

HOUSE BILL No. 4757

May 27, 2003, Introduced by Reps. LaSata, Rivet, Tabor, Julian, Brown, Sheltroun, Farrah, Pappageorge, Elkins, Woronchak, Kooiman, Gaffney, Paletko, Adamini, Richardville, Hummel, Stahl, Vander Veen, Spade, Pumford, Condino, Taub, Woodward, Bradstreet, Caul, Gleason, Sak, Hager, Minore, Shaffer, Gielegem, Emmons, Palsrok, Robertson and Tobocman and referred to the Committee on Transportation.

A bill to prevent certain unfair methods of competition and pricing practices in the distribution of motor fuel; to prescribe powers and duties of certain state officers and agencies and the courts; and to provide remedies, fines, and penalties for violations of this act.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "petroleum marketing stabilization act".

3 Sec. 2. As used in this act:

4 (a) "Affiliate" means a person who controls, is controlled
5 by, or is under common control with, any other person, other than
6 by means of a franchise. The term also includes a person in a
7 business relationship with any other person related to the retail
8 sale of motor fuel.

9 (b) "Average posted terminal price" means the average posted

HOUSE BILL No. 4757

1 rack price, by grade of motor fuel, as published by a petroleum
2 price reporting service, at which motor fuel is offered for sale
3 at the close of business on the determination date by all
4 refiners, suppliers, and wholesalers of motor vehicle fuel at a
5 terminal, plus any excise, sales, or use taxes imposed on the
6 motor fuel or on its sale, any cost incurred for transportation,
7 and any other fees or charges that are not otherwise included in
8 the average posted rack price. As used in this subdivision,
9 "average" means the arithmetic mean.

10 (c) "Basic cost" means the lesser of the invoice cost to a
11 retailer, or the lowest replacement cost to the retailer within 5
12 days before the date of sale, in the quantity last purchased
13 either within or before that 5-day period, less customary
14 discounts for cash, plus the full value of any freight costs, and
15 taxes, if not already included in the invoice cost to the
16 retailer.

17 (d) "Competition" includes a person who competes with another
18 person for retail sales of motor fuel in the same market area.

19 (e) "Cost of doing business component" means an amount
20 intended to cover a proportionate part of the cost of doing
21 business at a retail location or unattended location.

22 (f) "Customary discount for cash" includes an allowance made
23 to a retailer when the retailer pays for motor fuel within a
24 limited or specified time.

25 (g) "Determination date" means 1 of the following:

26 (i) If a retailer sells motor fuel on a day other than the
27 day on which the retailer last purchased any motor fuel and the

1 sale of the motor fuel by the retailer occurs no later than 10
2 days after its last purchase by the retailer, either the day
3 preceding the day of the sale of motor fuel by the retailer or
4 the day on which motor fuel was last purchased by the retailer,
5 as selected by the retailer.

6 (ii) If subparagraph (i) does not apply, the day preceding
7 the day of the sale at retail of motor fuel.

8 (h) "Existing price of a competitor" means a lawful price
9 that is simultaneously offered to a buyer for motor fuel of like
10 quality and quantity by a person who is a competitor of the
11 retailer and from whom the buyer can practicably purchase the
12 motor fuel.

13 (i) "Invoice" means either of the following:

14 (i) A document issued by a refiner or supplier to a
15 wholesaler or retailer evidencing a sale of motor fuel that
16 contains the invoice cost of the motor fuel.

17 (ii) A document issued by a wholesaler to a retailer
18 evidencing a sale of motor fuel that contains the invoice cost of
19 the motor fuel from an invoice issued by a refiner or supplier.

20 (j) "Invoice cost" means 1 of the following:

21 (i) For a sale of motor fuel from a refiner or supplier to a
22 wholesaler or retailer, either the sale price shown on the
23 invoice from the refiner or supplier to the wholesaler or
24 retailer, or the price generally available from the refiner or
25 supplier to wholesalers and retailers who are not its affiliates
26 from a terminal at which the refiner or supplier sells or offers
27 to sell motor fuel to wholesalers and retailers who are not its

1 affiliates, whichever is greater.

2 (ii) For a sale of motor fuel by a wholesaler to a retailer,
3 either the sale price shown on the invoice from the wholesaler to
4 the retailer, or the price the wholesaler paid the refiner or
5 supplier for that motor fuel, whichever is greater.

6 (k) "Maximum cost of doing business component" means 3 times
7 the cost of doing business component.

8 (l) "Maximum selling price" or "maximum sales price" means
9 the retail sales price measured as the retailer cost, applying
10 the maximum cost of doing business component.

11 (m) "Motor fuel" means that term as defined in section 4 of
12 the motor fuel tax act, 2000 PA 403, MCL 207.1004.

13 Sec. 3. As used in this act:

14 (a) "Person" means an individual, partnership, corporation,
15 association, limited liability company, governmental entity, or
16 other legal entity.

17 (b) "Petroleum price reporting service" means a wholesale
18 petroleum product price reporting service that is recognized
19 nationwide.

20 (c) "Rack" means a mechanism for delivering motor fuel from a
21 refinery, terminal, or marine vessel into a railroad tank car, a
22 transport truck, a tank wagon, the fuel supply tank of a marine
23 vessel, or other means of transfer outside of the bulk
24 transfer/terminal system.

25 (d) "Refiner" means that term as defined in section 5 of the
26 motor fuel tax act, 2000 PA 403, MCL 207.1005.

27 (e) "Replacement cost" means the cost at which a retailer

1 could have purchased motor fuel on the determination date if
2 purchased in the same quantity as the retailer's last purchase of
3 motor fuel.

4 (f) "Retail location" means a location where a retailer sells
5 motor fuel and where the presence of an attendant at the time of
6 a sale is required by law.

7 (g) "Retailer" means a person that meets all of the
8 following:

9 (i) Maintains a storage facility for motor fuel.

10 (ii) Sells motor fuel at a retail location that sells only to
11 members, at any other retail location, or at an unattended
12 location.

13 (iii) Sells motor fuel to the end user of the motor fuel.

14 (h) "Retailer cost" means 1 of the following:

15 (i) In a retail sale of motor fuel by a retailer at a retail
16 location, the lesser of the following:

17 (A) The invoice cost of the motor fuel to the retailer on the
18 determination date or the replacement cost of the motor fuel on
19 the determination date, whichever is lower, less customary
20 discounts for cash, plus any excise, sales, or use taxes imposed
21 on the motor fuel or on its sale and any cost incurred for
22 transportation and any other fees or charges not otherwise
23 included in the invoice cost or the replacement cost of the motor
24 fuel, plus a cost of doing business component of 13.38 cents per
25 gallon of motor fuel.

26 (B) The average posted terminal price on the determination
27 date at the terminal located closest to the retailer, plus a cost

1 of doing business component of 13.38 cents per gallon of motor
2 fuel.

3 (ii) In a retail sale of motor fuel by a retailer at an
4 unattended location, the lesser of the following:

5 (A) The invoice cost of the motor fuel to the retailer on the
6 determination date or the replacement cost of the motor fuel on
7 the determination date, whichever is lower, less customary
8 discounts for cash, plus any excise, sales, or use taxes imposed
9 on the motor fuel or on its sale and any cost incurred for
10 transportation and any other fees or charges not otherwise
11 included in the invoice cost or the replacement cost of the motor
12 fuel, plus a cost of doing business component of 6.4 cents per
13 gallon of motor fuel.

14 (B) The average posted terminal price on the determination
15 date at the terminal located closest to the retailer, plus a cost
16 of doing business component of 6.4 cents per gallon of motor
17 fuel.

18 Sec. 4. As used in this act:

19 (a) "Sell", "sale", or "sold" means a transfer of property
20 for any consideration. The term includes an advertising or offer
21 to sell or any transfer of property where title is retained by
22 the retailer as security for the payment of the purchase price.
23 In determining a selling price of motor fuel by a retailer under
24 this act, all fractions of a cent shall be carried to the next
25 full cent.

26 (b) "Sell at retail", "sale at retail", and "retail sale"
27 mean a transfer for a valuable consideration, made in the

1 ordinary course of trade or in the usual conduct of a retailer's
2 business, of title to tangible personal property to a purchaser
3 for consumption or use other than resale or further processing or
4 manufacturing.

5 (c) "Supplier" means that term as defined in section 5 of the
6 motor fuel tax act, 2000 PA 403, MCL 207.1005.

7 (d) "Terminal" means a motor fuel storage and distribution
8 facility that is supplied by a pipeline or marine vessel, from
9 which motor fuel may be removed at a rack. If 2 or more
10 terminals are included in the same geographic area by a petroleum
11 price reporting service, they are considered 1 terminal for
12 purposes of this act.

13 (e) "Unattended location" means a location where a retailer
14 sells motor fuel and where the presence of an attendant at the
15 time of a sale is not required by law.

16 (f) "Wholesaler" means that term as defined in section 6 of
17 the motor fuel tax act, 2000 PA 403, MCL 207.1006.

18 Sec. 5. (1) Except as provided in subsection (2), a
19 retailer engaged in commerce in this state shall not sell or
20 offer to sell motor fuel below retailer cost at a retail location
21 or unattended location.

22 (2) It is not a violation of subsection (1) to establish a
23 sale price for motor fuel in good faith to meet an equally low
24 lawful price of a competitor that is subject to this act, located
25 in the same market area, and selling the same or a similar
26 product of like grade and quality.

