GASOLINE PRICES IN HAWAII

THE IMPACT OF OIL COMPANY DIVORCEMENT ON CONSUMER PRICES

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EXECUTIVE SUMMARY

Divorcement is the prohibition of Oil Companies directly operating retail gasoline service stations. A bill proposing divorcement, S.B. 1757, was introduced in the 1991 Legislature. Act 295 of the 1991 Legislature imposed a two year moratorium on oil companies opening and operating retail gasoline stations in order to study the merits of divorcement. Act 295 directed the Attorney General and the Director of Commerce and Consumer Affairs to study the impact of divorcement on Hawaii. It directed the Attorney General to assess the effect on consumer prices. It directed the Director of Commerce and Consumer Affairs to study the impact on consumer service. A copy of Act 295 is attached. Legislation on divorcement has been introduced continually on both the federal and state levels, and controversy on divorcement continues between the oil companies and gasoline retailers. Both proponents and opponents of divorcement have written extensively on the issues. One purpose of this report is to assess authoritative reports on the impact divorcement has on prices. Nearly all the reports cite the Maryland experience as a basis for supporting or opposing divorcement. The second purpose of this report is to analyze the impact of the two-year moratorium on gasoline prices in Hawaii.

Section One reviews the focus of the divorcement issue in terms of the Attorney General's ongoing gasoline investigation. Entry barriers prevent low-priced mainland wholesale gasoline from competing in Hawaii. The entry barriers are partly natural. But they are partly man-made. The agreements and practices of the oil companies in Hawaii block competition. Particular concerns center on the oil companies' exchange agreements, control of storage and terminal facilities, and control over retail outlets. It is in this context that divorcement in Hawaii should be studied.

Section Two discusses the various authoritative reports on the effect of divorcement on consumer prices. There are two schools of thought. One view is that divorcement may decrease gasoline prices by allowing retailers the freedom to set prices competitively, and in turn pass the savings on to the consumer (as shown in the Maryland experience). Other studies attempt to show that divorcement actually increases gasoline prices and reduces retail operating hours, thereby harming consumers.

Section Three presents a statewide review of retail gasoline prices in Hawaii over the last two years. Retail gasoline prices were collected from neighbor island retailers via a telephone survey on a bi-monthly basis. Honolulu retail prices were extracted from Lundberg's Retail Price survey. (Price information from company-operated stations was provided by the oil companies under provisions of confidentiality.) Crude prices, rack prices, terminal prices, and wholesale prices were taken from Platt's Oilgram Price Report and Lundberg's price surveys. Pre-divorcement prices for the neighbor islands were not available. The data shows that a few months before the enactment of the moratorium, gasoline retail prices were declining. Just prior to divorcement, gas prices began to rise and then leveled off at a self-serve price of approximately $1.50 for a gallon of regular unleaded gas.

Section Four offers a review of federal legislation proposed to the last Congress. Each of the bills died when Congress adjourned. Senate Bill 720 would have enacted divorcement and also an "open supply" provision prohibiting a refiner from restricting the amount of gasoline a retail dealer could purchase from competing wholesalers. S. 1241, S. 1243, and HR 2966 would have prohibited a refiner from charging wholesale customers a price higher than the refiners' adjusted retail price at its company stations. These bills or a compromise version doubtless will be introduced in the next Congress.

Section Five closes the report with the Attorney General's conclusion that if the better policy for Hawaii is to promote competition, efficient small business, and lower consumer prices, divorcement should not be enacted by the Hawaii Legislature.

I. DIVORCEMENT AND THE ATTORNEY GENERAL'S ONGOING INVESTIGATION OF GASOLINE PRICES IN HAWAII

Assuring an adequate supply of gasoline and other automotive goods and services in Hawaii at the lowest possible price to consumers is a fundamental economic problem in Hawaii. As a matter of policy, the State of Hawaii has looked to free market competition to solve such problems. The question here is what impact "divorcement" would have on consumer prices. It likely will increase them.

The price to consumers is lowest when competition keeps any single seller or buyer or any combination of them from fixing the price. Competitors maximize profit and minimize loss by increasing output (sales) until the production cost is absorbed by the price. When the dominant factor for a buyer is price, the competitor with the lowest price will get the sale. Competitors whose costs are too high to match that price are forced to sell at a loss or leave the market. As a result, consumers get the lowest possible price and the market is kept clear of inefficient producers.

On the other hand, where there is no competition, a seller will maximize profits by running up the price to the highest the market will bear. With no competitor to offer a lower price, there is nothing to stop the seller. The lack of competition imposes unnecessarily high prices on consumers, reduces output, and permits inefficient producers to remain in the market. This result is unfair to consumers of gasoline and the public generally.

The Department of the Attorney General has been studying the gasoline markets in Hawaii since the Exxon Valdez disaster in the spring of 1989. In September of 1990, the Department released a preliminary report indicating that the price of gas in Hawaii is persistently higher than on the mainland. We concluded that this was because the gasoline markets in Hawaii are not competitive in the economic sense described above.

Virtually all gasoline consumed in Hawaii is produced by two local refiners, Chevron and Pacific Resources Incorporated (PRI) (now Broken Hill Proprietaries

Petroleum or BHPP). Neither Chevron nor PRI can supply the total demand for gasoline in Hawaii. So the market is divided between them. Each states that it strives to increase its market share. But there is not much vigor in their competition. Aggressive price competition apparently is not profitable. Theoretically, in a market with only two sellers, each seller will maximize profits by avoiding price competition and charging the highest prices the market will bear.

There is little likelihood of new competition entering Hawaii. A new wholesale competitor would need not only a secure supply of competitively-priced gasoline, but also terminal (storage) facilities and access to a sufficient number of retail outlets. These problems appear impossible to solve. No new major wholesaler has come to Hawaii since PRI entered the market some 20 years ago.

Low-priced wholesale gasoline produced on the mainland is not a competitive force in Hawaii despite the fact that the cost of transportation from the mainland usually is substantially less than the difference between mainland and Hawaii wholesale prices. Shell, Texaco, and Unocal, the other incumbent integrated wholesalers in Hawaii, obtain their supplies from Chevron or PRI. They do so under exchange agreements. Under an exchange agreement, a wholesaler who does not refine gasoline locally takes gasoline from a local refiner in exchange for supplying it a comparable amount of gasoline at a place on the mainland where the wholesaler does refine gasoline. Aloha Petroleum is an independent firm that sells gasoline both at wholesale and retail. However, it must obtain its supplies from PRI or Chevron. Aloha cannot bring mainland gasoline into Hawaii. It does not have sufficient storage capacity of its own and the incumbent oil companies will not lease theirs to Aloha or enter into exchange agreements with Aloha on "terms" that enable Aloha to take advantage of lower mainland wholesale prices.

It appears that low-priced mainland gasoline is prevented from entering the Hawaii markets. The current focus of our gasoline investigation is to determine whether the obstruction is caused by the agreements and practices of the incumbent oil companies. We are particularly concerned about the oil companies' exchange agreements, their control of terminal facilities, and their control over retail outlets. The "divorcement" question must be studied in this context.

All the incumbents (Chevron, PRI, Shell, Texaco, and Unocal) market gasoline at wholesale. All the incumbents except PRI market gasoline at retail through branded franchised dealers. Chevron also markets gasoline directly at retail on Oahu. PRI has always marketed directly at retail. It has never used branded or unbranded retail franchises. In 1988, PRI attempted to acquire Shell's retail facilities. But the acquisition was enjoined by the FTC on the grounds that it was anticompetitive. Since then, PRI has attempted to expand the market for its gasoline by expanding its direct retail operations. Aloha Petroleum markets gasoline at retail. But it is not a refiner.

When an oil company sells directly to the public at retail, any profit depends entirely on the retail price. Profit, of course, is price less cost. So the oil company's profit would be the retail price less its refinery costs (Chevron and PRI) or supply costs (Shell, Texaco, and Unocal), its storage costs, its distribution costs, and its marketing costs.

When an oil company markets through branded retail dealers (i.e., franchised independent dealers), it sells at wholesale, not retail. It takes its profit at the wholesale level. That is, the oil company adds its profit in the price at which it sells gasoline to the retail dealer. The independent retailer's costs necessarily include the wholesaler's profit. The independent retail dealer's price to the public must be high enough to cover the price it paid for its gasoline plus its own overhead. If it is not, the independent retailer will suffer losses that eventually will force it to leave the market.

Thus, an incumbent oil company that sells directly at retail holds a decisive competitive advantage over the independent retail dealer. Its costs at retail are lower than those of the independent dealer at least by the amount of the profit taken by the independent dealer's wholesale supplier. Moreover, the oil company may realize productive economies and economies of scale at the retail level not available to a franchised independent dealer. So an oil company selling directly at retail can offer a price to the public that the independent retail dealer cannot match.

Therefore, unless prohibited by divorcement or some other inhibition, we would expect PRI to continue to open Gas Express outlets in the busier areas of the State. And we would expect some of the other incumbents to follow. The effect should be to drive gasoline prices in these areas down some. Some of the less efficient independent dealers probably would leave the market.

An independent dealer could, however, absorb the loss on the sale of gasoline and remain in the market. Highly profitable side businesses (repairs, TBA[1], parts, fast food, etc.) might enable the independent to do so. The availability of such an alternative would depend on the economics of each situation. Hawaii statutes prohibit predatory sales below cost. But they do not prohibit pricing in good faith to meet the lawful prices of a competitor. Furthermore, an aggressive independent retailer could be expected to take full advantage of available economies of scale. Thus, aggressive, creative independents could become an important competitive force in the retailing of gasoline.

In any event, direct retailing by the oil companies in areas where the volume is high enough to support several competing retail outlets ought to lead to lower consumer prices than would be the case if oil companies were limited to marketing through independent dealers. In lower volume areas, where scale economies are not available, it is unlikely that the oil companies will sell at retail. Marketing through franchised independent dealers probably would be more profitable. So long as it is, the independents will not face competition from the oil companies. Consumer prices in these lower volume areas will tend to be as high as the market will bear. Consumers shopping for lower prices must find them elsewhere.

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[1]Tires, batteries, and accessories

Consumers valuing the personal service and loyalty of a friendly, local gas station will still find them among the "mom and pops" in these quieter, higher-priced areas. In all likelihood these small stations will not be much threatened by anything except their own inefficiency, their own miscalculation of their customers' needs, or increased costs from stricter government regulation and higher taxes.

Divorcement would prevent the oil companies from driving the independents out of business. But it would not keep aggressive independents from driving out the small, inefficient "mom and pop" franchises from high volume areas. Divorcement would give the more lucrative retail markets of Hawaii over to these aggressive independents. Divorcement would prevent competition from the oil companies. The unavailability of scale and other productive economies would prevent competition from the "mom and pops."

All divorcement would do is protect some retail dealers from otherwise legitimate, aggressive competition. Consumers will pay the price in the form of higher prices. Locking efficient competitors out of the market lessens competition. It discriminates in favor of a certain group of retailers. Our view is that divorcement is anticompetitive and anti-consumer. We doubt that divorcement is the right remedy for Hawaii.

Nevertheless, the question must be asked whether the leases, franchises, and supply agreements between the oil companies and the independents prevent independent retailers and wholesalers willing to compete with the oil companies from doing so. Forward integration (i.e. the ownership or control of retail outlets) by the incumbent oil companies in Hawaii may lessen competition. Selling to retail dealers under exclusive supply arrangements forecloses access to the dealers by competitors. If the amount of business foreclosed is substantial, the arrangement is anticompetitive.

If so, remedies other than divorcement may be of greater benefit to consumers and the public. The Legislature might prohibit the oil companies not only from directly operating retail outlets, but also from franchising them or owning and leasing them to branded dealers. Such a remedy could be called "divestiture" for it would require the incumbents to divest themselves completely of all retail interests. Divestiture would open up the retail gasoline outlets to competition among gasoline wholesalers. And, it would free the retail dealers from the control and protection of the oil companies. There are less drastic measures. The Legislature could open retail stations to competition among wholesalers by capping the amount of gasoline a franchisor-supplier could require a franchisee to purchase. Also, it could prohibit a franchisor-supplier from restraining a franchisee from dealing with the suppliers' competitors. Another possibility would be to prohibit an oil company selling at retail from charging its wholesale customers a price higher than its retail price less its retail operating costs. These alternatives appear to be procompetitive, pro-small business, and pro-consumer.

II. AUTHORITATIVE REPORTS ON DIVORCEMENT.

In 1974, the General Assembly of Maryland passed a law prohibiting oil refiners from operating retail gasoline outlets. This law is referred to as "divorcement." Several states (Maryland, Connecticut, Delaware, Florida, Virginia and the District of Columbia) passed divorcement statutes during this period. More than 30 other states have considered laws restricting refiners' operation of service stations. The Maryland law is, however, the best-known of the existing divorcement statutes and has served as the model for several of the bills proposed in Congress since 1979.

The Maryland law was challenged in court, but the United States Supreme Court upheld it in 1978. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). Following a one-year transition period that allowed producers and refiners to enter into alternative arrangements, divorcement went into effect on July 13, 1979. Nevertheless, due to further litigation, some stations remained company-operated until 1981.

These state legislative activities were in response to a heavy dealer drop-out that occurred throughout the 1970's, a period of increased growth and success by refiner-operated gasoline stations. Dealers were faced with increased competition from refiner-operated outlets, jobber-retail operations, increasing rents, and forced credit card processing fees. It was alleged that the refiners were favoring their directly operated outlets, particularly in the distribution of the scarce gasoline supplies. There were allegations that the oil companies were engaging in predation and other anti-competitive acts and practices. It was feared that small gasoline retailers were being forced out of business by the major oil companies. Therefore, the purpose of the legislation was to promote the small independent marketers (dealers) by eliminating the direct competition of refiner-marketers.

After the implementation of the gasoline divorcement law in Maryland, several studies were done in order to examine the effects of the controversial statute. Some of the more pivotal studies will now be discussed in this report.

A. Gasoline Prices in Maryland Following Divorcement.

Putnam, Hayes, and Bartlett, Inc. (1987).

The Maryland Attorney General and the Comptroller of the Treasury commissioned Putnam, Hayes, and Bartlett, Inc. to head a study to test the long-term effects of divorcement in Baltimore over a seven-year period with other cities without "divorcement." Data was collected from six sample non-divorcement Eastern cities (Atlanta, Birmingham, Charlotte, Philadelphia, Long Island, and Boston) and from Maryland's representative city, Baltimore.

The study, generally referred to as the PHB report, compared the prices of regular grade gasoline (net of tax) in Baltimore with corresponding prices in the six comparative cities, all of which are alleged to have similar gasoline markets.

The study found (1) that prices for both leaded and unleaded gasoline sold through self-serve pumps were generally lower in Baltimore than in the other Eastern cities during the period from January 1979 through September 1986 (commodity prices for leaded regular gasoline showed somewhat more fluctuation) and (2) that the service premium paid for full-serve gasoline in Baltimore generally was higher than the average premium paid in non-divorcement cities.

The PHB study concluded that:

> "Assuming that the difference between the prices paid in Baltimore and the non-divorcement Eastern cities is representative of the differences that all residents in Maryland enjoyed, and based on purchases of all types of gasoline by Maryland residents, the results of this study suggest that Maryland motorists saved over $117 million during the study period compared to what they would have paid had the price levels recorded in the non-divorcement Eastern cities prevailed."

