

Clearinghouse Rule 07-004

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DATCP Docket No. 06-R-08
Rules Clearinghouse No. _____

Proposed Hearing Draft
November 28, 2006

PROPOSED ORDER
OF THE STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the
- 2 following order to create ch. ATCP 106, relating to price gouging during an emergency.

Analysis Prepared by the Department of Agriculture,
Trade and Consumer Protection

This rule implements s. 100.305, Stats. (created by 2005 Wis. Act 450), which prohibits price gouging in sales of consumer goods or services during an emergency declared by the Governor. This rule includes standards for determining what constitutes illegal price gouging.

Statutory Authority

Statutory Authority: ss. 93.07(1), 93.15 and 100.305(3), Stats.

Statutes Interpreted: ss. 93.06(1) and (9), 93.15, 93.16 and 100.305, Stats.

The Wisconsin department of agriculture, trade and consumer protection ("DATCP") is responsible for administering the price gouging prohibition under s. 100.305, Stats. Section 100.305, Stats., prohibits sellers from selling "consumer goods or services" at wholesale or retail at "unreasonably excessive prices" if the Governor, by executive order, has certified that the state or a part of the state is in a "period of abnormal economic disruption" due to an emergency. An emergency may include, for example, a destructive act of nature, a disruption of energy supplies that poses a serious risk to the public health or welfare, a hostile action, or a strike or civil disorder.

DATCP has broad general authority, under s. 93.07(1), Stats., to adopt rules to implement laws under its jurisdiction. Under s. 100.305(3), Stats., DATCP is specifically required to adopt rules defining what constitutes an "unreasonably excessive price" for purposes of the price gouging prohibition under s. 100.305, Stats.

Under ss. 93.06(1) and (9) and 93.14 to 93.16, Stats., DATCP may investigate possible rule violations, and may require persons to provide documents, testimony and other evidence related to its investigation. Under s. 93.15, Stats., DATCP may by general order (rule) require persons to answer DATCP questions and submit documents for inspection.

Rule Content

Under this rule, a seller may not sell a consumer good or service in a declared emergency area during a declared emergency period at a price that is more than 10% above the highest price at which the seller sold like consumer goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration. A seller may charge a higher price if the seller can prove, based on evidence in the seller's possession at the time of sale, that any of the following apply:

- The higher price does not exceed the seller's cost plus normal markup. "Normal markup" means the percentage markup, over the seller's cost, which the seller regularly used in sales of like goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration. This allows sellers to pass on bona fide cost increases.
- The higher price is required by law. For example, a seller may prove that the higher price is required to comply with Wisconsin's Unfair Sales Act ("minimum markup law"), s. 100.30, Stats.
- The Governor's emergency declaration directly or impliedly exempts the sale from coverage under the emergency declaration.

Under this rule, DATCP may require a seller to submit written, documented answers to DATCP questions related to the seller's compliance with this rule, including information related to any of the following:

- The highest price at which the seller sold a consumer good or service to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration.
- The scope of the relevant trade area.
- Any defenses claimed by the seller under this rule.
- Other information relevant to DATCP's investigation.

Federal and Surrounding State Regulations

Federal Law

At various times in United States history, the federal government has imposed price controls. There are no federal "price gouging" prohibitions currently in effect. However, there are federal laws that set or limit prices for certain products or services in certain

sectors. Some of these laws may preempt state “price gouging” provisions related to the federally-regulated products or services. For example, state law may not regulate interest rates charged by federally chartered banks, or certain prices charged by certain federally regulated common carriers. The scope and effect of federal regulation varies by industry sector, and is highly specific to individual federal programs.

Other States

Many states have prohibited price gouging during declared periods of emergency. Most of those states prohibit prices above pre-emergency prices, except that most states allow sellers to pass on increased costs. Four states prohibit increased markups over cost, and 6 states cap price increases at some percentage such as 10% or 25%.

Nineteen states prohibit prices that are “unconscionably excessive,” “exorbitant,” “unjustified,” or “grossly excessive” without defining those terms or establishing more specific standards. However, the New York attorney general found that New York’s broad prohibition against “unconscionably excessive” prices was unworkable without more specific standards.

