



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket PD907/908

Order PC10-01

IN THE MATTER of applications by
Karbrennal's Company Inc. and Stratford
Petroleum Inc. (TBI) for licenses to operate retail
gasoline and diesel outlets on Jubilee Drive in
Stratford, PEI.

BEFORE THE COMMISSION

on Thursday the 18th day of November, 2010

Allan Rankin, Vice-Chair
John Broderick, Commissioner
Chester MacNeill, Commissioner

Order

Compared and Certified a True Copy

(Sgd) *Allison MacEwen*

Technical and Regulatory
Services Division

IN THE MATTER of applications by
Karbrennal's Company Inc. and Stratford
Petroleum Inc. (TBI) for licenses to operate retail
gasoline and diesel outlets on Jubilee Drive in
Stratford, PEI.

Reasons for Order

1. Introduction

[1] These Reasons for Order address the applications filed with the Commission by Karbrennal's Company Inc. on February 4, 2010 and by Stratford Petroleum Inc. (TBI) on February 11, 2010 for initial licensing to operate, respectively, a retail self-serve gasoline and diesel outlet and a retail split-serve gasoline and diesel outlet. Both applications featured convenience store facilities and both proposed to locate on Jubilee Drive in Stratford, PEI. The applications were filed pursuant to the *Petroleum Products Act*, R.S.P.E.I. 1988, Cap P-5.1 (the "Act"), which requires, among other things, a license from the Commission in respect of each outlet operated by a retailer.

[2] Section 20 of the *Act* sets forth the criteria the Commission must consider when issuing a license:

20. When issuing a license with respect to the operation of an outlet operated by a retailer, the Commission shall consider the public interest, convenience and necessity by applying such criteria as the Commission may from time to time consider advisable including but not restricted to the demand for the proposed service, the location of the outlet, traffic flows and the applicant's record of performance.

2. Concurrent Applications

[3] The Commission recognizes that the presentation of two concurrent applications for essentially the same site provides a unique challenge. Previous Commission licensing decisions have involved scenarios of one applicant for one site. In this instance, however, two applications from different applicants have been submitted almost simultaneously for essentially the same location. Accordingly, it will be necessary for the Commission to decide whether any, one or two licenses should be granted in the circumstances of this case.

3. Procedure for Review

[4] The applications were publicly noticed on the Commission's website on and after March 19, 2010 and also published by the Commission in *The Guardian* on March 24, 2010. Among other things, the Notice of Application (the "Notice") stated, in part, as follows:

If you wish to comment on the applications, you can write to the Commission at the address below. Comments must be received by Tuesday, April 6, 2010 in order to be considered. Comments provided to the Commission must also be forwarded to the Applicant(s) at the address below.

The Commission will determine the necessity of a public hearing into these applications following receipt of written comments.

[5] In response to the Notice, the Commission received two formal notices of intervention against the proposed licenses and three e-mails and/or letters expressing opposition to the applications. Both notices of intervention requested a public hearing to be conducted relative to the matter.

[6] The requirement for a public hearing into licensing applications is discretionary. Section 38(1) of the *Petroleum Products Act* reads as follows:

38. (1) The Commission of its own motion may, and on the request of the Lieutenant Governor in Council shall, conduct a public hearing in respect of any matter involving licensing under this Act and any matter relating to the administration of this Act or the regulations.

[7] Although discretionary, this authority must be exercised reasonably and in a manner consistent with the overall purposes of the *Petroleum Products Act*.

[8] The Commission determined that, in light of the similarity of the applications and the degree of interest shown by both interveners and the general public, a public hearing was indeed appropriate and, accordingly, a

Notice of Hearing was published in the Guardian on June 11, 2010. While the hearing was initially scheduled for July 6, 2010, subsequent scheduling issues on the part of participants resulted in the hearing being rescheduled for July 26, 2010.

[9] A hearing, lasting nine days in total, commenced on July 26, 2010 and proceeded throughout the week. The hearing reconvened on August 9th, 10th and 12th and was completed on August 23rd. Fifty-five documents relating to the applications were entered as exhibits during the hearing. A total of 14 witnesses testified at the hearing either in support of or in opposition to the applications. In addition, two public presentations were made.

Appearances & Witnesses

Participants in the hearing and the parties for whom they appeared were as follows:

For Applicant: Karbrennal's Company Inc.

Counsel: Lynn Murray, Q.C.; Kerri Lynn Seward Carpenter
Matheson & Murray

Witnesses: Bruce Brine
Warren Maynard
Kevin Reynolds

For Applicant: Stratford Petroleum Inc. (TBI)

Counsel: David Hooley, Q.C.; Ewan Clark
Cox and Palmer

Witnesses: Jean Pierre Pethel
Richard Graham
Wade Bruce
Alan Aitken

Intervener In Opposition: Cape D'or Holdings Limited

Counsel: Sean Casey, Q.C.; Scott M. Barry
Stewart McKelvey

Witnesses: Michael Gardner
Doug MacDonald

Intervener In Opposition: P.E.I Retail Gasoline Dealers Association

Witnesses: Dale Mader
Brock Vickerson
Austin Roberts
Bobby Cooper
Wayne Vloet

Public Presenters: Bus Gay
Tim Banks

For The Commission:

Staff: Allison MacEwen, Director, Technical and Regulatory Services
Counsel: Doug Drysdale, Q.C., Carr, Stevenson & MacKay
Recording Secretaries: Linda Allen, Heather Walker

4. Review of Evidence in Support

A) Karbrennal's Company Inc. Application

[10] Three witnesses for Karbrennal's Company Inc. provided evidence in support of the application, namely, Mr. Bruce Brine, company shareholder and business partner of R.G. Carmichael, Mr. Warren Maynard, Director of Retail Operations for Ultramar Canada and Mr. Kevin Reynolds, Development Officer, Town of Stratford.