However, the findings and conclusions of the study have been called into question because of the study's methodology and statistical utilization.

B. The Impact of Divorcement on Consumers in Maryland: A critique of 'gasoline prices in Maryland following divorcement'. T. Hogarty and R. Dougher (1987).

The American Petroleum Institute commissioned Hogarty and Dougher to review the contents of the PHB Maryland study on divorcement. This report pointed out the inadequacies of PHB's methodology and explained why it should not be used to investigate the effects of divorcement in Maryland. The authors also demonstrated that the PHB data themselves were contradictory. Rather than divorcement being shown as beneficial for the consumers, the PHB data showed exactly the opposite--that consumers paid more for a gallon of gasoline as a consequence of divorcement.

Hogarty and Dougher maintained that the principal error in the PHB study was its failure to correctly measure the impact of divorcement. The PHB statistics showed that prices in Baltimore were lower than those of the six comparison cities before divorcement. Hence, PHB's own data revealed that factors affecting prices did not have the same impact in all cities, and therefore, failed to isolate the impact of divorcement from other factors. A better method would have been to compare the price differences pre and post-divorcement for Baltimore and the six cities. Interestingly, when the correct methodology was implemented, PHB's $117 million savings was reversed to reveal a loss of approximately $202 million.

The PHB study failed to recognize that its own data contradicted its hypothesis. The hypothesis alleged that the initial impact of divorcement would raise prices. But it would reduce them in the long run. Instead of exhibiting this downward trend, the numbers showed that Baltimore prices rose relative to prices elsewhere and were higher in the 1983-86 period than during 1979-82.

Hogarty and Dougher also cited mathematical errors as contributing to the inaccuracy of the PHB study. The cost savings estimated by PHB appeared to be miscalculated when higher Baltimore prices were transformed into savings for Maryland motorists. The report concluded that such results were mathematically invalid.

Additionally, the PHB study failed to take into account the impact of divorcement on consumer choice. Prior studies found that divorcement allowed dealers to increase the spread between full-serve and self-serve prices. Consumers who would have preferred full service but were not able or willing to pay the higher prices were hurt. Hence, the PHB report seriously underestimated consumer losses from higher full-service prices.

The Hogarty and Dougher study concluded that Maryland's gasoline consuming public actually lost an estimated total of $306 million after adjusting the data, correcting computational errors, including the pre and post-divorcement factors, and accounting for consumer losses resulting from the move away from full service. Therefore, the PHB data, correctly assessed, confirmed the prediction of conventional economic analysis that divorcement harms consumers by reducing competition and efficiency.

C. The Cost to Consumers in Maryland of the Divorcement of Refiners from Gasoline Marketing 1979-1986.
Dr. P. E. Sorenson (1988).

Another review of the 1987 PHB report also found that the PHB study was seriously flawed. This critique by Dr. Philip E. Sorenson, also noted the invalid methodology, computational inaccuracy, and the fact that if the PHB data were corrected, it would reverse the PHB study's conclusion. In addition, this report presented new evidence regarding the impact of divorcement on gasoline prices and consumer costs.

The weighted-average increase in net-of-tax gasoline prices in Baltimore during the period of July 1979 through December 1986 was compared to the similarly computed increases in three different markets: the Lundberg Survey U.S.-city sample, the six-city sample used in the PHB study, and a three-city sample composed of Boston, Long Island, and Philadelphia. This study concluded that divorcement had raised the price of gasoline in Baltimore and imposed significant costs upon consumers in all three of the markets used for comparison. The increased cost ranged from $246 million in the six-city comparison to $848 million in the three-city comparison.

D. **Gasoline Station Divorcement: A review of studies concerning the economic impact of Maryland's gasoline station divorcement law.** Dept. of Fiscal Service, State of Maryland (1988).

The Department of Fiscal Services for the State of Maryland, was requested by its presiding officers to review the PHB study and to advise as to its findings. The Department faulted the PHB study as focusing only on data in the post-divorcement period and assuming, that after making adjustments for state and local gas taxes, all price variation was consequentially the result of divorcement. It found the study to be flawed because it failed to isolate the price effects of divorcement from all other market and cost factors that impact prices, such as degree of competition, wage and capital costs, other taxes, the regulatory structure, seasonal demand factors, etc.

The Department concluded that limitations of the data series and the lack of statistical analysis on price differentials were significant indicators of the invalidity of the PHB report. The Department theorized that gasoline divorcement led to both higher retail gasoline prices and shorter hours of operation. However, the data presented in the PHB study were not sufficient to produce a reliable estimate of the dollar impact of Maryland's consumers from divorcement legislation.

E. **The Effects of Different Contractual Arrangements: The case of retail gasoline markets.** John M. Barron and John R. Umbeck (1984).

This article sought to test the predicted effects on prices and operating hours of a divorcement-induced change. Barron and Umbeck obtained prices of each affected station and its competitors both before and after divorcement. Data was extracted from surveys of the Maryland gasoline markets over a four-year period during which one of the stations in each market converted from a refiner company operation to a franchise operation due to divorcement legislation.

Barron and Umbeck found that after divorcement, prices rose at stations formerly operated as company stations and converted to franchises as a result of divorcement. They also rose at independent stations not affected by divorcement. The authors also found that the hours of operation at newly franchised stations fell relative to their independent competitors.

The Barron and Umbeck article was criticized for alleging that gasoline dealers used divorcement as an opportunity to raise their profit margins. This allegation was countered by the claim that after divorcement, between 1982-1984, Maryland had the lowest and the second lowest profit margins in the nation.

Some critics stated that the Barron and Umbeck review failed to consider whether prices and margins were forced up by the federal regulations in effect from July 1979 to January 1981. Margins during these times were higher for dealer-operators than for company-operated stations. Therefore, it should not have been surprising that prices rose at divorced stations. Other critics claimed the

Barron and Umbeck review represented short-term results, and the long-term effects still needed to be examined.

F. Deregulated Gasoline Marketing: Consequences for competition, competitors, and consumers. U.S. Department of Energy (1984).

In 1984, the U.S. Department of Energy (DOE) examined the state of the gasoline marketing industry since prices had been decontrolled in January 1981. The discussion reviewed divorcement theoretically and also evaluated the situation in Maryland. The effects of divorcement were analyzed under two separate and opposite hypothetical situations--predatory pricing and effective competition.

The DOE found that the theoretical effects of divorcement depended upon the assumed competitive conditions in gasoline marketing. Some claim that refiners subsidized company-operated stations, thereby allowing them to sell gas below cost. Eventually, this would drive out competitors and enable the company stations to raise prices above competitive levels. This is commonly called predatory pricing. On the other hand, "divorcement would cause prices to increase in the short-term, since below-cost sales would be eliminated. In the long term, prices would be lower than without divorcement, since firms would not be able to engage in subsidization and monopolize the market". (DOE, p. 101.)

Others claim that even if refiner-marketers pushed their lessees out, monopolization would not occur. This is because refiner-marketers would still have to compete with each other and independents. It would also attract new entrants to the market. Under this scenario, divorcement would cause prices to increase in the short run, because it lessened competition and efficiency. In the long run, gasoline markets might be competitive in the sense that no excess profits would accrue. However, adverse efficiency effects likely would persist.

By examining the current data and studies concerning Maryland's divorcement statute, the DOE ultimately concluded that there was no convincing evidence that the majors engaged in widespread predatory pricing. Market share gains by non-majors and independents belied such a conclusion. Also, hard evidence of subsidization had not been provided. Furthermore, in over 40 years there was no indication that prices had increased as a result of predation.

The DOE reviewed and presented its evaluation of the following studies: the Price study, the Sorensen study, the Pennsylvania Governor's Energy Council study and the Barron-Umbeck study.

1. Price Study

The Price study was conducted by the Office of Comptroller of the Treasury and it used data collected by Platt's Oilgram and the Lundberg Letter. The researcher, Arthur Price, found that between January 1980 and August 1981, dealer margins for regular unleaded declined more in Baltimore than in any other East Coast city. Secondly, in August 1981, gas prices and dealer margins were lower in Baltimore than in other Eastern cities. Lastly, the decline in the number of retail service stations between January 1979 and March 1981 was lower for Maryland than for the region or the nation. The DOE found these findings to be seriously flawed in the following respects:

a. The study compared data from the period of price and allocation controls with post-control data. While it stated that this data was dubious, it was still used.

b. The Platt's/Lundberg data are not good measures of average consumer prices. They are weighted by the number of outlets, rather than by gallonage sold.

c. Although relatively close to Baltimore, the cities may not be comparable. There may be significant differences between the individuals markets.

d. Divorcement was not complete.

e. Different time periods could seriously affect the findings.

f. Lower dealer margins do not necessarily mean lower profitability.

g. Margins may fall because of an increase in dealer buying price and not a decrease in retail price. Therefore, the consumer is not necessarily better off.

The DOE contended that the findings of the Price study were inconsistent with the short-term effects predicted by either the effective competition theory or the predatory theory.

2. Sorensen Study

The Sorensen study also utilized the Lundberg data, yet came to conclusions opposite to the Price study. Philip E. Sorensen's study, done for the

American Petroleum Institute, compared post-divorcement prices and retail margin changes in Baltimore with the whole country. Comparisons were made between June 1979 and the annual average for 1980 for leaded, unleaded regular, and premium gasoline. The study concluded that the prices and margins increased less nationally than in Baltimore and the 1980 average margins were higher in Baltimore, a situation reversed from June 1979.

The DOE contended that although the Sorensen study had similar flaws to the Price study, at least it was consistent with the theory of effective competition.

3. Pennsylvania Governor's Energy Council.

The staff of the Pennsylvania Governor's Energy Council conducted a study which compared prices and margins from October 1979 through July 1982. The DOE found that this study, also, suffered from the same defects as the Price and Sorensen studies. The Council found that full-serve margins were higher and self-serve margins were lower in Baltimore than Philadelphia. However, because the proportion of gasoline sold through full and self-service was not known, results were not conclusive on whether the consumer realized lower average prices in Baltimore or Philadelphia. Nonetheless, at the end of the period studied, both full and self-serve prices were higher in Baltimore. Consequently, the average price paid by the consumers was higher in Baltimore.

4. Barron and Umbeck Study

The DOE acknowledged that the Barron and Umbeck study supported the "effective competition" theory under which it is unlikely that refiner-marketers would be able to reap significant monopoly profits even if these refiner-marketers drove the lessee-dealers out of business. The Barron and Umbeck study saw a post-divorcement increase in gasoline prices and argued that the divorced stations were less efficient than they were under the predivorcement (refiner-operated) system. Divorcement had reduced economic efficiency by interfering with the effective mix of independent and company-operated outlets.

However, the DOE had reservations about the study's methodology and improvements were suggested that included using a volume weighted average of daily prices, extending the available data and the period of analysis, and discussing the applicability of the report to other states. Despite its flaws, the Barron and Umbeck study was considered "the best empirical analysis of Maryland's divorcement law" by the DOE.

G. Conclusion

It is our view that none of the studies establish a conclusive case for or against divorcement. In the end, divorcement depends on a determination of policy. If the better policy favors the protection of independent retail dealers from competition even at the cost of higher prices to the public and perhaps inefficiency in the market, divorcement is appropriate. If the better policy is to promote competition, efficiency in marketing, and lower consumer prices, divorcement should be rejected.

III. DIVORCEMENT & RETAIL PRICES

Act 295 was approved on June 20, 1991. It imposed a two- year moratorium on oil companies opening and operating retail gas stations. This moratorium does not appear to have had a substantial effect on retail prices in Hawaii. Approximately 30 retailers on the islands of Maui and Hawaii, 16 retailers on the island of Kauai, two retailers on Molokai, and one retailer on Lanai were surveyed over the telephone from June 1991 to present. Seven retailers dropped out of the survey--three lost their leases; two could not be reached; one refused to give prices; and another was taken over by PRI. Retail prices for the island of Oahu were taken from Lundberg's retail price survey. Company-operated stations' prices were supplied by the oil companies under the provision of confidentiality.

All retail gasoline prices are simple averages and no statistical analyses were done. Prices are categorized into self-serve, mini-serve (gas & go), and full-serve prices. The data presented in the graphs depict regular unleaded gasoline at self-serve prices. It should be noted that the majority of neighbor island retail stations maintain full-serve pumps, are branded retailers, and run a service bay or grocery. The number of neighbor island stations operating only self-serve pumps is small. Therefore, the data from these retailers are limited. The survey of Oahu retailers include an even mix of services with repair bays or convenience stores. These outlets may provide a better average for regular unleaded retail prices. Also, pre-divorcement retail price data for the neighbor islands are not included in the study as the neighbor island survey began in response to Act 295.

The recent openings of company-operated retail stations by PRI were not affected by Act 295. These stations were already set to open prior to divorcement. PRI has retail stations on the islands of Oahu, Hawaii, and Maui. The most recent openings have been on the island of Maui with one each in Kihei, Piilani, and Fairgrounds. The island of Hawaii has a total of five PRI company-operated stations with two in Hilo and three along the Kona Coast.

Hawaii's retail gasoline prices increased on all islands after the moratorium was enacted. (See Graphs 1, 2, and 3.) These increases appear to reflect an increase in dealer tank wagon prices. (See Graph 4.) Additionally, the graph on differentials shows a slight increase in the Honolulu retail margin which leveled off at approximately 57 cents after the moratorium divorcement. (See Graph 5.) The retailers' margin, at first glance, appears to be significant. However, considering the amount of gasoline taxes, Hawaii's excise tax, and a gas station's operating costs, the retailers' margin is minimal.

There was a brief period at the close of the Gulf War when retail prices dropped. Unfortunately, recent retail gasoline prices on all islands rose to a point just below the prices during the Gulf War. (See Graph 4.) On Oahu the average self-serve price for a gallon of regular unleaded gas was between $1.47 and $1.50. (See Graph 4.) On the island of Hawaii, the average price of regular unleaded gas in Hilo was $1.60 and $1.75 in Kona. (See Graph 3.) The islands of Maui and Kauai each maintained an average of $1.58. (See Graphs 1 & 2.)

Pricing data from the oil companies that directly operated company stations reveal the effects of competition. Graphs 6 and 7 compare average retail pump prices to company-operated pump prices for a gallon of regular unleaded gas. The pump prices of an average retailer and a company-operated station in the same area appear to be similar, if not the same. On the other hand, outlying retailers in areas without a company-operated station show comparatively higher prices.

For a time after the moratorium, the difference between Hawaii dealer tank wagon and Los Angeles wholesale prices decreased significantly, by about 10 to 15 cents a year. This decrease could be attributed to a rise in LA wholesale prices as shown in Graph 5. Graph 4 also tracked a 50-cent spread between ANS crude and Honolulu wholesale that began at the time of the moratorium and that has remained at that level for a year. This 50-cent spread could also be seen at the time of the Exxon-Valdez incident. Wholesale prices fell after the Hawaii Department of the Attorney General launched its gasoline price investigation.

We believe the price data to be inconclusive on the effect of the moratorium. The data do not, in our view, provide a sound empirical basis on which to embrace or reject divorcement.

