



DALE KOOYENGA

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December 5, 2017

TO: Assembly Committee on Consumer Protection
FR: Representative Dale Kooyenga
RE: Assembly Bill 544 – the sale or rental of soda water beverage equipment

Thank you for holding a hearing on Assembly Bill 544.

This bill eliminates an out-of-date provision that inserts government into the middle of contractual relationships between private business entities.

There is an administrative rule that regulates and limits competition and negotiation between businesses on the purchase of soda beverage equipment. This regulatory imposition restricts the ability of two businesses to negotiate purchasing contract terms. This regulation is restrictive and does not allow for retailers and the soda wholesaler to negotiate the terms of the soda water equipment. Assembly Bill 544 prohibits the Department of Agriculture, Trade & Consumer Protection (DATCP) from regulating through administrative rule the contractual relationship between businesses regarding the purchase and rental of soda water equipment thus allowing businesses to freely negotiate.

DATCP regulates via rules as they apply to soda water beverage equipment and the purchasing terms between soda wholesalers and retailers – a 40 year old rule promulgated in 1977. The rule prohibits soda water beverage wholesalers from furnishing coolers or dispensing equipment for less than the wholesaler's cost of obtaining the equipment.

It is clear that there are other professions, industries and products where such government intrusion and restriction do not exist. We believe the necessity of this administrative rule for soda water beverages is outdated.

According the National Association of Theatre Owners of Wisconsin & Upper Michigan, this type of government restriction and regulation on soda water equipment is not the norm as compared to the rest of the country.

Thank you for hearing this bill and I respectfully ask for your support.



HOWARD MARKLEIN

STATE SENATOR • 17TH SENATE DISTRICT

December 5, 2017

**Assembly Committee on Consumer Protection
Testimony on Assembly Bill (AB) 544**

Good morning!

Thank you Chair Duchow and committee members for hearing Assembly Bill 544 (AB 544), which prohibits the Department of Agriculture, Trade and Consumer Protection (DATCP) from regulating the terms of sale or rental of soda water beverage equipment that is not a coin-operated vending machine.

Rep. Koyenga and I have brought forward AB 544 on behalf of the National Association of Theatre Owners (NATO) of Wisconsin & Upper Michigan.

Since 1977 DATCP has promulgated an administrative rule, ATCP 102, that prevents sellers from discriminating on price. Chapter 102 provides restrictions and regulation on three types of business: sales of fermented malt beverages, soda water beverages and motor fuel.

According to the National Association of Theatre Owners of Wisconsin & Upper Michigan, this type of government restriction and regulation on soda water equipment is not the norm as compared to the rest of the country. From what I have been told, and what you will hear from theatre owners today - the normal practice in other states is the discussion on soda beverage equipment and soda product is accomplished in one contract - a negotiation of both aspects of the business relationship. DATCP has stated it has the statutory authority to promulgate this rule under §100.20 Wis. Stats. "Methods of Competition and Trade Practices."

The intent of AB 544 before you today is meant to remove the equipment prohibition. Again, this section appears to be unique to only to soda water beverage transactions between wholesalers and retailers. AB 544 will simply prohibit DATCP from regulating the terms of sale or rental of soda water beverages equipment that is not a coin-operated vending machine.

Coin-operated vending machines were not included in the original bill draft because movie theaters do not have these machines. Rep. Kooyenga and I have drafted an amendment for your consideration, to include this equipment as well.

Thank you again for hearing AB 544.



Lisa Harmon
President

Bob Rauner
Vice President

Assembly Committee on Consumer Protection

PUBLIC HEARING

Assembly Bill 544, Terms of Rental or Sale of Soda Water Beverage Equipment

December 5, 2017

Good Morning Chair Duchow and Distinguished Members of the Committee:

My name is Kelly McDowell, I am the Executive Secretary of the Wisconsin Beverage Association. I appear before you today to speak to the significant and ongoing importance of the ATCP 102.12 regulatory provision in providing that soda water beverage wholesalers may rent or sell equipment to retailers, so long as it is **not furnished for less than the wholesaler's cost of obtaining, transporting and installing it.**

It is our understanding that the intent of Assembly Bill 544, in prohibiting the Department of Agriculture, Trade and Consumer Protection (DATCP) from regulating the terms of sale or rental of soda water beverage equipment, is to allow businesses to "freely negotiate" said terms. However, the one limit on negotiations, that of **requiring that rent at a minimum cover the wholesaler cost of the equipment,** is both intentional and purposeful.

That is, ATCP 102.12, as crafted by stakeholders, was intended to **prevent soda water beverage wholesalers from providing free equipment to retailers.** The purpose of the long-standing **prohibition on free equipment** is the preservation of competition. In the case of ATCP 102.12, the provision promotes competition by:

- ✓ **Protecting small wholesalers who are competing for retailers' business,** but can't provide free equipment to its customers because they don't have the same access to resources that larger wholesalers do. As the attached map shows, eight multi-generational Wisconsin family-owned wholesalers – whose single locations are shown as an X – have a greater ability to compete with larger multi-state and global operations due to the current level playing field with respect to the provision of equipment.

