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January 18, 1994

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

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

Re: Petroleum Market Share Act/ Annual Report to the Legislature

Dear Senator Dutremble and Speaker Martin:

Enclosed, in accordance with the provisions of 10 M.R.S.A. §1677, is the Attorney General's Annual Report to the Legislature concerning levels of concentration in Maine's retail petroleum markets. A recommendation for further legislative action is also provided.

Thank you for your consideration of these materials; please do not hesitate to call if you should have any question in this regard.

With best wishes for the New Year,

Sincerely,

FRANCIS E. ACKERMAN
Assistant Attorney General

cc Michael E. Carpenter
Vendean V. Vafiades
Honorable John L. Baldacci
Honorable Virginia Constantine
Honorable Alton E. Cianchette
Honorable Annette M. Hoglund
Members & Observers, Petroleum Advisory Committee

State of Maine
Department of the Attorney General

PETROLEUM MARKET SHARE ACT

ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE MAINE LEGISLATURE PURSUANT TO 10 M.R.S.A. § 1677

I. LEVELS OF CONCENTRATION IN MAINE'S RETAIL PETROLEUM MARKETS

II. LEGISLATIVE RECOMMENDATION

JANUARY 18, 1994

State of Maine
Department of the Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE MAINE LEGISLATURE PURSUANT TO 10 M.R.S.A. § 1677

JANUARY 18, 1994

I. INTRODUCTION

The central purpose of Maine's Petroleum Market Share Act ("PMSA"), 10 M.R.S.A. §§ 1671 -1682, is to provide the Attorney General with the ability to monitor levels of concentration in Maine's retail petroleum markets on a current basis. The perception that this monitoring function was both advisable and necessary arose out of a concern that a refiner or refiners could use the advantage conferred by vertical integration[1] to stake out a dominant position in Maine's retail petroleum markets, whether by a program of acquisitions, or otherwise. Indeed, the PMSA was adopted as a moderate alternative to so-called "divorcement" legislation, which would have barred refiners from Maine's retail petroleum markets altogether. Levels of concentration are also a matter of general concern for reasons of antitrust policy.

As levels of concentration in a given market rise, it becomes more likely that

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[1]A vertically integrated refiner enjoys two principal advantages over nonintegrated competitors in retail petroleum markets. First, the refiner is independent of the vagaries of wholesale markets; second, the refiner can pass along to its retail arm any economies realized in upstream phases of its integrated operation.

a single firm, or group of firms, could successfully exercise market power to levy monopoly profits by charging higher prices. In a rapidly evolving market environment, access to current data regarding levels of concentration is critical to effective antitrust enforcement. It is equally critical to a review of legislative options, and to a determination as to whether more drastic legislative remedies, such as divorcement, merit consideration or adoption. See 10 M.R.S.A. § 1677.

Under the PMSA, the Attorney General is required to report to the Legislature annually by December 31st. The required report comprises two elements: first, a recommendation concerning the need for further legislation; and second, an assessment of "the concentration of retail outlets in the State or in sections of the State." The required report may not disclose the identity of any particular retailer or retail outlet. Id.

In his report to the Legislature dated December 31, 1992, the Attorney General was unable to fully comply with these requirements, since at that time, the statute did not endow him with the authority to collect all the data necessary to a meaningful assessment of levels of concentration. As a result, the Attorney General's 1992 report emphasized the need for emergency legislation to correct these deficiencies. In lieu of a full report on levels of concentration, the 1992 report offered a summary of acquisition activity reported to the Attorney General pursuant to 10 M.R.S.A. § 1109 as an indicator that the trend toward concentration in retail petroleum markets had slowed appreciably during calendar 1992. A copy of the 1992 report is appended hereto as Appendix A.

In April of 1993, the Legislature enacted amendments to the PMSA in substantially the form proposed by the Attorney General. Following the effective date of this legislation, the Attorney General has moved rapidly to assemble the data necessary to form an accurate statistical picture of Maine's retail petroleum markets. Although further refinements will be brought to bear in due course in order to obtain a greater degree of accuracy, we are now in a position to offer a first full report on levels of concentration.

