

Clearinghouse Rule 98-097

STATE OF WISCONSIN)
) ss.
DEPARTMENT OF AGRICULTURE,)
TRADE & CONSUMER PROTECTION)

Clearinghouse Rule
No. 98-097
Docket No. 98-R-6

CERTIFICATION:

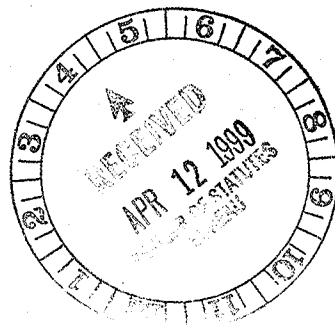
I, Ben Brancel, Secretary of the State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the department's official records, hereby certify that the attached rulemaking order relating to motor vehicle fuel sales below cost was signed and adopted by the department on April 12, 1999.

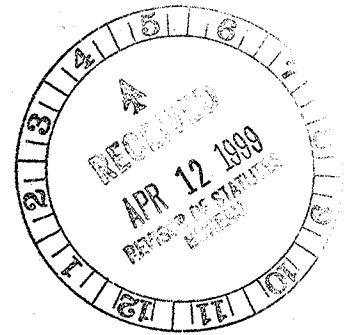
I further certify that I have compared the attached copy to the original on file in the department, and that the attached copy is a complete and accurate copy of the original.

Signed and sealed this 12th day of April, 1999.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Ben Brancel
Ben Brancel, Secretary





**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 hereby adopts
- 2 an order to repeal ATCP 105.007(2) and (note); to renumber ATCP 102.21(2); to amend ATCP
- 3 105.003 and 105.005(1) and (2); to repeal and recreate ATCP 102.21(1); and to create ATCP
- 4 102.21(5), (6) and (8), 105.001(4m), (6) and (7), 105.009(4) and subchapter III of chapter
- 5 ATCP 105; relating to 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 fuel. The legislation modified s. 100.30, Stats., which prohibits sales of motor 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 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 fuel. These changes took effect on August 1, 1998.

- **"Cost" of motor fuel.** The Unfair Sales Act previously defined the "cost" of motor fuel to mean the seller's invoice cost, less trade discounts, plus excise taxes and a presumptive 3% wholesale and 6% retail markup. Act 55 redefined the "cost" of motor vehicle fuel to mean the greater of the following:

- "Cost" as previously defined (with minor changes).

- The “average posted terminal price” for the motor 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” based on sales information collected by that service.
- **“Meeting competition” notice.** The Unfair Sales Act prohibits sales of motor 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 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,” “terminal closest to the retail station” and “cost of doing business.”

Meeting Competition Defense

Under s. 100.30(6)(a)7, Stats., a seller may price and sell merchandise below cost if it is done in good faith to meet an existing price of a competitor. This rule clarifies the intent of the “meeting competition” defense. Section ATCP 105.009(4) provides that a seller may not claim to be meeting competition if the seller’s price is less than the competitor’s price.

Unavailability of Average Posted Terminal Price at Closest Terminal

Section 100.30(2), Stats., requires the cost of motor vehicle fuel to be based on the seller’s cost or the “average posted terminal price” (AFTP), whichever is greater. If AFTP is used, it must be from the terminal located closest to the retail station. There are instances, however, where the closest terminal to the retail station does not list the specific product sold. The rule provides two alternatives if this occurs. A seller may use the AFTP for the same grade of motor vehicle fuel sold from a terminal which is located next closest to the seller, or the AFTP from the closest terminal for a fuel which is most nearly similar in terms of octane rating and content to the motor vehicle fuel sold by the retail station.

“Meeting Competition” Notice

This rule prescribes the form and content of the notice which a motor 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 the 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 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 effective date and time of that selling price, 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.

Cost of doing business

Under s. 100.30(2), Stats., refiners, wholesalers and retailers of motor vehicle fuel must include a 3% markup to cover their presumptive "cost of doing business" when selling motor vehicle fuel at a location other than a retail station. A seller may overcome the presumption by proving a lesser cost of doing business. This rule defines "cost of doing business" generally as the allocation of all costs related to sales of motor vehicle fuel, and specifies certain cost accounting requirements which must be met in making the cost allocation.

Technical and Editorial Changes

This rule makes 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 105.001(4m), (6) and (7) are created to read:

9 ATCP 105.001(4m) "Petroleum price reporting service" has the meaning given in
10 s. 100.30(2)(cL), Stats.

11 (7) "Terminal" means, for purposes of subchapter III, a terminal under s. 100.30(2)(j),

12 Stats., or group of terminals, under s. 100.30(2m)(c), Stats, for which a petroleum price reporting

1 service routinely lists, on most days, prices offered by at least 3 refiners or wholesalers of motor
2 vehicle fuel.

3 **SECTION 5.** ATCP 105.003 is amended to read:

4 **ATCP 105.003 Retailers purchasing directly from manufacturers or producers.** A
5 retailer who purchases cigarettes and other tobacco products, fermented malt beverages,
6 intoxicating liquor, ~~or wine or motor vehicle fuel~~ directly from a manufacturer or producer shall
7 compound the wholesaler markup with the retailer markup to determine the total markup on the
8 merchandise.

9 **SECTION 6.** ATCP 105.005(1) and (2) are amended to read:

10 **ATCP 105.005(1) NON-MANUFACTURERS AND NON-PRODUCERS.** In order to
11 determine the selling price to its own retail customers, a non-manufacturing or non-producing
12 retailer of cigarettes and other tobacco products, fermented malt beverages, intoxicating liquor,
13 or wine ~~or motor vehicle fuel~~ who sells to other retailers shall use the selling price for the sales to
14 other retailers plus at least the minimum retailer markup.

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

20 **SECTION 7.** ATCP 105.007(2) and (note) are repealed.

21 **SECTION 8.** ATCP 105.009(4) is created to read:

22 **ATCP 105.009(4) PRICING TO MEET COMPETITION.** A seller may not claim to be
23 meeting competition if the seller's price is less than the competitors price.

1 price for the specific grade of motor vehicle fuel sold by a retailer or retail station is unavailable
2 from the terminal located closest to the seller, the seller shall use one of the following:

3 (1) The average posted terminal price at the next closest terminal that is based upon the
4 prices of three or more suppliers for the same grade of motor vehicle fuel sold, as required under
5 s. 100.30(2)(j), Stats.

6 (2) The average posted terminal price at the closest terminal for a fuel which is most
7 nearly similar in terms of octane rating and content to the motor vehicle fuel sold.

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

14 NOTE: Section 100.30(7), Stats, only requires sellers of motor vehicle fuel to file a
15 notice on the day that they lower their price to meet a competitor's price. It is not
16 necessary for a seller to provide notice on a day they did not change their price, even if
17 they are selling motor vehicle fuel below cost in order to meet competition. The
18 department recommends that sellers maintain daily price surveys [see ATCP
19 105.009(3)], especially for days that they are selling motor vehicle fuel below cost, as
20 defined in s. 100.30(2), Stats.

21 (2) METHOD OF GIVING NOTICE. A person giving notice to the department under s.
22 100.30(7), Stats., shall give that notice in writing. The person shall give the written notice in one
23 of the following ways:

24 (a) Electronically, by transmitting a facsimile to a receiving number specified by the
25 department. Notice under this paragraph is rebuttably presumed to be timely under sub. (1) if the
26 department receives it by midnight of the day on which the person is required to give the notice.

1 (b) Electronically, by transmitting an e-mail message to an e-mail address specified by
2 the department. Notice under this paragraph is rebuttably presumed to be timely under sub. (1) if
3 the department receives it by midnight of the day on which the person is required to give the
4 notice.

5 (c) By United States mail, to a post office box number specified by the department.
6 Notice under this paragraph is rebuttably presumed to be timely under sub. (1) if it is postmarked
7 by midnight of the day on which the person is required to give the notice.

8 (d) By commercial courier delivery to the department's headquarters. Notice under this
9 paragraph is rebuttably presumed to be timely under sub. (1) if the commercial courier takes
10 custody of the notice by midnight of the day on which the person is required to give the notice.

11 (e) By personal delivery to the department's headquarters. Notice under this paragraph is
12 rebuttably presumed to be timely under sub. (1) if it is delivered to the department's headquarters
13 by 4:30 PM of the day on which the person is required to give the notice.

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

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

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

20 (c) The motor fuel selling price which the notice purports to justify, the effective date
21 and time that the person established that selling price, and the identity and grade of motor fuel
22 to which that selling price applies.

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

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

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

10 NOTE: Section 100.30, Stats., prohibits sales of motor fuel below "cost" as defined in
11 the statute. A seller may claim, as a defense, that the seller sold motor fuel below cost in
12 order to meet the existing price of a competitor. Under s. 100.30(7), Stats., a seller who
13 wishes to establish a presumptive "meeting competition" defense must notify the
14 department of the below-cost selling price on the day the seller offers that price to meet a
15 competitor's price. The seller must give notice "in the form and manner required by the
16 department. Section ATCP 106.22 spells out the "form and manner" in which a seller
17 must give the required notice. Section ATCP 105.22 does not affect or replace s. ATCP
18 105.009.

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

Dated this 12th day of April, 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: April 12, 1999

TO: Gary Poulson -- Revisor of Statutes Office
131 West Wilson Street, Suite 800

FROM: Ben Brancel, Secretary *Ben Brancel*

SUBJECT: Clearinghouse Rule No. 98-097, Chapters ATCP 102 and ATCP 105,
Relating to Motor Vehicle Fuel Sales Below Cost.



The Department of Agriculture, Trade and Consumer Protection hereby submits the following information for filing with the above rule.

Final Regulatory Flexibility Analysis

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 small business impacts are based on an analysis of the impacts of Wis. Act 55.

Small business in Wisconsin that sell motor vehicle fuels at either wholesale or retail are effected 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 service. The minimum cost of this service is roughly \$55 per month. The service will report 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 business 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, many of these business receive their prices early in the day. But these prices are irrelevant for determining 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.

Other petroleum dealers, typically small business, rely on a distributor or jobber to sell them fuel. These people have had no need for a subscription to a pricing service until now. Under the new law, a subscription to a pricing service will be essential to determine whether or not their price is in compliance with the law.

Although this could be a significant cost to the seller, it should be stressed that the 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 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 business. All business who sell gasoline will need to carefully assess their pricing policies and procedures and determine their level of risk of having to pay damages. In addition there will be a cost 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 choose 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 small forfeiture (\$50 to \$200) penalty 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 business.

Rule Contents

“Cost” of motor vehicle fuel

Act 55 extensively changed the method sellers use to determine their “cost” as defined in the statute. This rule clarifies and interprets some portions of the new rule. For example, the rule defines new statutory phrases such as: “terminal located closest to the retail station.” In addition, the rule states some basic cost accounting methodology that must be used when determining the “cost of doing business.”

“Meeting competition” notice

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

Under Act 55, a person who lowers their price to meet the price of a direct competitor must file a “meeting competition” notice with the department. This rule prescribes the form and manor of notice required by the department.

Legislative Review

On March 11, 1999, the Assembly Committee on Consumer Affairs held a hearing on this rule. Several people offered testimony in support and nobody registered or spoke in opposition to the rule. The committee did not take action on the rule and the legislative review period expired on April 11, 1999.