[11] Mr. Brine reviewed the successful operational history of Cornwall Esso which he and Mr. Carmichael have operated since 2003. He then outlined the features of the proposed Stratford outlet which is to include self serve gas and diesel pumps, a convenience store and a food service offering. He advised that the decision not to offer a full service option was based on their Cornwall experience where demand for such services has dropped from 30% at the time of opening in 2003 to less than 10% now. He indicated that, while not finalized, negotiations between his company and Ultramar are at an advanced state pending confirmation of the receipt of a retail license. He spoke of the desirability of the proposed location, citing its high visibility and the fact that it can be accessed from both Jubilee Drive and Shakespeare Drive. He advised that a construction budget had been determined and that project financing had already been negotiated with the Bank of Montreal. Mr. Brine indicated that a minimum volume required for sustained viability would amount to four million litres and that this volume would in all likelihood be sourced from a variety of surrounding existing outlets, including the existing Stratford Esso site and perhaps the Riverside Drive site in Charlottetown. He commented on the fact that his company had conducted two public opinion surveys, both of which indicated strong support for a second gasoline outlet in the community. Four hundred people were surveyed in each survey.

[12] Mr. Brine's evidence was to the effect that he and his business partner were experienced in the industry, knowledgeable, financially and operationally stable, and eager to begin operations in what they perceive to be a growing community in Stratford, P.E.I.

[13] The second witness called on behalf of Karbrennal's Company Inc. was Mr. Warren Maynard, Director of Retail Operations for Ultramar Canada Inc. Mr. Maynard confirmed that he has been negotiating with the applicant relative to a supply contract. Negotiations, though not finalized, were in an advanced stage and awaiting the outcome of the license hearing process. He commented that Ultramar is excited about Karbrennal's as a possible partner due to Robert Carmichael's experience as a petroleum products dealer in Cornwall, P.E.I. He noted that there is a critical shortage of qualified, well-capitalized dealers in Atlantic Canada. He expressed his view that the proposed new site represents a significant opportunity in what Mr. Maynard deemed to be an underserved market, and is dramatically different from a nearby Ultramar outlet which was closed in 2006 because it was outdated and in need of substantial corporate reinvestment. He felt that the community has grown and the new location is better.

[14] During cross examination, Mr. Maynard explained that the former Ultramar outlet's volume was not sufficient to justify additional capital investment but that his company was very interested in partnering with independent retailers such as the applicant in a new enterprise.

[15] The final witness called on behalf of Karbrennal's Company Inc. was Mr. Kevin Reynolds, Development Officer for the Town of Stratford. Mr. Reynolds testified that the estimated population of the Town of Stratford is between 8200 and 8500 residents with the last official census taken in 2006 indicating a population of 6400. He noted that Stratford has been described as the fastest growing community in P.E.I., and there has been significant growth in the community since 2001. He stated that the value of authorized development permits in the town has grown substantially over the past few years and currently is in excess of \$31 million. He also stated that Karbrennal's proposal is consistent with the Town's plans for future development of its downtown core.

[16] Mr. Reynolds confirmed that the site where Karbrennal's intends to develop its outlet had been approved by the Town, whereas the site opposite where Stratford Petroleum Inc. intends to locate has not yet received official approval.

[17] The Commission has reviewed documentary exhibits which were presented as part of Karbrennal's application (as well as all of the exhibits relating to both applications). One of these documents was a letter from Alan Aitken, Traffic Operations Engineer for the Province of P.E.I., which indicated that qualified approval had been given for access to the site. As it happened, Mr. Aitken testified in relation to the Stratford Petroleum application, and more will be said about site access below.

B) Stratford Petroleum Inc. Application

[18] Four witnesses for Stratford Petroleum Inc. provided evidence in support of the application, namely, Jean Pierre Pethel of Pethel Consultants Inc., Mr. Richard Graham, Territory Manager, Petro-Canada, Mr. Wade Bruce, applicant and Mr. Alan Aitken, Traffic Operations Engineer, Province of PEI.

[19] The first witness called on behalf of the applicant was Mr. Jean Pierre Pethel, a marketing consultant who had prepared numerous market evaluations for both Petro-Canada and the National Bank. In his view, the Stratford market provides an excellent marketing opportunity for a new retail gasoline/convenience store facility such as has been proposed by Stratford Petroleum. Given the traffic counts in the area, the size of the existing surrounding community and the current and anticipated population growth rate of Stratford, in his estimation, c-store sales of \$1.1 million and gasoline volumes of between 4.9 and 5.3 million litres were realistic sales forecasts. He indicated that 60 - 70% of the applicant's customer base would be sourced from Stratford with the remaining 30% coming from surrounding areas and transient traffic. Indeed, based on the existing provincial average retail outlet throughput, the community could support the addition of at least two new outlets.

[20] During his testimony, Mr. Pethel referred to and explained a market study he had conducted for Stratford Petroleum, as well as a similar document he prepared for the purposes of the hearing, as well as a critique of a report prepared on behalf of one of the interveners, Cape D'or Holdings Ltd. In short, his view was that the market potential for a new gas station outlet in Stratford was "huge".

[21] During cross-examination, Mr. Pethel testified that the majority of his previous marketing analysis has been conducted in the province of Quebec and that this case represented his first experience with the PEI market. Despite this, Mr. Pethel stated that, in his opinion, the existence of price regulation tends to stabilize the viability of low volume outlets. Indeed, he felt that the PEI market could be described as a stable market. He concluded by stating that based on Statistics Canada statistical analysis, while the PEI market as a whole had more retail outlets per capita than the national average, the Stratford market by virtue of having fewer outlets per capita than the national average could indeed be classified as being underserved.

[22] The second witness called on behalf of Stratford Petroleum Inc was Mr. Richard Graham, territory manager for Petro-Canada. Mr. Graham explained that his current territory responsibilities included mainland Nova Scotia, PEI and part of southern New Brunswick. On PEI he currently manages ten Petro-Canada sites, two corporately owned and eight independently owned. He offered that in recent years Petro-Canada, as well as other national oil companies, have been less interested in direct corporate investment and more interested in partnership arrangements with independent operators. He went on to explain that Petro-Canada is a major nation-wide franchise and currently has a 22% share of the entire Canadian retail gasoline market. He commented that in his estimation to grant two licenses for the same market at the same time would be undesirable and even dangerous both for the wholesaler and the developer. With two outlets the annual volumes achieved would essentially be divided in two thereby undermining the viability of either site. In his opinion, most of the new outlet volume would be sourced from the existing Stratford Esso and the Irving on Riverside Drive. He revealed that with regard to two recent new outlet offerings in the province, existing Petro-Canada sites were not dramatically impacted. Finally, he commented that the opening of a new Petro-Canada/Tim Hortons outlet in Stratford would create meaningful employment with four to five full time and four to five part time jobs being created in the gas bar/c-store operation alone.

[23] Mr. Graham commented on Wade Bruce's lack of experience in the industry and stated that this caused him no concern, as Mr. Bruce has a good history in business, and Petro-Canada will make assistance available to him.

[24] During cross examination, Mr. Graham indicated that, while nothing has been finalized with the Stratford Petroleum/Petro Canada lease, negotiations were at an elevated level, a letter of intent has been prepared and would be sent for final approval upon the confirmation of the granting of a retail outlet license.

[25] In his view, a new outlet at the proposed location in its first year would do approximately 3.7 million litres of volume, which would increase in subsequent years as the site matured. If both licenses are granted, this expected volume would be divided between the two new outlets.

[26] The third witness for Stratford Petroleum Inc. was the applicant himself, Mr. Wade Bruce. Mr. Bruce testified to provide information in addition to documents which were filed as part of his application. He proposed to build and operate a split-serve gasoline and diesel outlet, in conjunction with a convenience store and food-service offering. The site, his outlet, will be at the Trans Canada Highway/Jubilee Drive intersection in Stratford, P.E.I., on a lot situated to the east of the lot targeted by Karbrennal's.

[27] Mr. Bruce indicated that the selection of Petro-Canada as a supplier was a matter of personal choice on his part based on his perception of the value of the brand name in the marketplace. He anticipates that upon opening, the proposed outlet would generate six full time and four part time employment positions not including staff related to the Tim Hortons store. When questioned as to when he intended to start construction he answered that upon license approval he would immediately seek to finalize negotiations with his supplier and seek to obtain the necessary building permits. At this point his anticipated opening date would be May of 2011. When questioned by counsel as to the potential impact of the granting of two licenses, he responded by saying that while it would be his intention to proceed, the potential market available might not be sufficient to support two locations.

[28] Mr. Bruce described his work experience which includes managerial positions and extensive involvement in agriculture and real estate development, among other things. Admittedly, he has no experience in the petroleum products industry.

[29] The details of his application are quite similar to the application submitted by Karbrennal's, but there was some uncertainty associated with several aspects of his presentation. For instance, the details of the site plan to be used for his outlet are, as he put it, "a work in progress". A revised site plan was filed during the hearing, but it is not the final plan. As well, a type of right-of-way agreement from the present owner of the land adjacent to the site was provided. Lack of detail in this agreement was noted by counsel during questioning.

[30] Issues about access to and egress from the site were raised. Alan Aitken from the provincial Department of Transportation and Infrastructure Renewal attended the hearing to testify about these issues (his evidence is referred to below).

[31] In addition, there were questions about the meaning of a permit which had been granted in relation to the site, as it pertained to certain environmental issues. Exhibit 31, Tab 5 is a Prince Edward Island Buffer Zone Activity Permit that authorized the removal of a berm on the site location. It includes the following statement:

That the low berm at the upper slope of the roadside ditch may be removed to match the existing grade. No excavation into the wetland or below the existing grade is permitted.

[32] We do not know whether this prohibition is significant, but the question of how fuel tanks could be installed below ground in light of this condition was not clearly answered.

[33] Finally, while the site has not yet been subdivided, Mr. Bruce has been assured by the landowner and town officials that such approval would be forthcoming. However, no conclusive evidence on this issue was presented at the hearing.

[34] When asked to differentiate between the two applications before the Commission, Mr. Bruce indicated that his outlet would offer several full-serve pumps, whereas Karbrennal's would be all self-serve, Karbrennal's would have an ATM drive-through, and the two big differences between the applicants are the sites for each application, and the applicants themselves. As for his site, Mr. Bruce felt that access to his site from the highway would be easier than would be access to Karbrennal's site.

