

TO: Senate Committee on Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection

FROM: Nickolas C. George, President
Midwest Food Processors Association

Bill G. Smith, State Director
National Federation of Independent Business

Brad Boycks, Director of Government Affairs
Wisconsin Builders Association

Michelle Kussow, Vice President-Government Affairs & Communications
Wisconsin Grocers Association

Bill Oemichen, President and CEO
Wisconsin Federation of Cooperatives

James Buchen, Vice President, Government Affairs
Wisconsin Manufacturers & Commerce

David Storey, Senior Vice President
Wisconsin Merchants Federation

Ed Wilusz, Vice President
Wisconsin Paper Council

Erin Roth, Executive Director
Wisconsin Petroleum Council

Matthew Hauser, Director of Government Relations
Wisconsin Petroleum Marketers & Convenience Store Association

DATE: October 24, 2007

SUBJECT: Price Gouging During an Emergency (ATCP 106); Final Draft Rule

We appreciate the work the Department of Agriculture, Trade and Consumer Protection (DATCP) staff have undertaken with respect to this rulemaking effort. Several important changes that we requested were incorporated into this final draft rule, however, the current draft does not address the core concerns of the business community and its potential impact on markets for goods needed most during an emergency.

Our primary concern is the combination of such a low price cap (10%) and the failure to provide an exception if price increases are due to normal fluctuations of commodities markets. As DATCP staff warns, "Some sellers may withhold goods or services from the market rather than sell at those limited prices." We submit that it is more than a possibility – there has never been a price control scheme that has worked. History has shown and basic economics will ensure that the 10 percent cap in this rule will result in shortages of vital materials at times such supplies are most needed.

We request the Committee to consider the merits of changes noted below that will address our concerns, and thus, avoid otherwise inevitable market disruptions. The rule currently places a hard 10 percent cap on prices on all goods and services, whether wholesale or retail. These caps are put into place when the Governor certifies by executive order that there is a “period of abnormal economic disruption” due to an “emergency.” The only meaningful exception to the cap would be if those prices reflect increased costs that are documented at the time of the sale. We believe the requested changes are consistent with the underlying statutory directive that DATCP promulgate rules to establish formulas or other standards to be used in determining whether a wholesale or retail price is “unreasonably excessive.”

1. Commodity Pricing. Consumer goods needed in an emergency – fuel, lumber, water, etc. – are considered commodities and prices are governed by well known principles of economics. Because fungible commodities are, by definition, priced not by sellers but by market supply and demand, artificially capping prices during supply shortages or when demand increases in emergency areas will divert products to markets outside of an emergency area.

For example, as the attached chart shows, the price of corn has risen substantially past the 10 percent cap over numerous periods this past year. These price increases were driven by higher demand, mainly for ethanol, with little connection to higher costs. This is how commodity prices are determined. Under the final draft rule, however, a seller must show that the selling price did not exceed “cost plus normal markup,” a concept that does not translate in the world of commodity pricing.

Recommendation – The rule should be revised to clarify that “excessive pricing” does not include price increases “attributable to fluctuations in applicable commodity markets; fluctuations in applicable regional, national, or international market trends; or to reasonable expenses and charges for attendant business risk incurred in procuring or selling the goods or services.”

2. 10 Percent Price Cap. As noted, the rule generally prohibits selling consumer goods during an emergency period at a price more than 10 percent above the highest price in the past 60 days. We generally agree with the 60 day look-back, as well as using the highest price as the first screen. This is an objective measure that allows those covered by the price controls to assess compliance.

However, we believe the 10 percent threshold is too low – it is the lowest cap anywhere in the United States – and would cause compliance problems even for routine price fluctuations. Many goods fluctuate in excess of 10 percent over short periods under normal market conditions. For example, as the attached chart shows, the price of natural gas has in past decades seen routine fluctuations over the 10 percent cap due to seasonal demand changes. As illustrated, the look-back would cover periods of lower price conditions, assuring violations of the cap. Because these price changes were not due to costs, but market demands, a seller would not be able to obtain market prices in Wisconsin, resulting in shortages of natural gas.

The 10 percent threshold will simply cast too wide a net and will create a perception that many Wisconsin businesses are “price gouging” even if prices simply are due to increased costs. This “perception” issue as to what DATCP considers price gouging is very important to Wisconsin businesses who otherwise lawfully allow the markets to set prices. Moreover, it should be expected that prices will fluctuate even more widely during a period of abnormal economic disruption due to an emergency. Thus, there are compelling reasons to allow more than normal price fluctuations during emergencies to ensure that price controls do not limit shipments of needed supplies to emergency areas.

