BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Transfer of Assets, including much of Southern Union's gas supply department to EnergyWorx, a wholly owned subsidiary.	))))	Case No. GO-2003-0354

SOUTHERN UNION COMPANY'S MEMORANDUM OF LAW
AND SUPPORTING SUGGESTIONS

1. Overview

Staff's report filed with the Commission and summarizing the results of its ten (10) month investigation in the captioned case (hereinafter, the "Report") presents nothing that warrants further action on the part of the Missouri Public Service Commission ("Commission"). It contains no more than superficial refinements of its previous allegations in Case No. GC-2003-0348[1] and evidences a continuing lack of appreciation of the circumstances concerning the sale by Southern Union Company ("Southern Union" or the "Company") of its Texas natural gas division to ONEOK, Inc. The Report also demonstrates a disregard of elementary principles of statutory interpretation and utility regulation. Ultimately, Staff has failed in its obligation to fully advise the Commission in a forthright, objective manner. Staff's failure to apprehend the nature of the transaction in question has led it to improperly apply the applicable law to the facts, caused it to reach erroneous conclusions and resulted in a poorly reasoned recommendation.

It is obvious that the sale of Southern Union's gas distribution operations in **Texas** did not involve the sale the whole or any part of its franchise, works or system useful or necessary in the performance of its duties to the public in the State of **Missouri**. This is

evidenced by the fact that Southern Union's Missouri Gas Energy ("MGE") operations were not interrupted or impaired in any way by the sale of its Southern Union Gas division. MGE continues to render safe and reliable natural gas service in the State of Missouri in those areas certificated to it by the Commission. Similarly, the sale of Southern Union Gas to ONEOK was not a corporate reorganization of Southern Union as that term is used in §393.250 RSMo 2000 because it was not part of a liquidation, receivership or bankruptcy of Southern Union resulting in a material change of its capitalization.

Staff's Report contains numerous factual inaccuracies and a number of sweeping conclusions which lack benefit of factual support, rule interpretations or decisions of the Commission or case law support. In fact, the Report inexplicably avoids addressing compelling case law decisions from this and other states (previously supplied by Southern Union Company to the Staff and the Commission) that when taken into consideration lead to a quite different conclusion.

That these important considerations have been entirely overlooked or brushed aside by Staff is troubling to Southern Union given the fact that these legal issues were thoroughly briefed in a legal memorandum filed by the Company in Case No. GC-2003-0348 on or about April 22, 2003. That the case law provided by Southern Union has not been mentioned in the Report can only mean that Staff has simply chosen to disregard it and has determined to be less than forthright with the Commission. In doing so, Staff has reached a conclusion that is not based on a reasonable assessment of the facts as applied to the law and is entirely lacking in fairness or objectivity. This is regrettable because the undisputed facts and the overwhelming weight of authority demonstrates that Southern

[1] *Staff of the Missouri Public Service Commission v. Southern Union Company.*

Union has taken no action that in any fashion violates either the letter or the spirit of the Public Service Commission Law (the "Act").

2. <u>The Sale of Southern Union's Texas Operating Division.</u>

The relevant facts are easily and succinctly stated. They are not disputed by Staff.

Southern Union is a corporation duly incorporated under the laws of the State of Delaware and conducts business in Missouri under the fictitious name of MGE. MGE conducts the business of a "gas corporation" and provides natural gas service in all or portions of the Counties of Andrew, Barry, Barton, Bates, Buchanan, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, DeKalb, Green, Henry, Howard, Jackson, Jasper, Johnson, LaFayette, Lawrence, McDonald, Moniteau, Newton, Pettis, Platte, Ray, Saline, Stone, and Vernon in those areas certificated to it by the Commission. MGE has established a fully-staffed, dedicated and competent gas supply department at its offices in Kansas City, Missouri. Its Director, Dave Kirkland, supervises a group of three individuals. Mr. Kirkland reports to Rob Hack, MGE's Vice-President Rates and Regulatory Affairs.

Southern Union Gas Company ("Southern Union Gas") was the natural gas operating division of Southern Union located in the State of Texas. Headquartered in Austin, Texas, Southern Union Gas served approximately 535,000 customers in that state, including the cities of Ausin, El Paso, Brownsville, Galveston and Port Arthur. Pursuant to the terms of a Purchase and Sale Agreement dated October 16, 2002, the sale by Southern Union of Southern Union Gas to ONEOK, Inc., became effective as of January 1, 2003. The sale was announced over two months earlier in a press release dated October 16, 2002.

There was no physical interconnection between the service territories of Southern Union Gas, Southern Union's Texas division, and MGE. The areas served by the two divisions were not overlapping or contiguous and each division provided natural gas service to its customers using dedicated and geographically discrete and distinct municipal franchises and plant.

The sale of Southern Union Gas to ONEOK did not result in the sale, assignment, or transfer of control of the whole or any part of MGE's distribution network, plant, permits or franchises. To the contrary, MGE still provides natural gas service in the State of Missouri within the service areas certificated to it by the Commission without any impairment, pause or interruption. Southern Union's Missouri customers continue to be served effectively and efficiently by MGE in accordance with tariffs on file with and approved by the Commission. As was the case before the sale of Southern Union Gas, MGE is owned and operated by Southern Union.

3. The Sale by Southern Union Company of Southern Union Gas Did Not Involve the Sale of the Whole or Any Part of MGE's Franchise, Works or System.

Staff's Report fails to set forth any facts which, if true, would form the basis for the Commission to conclude that Southern Union has violated any provision of the Act or any rule or order of the Commission. The specific language of §393.190.1 RSMo 2000 states that:

> No gas corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public. . . without first having secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with an order of the commission authorizing the same shall be void. (Emphasis added.)

The statute makes no reference at all to "rate base property", the novel interpretation given the statute by Staff. (Report p. 3) The Commission instead must look to the plain language of the statute upon which Staff relies. As will be demonstrated herein, the sale by Southern Union of its Texas division, Southern Union Gas, did not involve the sale of the whole or any part of its Missouri franchise, works or system necessary or useful in the performance of its duties to the public here.

A. No Sale of any Missouri Franchises

Franchises granted to utility companies in Missouri are "no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *State ex rel Union Electric Company v. Public Service Commission*, 770 S.W. 2d 283, 285 (Mo. App. 1989).[2] The sale by Southern Union of Southern Union Gas did not include any franchises pursuant to which MGE provides natural gas service in any municipality in this state.

The Report's only nod to this legal authority is Staff's suggestion that the Commission simply ignore its obvious applicability by offering the assertion that the Act is "remedial" and should be "liberally construed". (Report p. 10) Reading a statute "broadly", as Staff suggests, does not authorize the Commission to simply ignore expository case law which is on-point.

B. Southern Union Gas Was Not Part of MGE's Works

Southern Union's sale of its Texas based Southern Union Gas division was not part of MGE's works. Again, the term "works" is not defined by statute or Commission rule. However, the Missouri Supreme Court has determined that the gas works of Missouri

Public Service (now Aquila, Inc.) is synonymous with the term "gas plant." *See*, *State ex rel. City of Trenton v. Public Service Commission*, 174 S.W. 2d 871, 879-880 (Mo. banc 1943).

The term "gas plant" is defined at §386.020(19) RSMo 2000 as including:

> All real estate, fixtures and personal property owned, operated, controlled or used or to be used for or in connection with or to facilitate the manufacture, distribution or sale of furnishing of gas, natural or manufactured, for light, heat and power.

Thus, the term "works" is restricted in scope to that real or tangible operational plant (i.e., right-of-ways, pipes in the ground, valves, compressors, regulators etc.) actually used to deliver gas to the public in this state.