27 Sec. 6. A retailer engaged in commerce in this state shall

1 not sell or offer to sell motor fuel for a price above the
2 maximum sale price at a retail location or unattended location.

3 Sec. 7. A retailer shall not offer a rebate, offer to give
4 a rebate, or offer a concession of any kind in connection with a
5 sale of motor fuel at a retail location or at an unattended
6 location if the resulting sale price is below retailer cost.

7 Sec. 8. A retailer or an affiliate of a retailer shall not
8 engage in an advertisement, offer for sale, or sale involving
9 motor fuel and 1 or more other items at a combined price, or an
10 advertisement, offer of sale, or sale involving the giving of a
11 coupon, gift, or concession of any kind, if the combined selling
12 price is below the retailer cost of the motor fuel and the basic
13 cost of each article, product, commodity, gift, and concession
14 included in the transaction.

15 Sec. 9. This act does not apply to a retail sale of motor
16 fuel that meets any of the following:

17 (a) It is made in an isolated transaction that is not in the
18 usual course of business.

19 (b) Motor fuel is advertised, offered for sale, or sold in a
20 bona fide clearance sale for the purpose of discontinuing trade
21 in that motor fuel, and both of the following are met:

22 (i) The advertising, offer to sell, or sale states the reason
23 for the sale and the quantity of the motor fuel available for
24 sale.

25 (ii) The motor fuel is kept separate from other motor fuel
26 stocks, and clearly and legibly marked with the reason for the
27 sale.

1 (c) Motor fuel is advertised, offered for sale, or sold as
2 imperfect or damaged, and both of the following are met:

3 (i) The advertising, offer of sale, or sale states the reason
4 for the sale and the quantity of motor fuel available for sale.

5 (ii) The motor fuel is kept separate from other motor fuel
6 stocks and clearly and legibly marked with the reason for the
7 sale.

8 (d) Motor fuel is sold as part of the final liquidation of a
9 business.

10 (e) Motor fuel is advertised, offered for sale, or sold by a
11 fiduciary under the order or direction of a court.

12 (f) Motor fuel is advertised, offered for sale, or sold
13 during a grand opening to introduce a new or remodeled retail
14 location if the grand opening meets both of the following:

15 (i) Is held for 3 days or less.

16 (ii) Is held within 60 days after the new or remodeled retail
17 location begins operations.

18 Sec. 10. An express or implied agreement that violates this
19 act is void and unenforceable.

20 Sec. 11. An action for violation of this act shall be
21 brought in a circuit court where venue is proper without regard
22 to the amount in controversy.

23 Sec. 12. (1) If the attorney general or a prosecuting
24 attorney has reasonable cause to believe that a person has
25 information or is in possession, custody, or control of any
26 document or other tangible object relevant to an investigation
27 for violation of this act, the attorney general or a prosecuting

1 attorney, with the permission of, or at the request of, the
2 attorney general, may serve upon the person, before bringing any
3 action in the circuit court, a written demand to appear and be
4 examined under oath, and to produce the document or object for
5 inspection and copying. The demand shall include all of the
6 following:

7 (a) Be served upon the person in the manner required for
8 service of process in this state.

9 (b) Describe the nature of the conduct constituting the
10 violation under investigation.

11 (c) Describe the document or object with sufficient
12 definiteness to permit it to be fairly identified.

13 (d) If demanded, contain a copy of the written
14 interrogatories.

15 (e) Prescribe a reasonable time at which the person must
16 appear to testify, within which to answer the written
17 interrogatories, and within which the document or object must be
18 produced, and advise the person that objections to or reasons for
19 not complying with the demand may be filed with the attorney
20 general or prosecuting attorney, with the permission of, or at
21 the request of, the attorney general, on or before that time.

22 (f) Specify a place for the taking of testimony or for
23 production within the county in which the person resides or
24 maintains a principal place of business in this state and
25 designate the person who shall be custodian of the document or
26 object.

27 (g) Contain a copy of subsection (2).

1 (2) If a person objects to or otherwise fails to comply with
2 the written demand served upon him or her under subsection (1),
3 the attorney general or a prosecuting attorney, with the
4 permission of, or at the request of, the attorney general, may
5 file in the circuit court in the county in which the person
6 resides or in which the person maintains a principal place of
7 business within this state an action to enforce the demand.
8 Notice of hearing the action and a copy of all pleadings shall be
9 served upon the person, who may appear in opposition. If the
10 court finds that the demand is proper, that there is reasonable
11 cause to believe that there may have been or is presently
12 occurring a violation of this act, and that the information
13 sought or document or object demanded is relevant to the
14 investigation, the court shall order the person to comply with
15 the demand, subject to modification the court may prescribe.
16 Upon motion by the person and for good cause shown, the court may
17 make any further order in the proceedings that justice requires
18 to protect the person from unreasonable annoyance, embarrassment,
19 oppression, burden, or expense.

