

Re: The Commission overruling the 1979 staff opinion letter regarding gasohol. [Nebraska Gasohol Committee, R811005]

January 8, 1993

Dear Mr. Sneller:

In October, 1979, the Federal Trade Commission staff, in an informal staff opinion issued to what is now known as the Nebraska Gasohol Committee, concluded that gasohol was not covered by either the definition of "automotive gasoline" in Title II of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. 2821,¹ or the Commission's Octane Rule, 16 CFR 306.² The purpose of this letter is to advise you formally of the Commission's view that, notwithstanding the earlier news expressed by the staff, gasohol is covered by the PMPA and the Octane Rule.³ Accordingly, the 1979 staff opinion letter should not be given any weight.

In the 1979 opinion, gasohol was defined as a mixture of 90% unleaded gasoline and 10% ethyl alcohol. The staff noted that the definition of "automotive gasoline" in Section 201(6) of the PMPA is "gasoline of a type distributed for use as a fuel in any motor vehicle." The staff took the position that gasohol did not fall within the scope of the statutory definition because it was not gasoline, but a mixture of gasoline and alcohol.

When the staff issued its opinion in 1979, the Commission had not reviewed or approved staff's interpretation of the PMPA. The Commission first considered the issue in responding to a 1983 letter from the Honorable John Dingell, Chairman of the House Committee on Energy and Commerce. In the Commission's reply, then

¹ Section 201(6) of the PMPA, 15 U.S.C. 2821(6), states that the term "automotive gasoline" means gasoline of a type distributed for use as a fuel in any motor vehicle.

² In 1979, the Nebraska Gasohol Committee was called the Agricultural Products Industrial Utilization Committee.

³ Under the Commission's Rules of Practice, the staff is authorized to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. 16 CFR 1.1(b). However, staff advice is not reviewed or approved by the Commission and is given without prejudice to the right of the Commission to rescind the advice. 16 CFR 1.3(c).

Chairman James Miller stated that the Commission itself had not formed a view concerning the applicability of the requirements of the PMPA and the Octane Rule to gasohol. He also noted that staff opinions are not binding on the Commission. Chairman Miller further stated that the staff would continue to watch developments in this area, and, if appropriate, recommend further Commission action.

Recently, the Commission interpreted the PMPA and the Octane Rule as covering gasohol. The Commission enunciated its position concerning gasohol in testimony before the House Subcommittee on Energy and Power, in June, 1990, and again in June, 1991. In both occasions, the Commission testified that the mandatory posting of octane ratings is appropriate for gasohol.⁴

In February, 1992, the Commission addressed the gasohol issue in the context of an enforcement action, alleging that gasohol sales are covered by the Octane Rule. Specifically, the Commission alleged that the Wright Companies had violated the Octane Rule by, among other things, misrepresenting the octane content of automotive gasoline, including gasoline blended with alcohol, other oxygenates or blending agents. The Consent Decree resolving the Octane Rule charges against the Wright Companies also specifically requires future compliance with the Octane Rule in connection with the sale of automotive gasoline, including gasoline blended with alcohol, other oxygenates or blending agents.⁵

The Commission's conclusions are consistent with the legislative history of the PMPA. In drafting the PMPA, Congress was aware that all gasoline is a blend of ingredients (*e.g.*, tetraethyl lead and gasoline in the case of leaded gasoline, which was indisputably

⁴ See "Prepared Statement of the Federal Trade Commission on Gasoline Marketing before the House Energy and Commerce Committee, Subcommittee on Energy and Power, June 20, 1990," and "Prepared Statement of the Federal Trade Commission on the Octane Display and Disclosure Act of 1991 before the House Energy and Commerce Committee, Subcommittee on Energy and Power, June 12, 1991."

⁵ The Consent Decree in the William P. Wright case (Civil Action No. 92-281H (CM)), which was negotiated after the Consent Decree in the Wright Companies case (Civil Action No. CV-S-92-157-HDM-RJJ), also covers gasohol. See the Commission's Press Releases relating to the Wright Companies and William P. Wright cases that were issued on February 26, 1992 and October 15, 1992, respectively.

covered by the definition of gasoline in the PMPA).⁶ Congress stated that, as commercially distributed, gasoline contains components added to the blend after completion of the refining process. Congress referred to these components as additives, which are designed to boost octane, clean internal carburetor parts and impart specific characteristics to the gasoline, such as cold starting ability, resistance to vapor lock and prevention of fuel freezing. In fact, Congress specifically described tetraethyl lead as an additive that was often used to boost the octane rating of gasoline.⁷

Consequently, the Commission concluded that Congress recognized that gasoline does not have a particular molecular structure, but is, rather, a mixture of differing molecules. In light of the PMPA's legislative history, there is no indication that Congress intended to exclude from PMPA coverage any gasoline-based fuel for which an octane rating can be determined using the (R+M)/2 test method.⁸ Nor is there any indication that Congress intended to exclude a gasoline-based fuel merely because it contains components other than gasoline itself.

Since the 1979 staff opinion was issued, gasohol has become an increasingly common automotive fuel and the ethanol in gasohol has come to be viewed generally as a relatively low-cost octane enhancer. Ethanol has become more popular as lead, also an octane enhancer, has been increasingly regulated by the Environmental Protection Agency. Rather than always being sold as "gasohol," as it was when the 1979 staff opinion was issued, gasohol is now often marketed either as "gasoline," or with an explanation that the gasoline contains ethanol. Finally, gasoline blended with 10% ethanol, does not lose its essential character as gasoline which can

⁶ H.R. Rep. No. 161, 95th Cong., 1st Sess. 16-18 (1977) and S. Rep. No. 732, 95th Cong., 2d Sess. 19-20 (1978).

⁷ *Id.*

⁸ See PMPA Sections 201(1) and (2) and 202(a)(1). Gasoline refiners are required to determine the octane ratings of the gasoline they produce in accordance with this formula. The formula is the sum, divided by two, of the Research Method and the Motor Method, two accepted laboratory test methods for evaluating the antiknock performance of automotive gasoline. This formula and method for determining the octane rating of automotive gasoline - (R+M)/2 - is recommended by the American Society for Testing and Materials ("ASTM"). The test method is referenced and discussed in ASTM D4814, "Standard Specification for Automotive Spark-Ignition Engine Fuel." Congress specified this method in the PMPA, and it was adopted in the Commission's Octane Rule.

be demonstrated by the fact that its octane rating can be determined by following the $(R+M)/2$ formula specified in the PMPA. For these reasons, against the historical legislative background discussed above, the Commission has interpreted the PMPA and the Octane Rule as covering gasohol.

The Energy Policy Act of 1992, enacted into law on October 24, 1992, amends the PMPA to extend automotive fuel posting requirements to all liquid automotive fuels. When the required conforming amendments to the Octane Rule become effective one year after the date of enactment of the Act, gasohol will be covered expressly by the Octane Rule.⁹

Pursuant to Rule 1.3(b) of the Commission's Rules of Practice, any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. This Commission opinion, overruling the 1979 staff opinion letter on this subject, has been placed on the public record for the benefit of interested persons.

⁹ The Energy Policy Act of 1992, Pub. L. No. 102-486 (1992).