At page 11 of the Report, Staff concedes the correctness of this analysis and contends the statutory definition of gas plant is "broad enough" to include things like copy machines, training manuals and video equipment. Clearly, Staff's free-form interpretation of this language is overly broad and unreasonable. Staff's approach leads to absurd results. Using Staff's sweeping analysis, a utility's inventory of copy paper, pencils, paperclips, tablets, clocks, wall decorations and all other manner of personal property owned by it would be part of its utility plant. Were this the interpretation to be given the term "gas plant" by the Commission, soon it will be overwhelmed by applications seeking authority to dispose of coffee makers and other mundane items which have no impact whatsoever on the provision of utility service. This makes no practical sense.

Also, the definition makes no reference whatsoever, directly or indirectly, to what Staff has referred to as an "in-place, trained and knowledgeable assembled workforce." (Report at p. 6) The term "gas plant" does not include gas procurement or other routine

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[2] Citing *State ex inf. Chaney v. West Missouri Power Company*, 281 S.W. 709 (Mo. 1926).

business activities or services that Southern Union Gas previously provided to MGE, nor does it include the personnel engaged in those business activities. People, jobs and activities are not property under the law of Missouri.

C. Southern Union Gas Was Not Part of MGE's System

Likewise, the business functions and activities formerly provided by Southern Union Gas to MGE, were not part of MGE's gas delivery system. The term "system" is not separately defined in Chapter 386 RSMo or by Commission rule. However, the terms "sewer system" and "water system" are defined at §386.020(49) and (59) RSMo 2000, respectively. Each of these statutory definitions enumerate a series of hard operational plant items and "other real estate, fixtures and personal property" used to provide that type of utility service. Thus, a utility's "system" encompasses the organization of the discrete parts of the plant and property used by the utility into an interdependent whole for the purpose of providing service to the public.[3] Again, employees, business or job functions or activities of a utility are not part of its property interests.

A decision of the Oregon Supreme Court supports this conclusion. That Court has determined that the terms "plant" and "system" are synonymous and refer to " the whole system, machinery, power, poles, wire and anything necessary to complete the circuit" for an electric utility. *Yamhill Electric Company v. City of McMinnville et. al.*, 130 Ore. 309, 274 P. 118, 126 (Ore. 1929).

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[3] When words in a statute follow a specific enumeration of things, the general words are limited to things of a similar character to those specifically enumerated. *See*, *Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 341, n. 12 (Mo. banc 1984). *See also*, *Vocational Services Inc, v. Developmental Disabilities Resource Board*, 5 S.W.3d 625 (Mo. App. 1999). [Held, a general phrase under the rule *ejusdem generis* must be construed to refer back to the subjects set out in the preceding words.]

There are no Missouri cases interpreting the exact meaning and scope of the phrase "franchise, works or system" as that phrase appears in §393.190.1 RSMo. The only case decision mentioned in the Report at page 10 is a passing reference to *State ex rel. Fee Fee Trunk Sewer Inc. v. Litz*, 596 S.W. 2d 466 (Mo. App. 1980). This case involved the sale by a utility of its entire operating system located in **Missouri** to the Metropolitan St. Louis Sewer District whereas the transaction discussed in the Report involves the sale of an entire operating system located in **Texas**. The Commission's jurisdiction was not contested. Consequently, the *Fee Fee* case is factually distinguishable from the sale of Southern Union Gas.

Staff fails to cite the Commission to any Missouri court decision in which it has been determined that a utility in Missouri must file for and obtain approval with the Commission under §393.190 RSMo to sell or dispose of an operating division located entirely in another state and having no physical interconnection with operations in this state. Similarly, the Commission has never handed down such an interpretation and, further, it has never promulgated a rule making it a requirement. Utilities have had no reason to expect this sweeping and unprecedented interpretation of the law. To the contrary, the case most closely on-point actually validates Southern Union's views on the topic.

Southern Union previously has pointed Staff and the Commission to a recent opinion of the Indiana Supreme Court interpreting a nearly identical Indiana statute which arose out of a very similar factual setting. The Indiana Supreme Court in September of 2000 found that Indiana Code §8-1-2-83(a) prohibiting utilities in that State from selling, assigning, transferring, leasing or encumbering their "franchise, works or system" to any other person or entity without the approval of the Indiana Public Service Commission (the

"IPSC") **did not prohibit two Indiana natural gas utilities from arranging that a separate company procure wholesale natural gas supplies for the utilities**. *United States Gypsum, Inc., et. al., v. Indiana Gas Company, et. al.*, 735 N.E. 2d 790, (Ind. S. Ct., 2000).

In that case, the Indiana Supreme Court concluded that the "franchise, works or system" of a public utility means the "entire operational unity of a utility." *Id.* at 801. The Indiana Supreme Court found that the transfer by the utilities of their gas procurement departments and functions to the special purpose affiliate did not require regulatory approval from the IPSC because the utilities (1) remained in control of their own physical gas delivery facilities, (2) remained providers of gas in their service areas, (3) continued to review and approve supply plans, and (4) continued to operate their gas storage fields. That Court held that "although wholesale gas supply and planning and scheduling thereof are unquestionably important to Indiana Gas, none of the matters relied upon by the [complainants] constitute an indivisible part of Indiana Gas' system or works absent some closer nexus with the utility's customer service or distribution." *Id.* at 802. Given the similarity in facts and law, this case should have been given careful consideration and significant weight by Staff, yet it has not even been mentioned in the Report. (A copy of the entire text of the decision of the Indiana Supreme Court is attached hereto.)

A conclusion similar to that of *United States Gypsum* is appropriate based on Staff's investigation. Simply put, the personnel employed and the activities and functions performed by Southern Union Gas on behalf of MGE, were not a part of MGE's franchise, works or system as that phrase is used in §393.190 RSMo 2000. Staff does not allege that MGE has transferred control of its gas distribution network; that MGE is not still the

provider of natural gas in its certificated territory; or that MGE otherwise has ceased to perform its public service obligations to its Missouri customers, even momentarily. Rather, the focus is on the fact that personnel have changed or that responsibilities of certain employees have been reassigned. These considerations do not establish any arguable basis for concluding that Southern Union has violated any provision of the Act, or any rule or order of the Commission.

4. Southern Union's Texas and Missouri Operations Were Geographically Remote and Operationally Discrete.

At page 8 of the Report, Staff states that "Southern Union combined its Texas and Missouri operations in such a manner so that the operations in one state support the operations in both states." This statement is incorrect and misleading. While some activities were undertaken by a handful of employees of Southern Union Gas in support of MGE, there was no physical interconnection whatsoever between the service areas of Southern Union Gas, Southern Union's Texas operations, and MGE. The areas served by the two divisions were not overlapping or contiguous and each division provided natural gas service to its customers using separate and geographically remote gas distribution networks.

5. The Classes of Allocated Plant Involved in the Sale by Southern Union of its Texas Division Were not Necessary or Useful in the Performance of Southern Union's Duties to the Public in Missouri.

At the outset, the Report includes the statement that the "sale/transfer included *assets* used to serve Missouri customers." (emphasis added) This statement is misleading and the Report includes no facts which, if true, would substantiate the claim that the whole

or any part of MGE's "works or system necessary or useful in the performance of its duties to the public" were sold or transferred.

The Company's first observation is that Staff incorrectly uses the term "assets" interchangeably with the statutory phrase "franchise, works or system". The two are not synonymous. While MGE's works or system may be comprised of certain of its assets, the converse is not necessarily true, that is, not all of MGE's assets are part of its works or system. For example, intangible assets are not components of the operating works or system. Additionally, not all tangible assets are part of the utility works and system. A good example would be office furnishings or vehicles because these items are not integral components of an operational whole the absence of which would result in a failure or interruption of service. As a consequence, the Report is founded on an erroneous premise.

Furthermore, none of the categories of property identified by Staff would have been part of MGE's works or system in any event. Items such as postage meters and machinery, office furniture, alarm systems, copy machines, dictation equipment, projectors, video equipment, studies and training materials were not part of MGE's works or system even when in use in Austin because they were not physically or operationally connected to the facilities used to deliver natural gas to customers in Missouri. Rather, as is the practice and custom, these are items easily and routinely retired, replaced or substituted in the normal course of business. Although deployed for necessary administrative or support activities associated with MGE's business and therefore legitimate cost of service items for ratemaking purposes, they were not indivisible parts of its works or system as that phrase

is used in §393.190 RSMo. This is an important distinction noted in the *United States Gypsum* case that is not addressed in the Report.