The states surrounding Wisconsin have the following regulations:

- Illinois, on September 2, 2005, adopted an emergency rule (now expired) which prohibited “unconscionably high prices for petroleum products.”
- Indiana prohibits price gouging in the sale of fuel. Price gouging occurs if a retailer charges a price that grossly exceeds the average price at which the fuel was readily available during the 7 days immediately preceding the declared emergency and the increase is not attributable to cost factors to the retailer.
- Iowa regulates prices on “merchandise needed by disaster victims.” The Iowa regulation prohibits “unjustified prices” during times of disaster and recovery (60 day maximum) in a declared disaster zone.
- Michigan’s consumer act prohibits, among other things, a price that is “grossly in excess” of the price at which similar property or services are sold.
- Minnesota does not regulate price gouging.
- Ohio prohibits, during a state of emergency, prices that are substantially higher than “the price at which the goods or services were readily obtainable during the 30 days immediately preceding the state of emergency” or “the average price of the goods or services during the 30 days immediately preceding the state of emergency.”

Business Impact Analysis

Depending on the scope of a declared emergency, this rule could conceivably affect nearly every business that sells consumer goods in the state (whether at wholesale or retail). A declared emergency may be statewide or localized in scope, and may be broad-based or confined to certain economic sectors. The impact of this rule will vary accordingly.

This rule could have a substantial impact on a wide array of businesses. But it is not possible to predict the impact on individual businesses or on business generally.

Whenever it applies in an emergency, this rule will limit the prices that may be charged by affected businesses. This rule prohibits prices that are more than 10% higher than pre-emergency prices, unless sellers can document that their higher prices do not exceed their cost plus normal markup. Sellers are thus free to pass on relevant cost increases, if they can document those increases.

This rule applies only when the Governor, by executive order, issues an emergency declaration. The emergency declaration determines the scope of coverage, and may exempt certain business sectors from coverage. This rule applies only for the period of time that the emergency declaration remains in effect.

This rule provides some latitude for price adjustments in response to supply and demand, and allows sellers to pass on bona fide cost increases. However, this rule does ultimately set limits on the prices that manufacturers, wholesaler distributors and retailers may charge. Some sellers may withhold goods or services from the market rather than sell at those limited prices. Retailers may benefit from wholesale price limitations, but may suffer from wholesaler decisions to withhold goods or services from distribution.

Under 2003 Wis. Act 145, DATCP and other agencies must adopt rules spelling out their rule enforcement policy for small businesses. DATCP has adopted a separate rule outlining its small business enforcement policy (see ATCP 1, subch. VII). DATCP will follow that rule in the administration of this price gouging rule. DATCP will, to the maximum extent feasible, seek voluntary compliance with this price gouging rule.

This rule first applies to small businesses 2 months after it first applies to other businesses, as required by s. 227.22(2)(e), Stats. This rule will not apply to small businesses during declared emergencies that fall within that 2-month period, but will apply to small businesses during subsequent declared emergencies. If a declared emergency period starts before the small business effective date, but extends beyond the small business effective date, this rule will apply to small businesses for that portion of the emergency period that occurs after the small business effective date.

DATCP Contact

Questions and comments related to this rule may be directed to:
Kevin LeRoy
Department of Agriculture, Trade and Consumer Protection

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1 **SECTION 1.** Chapter ATCP 106 is created to read:

2 **Chapter ATCP 106**

3 **PRICE GOUGING DURING AN EMERGENCY**

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5 **ATCP 106.01 Definitions.** (1) “Abnormal economic disruption” means a
6 disruption or threat of disruption to normal business transactions, due to an emergency.

7 (2) “Consumer good or service” means a good or service that is used primarily
8 for personal, family or household purposes.

9 (3) “Cost” means the seller’s cost to obtain, replace or produce a consumer good
10 or service and to provide that consumer good or service to the customer. Cost includes
11 all of the following:

12 (a) Direct costs.

13 (b) Indirect costs that the seller reasonably allocates to that consumer good or
14 service under the seller’s normal cost accounting system, in the seller’s ordinary course
15 of business.

16 (4) “Department” means the Wisconsin department of agriculture, trade and
17 consumer protection.

18 (5) “Emergency” means circumstances identified by the governor in an
19 emergency declaration, including any of the following:

20 (a) A tornado, flood, fire, storm, or other destructive act of nature.

1 (b) A disruption of energy supplies that poses a serious risk to the economic well-
2 being, health, or welfare of the public.

3 (c) Hostile action.

4 (d) A strike or civil disorder.

5 (6) "Emergency area" means this state or that part of this state identified, in an
6 emergency declaration, as being affected by abnormal economic disruption.

7 (7) "Emergency declaration" means an executive order, issued by the governor,
8 which declares that this state or a part of this state is affected by abnormal economic
9 disruption due to an emergency.

10 (8) "Emergency period" means the time period during which an emergency
11 declaration is in effect.

12 (9) "Hostile action" means an act of violence against a person or property in the
13 United States by a foreign power or by a foreign or domestic terrorist.

