

A Review of the Liquefied Petroleum Gas Board

SCOPE AND METHODOLOGY

The period of our review of the LP Gas Board was FY 00-01 through FY 04-05. We did not consider the operations of the LP Gas Board or the Department of Labor, Licensing, and Regulation (LLR), which provides administrative support to the board, except for activities relating to the audit objective. We interviewed board members, officials of the Department of Labor, Licensing, and Regulation, private organizations associated with LP gas, and officials at the Federal Trade Commission. We reviewed the following documents:

- State laws and regulations.
- National Fire Protection Association standards.
- LP Gas Board's meeting minutes.
- LLR publications.
- Other states' laws, regulations, and policies.
- Prior LAC reports relating to the regulation of professions.

This audit was conducted in accordance with generally accepted government auditing standards.

November 2005



SUMMARY

Members of the General Assembly requested that the Legislative Audit Council review the Liquefied Petroleum (LP) Gas Board to determine whether the current system of regulation for liquid petroleum gas serves the public interest without limiting competition or impeding commerce.

We found that liquefied petroleum gas should be regulated because it is a hazardous substance that is highly flammable. However, the statutory requirements for LP gas dealers to maintain minimum storage capacities could limit competition and impede commerce. There are several reasons why we recommend that requirements for minimum storage be repealed:

- Based on a S.C. Attorney General's opinion, storage requirements could be unconstitutional.
- The absence of the storage requirements would not result in significant harm to consumers.
- The statute requires storage capacity, but it does not require dealers to keep a specific amount of LP gas on hand at any given time.
- Federal Trade Commission officials stated that storage requirements could have a negative effect on smaller competitors in the LP gas industry.
- Zoning restrictions sometimes prohibit new storage facilities.

Also, we found evidence that board members have shown anticompetitive behavior in the course of their duties. Most other states we contacted did not have a board to regulate LP gas; instead, an agency was responsible for LP gas regulation. The S.C. state fire marshal's office regulates other hazardous materials and should administer LP gas regulations.

In related areas, we found that the LP Gas Board exceeded its statutory authority when it created a new licensing category. Beginning in 2003, the board granted modified dealers licenses to some companies and has developed a test for this category. There is nothing in the current statute which grants authority to the board to create new license categories. Also, tests for licensees of the LP gas board do not meet professional testing standards. A continuing education and training program created by the National Propane Gas Association (NPGA) could be used instead of the current program.

BACKGROUND

Liquefied petroleum gas (LP gas) is a material that is potentially hazardous because of its flammability. It is composed of hydrocarbons, including propane, propylene, butanes, and butylenes. LP gas provides energy that is used for some of the following purposes:

- Residential and Commercial – Cooking, heating, drying, and refrigeration.
- Agriculture – Greenhouse heating, crop drying, and powering equipment.
- Industrial – Metalworking, ceramic and glass production, and construction.
- Transportation – An alternate automotive fuel.

The Liquefied Petroleum Gas Board was created to promulgate and enforce rules and regulations to develop minimum standards relating to liquefied petroleum gases. The Department of Labor, Licensing, and Regulation (LLR) provides administrative and operational services to the board.

The LP Gas Board is composed of seven members, who serve two-year terms, and are appointed by the Governor:

- One fireman.
- Two LP gas dealers.
- One LP gas licensee in a category other than dealer.
- One insurance industry representative.
- Two public members.

As of September 2005, there was one vacant public member position on the board.

LLR provides administrative support to the board through the state fire marshal’s office. The state fire marshal ensures fire safety for S.C. citizens through education, regulation, and code enforcement. The state fire marshal’s office conducts the administrative duties associated with regulation of the LP gas industry, such as inspecting storage facilities, conducting investigations, administering tests, and collecting licensing fees. In FY 04-05, the fire marshal’s office conducted 681 inspections for LP gas.

South Carolina’s laws establish the provisions of the National Fire Protection Association (NFPA) pamphlet No. 58, which is the Liquefied Petroleum Gas Code, as the minimum standards for handling LP gas in the state. The provisions in the code reflect a national consensus of what is necessary to provide protection during the storage, handling, transportation, and use of LP gas.

LP Gas Licensing Categories

The board administers the licensing requirements for the LP gas industry. A person must have a license to engage in the storage, handling, or transportation of LP gas as well as to install, service, or repair LP gas systems or containers.

There are seven LP gas licensing categories and the licenses are issued for two-year periods (see table). To be licensed as a dealer, modified dealer, or a reseller, an applicant must pass an examination based on the NFPA codes.

By law, the cost to regulate an industry or profession must be paid by its licensees. LLR collected \$93,545 in licensing fees for LP Gas Board licenses in FY 04-05. The department reviews board licensing fees to ensure they are adequate and not excessive.

LIQUEFIED PETROLEUM GAS LICENSE CATEGORIES			
TYPE OF LICENSE	DESCRIPTION	BIENNIAL LICENSING FEE	NUMBER OF LICENSES*
Reseller	Engages in the resale of LP gas by filling cylinders up to 100 pounds.	\$100	461
Dealer	Engages in the installation of LP gas systems or in the manufacture, distribution, sale, storing, or transporting of LP gas.	\$400	196
Utility Gas Plant	A fuel distribution facility that uses LP gas to supplement natural gas supplies when necessary.	\$500	10
Modified Dealer	Engaged in filling LP gas cylinders not more than 100 pounds and/or transporting such cylinders.	\$400	17
Transporter	Engages in the transportation of LP gas from pipelines to bulk plants in quantities higher than 3,500 gallons.	\$500	8
Cylinder Exchanger	Provides filled LP gas cylinders for purchase or exchange.	\$400	5
Installer	Installs or services appliances or equipment to LP gas systems or containers.	\$50	3

* Data as of September 2005 for modified dealer and as of May 2005 for all other categories.

Source: State law and the state fire marshal’s office.

STATUTORY STORAGE REQUIREMENTS UNNECESSARY

We found that the statutory requirements for LP gas dealers to maintain minimum storage capacities could limit competition and impede commerce. Also, we found evidence that board members have shown anticompetitive behavior in the course of their duties.

S.C. Code §40-82-240(A) requires LP gas dealers to have storage capacity of 30,000 gallons located within close proximity to the area to be served. It also requires vendors from outside of the state to have a storage capacity within close proximity to the area to be served. State law allows the board to grant a waiver of the 30,000 gallon storage requirement. From FY 99-00 through FY 04-05, there were 18 requests for waivers of the storage requirement, and 15 were granted by the board.

Anticompetitive Behavior

We identified instances where the members of the LP Gas Board displayed anticompetitive behavior during hearings held to consider waivers of the storage requirement. The board generally granted waivers, but required out-of-state vendors to only deliver to S.C. customers within 25 to 40 miles of their storage. Two board members stated at an administrative hearing that the purpose of limiting out-of-state vendors to a certain distance from their storage was to keep out-of-state vendors from taking South Carolina dealers' customers. The board's statements and discussions provided evidence that they may wish to inappropriately limit competition through the board's regulatory authority.

JULY 2002 ADMINISTRATIVE HEARING	
Board Member A:	That's why I think it's really important about the mileage because I really...I just don't think they need to be coming into South Carolina taking more customers from Carolina dealers.
Member B:	That's why the parameters are on there.
Lawyer:	...Be real careful now. It is not the purpose of a licensing board to protect the business interest of a licensee. We have always got to talk about protecting the customer. So just be real careful what you say here.
Member B:	I think I've been called on that on several occasions.
Member A:	I just want to make sure everybody's served.
Lawyer:	Precisely.
Member A:	By people who are close by.

At another administrative hearing in October 2003, a vendor applied for a waiver from the 30,000 gallon storage requirement. The vendor sold pre-filled 100 pound tanks to customers throughout the state.

OCTOBER 2003 ADMINISTRATIVE HEARING	
Board Member:	And we need to have a stipulation to restrict them from getting into the retail business. (discussion)
LLR Staff:	They are not going and competing with your customers. They are not going to... (discussion)
Lawyer:	It would be a prohibition against selling except in the form of pre-filled cylinders, I think.
LLR Staff:	Right. That's exact — and you are right. What they are looking for and willing to accept is some sort of restricted license. They are not looking to do installs at all. That's not what they are asking. They are not looking to go out there and compete with the residential customers, or even the commercial customers. They are looking to do the retail sales that they have always been doing, the commercial customers that they have already gone out there and sold to...That's what they are out for. ...

We also found that board members wanted to know if the waiver requesters were planning on expanding their business into South Carolina. The purpose of the board is to develop regulations, ensure state laws are followed, and institute proceedings for violations of the LP gas law. It is not to limit competition for vendors.

According to an official from the state fire marshal's office, the reason for the distance requirement is to ensure the safety of S.C. citizens. The board wants to limit the length of time a hazardous material is being transported on South Carolina roads. The official further stated that the industry wants storage facilities to be near delivery points. Yet, there is no requirement that in-state vendors deliver only to customers within a specific distance from their storage facilities. Therefore, a dealer could have a storage facility in Myrtle Beach and deliver to customers in Charleston with no restrictions.

Requirements Could be Unconstitutional

A 2002 case, decided by the 8th Circuit U.S. Court of Appeals, R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, found that a Missouri statute requiring dealers to maintain a minimum LP gas storage capacity of 18,000 gallons in the state imposed an unconstitutional burden upon interstate commerce. Based on this court proceeding and other legal analysis, the S.C. Attorney General's Office found, in an April 1, 2003, opinion, that §40-82-240, which specifies storage requirements, is constitutionally suspect and would in all probability be declared unconstitutional by a court as violative of the commerce clause of the U.S. Constitution. According to the opinion, the commerce clause prohibits state regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the market place.

No Proof of Harm to Consumers

We found no evidence that the absence of the storage requirements would result in significant harm to consumers. According to officials at the state fire marshal's office and LP Gas Board members, the storage requirements are needed to ensure that the public would have access to LP gas should an emergency disrupt the supply. In spring 2005, there was a shortage when the Dixie Pipeline, the main supplier of LP gas in S.C., was closed due to contamination issues. There was not a high demand for LP gas at this time, so there were no significant negative effects.

LP Gas Board members warned that if a shortage happened when usage was at its peak, it could have harmful effects on the public. When we asked officials to document an instance where a supply shortage has caused a negative effect on citizens, they could not. Considering the mild climate of South Carolina and the temporary duration of the disruption, it seems that the risk of harm due to lack of supply is unlikely. Also, there could be a risk of harm due to proliferation of storage facilities required by the current statute.

No Supply Requirement

It is difficult to determine how the 30,000 gallon storage requirement would protect South Carolina citizens from a liquid petroleum gas shortage. The statute requires the storage capacity, but it does not require dealers to keep a specific amount of LP gas on hand at any given time. Therefore, if there was a supply shortage, there is no guarantee that fuel would be available.

Federal Trade Commission

We contacted the Federal Trade Commission (FTC) to obtain information about the effects of the S.C. statutory requirement for dealers to have 30,000 gallons of storage. The FTC is a federal agency whose mission is to ensure that there is competition among producers and accurate information in the hands of consumers to generate the best products at the lowest prices. FTC officials stated that they would support eliminating the 30,000 gallon storage requirement because it could have a harmful effect on the smaller competitors in the LP gas industry.

Zoning Prohibits New Storage Facilities

We found evidence that some counties do not allow installation of new storage facilities. According to a state fire marshal official, the counties do not want the storage facilities because of the danger associated with them, so the counties have strengthened their zoning laws. The tightened zoning laws and the storage requirements together act as a barrier to entry for a new company in the LP gas business.

Other States' Regulation of LP Gas

We reviewed how 10 other southeastern states regulate LP gas and found that all regulated LP gas in some capacity. We also found that only three, Alabama, Arkansas, and Mississippi, regulated LP gas with the assistance of a board. Many of the states relied on the state fire marshal's office or had an LP gas division within another agency, such as the department of insurance, to develop rules and regulations and conduct the administrative duties associated with LP gas.