It is important for the Commission to realize that the tabulation of assets provided by Staff does not list assets that were dedicated exclusively to Missouri operations. These were items located at corporate headquarters in Austin, Texas, the value of which was allocated to Southern Union's various utility operations, including those in Missouri, as an overhead cost for ratemaking purposes. Significantly, of the $2 million claimed by Staff, only approximately 38% of this amount was assigned as rate base to the cost of service in Missouri during MGE's last rate case in 2001, so the value for Missouri ratemaking purposes was only $718,940[4]. This amount is *de minimus* in relation to this $420 million transaction.

Moreover, the list of plant accounts allocated to MGE in Case No. GR-2001-292 and attached to the Report does not identify any items any longer used or needed by Southern Union to provide natural gas service to its Missouri customers. A review shows that the list is dominated by back office support items (such as office furniture and equipment, copy machines, postage machines and the like) that are disposed of and replaced routinely in the ordinary course of business. Replacement of such items due to the re-location of Southern Union's corporate headquarters from Austin, Texas to Wilkes-Barre, Pennsylvania—which took place in 2002, prior to the ONEOK sale—is a routine practice in the ordinary course of business. Southern Union is aware of no precedent indicating that regulatory review and approval of such ordinary course transactions is required or

[4] Inexplicably at page 8 of the Report, Staff recognizes that "approximately 30% to 40% of corporate overhead costs" were allocated to MGE in Case No. GR-2001-292, yet it has failed to adjust the $2 million dollar figure by the amounts actually allocated to Missouri cost of service in the test year.

expected. In fact, the only item on the list that might even be remotely susceptible to categorization as "franchise, works or system"—Unaccounted for Gas System (Account 3910, $234,688)—relates to the Taurus computer system formerly used by gas supply/control when personnel performing that function were housed in Austin, Texas. Since the personnel performing the gas supply/control function have been housed in MGE's Kansas City, Missouri offices beginning in 2003, this back office support item has not been used or needed by Southern Union.

Because those items contained on the list are no longer necessary or useful in the performance of Southern Union's duties to its customers in Missouri, they are therefore exempt from the application of §393.190 RSMo in any event which provides as follows:

> Nothing in this subsection contain shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

Thus, Southern Union acted lawfully in all respects even if the items of allocated property identified in the Report are considered to have at some point comprised a part of MGE's works or system, a premise with which Southern Union firmly disagrees.

Staff has disregarded this language claiming that the Commission should have been given the opportunity to make a finding as to the usefulness or necessity of these items but this misses the point of the statutory language. As is always the case, the utility in the first instance makes a determination as to whether the statute is applicable. There is no history or practice of utilities submitting applications to the Commission for authority to retire or replace office furnishings, copying equipment or training manuals. Also, the statute

provides a legal presumption that they are not useful or necessary as to a good faith purchaser for value like ONEOK.

Ultimately, Staff's argument is merely academic. That no property necessary or useful in the performance of MGE's duties to the public in the State of Missouri was sold or transferred to ONEOK is proven by the undisputed fact that utility service in the State of Missouri was not impaired or interrupted by virtue of the sale of Southern Union Gas. Southern Union was able to make appropriate and adequate provision for continuity in service and operations without any harm to MGE's customers whatsoever. The statutory presumption supports this conclusion.

6. MGE Has the Right to Manage its Affairs and Conduct its Business.

It is axiomatic that the Commission is an administrative body of limited powers, created by state law. Accordingly, it has only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. *State ex rel. and to the Use of Kansas City Power and Light Company v. Buzard*, 315 Mo. 763, 168 S.W.2d 1044, 1046 (1943); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). Although the Act is remedial in nature, and should be construed liberally, neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the Commission is authorized by statute. *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (Mo. banc 1923); *State ex rel. Utility Consumers Counsel of Missouri Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

Ultimately, how Southern Union goes about setting up and running the gas procurement activities for its various operating divisions is not a matter that can be directed or determined by the Commission or by its Staff. The law on this topic is clear and unambiguous. The Commission's authority to regulate certain aspects of a public utility's operations and practices does not include the right to dictate the manner in which the company conducts its business. *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8 (Mo. banc 1930). The *City of St. Joseph* case involved an appeal by the City of St. Joseph, Missouri of an order of the Commission affixing the value of property of St. Joseph Water Company for ratemaking purposes and approving a schedule of rates. In rejecting the Appellant's contention that the Commission should not have authorized an administrative charge imposed on the operating company by its parent company, the Missouri Supreme Court stated the following:

> The holding company's ownership of the property includes the right to control and manage it, subject, of course, to state regulation through the Public Service Commission, but it must be kept in mind that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. The company has the lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in doing so, it does not injuriously affect the public. The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the company must employ in that rendition of that service. It is of no concern of either the customers of the water company or the Commission, if the water company obtains necessary material, labor, supplies, etc. from the holding company, so long as the quality and price of the service rendered by the water company are what the law says it should be. (emphasis added)

Id. at 14. Similarly, in *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960), the Court observed that the Commission's powers are "purely regulatory." *Id.* at 181. Further, the Act provides "regulation which seeks to correct the abuse of any

property right of a public utility, not to direct its use." *Id.* The Court of Appeals elaborated on this important principle:

> The utility's ownership of its business and property includes the right to control and management, subject, necessarily to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare.

Thus, the Commission may regulate Southern Union's Missouri operations, but it has no authority to manage MGE's business or to substitute its business judgement for that of Southern Union, so long as MGE is meeting its public service obligation to provide safe and adequate service to its patrons. The Report includes no evidence whatsoever that MGE is not meeting, or has not met, its public service obligations to provide safe and adequate service to its **Missouri** customers as a consequence of selling its operations in **Texas**.

Although the Report at page 19 gives lip service to the fact that the Commission has no authority to manage the utilities it regulates, the Report's *ad hoc* vilification of Southern Union amounts to nothing more than a critique of the business decisions of Southern Union's management. The Report presents Staff's grievance that MGE has reconfigured its gas purchasing function and, in doing so, is claimed to have lost a "wealth of knowledge and experience" in doing so. This is no more than a belief on the part of Staff that Southern Union should have done something differently. Significantly, the Report does not identify any failure on the part of MGE to perform its legal duty to provide safe and reliable natural gas service to the customers located in the service area in the State of Missouri.

The only legal authority provided by Staff at page 20 of the Report completely misses the mark. The *Kansas City Transit* case has nothing to do with transfers or reassignments of personnel. Rather, it involved an unauthorized corporate reorganization of a street railway company whereby Kansas City Transit, Inc., ("Transit") had undertaken to create a new corporate entity to acquire Transit's common stock and to fundamentally reorganize Transit's business structure. There is no factual parallel whatsoever between the two cases.

Staff identifies certain contractual arrangements between Southern Union and ONEOK for the provision of certain transition services as support for the allegation that Southern Union Gas in Texas was part of MGE's works or system in Missouri. This too provides no basis for concluding that anything unlawful or inappropriate has occurred. Historically and currently, public utilities in this state have relied upon third-party providers to supply central functions such as legal services, accounting/auditing services, engineering services, financial services, construction and maintenance services, customer service/call center operations, billing and collection services, shipping and delivery services and all other manner and category of routine business activity. *All* of these activities are critical to the operation of a public utility but it cannot be seriously argued that public utilities are prohibited by §393.190 RSMo from using qualified vendors and providers as necessary to fulfil these essential functions without the Commission's express authority, whether it is for an indefinite period or short interim period of time.

