

HOUSE BILL No. 2250

By Committee on Transportation

2-1

AN ACT enacting the Kansas motor fuel marketing act; declaring public policy regarding motor fuel marketing and pricing; prohibiting certain acts and providing penalties and other remedies for violations; declaring certain contracts void.

Be it enacted by the Legislature of the State of Kansas:

Section 1. This act shall be known and may be cited as the Kansas motor fuel marketing act.

Sec. 2. The legislature hereby makes the following findings with respect to the marketing of motor fuel in Kansas:

(a) Marketing of motor fuel is affected with the public interest;

(b) unfair competition in the marketing of motor fuel occurs whenever costs associated with the marketing of motor fuel are recovered from other operations, allowing the refined motor fuel to be sold at subsidized prices. Such subsidies most commonly occur in one of three ways: (1) When refiners use profits from refining of crude oil to cover below normal or negative returns earned from motor fuel marketing operations; (2) where a marketer with more than one location uses profits from one location to cover losses from below-cost selling of motor fuel at another location; and (3) where a business uses profits from nonmotor fuel sales to cover losses from below-cost selling of motor fuel;

(c) independent motor fuel marketers, including dealers, distributors, jobbers and wholesalers, are unable to survive predatory subsidized pricing at their marketing level; and

(d) subsidized pricing is inherently predatory and is reducing competition in the petroleum industry, and if it continues unabated, will ultimately threaten the consuming public.

Sec. 3. It is hereby declared that:

(a) Marketing of motor fuel in Kansas is affected with the public interest;

(b) it is the legislature's intent to encourage fair and honest competition, and to safeguard the public against creation of monopolies or unfair methods of competition in transactions involving the sale of, offer to sell or inducement to sell motor fuel in the wholesale and retail trades in this state;

1 (c) the advertising, offering for sale or sale of motor fuel below cost
2 or at a cost lower than charged other persons on the same marketing
3 level, which has the effect of injuring competitors or destroying or sub-
4 stantially lessening competition, is an unfair and deceptive trade practice,
5 and the policy of this state is to promote the general welfare through the
6 prohibition of such sales; and

7 (d) the purpose of the Kansas motor fuel marketing act is to carry
8 out that policy in the public interest, providing for exceptions under stated
9 circumstances, providing for enforcement and providing penalties.

10 Sec. 4. As used in this act:

11 (a) "Affiliate" means any person who, other than by means of fran-
12 chise controls, is controlled by or is under common control with any other
13 person.

14 (b) "Basic cost of motor fuel" means whichever of the two following
15 amounts is lower namely: (1) The invoice cost of motor fuel to the whole-
16 saler or retailer, as the case may be; or (2) the lowest replacement cost
17 of motor fuel to the wholesaler or retailer, as the case may be, within five
18 days prior to the date of sale, in the quantity last purchased, whether
19 within or before such five-day period, less, in either of the two cases, all
20 trade discounts except customary discounts for cash, plus the full value
21 of freight costs and any taxes which may be required by law, now in effect
22 or hereafter enacted, if not already included in the invoice cost of the
23 motor fuel to the wholesaler or retailer, as the case may be. In computing
24 its basic cost of motor fuel, its cost of doing business and in meeting
25 competition under section 8, and amendments thereto, refiner that as-
26 sesses a processing fee of any kind for credit card transactions must assess
27 such fees in a like manner to its affiliates.

28 (c) "Buying pool" means any combination, corporation, association,
29 affiliation or group of retail dealers operating jointly in the purchase, sale,
30 exchange or barter of motor fuel, the profits of which accrue directly or
31 indirectly to such retail dealers.

32 (d) "Competition" means any person who competes with another
33 person in the same market area at the same level of distribution.

34 (e) "Cost of doing business" or "overhead expense" means all costs
35 incurred in the conduct of business, including but not limited to: Labor,
36 including salaries of executives and officers; rent, which rent must be no
37 less than fair market value based on current use; interest on borrowed
38 capital; depreciation; selling cost; maintenance of equipment; transpor-
39 tation or freight cost; losses due to breakage or damage; credit card fees;
40 or other charges; credit losses; all types of licenses; taxes; insurance; and
41 advertising.