[35] Under cross examination Mr. Bruce agreed that the granting of two licenses would significantly impact the viability of each proposal.

[36] The final witness called (later in the hearing) for Stratford Petroleum Inc. was Mr. Alan Aitken, Traffic Operations Engineer for the province of PEI. Mr. Aitken reviewed traffic flow issues and his department's mandate to regulate access to public roads, as it related to the proposed site. He stated that there has been significant growth in the Stratford area in recent years, and stated that traffic near both of the proposed sites has grown by about 6.3 percent annually in the past ten years (13,000 cars in 1999, 21,000 cars in 2009). Mr. Aitken confirmed that the Stratford Petroleum site now has approved full access off of Jubilee Drive, but there is potential for access/egress to be restricted to "right in, right out" in future, if traffic conditions warrant. He stated that he is not concerned about negative impact on traffic if either one or both of the present applications were to be granted, as the increase in traffic for the sites is manageable. In cross-examination, Mr. Aitken confirmed that his department is satisfied with the planned access to both sites.

C) Public Presenters

[37] Mr. Tim Banks, one of the Province's leading businessmen and entrepreneurs, told the Commission that both license applications represented positive economic development and should be looked upon favorably.

[38] Mr. Bus Gay, a prominent citizen of Stratford, also strongly supported both applications and the possibility of a new retail gas outlet in that community.

5. Review of Evidence In Opposition

A) Intervener: Cape D'or Holdings Limited

[39] Cape D'or Holdings Limited presented evidence through two witnesses, namely, Michael Gardner, Consultant with Gardner Pinfold Consulting Economists Limited, and Doug MacDonald, Operations Manager for Wilson Fuel Co. Limited.

[40] The first witness, Mr. Michael Gardner, referred to a previous 2005 report that he had prepared relative to the re-introduction of petroleum regulation in the province of Nova Scotia where at the time concern was being expressed as to the closure of rural outlets (Exhibit 8, Tab 3). He also prepared and testified about a report dated June 2010 which related to the two applications before the Commission (Exhibit 12). Mr. Gardner indicated that relative to the applications in question, the impacted market or trading area could not reasonably be restricted to the Town of Stratford. He critiqued the Pethel market study filed by Stratford Petroleum pointing out that it took a micro approach to its market analysis, focusing on the town as opposed to a more appropriate macro approach which would include the City of Charlottetown and communities to the east of Stratford. According to Mr. Gardner, using such a narrowly defined trading area may have led to some inappropriate conclusions. In Mr. Gardner's opinion, the population growth being experienced by the town of Stratford did not justify the opening of two new retail gasoline outlets. Indeed based on the town's current population growth it would take approximately 15 years to grow the 4 to 5 million litre demand projected to be necessary to ensure the viability of either of the new applications. In the interim in order for either application to be successful, demand would have to be sourced from existing outlets. Accordingly, Mr. Gardner stated that the opening of any new outlet would necessarily draw from the volume and profitability of existing outlets in the trading area. This being the case, the public interest requires that a new license not be granted.

[41] The second witness called on behalf of Cape D'or Holdings Limited was Mr. Doug MacDonald, Operations Manager for Wilson Fuel Co. Limited. Mr. MacDonald explained that Cape D'or Holdings Limited was a holding company that was formed to hold the assets of the corporate Esso accounts purchased from Esso by the Wilson Fuel Co. Limited in 2006. He further explained that on PEI the Wilson company operates and/or supplies a total of eight corporate accounts (comprised of seven Esso accounts and one Wilsons account) and twenty-one independent dealer accounts and have, collectively, a 35% share of the total PEI retail gasoline market. Mr. MacDonald explained that his company intervened in this application hearing for a number of reasons. Firstly, as a neighboring competitive outlet they would have the most to lose if a new outlet license was granted and, therefore, are attempting to protect their existing market share. Secondly, they are concerned for the economic stability of their currently contracted independent dealers. Thirdly, they are concerned for the economic viability of other outlets which may in future become their customers and fourthly, they are concerned with potential future new outlet applications.

[42] He stated that Stratford Esso's trading area is much broader than the community of Stratford and in his estimation Stratford Esso's primary competitors are Cherry Valley Ultramar, Mt. Albion Irving, Riverside Dr. Irving and Grafton St. Shell. The current annual volume of Stratford Esso amounts to 7.6 million litres and this past year volumes for July were up 10-12% over last year. He offered that nothing proposed in either applicant's application isn't already available in the trading area, that other than incremental tourist related volume, the annual volume of Stratford Esso has essentially leveled off and that volumes picked up at any new outlet will have to come from existing outlets. However, he offered his opinion that Stratford Esso would continue to survive in the event that a new license is granted and while in the short run there would be some volume loss, the volume would eventually be regained as smaller neighboring outlets closed due to reduced volumes and resultant eroded profitability.

[43] Under cross-examination, Mr. MacDonald spoke quite highly of Robert Carmichael, one of the principals involved with the Karbrennal's application. He commented that Mr. Carmichael has a high level of expertise in the industry, and is perhaps one of the most capable independent dealers in the Province. He also clarified the identification of the Wilson corporately operated outlets on PEI. Upon being asked how many of the independent outlets currently contracted with Wilsons would be impacted by the introduction of a new outlet in Stratford, Mr. MacDonald agreed that the outlets in question would be located in Kings County, that is, quite a distance from Stratford.

B) Intervener: P.E.I. Retail Gasoline Dealer's Association

[44] Five witnesses provided evidence for the PEI Retail Gasoline Dealers Association including Mr. Dale Mader, Executive Director of the Association, Mr. Brock Vickerson, operator of Grafton Street Shell, Mr. Austin Roberts, owner and operator of Mount Albion Irving, Mr. Bobby Cooper, representing Coopers Red and White Shell in Eldon and Mr. Wayne Vloet, operator of University Avenue Shell.

[45] Mr. Dale Mader provided evidence in the form of a letter dated July 15, 2010, on behalf of the P.E.I. Retail Gasoline Dealer's Association (Exhibit 14), and a binder of documents (Exhibit 15), wherein he reviewed statistics relating to a) the number of retail outlet closures in the province over the past decade and b) the average annual volume and gross margin of PEI retail gasoline outlets as compared to national averages. He characterized the Island retail gasoline industry as fragile and static and stated that, in his opinion, any gasoline volumes to be obtained by a new retail outlet would be sourced primarily from existing outlets. In addition, Mr. Mader, in Exhibit # 7 on behalf of the Association (letter dated April 6, 2010) made the following statement: "We would strongly suggest however, that there is no justification at the present time for the establishment of two new outlets as proposed. Therefore, should the Commission determine, in its wisdom, that one or the other of the applications merits approval, the necessity of the second initial license cannot, in our opinion, be justified at this time."

[46] The second witness called on behalf of the PEI Retail Gasoline Dealer's Association was Mr. Brock Vickerson who operates Grafton Street Shell in Charlottetown. Mr. Vickerson stated that he has managed his outlet now for the past 17 years. His station features full service gasoline pumps and complete automotive repair bay service. His annual volume for 2009 was down from his peak year achieved in 2004, by approximately 700,000 litres. He offered that gasoline sales are down in general due to increased use of public transit, the prevalence of smaller, more efficient cars and the higher price of gasoline. He stated that many of his customers live in Stratford and that none of his customers are complaining of lack of gasoline services in the area. He stated his concern that the loss of much more volume from his outlet could result in Shell deciding to close the outlet altogether.

[47] The next witness called was Mr. Austin Roberts. Mr. Roberts testified that he and his wife Ramona operate Mt. Albion Irving along with seven other retail outlets in the province. He stated that when he purchased Mt. Albion Irving he invested a considerable amount to purchase the outlet and subsequently invested significant additional monies to upgrade the facility. He stated his opinion that any significant loss in volume from the outlet would be devastating to its economic viability.

[48] The next witness called was Mr. Bobby Cooper. Mr. Cooper stated that he along with his family own and operate Cooper's Red and White Shell in Eldon and have been in business there now for 50 years. He expressed his concern that any significant loss of volume might jeopardize his ability to maintain the Shell brand and the related air miles offer which he perceives to be of great value to his business.

[49] Under cross examination, Mr. Cooper stated that his current customer base is made up of 1/3 local traffic, 1/3 tourist ferry traffic and 1/3 commuter traffic. He characterized his customer base as very loyal.

[50] The next witness called was Mr. Wayne Vloet of City Shell in Charlottetown. Mr. Vloet stated that he operates a full serve two bay Shell service station. He offered that none of his customers have mentioned the need for more outlets in the greater Charlottetown area.

[51] During cross examination Mr. Vloet admitted that the Karbrennal's Company Inc. proposed outlet will be self serve and will have no bay service thus distinguishing it from Mr. Vloet's business.

6. Issue 1: Whether to Grant any License

[52] As noted earlier, the primary statutory provision guiding the Commission in this matter is Section 20 of the *Petroleum Products Act*.

20. When issuing a license with respect to the operation of an outlet operated by a retailer, the Commission shall consider the public interest, convenience and necessity by applying such criteria as the Commission may from time to time consider advisable including but not restricted to the demand for the proposed service, the location of the outlet, traffic flows and the applicant's record of performance.

[53] Section 20 allows the Commission to be flexible with respect to the factors it will consider in any particular license application – the circumstances of the case will dictate what is relevant. In Order No. P.980730, the Commission observed that "...there is no checklist of criteria which can be applied equally, but rather consideration of all factors relating to the issues of public interest, convenience and necessity must be given in order to arrive at an appropriate decision in each case."

[54] The panel in that case went on to note that the goal is to ensure a reasonable network of facilities, offering basic if not equivalent services to the motoring public:

In other words, specific issues apply in varying degrees in assessing all applications for initial licensing under the *Petroleum Products Act*. Clearly, the purpose of the legislation with regard to the issuance of initial licenses is to ensure a reasonable network of facilities which provide the motoring public, insofar as possible, with basic if not equivalent services. Applications must be assessed in terms of each one's specific location in addressing the test of public interest, convenience and necessity. Outlets may be, and have been, approved in close proximity to each other because of competitive offerings and customers' stated needs. In other areas, approval might result in the non-viability of the existing outlet or outlets, and customers might well find themselves with reduced or no service. Thus, the factors considered are carefully weighed in relation to the specific application.

[55] As indicated on the Commission's New Retail Outlet application form "The Commission has interpreted this legislation [section 20] to mean that both public convenience and necessity must be proven as they relate to the motoring public, and not the public in general. The applicant must demonstrate a demand for the proposed outlet at the proposed location. Public interest factors will be weighed individually based on existing circumstances. Notwithstanding the generality of the foregoing, the following factors are among those that the Commission will consider in determining whether initial applications for consumer outlets meet the public convenience and necessity test:

- 1) the promotion of competition;
- 2) traffic volumes and trends in the general area of the proposed outlet;
- 3) population size and trends in the general area of the proposed outlet;
- 4) trends in gasoline sales, especially, but not exclusively, among outlets in the general vicinity of the proposed location; and
- 5) services presently available to the motoring public in the general area of the proposed location."