20 (3) Any procedure, testimony taken, or material produced
21 shall be kept confidential by the attorney general or a
22 prosecuting attorney before bringing an action against a person
23 under this act for the violation under investigation, unless
24 confidentiality is waived by the person being investigated and
25 the person who has testified, answered interrogatories, or
26 produced material, or disclosure is authorized by the court.

27 Sec. 13. The attorney general or a prosecuting attorney,

1 with the permission of, or at the request of, the attorney
2 general, may bring an action for appropriate injunctive or other
3 equitable relief and civil penalties in the name of the state for
4 a violation of this act. The court may assess for benefit of the
5 state a civil penalty of not more than \$2,500.00 for each
6 violation of this act, subject to a maximum of \$10,000.00 per day
7 if multiple sales violations occur during any 1 day.

8 Sec. 14. Any person threatened with injury or injured
9 directly or indirectly in his or her business or property by a
10 violation of this act may bring an action for appropriate
11 injunctive or other equitable relief, 3 times the amount of
12 actual damages sustained by reason of a violation of this act,
13 interest on the damages from the date of the complaint, taxable
14 costs, and actual attorney fees. All of the following apply to
15 an action under this section:

16 (a) The court shall grant the equitable relief it determines
17 is necessary to remedy the effects of any violation of this act,
18 which may include a declaratory judgment, mandatory or
19 prohibitive injunctive relief, and interim equitable relief.

20 (b) The court shall grant a temporary restraining order and
21 preliminary injunction if the plaintiff shows that all of the
22 following are met:

23 (i) There is reasonable cause to believe that a violation of
24 the act has occurred.

25 (ii) There exist sufficiently serious questions going to the
26 merits to make those questions a fair ground for litigation.

27 (iii) The court determines that, on balance, the hardships

1 imposed upon the defendant by the issuance of a temporary
2 restraining order or preliminary injunction will be less than the
3 hardship that would be imposed upon the plaintiff in the absence
4 of that relief.

5 (c) If the action seeks injunctive or other equitable relief,
6 the court shall not require the plaintiff to provide a bond.

7 (d) If the action seeks injunctive or other equitable relief,
8 it is not a defense that the plaintiff's injury or threatened
9 injury may be adequately remedied by an award of damages.

10 Sec. 15. A person who knowingly prepares a false invoice or
11 causes a false invoice to be prepared or knowingly submits false
12 information in response to a demand issued under section 12 of
13 this act is guilty of a misdemeanor punishable by imprisonment of
14 not more than 6 months or a fine of not more than \$500.00, or
15 both.

16 Sec. 16. A final judgment or decree determining that a
17 person has violated this act in an action brought by the state
18 under section 13, other than a consent judgment or decree entered
19 before any testimony has been taken, is prima facie evidence
20 against the person in any other action against the person under
21 section 14 as to all matters with respect to which the judgment
22 or decree would be an estoppel between the parties to the
23 action.

24 Sec. 17. (1) An action under section 13 or 14 is barred if
25 not commenced within 1 year after the claim for relief or cause
26 of action accrues.

27 (2) An action to recover damages under section 14 is barred

1 if not commenced within 1 year after the claim for relief or
2 cause of action accrues, or within 1 year after the conclusion of
3 any timely action brought by the state under section 13 which is
4 based in whole or in part on any matter complained of in the
5 action for damages, whichever is later.

6 Sec. 18. The remedies provided in this act are cumulative
7 and in addition to any other remedy available under state law.

8 Sec. 19. If a witness has been or may be called to testify
9 or provide other information at any proceeding relating to or
10 under this act, the circuit court for the county in which the
11 proceeding is or may be held may issue, upon application of the
12 attorney general or a prosecuting attorney, with the permission
13 of, or at the request of, the attorney general, which asserts
14 that in his or her judgment the testimony or other information
15 may be necessary to the public interest and the witness has or is
16 likely to refuse to testify, an order requiring the witness to
17 give testimony or provide other information which the witness
18 refuses to give or provide on the basis of the privilege against
19 self-incrimination, if the court provides in its order that the
20 witness shall not be prosecuted or subjected to any penalty or
21 forfeiture for, or on account of, any transaction, occurrence,
22 matter, or thing to which the witness testifies or provides other
23 information or evidence, documentary or otherwise, and that the
24 testimony, information, or evidence shall not be used against the
25 witness, in any criminal investigation, proceeding, or trial,
26 except a prosecution for perjury for giving a false statement or
27 for otherwise failing to comply with the order.