14 (10) "Like consumer goods or services" means identical or essentially identical
15 consumer goods or services.

16 (11) "Like customers" means customers whom the seller, in the ordinary course
17 of business, normally treats as equivalent customers for pricing and sale purposes.

18 **NOTE:** For example, if a seller sells like consumer goods or services both at
19 wholesale and at retail, and normally charges lower prices to wholesale
20 customers than to retail customers, the wholesale customers are not
21 considered "like customers" to the retail customers.

22 (12) "Normal markup" means a percentage markup, over the seller's cost, that
23 the seller has regularly used in the sale of like consumer goods or services to like
24 customers in the relevant trade area during the 60-day period immediately preceding the
25 emergency declaration.
26

1 (13) “Relevant trade area” means the market area, including the relevant point of
2 sale under s. ATCP 106.02(1), in which the seller normally sells like consumer goods or
3 services to like customers at like prices.

4 **NOTE:** The “relevant trade area” may be larger or smaller than the emergency
5 area. The “relevant trade area” would not include areas where prevailing
6 prices normally differ from those charged locally. For example, a multi-
7 state or multi-national seller may not justify inflated local prices based on
8 sales at distant locations where prices are normally higher. On the other
9 hand, an emergency declaration could conceivably encompass 2 or more
10 distinct trade areas in which prices for the same consumer good or service
11 routinely differ.

12 (14) “Sale” means a contract to sell, an offer to sell, or an advertisement
13 announcing a willingness to sell.

14 (15) “Sell” means to contract, advertise or offer for sale at wholesale or retail.

15 (16) “Sale at retail” means sale to consumers primarily for their consumption or
16 use, and not for resale or for further distribution, manufacturing or processing.

17 (17) “Sale at wholesale” means sale other than sale at retail.

18 (18) “Seller” means a manufacturer, producer, supplier, wholesaler, distributor or
19 retailer.

20 **ATCP 106.02 Price gouging prohibited. (1) PROHIBITION.** Except as provided
21 in sub. (2), no seller may sell a consumer good or service in an emergency area during an
22 emergency period at a price that is more than 10% above the highest price at which the
23 seller sold like consumer goods or services to like customers in the relevant trade area
24 during the 60-day period immediately preceding the emergency declaration.

25 (2) DEFENSES. In an action under s. 100.305(4m)(b)., Stats., or other applicable
26 law alleging a violation of sub. (1), it is a defense for the seller to prove any of the
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1 following by clear and convincing evidence that the seller possessed and relied upon
2 when making the sale:

3 (a) The selling price did not exceed the seller's cost plus normal markup.

4 (b) The selling price was required by law.

5 (c) The emergency declaration directly or impliedly exempted the sale from
6 coverage under the emergency declaration.

7 **ATCP 106.03 Price justification. (1) REQUIREMENT.** The department may by
8 written notice require a seller to justify a price at which a seller has sold a consumer good
9 or service in an emergency area during an emergency period. The notice shall identify
10 the price that the seller must justify, the sale location, and the specific type of consumer
11 good or service sold. The seller shall submit the justification to the department in writing
12 within 10 days after the department issues the notice to the seller, or by a later date
13 specified in the notice.

14 **NOTE:** See ss. 93.15 and 93.16, Stats. The notice under sub. (1) is not a warning
15 notice under s. 100.305(4m)(a), Stats., but is rather a demand for
16 information.

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18 **(2) JUSTIFICATION CONTENTS.** The department may require the seller to include
19 all of the following information in a price justification under sub. (1):

20 (a) The highest price at which the seller sold like consumer goods or services to
21 like customers in the relevant trade area during the 60-day period immediately preceding
22 the emergency declaration.

23 (b) Any material differences between the like consumer goods or services under
24 par. (a) and the consumer good or service identified in the department's notice under sub.
25 (1), if the consumer goods or services are not identical.

1 (c) The scope of the relevant trade area claimed by the seller, and the rationale
2 for that scope.

3 (d) Any defenses claimed by the seller under s. ATCP 106.02(2).

4 (e) Documentation to support the seller's responses under pars. (a) to (d).

5 (f) Other relevant information required by the department.

6 **EFFECTIVE DATE:** (1) Except as provided in sub. (2), this rule takes effect on the
7 first day of the month following publication in the Wisconsin administrative register, as
8 provided in Wis. Stats., s. 227.22(2)(intro.).

9 (2) This rule first applies to small businesses as defined in Wis. Stats., s.
10 227.114(1) on the first day of the third month commencing after the rule publication date,
11 as required by Wis. Stats., s. 227.22(2)(e).

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary