

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL

State of Maine
Department of the Attorney General

Petroleum Market Share Act/Report to the Legislature

KF
1860
.799
M24
1992
c.2

JAN 29 1993



STATE LAW LIBRARY
AUGUSTA, MAINE

MICHAEL E. CARPENTER
ATTORNEY GENERAL

VENDEAN V. VAFIADES
CHIEF DEPUTY

Telephone: (207) 626-8800
FAX: (207) 287-3145

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

REGIONAL OFFICES:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260

January 7, 1993

Honorable Dennis L. Dutremble
President of the Senate
State House Station 3
Augusta, Maine 04333

Honorable John L. Martin
Speaker of the House
State House Station 2
Augusta, Maine 04333

Re: Petroleum Market Share Act/Report to the Legislature

Dear Speaker Martin and Senator Dutremble:

Pursuant to 10 M.R.S.A. § 1677, I am attaching the Petroleum Advisory Committee's Report to the Legislature regarding the Petroleum Market Share Act. Should you have questions, please feel free to contact me at 626-8855. Thank you.

Sincerely,

KAREN E.S. PUSHARD
Secretary

HOUSE OF REPRESENTATIVES
READ & PLACED ON FILE
WITH ACCOMPANYING REPORT
JAN 8 1993

CLERK

JUL 20 1993



MICHAEL E. CARPENTER
ATTORNEY GENERAL

VENDEAN V. VAFIADES
CHIEF DEPUTY

Telephone: (207) 626-8800
FAX: (207) 287-3145

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

REGIONAL OFFICES:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 879-4260

December 31, 1992

Honorable Dennis L. Dutremble
President of the Senate
State House Station 3
Augusta, Maine 04333

Honorable John L. Martin
Speaker of the House
State House Station 2
Augusta, Maine 04333

Re: Petroleum Market Share Act/Report to the Legislature

Dear Speaker Martin and Senator Dutremble:

The purpose of this letter is to provide a report to the Legislature in accordance with the Petroleum Market Share Act, 10 M.R.S.A. § 1677. The Act is designed to provide the Attorney General with the information needed to effectively monitor retail markets for petroleum products, and to effectively enforce antitrust law within those markets. The Act is funded by means of a fee currently payable by wholesalers on gallonages of product sold to retailers. The cited provision requires the Attorney General to "make a report to the Legislature describing the concentration of retail outlets in the State or in sections of the State without disclosing the name of any particular retailer or retail outlet." The Attorney General is further required to provide to the Legislature a recommendation "as to whether additional legislation is needed to further limit or curtail the activity of refiners operating retail outlets".

In addition, the statute creates a body known as the Petroleum Advisory Committee for the purpose of consulting with, advising and assisting the Attorney General in all matters relating to petroleum marketing, as well as in the formulation of the Attorney General's recommendations to the Legislature as set forth in his annual report. The Petroleum Advisory Committee is composed of industry representatives appointed by the Governor, and two members of the Legislature, Senator John Baldacci and Representative Virginia Constantine. The Committee is chaired by Senator Baldacci.

In the paragraphs following, we offer a report concerning market concentration, and make recommendations for additional legislation. It should be noted that at its initial meeting in Augusta on December 14, 1992, the Petroleum Advisory Committee reviewed and unanimously recommended emergency passage of the legislative amendments proposed below.

I. CONCENTRATION OF RETAIL OUTLETS

The Attorney General has encountered unforeseen difficulties in implementing the fee and data collection provisions of the statute, 10 M.R.S.A. §§ 1673 and 1681. These are described in more detail below. As a result of these difficulties, we have as yet been unable to assemble complete data with regard to market concentration. For this reason, the Attorney General is unable to provide a full report to the Legislature with regard to market concentration at this time. It is anticipated that complete data will be available at the latest by June 1, 1993; the Attorney General proposes to provide the required report as soon as possible, but in no event later than June 1, 1993.

Although data concerning market concentrations is not currently available, the Attorney General is able to report at this time that the trend toward concentration in the home heating oil and motor fuel oil retail markets has slowed appreciably over calendar year 1992, as measured by acquisition activity reported to the Attorney General pursuant to 10 M.R.S.A. § 1109.

A. Motor Fuel Oil Acquisitions. The Attorney General began to receive reports of acquisitions of motor fuel oil retail outlets pursuant to 10 M.R.S.A. § 1109 in January, 1990. During 1990, we received notice of 14 acquisitions. In 12 of 14 instances, the acquiring party was a large entity operating multiple retail outlets. Geographically, the acquisitions were distributed as follows: Central Maine, 7; Southern Maine, 4; Western Maine, 2; Midcoast, 1. During calendar year 1991, the pace of acquisition picked up appreciably. Thirty acquisitions were reported, of which approximately half were by large companies operating multiple retail outlets. The primary focus of this activity shifted from Central to Southern and Eastern Maine, as reflected in the following figures: Central Maine, 4; Southern Maine, 11; Eastern Maine, 10; Western Maine, 4; Midcoast, 1.