Nothing better illustrates this fact than the case of *Re Drexel Telephone Company*, 19 Mo. P.S.C.(N.S.) 281 (1974), in which the Commission observed that Drexel Telephone Company ("Drexel") had no employees of its own and thus contracted with another

telephone company for all work that was done. *Id.* at 281. Yet no mention of the *Drexel* case appears in the Report. The key question left unanswered in the Report is if it is acceptable that Drexel provided regulated telephone service with no employees, why is it unlawful for MGE to provide natural gas service with a full compliment of employees, including a dedicated gas procurement department located in Kansas City, Missouri?

Ultimately, it is the responsibility of the Company's management team to determine how to get the job done. No provision of Missouri law or Commission rule requires that any of these activities be done at any particular location or by any particular individual or group of employees with any particular level of experience or training. No provision of Missouri law permits the Commission to veto such decisions. The contrary conclusions in the Report are directly at odds with practical experience and common sense in the operation of public utilities.

7. People Are Not Property.

The Report goes through considerable intellectual gymnastics to reach the bizarre conclusion that utility employees are no more than biological units of machinery that can be bought, sold and traded, subject of course to the Commission's prior approval. For this novel proposition, Staff relies on one isolated phrase appearing in the 1998 HVAC legislation appearing in Chapter 386 RSMo. This reliance on completely unrelated legislation is misplaced.

The HVAC Act which was enacted for the limited purpose of restricting the ability of certain utilities to offer heating or air conditioning services. It does not purport to convert personnel into assets owned and controlled by utilities or in any other manner serve to change recognized principles of Missouri property law.

Southern Union does not own its employees and the Commission has no jurisdiction with respect to personnel decisions made by a company's management, sometimes on a daily basis. Euphemistically repackaging groups of employees as "functions" or as a "trained and assembled workforce" in an effort to depersonalize the subject is no more than an unwise effort to place the Commission unlawfully in the role of supervising the hiring, promotion, reassignment and firing practices of the utilities it regulates. The Commission has no statutory authority with regard to these matters and none can be found in any provision of the Act.

Ultimately, the fatal flaw in the Report's conclusions is that its apparent objective is to encourage the Commission to unlawfully insert itself into the Company's hiring, promoting, reassignment and firing practices. This would have the effect of interposing the Commission as Southern Union's *de facto* human resources department for the utilities it regulates, a role it is ill-suited to assume. Not only would it involve unlawful conduct on the part of the Commission, it would be imprudent as a practical matter.

If the Commission were to purport to exercise a veto power over the business and employment practices of the companies it regulates, it would be bound in subsequent rate cases by the decisions made by the individuals whose employment the Commission has authorized or compelled. This conundrum is one that the Commission has already confronted. In previous legal proceedings, the Commission stated to the Southern District Court of Appeals that it would be a conflict of interest for the Commission to assume the dual role of manager and regulator. The Commission said that a Circuit Court order appointing the Commission as receiver for a sewer company would put the Commission "in the conflicting position of regulator and regulated". *State ex rel. Public Service*

Commission v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. 1995). This is a judicial admission on the part of the Commission.

Controlling a utility's hiring and firing practices by virtue of a regulatory veto power and thereafter determining the ratemaking treatment to be given the decisions and practices of the very same personnel would present the very same type of conflict protested by the Commission in the *Bonacker* case. The Commission cannot regulate Southern Union at the same time the Commission is making MGE's personnel decisions. The Commission's integrity as an independent regulator would be contaminated if it were to take unto itself the responsibility for personnel management of the companies it regulates.

The Report likewise fails to address the fact that the Commission has already rejected the fundamental premise of the Report when it turned down a Staff proposal to require that utilities be compensated by their affiliates when experienced employees are transferred. In rejecting this proposal, the Commission state that "employee transfers do not have to be restricted, penalized or compensated" to accomplish the legitimate regulatory objectives of preventing cost shifting or cross-subsidies. Mo. Reg. Vol. 25, No. 1, p. 61, January 3, 2000.[5] This determination made it clear that the Commission was not going to interfere with a utility's decisions regarding personnel assignments or transfers.

The parallel to the current circumstance is undeniable. At page 21 of the Report, Staff complains about "[t]he value of [Southern Union's] workforce" being transferred to ONEOK as a consequence of the transaction. It bemoans "the loss of these valuable employees." This is no different a consideration than that rejected by the Commission in

[5] *Order of Rulemaking*, 4 CSR 240-40.015. Case No. GX-99-444.

January of 2000 when it concluded no compensation for or restriction on employee transfers should be put in place.

These important legal and policy considerations are not even addressed in the Report. Staff has failed to fully advise the Commission of these conflicts, key principles of regulation and the representations the Commission has made in previous court cases. By failing to do so, Staff has not presented the issues to the Commission fairly, objectively and completely.

8. No Detrimental Impact on MGE's Customers

At pages 21 through 26, the Report contains the allegation that the sale of Southern Union's Texas operations to ONEOK was detrimental to MGE's customers. This claim is completely lacking in any factual support. The investigation has uncovered no facts which would support such a conclusion. As such, this conclusion is no more than unsubstantiated speculation on the part of Staff.

Likewise, the statement at page 6 of the Report that Southern Union "sacrificed the interests of its Missouri customers in order to profit from the sale of" Southern Union Gas is totally unwarranted, inflammatory and completely unsubstantiated. It reflects an investigation, the ultimate outcome of which apparently was never in doubt. There is not one scintilla of factual support for this gratuitous and inaccurate conclusion.

The only incidents noted in the Report as evidence of a public detriment are cryptic or trivial. At page 23, Staff asserts that "critical information was unavailable to MGE during the winter heating season" but the nature of the information is not specified and it is not explained what harm was caused by its unavailability until February 28, 2003. Also, Staff claims that a response to a data request was not "immediately available" because Mr.

Langston had been out of town and possibly might not able to track down the information requested within the twenty days provided by rule. However, the Commission's discovery rules specifically provide for a party to request additional time to provide information. Commission rule 4 CSR 240-2.090(1) states that a party may request additional time to respond to a data request if it is "unable to answer within twenty (20) days." Southern Union should not be open to criticism for invoking a procedure specifically authorized by Commission rule.

Staff's other claims are nothing more than speculation and conjecture. On page 24 of the Report, for example, Staff states that "it becomes apparent that day to day decisions can impact gas costs by millions of dollars" but offers no credible basis for concluding that gas costs have been impacted by personnel changes relating gas supply. Staff offers no indication that any of the gas supply contracts for MGE which were in place at the time of the transaction been changed or renegotiated or, if so, to what extent and to what effect. Had there been any material adverse changes in these arrangements, presumably they would have been described in the Report. Ultimately, no actual causal connection between the personnel changes and any objective, measurable harm to the public interest is set forth in the Report.

Finally, the Report alleges MGE's facilities are not "adequate" because six former employees of Southern Union's Texas operations have accepted other employment. (Report p. 28) For this remarkable claim, Staff points to *State ex rel. Ozark Electric Cooperative v. Public Service Commission*, 527 S.W.2d 390 (Mo. App. 1975). This is a case that has nothing whatsoever to do with the circumstances presented in the case at hand. The *Ozark* case was a challenge by a competing electric supplier to the issuance by

the Commission of a certificate public of convenience and necessity to The Empire District Electric Company ("Empire") under §393.170 RSMo. The Court of Appeals merely found that the Commission could consider the comparative experience of Ozark and Empire with installing and operating underground electric distribution systems in deciding whether to grant Empire's application for authority to serve in the disputed territory. The issues presented in this case have nothing to do with the issuance of a certificate of public convenience and necessity.

In the final analysis, there has been no adverse impact on MGE's customers whatsoever. They have continued to be served effectively and efficiently. MGE still provides natural gas service within those areas certificated to it by the Commission without impairment or interruption. It is simply not plausible for Staff to conclude that there has been a detrimental impact on the public in **Missouri** arising out of the sale of the Southern Union Gas operations in **Texas**.