[56] With regard to the issue of demand, one of the criteria included in Section 20, the Commission is satisfied by the evidence presented that there is a substantial retail gasoline market in the vicinity of the proposed outlets, and that the size of the market and growth and development in the area will create demand for fuel at the location. Traffic counts provided by the PEI Department of Transportation and Infrastructure Renewal and referenced by both applicants indicate average annual daily traffic volumes passing the proposed sites exceed 20,000 vehicles a day. In addition, statistics provided by the town of Stratford documenting the steady growth of the community, the continued development of the Charlottetown arterial highway and the presence within the community of the province's largest single volume outlet all support the existence of a significant motoring public market.

[57] Evidence of actual demand was presented in the form of the two surveys submitted on behalf of Karbrennal's, as well as evidence from members of the public in the form of emails, letters and presentations by two individuals at the hearing. The fact that a number of local residents took the time to communicate their support for an additional community retail gasoline facility, and to indicate that they would use that facility, is noteworthy. The Mayor of Stratford and the local community fire department expressed, in writing, their support of an additional outlet. In addition, the Commission notes that the experienced industry market consultant, Jean Pierre Pethel, stated in his testimony that the community could support additional outlets.

[58] While the Commission is of the opinion that market opportunity, by itself, does not necessarily equate with public interest, convenience and necessity – reference previous Commission Order P.920211-1 (February, 1992 Ellis-Birt) – it is also sensitive to the fact that the needs and desires of the motoring public change over time. For example, complementary services such as convenience stores and fast-food offerings are much more prevalent, and expected, than they once were. Stratford itself has changed and is changing, and the results of the marketing surveys provided as evidence by Karbrennal's Company Inc. indicated a definite desire on the part of Stratford consumers to have access to another local alternative. Specifically, the Vision Research Inc. survey indicated that 59% of respondents recognized the need for an additional community outlet, while 72% of the sample expressed their opinion of the convenience of the proposed Jubilee Drive site. In addition, while 80% of the Dunne Group market sample indicated the perceived convenience of being able to purchase motor fuel in Stratford, only 45% of the same sample actually purchased there on a regular basis inferring the need for an additional retail outlet. Considering these facts the Commission is inclined to come to a similar conclusion as was arrived at in previous Commission Order P.920211-1 wherein it was determined that “the issue is not whether existing outlets are capable of fulfilling existing requirements, but rather whether there is a need or convenience requirement of the public that is not being served” by existing outlets. The Commission accepts this evidence of demand for an outlet at the intersection in question.

[59] Relative to location, the Commission finds that Stratford is a growing community and traffic volumes passing by the proposed sites are sufficiently large to support a new outlet. The continued development of the Charlottetown bypass which has served to direct traffic around Charlottetown and through Stratford combined with the evolution of traffic patterns within the community of Stratford itself which has resulted in increased traffic flow passing the subject intersection both tend to validate the viability of the proposed sites. Direct access from the Trans Canada Highway is not available to either site, hence, customers for either location would be required to turn onto Jubilee Drive from the highway and then turn again into one of the sites. Issues of ingress and egress were discussed at the hearing but the provincial Department of Transportation and Infrastructure Renewal has been involved in both projects

and has indicated that these issues do not present insurmountable problems. Apart from access to the sites, the locations at the corners of this busy intersection would serve the motoring public well. The local municipal administration has demonstrated support for development of this nature and at this location close to the town's commercial core. Location, therefore, is a factor in favor of both applications.

[60] Record of performance is one of the few criteria in this case where the applicants are different. Although both applicants present a strong case as to their abilities to manage the challenges of operating today's highly technical and multi-profit centered retail gasoline facilities, one of the applicants has an impressive record of performance, while the other has (understandably) no record of performance in the petroleum products industry. One of the principals of Karbrennal's, Robert Carmichael, has extensive experience in the development and management of an existing successful outlet. Wade Bruce, on the other hand, has impressive credentials of his own, but not in the petroleum products industry. Both appear to be capable and well able to set up and operate a new business venture.

[61] With regard to the promotion of competition, the Commission was convinced that the addition of a modern state-of-the-art retail outlet will enhance the competitive profile of the local market. The Commission was sensitive to the concern raised by Mr. Dale Mader that the opening of a second Esso branded outlet might lead to market dominance on the part of one supplier. During the hearing, Bruce Brine testified on behalf of Karbrennal's, after questions were raised, that Esso will not be the supplier of a Karbrennal's outlet, and Doug MacDonald indicated that it was very unlikely that his company would supply an outlet at either location. With the confirmation that Esso will not be the supplier of either outlet, it is felt that the development of an alternative, multi-service-providing retail outlet is likely to offer the residents of Stratford a competitive offering not currently available in their community.

[62] As to the issues of traffic volumes and population size, evidence provided during the hearing and, specifically, traffic counts as generated by the PEI Department of Transportation and Infrastructure Renewal and building permit authorization and population statistics as provided by the Town of Stratford clearly spoke to the growth in both the population of Stratford as a community and in the volume of traffic travelling in and out of the town. Urbanization, immigration and new residential development were all cited as reasons for the increased traffic flows in and out of the area over the past few years. The Commission noted this demonstrated growth and shift in population and the inherent increased demand for service associated with it.

