

Minnesota Department of Commerce

**Below Cost Gasoline Pricing
July 24, 2001**



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- The 2001 Minnesota Legislature amended an existing law to specifically prohibit selling gasoline below cost.
 - Minnesota Statutes, Section 325D.01, was originally enacted in 1937. It generally prohibits selling below cost. However, the law relied on a cost calculation formula that included an undefined “cost of doing business.”
 - The 2001 Minnesota Legislature amended Section 325D.01 to clearly define the cost of gasoline.
 - The cost calculation is simple and unambiguous.
 - The new law clearly prohibits selling gasoline below cost.
 - The new law is enforceable.
- How the new law will be enforced.
 - The Weights and Measures Division will take complaints from distributors and retailers. The division does not expect to receive many complaints from consumers.
 - The Division will take action on valid complaints:
 - For an initial violation, enforcement action will include a call to the retailer and an order to post a price in compliance with the law.
 - On subsequent violations, enforcement action may include:
 - + Shutting down the pumps, or
 - + A cease and desist order issued by the Commissioner of Commerce. The penalty for violating a cease and desist order is substantial.
- Definition of the cost of gasoline.
 - **Cost = wholesale price + all taxes and fees + 6% or \$0.08** (whichever is less).
 - The wholesale price is defined as the arithmetic mean (average) of all prices for an individual grade of gasoline at a terminal.
 - As defined in the statute, the wholesale price includes prices for branded and unbranded products.
 - The wholesale price must be the price published by a nationally recognized price reporting service for the terminal from which you received the product, and for the day you received the product.
 - To calculate your minimum retail price, you must begin with the wholesale price of the last load you received. You cannot “average-in” the price of a remainder in a retail storage tank.
 - The purpose of this simplified definition is to make the law enforceable.
- What you must do to comply.
 - The price displayed on your advertising sign must be at, or above your calculated cost. There are some exceptions.
 - The price displayed on your pumps must be at, or above your calculated cost. It must be the same as the price displayed on your advertising sign.

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- What else can you do? Exceptions and qualifications.
 - You can offer full service below cost. The law prohibits selling below cost only for self-service pumps.
 - You can offer discount coupons.
 - For three days in each quarter, you can offer a promotion price. The promotion price can be below cost. We recommend that you define your “quarters” and **document your promotions**. If someone complains, you will have to be able to prove that you met the requirement for quarterly promotion prices.
 - You can price your product below cost to meet legal competition in the same market area.

- What can't you do?
 - You cannot post a “legal” price on your advertising sign, with a lower, “discount” price posted on your pumps. Your pump price must match your advertised price.

- What is your market area?
 - This was intentionally left undefined in the statute.
 - Weights and Measures will determine market areas on a case by case basis.

- What you need to know if you are going to call Weights and Measures.
 - You will have to do some work to determine whether a competitor's price is legal.
 - You will have to know:
 - The day your competitor received the last load;
 - The average rack price that day;
 - The ethanol content of the product; and,
 - Whether the competitor is running a promotion that day.

Background Information

Statutory Definition of Cost

325D.01 Definitions.

Subdivision 5. **Cost.** The term "cost", as applied to the wholesale or retail vendor, means:

- (1) The actual current delivered invoice or replacement cost, whichever is lower, without deducting customary cash discounts, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business at that location by the vendor;
- (2) Where a manufacturer publishes a list price and discounts, in determining such "cost" the manufacturer's published list price then currently in effect, less the published trade discount but without deducting the customary cash discount, plus any excise or sales taxes imposed on such commodity, goods, wares or merchandise subsequent to the purchase thereof and prior to the resale thereof, plus the cost of doing business by the vendor shall be prima facie evidence of "cost."
- (3) For purposes of gasoline offered for sale by way of posted price or indicating meter by a retailer, at a retail location where gasoline is dispensed into passenger automobiles and trucks by the consumer, "cost" means the average terminal price on the day, at the terminal from which the most recent supply of gasoline delivered to the retail location was acquired, plus all applicable state and federal excise taxes and fees, plus the lesser of six percent or eight cents.

