

**TESTIMONY OF CARLITO P. CALIBOSO
CHAIRMAN, PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION & COMMERCE
MARCH 31, 2008**

MEASURE: S.B. No. 2630 SD2 HD1
TITLE: RELATING TO PETROLEUM INDUSTRY REPORTING.

Chair Herkes and Members of the Committee:

DESCRIPTION:

The purpose of this measure is to provide the Public Utilities Commission ("Commission") with more discretionary authority with the reporting requirements for information reported by oil producers, refiners, marketers, oil transporters, oil storers and oil retailers.

POSITION:

The Commission supports this version of the bill.

COMMENTS:

- **The Commission appreciates the amendments made to this bill by the House Committee on Energy and Environmental Protection. These amendments strengthen the Commission's authority under Chapter 486J, Hawaii Revised Statutes ("HRS") and give it greater flexibility in administering the Petroleum Industry Monitoring, Analysis and Reporting Program.**
- **Section 486J-3, Hawaii Revised Statutes ("HRS"), currently requires distributors and major fuel users to file certified statements every week with the Commission containing, among other things, specific information on fuel use and sales, volumes, prices, and margins**
 - The bill amends this section to allow the Commission to set a time period for filing the statements other than every week, if appropriate.
 - The bill also allows the Commission to establish reporting dates for these statements.

- This flexibility would provide for more effective monitoring if weekly reporting should prove to be unrealistic for either the companies or the Commission.
- **In addition, the bill also amends Section 486J-8(b), HRS, to change the time period within which the Commission must disclose information to the public after receiving it from 14 days to 30 days, or as practically and technically feasible after receipt of the information.**
 - The Commission supports this amendment to ensure that adequate time is allowed for receipt, review, processing and publication of the data.
- **Lastly, the bill amends Section 486J-11, HRS, to give the Commission discretion to determine the specific information that must be reported, in order to most effectively facilitate the efficient reporting and analysis of information collected under the chapter.**

Thank you for the opportunity to testify.



Western States Petroleum Association

March 31, 2008

2 p.m.

**House Committee on Consumer Protection and Commerce
Conference Room 325**

SB 2630, SD2, HD 1 - Relating to Petroleum Industry Reporting

Western States Petroleum Association is a non-profit trade association representing a broad spectrum of petroleum industry companies in Hawaii and five other western states. We are providing these comments on ***SB 2630, SD2, HD1***.

This measure currently provides the Public Utilities Commission ("PUC") with greater flexibility in requiring reporting time periods under the Petroleum Industry Monitoring and Reporting Act ("PIMAR"), something to which we are not opposed. However, we are concerned that earlier versions of this measure which exclusively addressed the publication of sensitive proprietary information, could be re-inserted should this measure be advanced to conference committee.

Hawaii member companies have been cooperating with the PUC and are not aware of any confirmed instances in which a reporting entity has failed to comply with the PIMAR program requirements. The PUC earlier this year released their initial findings based upon their analysis of the data and found no signs to suggest any wrongdoing by market participants. In fact, the report authored by ICF validated many of the findings of previous studies that advised against regulatory actions, such as the gas cap, that negatively impacted the local petroleum market to the detriment of consumers.

Local petroleum companies are understandably concerned that their competitively sensitive information be treated as such, and that the state's reporting requirements do not unwittingly result in a disclosure of competitively sensitive information that could lead to market distortions and negatively impact the companies and consumers.

We want to bring to your attention certain legal issues stemming from earlier versions of this bill and the reason for our concern that the publication of proprietary information not be reinserted into the bill. These proposals threaten trade secret property rights protected by the takings clause of the United States Constitution.

- The existing Petroleum Industry Monitoring and Reporting act ("PIMAR") requires each distributor to file weekly reports with the Hawaii Public Utilities Commission ("Commission").
- The weekly reports must include "the average crude oil cost and the average wholesale gasoline prices charged by the distributor for each class of trade..."

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- Earlier versions of this measure would require the Commission to “publish weekly for each island” the information filed by distributors in their weekly reports. We understand that some legislators may continue to advocate for these provisions should this measure advance.
- The information required to be reported under PIMAR is trade secret information. Courts “have recognized that information related to cost and pricing can be trade secret.” (*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1455 (2002)).
- The Hawaii Supreme Court has recognized that trade secrets are property rights protected by the Uniform Trade Secret Act, which has been adopted by Hawaii. (*Teller v. Teller*, 99 Haw. 101, 108-109 53 P.3d 240 (2002)).
- The Takings Clause of the U.S. Constitution prohibits the government from taking property without just compensation. Trade secret property rights recognized under state law are property rights protected by the Takings Clause. (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1004 (1984)).
- In order to preserve their trade secret rights, distributors would have to make “efforts that are reasonable under the circumstances to maintain its secrecy.” (HRS § 482B-2.) That means distributors may find it necessary to seek judicial protection for the cost and price information prior to reporting it for publication, as is consistent with prior rulings.

Thus far under the Petroleum Industry Monitoring and Reporting Act (“PIMAR”), local petroleum companies have submitted information under protective orders negotiated with the PUC. In this manner, companies can be assured that information that they provide in response to PIMAR cannot be used by competitors to gain an advantage over them in the marketplace.

Thank you for the opportunity to provide these comments to *SB 2630, SD2, HD1*.