With the PMSA program now fully operational, it is important to recall that the statute contains sunset provisions which would effect its repeal as of October 1, 1994, only one year from now. We are therefore also called upon to offer an assessment of the impact and effectiveness of the program, and to provide a legislative recommendation with respect to repeal or reenactment. In this report, the Attorney General concludes that the program is effectively fulfilling the purposes for which it was designed, and that it merits continuation. Accordingly, we strongly recommend that the sunset provisions be eliminated.[2]

The report which follows is divided into two sections. In the first, following an explanation of the antitrust methodology used, we evaluate levels of concentration and review trends to the extent permitted by available information. In the concluding section, a legislative recommendation is offered.

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[2]We also recommend that the reporting obligation imposed on wholesalers be amended to require annual reports only. The current provision permits the Attorney General to order reports on a quarterly basis; experience has shown, however, that quarterly reports add little to the quality of the data, and are, accordingly, an unnecessary burden.

II. LEVELS OF CONCENTRATION IN MAINE'S RETAIL PETROLEUM MARKETS

A. Methodology

The methodology employed by the Attorney General to assess levels of concentration in Maine's retail petroleum markets, as reflected in this report, is essentially the same methodology used by the U.S. Department of Justice, the Federal Trade Commission and the Attorneys General of the several states in evaluating the legality of any given merger or acquisition under applicable antitrust law. Since the Attorney General has been notably active in enforcing Maine's merger law, 10 M.R.S.A. § 1102-A, in recent years, this office has developed a familiarity with, and expertise in the required analysis.

1. Market Definition. The first step in this analysis is to define the relevant product and geographical markets. The product markets on which this report will focus are the retail markets for Home Heating Oil (HHO) and Motor Fuel Oil (MFO) as defined in the PMSA. HHO is defined as "#2 fuel oil sold for heating residential, industrial or commercial space or water". MFO "means internal combustion fuel sold for use in motor vehicles" as more fully defined in 29 M.R.S.A. § 1(7). See 10 M.R.S.A. § 1672(3) and (4).[3]

The relevant geographical markets are more problematic. In layman's terms, the task of defining the relevant geographical market is essentially one of

[3]In general, HHO and MFO, as defined in the statute, are properly susceptible of antitrust analysis as distinct product markets.

determining who competes against who in a given locality or region. For example, the wholesale market for widgets may be a nationwide market, if it is found that sellers in Maine and California actually compete with each other for sales. Alternatively, if transportation costs render transcontinental competition economically unfeasible, and sellers from Minnesota or Louisiana find it possible to make sales in Maine, while those from California do not, it may make more sense to divide the country into two separate (east-west) geographical markets. Then again, if the most distant competition to Maine-based sellers comes from New York, a geographical market limited to the northeast may be appropriate. In short, the chosen geographical market should reflect the realities of competition.

In more technical terms, the chosen geographical market should approximate one within which a putative monopolist could implement a small, but significant and nontransitory price increase, on the order of, for example, five percent, without precipitating competitive responses which would render the price increase unprofitable. If the posited price increase would neither impel customers within the the chosen geographical market to look beyond its boundaries, nor attract competitors located elsewhere to look for sales within its boundaries, the market will fairly represent competitive realities. Otherwise, it will be necessary to redraw the boundaries until it does.

It should be emphasized that market definition is not an exact science. Few markets can be geographically delineated with absolute certainty that their chosen contours accurately reflect human economic behavior. For better or for worse, the task of defining a geographic market will always be one of approximation.

The Attorney General has taken quite different approaches to defining geographic markets within the State for HHO on the one hand, and MFO on the other. In the case of HHO, we have conducted a series of interviews with a number of persons knowledgeable in and about the petroleum industry in this State. The assistance of Eugene Guilford, Executive Director of the Maine Oil Dealers Association, is particularly acknowledged. On this basis, we have divided the State into thirty-three separate geographic markets which, we believe, represent a fair approximation of economic and competitive realities. A map depicting these markets is attached hereto as Appendix B. While we have no doubt that it will prove necessary to refine our conception of the boundaries of these markets over time, and would welcome comment from any reader of this report, we remain confident that the HHO geographic markets analysed here would (minor modifications aside) stand up to antitrust scrutiny in any forum.

Markets for MFO within the State, however, operate differently from those for HHO. While HHO markets typically encompass a geographic region, however limited -- for example, the St. John Valley, or Mount Desert Island -- MFO markets may be more localised. The task before us here, however, is not the analysis of a merger in a local market. We have determined that for purposes of monitoring broad trends toward concentration across the State, to focus on such narrow geographic markets would be counterproductive. Instead, it was determined that the use of Maine's sixteen counties as hypothetical MFO geographic markets would, at least initially, constitute a more effective mode of analysis.[4] Wherever a trend toward concentration is observed within these hypothetical markets, a fuller and more accurate analysis can be brought to bear, in order to pinpoint the geographic sources of the trend.

2. The Herfindahl-Hirschmann Index. No market is perfectly competitive, and there are varying degrees of competition. The most important factor affecting competition in a given market is the level of concentration.[5] To give an extreme example, a market in which there is only one seller, a monopolist, is obviously highly concentrated, and by the same token, totally lacking in competition. Conversely, a market with numerous small sellers and no large ones has a low level of concentration, and is likely to have a high degree of competition. The number of competitors in a market cannot, however, by itself, provide a measure of either concentration or competition. For example, a market with numerous small competitors which is nevertheless dominated by a single larger competitor may have a high degree of concentration, and a low level of competition.

The Herfindahl-Hirschmann Index, or HHI, is a measure of the level of concentration in any given market. It is also, therefore, a good indicator of the presence or absence of competition in that market. The HHI measures concentration by focusing not only on the number of competitors in the market, but also on their

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[4]Use of county markets also permits a meaningful integration of MFO bulk sales to end users into the calculation of market share.

[5]That competition in turn represents the best guarantee to consumers of high quality and low price needs no emphasis here.

size. The index is widely used by federal and state antitrust enforcement agencies, including this office, as a valuable tool in merger analysis. We have used the HHI in this report to quantify, compare and evaluate levels of concentration in Maine's retail petroleum markets.

Simply expressed, the HHI is the sum of the squares of the percentage market shares of each competitor in the market. Thus a market which is a monopoly -- i.e., in which one seller has a 100% market share -- will have an HHI of 10,000 (100 squared). At the other end of the spectrum, a market in which one hundred sellers each have a market share of 1% will have an HHI of only 100 (one squared times 100). Somewhere in between, a market with ten competitors at 10% each would have an HHI of 1000 (ten squared times ten); by way of comparison, a market with nine competitors at 5% each, and the tenth at 55% would have a much higher index, 3250 (five squared times nine, plus 55 squared), reflecting a higher degree of concentration and a lower level of competition in a market dominated to this extent by a single competitor.

Experience in merger analysis has permitted enforcement authorities to generalise regarding the relative risks to competition reflected in varying HHI numbers. These generalisations are set forth in two sets of merger guidelines published by the U.S. Department of Justice and the Federal Trade Commission on the one hand, and by the National Association of Attorneys General (NAAG) on the other. The points of disagreement between the two sets of guidelines are few, and immaterial for our purposes here; in any case, this office has in the past, and will continue to use both sets of guidelines.

Based upon the guidelines generally, the consensus among antitrust enforcement authorities is that an HHI below 1000 points betokens an unconcentrated market -- one in which competition would be expected to flourish. Enforcement authorities would challenge a merger in such a market only in extraordinary circumstances. Where the HHI falls into a middle range, roughly between 1000 and 1800, the market is generally viewed as moderately concentrated. In such markets, a merger will ordinarily be a matter of concern to enforcement authorities only if the merger produces an increase in the HHI in excess of 100 points. Markets registering an HHI above 1800 points are viewed as highly concentrated. In this category, enforcement authorities are likely to consider any merger resulting in an increase in the HHI of 50 points or more as cause for antitrust concern.[6]

B. Levels Of Concentration

Data assembled from reports submitted by wholesalers and refiners pursuant to the PMSA have permitted us to calculate the annual gallonage supplied to each HHO and MFO retailer and retail outlet located in the State. These annual gallonage figures, in turn, provide the basis for arriving at the percentage market shares held by each retailer in every geographic market in the State. We have calculated HHIs by

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[6]It should be noted that in analysing a particular merger, antitrust enforcement authorities do not mechanically apply the HHI criteria described above. Rather, the HHI is employed as an indicator of the appropriateness of further inquiry. In addition to the HHI, a variety of other factors, such as ease of entry, are consulted in order to determine whether the merger merits a challenge.

squaring the percentage market shares arrived at for each competitor, and deriving a total figure for each market. These HHI figures are set forth in Appendix C below.

1. Overview: Retail Home Heating Oil Markets. Levels of concentration in Maine's retail HHO markets are generally high. Only two of thirty-three markets, Belfast and Augusta, could be characterised as unconcentrated, with HHIs below 1000. At the other end of the spectrum, ten markets racked up HHI point totals over 2500 to qualify as extremely concentrated. Three of these ten markets, Jackman-Greenville, Bethel and York, actually showed HHI totals over 5000.

The remaining twenty-one markets all fell into the range of moderate to high levels of concentration (1000 to 2499 points). Both the average (2490) and the median (2096) HHIs for all retail HHO markets in the State were in the highly concentrated category.

Broadly speaking, markets along the State's western reaches showed the strongest tendency toward overconcentration; this tendency was also evident in downeast and northern sections. York, a highly concentrated market in the extreme south, was the exception to this rule. Markets along the Interstate 95 corridor as far south as Biddeford and as far north as Lincoln appeared less prone to concentration.

Of the ten most concentrated markets in the State, a refiner commanded significant market share (18%) in only one, namely, Woodland-Calais. More broadly, a refiner led the field in five markets (Ashland-Presque Isle, Lincoln, Belfast, Skowhegan and Mount Desert) and held second place in two others (Woodland-Calais and Houlton). In Skowhegan, a refiner held a 24% share; in

Ashland-Preque Isle, the figure rose to in excess of 35%.

The high levels of concentration observable in Maine's retail HHO markets are a source of antitrust concern to the Attorney General. That concern would be heightened in the event a consistent trend toward further concentration were to emerge.[7] At the same time, it is important to note that these high levels of concentration do not necessarily translate immediately into high retail prices for HHO. In fact, HHO prices in Maine are currently among the lowest in the nation. However, a trend toward higher levels of concentration could portend higher retail prices in the future. For this reason, the Attorney General will pay close attention to any such trend, and, with an eye to the motivating purpose of the PMSA program, will also pay close attention to the part played by refiners in bringing about any such trend.

2. Overview: Retail Motor Fuel Oil Markets. Fully half of the county MFO markets listed in Appendix C below fall into the unconcentrated category. Only two (Somerset and Piscataquis) rise to the highly concentrated level, with the remainder characterised as moderately concentrated. It is likely, however, that the HHI levels shown in Appendix C significantly understate the actual levels of concentration which would be found in the narrower geographic markets suitable for purposes of

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[7]Indeed, a single proposed acquisition in a concentrated market can give cause for concern great enough to warrant barring the transaction. For example, in one of the markets listed above (unnamed here for reasons of confidentiality) a merger of the third and fourth largest competitors would result in an increase in the HHI of more than 150 points. Such an increase would place the merger squarely in the category of those which would merit a challenge unless other factors weighed heavily in its favor.

merger analysis. These HHI figures should not, therefore, be read as a signal that this office would be likely to take a hands-off attitude to antitrust review of transactions in markets described as unconcentrated.

It is significant, in this context, that in ten of the sixteen county markets, at least one competitor enjoys a market share in excess of 20%; while in five of them, at least one competitor registers a market share above 30%. Consider that where a market participant with 30% acquires a competitor with a market share over 2%, there will be an increase in the HHI in excess of 100 points. Clearly, almost any acquisition by a competitor holding a market share above 30% is likely to be the subject of very careful antitrust review.

Of particular concern is the fact that a refiner holds first or second place in terms of market share in thirteen of Maine's sixteen counties, with a leading position in eight of these. In eight counties, a refiner held a market share in excess of 20%; in four, a refiner's market share exceeded 30%. In one county, a refiner's market share exceeded 40%.

In MFO markets as in HHO markets, a stronger tendency toward concentration is noticeable on the western reaches of the State, as well as in northern and downeast sections. Southern and central counties were less prone to concentration. The median (990) and average (1085) HHIs for the State are indicative of moderate, rather than extreme levels of concentration; again, however, it should be emphasized that these figures represent a significant understatement.

A consistent rise in levels of concentration in Maine's retail MFO markets, whether as a result of acquisition activity, new construction or other factors, will be viewed as cause for serious antitrust concern. Again, the Attorney General will take careful note of the part played by refiners in any such trend toward concentration.

C. Trends

The present interim report will provide a baseline for purposes of observing and monitoring trends reflected in data to be summarised in future annual reports. Since no accurate HHIs for periods antedating the present report are available, there is no basis for a comparison of the HHIs reported above to those for prior periods, and no basis for any observation with respect specifically to HHI trends.

However, as noted in the Attorney General's 1992 report (see Appendix A), it is clear from acquisition reports received pursuant to 10 M.R.S.A. § 1109 that at least since September 1991 with respect to HHO, and since January 1990 with respect to MFO, there has been a significant trend toward concentration in petroleum markets. Confidential anecdotal information available to this office suggests that this trend was accelerating through calendar year 1991, but that it slowed markedly in calendar year 1992, and has slowed even further during calendar year 1993 to date. This pattern is illustrated in the following table:

§1109 Acquisition Reports

	HHO Acquisitions	(sites acquired)	MFO Acquisitions
1990	unknown		14
1991	12 (3 months)		27
1992	9		16
1993	7 (9 months)		12 (9 months)

While economic factors have certainly played their part in slowing the trend toward concentration in these markets, it is also likely, as we noted in our 1992 report, that the PMSA, which has existed in concept since early 1992 and became effective midway through 1992, has itself tended to deter anticompetitive acquisitions. It would appear that the statute has had the effect of encouraging self-policing by larger market participants, including refiners. It is our expectation that the statute will continue to have a salutary effect in this regard, as larger competitors become more aware of the antitrust implications of proposed transactions in specific markets, exerting greater caution as a result.

It should be noted, however, in this context, that the Attorney General is cognizant that a trend toward concentration can arise from causes other than acquisitions. For example, a trend toward concentration could result from a practice known as predatory pricing -- i.e., in layman's terms, below cost pricing by a larger competitor with the purpose of driving smaller competitors out of business. The Attorney General has every intention of monitoring and responding appropriately to increased concentration in Maine's retail petroleum markets whatever the cause. Accordingly, larger competitors, including refiners, would be correct to view the PMSA program as a deterrent to anticompetitive acquisitions. These larger competitors would be wrong, however, to view the PMSA as an incentive to adopt predatory pricing policies as a means of gaining market share unattainable through acquisitions. Predatory pricing is illegal under Maine's antitrust law, specifically 10

M.R.S.A. § 1102.

Specifically, predatory pricing constitutes a form of monopolization. In any monopolization case, market share is necessarily a central issue. In fact, therefore, far from amounting to a tacit encouragement of predatory pricing, the PMSA provides the Attorney General with information essential to the prosecution of such a violation.

III. LEGISLATIVE RECOMMENDATION

At the time of his first annual report, the Attorney General found it necesary to recommend significant corrective amendments to the PMSA to ensure the efficacy of its reporting, monitoring and fee mechanisms. Today, no such corrective legislation is required. The statutory program is fully operational. Fees are being collected on an equitable and administratively efficient basis (i.e., the "first importer rule", see 10 M.R.S.A. § 1681). The Attorney General has been receiving regular quarterly reports from refiners and wholesalers regarding gallonages of HHO and MFO supplied to retail outlets; these reports provide a reliable basis, in turn, upon which to calculate up-to-the-minute market shares for markets throughout the State.[8]

In short, the PMSA program is now performing the functions for which it was designed, permitting the Attorney General to monitor levels of concentration generally in petroleum markets throughout the State, and to monitor the role

[8] With few exceptions, the level of compliance with statutory reporting and fee requirements has been high. The Attorney General commends participants in Maine petroleum markets for their cooperation with this important program.

played by refiners in any trend toward increased concentration. The purpose of monitoring levels of concentration, of course, is to permit the Attorney General or the Legislature to take appropriate action swiftly should the need arise to block a given acquisition, to end a predatory practice, or to impose generalised restrictions on the activities of refiners in retail markets.

Experience has shown that the quality of the data received is increased only marginally by the current provision for quarterly wholesaler reporting. Accordingly, we recommend that the statute be amended to require annual reporting only. This will reduce the administrative burden on the industry; at the same time, it will permit a lowering of the statutory fee.

The reporting and fee sections of the statute, 10 M.R.S.A. §§ 1673, 1681, contain sunset provisions which automatically repeal those sections as of October 1, 1994. It is the Attorney General's strong recommendation that the sunset provisions themselves be repealed.[9] The concept of the PMSA program has been tested in action; initial glitches have been corrected and the program is in operation and working well. The Attorney General is now in a position to follow trends in Maine's petroleum markets on a current basis, and to react swiftly by seeking remedies in court, or in the Legislature should the need arise.

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[9]It should be noted that this view was not endorsed by the Petroleum Advisory Committee. No formal recommendation was voted on by the Committee. While a wide range of views was expressed by members and observers attending Committee meetings (including, for example, the proposal that the sunset provisions should be extended for a further three to five years), no clear consensus emerged.

Without the PMSA program, the Attorney General would be forced to fall back on routine antitrust enforcement methods and mechanisms. The PMSA program was adopted in the first place because it was felt that in a rapidly evolving market environment, there was a serious risk that routine enforcement would be ineffective -- that it would accomplish too little, too late. Nothing has intervened to alter that equation, and the risk remains.

Further, the PMSA program was conceived, not as a means of affording the Attorney General a one-time look at levels of concentration in Maine's petroleum markets, but as a means to follow and evaluate trends. It would accordingly be inadvisable to eliminate the program in accordance with the sunset provisions now in place; and equally inadvisable to replace them with similar near-term limits on the life of the program. The problem which the PMSA was designed to address is not likely to go away in the near term; nor should the program itself.

It is the Attorney General's considered view that the continuation of the PMSA program is essential to the elaboration, through litigation or further legislation, of an effective competition strategy for Maine's petroleum markets.

Respectfully submitted,

Dated: January 10, 1994

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Attorney General

STEPHEN L.WESSLER
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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 in 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

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

3. <u>Repeal.</u> 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,

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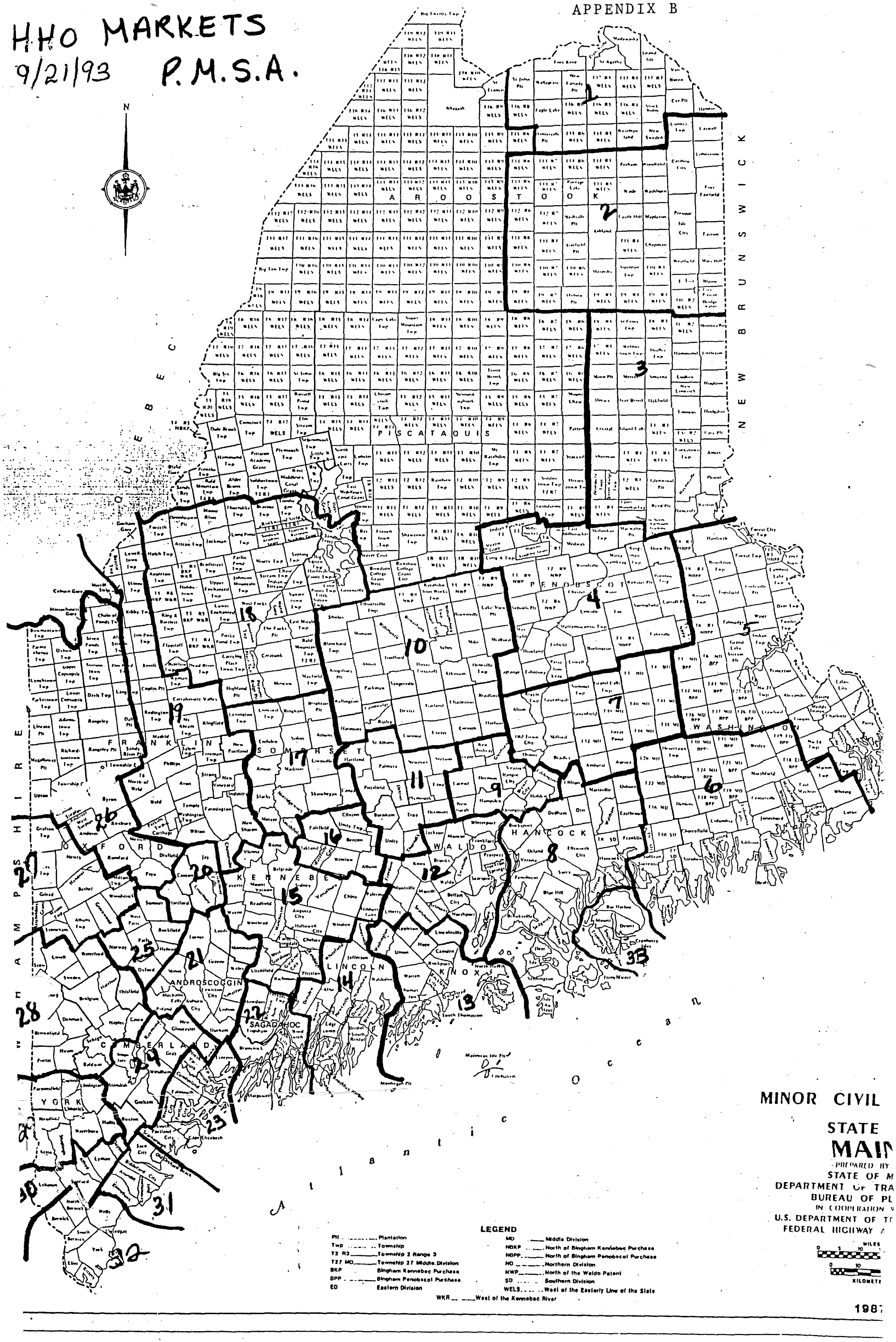
H HO

DEFINED MARKET AREAS BY NUMBER

1. St. John Valley
2. Ashland/Presque Isle
3. Houlton
4. Lincoln
5. Woodland/Calais
6. Cherryfield/Machias
7. Old Town
8. Ellsworth
9. Bangor
10. Dover-Foxcroft
11. Pittsfield/Newport
12. Belfast
13. Rockland
14. Mid Coast
15. Augusta
16. Waterville
17. Skowhegan
18. Jackman/Greenville
19. Farmington
20. Jay
21. Lewiston/Auburn
22. Bath/Brunswick
23. Portland
24. Gray
25. Paris
26. Rumford/Rangeley
27. Bethel
28. Bridgton
39. Limerick
30 Sanford
31. Biddeford/Saco
32. York
33. Mt. Desert

APPENDIX B

HHO MARKETS
9/21/93 P.M.S.A.



APPENDIX C

This appendix sets forth HHI figures for Maine's retail petroleum markets. As we note in the text above, these are derived from data reported to us by wholesalers and refiners pursuant to the PMSA.

It should be noted that in the case of HHO markets located along the Maine-New Hampshire border, available data do not indicate market shares held by cross-border competitors. Accordingly, HHIs for these markets are based to some extent on estimates. We indicate below wherever an estimate is used.

The Attorney General is forbidden by statute to disclose the identity of any retailer or retail outlet in making his report. The market summaries offered below therefore set forth only (1) geographic location (for HHO markets, reference should be made to the map attached hereto as Appendix B); (2) number of competitors; (3) HHI; and (4) a characterisation of the level of concentration. We have used four characterisations, loosely derived from federal and NAAG guidelines, as follows: an HHI in the 0 -1000 range is viewed as "unconcentrated"; in the 1000 -1800 range, the characterisation is "moderately concentrated"; in the 1800 -2500 range, an HHI is rated "highly concentrated"; while in the 2500 plus range, the phrase "extremely concentrated " is used.

A. Home Heating Oil HHIs.

1. St. John Valley

No. of competitors: 6

HHI: 2538

Character: extremely concentrated

2. Ashland/Presque Isle

No. of competitors: 19

HHI: 1925

Character: highly concentrated

3. Houlton

No. of competitors: 10

HHI: 1973

Character: highly concentrated

4. Lincoln

No. of competitors: 10

HHI: 1316

Character: moderately concentrated

5. Woodland/Calais

No. of competitors: 9

HHI: 3366

Character: extremely concentrated

6. Cherryfield/Machias

No. of competitors: 10

HHI: 2228

Character: highly concentrated

7. Old Town

No. of competitors: 10

HHI: 1709

Character: moderately concentrated

8. Ellsworth

No. of competitors: 22

HHI: 2167

Character: highly concentrated

9. Bangor

No. of competitors: 36

HHI: 1633

Character: moderately concentrated

10. Dover-Foxcroft

No. of competitors: 9

HHI: 2096

Character: highly concentrated

11. Pittsfield/Newport

No. of competitors: 15

HHI: 2096

Character: highly concentrated

12. Belfast

No. of competitors: 17

HHI: 984

Character: unconcentrated

13. Rockland

No. of Competitors: 23

HHI: 1321

Character: moderately concentrated

14. Midcoast

No. of competitors: 9

HHI: 3680

Character: extremely concentrated

15. Augusta

No. of competitors: 25

HHI: 922

Character: unconcentrated

16. Waterville

No. of competitors: 14

HHI: 1548

Character: moderately concentrated

17. Skowhegan

No. of competitors: 11

HHI: 1618

Character: moderately concentrated

18. Jackman/Greenville

No. of Competitors: 3

HHI: 5531

Character: extremely concentrated

19. Farmington

No. of competitors: 12

HHI: 2257

Character: highly concentrated

20. Jay

No. of competitors: 5

HHI: 3211

Character: extremely concentrated

21. Lewiston/Auburn

No. of competitors: 14

HHI: 1613

Character: moderately concentrated

22. Bath/Brunswick

No. of competitors: 11

HHI: 1921

Character: highly concentrated

23. Portland

No. of competitors: 32

HHI: 1097

Character: moderately concentrated

24. Gray

No. of competitors: 19

HHI: 1281

Character: moderately concentrated

25. South Paris

No. of competitors: 7

HHI: 3706

Character: extremely concentrated

26. Rumford/Rangeley

No. of competitors: 7

HHI: 1926

Character: highly concentrated

27. Bethel

No. of competitors: 3

HHI: 5634

Character: extremely concentrated

28. Bridgton

No. of competitors: 7

HHI: 2400 (estimate)

Character: highly concentrated

29. Limerick

No. of competitors: 7

HHI: 2992

Character: extremely concentrated

30. Sanford

No. of competitors: 5

HHI: 4000 (estimate)

Character: extremely concentrated

31. Biddeford/Saco

No. of competitors: 17

HHI: 1524

Character: moderately concentrated

32. York

No. of competitors: 3

HHI: 8000 (estimate)

Character: extremely concentrated

33. Mt. Desert

No. of competitors: 10

HHI: 1970

Character: highly concentrated

B. Motor Fuel Oil HHIs.

County markets for MFO are listed below in inverse order of concentration.

1. Cumberland

No. of competitors: 128

HHI: 415

Character: unconcentrated

2. <u>York</u>

No. of competitors: 92

HHI: 452

Character: unconcentrated

3. <u>Androscoggin</u>

No. of competitors: 52

HHI: 482

Character: unconcentrated

4. <u>Knox</u>

No. of competitors: 59

HHI: 510

Character: unconcentrated

5. <u>Lincoln</u>

No. of competitors: 25

HHI: 714

Character: unconcentrated

6. <u>Penobscot</u>

No. of competitors: 137

HHI: 971

Character: unconcentrated

7. Hancock

No. of competitors: 53

HHI: 972

Character: unconcentrated

8. Kennebec

No. of competitors: 70

HHI: 974

Character: unconcentrated

9. Franklin

No. of competitors: 35

HHI: 1006

Character: moderately concentrated

10. Washington

No. of competitors: 48

HHI: 1124

Character: moderately concentrated

11. Waldo

No. of competitors: 34

HHI: 1313

Character: moderately concentrated

12. Aroostook

No. of competitors: 90

HHI: 1343

Character: moderately concentrated

13. Sagadahoc

No. of competitors: 22

HHI: 1502

Character: moderately concentrated

14. Oxford

No. of competitors: 31

HHI: 1594

Character: moderately concentrated

15. Piscataquis

No. of competitors: 25

HHI: 1878

Character: highly concentrated

16. Somerset

No. of competitors: 58

HHI: 2118

Character: highly concentrated