

1 **State of Arkansas**  
2 **79th General Assembly**  
3 **Regular Session, 1993**  
4 **By: Representative Mike Wilson**

# **A Bill**

**ACT 380 OF 1993**  
**HOUSE BILL 1226**

## **For An Act To Be Entitled**

8 "AN ACT TO ESTABLISH PETROLEUM TRADE PRACTICES; TO PREVENT  
9 BELOW COST MOTOR FUEL SALES THAT INJURE COMPETITION; TO  
10 PREVENT DISCRIMINATORY MOTOR FUEL ALLOCATIONS AND REBATES;  
11 TO PROVIDE FOR ENFORCEMENT AND PENALTIES; AND FOR OTHER  
12 PURPOSES."

## **Subtitle**

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14  
15 "THE ARKANSAS PETROLEUM TRADE PRACTICES ACT."

16  
17  
18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

19  
20 SECTION 1. SHORT TITLE. This part shall be known and may be cited as  
21 the "Arkansas Petroleum Trade Practices Act."

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23 SECTION 2. DEFINITIONS. As used in this act, unless the context  
24 specifically requires otherwise, the term:

25 (a) "Affiliate" shall mean any person who (other than by means of  
26 franchise) is controlled by, or is under common control with, any other  
27 person.

28 (b) "Competition" shall mean the vying for motor fuel sales between two  
29 or more sellers in the same market area and at the same level of distribution.

30 (c) "Cost of overhead" shall mean and include all costs incurred in the  
31 conduct of business at *that retail location*, including but not limited to  
32 labor, rent (which rent must be fair market value based on current use),  
33 interest on borrowed capital, depreciation, selling cost, maintenance of  
34 equipment, loss due to breakage or damage, credit card fees or other charges,  
35 credit losses and all types of licenses, taxes, insurance, advertising and  
36 environmental reporting and compliance, but does not include the cost of

1 environmental clean up or remediation.

2 (d) "Cost to the retailer" means the sum of:

3 (i) The lower of:

4 (A) The purchase price of motor fuel to the retailer, less  
5 all trade discounts, allowances, or rebates actually granted to the retailer;  
6 or

7 (B) The replacement cost of motor fuel at the time of  
8 retail sale in the quantity last purchased by the retailer; plus

9 (ii) The cost of transportation of motor fuel from the point of  
10 purchase by the retailer to the retail location;

11 (iii) All applicable federal, state, or local motor fuel or sales  
12 taxes not already included in the purchase price to the retailer; and

13 (iv) The reasonable cost of overhead for motor fuel at that  
14 location.

15 (e) "Dealer" shall mean any person, *firm, corporation, or partnership,*  
16 *including a vertically integrated refiner,* engaged in the sale of motor fuel  
17 to the public at retail.

18 (f) "Distributor" shall mean any person engaged in the sale of motor  
19 fuel at wholesale to dealers.

20 (g) "Exempt" shall mean those sales at retail exempted by  
21 Subsection (c) or (d) of Section 4.

22 (h) "Motor fuel" shall mean gasoline, diesel fuel, alcohol or any  
23 mixture of these fuels, or any other fuel sold for use in automobiles and  
24 related vehicles. Each separate grade or blend of motor fuel shall be  
25 considered an individual item, product, and commodity.

26 (i) "Person" shall mean any person, firm, association, organization,  
27 partnership, business trust, joint stock company, corporation, or legal  
28 entity, *except that it does not include any public utility as that term is*  
29 *defined in Act 324 of 1935, as amended.*

30 (j) "Refiner" shall mean any person, including an affiliate, who is  
31 engaged directly or indirectly in the refining of motor fuel.

32 (k) "Retailer" shall mean a dealer as defined in this act.

33 (l) "Sale" includes, but is not limited to, a transfer, gift, sale,  
34 offer for sale, or advertisement for sale in any manner or by any means  
35 whatsoever, including a transfer of motor fuel from a person to itself or an

1 affiliate at another level of distribution.

2 (m) "Sale at retail," "sales at retail" or "retail sale" mean and  
3 include any transfer, made in the ordinary course of trade or in the usual  
4 pursuit of the seller's business, of title to tangible personal property to  
5 the purchaser for use or consumption and for valuable consideration. The  
6 above terms include any transfer of such property where title is retained as a  
7 security for the purchase price but is intended to be transferred later.

8 (n) "Transfer price" shall mean the price used by a refiner in  
9 transferring motor fuel to its own or an affiliate for resale to another  
10 marketing level.

