

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

A Bill

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

14 "THE ARKANSAS PETROLEUM TRADE PRACTICES ACT."

15
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."

22
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

1 environmental reporting and compliance, but does not include the cost of
2 environmental clean up or remediation.

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

4 (i) The lower of:

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

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

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

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

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

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

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

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

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

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

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

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

34 (l) "Sale" includes, but is not limited to, a transfer, gift, sale,
35 offer for sale, or advertisement for sale in any manner or by any means

1 whatsoever, including a transfer of motor fuel from a person to itself or an
2 affiliate at another level of distribution.

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

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

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

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

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

23

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

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

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

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

16

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33

34 SECTION 5. DISCRIMINATORY ALLOCATIONS. (a) It is unlawful for a
35 refiner to limit or allocate the quantity of motor fuel available to a dealer,

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

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

12

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

23

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

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

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

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

6

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

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

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

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

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

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

34 (g) An action pursuant to the provisions of this section shall be
35 brought in a court of competent jurisdiction in the county where the alleged

1 or threatened violation of this act took place, is taking place, or in the
2 county in which such dealer or refiner resides, has his principal place of
3 business, or can be found.

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

8

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

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

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

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

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

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

32

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

35

1 SECTION 11. SEVERABILITY. If any provision of this act or the
2 application thereof to any person or circumstance is held invalid, such
3 invalidity shall not affect other provisions or applications of the act which
4 can be given effect without the invalid provision or application, and to this
5 end the provisions of this act are declared to be severable.

6

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

13

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

18

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

23

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

27

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

33

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

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

/s/Mike Wilson

1
2
3
4
5
6
7
8
9
10
11