42 (f) "Cost to refiner" means that refiner's posted terminal price to the
43 wholesale class of trade. In the event a refiner does not regularly sell to

1 the wholesale class of trade at that terminal or does not post such a ter-
2 minal price, it may use as its cost the posted price of any other refiner at
3 any terminal within the general trade area which has motor fuel readily
4 available for sale to the wholesale class of trade.

5 (g) "Cost to retailer" means, as applied to retail sales, the lesser of
6 either the invoice cost or the replacement cost of the motor fuel within
7 five days prior to the date of sale, in the quantity last purchased, less all
8 trade discounts except customary discounts for cash, to which shall be
9 added all applicable state, federal and local taxes, inspection fees, freight
10 cost, if paid by the retailer, plus the cost of doing business.

11 (h) "Cost to wholesaler" means, as applied to wholesale distribution,
12 the lesser of either the invoice cost or the replacement cost of the motor
13 fuel within five days prior to the date of sale, in the quantity last pur-
14 chased, less all trade discounts except customary discounts for cash, to
15 which shall be added all applicable state, federal and local taxes, inspec-
16 tion fees, freight charges not otherwise included in the cost of motor fuel,
17 cartage to the retail outlet, if paid by the wholesaler, plus the cost of doing
18 business.

19 (i) "Customary discount for cash" means any allowance, whether a
20 part of a larger discount or not, made to a wholesaler or retailer when
21 such person pays for motor fuel within a limited or specified time.

22 (j) "Loss leader" means any product sold at less than cost for the
23 purpose of inducing, promoting or encouraging the purchase of other
24 merchandise.

25 (k) "Motor fuel" means any refined or blended motor fuel products,
26 including gasoline, diesel fuel, aviation fuel, gasohol and all other fuel of
27 a type designated for use as a motor fuel in self-propelled vehicles.

28 (l) "Person" means an individual, firm, association, organization, part-
29 nership, business trust, joint stock company, company, corporation or
30 other legal entity.

31 (m) "Refiner" means any person engaged in the production or refin-
32 ing of motor fuel, whether such production or refining occurs in this state
33 or elsewhere, and includes any affiliate of such person.

34 (n) "Retailer" means any person who is engaged in this state in the
35 business of selling motor fuel at retail to the general public for ultimate
36 consumption, and includes any group of persons, cooperative organiza-
37 tions, buying pools and any other person or group purchasing motor fuel
38 on a cooperative basis from licensed distributors or wholesalers.

39 (o) "Sale" or "sell" means any transfer for a combination, exchange,
40 barter, gift, offer for sale, advertising for sale, soliciting an order for motor
41 fuel and distribution in any manner or by any means whatsoever.

42 (p) "Sell at retail," "sale at retail" and "retail sales" means any sale
43 for consumption or use in the ordinary course of trade or usual conduct

1 of a retailer's business.

2 (q) "Sell at wholesale," "sale at wholesale" and "wholesales" means
3 any sale made in the ordinary course of trade or usual conduct of the
4 wholesaler's business to a retailer for the purpose of resale.

5 (r) "Transfer price" means the price used by a person in transferring
6 motor fuel to itself or an affiliate for resale or distribution at another
7 marketing level, and it includes credit terms, discounts, rebates, allow-
8 ances, services or facilities granted any of a supplier's own marketing
9 operations in excess of those provided to a person who purchases for
10 resale at the same level of distribution. Such price shall be determined
11 using standard, functional accounting procedures.

12 (s) "Wholesale distribution" means the purchase of motor fuel for
13 sale, consignment or distribution to another or receipt of motor fuel for
14 sale, consignment or distribution to another, to one's own motor fuel
15 accounts or to accounts of one's supplier.

