fair. *(NOTE: Many of the national oil companies offer discounts to consumers who purchase fuel with a credit card offered by the company. The department does not view this as a reduction in the selling price because the customer buys the fuel from one party - a local dealer, and receives the discount from a separate party - the refining company.)*

Mr. Van Zeeland offered opinions on a document prepared by Trade and Consumer Protection Division staff, entitled "Additional Rulemaking Considerations." In general, Mr. Van Zeeland supported aggressive enforcement of the Unfair Sales Act.

Madison

The fourth and final hearing was held in Madison on September 8, 1998. Fifteen individuals attended the hearing and two people, Mr. Randy Meffert of Meffert Oil Company and Mr. Tom Kieffer, representing Kwik Trip, offered testimony. Mr. Meffert registered in favor of the proposed hearing draft and Mr. Kieffer was neither in favor or opposition to it.

Mr. Meffert noted that the Unfair Sales Act is a very confusing law to understand and anything the Department could do to clarify the confusion would be welcome. Specifically, Mr. Meffert urged staff to include a definition of "cost of doing business." *(NOTE: Under the Unfair Sales Act, persons when a person sells motor vehicle fuel at wholesale, or at retail at a location other than a "retail station," the seller must include a markup of 3% in order to cover the "cost of doing business." If the seller can show that they actually have a lower cost of doing business, they may use their own "cost of doing business" instead of the presumptive 3%.)*

Mr. Kieffer noted that the Unfair Sales Act includes several inequities. Mr. Kieffer recommended a definition of selling price that would not include rebates or discounts that occurred after the fact. He reasoned that this would be much easier to calculate, it leveled the playing field between national brands and local or regional marketers, and that most fuel is sold at the posted price anyway.

Informal Discussion Sessions.

In conjunction with the official public hearings, department staff hosted informal evening discussion sessions. These sessions were publicized along with the hearing in the notice of hearing and were intended as a chance for people in the petroleum industry to ask questions of staff regarding department enforcement policies and other topics. It was also a chance for sellers of motor vehicle fuel to ask questions about mechanical topics, such as calculating "cost" and filing "meeting competition notices." Approximately fifteen people attended these meetings.

Written Comments.

The official hearing record contains comments submitted by seven people. Most of these comments were responses to the questions listed on the "Additional Rulemaking Considerations" document. The individuals who submitted written comments were:

- Jon Weston Day, Vice President and part Owner, Hometown Inc., Milwaukee, Wis.
- Daniel H. Moenter, Manager, State Government Affairs, Marathon Ashland Petroleum LLC, Findlay, Ohio.
- William M. Conley, Attorney, Foley & Lardner Law Firm, Madison, WI. Mr. Conley submitted written testimony prepared by Thomas J. Kieffer, Legal Counsel, Kwik Trip, Inc., La Crosse, WI.
- Jim Goetz, Jr., President, Board of Directors, Wisconsin Association of Truck Stop Operators, Portage, Wis.
- Jennifer Badeau, Director of Government Affairs, Petroleum Marketers Association of Wisconsin / Wisconsin Association of Convenience Stores, Madison, Wis.
- Dave Wantland, Regulatory Specialist, Growmark, Bloomington, Illinois.
- Marjorie M. Young, General Counsel, U.S. Oil Co., Inc., Combined Locks, WI.