IV. FEDERAL ACTIVITY

A. The Motor Fuel Consumer Protection Act (S 790, 102d Cong.) (DeConcini, D-Arizona and Metzenbaum, D-Ohio)

This bill would have enacted divorcement. It would have prohibited refiners owning retail gas stations from running them with their own employees, commission agents, or the like. The bill also would have enacted an open supply rule. The open supply provision would have put a 70 percent cap on the amount of gasoline a refiner could require a retail dealer to purchase. It also would have forbidden a refiner from restraining the amount of fuel the dealer could buy. The bill died on adjournment of the 102d Congress. The divorcement provision of the bill resembles Senate Bill 1757 of Hawaii's 1991 legislative session.

B. The Petroleum Marketing Competition Enhancement Act (S 2041, 102d Cong.)(Grassley, R-Iowa); (HR 2966, 102d Cong.) (Synar, D-Okla. plus 92 Democrats and 44 Republicans).

This bill would have prohibited integrated oil companies from practicing "price inversion," that is from supplying gasoline to their wholesale customers at a price higher than offered at their own company-operated retail stations less an amount for the company's cost to operate at retail. The bill was passed out of the Senate Judiciary Committee. The committee report stated that the bill was needed because suppliers are dominant competitors of customers at all levels, but the bill died when Congress adjourned. This bill resembles Senate Bill 1758 of Hawaii's 1991 Legislature.

C. Motor Fuel Marketing Competition Act (S 2043, 102d Cong.) (Simon, D-Ill.)

This bill would have prohibited refiners from charging wholesale customers a price higher than its own retail price less operating costs or a price lower than that charged branded dealers in the same area, except for differences attributable to marketing functions. It also would have prohibited supply discrimination by a refiner against established customers in favor of its own retail outlets in times of short supply. This bill also died with the adjournment of Congress.

D. Petroleum Marketing Competition Enhancement Practices Act (compromise bill)

This bill was developed by the Senate staff and the trade associations near the end of the 102d Congress. Probably it will be used as a compromise bill in the 103d Congress. The bill would prohibit refiners from practicing price inversion as did S. 1241, S. 1243, and H.R. 1966. Also it would enact an open supply provision similar to that in S. 790. The FTC would adopt compliance regulations and would be authorized to obtain injunctions. The Justice Department and state attorneys general also would be given criminal and civil enforcement authority. Moreover, any person injured in its business or property, including, competitors, could sue for treble damages and injunctive relief. Refiners would be required to keep relevant records for four years.

V. CONCLUSION

Enacting a divorcement statute would prevent integrated oil companies from directly competing with retail dealers. As a result, competition in the retail sale of gasoline would be lessened significantly in Hawaii. The effect on retail prices would depend on the competitive vitality of the retail dealers remaining in the markets affected. Probably retail prices would be higher in some areas than they might be if divorcement were not enacted.

The markets most likely to be affected in Hawaii are downtown Honolulu, Ala Moana-Waikiki, Kailua-Kaneohe, Wailuku-Kahului, Hilo, and Kona. Retail dealers in these markets are mainly franchisees of the five incumbent oil companies, Chevron, PRI, Shell, Texaco, and Unocal. There are many dealers in these markets. But they are supplied by a refiner duopoly and an oligopoly of five wholesalers. Wholesale prices are almost always within a penny or two of each other. Branded supply agreements have the practical effect of keeping an independent dealer-franchisee from seeking a better price from competitors of its franchisor-supplier. These supply agreements also have the effect of limiting the maximum amount of gasoline that a retail dealer can obtain from its franchisor-supplier. Moreover, retail dealers operate on the narrowest of profit margins. They have very little ability to lower prices without encountering significant losses.

Discount gasoline is not a significant competitive force in Hawaii. There are few independent non-branded retailers. What few there are cannot offer gasoline at significant discounts. This is so because these dealers, like the franchisees, are supplied by the five incumbents. So they, like the franchisees, are unable to offer gasoline to consumers at a price substantially lower than the price offered by the franchisees. They are just as limited as the franchisees in the amount of gasoline they can obtain. And, whatever price break these dealers could offer depends on lowering costs by realizing efficiencies not usually available to the franchisees.

The only significant competitive force to have entered the retail market is the company-operated gas station. The two incumbents that operate directly at retail are PRI and Chevron. The price advantage they offer the consumer is a function of the fact that they take their whole profit as part of the price of the retail sale. Thus, the company-operated retailer can beat the retail price of both the franchisee and the discount dealer by the amount of the profit taken by the company that supplied the gasoline at wholesale.

The data collected by us indicate that price competition among the retail dealers in Hawaii is weak. Divorcement would eliminate the one competitive force that seems to have made a difference beneficial to consumers.

If the better policy for Hawaii is to promote competition, efficient small business, and lower consumer prices, divorcement should be rejected. There are alternatives to divorcement. Of course, any legislative intervention will interfere with the free operation of the gasoline markets in Hawaii. But each of the following alternatives appears to us on the whole to promote consumer welfare.

A. Prohibiting the oil companies not only from directly operating retail outlets, but also from franchising them or owning and leasing them to branded dealers. (A remedy called divestiture.)

B. Capping the amount of gasoline a franchisor-supplier requires a franchisee to purchase.

C. Prohibiting franchisor-supplier from restraining a franchisee from dealing with the suppliers' competitors.

D. Prohibiting an oil company selling at retail from charging its wholesale customers a price higher than its retail price (less its retail operating costs) that discriminate in favor of its company outlets.

A final alternative is to await action by the United States Congress on proposals similar to alternatives B, C, and D.

REFERENCES
(Cited in Text)

Barron, J. M. & Umbeck, J. R. "The Effects of Different Contractual Arrangements: The case of retail gasoline markets." The Journal of Law and Economics, Volume XXVII (2), October 1984, pp. 313-328.

Hogarty, Thomas P. and Rayola S. Dougher. "The Impact of Divorcement on consumers in Maryland: A critique of 'Gasoline Prices in Maryland Following Divorcement,' By Putnam, Hayes and Bartlett, Inc., March 13, 1987," American Petroleum Institute Critique #019, June 1987.

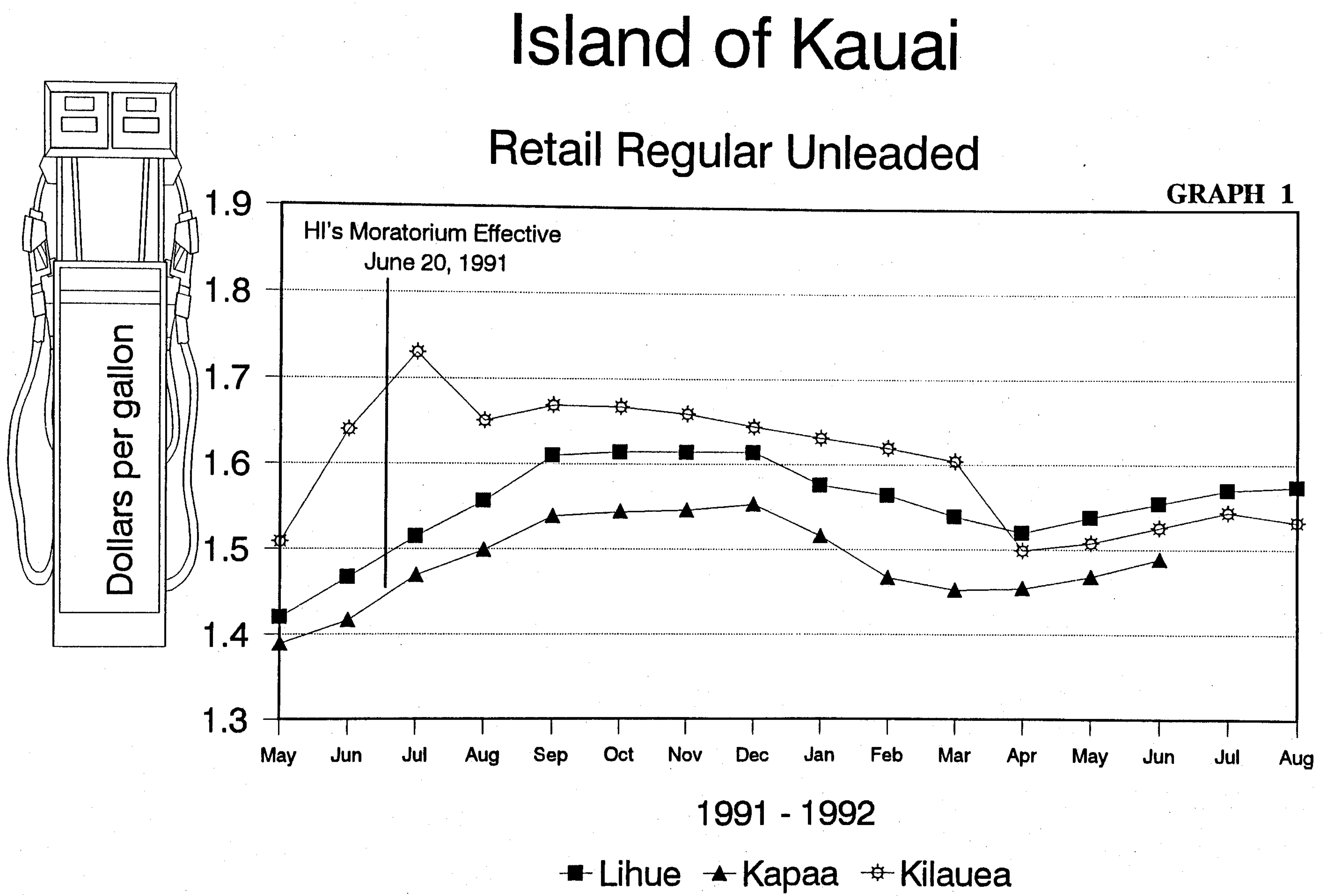
Putnam, Hayes, and Bartlett, Inc. Gasoline Prices in Maryland Following Divorcement, March 13, 1987.

Ratchford, William S., Director, Department of Fiscal Services, Maryland General Assembly, Letter to the Members of the General Assembly, dated November 30, 1988.

Sorenson, Philip E. The Cost to Consumers in Maryland of the Divorcement of Refiners from Retail Gasoline Marketing, 1979-1986, January 1988.

U.S. Department of Energy, Deregulated Gasoline Marketing: Consequences for competition, competitors, and consumers, March 1984 (Draft).