Subd. 11. **TERMINAL.** "Terminal" means a storage facility to which gasoline is shipped by pipeline, barge, or rail, and from which gasoline is subsequently transferred into motor vehicles for delivery to other locations. For purposes of this chapter, an oil refinery is also a terminal.

Subd. 12. **AVERAGE TERMINAL PRICE.** "Average terminal price" means the arithmetic mean of all prices for an individual grade of gasoline at a terminal as published by a nationally recognized petroleum price reporting service.

Section 325D.71 **UNLAWFUL GASOLINE SALES.** Any offer for sale of gasoline by a retailer by way of posted price or indicating meter that is below cost, as defined by section 325D.01, subdivision 5, clause (3), is a violation of section 325D.04, except that the criminal penalties in section 325D.071 do not apply. In addition to the penalties for violations and the

remedies provided for injured parties set forth elsewhere in this chapter, the commissioner of commerce may use the authority under section 45.027 for the purpose of preventing violations of this section. A retailer who sells gasoline at the same or higher legally posted price of a competitor in the same market area, on the same day, is not in violation of this section. A retailer who offers gasoline for sale at a price below cost as part of a promotion at an individual location for no more than three days in any calendar quarter is not in violation of this section.

**Commissioner of Commerce
Power to Issue Cease and Desist Orders**

Section 45.027 Investigations and Subpoenas.

Subd. 5a. Cease and desist orders.

(a) Whenever it appears to the commissioner that a person has engaged or is about to engage in an act or practice constituting a violation of a law, rule, or order related to the duties and responsibilities entrusted to the commissioner, the commissioner may issue and cause to be served upon the person an order requiring the person to cease and desist from violations.

(b) The cease and desist order must be calculated to give reasonable notice of the rights of the person to request a hearing and must state the reasons for the entry of the order. A hearing must be held not later than ten days after the request for the hearing is received by the commissioner. After the completion of the hearing, the administrative law judge shall issue a report within ten days. Within 15 days after receiving the administrative law judge's report, the commissioner shall issue a further order vacating or making permanent the cease and desist order. The time periods provided in this provision may be waived by agreement of the person requesting the hearing and the department of commerce and the person against whom the cease and desist order is issued. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, the person is in default, and the proceeding may be determined against that person upon consideration of the cease and desist order, the allegations of which may be considered to be true. Unless otherwise provided, all hearings must be conducted according to chapter 14. The commissioner may adopt rules of procedure concerning all proceedings conducted under this subdivision.

(c) If no hearing is requested within 30 days of service of the order, the cease and desist order will become permanent.

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(d) A cease and desist order issued under this subdivision remains in effect until it is modified or vacated by the commissioner. The administrative proceeding provided by this subdivision, and subsequent appellate judicial review of that administrative proceeding, constitutes the exclusive remedy for determining whether the commissioner properly issued the cease and desist order and whether the cease and desist order should be vacated or made permanent.

Subd. 5b. **Enforcement of violations of cease and desist orders.** (a) Whenever the commissioner under subdivision 5 seeks to enforce compliance with a cease and desist order that has been made permanent, the allegations in the cease and desist order are considered conclusively established for purposes of a proceeding under subdivision 5 for permanent or temporary relief to enforce the cease and desist order. Whenever the commissioner under subdivision 5 seeks to enforce compliance with a cease and desist order when a hearing or hearing request on the cease and desist order is pending, or the time has not yet expired to request a hearing on whether a cease and desist order should be vacated or made permanent, the allegations in the cease and desist order are considered conclusively established for purposes of a proceeding under subdivision 5 for temporary relief to enforce the cease and desist order.

(b) Notwithstanding this subdivision or subdivision 5 or 5a to the contrary, the person against whom the cease and desist order is issued and who has requested a hearing under subdivision 5a may within 15 days after service of cease and desist order bring an action in Ramsey county district court for issuance of an injunction to suspend enforcement of the cease and desist order pending a final decision of the commissioner under subdivision 5a to vacate or make permanent the cease and desist order. The court shall determine whether to issue such an injunction based on traditional principles of temporary relief.

Subd. 6. **Violations and penalties.** The commissioner may impose a civil penalty not to exceed \$10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified.