

1 **MOTOR FUEL MARKETING AMENDMENTS**

2 2000 GENERAL SESSION

3 STATE OF UTAH

4 **Sponsor: Parley Hellewell**

5 AN ACT RELATING TO COMMERCE AND THE MOTOR FUEL MARKETING ACT;
6 AMENDING DEFINITIONS; ADDRESSING REQUIREMENT TO ESTABLISH AND
7 DISCLOSE CERTAIN PRICES; AMENDING PROVISIONS AGAINST UNLAWFUL SALES;
8 ADDRESSING SALES NOT CONSIDERED VIOLATIONS; ADDRESSING CIVIL
9 ENFORCEMENT; ADDRESSING REBUTTABLE PRESUMPTIONS; ADDRESSING
10 ADMINISTRATIVE REMEDIES; AND MAKING TECHNICAL CHANGES.

11 This act affects sections of Utah Code Annotated 1953 as follows:

12 AMENDS:

13 **13-16-2**, as last amended by Chapter 260, Laws of Utah 1991

14 **13-16-3**, as last amended by Chapter 189, Laws of Utah 1987

15 **13-16-4**, as last amended by Chapter 300, Laws of Utah 1992

16 **13-16-6**, as last amended by Chapter 279, Laws of Utah 1994

17 **13-16-7**, as last amended by Chapter 260, Laws of Utah 1991

18 **13-16-8**, as last amended by Chapter 189, Laws of Utah 1987

19 **13-16-9**, as last amended by Chapter 189, Laws of Utah 1987

20 **13-16-10**, as last amended by Chapter 300, Laws of Utah 1992

21 **13-16-11**, as enacted by Chapter 260, Laws of Utah 1991

22 ENACTS:

23 **13-16-13**, Utah Code Annotated 1953

24 REPEALS:

25 **13-16-5**, as last amended by Chapter 189, Laws of Utah 1987

26 *Be it enacted by the Legislature of the state of Utah:*

27 Section 1. Section **13-16-2** is amended to read:

28 **13-16-2. Definitions.**

29 As used in this chapter:

30 (1) "Affiliate" means ~~[an entity]~~ a person that owns or controls, or is owned or controlled
31 by, another person, whether through stock ownership or otherwise.32 (2) "Cost" means an amount calculated as follows:

33 (a) (i) if motor fuel is not purchased from an affiliate:

34 (A) the lowest invoice cost that the seller charged to the purchaser for motor fuel of like
35 grade and quality within five days prior to the date of any alleged unlawful resale by the purchaser;

36 or

37 (B) if there was no sale to the purchaser within the preceding five days, the purchaser's last
38 invoice cost for motor fuel of like grade and quality; or

39 (ii) if motor fuel is purchased or received from an affiliate:

40 (A) the lowest transfer price that the affiliate charged to the purchaser or receiver for motor
41 fuel of like grade and quality within five days prior to the date of any alleged unlawful resale by
42 the purchaser or receiver; or43 (B) if there was no purchase or receipt within the preceding five days, the last transfer
44 price for motor fuel of like grade and quality; ~~[less]~~45 (b) ~~[trade discounts, allowances, or rebates]~~ less each of the following that the purchaser
46 receives on the particular invoice or transfer:47 (i) a trade discount;48 (ii) an allowance; or49 (iii) a rebate; [plus] and50 ~~(c) [the reasonable cost of doing business as determined by generally accepted accounting~~
51 ~~principles, which, with respect to retail sales and in the absence of proof of a lesser cost, is~~
52 ~~presumed to be a margin of 6% of the posted retail price;]~~ plus the following if not included in the
53 invoice cost or transfer price:54 ~~[(d)]~~ (i) freight charges [and];55 (ii) all applicable federal, state, and local taxes [not already included in the invoice cost
56 or transfer price]; and57 (iii) charges imposed by a federal, state, or local government that are not taxes.58 (3) "Division" means the Division of Consumer Protection.

59 ~~[(3)]~~ (4) "Motor fuel" means gasoline, diesel fuel, gasohol, and all other fuels of a type
60 designated for use as a motor fuel in self-propelled vehicles designated primarily for use on public
61 streets, roads, and highways.

62 (5) "Opening" means the first retail sale of motor fuel at a new retail station.

63 ~~[(4)]~~ (6) "Person" means any individual, partnership, corporation, or other legal entity.

64 (7) (a) "Posted rack price" means the price at which a refiner or other person offers a grade
65 of motor fuel for sale at the rack before:

66 (i) a reduction for:

67 (A) a trade discount;

68 (B) an allowance; or

69 (C) a rebate; or

70 (ii) the addition of:

71 (A) a charge for freight;

72 (B) a federal, state, or local tax; or

73 (C) a charge imposed by a federal, state, or local government that is not a tax.

74 (b) Notwithstanding Subsection (7)(a), the posted rack price for a refiner or other person
75 offering motor fuel for sale at the rack who does not establish a posted rack price shall be the
76 lowest posted rack price of any person for motor fuel of like grade or quality in the geographic area
77 served by the refiner or other person.

78 (8) "Purchase," "purchases," or "purchased" means the acquisition of motor fuel as a result
79 of a sale or resale.

80 (9) "Rack" means a deck, platform, or open bay that consists of a series of metered pipes
81 and hoses for the delivery or removal of motor fuel from the refinery or terminal into:

82 (a) a motor vehicle;

83 (b) a rail car; or

84 (c) a vessel.

85 (10) "Receipt" or "received" has the same meaning as purchase under Subsection (8).

86 (11) "Resale" or "resales" has the same meaning as sale under Subsection (14).

87 ~~[(5)]~~ (12) "Retail sale" means any sale of motor fuel to a member of the motoring public
88 for consumption.

89 (13) "Retail station" means a station, store, or other outlet from which motor fuel is sold

90 at retail in this state.

91 [(6)] (14) (a) "Sale," "sales," "sell," "sells," or "sold" means [any] the transfer of, [gift,
92 sale,] or offer [for sale, or advertisement for sale in any manner or by any means, including any
93 transfer of motor fuel by a person to himself or his affiliate.] to transfer:

94 (i) ownership, title to, or possession of, motor fuel from one person to another; and

95 (ii) with or without consideration.

96 (b) "Sale, "sales," "sell," "sells," or "sold" includes any method by which any person
97 transfers or offers to transfer ownership, title to, or possession of, motor fuel to itself or an affiliate
98 for resale at another marketing level.

99 (15) "Terminal" means a facility:

100 (a) for the storage of motor fuel that is:

101 (i) part of a refinery; or

102 (ii) supplied by:

103 (A) a motor vehicle;

104 (B) a pipeline; or

105 (C) a vessel; and

106 (b) from which motor fuel is removed for distribution at a rack.

107 [(7)] (16) "Transfer price" means the price used by a refiner [in-transferring] in connection
108 with any sale of motor fuel to itself or an affiliate for resale at another marketing level.

109 Section 2. Section **13-16-3** is amended to read:

110 **13-16-3. Requirement to establish and disclose "transfer prices" and "posted rack**
111 **prices."**

112 [Each] A refiner engaged in commerce in this state is required to:

113 (1) establish [and publicly disclose upon request];

114 (a) its transfer price on all grades of motor fuel [transferred-or] sold to itself or an affiliate
115 for resale in this state at a different marketing level of distribution[-]; and

116 (b) a posted rack price on all grades of motor fuel the refiner or other person sells at the
117 rack in this state; and

118 (2) notwithstanding the provisions of Section 13-16-9, at the request of any person disclose
119 to the requesting person:

120 (a) any transfer price described in Subsection (1)(a); or

121 (b) any posted rack price described in Subsection (1)(b).

122 Section 3. Section **13-16-4** is amended to read:

123 **13-16-4. Unlawful sale by persons engaged in commerce.**

124 (1) It is unlawful for any person engaged in commerce within this state to sell [~~or offer to~~
125 sell] motor fuel in this state below cost as defined in Subsection 13-16-2(2) if[~~:(a)~~] the intent or
126 effect of the sale [~~or offer~~] is to:

127 (a) injure competition; [or]

128 (b) [~~the intent and purpose of the sale or offer is to~~] induce the [purchase] buying of other
129 merchandise[~~;~~to];

130 (c) unfairly divert trade from a competitor[~~;~~]; or

131 (d) otherwise [to] injure a competitor.

