

### WI Minimum Markup on Fuel

**Background:** Wisconsin's Unfair Sales Act of 1939 originally intended to help keep small businesses afloat during the Great Depression. The Act required retailers to mark up their products a certain percentage over their wholesale price. In theory, this was supposed to keep large retailers from undercutting the prices of smaller "mom and pop" stores, which could drive the smaller stores out of business (commonly referred to as "predatory pricing.")

In the 1980's many of the Unfair Sales Act's provisions were repealed, such as the application of the minimum markup provision to groceries. Yet a minimum markup formula still applies to auto fuel (also alcohol and tobacco) in Wisconsin (WPRI, Wisconsin's Minimum Markup Law, 2008). The Unfair Sales Act is applied as a percentage standard, so as the wholesale cost of gas escalates, the minimum markup escalates as well. The Department of Agriculture, Trade and Consumer Protection (DATCP) enforces this law on a complaint-driven basis.

In 2003, the U.S. Federal Trade Commission (FTC) analyzed the scholarship on "predatory pricing," concluding:

"Economic studies, legal studies, and court decisions indicate that below-cost pricing that leads to monopoly occurs infrequently. Below-cost sales of motor fuel that lead to monopoly are especially unlikely. For these reasons, we believe Wisconsin's Unfair Sales Act likely harms consumers and restricts competition. Moreover, at best, the Act is unnecessary because the federal antitrust laws already protect against predatory pricing" (U.S. FTC, response to letter by Rep. Shirley Krug, October 15, 2003).

There have been many attempts to repeal the minimum markup on gasoline with the most recent in 2006 when a bill authored by Republican Senator Dave Zien made it to the floor but was sent back to committee where it eventually perished. Lobbying on the 2006 effort to repeal the Unfair Sales Act on gas broke down primarily into two camps: those who buy a lot of gas (for) and those who sell a lot of gas (against). Wisconsin Farm Bureau was in the camp of those who opposed repealing the minimum markup on fuel (WPRI).

Arguments supporting a minimum markup on fuel include preventing larger operators from offering gasoline below wholesale price as a "loss leader" to harm smaller operators. This argument contends that smaller operators may be squeezed out of business eventually resulting in the fuel cost to end users being controlled by very few large vendors. This is often coupled with evidence that even with the minimum markup, some smaller operators cannot be guaranteed a profit.

Arguments against minimum markups on fuel point out that the law is actually anti competition, and setting an artificial markup has no relationship to the actual cost of doing business or profitability.

## **WFBF's Current Positions**

### **Minimum Markup**

**Page 7 Lines 1-4 "We support limiting the minimum markup law to prohibit the selling of products below cost except in merchandise clearing instances. We support repeal of the minimum markup law as it relates to gasoline and diesel fuel."**

Production agriculture relies on readily available and reasonably priced fuel.

WFBF has taken the position of supporting the repeal of the minimum markup law on gasoline and diesel fuel but continues to support prohibiting the sale of products below cost except in merchandise clearing instances.

### **Indexing Fuel Tax**

**Page 19 Line 55 "We oppose the indexing of fees."**

While WFBF has taken the position supporting a fuel tax to contribute funding for transportation infrastructure, the membership does not support the automatic indexing of a gasoline tax. Current law does not allow for indexing a tax on fuel.

The price of gasoline results largely from the forces of supply and demand for petroleum products worldwide, crude oil prices and refinery capabilities.

Dramatic price swings in the cost of gasoline are almost always due to world, national and market events that influence supply and demand, and in turn, price. Small changes in state tax rates on gasoline do not influence the basic supply and demand curves that establish the price of gasoline at the pump in Wisconsin or throughout the nation (WI Dept of Transportation).

### **2019 Senate Bill 51 and Assembly Bill 155**

There has been a proposal in the 2019-21 legislative session to eliminate the minimum markup requirements and the prohibition on sales below costs entirely. The fiscal impact to the state would be an annualized reduction of \$253,000 in salaries and fringes for 2 FTE who currently enforce the provisions of the Unfair Sales Act. Also represented in this figure would be minimal amount of staff time to amend Ch ATP 102 and repeal Ch ATP 105, Adm. Code, due to their statutory references to §100.30 which will be repealed under this proposal.

### **Probing Questions**

Should WFBF continue to support repealing the minimum markup on only gasoline and diesel fuel?

Should WFBF amend their policy statement to support repealing minimum markup and sales below cost on all products? Some products?