16 (t) "Wholesaler" means any person engaged in commerce within this
17 state, including any affiliate of such person, who purchases motor fuel for
18 sale, consignment or distribution to another, or receives motor fuel on
19 consignment for consignment or distribution to such person's own motor
20 fuel accounts or to accounts of such person's supplier; such term shall
21 include a distributor, as that term is defined in subsection (f) of K.S.A.
22 79-3401, and amendments thereto, but shall not include a person who is
23 an employee of, or merely serves as, a common carrier providing trans-
24 portation services for such supplier.

25 Sec. 5. All persons engaged in commerce in this state are required
26 to establish transfer prices and to disclose, upon request, their transfer
27 prices on each grade of motor fuel transferred or sold to itself or an
28 affiliate for resale at another marketing level of distribution. Such disclo-
29 sure shall only be made to those persons affected by such transfer prices
30 or in any legal proceedings arising from this act.

31 Sec. 6. It shall be unlawful for any person engaged in commerce in
32 this state to sell or offer to sell any grade of motor fuel below cost or to
33 sell it at a price lower than the seller charges other persons on the same
34 day and on the same level of distribution, within the same market area,
35 where the effect is to injure competition.

36 Sec. 7. It shall be unlawful for any person engaged in commerce in
37 this state to sell or transfer any grade of motor fuel to itself or an affiliate
38 for resale at another marketing level of distribution at a transfer price
39 that is below cost or lower than the price it charges a person who pur-
40 chases for resale on the same day and at the same distribution level, within
41 the same market area, where the effect is to injure competition.

42 Sec. 8. (a) It is not a violation of this act if a difference exists between
43 the transfer price or sales price of motor fuel of like grade and quality

1 and the price charged to a person who purchases for resale at the same
2 level of distribution, including any discounts, rebates, allowances, services
3 or facilities granted any of a supplier's own marketing operations in excess
4 of those provided to a person who purchases for resale at the same level
5 of distribution, if the lower price is due to a cost differential incurred
6 because of a difference in shipping method.

7 (b) It is not a violation of this act if any price is established in good
8 faith to meet but not be lower than a specific price of a competitor in the
9 same market area on the same level of distribution selling the same or a
10 similar product of like grade and quality or is exempt under section 13,
11 and amendments thereto.

12 Sec. 9. It shall be unlawful for:

13 (a) Any person engaged in commerce in this state to sell, offer to sell
14 or use any grade of motor fuel as a loss leader, where the effect is to
15 injure competition;

16 (b) any person, where the effect is to injure competition, to offer a
17 rebate, to offer to give a rebate or to offer a concession of any kind in
18 connection with the sale of motor fuel; or

19 (c) any retailer to induce or attempt to induce or to procure or at-
20 tempt to procure the purchase of any grade of motor fuel at a price less
21 than cost to the wholesaler.

22 Sec. 10. In all advertisements, offers for sale or sales involving two
23 or more items, at least one of which is motor fuel, at a combined price,
24 and in all advertisements, offers of sale or sales involving the giving of
25 any gift or concession of any kind whatsoever, whether it be coupons or
26 otherwise, the wholesaler's or retailer's combined selling price shall not
27 be below the cost to the wholesaler or the cost to the retailer, respectively,
28 of the total of all articles, products, commodities, gifts and concessions
29 included in such transactions, except that if any such articles, products,
30 commodities gifts or concessions shall not be motor fuel, the basic cost
31 thereof shall be determined in like manner as provided in subsection (b)
32 of section 4, and amendments thereto.

33 Sec. 11. When one wholesaler sells motor fuel to any other whole-
34 saler, the former shall not be required to include in such wholesaler's
35 selling price to the latter the cost to the wholesaler, but the latter whole-
36 saler, upon resale to a retailer, shall be required to include in the selling
37 price to the retailer the cost to the wholesaler.