132 (2) It is unlawful for any person engaged in commerce [~~within~~] in this state, in the course
133 of such commerce, either directly or indirectly, to:

134 (a) sell motor fuel to itself or an affiliate for resale in this state on a different marketing
135 level of distribution at a transfer price lower than the price it charges a person who purchases
136 motor fuel of like grade and quality at reasonably the same time for resale in this state on the same
137 level of distribution, if the intent or effect of the sale is to injure competition; or

138 (b) sell [~~or offer to sell~~] motor fuel for resale in this state at a price lower than the seller
139 charges other persons [at the same time and] purchasing motor fuel of like grade and quality at
140 reasonably the same time for resale in this state on the same level of distribution, if the intent or
141 effect of the sale [~~or offer~~] is to injure competition.

142 Section 4. Section **13-16-6** is amended to read:

143 **13-16-6. Sales not considered violations.**

144 (1) It is not a violation of [Section] Subsection 13-16-4(2) [~~or 13-16-5~~] if:

145 (a) a difference exists at the same level of distribution between the transfer price or sales
146 price of motor fuel of like grade and quality and the price charged to a person who purchases for
147 resale, including any discount, rebate, allowance, service, or facility granted to any person,
148 including any of a supplier's own marketing operations, who purchases for resale, in excess of
149 those provided to [a] any other person who purchases for resale if the difference [is] makes only
150 due [~~to a difference~~] allowance for differences in the cost of:

151 (i) manufacturing;

152 (ii) transportation, shipping, or other delivery method, [transportation,]; or
153 (iii) marketing[;] or sale[,-or] resulting from the method or quantity in which the motor
154 fuel is sold or delivered.

155 ~~[(2)]~~ (b) [It is not a violation of Section 13-16-4 or 13-16-5 if] a difference exists in
156 transfer price and sales price or between sales prices at the same marketing level if the difference
157 exists because of a good faith effort to meet the equally low price of a competitor or if the sale is
158 exempt under Section 13-5-12.

159 ~~[(3)]~~ (2) (a) It is not a violation of Subsection 13-16-4(1) if [the] a sale below cost is:

160 (i) the result of a good faith effort to meet the equally low price of a competitor [or if the];

161 (ii) a sale [is] exempt under Section 13-5-12[-]; or

162 (iii) in connection with the opening of a retail station if:

163 (A) the below cost sale occurs only from the retail station that is opening;

164 (B) the first sale of motor fuel at a price below cost in connection with the opening occurs
165 within 60 days from the day of the retail station's opening;

166 (C) the below cost sale of motor fuel at the retail station in connection with the opening
167 occurs no later than 72 hours from the first sale of motor fuel at a price below cost in connection
168 with the opening; and

169 (D) the opening occurs only once.

170 (b) Notwithstanding Subsection (2)(a)(iii)(D), a sale described in Subsection (2)(a)(iii) is
171 not a violation of Subsection 13-16-4(1) if:

172 (i) the retail station at which an opening previously occurred is reopening after:

173 (A) the retail station stopped the sale of motor fuel at the retail station for a period of not
174 less than 72 continuous hours because of remodeling; or

175 (B) the transfer of the retail station to a new owner who is not an affiliate;

176 (ii) the below cost sale occurs only from the retail station that is reopening;

177 (iii) the first sale of motor fuel at a price below cost in connection with the reopening
178 occurs within 60 days from the day the retail station makes its first sale of motor fuel after the
179 reopening; and

180 (iv) the below cost sale of motor fuel at the retail station in connection with the reopening
181 occurs no later than 72 hours from the first sale of motor fuel at a price below cost in connection
182 with the reopening.

183 (3) Notwithstanding Subsection (2), any below cost price for the sale of motor fuel made
 184 by any person to meet the price at which a competitor has made a sale of motor fuel in connection
 185 with an opening or reopening may not occur after the 72 hour period described in:

186 (a) Subsection (2)(a)(iii)(C); or

187 (b) Subsection (2)(b)(iv).

188 ~~[(b)]~~ (4) In determining whether a person has set the price at which motor fuel is sold [or
 189 offered for sale] to meet the price of a competitor, the court shall consider only whether the seller
 190 [or offeror] has set the price of motor fuel to [match] meet the price at which a competitor has sold
 191 [or offered] motor fuel without regard to any other items sold [or offered] in conjunction with the
 192 sale [or offer for sale] of the motor fuel.