[63] With regard to trends of gasoline sales and the availability of services in the area, the Commission is aware that from year to year there can be total annual volume fluctuation due to such factors as general economic conditions

and price volatility. Notwithstanding such factors, based on testimony heard and confirmed by the Commission's own internal records, the annual gasoline sales volumes of Stratford Esso have grown dramatically over the past number of years to the point where it is the single highest volume outlet in the province. This, no doubt, is at least in part due to growth of traffic volumes in the area and to the fact that it is now the only retail outlet located in the community. Both factors tend to support the viability of additional retail outlet offerings in the area.

[64] An important issue always to be considered is the potential effect that the granting of new licenses will have on existing retail outlets and the likelihood that such action would result in the loss of services in a particular geographical area thus constituting a detrimental impact on the motoring public. In this case, the interveners were opposed to both license applications because of the potential impact on existing outlets currently licensed in the Greater Charlottetown area and points east. Their evidence was that any new outlet will take business away from existing outlets, and concern was expressed that some outlets might fail as a result. However, while a number of existing licensees did testify that the approval of any new license in the area would negatively impact on their volumes and viability, clear evidence that any particular outlet would close its doors was not provided. The Commission accepts the evidence that a new outlet is likely to result in lower volumes of gasoline sales and business in general for some presently-licensed outlets, but the evidence does not establish that any outlet will be put out of business. However, in the unfortunate event that that happens, we conclude that such a result will be a consequence of the current wants and needs of the motoring public.

[65] The Commission has commented on this issue in the past. For instance, in Order No. P.951017, the panel said:

Having reviewed numerous board decisions and court cases dealing with public interest, convenience and necessity, and with public convenience and necessity (including *Re Allison MacLeod Ltd.* (1958), 14 D.L.R. (2d) 500 (P.E.I.S.C.); *Nova Enterprises Limited v. Nova Scotia (Attorney General)*, (unreported, N.S.S.C.A.D., October 23, 1987), Simeon Carlos (N.S.P.U.B., December 31, 1934); *In re Irving Oil*, [1986] 2 P.E.I.R. B-8 (A.D.); *Canadian Tire Corporation Ltd.*, (N.S.P.U.B., October 3, 1990, including dissent by Harris), the Commission has determined that the issue to be considered when applying the public interest, convenience and necessity test is not whether existing outlets are capable of fulfilling existing requirements in the global sense, but rather whether there is a need or convenience requirement of the public that is not being served—either by location, service offerings, price or some other aspect of business. If so, it would be in the interests of the motoring public to be served in that area for the new outlet to be approved, unless such a new outlet would likely have an overall negative impact on this group.

If such a proposed operation would have such a negative effect upon existing retailers that there would be an overall decline of availability of service to the overall detriment of the motoring public in the area, then those negative effects would override the benefits. (Ben Livingston & Sons Ltd., Order No. P.920211-3, p.17; Irving Oil Limited, Order No. P.920211-2, pp. 24-25; Ellis-Birt Ltd., supra, at pp. 15-16).

On the issue of existing outlets already providing the same services, the Commission has stated:

Mr. [Dale] Mader concludes that if there are more than enough outlets, there is no need for another. This is one possible conclusion, but our review of the law would qualify this statement by adding, "unless the proposed outlet would add to the public interest, convenience and necessity of the motoring public being served in that area." The other possible conclusion we see is that, if there are too many outlets now, it is likely that some could close without the motoring public suffering any material detriment in terms of convenience and necessity." Ben Livingston & Sons Ltd., supra, at p.16.

[66] The Commission must consider the effect of the possibility of a volume shortfall at existing outlets as well as the potential loss of other services as part of its assessment of public interest, convenience and necessity. In this case all neighbouring outlets represent longstanding business ventures with established customer bases. While concerned about the viability of each and every existing retail outlet, the Commission's statutory mandate relates primarily to the motoring public at large and as such their interest, convenience and necessity. As per previous Commission Order P.920211-2 (February, 1992 Irving Oil Limited) the Commission is of the opinion that it is only when the evidence clearly indicates that a new license will result in the closure of an existing outlet, which in turn will result in diminished service to the motoring public at large, that this detrimental effect takes a greater significance. In this case the evidence given relating to any anticipated detrimental effect to existing outlets was insufficient to warrant declining the applications on that basis alone.

[67] In applying the public interest, convenience and necessity test, the Commission is required to apply such criteria as it may from time to time consider advisable which, in this case, includes the broader demographic, social and economic changes that are occurring within the Province. The recent growth of the Town of Stratford, in large part, has come at the expense of the de-population of rural Kings County. This shift in population was recognized during the hearing process and is also confirmed by electoral and census data. Stratford is a dynamic and mainly suburban community which is slowly acquiring its own business and institutional prowess separate from that of Charlottetown. It is acknowledged in the world of commerce that services

follow people. In other words, where there is a concentration of population, business opportunities exist. It is reasonable to expect that in the growing Town of Stratford there are new opportunities for service related business. The two applicants are representative of this positive business environment. Balancing the needs of the two growing urban communities of greater Charlottetown and Summerside with the needs of rural parts of the province that are declining in population does present a continuing challenge for the Commission. Indeed, the rural-urban divide in Prince Edward Island appears to be widening. While the *Petroleum Products Act* does not direct the Commission in its licensing of retail outlets, to ensure that rural communities throughout the province have equitable access to these services and products, the practice has been to be sensitive to the needs of smaller communities and to make licensing decisions that do not threaten the availability of petroleum products in rural Prince Edward Island. The Commission is of the view that a new retail gasoline outlet in Stratford will not seriously threaten the viability of existing rural outlets to the east of the proposed new location to the point that any of these outlets would close as a result. The evidence put forward during the hearing supports such a conclusion. The Commission is satisfied that public interest, convenience and necessity require a new license to be issued for the intersection in question.