A marked decrease in acquisition activity in this market was recorded during 1992, which showed only 12 acquisitions, of which 8 were by large entities operating multiple retail outlets. The focus of this activity shifted back to Central

Maine, as reflected in the following figures: Central Maine, 7; Southern Maine, 1; Western Maine, 3; Northern Maine, 1.

B. Home Heating Oil. The Attorney General began to receive reports regarding home heating oil retail acquisitions pursuant to 10 M.R.S.A. § 1109 in September, 1991. For the last three months of 1991, nine acquisitions were recorded -- a relatively hectic pace. Six of the nine acquiring parties were large entities operating multiple retail outlets. Geographically, this activity was fairly evenly distributed, as follows: Central Maine, 3; Southern Maine, 2; Western Maine, 2; Eastern Maine, 2. Calendar year 1992 showed a marked decrease in this level of activity, with only seven acquisitions over 12 months. Five of the seven acquiring parties were large entities operating multiple outlets. The focus of the action shifted to Central Maine, where six of the seven acquisitions were recorded, with the remaining acquisition occurring in the Midcoast region.

As noted above, the overall pattern shows a decrease in acquisitions activity in both motor fuel oil and home heating oil retail markets during calendar year 1992. While it is likely that the primary factors which explain this decrease are economic in nature, we believe, based in part upon confidential anecdotal information, that the Petroleum Market Share Act, which has existed in concept since early 1992 and became effective in mid-1992, has played some part in deterring acquisitions activity and in slowing the trend towards concentration. It should be emphasized that this is a tentative conclusion: it is one which we will revisit and update in future reports.

II. RECOMMENDATION ON THE NEED FOR ADDITIONAL LEGISLATION

The Attorney General's ability to effectively implement the statute has been seriously hampered by unforeseen problems in two areas: fee collection and reporting obligations. As we explain below, these problems can only be solved by amending the statute. Accordingly, we respectfully recommend that the statute, in particular 10 M.R.S.A. §§ 1673 and 1681, be amended as proposed below. In addition, it is our recommendation that these amendments be adopted on an emergency basis. This is especially important with regard to the amendments to the reporting provisions, 10 M.R.S.A. § 1673, since without an immediate effective date, the Attorney General will be unable to assemble the data needed to report fully on market concentration before next autumn. With an emergency effective date, this report should be available, as noted above, at the latest by June 1, 1993. The proposed amendments are outlined and explained below. It should be noted that these amendments

have been submitted in the usual manner on a timely basis by this office.

A. Fee Collection. The statute as written imposes the fee on the last wholesaler of product (the last wholesaler rule). The problem with the last wholesaler rule is that many wholesalers are also retailers. A single example may serve to illustrate the administrative nightmare which ensues. Wholesaler A sells to B, a wholesaler/retailer. A owes a fee, since B retails some of the gallonage sold to B by A. But in order to determine the proper amount of A's fee, either (1) A must informally get B to tell A how many of the gallons sold by A to B were resold by B at wholesale and how many were resold by B at retail; or (2) A must pay a fee as if all of the gallonage sold to B was ultimately retailed by B. In the latter event, the Attorney General's office must then undertake the task of refunding a portion of A's fee, once B has filed a report and paid a fee with respect to the gallonage which it, in turn, wholesaled.

In sum, the last wholesaler rule sets up a system where it is virtually impossible to avoid double collection -- the imposition of a fee more than once on the same gallon of fuel. Further, it sets up a system which places a heavy and unnecessary burden of administration on this office, and a heavy and unnecessary burden of compliance upon all entities subject to the statute.

The proposed amendment would replace the last wholesaler rule with a "first importer rule". Under the amendment, remittance of fees would be due from those who first bring motor fuels or home heating oil into Maine, thereby avoiding the possibility of assessing the fees more than once on the same gallon. Remittance would occur in the same manner as in the context of two environmental funds administered by the Maine Department of Environmental Protection. It would set up a tried and true procedure well known to those who remit fees to those existing funds. By duplicating these existing procedures, the Legislature would clarify its intention to make the funding mechanism supporting the Petroleum Market Share Act as simple and free of undue burdens as possible.

The language of the amendment would also clarify the intention of the Legislature that fees not be imposed on products initially brought into Maine, but soon thereafter transshipped to jurisdictions outside of Maine (except in the case of home heating oil sold to retailers or retail outlets located outside the State which sell product within the State).

B. Fee Collection Amendment. We propose that the statute, 10 M.R.S.A. § 1681, be amended to read as follows:

§ 1681. Fees.

Annually by September 1, every person operating or causing to be operated an oil terminal facility, as defined in 38 M.R.S.A. § 542(7) within the State, and every person required to register with the Commissioner of the Department of Environmental Protection pursuant to 38 M.R.S.A. § 545-B, a wholesaler shall pay to the Attorney General a fee for each 10,000 gallons of home heating oil and motor fuel oil transported into the State sold-to-retail-outlets-or-retailers during the previous 12-month period ending June 1st, excluding home heating oil or motor fuel oil that is subsequently exported from the State, except that home heating oil sold to a retailer or retail outlet located outside the State which sells home heating oil at retail within the State shall not be excluded. The fee that must be paid by September 1, 1992 is 45¢ for each 10,000 gallons or portions thereof. The fee for each subsequent year is 40¢ for each 10,000 gallons or portion thereof. The fees must be deposited in a dedicated, nonlapsing account, known as the Petroleum Marketing Fund. The Attorney General shall administer the fund. This section is repealed October 1, 1994.

C. Reporting Obligations. The statute as written imposes reporting requirements on wholesalers and refiners. Wholesalers are required to report total gallons of product sold to each retail outlet or retailer; refiners must provide a list of retail outlets which they control, with periodic updates. These regular reporting requirements are insufficient to provide the data the Attorney General needs in order to form a complete and reliable picture of retail concentrations in local markets. The Attorney General does have the option of requiring production of additional data by means of a summons issued under authority of 10 M.R.S.A. § 1674; however, at best, this procedure would be costly and cumbersome for all concerned. It would be far preferable if the statute could be amended to require additional regular reports to supply the needed data.

Accordingly, the amendment which we recommend as set forth below would impose on wholesalers and refiners the additional requirement to report (a) gallonage supplied to retail outlets they control; and (b) gallonage supplied directly by them to end users.

The need for emergency enactment of this legislation cannot be overemphasized. Without such emergency enactment, the

Attorney General will be unable to form a reliable picture of market concentration until late in calendar 1993.

D. Reporting Amendment. Under our proposal, the reporting provision, 10 M.R.S.A. § 1673, would be amended to read as follows:

§ 1673. Reporting

1. Reporting by wholesaler. A wholesaler shall provide reports to the Department of the Attorney General in a manner, frequency, time and form specified by the Attorney General, but at no greater frequency than 4 times per year, setting forth (a) the total gallons of home heating oil and motor fuel oil sold by the wholesaler to each retail outlet or retailer; (b) the total gallons of home heating oil and motor fuel oil supplied by the wholesaler to each retail outlet controlled by the wholesaler during any portion of the reporting period; and (c) the total gallons of home heating oil and motor fuel oil sold by the wholesaler from a bulk storage facility or depot directly to any end-user for consumption in the State.

2. Reports by Refiner. A refiner shall make the following reports.

A. Within 30 days of the effective date of this chapter, a refiner controlling retailers or retail outlets shall file with the Department of the Attorney General a list showing the business name and location of each retail outlet controlled by the refiner on the effective date of this chapter and specifying whether the retail outlet sells home heating oil, motor fuel oil or both.

B. Within 60 days of the effective date of this chapter, and every 60 days thereafter, a refiner shall file with the Department of the Attorney General a list showing any changes in the number and location of retail outlets controlled by the refiner during the preceding 60 days.

C. A refiner shall provide reports to the Department of the Attorney General in a manner, frequency, time and form specified by the Attorney General, but at no greater frequency than 4 times per year, setting forth the total gallons of home heating oil and motor fuel oil supplied by the refiner to each retail outlet controlled by the refiner during any portion of the reporting period, and the total gallons of home heating oil and motor fuel oil sold by the refiner

from a bulk storage facility or depot directly to any end-user for consumption in the State.

3. Repeal. This section is repealed October 1, 1994.

CONCLUSION

Noting that the amendments proposed in this report have been reviewed and unanimously approved by the Petroleum Advisory Committee, chaired by Senator Baldacci, we respectfully urge their enactment on an emergency basis.

This office, and in particular Assistant Attorney General Francis Ackerman and PMSA Director Vickie Ostertag, is at your disposal to work with you further, as required, on these amendments.

Thank you for your consideration; please do not hesitate to call if you should have any questions.

Respectfully submitted,



FRANCIS E. ACKERMAN
Assistant Attorney General
Consumer & Antitrust Division

FEA/kesp

cc: Michael E. Carpenter, Esq.
Vendean V. Vafiades, Esq.
Senator John Baldacci, Chair, Petroleum Advisory Committee
Representative Virginia Constantine
House Chair, Business Legislation Committee
Senate Chair, Business Legislation Committee
Members & Observers, Petroleum Advisory Committee
Stephen L. Wessler, Esq.
Vickie Ostertag