193 (5) Notwithstanding Section 13-16-2, for purposes of Subsection (2)(a)(iii)(C) and
 194 Subsection (2)(b)(iv) the term "sale" does not include an offer to sale.

195 Section 5. Section **13-16-7** is amended to read:

196 **13-16-7. Civil actions authorized -- Expenses -- Jurisdiction and venue.**

197 (1) (a) If the [~~Division of Consumer Protection~~] division has reason to believe that a
 198 person has engaged in acts or practices that violate Section 13-16-4 [~~or 13-16-5~~], the division may
 199 request the attorney general or a county attorney to commence a civil action to enjoin the acts or
 200 practices, seek civil penalties as provided in Subsection (1)(b), and upon a proper showing, a
 201 temporary restraining order, preliminary injunction, or permanent injunction shall issue without
 202 the necessity of a bond.

203 (b) Any person who violates Section 13-16-4 [~~or 13-16-5~~] is liable to the state for a civil
 204 penalty, assessed by a court, not to exceed \$5,000 per day for each business location where a
 205 violation occurred.

206 (2) (a) Any person injured as a result of an act or practice that violates Section 13-16-4 [~~or~~
 207 ~~13-16-5~~] may bring a civil action for appropriate relief, including an action for a declaratory
 208 judgment, injunctive relief, a treble award of actual damages, and exemplary damages.

209 (b) Any action under this subsection shall be brought within two years after the alleged
 210 violation occurred.

211 (3) The court, in making an award under Subsection (1) or (2), may award court costs and
 212 a reasonable attorney's fee to the prevailing party, except that the court may not award attorney's
 213 fees or court costs against the state, a state agency, or a political subdivision of the state.

214 (4) If the state, a state agency, or a political subdivision of the state prevails in an action
215 under this chapter, it is entitled to an award for reasonable investigative expenses in addition to
216 any other relief granted.

217 (5) (a) The district courts of this state may hear and determine all cases brought under this
218 section.

219 (b) Venue lies in any county where the defendant is doing business or in the county where
220 the plaintiff resides.

221 Section 6. Section **13-16-8** is amended to read:

222 **13-16-8. Rebuttable presumption in a civil or administrative action.**

223 (1) In [any] a civil action brought under Section 13-16-7[, the burden of proof, upon a
224 prima facie showing of a violation, shall shift to the defendant to show justification. Unless
225 justification is shown, the court shall award judgment for the plaintiff.] or an administrative action
226 brought under Section 13-16-13:

227 (a) a rebuttable presumption described in Subsection (2)(a) is created if the person bringing
228 the action shows that the defendant:

229 (i) engages in commerce within this state; and

230 (ii) sells motor fuel in this state below cost; or

231 (b) a rebuttable presumption described in Subsection (2)(b) is created if the person
232 bringing the action shows that the defendant engages in commerce within this state and in the
233 course of such commerce, either directly or indirectly:

234 (i) sells motor fuel for resale in this state at a price lower than the price it charges other
235 persons purchasing motor fuel of like grade and quality at reasonably the same time for resale in
236 this state on the same level of distribution; or

237 (ii) sells motor fuel:

238 (A) to itself or an affiliate;

239 (B) for resale in this state on a different marketing level of distribution; and

240 (C) at a transfer price lower than the price it charges a person that purchases motor fuel
241 of like grade and quality at reasonably the same time for resale in this state on the same level of
242 distribution.

243 (2) (a) If the showing described in Subsection (1)(a) is made, there is a rebuttable
244 presumption that the intent or effect of the sale is to:

245 (i) injure competition;
 246 (ii) induce the buying of other merchandise;
 247 (iii) unfairly divert trade from a competitor; or
 248 (iv) otherwise injure a competitor.
 249 (b) If the showing described in Subsection (1)(b) is made, there is a rebuttable presumption
 250 that the intent or effect of the sale is to injure competition.

251 (3) (a) The defendant may rebut the presumption described in Subsection (2)(a) by:
 252 (i) producing evidence that proves by a preponderance of the evidence that it is more
 253 probable than not that the sale was made without the intent or effect described in Subsection (2)(a);
 254 or

255 (ii) showing that the sale is not a violation under Section 13-16-6.