Recommendation – The rule should be revised to set a higher cap consistent with Alabama (25%), Pennsylvania (20%), or Texas (20%).

3. Proving Increased Costs caused Price Increases. Another fundamental flaw with the rule is that the “cost” exception is unworkable as it creates an unreasonable compliance trap. The rule allows prices to exceed the 10 percent cap if “at the time of sale, the seller possesses and relies upon accurate information that clearly and convincingly shows . . . the selling price does not exceed the seller’s cost plus normal markup.”

Consider a wholesaler or retailer with thousands of products. Before they increase a price on any product, they must undertake a 60-day look-back to document their 10 percent baseline. If they intend to move prices at any time during the emergency declaration they must aggregate those increases to determine if the cap is breached. For example, during any prolonged emergency, small increases over that period might be okay, but a final increase that could be only 1 percent is illegal if the total increases are over 10 percent. Through this rigorous analysis, they may identify numerous compliance problems with a wide array of products. This liability trap only gets worse.

Now, before they offer for sale these products, they must have in hand (“possess”) “clear, convincing, and accurate” documentation the increases were due to increased cost and not normal market fluctuations. This is an impossible threshold. As an illustration, consider the attached chart that reflects the run-up of milk prices during 2007 that breached the 10 percent cap. A review of just one financial article suggests various reasons, but no one cause for the milk price increases. Reasons noted include: Surge in corn prices (legal as it pertains to costs); drought in Australia and New Zealand (illegal as it pertains to supply); lower subsidies in European Union countries (illegal demand cause); and, booming Asian demand (illegal). *Corn and Milk: A 1-2 Inflation Combo*, CNN Money.com (June 19, 2007).

A Nobel Prize economist could not provide accurate, clear and convincing documentation that costs and not market fluctuations caused the milk price run-up. How could the thousands of sellers in the milk marketing chain possibly possess such a defense before offering milk for sale? Consider compounding this one example by thousands of products with routine price adjustments and the rule creates a compliance hurdle that could never be cleared.

Recommendation – In addition to increasing the 10 percent safe harbor and allowing normal market fluctuations, the concept that a seller must have an irrefutable defense documented prior to any sale must be eliminated.

4. Applicability and Fair Notice Issues. Beyond the substantive requirements of regulatory programs, it is important to the regulated community that agency rules provide certainty as to their application – that is, in addition to clear standards, industry needs to know the who, what, where and when of these standards. Generally, these scoping parameters are set forth in a rule’s applicability provisions. There is no such applicability provision in the final draft rule. The draft rule merely restates the prohibition set forth in Act 450 that “no *seller* may sell a *consumer good or service* in an *emergency area* during an *emergency period*” at prices above those proscribed in the rule.

For example, the final draft rule fails to provide any clarification as to the duration the price controls will remain in effect; it merely notes that the “emergency period” is defined as “the time period during which an emergency declaration is in effect.” Similarly, the rule defines “emergency area” as the entire state or part of the state identified in an emergency declaration. Thus, rather than in this rule, the applicability of price controls can only be determined by future, mostly obscure publications of emergency declarations; hardly fair notice for such an important liability trigger.

To assess how a business could determine when and where prices controls apply, we searched for sources of related gubernatorial declarations. We found that such declarations of emergencies can be found at the Governor’s web site though links in “media room” pages that go to all other executive orders (e.g., with proclamations for flying flags at half-staff). Among scores of executive orders over that past few years are ones that related to declarations of emergencies. The point is, it appears there is simply no mechanism to assure businesses will have fair notice that their pricing for goods and services is now under government control. These ambiguities over the scope of the rule – when do price controls start and end, where will price controls apply, and what products or services are covered by price controls – creates a liability trap for all businesses providing consumer goods and services in Wisconsin.

Recommendation – Through written comments, we have provided DATCP with numerous suggestions to clarify these applicability issues that are generally the first component in regulations. Actual notice by DATCP as to the rule’s application issued after the declaration to businesses suspected of “price gouging” would be the best approach.

Short of actual notice, the rule could prescribe, for example, that in the absence of specificity in the Governor’s declaration, price controls apply for a defined period, say one or two weeks after the declaration. In addition, DATCP could revise the draft rule to clarify that price controls only apply to those products or services being offered in counties where the emergency has occurred.