Other States' Storage Requirements

We found that there are no storage requirements in three (North Carolina, Texas, and Virginia) of the ten southeastern states we reviewed. In Texas there is an LP gas regional supply emergency response protocol, which includes a distribution plan in the case of emergencies. Furthermore, Texas regulations allow vendors from other states to deliver LP gas into the state without obtaining a license should an emergency occur. South Carolina should eliminate the storage requirement and develop a protocol for occurrences when there is a supply problem.

Regulation of Other Hazardous Substances

State law designates the state fire marshal's office as the agency responsible for implementing, administering, enforcing, and promulgating rules and regulations regarding the explosives and blasting industry. Explosives are potentially just as hazardous to the public as LP gas, yet a board is not needed to promulgate regulations regarding these materials. According to an official at the state fire marshal's office, if the board was dissolved, then the state fire marshal's office would not have a problem regulating the LP gas industry.

CREATING A NEW LICENSE CATEGORY

The LP Gas Board exceeded its statutory authority when it created a new licensing category. Beginning in 2003, the board granted modified dealers licenses to some companies and has developed a test for this category. LP gas licensing categories are established in statute. There is nothing in the current statute which grants authority to the board to create new license categories.

The board received requests for waivers from companies it perceived to be acting in the capacity of a dealer. The companies were transporting 100 pound cylinders of LP gas to customers in the state. These individuals were applying for transporter licenses, but according to state law they fell into the dealer category.

To be a dealer in South Carolina, a company must have a storage facility of 30,000 gallons in the state. These companies did not have the storage and requested waivers from this requirement from the board. The board determined that it should create a new category and define it as the modified dealer. The board then granted the state fire marshal's office the authority to grant the modified license as long as the requester fell under specific parameters.

Although the LP Gas Board is recommending that the law be changed to create a category for modified dealers, it had no authority to use the category prior to statutory change. Moreover, if the 30,000 gallon storage requirement were eliminated, there would be no need for the modified dealer category. These vendors would fall into the dealer category automatically because all they lack is the storage requirement.

LICENSEE TESTING PRACTICES

Tests for licensees of the LP Gas Board do not meet professional testing standards. S.C. Code §40-82-230 requires the board to approve examinations and the Department of Labor, Licensing, and Regulation to administer the tests. The board currently has examinations for the dealer, reseller, and modified dealer categories.

The LP gas license examinations were developed by a committee of individuals familiar with the LP gas industry and state fire marshal staff, and then approved by the board. The tests are administered by the state fire marshal's office and graded by staff. The state fire marshal's office does not maintain comprehensive pass/fail records of the test.

To meet professional standards, exams should be based on up-to-date job analyses and designed according to documented test plans or specifications. Item analyses should be performed to review results and document test validity and reliability. When exams do not meet professional testing standards, there is little assurance that they are fair to applicants or legally defensible.

A continuing education and training program created by the National Propane Gas Association (NPGA) could be used instead of the current program. The South Carolina Propane Gas Association (SCPGA), the state chapter of the NPGA, offers training to employees in the LP gas industry. The training is conducted by an instructor brought in by the SCPGA. Individuals are tested on their knowledge of the training, and tests are secure because they are graded by an external entity. According to an SCPGA representative, many states use the NPGA's training and assessments, but they may also use additional tools .

RECOMMENDATIONS

1. The General Assembly should amend S.C. Code §40-82-240 to delete subsection (A)(1), which requires dealers to have LP gas storage capacity of 30,000 water gallons.
2. The General Assembly should amend S.C. Code §40-82-10 to eliminate the Liquefied Petroleum Gas Board and require the state fire marshal's office to regulate liquid petroleum gas.
3. The Liquefied Petroleum Gas Board should cease granting licenses for which it has no authority.
4. The Liquefied Petroleum Gas Board should use the National Propane Gas Association to certify licensees.