38 Sec. 12. (a) The provisions of this act shall not apply to a sale at
39 wholesale or a sale at retail made:

40 (1) In an isolated transaction and not in the usual course of business;

41 (2) where motor fuels are advertised, offered for sale or sold in a
42 bona fide clearance sale for the purpose of discontinuing trade in such
43 motor fuel, and such advertising, offer to sell or sale shall state the reason

1 therefor and the quantity of such motor fuel advertised, offered for sale
2 or to be sold;

3 (3) where motor fuel is advertised, offered for sale or sold as imper-
4 fect or damage, and such advertising, offer of sale or sale shall state the
5 reason therefor and the quantity of such motor fuel advertised, offered
6 for sale or to be sold;

7 (4) where motor fuel is sold upon the final liquidation of a business;
8 or

9 (5) where motor fuel is advertised, offered for sale or sold by any
10 fiduciary or other officer under the order or direction of any court.

11 (b) The notice required to be given under this section shall not be
12 sufficient unless the subject of such sales is kept separate from other
13 stocks and clearly and legibly marked with the reason for such sales, and
14 any advertisement of such goods must indicate the same facts and the
15 quantity to be sold.

16 Sec. 13. (a) Any wholesaler may advertise, offer to sell or sell motor
17 fuel at a price made in good faith to meet, but not be lower than, a specific
18 price of a competitor who is rendering the same type service and is selling
19 the same article at cost to the competing wholesaler as defined in this
20 act. Any retailer may advertise, offer to sell or sell motor fuel at a price
21 made in good faith to meet, but not be lower than, a specific price of a
22 competitor who is selling the same article at cost to the competing retailer
23 as defined in this act. The price of motor fuel advertised, offered for sale
24 or sold under the exceptions specified in section 12, and amendments
25 thereto, shall not be considered the price of a competitor and shall not
26 be used as a basis for establishing prices below cost, nor shall the price
27 established at a bankrupt sale be considered the price of a competitor
28 within the purview of this section.

29 (b) In the absence of proof of the actual cost to the competing whole-
30 saler or the competing retailer, as the case may be, such cost may be
31 presumed to be the lowest cost to wholesalers or the lowest cost to re-
32 tailers, as the case may be, within the same market area as determined
33 by a cost survey made pursuant to subsection (b) of section 15, and
34 amendments thereto.

35 Sec. 14. Any contract, express or implied, made by any person in
36 violation of any of the provisions of this act, is illegal and void and no
37 recovery shall be had thereon.

38 Sec. 15. (a) In determining cost to the wholesaler and cost to the
39 retailer in any proceeding before a court of competent jurisdiction in this
40 state, the court shall receive and consider as bearing on the bona fides of
41 such cost, evidence tending to show that any person complained against
42 under any of the provisions of this act purchased the motor fuel involved
43 in the complaint at a fictitious price, or upon terms, or in such a manner,

1 or under such invoices, as to conceal the true costs, discounts or terms
2 of purchase, and also shall receive and consider as bearing on the bona
3 fides of such costs, evidence of the normal, customary and prevailing
4 terms and discounts in connection with other sales of a similar nature in
5 the market area.

6 (b) Where a cost survey pursuant to recognized statistical and cost
7 accounting practices has been made for a market area in which a violation
8 of this act is committed or charged, to determine and establish on the
9 basis of actual existing conditions the lowest cost to wholesalers or the
10 lowest cost to retailers within the area, the cost survey shall be deemed
11 competent evidence in any action or proceeding under this act as tending
12 to prove actual cost to the wholesaler or actual cost to the retailer com-
13 plained against, but any party against whom any such cost survey may be
14 introduced in evidence shall have the right to offer evidence tending to
15 prove any inaccuracy of such cost survey or any state of facts which would
16 impair its probative value.

17 Sec. 16. (a) Any person who violates this act shall be subject to a civil
18 penalty not to exceed \$10,000 per violation for each offense. Any such
19 person also shall be liable for attorney fees and shall be subject to in-
20 junctive relief. Each day that a violation of this act occurs shall be con-
21 sidered as a separate violation.