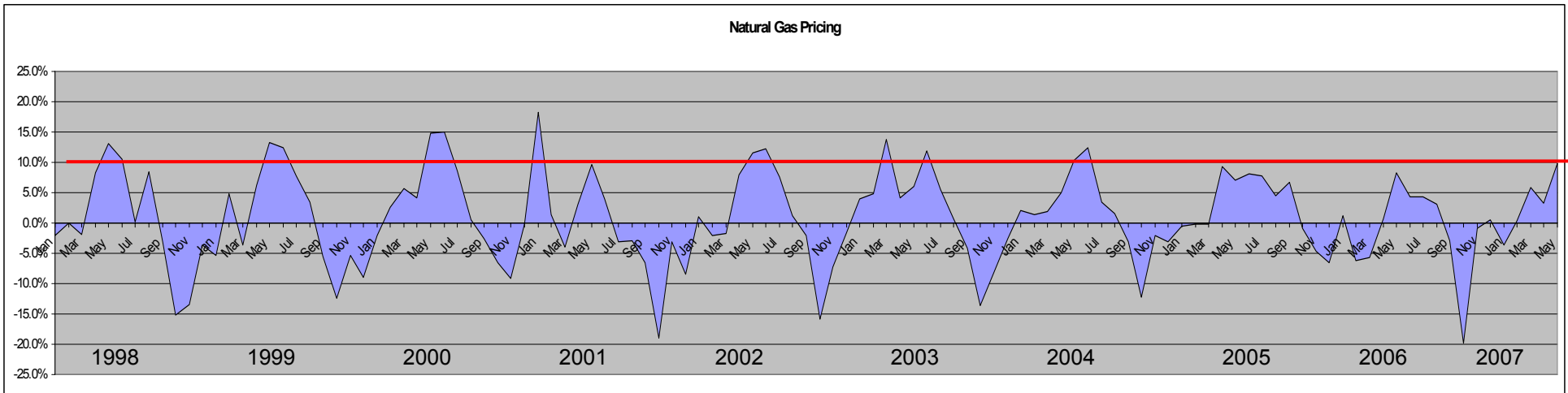
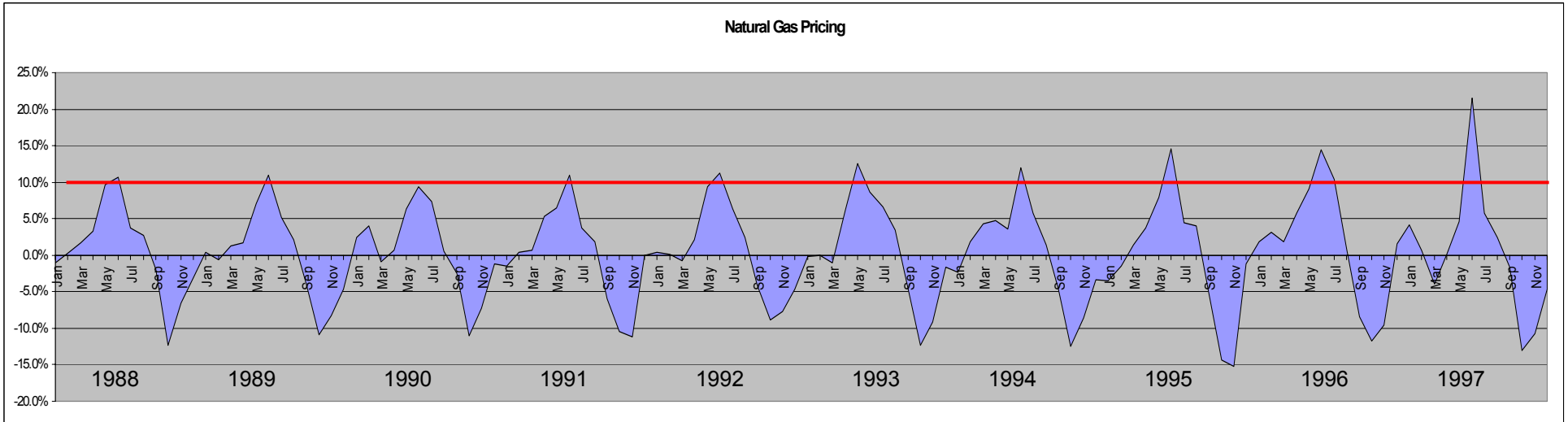
Thank you for the opportunity to provide these comments. If you have any questions or concerns about these issues, please feel free to contact us.