GRAPHS



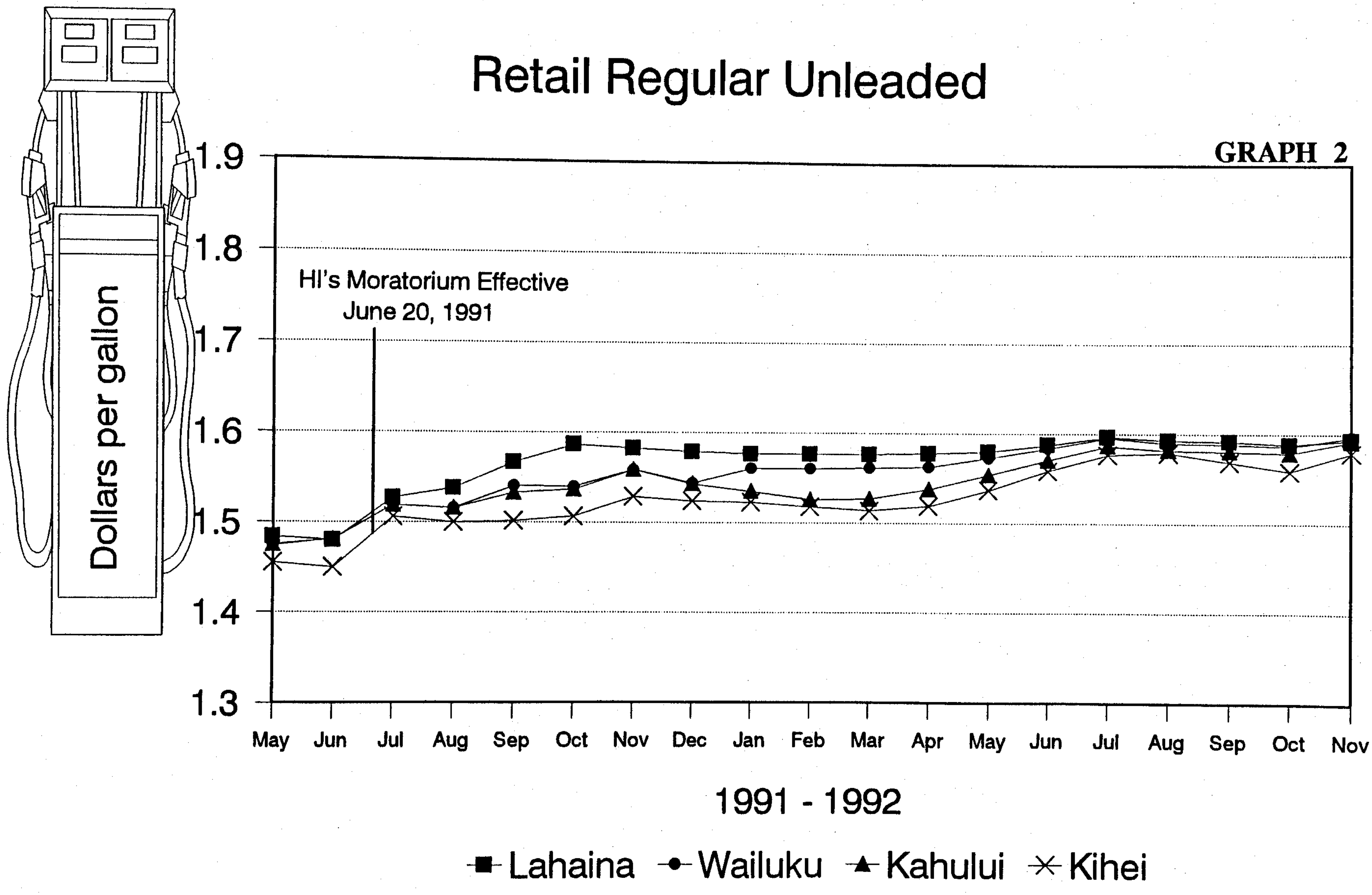
Source: Retailers

KAUAI1.HGW

Island of Maui

Retail Regular Unleaded

GRAPH 2



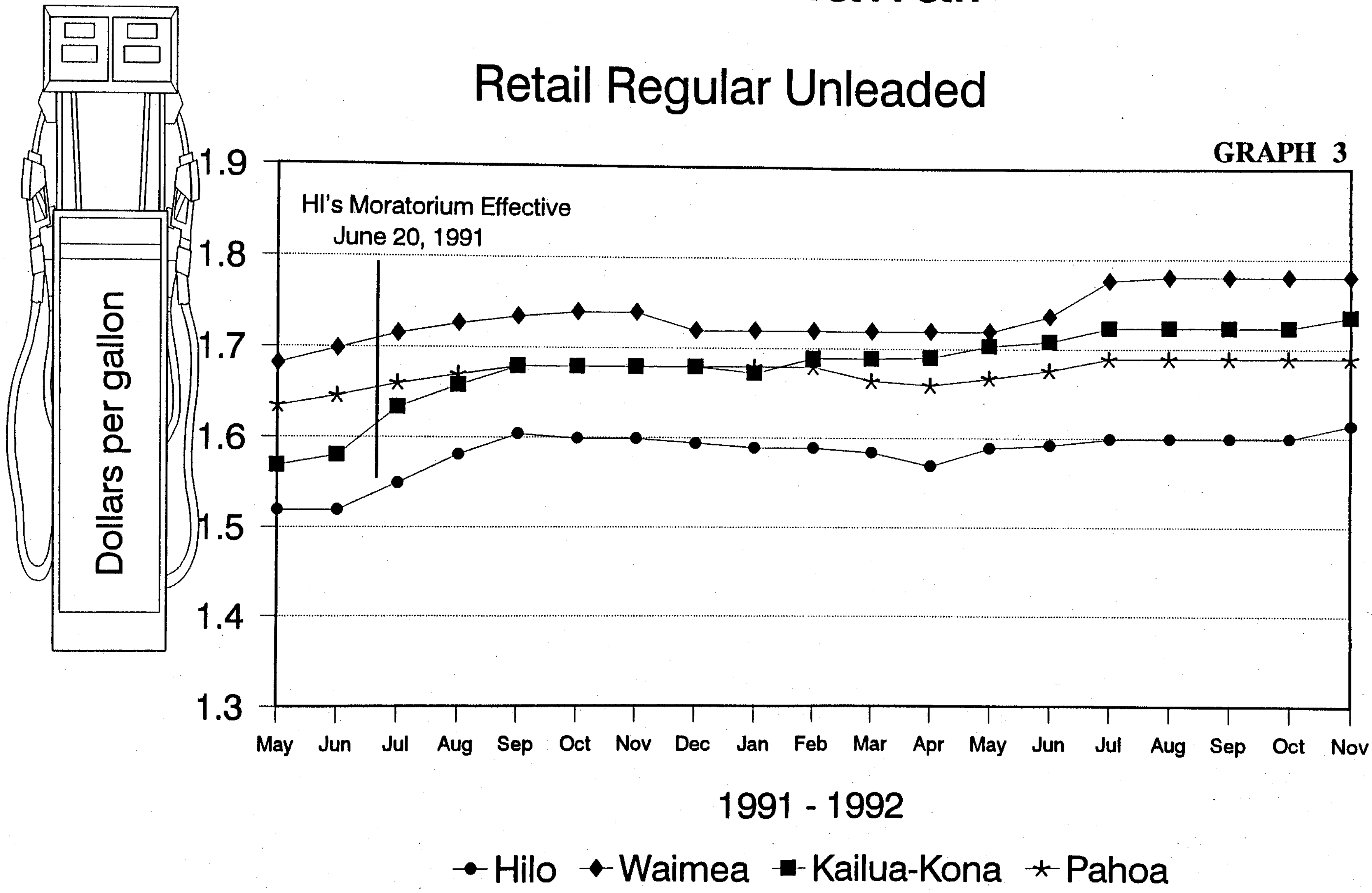
Source: Retailers

MAUI1.HGW

Island of Hawaii

Retail Regular Unleaded

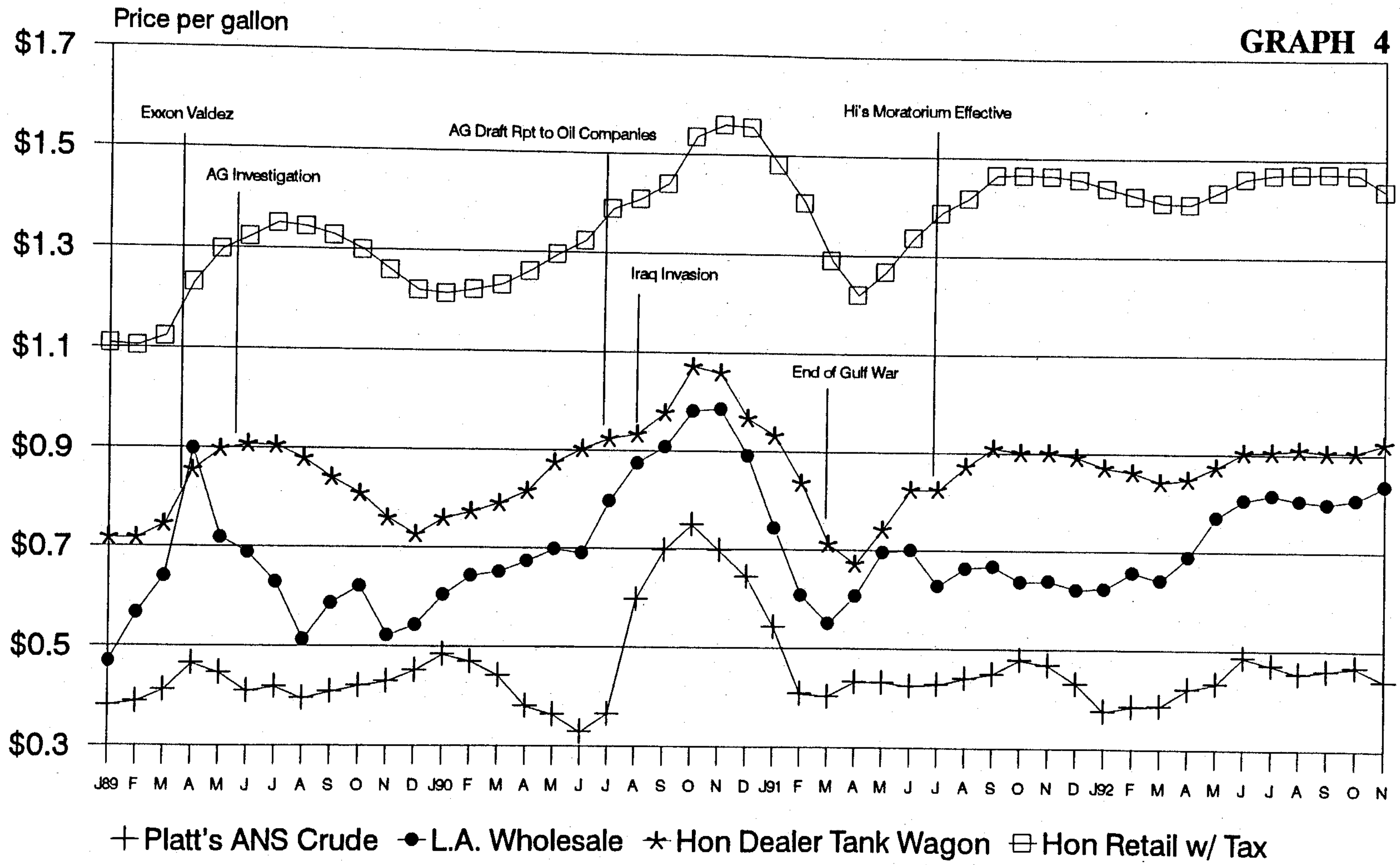
GRAPH 3



Source: Retailers

HAWAII1.HGW

ANS Crude/LA Whlse/Hon Whlse/Hon Retail
1989 - 1992



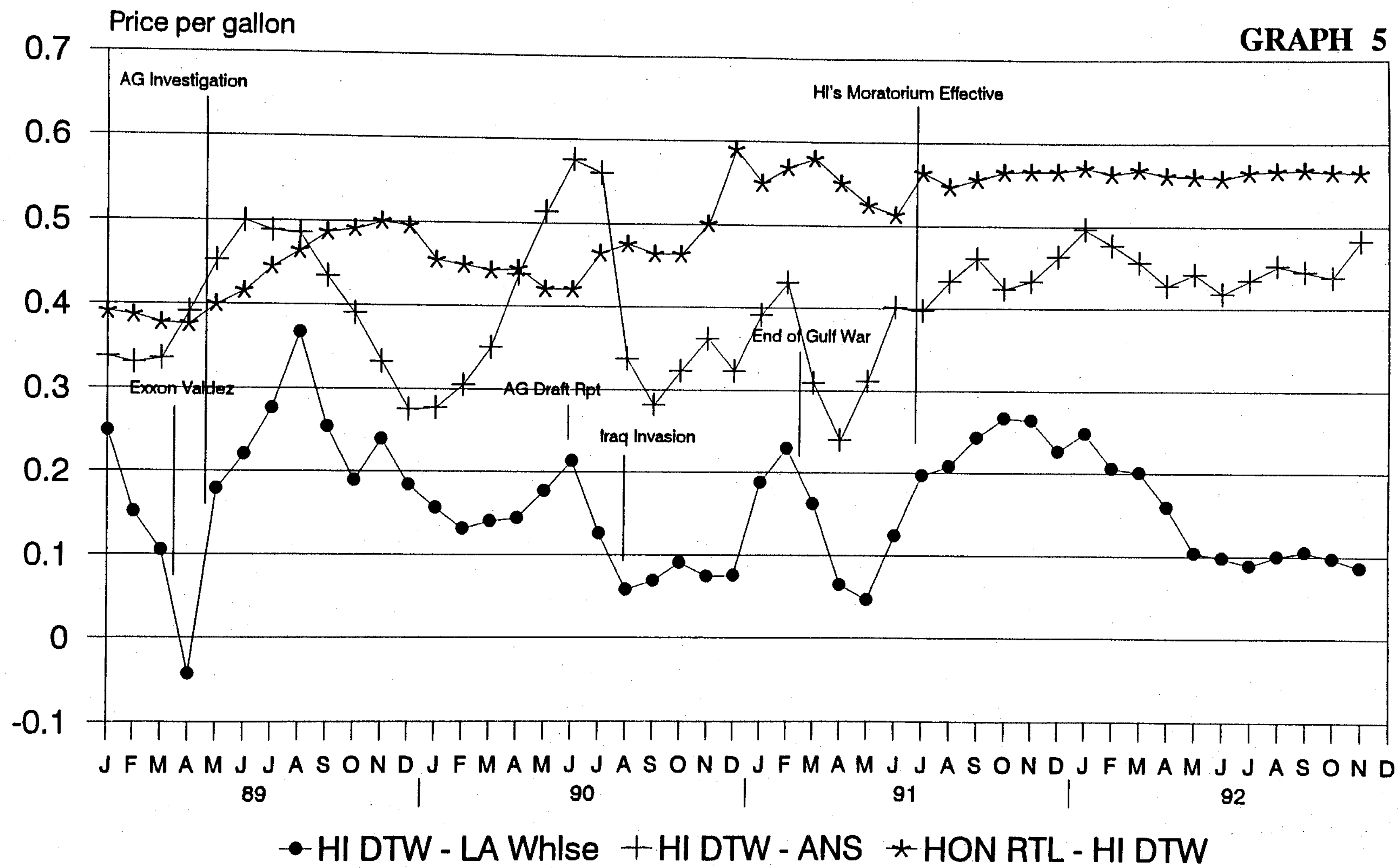
* Wholesale average prices combine (1) avg dealer buying prices ex-taxes and (2) avg rack prices

** Hon dealer tank wagon price is the delivered price to retail dealer less taxes

Source: Platt's/Lundberg

ANSALL1.HGW

DIFFERENTIALS
ANS/LA WHLSE/HI DTW/HON RTL

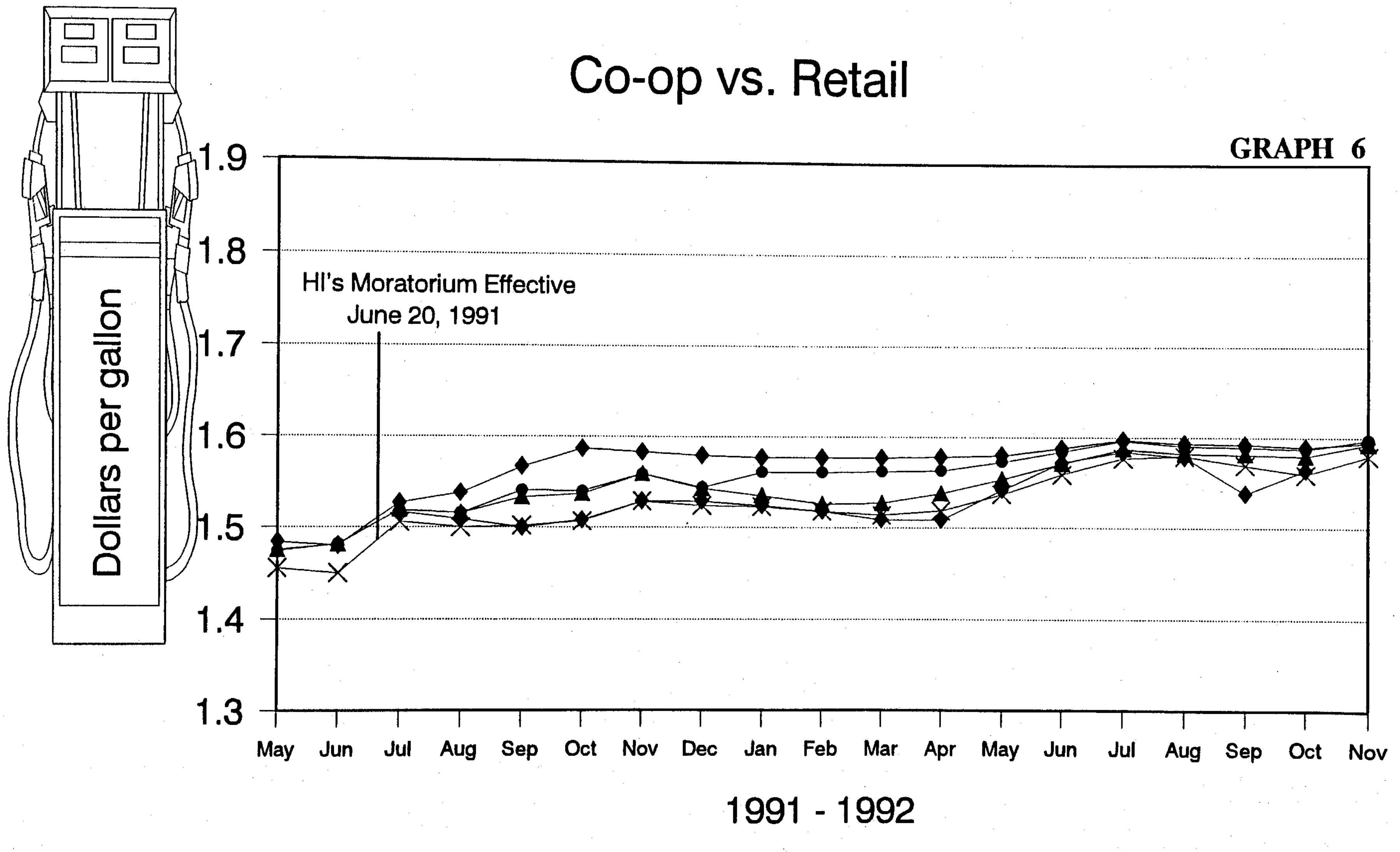


Note: Simple Averages
Source: Platts/Lundberg

DIFF1.HGW

Island of Maui

Co-op vs. Retail



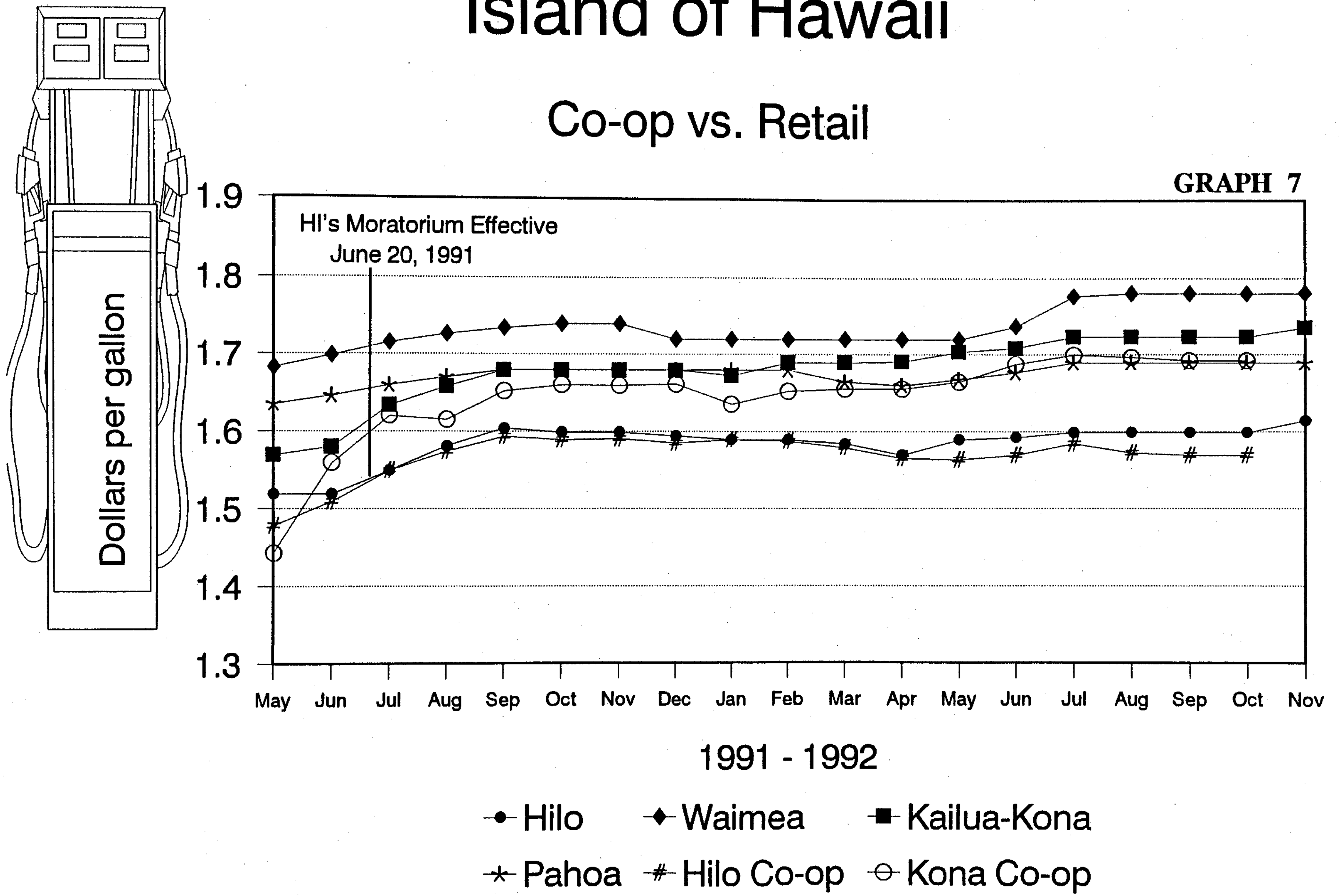
Source: Retailers Avg & Co-op Avg

MAUI2.HGW

Island of Hawaii

Co-op vs. Retail

GRAPH 7



Source: Retailers Avg & Co-op Avg

HAWAII2.HGW

LEGISLATIVE MATERIALS

the access organization, which is broadcast on any channel obtained under section 440G-8, or under similar arrangements."

SECTION 3. New statutory material is underscored.[1]

SECTION 4. This Act shall take effect upon its approval.

(Approved June 20, 1991.)

Note

1. Edited pursuant to HRS §23G-16.5.

ACT 295

S.B. NO. 1757

A Bill for an Act Relating to Prohibition Against Retailing of Motor Fuel by Refiners.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. As used in this Act:

"Affiliate" means any person who, other than by means of a franchise, controls, is controlled by, or is under common control with any other person.

"Direct operation" or "directly operated" means operating through employees, through an affiliate, or through persons under any contract which is not a franchise.

"Distributor" means any person, including any affiliate of such person, who either purchases motor fuel for sale, consignment, or distribution to another, or receives motor fuel on consignment for consignment or distribution to his or her own motor fuel accounts or to accounts of his or her supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

"Franchise" means any contract between a refiner and a distributor, between a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by the refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits the use. The term "franchise" includes any of the following:

(1) Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark owned or controlled by the refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits the occupancy.

(2) Any contract pertaining to the supply of motor fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned, or distributed under a trademark owned or controlled on that date by a refiner.

(3) The unexpired portion of any franchise, as defined by paragraph (1) and (2) of this subsection, which is transferred or assigned as authorized by the franchise or by any applicable law which permits the transfer or assignment without regard to any provision of the franchise.

"Motor fuel" means gasoline, diesel, and any other fuel of a type distributed for use as a fuel in self-propelled vehicles primarily for use on public streets, roads, and highways.

"Refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

"Retail motor fuel outlet" means any location where motor fuel is distributed for purposes other than resale.

"Retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

"Service station" means any establishment where motor fuel is sold to the general public for ultimate consumption.

SECTION 2. The attorney general shall gather and assess authoritative reports on the subject of the impact on motor fuel prices to consumers of a prohibition (better known as "divorcement") on direct retailing of motor fuel by refiners and distributors in competition with franchised and independent service stations. The attorney general shall also collect and analyze Hawaii data on the impact of divorcement on the price of motor fuel to customers in Hawaii. The attorney general shall submit a final report no later than fifteen days prior to the convening of the 1993 session of the legislature.

SECTION 3. The department of commerce and consumer affairs shall gather data and study the impact of direct retailing of motor fuel by refiners and distributors in competition with franchised and independent service stations. The department shall review information and data related to the preservation of a mixed marketplace in terms of the level of customer service provided, the maintenance of geographical dispersed "neighborhood" stations, the level of consumer problems associated with the various types of stations, and any alternatives that consumers have for services which are otherwise lost through market changes. The department shall submit its final report no later than fifteen days prior to the convening of the 1993 session of the legislature. The department shall submit an interim report setting forth its research methods and progress to date no later than fifteen days prior to the convening of the 1992 session of the legislature.

SECTION 4. This chapter shall not be applied in a manner that would render such application preempted by the Petroleum Marketing Practices Act (15 U.S.C. §2801, et. seq.) or other applicable federal or state law.

SECTION 5. For a period beginning on the effective date of this Act, and ending August 1, 1993, refiners and distributors are prohibited from opening any new direct operated service stations or retail motor fuel outlets except where:

(1) A refiner or distributor has executed a binding lease or has acquired real property in fee simple;

(2) The land involved has been zoned appropriately to permit service station use or retail motor fuel outlet use and has received a shoreline management area permit, if applicable, as of the effective date of this Act; and

(3) A refiner or distributor has obtained all of the other necessary permits to commence construction of real property improvements for the purpose of constructing a service station or retail motor fuel outlet, prior to the effective date of this Act.

Provided, however, a refiner shall be allowed to replace two service stations or retail motor fuel outlets within the same county where the refiner or distributor has had to close a station or outlet due to the termination of the real property lease.

SECTION 6. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SECTION 7. This Act shall not apply to existing retailing operations of any refiner or distributor as of the effective date of this Act, but shall apply to any refiner or distributor establishing a retail operation on or after the effective date of this Act.

SECTION 8. This Act shall take effect upon its approval and be repealed August 1, 1993.

(Approved June 20, 1991.)

102d CONGRESS
1st Session

S. 790

To amend the antitrust laws in order to preserve and promote wholesale and retail competition in the retail gasoline market.

IN THE SENATE OF THE UNITED STATES
April 9, 1991

Mr. DeConcini (for himself, Mr. Metzenbaum, and Mr. Thurmond) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the antitrust laws in order to preserve and promote wholesale and retail competition in the retail gasoline market.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Motor Fuel Consumer Protection Act of 1991".

SEC. 2. WHOLESALE PURCHASE OF GASOLINE.

(a) Required Percentage Purchase of Motor Fuel.--Notwithstanding any other provision of law and except as provided in this section, it shall be unlawful for any producer or refiner, directly or indirectly, to require any retail motor fuel dealer to purchase more than 70 percent of the monthly retail sales of motor fuel from such refiner or producer.

(b) Wholesaler.--It shall be unlawful for any producer or refiner, directly or indirectly, to restrain any retail motor fuel dealer from purchasing any or all of the retail motor fuel dealer's requirements of motor fuel from a wholesaler of the motor fuel refined by such refiner, or on behalf of such producer.

(c) Retail Motor Fuel Dealer.--

(1) In general.--Except as provided in paragraph (2), it shall be unlawful for any retail motor fuel dealer, at a motor fuel service station displaying a trademark, trade name, or other identifying symbol or name owned by a producer or refiner, to sell motor fuel which is not provided by or for such producer or refiner without providing reasonable

notice at the point of sale that motor fuel dispensed by one or more dispensers is not refined by or for such producer or refiner.

(2) Exception.--A dealer may convert one or more existing storage tanks and dispensers or establish new storage tanks and dispensers for sale of motor fuel supplied by other than the owner of the trademark, trade name, or identifying symbol displayed at the station.

SEC. 3. OPERATION OF MOTOR FUEL SERVICE STATIONS.

(a) Violation.--It shall be unlawful for any producer or refiner to operate any motor fuel service station in the United States.

(b) Exception.--Notwithstanding subsection (a), it shall not be a violation of this Act for a producer or refiner to own all or part of the assets of a motor fuel service station so long as such producer or refiner does not engage in the business of selling motor fuel at such station through any--

(1) employee;

(2) commissioned agent;

(3) person acting on behalf of the producer or refiner or under the producer's or refiner's supervision; or

(4) person operating such station pursuant to a contract with the producer or refiner which provides that the producer or refiner has substantial or effective control over the motor fuel operations of the station.

SEC. 4. CONTRACT, COMBINE, OR CONSPIRACY.

It shall be a violation of this Act for any producer or refiner to contract, combine, or conspire with any other producer or refiner for the purpose of violating section 2 or 3.

SEC. 5. DEFINITIONS.

For purposes of this Act--

(1) the term "refiner" means any person engaged, directly or indirectly, in the refining of motor fuel or any producer who contracts with another to refine petroleum products for purposes of sale of motor fuel by the producer;

(2) the term "motor fuel" means gasoline, diesel fuel, alcohol, or any mixture of them sold for use in automobiles and related vehicles;

(3) the term "motor fuel service station" means any facility at which motor fuel is sold at retail;

(4) the term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, joint-stock companies, trustees and receivers in bankruptcy and reorganization, common law trusts, and any organized group, whether or not incorporated;

(5) the term "United States" means the several States, the District of Columbia, and any territory or possession of the United States; and

(6) the term "producer" means any person who is engaged, directly or indirectly, in the production of crude oil.

SEC. 6. ENFORCEMENT AND PRIVATE RIGHT OF ACTION.

(a) FTC Enforcement.--

(1) Civil action.--The Federal Trade Commission may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever the Federal Trade Commission has reason to believe that any person has violated or is violating any provision of this Act, or any regulations promulgated thereunder.

(2) Appropriate court.--Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business.

(3) Jurisdiction.--The district court shall have jurisdiction to--

(A) restrain a violation of this Act and to require compliance;

(B) impose monetary penalties under the same terms and conditions as provided in section 5(m)(2)(A) of the Federal Trade Commission Act; and

(C) order such additional equitable relief as it deems appropriate.

(b) Private Right of Action.--

(1) In general.--If any person fails to comply with the requirements of this Act, any other person affected by such failure may maintain a civil action against such person failing to comply with such requirements for damages and appropriate equitable relief, including temporary and permanent injunctive relief. If the plaintiff prevails in any action under this section, the plaintiff shall be entitled to reasonable attorney and expert witness fees to be paid by the defendant, except that in any case in which the court determines that only nominal damages are to be awarded to the plaintiff, the court may, in its discretion, determine not to direct that such fees be paid by the defendant.

(2) Appropriate court.--An action brought pursuant to this subsection may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the plaintiff resides or is doing business or in which the defendant resides or is doing business.

SEC. 7. REGULATIONS.

(a) In General.--The Federal Trade Commission shall prescribe regulations for the manner of complying with the requirements of section 2(c) and for the collection of information necessary for the determinations specified in section 3. Regulations promulgated pursuant to this section shall be promulgated, after notice and a reasonable period for comment by the public, no later than 180 days after the date of enactment of this Act.

(b) Relevant Information.--Notwithstanding any other provision of this Act, information related to section 3 need not be provided by private persons if reliable and timely information is available from published sources.

SEC. 8. EFFECT ON STATE LAWS.

Nothing in this Act shall supersede any comparable State law.

SEC. 9. EFFECTIVE DATE.

This Act shall take effect one year after the date of the enactment of this Act.

Statement of
CHARLES T. STEVENS
on behalf of the
AMERICAN PETROLEUM INSTITUTE
and the
WESTERN STATES PETROLEUM ASSOCIATION
before the
SENATE JUDICIARY SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS

May 28, 1991

Mr. Chairman and members of the Subcommittee, my name is Charles T. Stevens and I am an attorney with the firm of Stevens & Leibow located here in Phoenix, Arizona. I am testifying today on behalf of the American Petroleum Institute (API) and the Western States Petroleum Association (WSPA). API represents over 250 companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing. WSPA represents 40 petroleum companies operating in Arizona and five other western states.

We are opposed to S. 790, the proposed Motor Fuel Consumer Protection Act of 1991, which provides for retail divorcement and imposes open-supply requirements. These are very old ideas which have been repeatedly discredited and which are against the best interests of consumers in Arizona and the nation as a whole.

We believe there is no reason to enact such harmful legislation. To quote the December 1988 final report of Arizona's Joint Legislative Study Committee on Petroleum Pricing and Marketing

Practices: "The marketplace for petroleum products is very competitive in Arizona. This has worked to the advantage of the consumer, especially in the Phoenix metropolitan area."

The report also states: "The State Attorney General's Office, Antitrust Division, and the Federal Trade Commission, Bureau of Competition, testified that they have no knowledge or evidence of mischief or predatory pricing practices in this State. The Attorney General's Office further stated that current laws are more than adequate to handle any possible case involving predatory pricing or anticompetitive behavior."

The report goes on to say: "...while the SSDA (Service Station Dealers of Arizona ~~America~~) recommends that the legislature consider a retail divorcement bill, other members of this organization testified before the committee opposing such legislation as detrimental to their business opportunities. In addition, evidence supports the fact that any legislation in this area will increase prices."

After thoroughly studying the functioning of the gasoline market in Arizona, the Joint Legislative Study Committee opted <u>against</u> recommending divorcement or open-supply provisions of the type provided by <u>S. 790</u>.

Many other government agencies and private groups have reached the same conclusions in recent years. The U.S. Justice Department, U.S. Department of Energy and Federal Trade Commission have long opposed retail divorcement and open supply, as has the Section of Antitrust Law of the American Bar Association.

We believe that there is overwhelming evidence that gasoline marketing is one of the most competitive U.S. businesses at both the wholesale and retail levels. The high level of competition and efficiency makes the gasoline market highly responsive to consumer needs and provides the consumer with a broad range of choices.