22 (b) Such penalty may be assessed and recovered in a civil action
23 brought in any court of competent jurisdiction by the attorney general or
24 by any district attorney. If a penalty is recovered in an action brought by
25 a district attorney, the entire amount of the penalty shall be paid to the
26 treasurer of the county in which the judgment was entered for deposit in
27 the county treasury to the credit of the county general fund. If a penalty
28 is recovered in an action brought by the attorney general, $\frac{1}{2}$ of the penalty
29 shall be paid to the treasurer of the county where the judgment was
30 entered, for deposit in the county treasury to the credit of the county
31 general fund and $\frac{1}{2}$ shall be paid to the state treasurer, and the state
32 treasurer shall deposit the same in the state treasury to the credit of the
33 state general fund.

34 Sec. 17. (a) Any person injured by any violation of this act, or who
35 would suffer injury from any threatened violation of this act, may maintain
36 an action in any court of competent jurisdiction to prevent, restrain or
37 enjoin such violation or threatened violation. If in such action a violation
38 or threatened violation of this act shall be established, the court shall
39 enjoin and restrain, or otherwise prohibit, such violation or threatened
40 violation and, in addition thereto, the court shall assess in favor of the
41 plaintiff and against the defendant the costs of suit, including reasonable
42 attorney fees. In such action it shall not be necessary that actual damages
43 to the plaintiff be alleged or proved, but where alleged and proved, the

1 plaintiff in such action, in addition to such injunctive relief and cost of
2 suit, including reasonable attorney fees, shall be entitled to recover from
3 the defendant the damages sustained by the plaintiff.

4 (b) A person injured as a result of an act or practice which violates
5 this act may bring a civil action for appropriate relief, including an action
6 for a declaratory judgment, injunctive relief and for actual damages. Any
7 actual damages found to have resulted from violations of this act shall be
8 trebled by the court in making its award. Any action under this subsection
9 shall be brought within two years after the alleged violations occurred.

10 (c) The court, in making an award under subsection (b) of this sec-
11 tion, may award court costs and reasonable attorney fees to the prevailing
12 party.

13 (d) The courts of this state are empowered with jurisdiction to hear
14 and determine all cases brought under this section. Venue lies in any
15 county where any of the defendants resides or does business or where
16 the cause of action accrues.

17 Sec. 18. In any action brought under section 15, 16 or 17, and
18 amendments thereto, upon a prima facie showing of a violation, the bur-
19 den of rebutting the prima facie case thus made by showing justification
20 shall shift to the defendant. A prima facie showing of a violation shall be
21 constituted if the plaintiff shows that:

22 (a) The plaintiff's purchase price from a refiner or wholesaler is
23 greater than the refiner's transfer price; or

24 (b) the plaintiff's purchase price from a refiner or wholesaler plus the
25 plaintiff's cost of doing business is greater than the refiner's or whole-
26 saler's retail posted sales price; or

27 (c) the plaintiff's basic cost of motor fuel plus the plaintiff's cost of
28 doing business is greater than the posted sales price at a retail location of
29 a competitor, within the plaintiff's marketing area, suspected of selling
30 motor fuel in violation of this act.

31 Sec. 19. A person who purchases motor fuel for resale who has cause
32 to believe that a refiner marketing motor fuel has violated section 6, 7 or
33 9, and amendments thereto, may, upon motion to the court and a proper
34 showing of cause, obtain an order requiring the refiner to provide such
35 person with the following information:

36 (a) The price or transfer price at which each grade of motor fuel is
37 transferred to each level of distribution in the marketing of motor fuels
38 together with information relevant to the market area which serves as the
39 basis for the order; and

40 (b) the cost of, amount and nature of all discounts, rebates, allow-
41 ances, services or facilities connected with the handling, sale or offering
42 for sale of any motor fuel provided to each level of such refiner's mar-
43 keting operations and to the local market area of the complainant.

1 Sec. 20. If any provisions of this act or the application thereof to any
2 person or circumstances is held invalid, the legislature hereby declares
3 its intent that such invalidity shall not affect other provisions or applica-
4 tions of this act which can be given effect without the invalid provisions
5 or application, and to this end the provisions of this act are severable.

6 Sec. 21. This act shall take effect and be in force from and after its
7 publication in the statute book.

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