256 (b) The defendant may rebut the presumption described in Subsection (2)(b) by:
 257 (i) producing evidence that proves by a preponderance of the evidence that it is more
 258 probable than not that the sale was made without the intent or effect described in Subsection (2)(b);
 259 or

260 (ii) showing that the sale is not a violation under Section 13-16-6.

261 Section 7. Section **13-16-9** is amended to read:

262 **13-16-9. Right of purchaser to obtain price and cost information from marketer.**

263 A person who purchases motor fuel for resale and who has cause to believe that another
 264 person marketing motor fuel has violated Section 13-16-4 [~~or 13-16-5~~] may, upon motion to the
 265 court and a proper showing of cause, obtain an order requiring the marketer to provide the
 266 following information:

267 (1) the price or transfer price at which [~~he transfers~~] the marketer sells each grade of motor
 268 fuel to each level of distribution in [~~his~~] the marketer's marketing operations in this state;

269 (2) information relevant to the market area to which [~~he transfers~~] the marketer sells the
 270 motor fuel in this state; and

271 (3) the cost of, amount, and the nature of all discounts, rebates, allowances, services, or
 272 facilities connected with the handling[,] or sale [~~or offering for sale~~] of any motor fuel [~~he~~] the
 273 marketer provides to:

274 (a) each level of [~~his~~] the marketer's marketing operations in this state; and [to]

275 (b) the local market area of the complainant.

276 Section 8. Section **13-16-10** is amended to read:

277 **13-16-10. Recordkeeping -- Civil penalty.**

278 (1) Persons engaged in commerce within this state who sell ~~[or offer to sell]~~ motor fuel
279 in this state shall maintain records accurately indicating the date and the time of day of each change
280 in the sale price of motor fuel and the identity of the person who recorded the price change. In the
281 event the change in price is to meet a lower price of a competitor, the record shall set forth the
282 competitor by name and address, specifying the price which was met. These records shall be
283 maintained for a period of two years.

284 (2) The records shall be made available to the Division of Consumer Protection and the
285 attorney general on request.

286 (3) A person who fails to comply with Subsection (1) is liable to the state for a civil
287 penalty, assessed by a court or by the division in an administrative action, of \$500 per day for each
288 business location where a violation occurred.

289 Section 9. Section **13-16-11** is amended to read:

290 **13-16-11. Applicability.**

291 ~~[(1)]~~ Section 13-16-4 applies equally to all persons engaged in commerce in the marketing
292 of motor fuel, regardless of the size of a marketing operation.

293 ~~[(2) Section 13-16-5 applies equally to all refiners engaged in commerce in the marketing~~
294 ~~of motor fuel, regardless of the size of a marketing operation.]~~

295 Section 10. Section **13-16-13** is enacted to read:

296 **13-16-13. Administrative actions.**

297 (1) In addition to other penalties and remedies provided in this chapter, if a person violates
298 this chapter, the division may do one or more of the following:

299 (a) issue a cease and desist order;

300 (b) impose an administrative fine not to exceed \$5,000 for each day on which a violation
301 of this chapter occurs for each business location where a violation of this chapter occurs; or

302 (c) take any action permitted under Section 13-2-6.

303 (2) All money received through administrative fines imposed under this section shall be
304 deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

305 Section 11. **Repealer.**

306 This act repeals:

307 Section 13-16-5, Unlawful sale by refiner.

Legislative Review Note
as of 1-21-99 7:02 AM

This legislation raises the following constitutional or statutory concerns:

State and federal constitutional issues concerning due process limits may be raised when the state restricts below cost sales of or discriminatory market activities involving a commodity such as motor fuel and creates rebuttable presumptions in establishing unlawful those acts. The Utah Supreme Court, while upholding as constitutional the Motor Fuel Marketing Act (as it read prior to 1987) against a due process challenge, reserved ruling on the issue of whether a showing of intent is required by due process. *State v. Rio Vista Oil*, 786 P.2d 1343 (Utah 1990). A limited examination of case law in other states is not conclusive in determining what is required by due process.

Office of Legislative Research and General Counsel