Divorcement and open-supply -- as provided for by S. 790 -- can only reduce competition and harm consumers by increasing prices and reducing product quality and efficiency of service. We believe the gasoline marketing business works well -- with the rights of consumers, service station dealers and gasoline suppliers fully protected and balanced. When a business functions so effectively, it makes no sense to attempt to fix what isn't broken -- enactment of S. 790 can only harm all parties concerned while producing benefits for no one.

Gasoline Marketing is Highly Competitive

There is much evidence that the diversity of the U.S. retail gasoline market spawns competition, which makes it highly responsive to consumer demand:

o The petroleum industry has many competitors. There are 185 refineries, 10,000 independent distributors and 160,000 retail outlets.

o No oil refiner is dominant. In 1989, the largest U.S. refiner held about 11 percent of total national refining capacity, and the four largest refiners together controlled less than 32 percent of total capacity. The largest refiner held less than a 9-percent share of total retail gasoline sales. The top four refiners together had less than a 30-percent share of gasoline sales.

o The gasoline market is responsive to consumers. The U.S. retail gasoline market reflects changes in consumer preference and competitive economics. The number of larger, higher-volume retail outlets has grown, while the overall number has declined. U.S. gasoline outlets offer the consumer a wide variety of automotive and non-automotive products and services. Self-service and convenience-store stations have become increasingly popular as motorists have demanded speed and convenience.

By eliminating company-operated stations, divorcement would lead to an overall distribution system that is less competitive and thus less responsive to consumer needs than the present one. As a result, retail prices could rise and service levels could fall. As part of these effects, divorcement also could cause affected refiners to reduce their investment in retail gasoline marketing.

The open-supply provisions of S. 790 would allow dealers to buy their gasoline from sources other than the refiners whose trademark is carried on their stations and pumps. Proponents assert that such legislation is needed to protect dealers against alleged anticompetitive practices by refiners -- but open supply would hurt, not help, dealers of branded gasoline by reducing brand value.

The use of a refiner's trademark carries with it an obligation to meet that refiner's product requirements, in the interests of all parties, including consumers. Mandatory open supply would ultimately cripple or destroy branded marketing, mainly because motorists would come to doubt the usefulness of trademarks as indicators of quality.

Dealers Remain Highly Competitive

Proponents of this legislation allege that major refiners engage in anticompetitive pricing practices aimed at squeezing independent dealers out of the retail gasoline market through increased reliance on company-operated stations. But while the number of company-operated stations has increased in recent years, they still constitute only a small portion of refiners' distribution networks.

A 1988 study of the gasoline market was conducted for the American Petroleum Institute by the consulting firm of Temple, Barker & Sloane, Inc., (TBS) in consultation with Dennis Carlton, professor of business economics at the University of Chicago's Graduate School of Business. Gasoline sold through branded wholesale or retail distribution networks of refiners studied by TBS made up about 63 percent of total U.S. sales, but company-operated outlets of these refiners accounted for only about 10 percent of total gasoline sales and just 6 percent of total outlets.

Moreover, dealer allegations of ruinously low prices at major refiner-operated retail outlets are contradicted by U.S. Department of Energy data which show that prices at refiner-operated retail outlets consistently exceed, state-by-state and month-by-month, those same refiners' prices to independent resellers. The TBS study examined 1,179 pairs of prices and found no evidence of ruinously low prices.

Similarly, a 1987 study by the Washington State Attorney General concluded, after examining 10,000 pairs of retail and wholesale gasoline prices, that dealers' allegations of predatory pricing could not be sustained. A congressionally-mandated, exhaustive study by the U.S. Department of Energy reached a similar conclusion in 1981.

Divorcement Reduces Consumer Choice

The TBS study concluded that the gasoline market benefits consumers, who can choose from among thousands of competing major gasoline brand service stations as well as thousands of unbranded service stations that do not sell gasoline under a refiner trademark. Consumers can also choose between self service and full service and from among various grades of gasoline. But eliminating an entire class of competitor -- the company-operated station -- from the marketplace could sharply curtail these choices. The U.S. Department of Energy reached a similar conclusion. In a study covering the years 1976 to 1981, the department found that divorcement was associated with substantial increases in concentration ratios, producing a higher percentage of total gasoline sales by large marketers.

Divorcement Increases Prices

By eliminating company-operated stations, S. 790 would reduce competition and cause gasoline prices to rise. Maryland's experience with divorcement is a good example. Studies of Maryland's divorcement law show that retail gasoline prices rose substantially after that law went into effect:

o A study of Maryland's divorcement law by Professors John Umbeck and John Barron of Purdue University found that, after divorcement, the newly franchised stations (formerly company-operated) raised their prices an average of 1.4 cents per gallon on self-service, and 6.7 cents per gallon on full-service.

o The U.S. Department of Energy reported in 1984 that gasoline prices in Maryland were higher in both the long and short run. The department concluded that prices went up because the divorcement law "excludes an entire class of competitors (refiner-marketers) from the market."

o The Maryland Department of Fiscal Services concluded in 1988 that the state's retail divorcement law has "led to both higher gasoline prices and shorter hours of (service station) operations." The Fiscal Services review stated: "Divorcement cannot be sustained as being in the financial interest of consumers."

Divorcement Means Less Service to the Consumer

Maryland's experience shows that divorcement led to shorter hours of operation at the affected stations, causing service levels to fall. In addition, the TBS study indicates that divorcement would encourage refiners to reduce their investment in gasoline marketing.

Moreover, divorcement could result in a loss of jobs, particularly in inner city neighborhoods and other economically depressed areas. If company-operated stations were banned, there is no guarantee that the stations in such areas would be replaced by dealer-operated stations. The end-result could be less service to consumers in these areas.

Open Supply Weakens Branded Marketing

Enactment of an open-supply requirement would seriously weaken the economic viability of branded gasoline marketing by discouraging investments by gasoline suppliers to promote and protect their individual brands. When an oil company invests $1,000,000 or more to build a service station, it does so to provide an outlet for its brand of gasoline. If it cannot assure that all grades of its gasolines are available at the station, the major purpose for the investment is destroyed. Even enabling the dealer to buy gasoline from other sources within the same brand will prevent a company from fully recovering its investment and from efficiently distributing its product through its service station network.

Open supply would encourage the commingling of products of two or more suppliers in a single storage tank, which causes quality and labeling problems. Commingling causes product aldulteration and can destroy product integrity. As a result, when there is a product-quality problem, the consumer will probably have difficulty identifying the source of the gasoline involved. While a motorist can remember always going to a particular branded station, he or she may not remember -- or may never have known -- the brand of gasoline indicated on the pump the last time gasoline was purchased.

Consumers depend on branded gasoline -- the same as they do on brand-name breakfast cereals, laundry detergents, and other consumer goods -- for consistency of quality and the assurance that they will always get what they pay for. When consumers see an oil company's logo over a station, they expect to find all of that company's major products at the station. If they cannot find them, many consumers will be justifiably dissatisfied. And it is the company whose logo is over the station that will be held responsible. Soon the brand will cease to have any meaning.

If branded marketing ends, not only will there be no incentive for oil companies to invest in service stations, but there will also be no incentive for them to invest millions of dollars in additives and additive research to improve product quality and differentiate products from those of the competition.

Conclusion: S. 790 Should Be Rejected

We believe today's gasoline market features a high level of competition that works to the consumer's advantage. Government interference in a market that works so effectively would be both harmful and unnecessary. Divorcement and open supply mean higher gasoline prices, reduced quality and efficiency and restricted choice. Such measures can only harm consumers while benefiting no one. We urge the Subcommittee to reject S. 790.

102d CONGRESS
1st Session

S. 2041

To amend the Petroleum Marketing Practices Act to enhance competition, and for other purposes.

IN THE SENATE OF THE UNITED STATES
November 25 (legislative day, November 23), 1991

Mr. Grassley introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Petroleum Marketing Practices Act to enhance competition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Petroleum Marketing Competition Enhancement Act".

SEC. 2. PROHIBITED MARKETING PRACTICES.

The Petroleum Marketing Practices Act (15 U.S.C. 2801 et seq.) is amended by adding at the end the following new title:

"TITLE IV--MOTOR FUEL

"SEC. 401. DEFINITIONS.

"As used in this title:

"(1) Agreement.--The term 'agreement' means an oral or written contract, combination, conspiracy, arrangement, or other similar understanding.

"(2) Adjusted retail price.--

"(A) In general.--The term 'adjusted retail price' means the consumer retail price per gallon of motor fuel sold from a direct operated outlet minus the refiner's average retail operating expenses per gallon of motor fuel sold from the direct operated outlet.

"(B) Sale to branded wholesaler.--In the event of a sale by the refiner to a branded wholesaler, the term 'adjusted retail price' means the resulting difference from subparagraph (A) minus the refiner's average wholesale operating expenses attributable to the wholesale sale of a gallon of motor fuel to its branded dealers in the same geographic area.

"(3) Affiliate.--The term 'affiliate' means a person who (by means of direct or indirect authority of a person to vote more than 50 percent of the voting stock or partnership interest in another person) controls, is controlled by, or is under common control with another person.

"(4) Branded dealer.--The term 'branded dealer' means a retailer who purchases motor fuel from a refiner under an arrangement whereby the refiner permits the retailer to market the motor fuel under a trademark owned or controlled by the refiner.

"(5) Branded wholesaler.--The term 'branded wholesaler' means a person who purchases motor fuel from a refiner for resale to a retailer under an arrangement whereby the refiner permits the person or retailer to market the motor fuel under a trademark owned or controlled by the refiner.

"(6) Consumer retail price.--

"(A) In general.--The term 'consumer retail price' means the price per gallon at which motor fuel is sold to the public at a direct operated outlet.

"(B) Cash or credit price.--If motor fuel is sold or offered to the public at one price for cash transactions and at another price for credit transactions, the term 'consumer retail price' means the lower of the prices, adjusted for the cost of consumer credit.

"(C) Combined price.--If motor fuel is sold with another item or service at a combined price, the consumer retail price shall be adjusted to include the price per gallon of the item or service minus the cost per gallon of the item or service.

"(7) Cost.--The term 'cost', when used to refer to an item or service sold at a combined price with motor fuel, means all direct and indirect expenses attributable to the acquisition and retail sale of the item or service by the direct operated outlet.

"(8) Cost of consumer credit.--The term 'cost of consumer credit', with respect to motor fuel or any other item or service sold by credit, means the lesser of--

"(A) 4 percent of the sales price of the fuel, item, or service sold by credit; or

"(B) all direct and indirect expenses of the direct operated outlet attributable to the use of credit with respect to the sale.

"(9) Cost of wholesale credit.--The term 'cost of wholesale credit', with respect to motor fuel sold by credit to a branded dealer, means the lesser of--

"(A) 2 percent of the sales price of the motor fuel; or

"(B) the average of all direct and indirect expenses of the refiner attributable to the use of credit with respect to a sale by the refiner to all of its branded dealers.

"(10) Customer for resale.--The term 'customer for resale' means a person who purchases motor fuel for the purpose of reselling the motor fuel to another person.

"(11) Direct and indirect expenses.--The term 'direct and indirect expenses' means expenses including labor costs, fair market rental value, repair and maintenance, utilities, supplies, property taxes, other third-party payments, sales and promotional costs, advertising, inventory shrinkage, and accounts servicing.

"(12) Direct operated outlet.--The term 'direct operated outlet' means a service facility at which the employees are subject to the Federal Insurance Contributions Act (26 U.S.C. 3101 et seq.) paid by the refiner or an affiliate of the refiner.

"(13) Fair market rental value.--The term 'fair market rental value' means the amount of rent that would be paid in a transaction negotiated by unrelated parties for the use of the specific direct operated outlet utilized for the sale of motor fuel.

"(14) Freight.--The term 'freight' means the per gallon rate at which a third party, unaffiliated petroleum carrier will deliver motor fuel in tank truck quantities. The rate shall be established by reference to a published common carrier rate within the particular geographic area.

"(15) Inventory shrinkage.--The term 'inventory shrinkage' means all losses of inventory from whatever cause or source, including theft by suppliers, employees, or customers, contamination, drive-offs, and evaporation.

"(16) Motor fuel.--The term 'motor fuel' means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

"(17) Person.--The term 'person' means an individual, firm, partnership, corporation, municipal corporation, public corporation, or trade association.

"(18) Refiner.--The term 'refiner'--

"(A) means a person engaged in the refining of crude oil to produce motor fuel; and

"(B) includes an affiliate of the person.

"(19) Retail operating expenses.--The term 'retail operating expenses' means all direct and indirect expenses attributable to the retail sale of a gallon of motor fuel from a direct operated outlet.

"(20) Retailer.--The term 'retailer' means a person who purchases motor fuel for sale to the general public for ultimate consumption.

"(21) Sale.--The term 'sale' or 'sell' means a transfer, gift, sale, offer for sale, or advertisement for sale, in any manner or by any means whatsoever, including product exchanges.

"(22) Same geographic area.--The term 'same geographic area' means the area served by a terminal from which a direct operated outlet obtains its motor fuel or a terminal within a commercially reasonable distance of the outlet.

"(23) Same or similar grade or quality of motor fuel.--The term 'same or similar grade or quality of motor fuel' means motor fuel containing an additive that does not change the octane or cetane rating of the product by more than 1 point.

"(24) Scheme.--The term 'scheme' means a threat, intimidation, communication, boycott, pattern of action, inducement, or coercion.

"(25) Trademark.--The term 'trademark' means a trademark, trade name, service mark, or other identifying symbol or name.

"(26) Wholesale operating expenses.--The term 'wholesale operating expenses' means the direct and indirect expenses, and the cost of wholesale credit, attributable to the sale of a gallon of motor fuel by a refiner or a branded wholesaler to its branded dealers.

"SEC. 402. PROHIBITED MARKETING PRACTICES.

"(a) Sale of Fuel at Higher Prices.--

"(1) In general.--It shall be unlawful for a refiner to sell motor fuel to a customer for resale at a price that is higher than the refiner's adjusted retail price for the same or similar grade or quality of motor fuel sold from a direct operated outlet in the same geographic area.

"(2) Adjustments.--In comparing a refiner's price to a customer for resale to a refiner's adjusted retail price, adjustments shall be made to account for differences in freight, taxes, and inspection fees, whether or not the items are separately listed as part of the price. If a refiner includes consumer credit as part of the price, an adjustment for the cost of consumer credit shall be made in comparing the prices.

"(b) Agreements Setting Maximum Prices.--

"(1) In general.--Subject to paragraph (2), it shall be unlawful for a refiner to enter into a scheme or agreement to set, change, or maintain maximum retail prices of motor fuel.

"(2) Exception.--This subsection shall not apply to a refiner's retail sales at its direct operated outlets.

"SEC. 403. ENFORCEMENT.

"(a) Proceedings by the Attorney General.--

"(1) Penalties.--A refiner who violates section 402(a) shall forfeit and pay to the United States a penalty of not more than $5,000 for each violation. A refiner who violates section 402(b) shall forfeit and pay to the United States a penalty of $25,000 for each violation.

"(2) Civil actions.--The Attorney General of the United States may bring a civil action under this subsection in a district court of the United States in which the defendant resides or has an agent.

"(3) Equitable relief.--

"(i) In general.--The district courts of the United States shall have jurisdiction to prevent and restrain violations of this title.

"(ii) Other relief.--In an action under this subsection, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of a violation, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(b) Maintenance of Private Civil Actions.--

"(1) In general.--A person who is injured in business or property by reason of an action prohibited by this title may bring suit for the injury (acting either in an individual capacity or as a member of a class) in a district court of the United States in the district in which the defendant resides or has an agent.