- ✓ **Preventing discriminatory treatment of retailers.** Currently, equipment is furnished to retailers who want or need it in return for a *typical* rental charge of \$25-\$45 per month, depending upon the wholesaler cost of the type of equipment provided. On this point, Jeremy McPherson, Director of the Bureau of Business Trade Practices at DATCP, wrote in a 2007 memo on similar legislation, that ATCP 102.12 “protects retailers who may not be offered special prices, discounts or free equipment and would face higher operating costs than those “preferred” retailers. Without this rule, retailers who are not offered special pricing or free equipment from wholesalers must choose between charging higher prices or absorbing higher costs.”
- ✓ **Limiting wholesaler influence over retailer operations.** For example, a wholesaler providing free equipment to a retailer may require that their products be exclusively sold or given preferential treatment. Currently, exclusivity is only allowed for coin-operated vending equipment.

Because they serve to promote competition, trade practice regulations like ATCP 102.12 are widely supported by the manufacturers and wholesalers they govern. AB 544 focuses solely on the provision of soda water beverage equipment, yet similar statutes regulate the beer and dairy industries:

- Chapter 125 of the Wisconsin statutes, relating to alcohol beverages, provides that **“no brewer, brewpub, or wholesaler may furnish, give, lend, lease, or sell any furniture, fixtures, fittings, equipment, money, or other thing of value”** to any on-premise retailer, with certain exceptions including that they **“may sell equipment to retailers at fair market value.”**
- Section 100.201(e) of the Wisconsin statutes provides that **no dairy wholesaler “shall furnish, sell, give, lend or rent any equipment to a retailer,** with limited exceptions, including that they **“may sell or rent portable freezer cabinets.”** Chapter 100 enumerates other restrictions on dairy wholesalers in terms of their ability to provide equipment to customers.

The fact that Wisconsin has a vibrant mix of beverage wholesalers, including independent family-owned operations, is owing to Wisconsin’s long-standing tradition of supporting trade practice rules like ATCP 102. By prohibiting DATCP from enforcing certain provisions of the rule, AB 544 would cause considerable and sudden changes to the current competitive structure in Wisconsin, arguably to the detriment of both wholesaler and retailer.

Please consider that ATCP 102.12 not only preserves competition, but it is the basis of every wholesaler's business model, as it has been for some 40 years. The rule provides all Wisconsin soda water beverage wholesalers with the certainty they need to make significant capital investments in vending, cooling and dispensing equipment.

If the option to collect rent from **thousands of retailers throughout the state** is no longer feasible, wholesalers would be left with considerable fixed costs for which there is no longer a reliable revenue source. For those who would argue that rent could still be negotiated, the reality is that in the very competitive soft drink industry environment, there will be some wholesalers willing and able to provide equipment free of charge to "preferred" customers in seeking to get a foothold. As such, it may be nearly impossible for any wholesaler to continue the current practice of charging a typical rental fee.

Instead, wholesalers will likely be forced to choose between increasing the wholesale price of their products, reducing the amount of equipment placed, or a combination of both. While any of these options might allow Wisconsin wholesalers to recoup lost rental revenue, certainly there is a significant downside in that the cost may ultimately be passed along to the consumer which, in turn, would drive down sales, harming both wholesaler and retailer alike. It is important to also note that under current law, retailers do not have to pay expensive repair bills if their equipment needs servicing, as those costs are included in the monthly rental charge. Additionally, there are hundreds, if not thousands, of equipment rental agreements in place based upon current law. Bottlers would need some allowance of time to manage the considerable financial, administrative and contractual upheaval that would be caused by AB 544.

In closing, I respectfully ask on behalf of Wisconsin bottlers, who together provide some 4700 family-supporting jobs throughout Wisconsin, that AB 544 not advance through committee. Please know that the members of the Wisconsin Beverage Association are grateful for your consideration of the significant and serious concerns we have sought to bring to your attention. We would be happy to clarify any points or provide additional information. Thank you.

Attachments:

