

Opinion No. 68-100

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BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. C. P. Correll Director New Mexico Liquefied Petroleum Gas Commission P.O. Box 1357 Santa Fe. N. M. 87501

QUESTION

FACTS

There are twenty-six refineries and natural gas processing plants in New Mexico licensed by this Commission with a Classification 8 license. At some of these producing plants, several different companies are offering for sale and selling liquefied petroleum gas but it is always loaded by the facilities and employees of the producer. Some of these companies are licensed for another location within the state and some are brokers who first buy from the actual plant operator and then bill the company who moves the product from the plant. Some of these companies have offices in states other than New Mexico but have no assets or other activities in New Mexico.

QUESTION

If an actual plant operator is licensed and then sell to a broker or reseller, who in turn may bill one or two more in the chain before the product is billed to the company that takes physical custody of the product, who of all of these must be licensed?

CONCLUSION

See analysis.

OPINION

{*155} ANALYSIS

The liquefied petroleum gas industry in New Mexico is governed by Section 65-7-1 through Section 65-7-23, N.M.S.A., 1953 Compilation. The purpose of the Act was to provide safety regulations and control of the liquefied petroleum gas industry (see note of the compiler to § 65-7-1 and Opinion of the Attorney General No. 57-157, issued July 8, 1957) and for the health, safety and protection of the public (see Opinions of the Attorney General No. 63-53, issued May 10, 1963 and No. 65-153, issued August 16, 1965). The Act created the Liquefied Petroleum Gas Commission (Section 65-7-1) and gave it broad licensing powers (Section 65-7-5). The types of licenses that may be issued by the commission are enumerated in Section 65-7-8.

The question asked here concerns a Classification 8 license. That type of license is issued by the commission under the following criteria (as set out in Section 65-7-8 (8)):

"Manufacturing and delivery of liquefied petroleum gas from manufacturer's storage tanks to transportation equipment of licensees authorized to transport or sell such gas, or delivery into tanks cars for shipment by rail"

We are concerned here with whether the brokers or middlemen who really do not handle the liquefied petroleum gases but only deal in sales of the gas must have a Classification 8 license.

The key word in answering this question is "delivery". In the technical legal sense mere transfer of title may constitute delivery. The usual meaning of delivery is the actual removal from the premises and a physical change in possession. What is the meaning of "delivery" as used in Section 65-7-8 (8)?

One New Mexico case has defined delivery as the placing in possession of the subject matter (**Levers v. Atchison, Topeka and {156} Santa Fe Ry. Co.**, 22 N.M. 599, 604 (1917)). Cases in other jurisdictions have also been confronted with the problem of the meaning of delivery. The court in **Bowles, Price Administrator, v. Ward** (D.C.W. D. Pa.) 65 F. Supp. 880 (1946) states at page 889:

"It must, therefore, be presumed that Congress, in enacting such statute making it unlawful to sell or deliver in violation of the price schedule which applied to coal, used such words according to their ordinary and usually accepted meaning. Schreffler, et al. v. Bowles (10th Cir. 1946)

In the Schreffler case cited above, the court said that "the words 'sell and deliver' are not synonymous terms. They have separate and distinct meanings."

In **Michigan Type Co. v. Michigan Fire and Marine Insurance Co.**, 92 Mich. 482, 52 N.W. 1070, 1072 (1892) the court discussed the meaning of the word deliver. In that case the court held that deliver meant removal and that in determining the meaning of the word "deliver" all the facts must be considered.

It is evident from a reading of Section 65-7-5 that delivery was to mean something entirely different than sale or manufacture. This section provides that no person, firm or corporation shall:

". . . engage in the manufacture, sale, transportation, dispensing or storage of liquefied petroleum gases within this state, . . . without having first obtained from the commission a license so to do . . . No such license shall be issued until the commission has determined that the applicant will meet all safety requirements provided for in this act and required by the rules and regulations of the liquefied petroleum gas commission . . ."

It is therefore the opinion of this office that the word deliver is not to be construed here in its direct legal sense but here means the actual physical transportation and change of possession of the liquefied petroleum gases. Following from that conclusion it is the further opinion of this office that only those who have physical custody of liquefied petroleum gas must have a Class 8 license. In order to effectuate the purpose of the Act, which is public safety, there is no need to license a broker or middleman who is merely selling and is not physically handling the liquefied petroleum gases in any way or manner.