"(2) Equitable relief.--

"(A) Injunctive relief.--A person may sue for and obtain injunctive relief, in a court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of section 402.

"(B) Other relief.--In an action under paragraph (1), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of a violation, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(3) Deemed injury.--A person who purchases motor fuel in an unlawful sale under this title shall be deemed injured in the person's business or property.

"(4) Competitors.--No person shall be precluded from bringing suit under paragraph (1) or (2) on the ground that the person is a competitor of the defendant, or that no injury to competition has occurred.

"(5) Recovery.--If a claimant in an action under paragraph (1) or (2) prevails, the claimant shall recover--

"(A) the greater of--

"(i) three times the actual damages sustained by the claimant, including the difference between the actual price paid and the lawful price; or

"(ii) $5,000 for each violation; and

"(B) the cost of suit, including reasonable attorneys' fees and expert witness fees.

"(6) Jury Trial.--In an action brought under paragraph (1), there shall be a right of trial by jury.

"(c) Proceedings by State Attorneys General.--

"(1) Civil action.--

"(A) In general.--The attorney general of a State may bring a civil action in the name of the State, as parens patriae on behalf of persons residing in the State, to secure monetary relief as provided in paragraph (2) for injury sustained by the persons to their business or property because of a violation of section 402.

"(B) Jurisdiction.--An action described in subparagraph (A) may be brought in a district court of the United States having jurisdiction over the defendant.

"(2) Penalties.--

"(A) Prohibited price.--A refiner who violates section 402(a) shall forfeit and pay to each State in which the violation occurred a penalty of--

"(i) $1,000 for each violation; and

"(ii) an additional $5,000 for each violation that occurs more than 3 business days after the refiner's receipt of a notice of probable violation of section 402(a) from the attorney general of the State.

"(B) Prohibited agreement.--A refiner who violates section 402(b) shall forfeit and pay to each State in which the violation occurred a penalty of--

"(i) $25,000 for each violation; and

"(ii) an additional $5,000 per day for each day the violation continues more than 3 business days after the refiner's receipt of a notice of probable violation of section 402(b) from the attorney general of the State.

"(C) Court proceedings.--

"(i) In general.--The attorney general of a State may bring a civil action under this paragraph in a district court of the United States or an appropriate State court having jurisdiction over the defendant.

"(ii) Equitable relief.--The court shall grant such equitable relief as the court determines is necessary to remedy the effects of a violation, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(3) Notice.--After determination by the attorney general of a State of a probable violation of this title in the State by a refiner, the attorney general may, but shall not be obligated to, send written notice of the probable violation to the refiner. Neither the failure of an attorney general to give notice under this paragraph nor a lack of adequacy of the notice shall affect the right of an attorney general to maintain a proceeding under this subsection or to collect damages under this subsection.

"(d) Prima Facie Case.--

"(1) Establishment.--

"(A) In general.--A person bringing an action to enforce section 402(a) may establish a prima facie case that a refiner has violated a provision by establishing that the refiner has sold motor fuel to a customer for resale at a price that is higher than--

"(i) 94 percent of its consumer retail price per gallon;

"(ii) in the event of a sale to a branded wholesaler, 90 percent of its consumer retail price per gallon; or

"(iii) the refiner's consumer retail price per gallon minus the most recently available average retail operating expenses per gallon and, in the event of a sale by a refiner to a branded wholesaler, also minus the most recently available average wholesale operating expenses per gallon for the State in which the consumer retail price was charged.

"(B) Operating expenses.--The average retail operating expenses and average wholesale operating expenses referred to in subparagraph (A)(iii) shall be obtained from--

"(i) the annual survey conducted by the relevant State under section 404(a)(2); or "(ii) if the State has not conducted an annual survey, the annual survey conducted by the Secretary of Energy under section 404(a)(1).

"(2) Overcoming the case.--The prima facie case may be overcome by a preponderance of evidence that the refiner's actual retail operating expenses and actual wholesale operating expenses, if applicable, are less than the average operating expenses presented by the plaintiff to establish the prima facie case.

"SEC. 404. ANNUAL SURVEY.

"(a) Secretary of Energy.--The Secretary of Energy shall conduct an annual survey to determine the average retail operating and average wholesale operating expenses per gallon for the petroleum industry.

"(b) State.--

"(1) In general.--A State or an agency of a State may authorize an annual State survey to reflect local conditions with respect to motor fuels sold to the public in the State.

"(2) Basis of survey.--

"(A) Actual retail expense survey.--A survey with respect to actual retail operating expenses shall be based on all direct and indirect expenses attributable to the sale of a gallon of motor fuel to the public by direct operated outlets and by nondirect operated outlets.

"(B) Wholesale expense survey.--A survey with respect to wholesale operating expenses shall be based on all direct and indirect expenses attributable to the wholesale sale of a gallon of motor fuel by a refiner or a branded wholesaler to a branded dealer.".

SEC. 3. CONFORMING AMENDMENT.

The table of contents in the first section of the Petroleum Marketing Practices Act (15 U.S.C. 2801 note) is amended by adding at the end the following new items:

"TITLE IV--MOTOR FUEL

"Sec. 401. Definitions.
"Sec. 402. Prohibited marketing practices.
"Sec. 403. Enforcement.
"Sec. 404. Annual survey.".

SEC. 4. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective 30 days after the date of enactment of this Act.

II

102d CONGRESS
1st Session

S. 2043

To prohibit certain motor fuel marketing practices.

IN THE SENATE OF THE UNITED STATES
November 25 (legislative day, November 23), 1991
Mr. Simon introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL
To prohibit certain motor fuel marketing practices.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1 SHORT TITLE.
This Act may be cited as the "Motor Fuel Marketing Competition Enhancement Act".

SEC. 2. INCLUSION IN ANTITRUST LAWS.
Subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) is amended by striking "and also this Act" and inserting "this Act; and the Motor Fuel Marketing Competition Enhancement Act".

SEC. 3. DEFINITIONS.
As used in this Act:

(1) The term "adjusted retail price" means the consumer retail price per gallon of motor fuel sold from a directly operated outlet, adjusted by--

(A) subtracting the refiner's average retail operating expenses per gallon of motor fuel sold from that outlet;

(B) making appropriate adjustments to account for--

(i) differences in freight, taxes, and inspection fees (whether or not such items are separately listed as part of the price); and

(ii) the refiner includes consumer credit as part of its price, the cost of consumer credit; and

(C) in a case in which the plaintiff is an established customer for resale that is a wholesaler, subtracting a wholesale functional discount.

(2) The term "affiliate" means a person that controls, is controlled by, or is under common control with any other person by virtue of direct or indirect authority of 1 such person to vote more than 50 percent of the voting stock of or partnership interest in the other person.

(3) The term "affiliated retail outlet" means a retail outlet operated under a brand or trademark owned by a refiner that supplies the outlet with motor fuel, whether the outlet is directly operated by the refiner or is sold motor fuel by the refiner.

(4) The term "agreement" means any oral or written contract, combination, conspiracy, arrangement, or other understanding.

(5) The term "branded dealer" means a retailer that purchases motor fuel from a refiner under an arrangement whereby the refiner permits the retailer to market the motor fuel under a trademark owned or controlled by the refiner.

(6) The term "branded wholesaler" means a person that purchases motor fuel from a refiner for resale to a retailer under an arrangement whereby the refiner permits the wholesaler or the retailer to market the motor fuel under a trademark owned or controlled by the refiner.

(7) The term "consumer retail price" means the lesser of the cash price or credit price per gallon at which motor fuel is sold to the public at a directly operated outlet, adjusted, if motor fuel is sold with another item or service at a combined price, to include the price less the cost of such item or service that is associated with the sale of a gallon of motor fuel.

(8) The term "cost", with respect to an item or service sold by a directly operated outlet at a combined price with motor fuel, means all direct and indirect expenses attributable to the acquisition and retail sale of the item or service by the directly operated outlet.

(9) The term "cost of consumer credit", with respect to motor fuel or another item or service sold by a directly operated outlet, means all direct and indirect expenses of the outlet attributable to the acquisition and retail sale of the item or service by the outlet.

(10) The term "cost of wholesale credit", with respect to motor fuel sold by credit to a branded dealer, means the average of all direct and indirect expenses of the refiner attributable to the use of credit with respect to a sale by the refiner to all of its branded dealers.

(11) The term "customer for resale" means a wholesaler or retailer, other than an affiliate of a refiner, that purchases motor fuel from a refiner for the purpose of reselling it to another person.

(12) The term "direct and indirect expenses" includes labor costs, fair market rental value, repair and maintenance, utilities, supplies, property taxes, other third-party payments, sales and promotional costs, advertising, inventory shrinkage, accounts servicing, and other expenses.

(13) The term "directly operated outlet" means a location at which motor fuel refined by a refiner is sold at retail at which the employees subject to chapter 21 of the Internal Revenue Code of 1986 are paid by the refiner, an affiliate of the refiner, or an independent contractor that operates the facility under contract with the refiner or an affiliate at the refiner.

(14) The term "dual distribution" means the practice by a refiner of marketing motor fuel through an affiliated retail outlet while selling motor fuel to an independent wholesale distributor that sells motor fuel to a retail outlet in competition with the affiliated retail outlet in the same geographic area.

(15) The term "established customer for resale" means a customer for resale that is party to a written contract with a refiner that contains a minimum-volume-of-purchases requirement.

(16) The term "fair market rental value", with respect to a particular directly operated outlet, means the amount of rent that would be paid in a transaction negotiated at arms' length for the use of the outlet for the purpose of selling motor fuel.

(17) The term "freight" means the per gallon rate at which a petroleum carrier not affiliated with a refiner or customer for resale will deliver motor fuel in tank truck quantities, as determined by reference to a published common carrier rate within a geographic area.

(18) The term "inventory shrinkage" means loss of inventory by any cause, including theft, contamination, drive-offs, and evaporation.

(19) The term "minimum volume of purchases requirement" means a provision contained in a contract for the supply of motor fuel by a

refiner to a customer for resale that requires the refiner to supply and the customer for resale to purchase at least a certain amount of motor fuel in a year (or a certain aggregate amount by a certain date in a year), failure of the customer for resale to purchase that amount resulting in--

(A) a decrease in the amount that the refiner will be required to supply by at least the amount of the shortfall in purchases; or

(B) termination of the contract.

(20) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(21) The term "period of short supply" means a period of time during which a refiner is unable to supply the requirements for motor fuel of the refiner's directly operated outlets and its established customers for resale.

(22) The term "person" means a natural person, firm, partnership, corporation, municipal corporation, public corporation, or trade association.

(23) The term "refiner" means a person engaged in the refining of crude oil into motor fuel or the sale of motor fuel to wholesalers and retailers, and includes all affiliates of such a person.

(24) The term "retail operating expenses" means all direct and indirect expenses attributable to the retail sale of a gallon of motor fuel from a directly operated outlet.

(25) The term "retailer" means a person that purchases motor fuel for sale to the general public for ultimate consumption.

(26) The term "sale" means a transfer, gift, sale, offer for sale, or advertisement for sale in any manner or by any means, including the making of a consignment.

(27) The term "same geographic area" means the area that is within which competition occurs between 2 or more of the following entities that are supplied by the same refiner:

(A) A directly operated outlet.

(B) A branded dealer.

(C) A branded wholesaler or a retailer supplied by a branded wholesaler.

(D) A retailer.

(E) A customer for resale.

(28) The term "same or similar grade or quality of motor fuel" means motor fuel of a certain grade or quality without regard to whether it contains an additive, so long as the additive does not change the octane or cetane rating of the motor fuel by more than 1 point.

(29) The term "scheme" means a threat, intimidation, communication, boycott, pattern of action, inducement, or coercion.

(30) The term "sell" means to transfer, give, sell, offer for sale, or advertise for sale in any manner or by any means, including making a consignment.

(31) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(32) The term "wholesale functional discount" means a reduction in price given by a refiner to a wholesale distributor of motor fuel in recognition of the role of the distributor in the refiner's distributive system and as compensation for marketing functions and other services performed by the distributor that the refiner would otherwise perform itself.

(33) The term "wholesale operating expenses" means the direct and indirect expenses and the cost of wholesale credit, attributable to the sale of a gallon of motor fuel by a refiner or a branded wholesaler to its branded dealers.

(34) The term "wholesaler" means a person that purchases motor fuel for sale to a retailer or performs marketing or other functions and services that a refiner would ordinarily perform.

SEC. 4. PROHIBITION OF CERTAIN MOTOR FUEL MARKETING PRACTICES.

(a) Sale at Price Higher Than Price at Which Fuel is Sold at Directly Operated Outlets.--It shall be unlawful for a refiner to sell motor fuel to customer for resale at a price that is higher than the refiner's adjusted retail price for the same or similar grade or quality of motor fuel sold from a directly operated outlet in the same geographic area made within 10 days of the sale to the customer for resale.

(b) Sale at Price Lower Than Price Charged to Branded Dealer.--It shall be unlawful for a refiner to sell motor fuel to a customer for resale at a price that is lower than the price charged branded dealers in the same geographic area for motor fuel of the same or similar grade or quality within 10 days of the sale to the customer for resale, except to the extent that the difference in price is attributable to marketing functions, transportation, or other services that the refiner would provide when marketing through affiliated retail outlets.

(c) Price Fixing.--It shall be unlawful for a refiner to enter into any scheme or agreement to set, change, or maintain the retail price of motor fuel elsewhere than at a directly operated outlet of the refiner.

(d) Discrimination in Periods of Short Supply.--During a period of short supply it shall be unlawful for a refiner that engages in dual distribution to discriminate against an established customer for resale by--

(1) supplying a lesser proportion of the established customer for resale's requirements for motor fuel than the proportion of requirements that is supplied to the refiner's directly operated outlets in the same geographic area; or

(2) delaying delivery of motor fuel to the established customer for resale for a time longer than any time of delay in deliveries to directly operated outlets in the same geographic area.

SEC. 5. ADDITIONAL ENFORCEMENT PROVISIONS.

(a) In General.--The rights, remedies, penalties, and jurisdiction provided by this section are in addition to those available to enforce this Act under the antitrust laws other than this Act.

(b) Proceedings by the Attorney General of the United States.--(1) A refiner that violates section 4 (a), (b), or (d) shall pay to the United States a penalty of not more than $5,000 for each violation.

(2) A refiner that violates section 4(c) shall pay to the United States a civil penalty of $25,000 for each violation.

(3)(A) The district courts of the United States have jurisdiction to prevent and restrain violation of this Act.

(B) In an action under this subsection, the court shall grant such equitable relief as the court determines to be necessary to remedy the effects of any violation, including granting of--

(i) a declaratory judgment;

(ii) mandatory or prohibitive injunctive relief; and

(iii) interim equitable relief.

(4) The Attorney General may bring a civil action under this subsection in any district court of the United States in which the defendant resides, is found, or has an agent.

(c) Private Civil Actions.--(1) A customer for resale that is injured by a violation of section 4 may sue therefor, in the customer's individual capacity or as a representative of a class of similarly situated customers for resale, in the district court of the United States in any district in which the defendant resides, is found, or has an agent.

(2) A customer for resale shall be entitled to injunctive relief, in any

court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of section 4.