Corn Prices – Wall Street Journal (Markets Data Center)



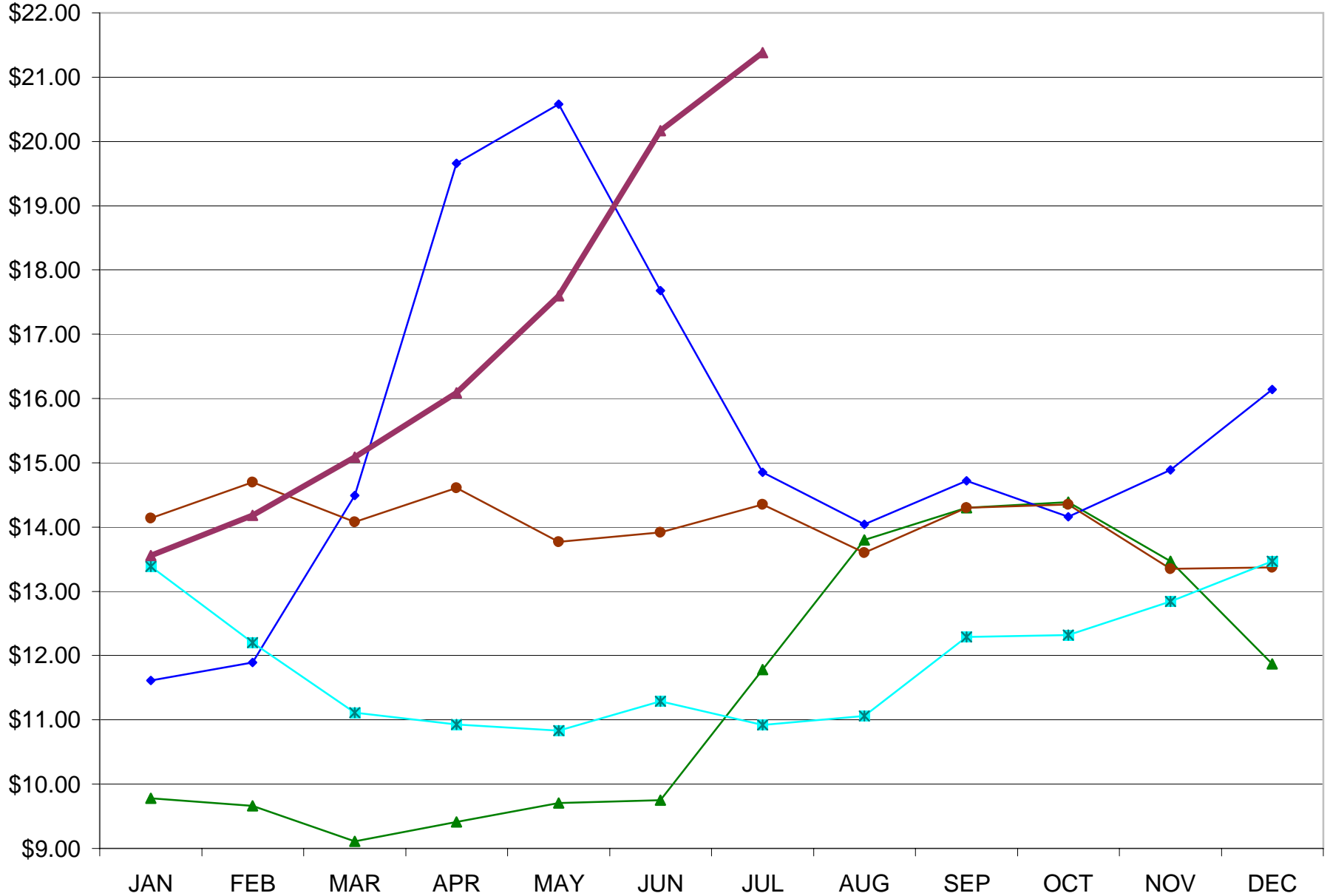
Scenario	Base Period	Base Peak	Emergency Period	Emergency Peak	Percent Increase
1	Aug-Sep	277	Oct	359	29.6%
2	Aug-Sep	277	Oct-Nov	390	40.8%
3	Sep-Oct	345	Nov	390	13.0%

U.S. Natural Gas Residential Prices – U.S. Energy Information Administration
Month to Month Changes to Monthly Average Residential Price



PER CWT.

CLASS III MILK PRICE AT 3.5%TEST



8/3/2007

▲ 2003 ◆ 2004 ● 2005 ✕ 2006 ▲ 2007