9. <u>The Sale by Southern Union Company of its Southern Union Gas Division Was Not a Corporate Reorganization.</u>

At several points in the Report, Staff makes the conclusory statement that the sale by Southern Union of its Southern Union Gas division to ONEOK was a "corporate reorganization." This conclusion is wholly unsubstantiated. The term "reorganization" as utilized in §393.250 RSMo is not defined in the Act or in the Commission's Rules of Practice and Procedure. In such circumstances, words in a statute are to be given the plain and ordinary meaning. *See*, §1.090 RSMo 2000. That meaning is to be found by reference to the dictionary. *Roberts v. McNary*, 636 S.W. 2d 332 (Mo. banc 1982).

A corporate reorganization is a business plan for winding up the affairs of, or financially restructuring a distressed or insolvent corporation under the supervision of a receiver, trustee or court. *Am. Jur.* 2d §2514 Corporations; Blacks Law Dictionary, 7th Ed. Consequently, the term has no relevance to the sale of Southern Union Gas and §393.250 RSMo has no bearing on the circumstances presented in the Report. The sale of Southern Union Gas was not a part of a liquidation of MGE's business or a receivership or bankruptcy of Southern Union. Southern Union has not restructured itself as a holding company nor has it changed its business character from that of a corporation to any other type of business organization. *See, State ex rel. Kansas City Transit, Inc., v. Public Service Commission*, 406 S.W.2d 5 (Mo. 1966).

The Report at page 5 contains a summary description of the corporate structure of Southern Union, correctly noting that MGE is simply a trade name for use in the State of Missouri. It is significant to note that this was the situation both immediately before and immediately after the sale of the Texas properties. Nothing has changed. Thus, the facts recited in the Report do not square with Staff's ultimate conclusion that Southern Union has engaged in a corporate reorganization.

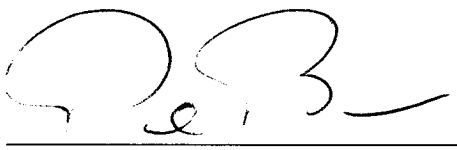
Finally, the Commission needs to be made aware that the viability of §393.250 RSMo itself is in doubt. Enacted in 1913, it appears to have been superseded and preempted by the subsequent enactment in 1978 of the Federal Bankruptcy Code (the "Code"). The Code sets forth a comprehensive set of laws governing corporate reorganizations, "notwithstanding any otherwise applicable non-bankruptcy law." 11 U.S.C. §1123(a)(5); *Re Pacific Gas and Electric Co.*, 283 B.R. 41 (N.D. Cal. 2002). The fact that

§393.250 RSMo may be a dead letter is an important issue that has been omitted from the Report

10. Conclusion

The Report is inadequate and misconceived. The facts are inaccurate, incomplete and misleading. The conclusions in the Report misconstrue the facts and misapply the law. Consequently, the ultimate conclusion contained in the Report is unreliable and sets forth no basis—under either the law or the facts—to conclude that the sale by Southern Union of Southern Union Gas to ONEOK violated any provision of the Act or any rule or order of the Commission. The Report does not in any way establish that Southern Union has acted unlawfully or inappropriately. Thus, there is no basis whatsoever for the Commission to authorize Staff to file a compliant pursuant to. §386.390 RSMo.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail or by hand delivery, on this 23rd day of January 2004 to the following:

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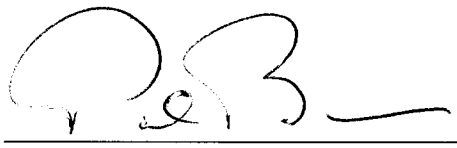

UNITED STATES GYPSUM, INC.; GENERAL MOTORS CORP.; REID HOSPITAL & HEALTHCARE SERVICES; BELDEN WIRE & CABLE CO.; ELI LILLY & CO.; KNAUF FIBER GLASS GMBH; DANA CORP.; ALUMINUM CO. OF AMERICA; HAYES WHEELS INT'L; THOMPSON CONSUMER ELECTRONICS; VISY PAPER, INC.; JEROME E. POLK; GRANT SMITH; JULIA L. VAUGHN; MARK S. BAILEY; WILLIAM G. SIMMONS; TIMOTHY E. PETERSON; ROBERT V. BENGE; CITIZENS ACTION COALITION OF INDIANA, INC.; UNITED SENIOR ACTION, INC.; INDIANA OFFICE UTILITY CONSUMER COUNSELOR; and ENRON CAPITAL & TRADE RESOURCES CORP., Appellants (Petitioners and Intervenors below) v. INDIANA GAS CO., INC.; BOARD OF DIRECTORS FOR UTILITIES OF THE DEPT. OF PUBLIC UTILITIES OF THE CITY OF INDIANAPOLIS, AS SUCCESSOR TRUSTEE OF A PUBLIC CHARITABLE TRUST, d/b/a CITIZENS GAS & COKE UTILITY; AND PROLIANCE ENERGY, LLC, Appellees (Respondents below.)

Supreme Court No. 93S02-9904-EX-251

SUPREME COURT OF INDIANA

735 N.E.2d 790; 2000 Ind. LEXIS 936

September 22, 2000, Decided

SUBSEQUENT HISTORY: Related proceeding at United States Gypsum Co. v. Ind. Gas Co., 2003 U.S. App. LEXIS 23852 (7th Cir. Ind., Nov. 24, 2003)

PRIOR HISTORY: **[**1]** APPEAL FROM THE INDIANA UTILITY REGULATORY COMMISSION. Cause No. 40437. Court of Appeals No. 93A02-9710-EX-667. United States Gypsum v. Indiana Gas Co., 705 N.E.2d 1017, 1998 Ind. App. LEXIS 1704 (Ind. Ct. App., 1998)

DISPOSITION: Commission's order affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants challenged the order of the Indiana Utility Regulatory Commission denying their petition opposing the creation of appellee and seeking the commission to disprove appellee as against the public interest.

OVERVIEW: Affiliates of two natural gas utilities created appellee to procure wholesale natural gas. Appellant's petition seeking disapproval of appellee as against the public interest was denied by the Indiana Utility Regulatory Commission. On appeal, the court affirmed. The commission correctly determined that it lacked plenary jurisdiction over appellee in appellant's Ind. Code § 8-1-2-54 proceeding. The commission was not constrained to considering the agreements between appellee and the utilities only as a proposal under the Alternative Utility Regulation Act. Ownership of the utilities was not transferred to appellee because no plant or equipment for distributing gas was transferred to appellee. The commission properly evaluated and determined that appellee was in the public interest under Ind. Code § 8-1-2-49 by considering the cost effect to consumers, that anti-competitive price patterns had not emerged, that the gas transportation market had not been detrimentally affected, and that gas cost adjustment proceedings would allow the commission to ensure that charges for gas were reasonable.

OUTCOME: Order affirmed because the Indiana Utility Regulatory Commission lacked plenary jurisdiction over appellee, the commission was not contracted to consider the agreements only as a proposal, ownership of the utilities was not transferred to appellee, and the commission correctly determined that appellee

was in the public interest.