11 (o) "Transportation cost" shall mean the actual cost of transportation  
12 of motor fuel or, in the absence of proof of actual cost, the common carrier  
13 rates fixed by the Arkansas Highway & Transportation Department for the  
14 immediate market area covered.

15 (p) "Vertical integration" shall mean the ownership or control of the  
16 production of motor fuel including the refining, distribution, and resale of  
17 such motor fuel by a person, firm, partnership or corporation or from the  
18 refinery to the gasoline pump.

19 (q) "Vertically integrated refiner" shall mean a refiner controlling  
20 all phases of petroleum production and sale from the refinery through  
21 distribution to dealers as defined herein.

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23 SECTION 3. PURPOSE. (a) The purpose of this act is to regulate  
24 vertical integration of the petroleum industry in Arkansas, it being the  
25 conclusion of the General Assembly hereby expressed that *certain* vertical  
26 integration *may tend* to operate in restraint of free trade and *may inhibit*  
27 full and free competition and therefore *may tend* to increase the price of  
28 motor fuel and services as prohibited in this act. It is also the purpose of  
29 this act to safeguard the public against the creation or perpetuation of  
30 monopolies in the marketing segment of the petroleum industry.

31 (b) Independent and small dealers and distributors of motor fuel are  
32 vital to a healthy, competitive marketplace, but are unable to survive  
33 subsidized below-cost pricing at the retail level by others who have other  
34 sources of income. Fair and healthy competition in the marketing of motor  
35 fuel provides maximum benefits to consumers in this state, and certain market-

1 ing practices which impair such competition are contrary to the public  
2 interest. Predatory pricing practices are unfair trade practices and  
3 restraints which adversely affect motor fuel competition. Subsidized pricing  
4 is inherently predatory because it is unfair and destructive to, and reduces  
5 competition in, the motor fuel marketing industry. Below-cost selling and  
6 related laws have been effective in preserving independent and small retailers  
7 and wholesalers in other trades and businesses from subsidized and predatory  
8 pricing related to unfair practices.

9 (c) Recovery under the federal antitrust laws has become increasingly  
10 difficult due to the requirement of establishing an "antitrust injury." The  
11 legislature has determined that subsidized and predatory pricing presumptively  
12 injure competition by damaging independent dealers and distributors of motor  
13 fuel. Proof of an "antitrust injury" is unnecessary for recovery under this  
14 act.

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16 SECTION 4. SALES BELOW COST TO RETAILER. (a) No dealer shall make, or  
17 offer or advertise to make, sales at retail at below cost to the retailer of  
18 motor fuel, where the effect may injure competition, unless such sales at  
19 retail are exempt under Subsection (c) or (d) of this Section. In calculating  
20 the cost to the retailer as defined in Subsection (d) of Section 2, it is the  
21 intention of the General Assembly that each separate grade or blend be  
22 considered an individual item, product, or commodity. The entire line or  
23 array of complimentary products need not be considered in calculating the cost  
24 to the retailer.

25 (b) No vertically integrated refiner may sell or transfer motor fuel to  
26 its own or an affiliate retail outlet at a price which is less, *after making*  
27 *adjustment for credit card and on-site retail outlet brand imaging fees, if*  
28 *any*, than the price at which that motor fuel is offered for sale by the  
29 vertically integrated refiner to a dealer operating in the same class of trade  
30 and within the same competitive area as the retail outlet of the vertically  
31 integrated refiner.

32 (c) Nothing in this section shall prohibit a dealer from making, or  
33 offering or advertising to make, sales at retail of motor fuel which are made  
34 in good faith to compete with the equally low or lower retail price of a  
35 competitor. However, while the previous sentence allows a dealer to make,

1 offer or advertise, sales at a price equal to the retail price of a compet-  
2 itor, it does not authorize such dealer to make, offer or advertise to make,  
3 sales at retail at a price below such competitor if such sales would be in  
4 contravention with the provisions of this section.

5 (d) The provisions of this section shall not apply:

6 (i) Where motor fuel is advertised, offered for sale, or sold in  
7 a bona fide clearance sale for the purpose of discontinuing trade in such  
8 motor fuel, and said advertising, offer to sell, or sale shall state the  
9 reason thereafter and the quantity of such motor fuel advertised, offered for  
10 sale, or to be sold;

11 (ii) Where motor fuel is sold upon the final liquidation of a  
12 business; or

13 (iii) Where motor fuel is advertised, offered for sale, or sold  
14 by any fiduciary or other officer under the order or direction of any court;  
15 or

16 (iv) Where motor fuel is sold during a grand opening to introduce  
17 a new or remodeled business. However, such grand opening shall not exceed 3  
18 days and shall be held within 60 days from the date the new or remodeled  
19 business begins operations.

20 (e) Nothing contained within the provisions of this section shall be  
21 construed to regulate the price of motor fuel purchased from a refiner or a  
22 distributor:

23 (i) By a person solely for use in agricultural production  
24 activities on the farm of such person;

25 (ii) By an employer for the business use of his employees;

26 (iii) By any common carrier regulated by the Arkansas  
27 Transportation Commission; or

28 (iv) By a person for industrial and commercial purposes which do  
29 not include the sale of motor fuel to the public.

30 (f) The burden of proving an exemption from the provisions of this  
31 section shall be upon the dealer claiming its sales are exempt.

32

33 SECTION 5. DISCRIMINATORY ALLOCATIONS. (a) It is unlawful for a  
34 refiner to limit or allocate the quantity of motor fuel available to a dealer,  
35 distributor or other reseller purchasing under contract from such refiner

1 unless the limitations or allocations are applied in a reasonable and  
2 nondiscriminatory manner among all resellers supplied by such refiner under  
3 contract in a general trade area and the refiner's own affiliate retail out-  
4 lets.

5 (b) It is also unlawful for a refiner to limit or allocate for more  
6 than five (5) days the quantity of motor fuel available to a dealer,  
7 distributor or other reseller purchasing under contract from such refiner,  
8 unless the limitations or allocations are applied in a reasonable and  
9 nondiscriminatory manner among all resellers supplied by such refiner under  
10 contract in a general trade area and the refiner's own retail outlets.

11

12 SECTION 6. CERTAIN REBATES UNLAWFUL. It is unlawful for a refiner to  
13 offer or give a rebate or concession of any kind in connection with the sale  
14 of motor fuel for resale to a person when the refiner does not provide, on  
15 proportionately equal terms, the same rebate or concession to all persons  
16 purchasing for resale in a market area, where the effect may injure  
17 competition. However, a rebate or concession made in good faith to meet the  
18 same or an equivalent rebate or concession of a competitor shall not be a  
19 violation of this act. Such rebates or concessions made pursuant to the  
20 authority in the previous sentence may equal, but not be greater than, the  
21 rebate or concession of a competitor.

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23 SECTION 7. DISCLOSURE. (a) All refiners doing business in this state  
24 are required to establish and publicly disclose upon request their "transfer  
25 prices" on all grades of motor fuel transferred or sold to itself or an  
26 affiliate for resale in this state at another marketing level of distribution.

27 (b) In the absence of proof of the actual cost to a dealer, such cost  
28 may be presumed to be the lowest cost to the dealer within the same market  
29 area as determined by a cost survey.

30 (c) Where a cost survey pursuant to recognized statistical and cost  
31 accounting practices has been made for a market area in which a violation of  
32 this act has been alleged to have been committed, to determine and establish  
33 on the basis of existing conditions the lowest cost to dealers within the said  
34 area, the said cost survey shall be deemed competent evidence in any  
35 proceeding or action under this act as tending to prove actual cost to the

1 dealer. The party against whom such cost survey may be introduced in evidence  
2 shall have the right to offer to evidence tending to prove any inaccuracy of  
3 such cost survey or any state of facts which would impair the cost survey's  
4 probative value.

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6 SECTION 8. ENFORCEMENT. (a) Any person who violates this act shall be  
7 subject to a civil penalty not to exceed One Thousand Dollars (\$1,000.00) per  
8 day for each day during which the act or omission continues or occurs.

9 (b) The Attorney General may investigate any complaints regarding any  
10 violations of this act.

11 (c) The Attorney General may bring an action in the name of the state  
12 in a court as described in Subsection (g) of Section 8, if there is a  
13 reasonable basis for believing that a violation of this act has occurred or is  
14 occurring, for appropriate relief, including civil penalties, a temporary re-  
15 straining order, temporary injunction, or permanent injunction, against any  
16 person who has violated or is violating this section. All funds recovered by  
17 the Attorney General shall be paid to the state Treasury.

18 (d) Any person having an interest which is or may be adversely affected  
19 by a violation or threatened violation of this act may commence a civil action  
20 on his own behalf against any dealer who is alleged to be in violation of this  
21 act, to recover actual and special damages, for payment of civil penalties,  
22 and to enjoin the dealer who has violated, is violating or who is otherwise  
23 likely to violate this section.

24 (e) No action may be commenced under Subsection (d) of Section 8 prior  
25 to ten (10) days after the plaintiff has given notice by certified mail of the  
26 alleged violation to any alleged violator and to the Attorney General.