WISCONSIN BEVERAGE ASSOCIATION: OWNERSHIP OF MEMBER FACILITIES

Bottling Plant/Distributor +

Bottling Plant ◆

Publicly-held Distributor (Global: 2 owners/9 locations) ●

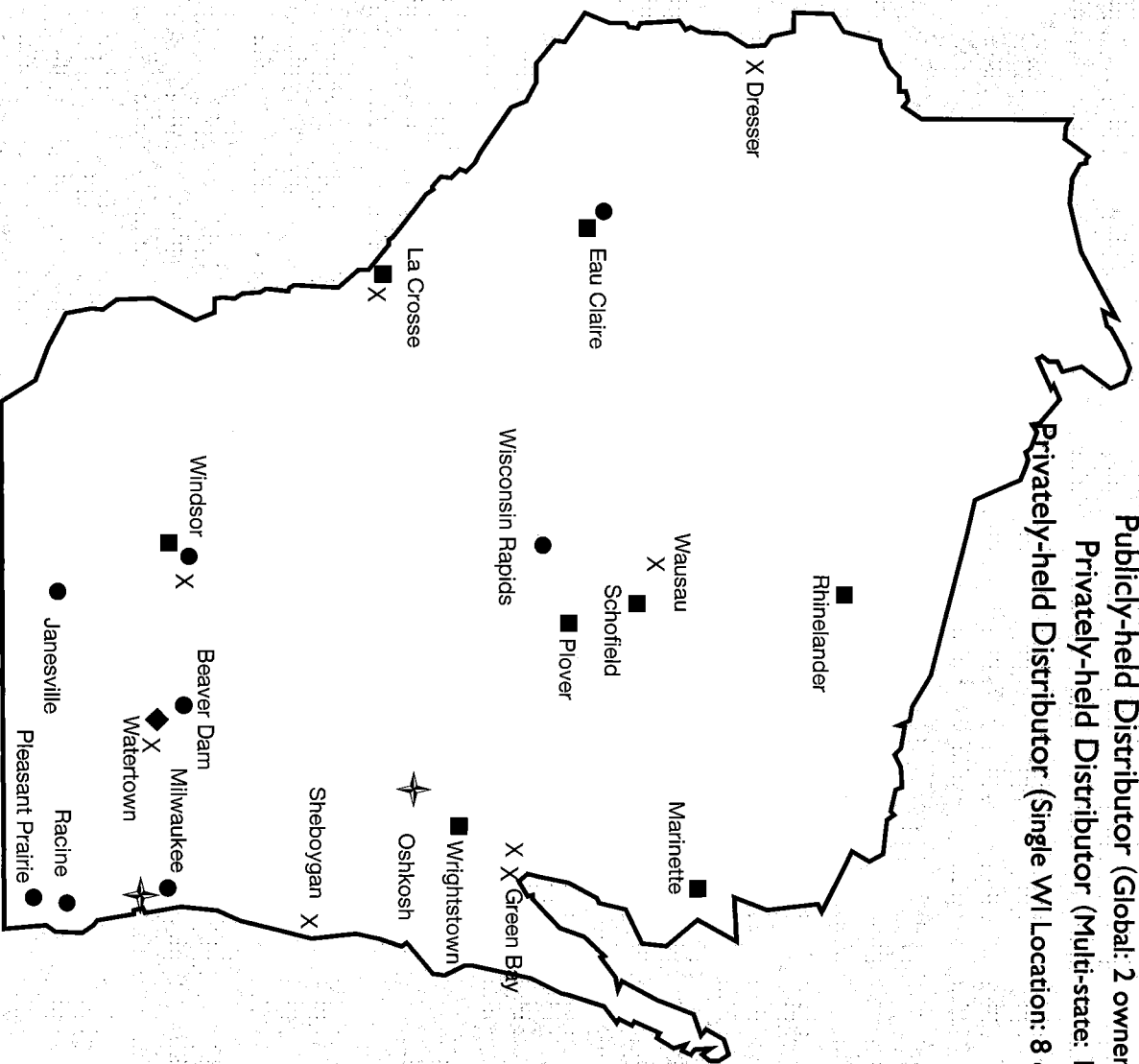
Privately-held Distributor (Multi-state: 1 owner/9 locations) ■

Privately-held Distributor (Single WI Location: 8 owners/8 locations) X

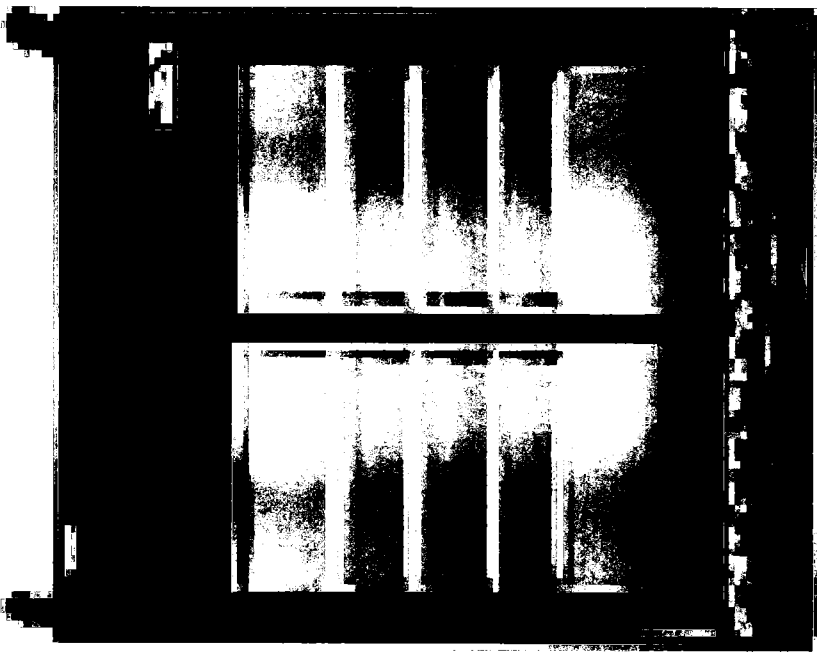
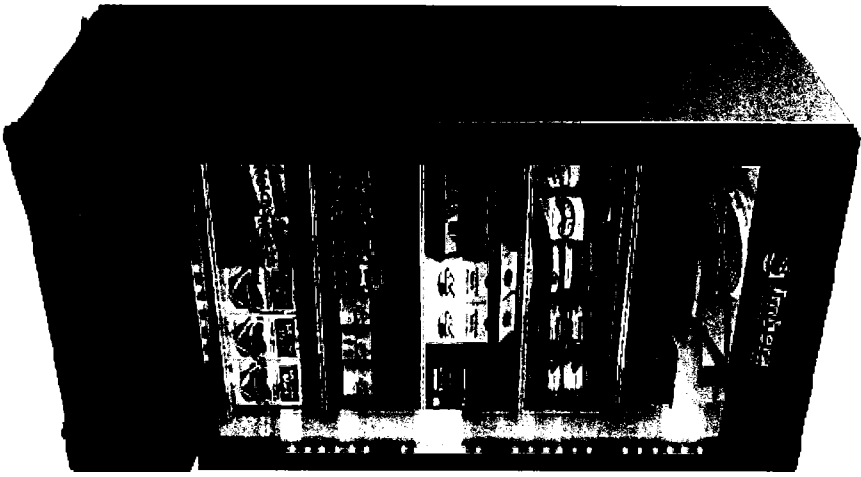


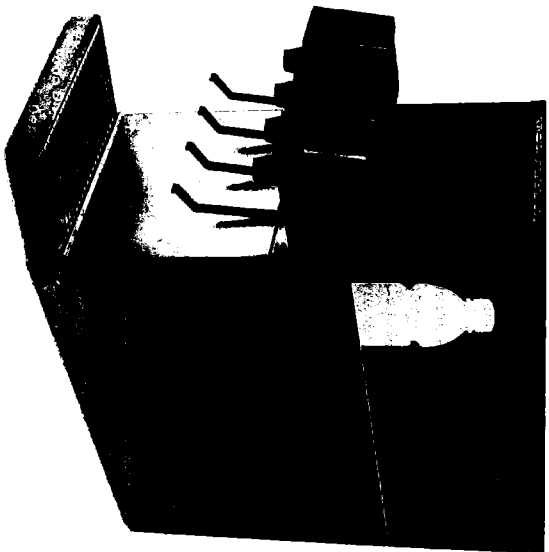
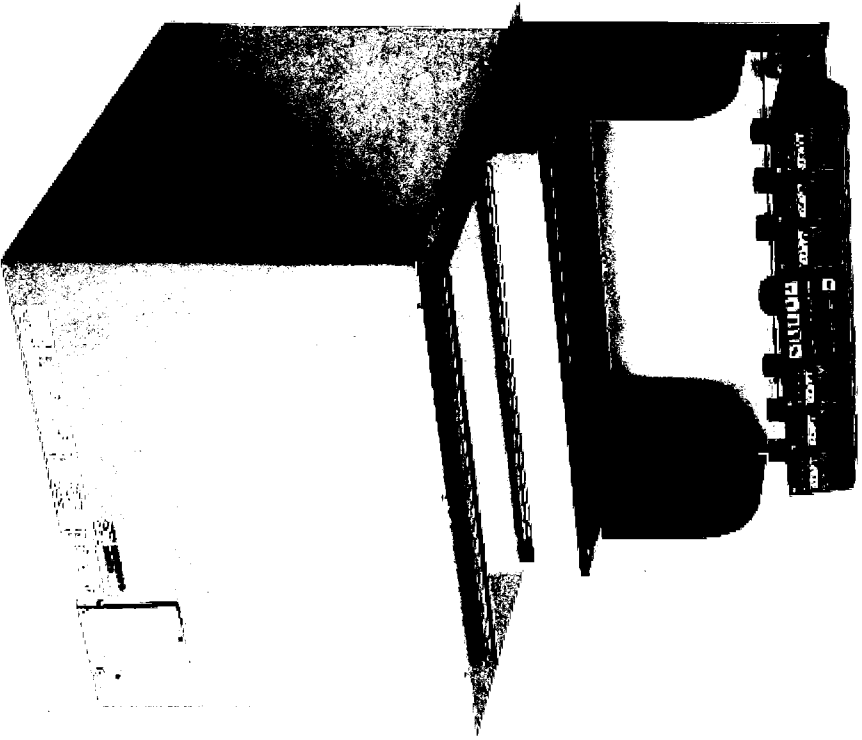
WISCONSIN BEVERAGE ASSOCIATION

The Wisconsin Beverage Association is comprised of Coca-Cola, Dr Pepper Snapple Group, Pepsi-Cola, and Seven-Up bottlers and distributors. Together, we bring to market hundreds of brands, flavors and packages, including regular and diet soft drinks, bottled water and water beverages, 100 percent juice and juice drinks, sports drinks, energy drinks and ready-to-drink teas. We are an important part of our state and national economy, and we are effective partners in providing solutions to some of our most important social challenges. Our industry's presence is felt in every corner of every community in Wisconsin.



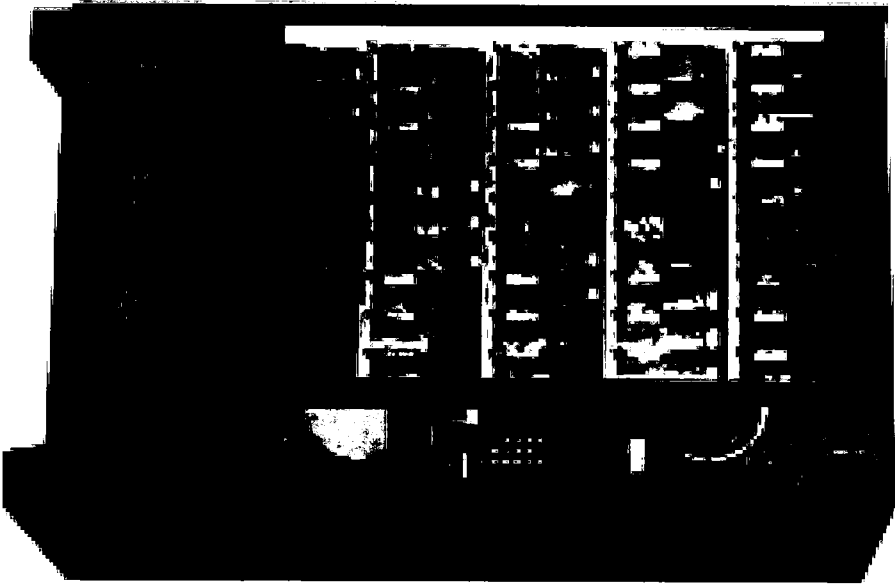
Single and Double Door Coolers





Fountain Dispensing Systems

Vending Machines



Chapter ATCP 102

PRICE DISCRIMINATION AND RELATED PRACTICES

Subchapter I — Fermented Malt Beverages

- ATCP 102.01 Definitions.
ATCP 102.02 Prohibited trade practices.
ATCP 102.03 Report requirements.

Subchapter II — Soda Water Beverages

- ATCP 102.11 Definitions.
ATCP 102.12 Prohibited trade practices.
ATCP 102.13 Prohibited acts of retailers.

- ATCP 102.14 Prohibited acts of brokers.
ATCP 102.15 Exceptions.
ATCP 102.16 Reporting requirements.

Subchapter III — Motor Fuel

- ATCP 102.21 Definitions.
ATCP 102.22 Discrimination.
ATCP 102.23 Coercion.

Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.26 (3) or (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss together with costs and reasonable attorneys' fees.

See also s. 133.04, Stats. (price discrimination; intent to destroy competition); s. 100.201, Stats., and ch. ATCP 103 (dairy trade practices); s. 100.22, Stats. (price discrimination in milk procurement); and s. 100.31, Stats. (drug price discrimination).

Subchapter I — Fermented Malt Beverages

ATCP 102.01 Definitions. In this subchapter:

(1) "Brewer" means a person, firm or corporation engaged in the sale of beer to wholesalers licensed to sell beer to retailers under the provisions of s. 125.28, Stats.

(2) "Wholesaler" means a person, firm, or corporation engaged in the sale of fermented malt beverages for resale.

(3) "Fermented malt beverages" means any liquor or liquid capable of being used for beverage purposes, made by the alcoholic fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing one-half of one percent or more of alcohol by volume.

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; am. (1), Register, July, 1969, No. 163, eff. 8-1-69; renum. from ATCP 106.01, Register, February, 1996, No. 482, eff. 3-1-96; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, May, 1999, No. 521.

ATCP 102.02 Prohibited trade practices. (1) No brewer shall discriminate in price, allowance, rebate, refund, commission or discount between wholesalers purchasing fermented malt beverages of like kind or quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition by a person who is or in good faith intends to become a competitor, in the wholesaling of fermented malt beverages, unless such discrimination is:

(a) Merely commensurate with a difference in the cost of manufacture, sale, or delivery resulting from differing methods or quantities of sale or delivery, or

(b) Made in good faith to meet or enable a wholesaler to meet the price or other terms of a competitor of either of them.

(2) No brewer shall threaten any wholesaler with any discrimination prohibited under sub. (1) with the purpose or effect of changing or maintaining resale prices of the wholesaler.

(3) Nothing in this chapter shall be deemed to prohibit brewers from selecting their own customers in bona fide transactions not in restraint of trade.

(4) The provisions of sub. (1) shall not be deemed to prohibit a brewer from extending to its wholesalers different terms of credit in the ordinary course of business taking into consideration the financial condition of the individual wholesaler and other factors normally considered in establishing credit, or from offering

or furnishing to its wholesalers different advertising, promotional or merchandising services, provided that such services shall not be intended or used to effect a discrimination in price, allowance, rebate, refund, commission or discount prohibited by said sub. (1).

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; am. (1), cr. (4), Register, July, 1969, No. 163, eff. 8-1-69; renum. from ATCP 106.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.03 Report requirements. In any investigation under this chapter a brewer or wholesaler upon request of the department shall furnish to it price lists and such other information as directed concerning the terms of any agreement, transaction, or offer which may be the subject of any prohibition under this chapter.

History: Cr. Register, August, 1968, No. 152, eff. 9-1-68; renum. from ATCP 106.03, Register, February, 1996, No. 482, eff. 3-1-96.

Subchapter II — Soda Water Beverages

ATCP 102.11 Definitions. In this subchapter:

(1) "Soda water beverage" means all beverages commonly known as soft drinks, including soda water, carbonated or uncarbonated or sweetened or flavored, and bases, fountain syrups, concentrates and powders intended to be reconstituted by wholesalers or retailers to produce soft drinks. It does not include strong spirituous, vinous, malt, ardent or intoxicating liquors.

(2) (a) "Retailer" means every person making sales of soda water beverages for consumption or use other than resale or further processing or manufacturing. In the case of a person making both sales at wholesale and retail, such term shall apply to only the retail portion of such sales. "Retailer" does not include the United States, the state, any municipality as defined in s. 345.05 (1) (c), Stats., or any agency thereof, or any religious, charitable or educational organization or institution, but does include any other person engaged in the business of making retail sales wholly or in part for profit at an institution or facility operated by such an exempt party.

(b) Any subsidiary or affiliate corporation, cooperative, partnership or association, and any officer, director or partner of a corporation, cooperative, partnership, association or any other business unit which owns, controls or franchises any retailer or which has any retailer as an affiliate, member or subsidiary, is deemed to be a retailer of soda water beverages.

(3) (a) "Wholesaler" means every person making sales of soda water beverages for purposes of resale or further processing or manufacturing. In the case of a person making both sales at retail and wholesale, such term shall apply only to the wholesale portion of such business.

(b) Any subsidiary or affiliate corporation, cooperative, partnership or association, and any officer, director or partner of a corporation, cooperative, partnership or association which is a

wholesaler of soda water beverages is deemed to be a wholesaler of soda water beverages.

(4) "Broker" means any person engaged in negotiating sales or purchases of soda water beverages for or on behalf of a retailer or wholesaler or both.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.01, Register, February, 1996, No. 482, eff. 3-1-96; **correction in (2) (a) made under s. 13.92 (4) (b) 7., Stats., Register June 2011 No. 666.**

ATCP 102.12 Prohibited trade practices. No wholesaler of soda water beverages shall, in the sale or distribution of soda water beverages, engage in the following unfair methods of competition or unfair trade practices:

(1) Discriminate, directly or indirectly, in the price at which soda water beverages are sold to customers by selling or offering to sell such beverages at a special price or discount, or with special allowances, rebates, or commissions, or under other price or credit terms or conditions not offered or made available to all customers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or otherwise injure, destroy or prevent competition between wholesalers of soda water beverages or any of their customers.

(2) Furnish, sell, give, lend or rent any equipment, after the effective date of this chapter, for the refrigerated or heated storage or display, or mechanical dispensing of soda water beverages to a retailer, but this shall not prevent:

(a) The sale or rental of such equipment to a retailer under a written agreement describing the equipment sold or rented, and specifying the price and other terms and conditions under which it is to be sold or rented. Copies of agreements shall be kept on file by the wholesaler for at least 3 years after final payment has been received. No agreement for the sale or rental of equipment other than agreements for the rental of coin-operated vending machines shall contain any provision that prohibits the use of the equipment for the storage, display, or dispensing of the products of competing wholesalers or reserves any part of the available capacity of the equipment for the products of the wholesaler selling or renting the equipment.

1. Terms for the sale of equipment shall provide that the wholesaler shall recover at least the wholesaler's cost for the equipment, including all costs for transportation and installation of the equipment, either by advance payment in full or by equal monthly installment payments over a period not to exceed 5 years.

2. Terms for the rental of equipment, other than coin-operated vending machines, shall provide that minimum monthly rental charges shall be no less than one-sixtieth (1/60) of the total cost to the wholesaler, including all costs for transportation and installation of the equipment. Rentals may be charged in equal periodic installments or on a volume basis, and shall be collected at least once each year in an amount sufficient to recover all such costs within a period of 60 months.

3. Terms for the rental of coin-operated vending machines shall provide that the minimum monthly rental charge shall be no less than one ninety-sixth (1/96) of the total cost to the wholesaler, including all costs for transportation and installation. Rentals may be charged in equal periodic installments or on a volume basis, and shall be collected at least once each year in an amount sufficient to recover all such costs within a period of 96 months.

4. Cost of equipment which has been returned or repossessed or on which rental contracts are renewed shall be based on fair market value of the equipment, whether or not cost was recovered in whole or in part under a previous sale or rental agreement.

(b) The furnishing of equipment to a retailer, for the storage, transportation or display of soda water beverages for not more than a total of 20 days in a calendar year for use at fairs, exhibitions, expositions or other events for agricultural, industrial, charitable, educational, religious or recreational purposes.

(3) Discriminate, directly or indirectly, between customers in furnishing of advertising, promotional or other services or facilities to them, or in compensating customers for services or facilities to be rendered or furnished by or through them in connection with the sale or distribution of soda water beverages, under terms or conditions not available to all customers on proportionally equal terms, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or otherwise injure, destroy or prevent competition between wholesalers of soda water beverages or any of their customers. This does not apply to the furnishing of equipment under sub. (2) (b).

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; am. (2) (a) and (3), r. (2) (c), Register, August, 1979, No. 284, eff. 9-1-79; renum. from ATCP 107.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.13 Prohibited acts of retailers. No retailer or any officer, director, employee or agent thereof shall solicit or receive, directly or indirectly, from or through a wholesaler, broker, or another retailer, anything which is prohibited by s. ATCP 102.12, where it is known, or in the exercise of reasonable prudence should be known that it is prohibited.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.03 and am., Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.14 Prohibited acts of brokers. (1) No broker, or any officer or agent thereof, shall participate, directly or indirectly, in any trade practice prohibited by s. ATCP 102.12.

(2) No wholesaler shall engage or offer to engage in any trade practice prohibited by s. ATCP 102.12, directly or indirectly, through a broker.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.04 and am. (1) and (2), Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.15 Exceptions. (1) Nothing in s. ATCP 102.12 (1) and (3) shall apply to the sale or offering for sale of soda water beverages:

(a) At a price different from that charged other customers, if such price differential merely allows for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such soda water beverages are sold or delivered, or if made in good faith to meet an equally low price of a competitor, or the terms or conditions under which they are sold by a competitor.

(b) With differences in services or facilities under s. ATCP 102.12 (3), if made in good faith to meet services or facilities, or any compensation therefor, furnished by a competitor.

(c) Which are imperfect, damaged, subject to immediate loss because of obsolescence or perishability, or discontinuance from sale.

(d) In the final liquidation of a soda water beverage business.

(e) To customers other than retailers or wholesalers as defined in s. ATCP 102.12 (2) or (3).

(f) Under the order or direction of any court.

(2) Equipment furnished, sold, given, lent, or rented prior to the effective date of this chapter shall, within 18 months after the effective date of this chapter, be either removed from the retailer's premises or brought into compliance with the requirements of s. ATCP 102.12 (2) and (3).

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.05 and am. (1) (intro.), (b), (c) and (2), Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.16 Reporting requirements. (1) In any investigation under this chapter, any wholesaler shall on request of the department furnish to it price lists, accounting records and data used in determining cost, and such other information as requested concerning the terms or conditions of any agreement, transaction, or offer related to the sale of soda water beverages.

(2) Cost data shall to the extent permitted by law be accorded confidentiality by the department and not opened to the public inspection without 10 days prior notice to the wholesaler concerned.

History: Cr. Register, February, 1977, No. 254, eff. 3-1-77; renum. from ATCP 107.06, Register, February, 1996, No. 482, eff. 3-1-96.

Subchapter III — Motor Fuel

ATCP 102.21 Definitions. In this subchapter:

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

(3) "Motor fuel" includes motor fuels and special fuels as defined in ch. 78, Stats.

(4) "Person" means any individual, sole proprietorship, partnership, corporation or other business entity or any individual acting on behalf of any individual, sole proprietorship, partnership, corporation or other business entity.

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

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

(7) "Supplier" means a person who manufactures motor fuels or who is a controlled subsidiary of one who manufactures motor fuels and is engaged in the business of selling motor fuels to wholesalers, retailers or consumers.

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

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; renum. from ATCP 108.01 and amend (intro.), Register, February, 1996, No. 482, eff. 3-1-96; r. and recr. (1), renum. (2) to be (7), cr. (5), (6) and (8), Register, May, 1999, No. 521, eff. 6-1-99.

ATCP 102.22 Discrimination. (1) No supplier or wholesaler of motor fuel shall enter into any agreement or

arrangement whereby directly or indirectly discrimination is made in the price at which said supplier or wholesaler sells motor fuel to wholesalers or retailers thereof, where the effect of such discrimination may be to substantially lessen competition or to tend to create a monopoly, or to injure, destroy or prevent competition with any person in the marketing of motor fuel in the community in which said supplier or wholesaler is thus selling at a lower price; provided, that it shall be a justification for such a discrimination in price if the difference, made by said supplier or wholesaler in the price to the wholesaler or retailer to whom said supplier or wholesaler sells at a lower figure, is merely commensurate with an actual difference in the quality or quantity of motor fuel sold to said wholesaler or retailer or in the transportation charges or other expenses of marketing involved in the sale to said wholesaler or retailer. Nothing herein contained shall prevent a seller from showing that the lower price was made in good faith to meet an equally low price of a competitor.

(2) No person any part of whose business is the sale of motor fuel to wholesalers shall sell motor fuel for ultimate consumption or use at a price lower than that at which he or she sells to such wholesaler unless such lower price is justified as provided in sub. (1).

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; corrections made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448; renum. from ATCP 108.02, Register, February, 1996, No. 482, eff. 3-1-96.

ATCP 102.23 Coercion. No supplier or wholesaler shall threaten any of his or her customers with any price discrimination or use any form of coercion with the purpose or effect of changing or maintaining resale prices of such customer.

History: Cr. Register, May, 1972, No. 197, eff. 9-1-72; correction made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448; renum. from ATCP 108.03, Register, February, 1996, No. 482, eff. 3-1-96.



ROGERS CINEMA

P.O. BOX 280 MARSHFIELD, WI 54449 715-387-3437

To: Representative Cindi Duchow, Chair
Members, Assembly Committee on Consumer Protection
From: Scott Koran, Rogers Cinema
Date: Tuesday, December 5, 2017
Re: **Testimony in Support of Assembly Bill 544**
Soda Beverage Equipment

Good morning Chairwoman Duchow and members of the Assembly Committee. My name is Scott Koran from Rogers Cinema, which operates cinemas in six cities and two states. The Wisconsin operations are in Marshfield, Wisconsin Rapids, Waupaca, Beaver Dam and Stevens Point. The Michigan operation is in Houghton.

I am here today because of what other Wisconsin movie theatre owners and I view as a government intrusion into the negotiation, terms and contracts between Wisconsin retailers and wholesalers with respect to soda beverage equipment. Further, it is our experience and belief that this government intrusion and industry protectionism provides an unfair leverage in negotiations that may increase and protect soda beverage wholesaler profits at the expense and increased cost to your local Wisconsin retailers – as compared to other states.

It should be noted, that not only is it illegal for soda beverage wholesalers to provide equipment at a discount – I as a retailer am prohibited by law from even bringing the issue up (i.e. soliciting treatment from wholesalers that is prohibited by ATCP 102).

Based on our research, to the best of our knowledge we do not know of any other state in the U.S. that has such a restriction on contract negotiations and terms. Therefore, Wisconsin is either the only state or one of only a few states – making this type of business intrusion peculiar.

Further, based on a survey of our members, the advantage the administrative rule provides soda beverage wholesalers seems to affect and cost operators of all size. In fact, it is the mid-level and smaller movie theatre operator members who have complained the loudest within the association.

We are just asking the legislature to be fair and allow businesses to negotiate these contract terms as they do in other states.

The issue is an administrative rule promulgated by the Wisconsin Department of Agriculture, Trade and Consumer Protection, ATCP 102, that regulates price discrimination and related practices for the sale of fermented malt beverages from brewers to wholesalers; sales of soda water beverages from wholesalers to retailers; and, sales of motor fuel between suppliers or wholesalers and retailers.

However, In the case of soda water beverages, additional prohibitions include:

- Wholesalers are prohibited from furnishing coolers or dispensing equipment for less than the wholesaler's cost of obtaining the equipment.
 - With certain exceptions, wholesalers are further prohibited from requiring retailers to exclusively dispense the wholesaler's products.
- Retailers are prohibited from soliciting treatment from wholesalers that is prohibited by ATCP 102.

This issue hit home for Rogers Cinema when a couple of years ago we upgraded our theatres. While contract negotiations could occur with every other aspect and equipment in the theatre – in Wisconsin it was brought to our attention that the price of the soda beverage equipment was non-negotiable. This of course was not the case in our Michigan theatre. For Rogers Cinema, it cost a little more to do business in Wisconsin.

The law (ATCP 102) was discussed and researched at the state and national theatre associations, and we quickly realized this barrier to soda beverage equipment contract negotiation seemed to apply only in Wisconsin.

It is clear that there are other professions, industries and products where such government intrusion and restriction does not exist. We believe the necessity of this administrative rule for soda water beverage equipment is outdated and seems to benefit and profit one side of the contract equation over the other. This is simply not fair.

It also creates further roadblocks and restrictions on the small to middle sized businesses switching from one soda company to another. Our choices are already limited to the two major brands, adding additional costs to switching force many of these businesses to stay with their current supplier.

When our last soda contract expired, I was interested in what the other national brand could offer me, especially in terms of promotion and brand marketing. Even with a strong desire to switch national brands, when the analysis was complete, that we would have to stay with our current vendor. The cost of replacement equipment was one of the overriding reasons.

Thank you for your consideration in this matter. I am happy to answer any questions you may have.

ATCP 102, Price Discrimination and Related Practices

Summary of Rule:

- For the products and types of businesses listed below, prohibits sellers from discriminating in price and other consideration between buyers where the effect of such discrimination may lessen competition among buyers.
- Products and business types include:
 - Sales of fermented malt beverages from brewers to wholesalers
 - Sales of soda water beverages from wholesalers to retailers
 - Sales of motor fuel between suppliers or wholesalers and retailers.
- In the case of soda water beverages, additional prohibitions include:
 - Wholesalers are prohibited from furnishing coolers or dispensing equipment for less than the wholesaler's cost of obtaining the equipment.
 - With certain exceptions, wholesalers are further prohibited from requiring retailers to exclusively dispense the wholesaler's products.
 - Retailers are prohibited from soliciting treatment from wholesalers that is prohibited by ATCP 102.



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Testimony

To: Representative Cindi Duchow, Chair
Members, Assembly Committee on Consumer Protection
From: George Rouman, President
Date: Tuesday, December 5, 2017
Re: Urge Support of Assembly Bill 544
Allow Businesses to Negotiate Terms on Soda Beverage Equipment

As small business owner myself, as President of the National Association of Theatre Owners of Wisconsin and Upper Michigan and on behalf of our membership, I am asking the members of the Assembly Committee on Consumer Protection to please support passage of Assembly Bill 544.

My name is George Rouman, and I am the owner of Rouman Cinemas located in Rhineland, Wisconsin.

The policy discussion before you today is simple. Should state government intervene and restrict contract terms between soda beverage wholesalers and local retailers such as movie theatres – to exclude discounts on beverage equipment?

It should be noted, that not only does the rule limit negotiation, as a retailer I am prohibited from even raising the issue (i.e. soliciting treatment from wholesalers that is prohibited by ATPC 102).

While some soda beverage wholesalers will cite that this rule \ law protects them from competition from within their own industry - I suggest that this protectionist policy is coming at a price that your local businesses like mine are having to pay.

I want to thank the authors for introducing the legislation and the Committee Chair for scheduling a hearing. We are well aware of the lobbying that has been going on behind the scenes to prevent this issue from even receiving a public hearing.

The more this issue is in the spotlight, the more local businesses become aware that Wisconsin maybe one of only a few – possibly the only state in the U.S. - to limit contract negotiation terms on soda equipment. It should not cost us more to do business in Wisconsin.

Finally, the question has to be asked why can a movie theatre, restaurant and other retailers accept as part of contract negotiation terms free or discounted refrigeration equipment from distributors of ice cream foods, energy drinks and other products?

I suspect there are other industries that would enjoy similar business negotiation limits of contract terms, as it would ensure larger profit margins for one entity over another.

Simply put, this situation is not fair.

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