(3) In an action brought by a customer for resale to enforce this Act, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of the violation, including the granting of--

(A) declaratory judgment;

(B) mandatory or prohibitive injunctive relief; and

(C) interim equitable relief.

(4) For the purposes of paragraph (1), a customer for resale that purchases motor fuel at a price that is unlawful or that is subjected to discriminatory treatment that is unlawful under section 4 shall be considered to have been injured by the violation.

(5)(A) A substantially prevailing plaintiff in an action under this Act shall recover, for each violation--

(i) the greater of--

(I) threefold the actual damages sustained by the plaintiff, or

(II) $5,000; and

(ii) the cost of suit, including reasonable attorneys' fees and expert witness fees.

(B) For the purpose of subparagraph (A)(i)(I), a plaintiff's actual damages may include the difference between the price paid by the plaintiff for motor fuel and the lawful price.

(d) Proceedings by State Attorneys General.--(1) The attorney general of a State may bring a civil action in the name of the State, as parens patriae on behalf of persons residing in the State, in any district court of the United States or court of a State having jurisdiction over the defendant to secure monetary relief as provided in subsection (b) for injury sustained by those persons to their business or property by reason of a violation of section 4.

(2)(A) A refiner that violates section 4 (a) or (b) shall forfeit and pay to a State in which a violation occurs--

(i) a civil penalty of $1,000 for each violation; and

(ii) $5,000 for each additional or continued violation that occurs more than 3 business days after the refiner's receipt from the attorney general of the State of a notice of probable violation of the same nature.

(B) A refiner that violates section 4(c) shall forfeit and pay to a State in which the violation occurs--

(i) a civil penalty of $25,000 for each violation; and

(ii) $5,000 per day for each day such violation continues more than 3 business days after the refiner's receipt of a notice of probable violation of the same nature from the attorney general of the State.

(C) In any action brought under this paragraph, the court shall grant such equitable relief, the court determines is necessary to remedy the effects of the violation, including granting of--

(i) declaratory judgment;

(ii) mandatory or prohibitive injunctive relief; and

(iii) interim equitable relief.

(3)(A) After determination by the attorney general of a State of a probable violation of this Act in the State by a refiner, the attorney general may send written notice of the probable violation to the refiner.

(B) Neither the failure of an attorney general to give notice under this paragraph nor any lack of adequacy of such a notice shall affect the right of an attorney general to maintain a civil action under this paragraph.

(e) Jury Trial.--In a civil action brought under subsection (b)(1) the plaintiff and the defendant shall be entitled to a jury trial.

SEC. 6. RECORDKEEPING BY REFINERS.

(a) In General.--A refiner shall maintain, for a period of 4 years after a sale of motor fuel to a customer for resale or directly operated outlet, records that establish with respect to the sale--

(1) the adjusted retail price;
(2) the consumer retail price;
(3) the cost;
(4) the cost of consumer credit;
(5) the cost of wholesale credit;
(6) the direct and indirect expenses;
(7) the fair market retail value;
(8) the freight;
(9) the retail operating expenses; and
(10) the wholesale operating expenses.

(b) Inspection by Customers for Resale.--A refiner shall make available for inspection by a customer for resale during regular business hours all records described in subsection (a) that pertain to sales to customers for resale and directly operated outlets in the same geographic area in which the customer for resale is located.

(c) Criminal Penalty.--A refiner that fails to maintain under subsection (a) or to make available for inspection under subsection (b) records that are sufficient to establish the factors described in subsection (a) shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

SEC. 7. EFFECTIVE DATE.

This Act shall become effective on the date that is 30 days after the date of enactment of this Act.

I

102d CONGRESS
1st Session

H. R. 2966

To amend the Petroleum Marketing Practices Act.

IN THE HOUSE OF REPRESENTATIVES
July 22, 1991

Mr. Synar (for himself, Mr. Lent, Mr. Bliley, and Mr. Cooper) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and the Judiciary

---

A BILL

To amend the Petroleum Marketing Practices Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Petroleum Marketing Competition Enhancement Act".

SEC. 2. PROHIBITED MARKETING PRACTICES.

The Petroleum Marketing Practices Act (15 U.S.C. 2801 et seq.) is amended by adding at the end the following new title:

"TITLE IV--MOTOR FUEL

"SEC. 401. PROHIBITED MARKETING PRACTICES.

"(a) It shall be unlawful for a refiner to sell motor fuel, to any customer for resale, at a price which is higher than the refiner's adjusted retail price for the same or similar grade or quality of motor fuel sold from a direct operated outlet in the same geographic area.

"(b) It shall be unlawful for a refiner to enter into any scheme or agreement to set, change, or maintain maximum retail prices of motor fuel, except that this subsection shall not apply to a refiner's retail sales at its direct operated outlets.

"SEC. 402. DEFINITIONS.

"As used in this title:

"(1) The term 'agreement' means any oral or written contract, combination, conspiracy, arrangement, or other similar understanding.

"(2) The term 'adjusted retail price' means the consumer retail price per gallon of motor fuel sold from a direct operated outlet less the refiner's average retail operating expenses per gallon of motor fuel sold from such direct operated outlet, and in the event of a sale by the refiner to a branded wholesaler, also less the refiner's average wholesale operating expenses attributable to the wholesale sale of a gallon of motor fuel to its branded dealers in the same geographic area. In comparing a refiner's adjusted retail price to a refiner's price to other customers for resale, adjustments shall be made to account for differences in freight, taxes, and inspection fees, whether or not such items are separately listed as part of the price. If a refiner includes consumer credit as part of its price, then an adjustment for the cost of consumer credit shall be made in comparing these prices.

"(3) The term 'affiliate' means any person who (by means of direct or indirect authority of a person to vote more than 50 percent of the voting stock or partnership interest in any other person) controls, is controlled by, or is under common control with any other person.

"(4) The term 'branded dealer' means any retailer who purchases motor fuel from a refiner under an arrangement whereby the refiner permits the retailer to market such motor fuel under a trademark owned or controlled by the refiner.

"(5) The term 'branded wholesaler' means any person who purchases motor fuel from a refiner for resale to a retailer under an arrangement whereby the refiner permits such person or retailer to market the motor fuel under a trademark owned or controlled by the refiner.

"(6) The term 'consumer retail price' means the price per gallon at which motor fuel is sold to the public at a direct operated outlet. If motor fuel is sold or offered to the public at one price for cash transactions and at another price for credit transactions, the consumer retail price shall mean the lower of such prices, adjusted for the cost of consumer credit. If motor fuel is sold with another item or service at a combined price, then the consumer retail price shall be adjusted to include the price per gallon of any such item or service less the cost per gallon of such item or service.

"(7) The term 'cost' of any item or service sold at a combined price with motor fuel means all direct and indirect expenses attributable to the acquisition and retail sale of such item or service by the direct operated outlet.

"(8) The term 'cost of consumer credit' with respect to motor fuel or other items and services sold by credit means the lesser of--

"(A) 4 percent of the sales price of such goods sold by credit; or

"(B) all direct and indirect expenses of the direct operated outlet attributable to the use of credit with respect to such sale.

"(9) The term 'cost of wholesale credit' with respect to motor fuel sold by credit to a branded dealer means the lesser of--

"(A) 2 percent of the sales price of such motor fuel; or

"(B) the average of all direct and indirect expenses of the refiner attributable to the use of credit with respect to a sale by the refiner to all of its branded dealers.

"(10) The term 'customer for resale' means any person who purchases motor fuel for the purpose of reselling such motor fuel to another person.

"(11) The term 'direct and indirect expenses' means, without limitation, labor costs, fair market rental value, repair and maintenance, utilities, supplies, property taxes, other third-party payments, sales and promotional costs, advertising, inventory shrinkage, and accounts servicing.

"(12) The term 'direct operated outlet' means any service facility at which the employees are subject to the Federal Insurance Contributions Act (26 U.S.C. 3101 et seq.) paid by the refiner or an affiliate of the refiner.

"(13) The term 'fair market rental value' means the amount of rent which would be paid in a transaction negotiated by unrelated parties for the use of the specific direct operated outlet utilized for the sale of motor fuel.

"(14) The term 'freight' means the per gallon rate at which a third party, unaffiliated petroleum carrier will deliver motor fuel in tank truck quantities. Said rate shall be established by reference to a published common carrier rate within the particular geographic area.

"(15) The term 'inventory shrinkage' means all losses of inventory from whatever cause or source including theft by suppliers, employees, or customers, contamination, drive-offs, or evaporation.

"(16) The term 'motor fuel' means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

"(17) The term 'person' means any individual, firm, partnership, corporation, municipal corporation, public corporation, or trade association.

"(18) The term 'refiner' means any person engaged in the refining of crude oil to produce motor fuel and includes any affiliate of such person.

"(19) The term 'retail operating expenses' means all direct and indirect expenses attributable to the retail sale of a gallon of motor fuel from a direct operated outlet.

"(20) The term 'retailer' means any person who purchases motor fuel for sale to the general public for ultimate consumption.

"(21) The term 'sale' or 'sell' means any transfer, gift, sale, offer for sale, or advertisement for sale in any manner or by any means whatsoever, including product exchanges.

"(22) The term 'same geographic area' means the area served by any terminal from which a direct operated outlet obtains its motor fuel or any terminal within a commercially reasonable distance of such outlet.

"(23) The term 'same or similar grade or quality of motor fuel' means motor fuel containing an additive which does not change the octane or cetane rating of such product by more than 1 point.

"(24) The term 'scheme' means any threat, intimidation, communication, boycott, pattern of action, inducement, or coercion.

"(25) The term 'trademark' means any trademark, tradename, servicemark, or other identifying symbol or name.

"(26) The term 'wholesale operating expenses' means the direct and indirect expenses, and the cost of wholesale credit, attributable to the sale of a gallon of motor fuel by a refiner or a branded wholesaler to its branded dealers.

"SEC. 403. ENFORCEMENT.

"(a) Proceedings by the Attorney General of the United States.--

"(1) Any person who shall violate section 401(a) shall forfeit and pay to the United States a penalty of not more than $5,000 for each such violation. Any refiner who shall violate section 401(b) shall forfeit and pay to the United States a penalty of $25,000 for each such violation. The Attorney General may bring a civil action under this subsection in any district court of the United States in which the defendant resides or has an agent.

"(2) The several district courts of the United States are hereby vested with jurisdiction to prevent and restrain violation of this title. In any action under this subsection, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any violation; including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(b) Maintenance of Private Civil Action.--

"(1) Any person who shall be injured in his business or property by reason of anything prohibited by this title may sue therefore acting either in an individual capacity or as a member of a class in any district court of the United States in the district in which the defendant resides or has an agent.

"(2) Any person shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of section 401. In any action under paragraph (1) of this subsection, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any violation; including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(3) For the purposes of section 401(a), any person who purchases motor fuel in an unlawful sale under this title shall be deemed injured in his business or property.

"(4) No person shall be precluded from bringing suit under paragraph (1) or (2) of this subsection on grounds that he is a competitor of the defendant, or that no injury to competition has occurred.

"(5) If the claimant in any action under paragraph (1) or (2) of this subsection prevails, he shall recover--

"(A) the greater of--

"(i) threefold the actual damages by him sustained to include, but not be limited to, the difference between the actual price paid by him and the lawful price; or

"(ii) the sum of $5,000 for each violation; and

"(B) the cost of suit, including reasonable attorneys' fees and expert witness fees.

"(c) Proceedings by State Attorneys General.--

"(1) The attorney general of any State of the United States may bring a civil action in the name of such State, as parens patriae on behalf of persons residing in such State, in any district court of the United States having jurisdiction over the defendant to secure monetary relief as provided in subsection (b) for injury sustained by such persons to their business or property by reason of any violations of section 401.

"(2)(A) Any refiner who shall violate section 401(a) shall forfeit and pay to each State of the United States where such violation has occurred a penalty of $1,000 for each such violation and an additional $5,000 for each such violation which occurs more than 3 business days after the refiner's receipt of a notice of probable violation related thereto from the attorney general of such State.

"(B) Any refiner who shall violate section 401(b) shall forfeit and pay to each State of the United States where such violation has occurred, a penalty of $25,000 for each violation and an additional $5,000 per day for each day such violation continues more than 3 business days after the refiner's receipt of a notice of probable violation related thereto from the attorney general of such State.

"(C) The attorney general of any State may bring a civil action under this paragraph in any district court of the United States or any appropriate State court having jurisdiction over the defendant. In any action under this paragraph, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any violation; including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

"(3) After determination by the attorney general of any State of the United States of a probable violation of this title in such State by a refiner, the attorney general may, but shall not be obligated to, send written notice of such probable violation to the refiner. Neither the failure of any attorney general to give notice under this paragraph nor any lack of adequacy of such notice shall affect the right of any attorney general to maintain a proceeding under this subsection or to collect the damages set forth herein.

"(d) Establishment of Prima Facie Case.--

"(1) Any person bringing an action to enforce the provisions of section 401(a) may establish a prima facie case that a refiner has violated such provision by establishing that the refiner has sold motor fuel to a customer for resale, at a price which is higher than--

"(A) 94 percent of its consumer retail price per gallon;

"(B) in the event of a sale to a branded wholesaler, 90 percent of its consumer retail price per gallon; or

"(C) the refiner's consumer retail price per gallon less the most recently available average retail operating expenses per gallon and, in the event of a sale by a refiner to a branded wholesaler, also less the most recently available average wholesale operating expenses per gallon for the State in which the consumer retail price was charged.

In the event that the relevant State has not conducted an annual survey under section 404 to determine such average retail operating expenses or such average wholesale operating expenses, then the average operating expenses for the retail petroleum industry and the wholesale petroleum industry, as determined by the Secretary of Energy, shall be used instead.

"(2) The average retail operating expenses and average wholesale operating expenses for the petroleum industry shall be established as set forth in this subsection.

"(3) Such prima facie case may be overcome by a preponderance of evidence that the refiner's actual retail operating expenses and average wholesale operating expenses, if applicable, are less than the evidence presented by the plaintiff to establish such prima facie case.

"(e) Jury Trial.--In any action brought under subsection (b)(1) of this section there shall be a right of trial by jury.

"SEC. 404. ANNUAL SURVEY.

"The Secretary of Energy shall conduct an annual survey to determine the average retail operating and average wholesale operating expenses per gallon for the petroleum industry. Any State or any agency thereof may authorize an annual State survey to reflect local conditions with respect to motor fuels sold to the public in that State. Any such survey with respect to retail operating expenses and actual wholesale operating expenses shall be based upon all direct and indirect expenses attributable to the sale of a gallon of motor fuel to the public by direct operated outlets and by nondirect operated outlets. Any such survey with respect to wholesale operating expenses shall be based upon all direct and indirect expenses attributable to the wholesale sale of a gallon of motor fuel by a refiner or a branded wholesaler to a branded dealer.

"SEC. 405. CONSTRUCTION.

"This title shall be construed liberally so that its purposes may be served.".

SEC. 3. CONFORMING AMENDMENT.

The table of contents for the Petroleum Marketing Practices Act (15 U.S.C. 2801 note) is amended by adding at the end the following new items:

"TITLE IV--MOTOR FUEL

"Sec. 401. Prohibited Marketing Practices.
"Sec. 402. Definitions.
"Sec. 403. Enforcement.
"Sec. 404. Annual Survey
"Sec. 405. Construction.".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall become effective 30 days after the date of the enactment of this Act.