7. Issue 2: Which Application to Approve

[68] The issue at hand then turns to whether the decision should be for the approval of one license or two. The Commission is mindful of the impact of such a decision on both the existing retail outlet network and the ultimate viability of the two applications currently under consideration. Presumably any potential impact on existing outlets would be that much more should both licenses be granted. Additionally, the Commission is desirous of a reasonable prospect of success for any new license. When asked for their reaction to the possible granting of two licenses, both applicants expressed their reservations and concerns. Indeed, when industry expert. Mr. Rick Graham, was posed the question he characterized such an outcome as dangerous for both the investor and the supplier. The Commission is mindful, as well, of the concerns raised by Mr. Dale Mader of the PEI Retail Gasoline Dealers Association when he expressed his opinion (Exhibit #4) that “whatever volume of sales achieved by that new outlet must largely come from existing outlets”. Accordingly, in recognition of the importance of the potential success of any new licensee, of the potential impact of new licenses upon existing retail outlets and in consideration of the lack of evidence presented to support the viability of two outlets, the Commission has determined that only one retail outlet license will be granted at this time.

[69] With the determination that just one license will be granted, the question now becomes ‘to which applicant?’ While both applicants have presented good cases for their particular application, one of the applications was more

complete. The unresolved issues referred to earlier in these reasons pertaining to the application made by Stratford Petroleum Inc. caused this Commission to prefer the Karbrennal's application. In addition, and this is a significant factor in the circumstances of this unusual case, Robert Carmichael's proven record of performance must give the edge to Karbrennal's, when compared to the unproved, untested abilities of Wade Bruce (in this industry). Mr. Carmichael has a proven track record with seventeen years of industry-related employment, and in excess of seven years of direct experience in gasoline/c-store management.

[70] Finally, though a relatively minor issue in and of itself, it is fact that Karbrennal's Company Inc. was the first to register its application with the Commission, approximately a week prior to the application filed on behalf of Stratford Petroleum Inc.

[71] Accordingly, while both applicants presented strong cases, given the proven track record of management in the industry, the existence of fewer unresolved application issues and considering the date of receipt of the two applications, the Commission is persuaded to grant one retail outlet license to Karbrennal's Company Inc.

8. Disposition

[72] An Order will therefore issue approving the application for a retail self-serve gasoline and diesel outlet license to be issued in the name of Karbrennal's Company Inc., subject to the condition that the following be provided to the Commission within 180 days of the date of this Order:

- A copy of the building permit or approval in principal from the authority having jurisdiction.
- A copy of preliminary approval from the Department of Environment, Energy & Forestry relative to the installation of petroleum storage facilities.
- A \$200.00 filing fee.
- Proof of ownership of the outlet.
- Copy of petroleum supply agreement.
- Copy of approval from the Inspection Services Division of the Department of Environment, Energy & Forestry relative to the handling of propane.
- Proof that the Town of Stratford has approved the development of a retail petroleum products outlet for the site in question.

IN THE MATTER of applications by
Karbrennal's Company Inc. and Stratford
Petroleum Inc. (TBI) for licenses to operate retail
gasoline and diesel outlets on Jubilee Drive in
Stratford, PEI.

Order

UPON reading and considering the applications and the
submissions filed herein;

NOW THEREFORE, for the reasons given in the
annexed Reasons for Order;

IT IS ORDERED THAT

The licensing of the proposed retail self-serve gasoline and diesel outlet to be located on Jubilee Drive in Stratford in the name of Karbrennal's Company Inc. is approved, subject to the condition that the following be provided to the Commission within 180 days of the date of this Order:

- A copy of the building permit or approval in principal from the authority having jurisdiction.
- A copy of preliminary approval from the Department of Environment, Energy & Forestry relative to the installation of petroleum storage facilities.
- A \$200.00 filing fee.
- Proof of ownership of the outlet.
- Copy of petroleum supply agreement.
- Copy of approval from the Inspection Services Division of the Department of Environment, Energy & Forestry relative to the handling of propane.
- Proof that the Town of Stratford has approved the development of a retail petroleum products outlet for the site in question.

DATED at Charlottetown, Prince Edward Island, this 18th
day of November, 2010

BY THE COMMISSION:

(Sgd) Allan Rankin

Allan Rankin, Vice-Chair

(Sgd) John Broderick

John Broderick, Commissioner

(Sgd) Chester MacNeill

Chester MacNeill, Commissioner

NOTICE:

Section 58 of the *Petroleum Products Act* reads as follows:

58. Where any person has the status of a party or is an intervenor in any hearing before the Commission, he is entitled

(a) to appeal the decision of the Commission to the Court of Appeal; and

(b) to participate as a party in the hearing of an appeal.

and an appeal shall be on a question of law or jurisdiction only and be governed by section 13 of the Island Regulatory and Appeals Commission Act.

Sections 13 (1) and (2) of *the Island Regulatory and Appeals Commission Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 5 years.