CORE TERMS: energy, customer, public utility, settlement, pipeline, public interest, transportation, regulation, retail, municipal, plant, affiliate, disapprove, wholesale, consumer, interstate, marketer, affiliated, franchise, pricing, manage, commodity, planning, public utilities, index-based, investigate, motion to dismiss, natural gas, formation, breached

LexisNexis (TM) HEADNOTES - Core Concepts - Hide Concepts

Energy & Utilities Law > Administrative Proceedings > Judicial Review

HN1 An order of the Indiana Utility Regulatory Commission is subject to appellate review to determine whether it is supported by specific findings of fact and by sufficient evidence, as well as to determine whether the order is contrary to law. On matters within its jurisdiction, the commission enjoys wide discretion. The commission's findings and decision will not be lightly overridden just because the court might reach a contrary opinion on the same evidence. More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN2 The general assembly created the Indiana Utility Regulatory Commission primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature. Its authority includes implicit powers necessary to effectuate the statutory regulatory scheme. Still, as a creation of the legislature, the commission may exercise only that power conferred by statute. More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN3 Ind. Code § 8-1-2-54 allows the Indiana Utility Regulatory Commission to investigate a complaint by a sufficient number of complainants against any public utility that any regulation practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient, or unjustly discriminatory. More Like This Headnote

Energy & Utilities Law > Utility Companies

HN4 A "public utility" is defined as any corporation, company, partnership, or limited liability company that may own, operate, manage, or control any plant or equipment within the state for the production, transmission, delivery, or furnishing of heat, light, water, or power. Ind. Code § 8-1-2-1(a). More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN5 Ind. Code § 8-1-2-49(2) allows the Indiana Utility Regulatory Commission access to the records of affiliated interests involving transactions with the public utility related to matters within the commission's jurisdiction, not including ownership of stock. Further, § 8-1-2-49(2) provides that no management, construction, engineering, or similar contract, made after March 8, 1933, with any affiliated interest is effective until it is filed with the commission, and the commission has authority to disapprove such contracts if they are not in the public interest. More Like This Headnote

Energy & Utilities Law > Utility Companies

HN6 Ind. Code § 8-1-2-1(a) specifically exempts municipally owned facilities from the definition of "public utility." More Like This Headnote

Energy & Utilities Law > Utility Companies > Utility Rates

HN7 Traditional regulation allows a gas utility to obtain an adjustment of its rates to reflect fluctuations in gas cost without undergoing a formal rate proceeding. Ind. Code § 8-1-2-42 g . A gas cost adjustment permits the utility to pass along to its customers on a dollar-for-dollar basis any

fluctuations in the gas cost experienced by the utility. As part of the gas cost adjustment, the Indiana Utility Regulatory Commission applies an earnings test to ensure that the utility's gas costs are not being passed along to the consumer in a way that allows the utility to earn a higher return than that authorized by the Commission in the utility's last rate case. The clear legislative intent is preventing a utility from overearning. For this reason, the "earnings test" applies when gas costs decrease as well as when they increase. More Like This Headnote

Energy & Utilities Law > Utility Companies > Utility Rates

HN8 When a gas cost adjustment is sought, the Office of Utility Consumer Counselor (OUCC) may examine the books and records of the utility to determine the cost of gas on which the adjustment is being sought, and it must make a report to the Indiana Utility Regulatory Commission. Ind. Code § 8-1-2-42(g)(1). In any event, the OUCC must examine a gas utility's books and records pertaining to the cost of gas not less than annually and provide the commission with a report; if appropriate, the OUCC may request a reduction or elimination of a gas cost adjustment. Ind. Code § 8-1-2-42(g)(2). More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN9 The Alternative Utility Regulation Act (Act) permits a utility to propose, and the Indiana Utility Regulatory Commission to adopt, alternatives to traditional regulation. The Act is concerned with the regulation of retail service, rates, and charges, not wholesale supply arrangements to a utility. More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN10 The Alternative Utility Regulatory Act allows the Indiana Utility Regulatory Commission two alternatives to traditional regulation. First, the commission may, after notice and a hearing, commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over either the energy utility or the retail energy service of the energy utility, or both. Ind. Code § 8-1-2.5-3(a) (Supp. 1999). More Like This Headnote

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN11 See Ind. Code § 8-1-2.5-6(a), (c) (Supp. 1999).

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

HN12 The Alternative Utility Regulation Act was intended to supplement, not restrict, the authority that the Indiana Utility Regulatory Commission enjoys under traditional regulation. More Like This Headnote

Energy & Utilities Law > Utility Companies > Utility Rates

HN13 Gas costs may include the gas utility's costs for gas purchased by it from pipeline suppliers and other expenses relating to gas costs as shall be approved by the Indiana Utility Regulatory Commission. Ind. Code § 8-1-2-42(g). More Like This Headnote

Energy & Utilities Law > Utility Companies > Ownership & Restructuring

HN14 A public utility may not sell, assign, transfer, lease, or encumber its franchise, works, or system to any other person, partnership, limited liability company, or corporation, or contract for the operation of any part of its works or system by any other person, partnership, limited liability company, or corporation, without the approval of the Indiana Utility Regulatory Commission after hearing. Ind. Code § 8-1-2-83(a). More Like This Headnote

Energy & Utilities Law > Utility Companies

HN15 A utility's franchise, works, or system has been construed to mean an

entire operational unity of a utility. More Like This Headnote

Energy & Utilities Law > Utility Companies

HN16 The legislature has defined a "utility" as any "plant or equipment" in the state used for, inter alia, the transmission, delivery, or furnishing of power. Ind. Code § 8-1-2-1(g). A public utility is an entity that may own, operate, manage, or control any plant or equipment in the state for the same purposes. Ind. Code § 8-1-2-1(a). In another utility statute, the legislature refers to a franchise to own, operate, manage, or control any plant or equipment of any public utility. Ind. Code § 8-1-2-91. More generally, the primary focus of public utility regulation is ensuring that the utilities provide reasonably adequate service and facilities. Ind. Code § 8-1-2-4. This service includes the product itself, the use or accommodation afforded the customers, and the equipment employed by the utility in performing the service. More Like This Headnote

Energy & Utilities Law > Utility Companies

HN17 Common definitions of "works" include a factory, plant, or similar building or complex of buildings where a specific type of business or industry is carried on or internal mechanism: the works of a watch. A system is a group of interacting, interrelated, or interdependent elements forming a complete whole functionally related groups of elements, especially a network of structures and channels, as for communication, travel or distribution. More Like This Headnote

Governments > Legislation > Interpretation

HN18 Where statutes address the same subject, they are in pari materia, and the court harmonizes them if possible. More Like This Headnote

Energy & Utilities Law > Utility Companies > Contracts for Service

HN19 Ind. Code § 8-1-2-24 allows a public utility to enter an arrangement with its customers or consumers, subject to the Indiana Utility Regulatory Commission's finding that the arrangement is reasonable, just, and consistent with the purposes of Ind. Code § 8-1-2. Such settlements are under the commission's supervision and regulation. Ind. Code § 8-1-2-24. The commission may order rates and regulations as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to revoke its approval and amend or rescind all orders relative thereto, is reserved and vested in the commission, notwithstanding any such arrangement and mutual agreement. Ind. Code § 8-1-2-25. In other words, a settlement approved by the commission loses its status as a strictly private contract and takes on a public interest gloss. More Like This Headnote

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JUDGES: SHEPARD, Chief Justice. Dickson, Sullivan, and Boehm, JJ., concur. Rucker, J., not participating. **[**2]**

OPINIONBY: SHEPARD

OPINION: [*793]

SHEPARD, Chief Justice.

Affiliates of two Indiana natural gas utilities created ProLiance Energy for the purpose of procuring wholesale natural gas supply for the utilities. Opponents complained that ProLiance was an improper attempt to avoid state regulation and petitioned the Indiana Utility Regulatory Commission to disapprove ProLiance as against the public interest. The Commission concluded that ProLiance was in the public interest, however, and denied the opponents' petition. We affirm.

Facts and Procedural History

Indiana Gas Company, Inc., and Citizens Gas & Coke Utility (collectively "the Utilities") provide natural gas to retail customers through their intrastate pipelines at rates regulated by the Commission. The Utilities, known as local distribution companies ("LDC's"), receive gas at city gates where interstate pipelines connect to the LDC's' intrastate pipelines.

Historically, LDC's purchased both gas and transportation of that gas as a single "bundled" product from interstate pipelines. Beginning in 1978, Congress and the Federal Energy Regulatory Commission ("FERC") took steps to stimulate competition, leading interstate pipelines **[**3]** to offer transportation as a separate service. This created a competitive market for the gas itself and allowed customers to sell or "release" pipeline capacity that they did not need. With these changes emerged **[*794]** interstate marketers who sell gas to LDC's and large volume consumers. These large volume consumers are known as transportation customers because they buy gas directly from the marketer but rely on LDC's to provide local, intrastate pipeline transportation. n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 For more background on these changes, see General Motors Corp. v. Tracy, 519 U.S. 278, 283-84, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997); Teledyne Portland Forge v. Ohio Valley Gas Corp., 666 N.E.2d 1278, 1280 (Ind. Ct. App. 1996).