Agency Comments



Mark Sanford
Governor

Adrienne Riggins Youmans
Director

South Carolina
Department of Labor, Licensing and Regulation



110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
(803) 896-4300
FAX: (803) 896-4393
www.llr.state.sc.us

November 1, 2005

George L. Schroeder, Director
Legislative Audit Council
1331 Elmwood Avenue, Suite 315
Columbia, SC 29201

Re: Report: *A Review of the Liquefied Petroleum Gas Board*

Dear Mr. Schroeder:

The Department of Labor, Licensing and Regulation, of behalf of ourselves and the Liquefied Petroleum Gas Board, whose program we administer, thank you for the opportunity to respond to the Review of this program. The Legislative Audit Council staff has done an admirable job of analyzing the nuances of a program that employs very technical national consensus standards and integrates them into the regulatory environment of South Carolina. The Report Conclusions are largely supported by evidence in the public record. The Department certainly agrees with the primary conclusion that amendment of the statutes that govern the program is appropriate.

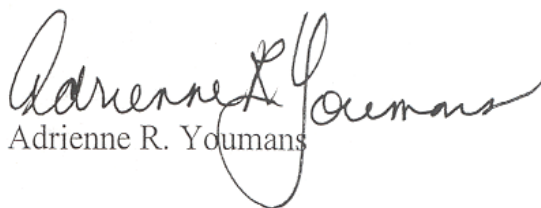
However, the Department remains concerned about legislatively mandating use of the NPGA training and testing program as a prerequisite for licensure to do business in the state. The Office of the State Fire Marshal respects the continuing education and training program created by the National Propane Gas Association. The Association's testing component incorporates many safeguards and validation features that are missing in the state examinations. However, the Association is a membership organization. At times, local LP gas dealers, resellers, and installers, who are not members of the Association have found it difficult to achieve certification using the SCPGA sponsored

George L. Schroeder, Director
Page Two
November 1, 2005

curriculum and certification tests. The Department is always hesitant to recommend that the State mandate the use of any training or testing program that is only available on a cost effective basis to members of a trade association. The Department endorses the use of the National Propane Gas Association to certify licensees only if that organization or its local affiliate guarantees equal access to the certification program to members and non-members. Certainly, there is no such guarantee in the current publications by either Association.

Thank you for the opportunity to relay our concerns about the report. With kindest

Very truly yours,


Adrienne R. Youmans

regards, I am

ARY:pf

AUDITS BY THE LEGISLATIVE AUDIT COUNCIL CONFORM TO GENERALLY ACCEPTED GOVERNMENT AUDITING STANDARDS AS SET FORTH BY THE COMPTROLLER GENERAL OF THE UNITED STATES.

FOR MORE
INFORMATION

This and other documents
are published
on the Internet at

www.state.sc.us/sclac

LEGISLATIVE AUDIT COUNCIL
1331 Elmwood Ave., Suite 315
Columbia, SC 29201
(803) 253-7612

George L. Schroeder
Director

Authorized by §2-15-10 *et seq.* of the South Carolina Code of Laws, the Legislative Audit Council, created in 1975, reviews the operations of state agencies, investigates fiscal matters as required, and provides information to assist the General Assembly. Some audits are conducted at the request of groups of legislators who have questions about potential problems in state agencies or programs; other audits are performed as a result of statutory mandate.

The Legislative Audit Council is composed of five public members, one of whom must be a practicing certified or licensed public accountant and one of whom must be an attorney. In addition, four members of the General Assembly serve *ex officio*.

Audits by the Legislative Audit Council are conducted in accordance with generally accepted government auditing standards as set forth by the Comptroller General of the United States.

Copies of all LAC audits are available at no charge. We encourage you to visit our website to view and print copies of LAC reports.

Public Members

Dill B. Blackwell, Chairman
Nancy D. Hawk, Esq., Vice Chairman
Marion H. Kinon, Esq.
Philip F. Laughridge, CPA
Henry M. Swink

Members Who Serve Ex Officio

Glenn F. McConnell
Senate Judiciary Committee
Hugh K. Leatherman
Senate Finance Committee
Rex F. Rice
House Ways & Means Committee
James H. Harrison
House Judiciary Committee

Audit Team

Jane I. Thesing
Deputy Director

Susan J. Poteat
Auditor