27 (f) If the court finds that the violations were willful or knowing  
28 violations, the court may award three (3) times the actual damage sustained  
29 and may provide such other relief as it considers necessary and proper. It  
30 shall be presumed that retail sales below cost by a dealer after he has re-  
31 ceived the notice required in Subsection (e) of Section 8 are willful and  
32 knowing.

33 (g) An action pursuant to the provisions of this section shall be  
34 brought in a court of competent jurisdiction in the county where the alleged  
35 or threatened violation of this act took place, is taking place, or in the

1 county in which such dealer or refiner resides, has his principal place of  
2 business, or can be found.

3 (h) In any action filed under this act, the prevailing party may be  
4 allowed a reasonable attorney fee to be assessed by the court and collected as  
5 costs. However, an attorney fee shall not be assessed against the Attorney  
6 General or the state.

7

8 SECTION 9. PRIVATE ACTION PRESUMPTION. (a) In any action brought  
9 under this chapter, upon a prima facie showing of a violation, the burden of  
10 rebutting the prima facie case thus made shall shift to the defendant. A  
11 prima facie showing of a violation shall be constituted if the plaintiff  
12 shows:

13 (i) That the plaintiff's purchase price from a refiner or  
14 distributor is greater than said refiner's transfer price; or,

15 (ii) That the plaintiff's purchase price from a refiner or  
16 distributor plus the plaintiff's cost of doing business is greater than said  
17 refiner's or distributor's retail posted sales price; or,

18 (iii) That the plaintiff's basic cost of motor fuel plus the  
19 plaintiff's cost of doing business is greater than the posted sales price at a  
20 retail location of a competitor, within plaintiff's marketing area, suspected  
21 of selling motor fuel in violation of this chapter.

22 (b) A plaintiff may utilize the presumption created by this section  
23 only if the plaintiff notifies the alleged violator by certified mail ten (10)  
24 days prior to commencing an action of the cost data the plaintiff has  
25 knowledge of at the time that the plaintiff reasonably believes gives rise to  
26 a violation under this act.

27 (c) A party may rebut the presumption created by this section by  
28 presenting evidence to establish his cost of the grade, brand or blend of  
29 motor fuel in question, or by qualifying for an exception under § 4(c) and  
30 (d).

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32 SECTION 10. Provisions of this act shall expire four (4) years after  
33 its effective date.

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35 SECTION 11. SEVERABILITY. If any provision of this act or the



1 application thereof to any person or circumstance is held invalid, such  
2 invalidity shall not affect other provisions or applications of the act which  
3 can be given effect without the invalid provision or application, and to this  
4 end the provisions of this act are declared to be severable.

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6 SECTION 12. CONFLICT WITH FEDERAL LAWS. If any provision of this act  
7 is found to conflict with federal requirements which are a prescribed  
8 condition to the allocation of federal funds to the state, the conflicting  
9 part of this act is hereby declared to be inoperative solely to the extent of  
10 the conflict, and such finding or determination shall not affect the operation  
11 of the remainder of this act.

12

13 SECTION 13. CONSTRUCTION OF THE ACT. This act is remedial legislation  
14 and shall be liberally construed to promote its purposes. The powers and  
15 remedies in this section shall be cumulative and supplementary to all other  
16 powers and remedies otherwise provided by law.

17

18 SECTION 14. REMEDIES CUMULATIVE. Nothing in this act shall be  
19 construed as repealing any other legislation, or portion thereof, but the  
20 remedies herein provided shall be cumulative to all other remedies provided by  
21 law.

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23 SECTION 15. All provisions of this act of a general and permanent  
24 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas  
25 Code Revision Commission shall incorporate the same in the Code.

26

27 SECTION 16. If any provision of this act or the application thereof to  
28 any person or circumstance is held invalid, such invalidity shall not affect  
29 other provisions or applications of the act which can be given effect without  
30 the invalid provision or application, and to this end the provisions of this  
31 act are declared to be severable.

32

33 SECTION 17. All laws and parts of laws in conflict with this act are  
34 hereby repealed.

35

1 SECTION 18. EMERGENCY. It is hereby found and determined by the  
2 Seventy-Eighth General Assembly of the State of Arkansas that subsidized below  
3 cost pricing, discriminatory allocations, and other unfair trade practices in  
4 the marketing segment of the petroleum industry are threatening small and  
5 independent petroleum marketers and therefore, free and healthy competition.  
6 Therefore, in order to address this serious issue, an emergency is hereby  
7 declared to exist, and this act being necessary for the immediate preservation  
8 of the public peace, health and safety shall be in full force and effect from  
9 and after its passage and approval.

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*/s/Mike Wilson*

APPROVED: 3/8/93

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