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

Against this background, IGC Energy, Inc. (Indiana Gas's sister company) n2 and Citizens By-Products Coal Co. (a wholly owned subsidiary of Citizens Gas) entered into a Fundamental Operating Agreement in March 1996 creating ProLiance Energy, a limited liability company. ProLiance was **[**4]** designed to allow the Utilities to benefit from the synergistic effects of combined gas supply and planning functions, including enhanced leverage in the wholesale gas marketplace and non-duplication of resources previously devoted by each Utility to those functions. Each of ProLiance's creators owns 50% of ProLiance and, through a board, maintains 50% control over it, thus allowing the Utilities the advantages of dealing with an affiliate rather than a third-party marketer.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 IGC Energy, Inc., is a wholly-owned subsidiary of Indiana Energy, Inc., the parent, holding company of Indiana Gas.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

ProLiance, in turn, entered into separate Gas Sales and Portfolio Administration Agreements with each of the Utilities, covering four and a half years. These agreements made ProLiance responsible for procuring wholesale gas supply and interstate pipeline transportation service for the Utilities. To that end, ProLiance took over the Utilities' existing gas supply contracts and pipeline capacity and assumed responsibility for **[**5]** negotiating new supply contracts when current ones expire. ProLiance also became responsible for scheduling gas delivery to the Utilities and for developing future supply plans, subject to the Utilities' approval. These agreements were filed with the Commission.

The agreements provide that the Utilities will purchase gas from ProLiance at index prices established in trade publications, although the price that ProLiance actually pays for gas may differ from the index price. Additionally, the agreements say the Utilities will pay ProLiance an annual administration fee for performing gas-supply and planning services that the Utilities previously performed themselves. ProLiance also provides the Utilities with a transportation credit in exchange for ProLiance's right to sell off any unused pipeline capacity available once ProLiance has met the gas needs of the Utilities and their gas customers. The transportation credit and the administration fee are partially based on historic benchmarks.

Some of the Utilities' transportation customers petitioned the Commission to disapprove the ProLiance agreements. Ten residential customers of Citizens Gas filed "joinders" purporting to add themselves **[**6]** as petitioners. The Office of Utility Consumer Counselor ("OUCC") appeared on behalf of the public and opposed the ProLiance agreements. Some citizen groups and gas marketers also intervened and opposed the agreements. We refer to these customers and groups adverse to the ProLiance agreements collectively as "Opponents."

The Commission conducted a five-day hearing. On September 12, 1997, the Commission concluded, in lengthy findings, that the ProLiance agreements were in the public interest, so it refused to disapprove them.

The Court of Appeals reversed and instructed the Commission to disapprove the agreements. United States Gypsum, Inc. v. Indiana Gas Co., 705 N.E.2d 1019 (Ind. Ct. App. 1998). It concluded that ProLiance's index-based pricing arrangement **[*795]** was an attempt by the Utilities to circumvent traditional regulation and that their failure to offer a proposal under the Alternative Utility Regulation Act, Indiana Code Chapter 8-1-2.5, required the Commission to disapprove the ProLiance agreements. 705 N.E.2d at 1021-22.

After hearing oral argument, we granted transfer at the request of the Utilities and ProLiance.

Our Standard of Review [7]**

HN1[↑] An order of the Commission is subject to appellate review to determine whether it is supported by specific findings of fact and by sufficient evidence, as well as to determine whether the order is contrary to law. Citizens Action Coalition of Ind., Inc. v. Public Serv. Co., 582 N.E.2d 330 (Ind. 1991). On matters within its jurisdiction, the Commission enjoys wide discretion. See In re Northeastern Ind. Tel. Telephone Co., 201 Ind. 667, 171 N.E. 65 (1930). The Commission's findings and decision will not be lightly overridden just because we might reach a contrary opinion on the same evidence. Public Serv. Comm'n v. City of Indianapolis, 267 Ind. 70, 181 N.E.2d 870 (1962).

I. Jurisdiction

HN2 The General Assembly created the Commission primarily as a "fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature." United Rural Elec. Membership Corp. v. Indiana & Mich. Elec. Co., 549 N.E.2d 1019, 1021 (Ind. 1990) ("UREMC"). Its authority "includes implicit powers necessary to effectuate the statutory regulatory scheme." Office of Utility Consumer Counselor v. Public Serv. Co., 608 N.E.2d 1362, 1363-64 (Ind. 1993). [**8] Still, as a creation of the legislature, the Commission may exercise only that power conferred by statute. UREMC, 549 N.E.2d at 1021.

Opponents petitioned under HN3 a statute that allows the Commission to investigate a complaint by a sufficient number of complainants "against any public utility" that "any regulation . . . practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory. . . ." Ind. Code § 8-1-2-54 n3 (emphasis added). HN4 A "public utility" is defined, in pertinent part, as any "corporation, company, partnership, [or] limited liability company . . . that may own, operate, manage, or control any plant or equipment within the state for the . . . production, transmission, delivery, or furnishing of heat, light, water, or power. . . ." Ind. Code § 8-1-2-1(a).

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 All statutory citations are to the 1998 version of the Indiana Code unless otherwise indicated.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**9]

Opponents named both Utilities and ProLiance as respondents to their petition and believe that all three are subject to investigation under Section 54. It is undisputed that Indiana Gas is a public utility. However, the Commission granted ProLiance's motion to dismiss, in part, after finding that ProLiance is not a public utility. The Commission found that ProLiance does not own, operate, manage, or control any plant or equipment for producing, transmitting, delivering or furnishing gas, and that the Utilities retained control over their facilities. (R. at 1603.) It found that all distribution functions remained with the Utilities. Consequently, the Commission concluded that Section 54 did not provide it with jurisdiction over ProLiance itself.

Opponents attack this conclusion on two grounds. First, they say that the Commission construed "public utility" too narrowly. They argue that ProLiance's integral role in gas supply planning and procurement makes it a public utility. Nonetheless, we agree with the Commission because the functions performed by [*796] ProLiance do not constitute operation, management, or control of a plant or equipment for transmitting or delivering gas; ProLiance [**10] performs services for the Utilities, not for the Utilities' retail customers. We decline Opponents' invitation to equate office equipment and clerical supplies, such as telephones and computers that ProLiance uses, with a "plant or equipment" for distributing gas within the meaning of Ind. Code § 8-1-2-1(a)(2). n4

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 We agree with the Commission that ProLiance does not own, operate, manage or control a plant or equipment for transmitting or delivering gas, and thus see little statutory support for Opponents' additional argument that the definition of "public utility" includes an entity that indirectly furnishes gas to the public.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Second, Opponents say that the Commission had jurisdiction because ProLiance is an "affiliated interest" within the meaning of Indiana Code § 8-1-2-49(2). HN5 Subsection 49(2) allows the Commission access to the records of affiliated interests involving transactions with the public utility related to matters within the Commission's jurisdiction, not including ownership of stock. See [**11] id. Further, Subsection 49(2) provides that "no management, construction, engineering, or similar contract, made after March 8, 1933, with any affiliated interest" is effective until it is filed with the Commission, and the Commission has authority to disapprove such contracts if they are not in the public interest. Id.

Despite granting ProLiance's motion to dismiss in part, the Commission ordered ProLiance to remain a party to this proceeding, pursuant to Indiana Code § 8-1-2-49, for the purposes of answering the other parties' discovery requests and providing information to the Commission. (R. at 1597, 1602.) Furthermore, the Commission squarely decided under Subsection 49(2) that the ProLiance agreements were in the public interest. Although Subsection 49(2) may have given the Commission access to certain affiliate records and accounts and the authority to review affiliate contracts, we find no error in the Commission's determination that it lacked plenary jurisdiction over ProLiance itself under Section 54.

Next, we consider whether the Section 54 petition gave the Commission jurisdiction over Citizens Gas. HN6 Indiana Code § 8-1-2-1(a) specifically exempts municipally owned [**12] facilities from the definition of "public utility." The Commission concluded that Citizens Gas is a municipal utility and therefore not a public utility subject to investigation under Section 54. See Cities & Towns of Anderson v. Public Serv. Comm'n, 397 N.E.2d 303, 310 (Ind. Ct. App. 1979) (Commission's authority to investigate complaints against public utilities under Section 54 does not extend to municipal utilities); Citizens Gas & Coke Util. v. Sloan, 136 Ind. App. 297, 196 N.E.2d 290, (en banc), reh'g denied, 136 Ind. App. 311, 311-12, 197 N.E.2d 312, 313 (1964) (Section 54's similarly-worded predecessor, § 54-408 (Burns' 1951 Replacement) did not allow Commission general authority to investigate Citizens Gas, a municipal utility).

Opponents agree that Citizens Gas is a municipal utility. Despite the earlier Court of Appeals opinions, Opponents argue that the Commission may investigate Citizens Gas under Section 54. Opponents reason that the rules of service and rates adopted by Citizens Gas's board of directors take effect only after the rules and rates have been filed with and approved by the commission and such approval [**13] shall be granted by the Commission only after notice of hearing and hearing as provided by IC 8-1-1 and IC 8-1-2, and only after determining compliance of the rates of service with IC 8-1.5-3-8 and IC 8-1.5-3-10 and only after determining compliance of the rules of service with IC 8-1-1 and IC 8-1-2, along with the rules and standards of service for municipal utilities of Indiana approved by the commission.
[*797]
Ind. Code § 8-1-11.1-3(c)(9). Opponents say that these cross-references to Chapter 8-1-2 necessarily make a complaint about Citizens Gas the proper subject of a petition under Section 54. In addition, symmetry favors treating municipal utilities like public utilities, Opponents contend.

We are not persuaded. The legislature explicitly exempted municipal utilities from the definition of "public utility." Other statutes' explicit references to municipal utilities in conjunction with public utilities show that the legislature knows how to say and include municipal utilities when it so desires. See, e.g., Ind. Code § 8-1-2-42(a),(g); accord Stucker Fork Conservancy Dist. v. Indiana Utility Regulatory Comm'n, 600 N.E.2d 955, 957-58 (Ind. Ct. App. 1992) (municipal [**14] utilities are subject to Commission's jurisdiction "only when specifically provided for by statute"). Thus, we hold that the Commission correctly determined that its jurisdiction under Section 54 did not extend to Citizens Gas. n5

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n5 Early in the proceeding, Citizens Gas presented evidence that only three of the petitioning Opponents were its customers (not ten as required by Indiana Code § 4-21.5-2-54) and moved to dismiss on that ground. (R. at 162-166.) The Opponents responded by filing "joinders" that cited Indiana Trial Rule 20(A) and were signed by ten residential customers of Citizens Gas. (R. at 306-14.) This, in turn, prompted Citizens Gas to move to strike the joinders on the ground that they purported to add petitioners without seeking the necessary permission from the Commission to intervene. (R. at 353-57.) By the parties' agreement, the Commission deferred its ruling on Citizen Gas's motion to dismiss until the case's conclusion. (R. at 1597-98.) Opponents acknowledge that the final order contained the finding that "an insufficient number of Citizens Gas's customers are among the Petitioners and, therefore Petitioners have not satisfied the standing requirement in Section 54." (R. at 1600.) Opponents argue that, to the extent this granted Citizens Gas's motion to dismiss, it is void without adequate findings or evidentiary support. But evidence that only three of the original petitioners were Citizens Gas customers appears to support Commission's finding and conclusion. Although Opponents have asserted in a reply brief something akin to an argument that the Commission abused its discretion if it did not allow joinder, an argument raised for the first time in a reply brief is waived. Gray v. State, 593 N.E.2d 1188, 1191 (Ind. 1992). In any event, we need not decide this issue where the Commission properly found another reason why it lacked jurisdiction over Citizens Gas.

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In sum, we affirm the Commission's conclusion that it lacked plenary jurisdiction over ProLiance and Citizens Gas in this Section 54 proceeding. In any event, Indiana Gas is a public utility, so we address the remaining issues.

II. Traditional and Alternative Utility Regulation

We turn next to the parties' dispute over whether the ProLiance agreements were a proposal for Alternative Utility Regulation (AUR) and thus could only be permitted by the Commission if offered and approved as an AUR proposal. This requires a brief overview of traditional regulation and the language of the AUR Act.

The bedrock principle behind utility regulation is the so-called "regulatory compact," which arises out of a "bargain" struck between the utilities and the state. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer. At the same time, the utility is not permitted to charge rates at the level which its status as a monopolist could command [**16] in a free market. Rather, the utility is allowed to earn a "fair rate of return" on its "rate base." Thus, it becomes the Commission's primary task at periodic rate proceedings to establish a level of rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors.

Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor ("Indiana Gas I"), [*798] 575 N.E.2d 1044, 1046 (Ind. Ct. App. 1991) (citations omitted).

This fair-rate-of-return concept underlies traditional rate regulation. See Citizens Utility Consumer Counselor v. Gary-Hobart Water Corp., 650 N.E.2d 1201 (Ind. Ct. App. 1995); Indiana Gas I, 575 N.E.2d at 1046. In determining fair rates, the Commission considers a representative level of anticipated revenues and expenses and the property employed by the utility to provide service to its customers. See City of Evansville v. Southern Indiana Gas & Elec. Co., 167 Ind. App. 472, 478-81, 339 N.E.2d 562, 566-71; Re Northern Indiana Public Serv. Co., No. 40159, 166 P.U.R.4th 413, (IURC December 28, 1995). The [**17] Commission compares the property used and

useful for the production of current service to the utility's revenues in order to quantify the return being provided by the existing rates. Id. If the Commission determines that a utility's rates have become unjust and unreasonable, it may modify them by ordering just and reasonable rates to be charged prospectively. Ind. Code § 8-1-2-68. This rate-setting procedure is comprehensive: "the Commission must examine every aspect of the utility's operations and the economic environment in which the utility functions to ensure that the data it has received are representative of operating conditions that will, or should, prevail in future years." City of Evansville, 167 Ind. App. at 482, 339 N.E.2d at 570-71.

HN7 Traditional regulation also allows a gas utility to obtain an adjustment of its rates to reflect fluctuations in gas cost without undergoing a formal rate proceeding. See Ind. Code § 8-1-2-42(g). A gas cost adjustment permits the utility to pass along to its customers on a dollar-for-dollar basis any fluctuations in the gas cost experienced by the utility. Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor ("Indiana Gas II"), 610 N.E.2d 865, 867 (Ind. Ct. App. 1993); [**18] see Indiana Gas I, 575 N.E.2d at 1046-49. As part of the gas cost adjustment, the Commission applies an earnings test to ensure that the utility's gas costs are not being passed along to the consumer in a way that allows the utility "to earn a higher return than that authorized by the Commission in the utility's last rate case." Indiana Gas I, 575 N.E.2d at 1046 (citing Ind. Code § 8-1-2-42(g)(3)(C)). The clear legislative intent here is preventing a utility from overearning. Indiana Gas I, 575 N.E.2d at 1052. For this reason, the "earnings test" applies when gas costs decrease as well as when they increase. Indiana Gas I, 575 N.E.2d at 1049.

HN8 When a gas cost adjustment is sought, the OUCC may examine the books and records of the utility to determine the cost of gas on which the adjustment is being sought, and it must make a report to the Commission. Ind. Code § 8-1-2-42(g)(1). In any event, the OUCC must examine a gas utility's books and records pertaining to the cost of gas not less than annually and provide the Commission with a report; if appropriate, the OUCC may request a reduction or elimination of a gas cost adjustment. Ind. Code § 8-1-2-42(g)(2). [**19]

The Commission found that the index-priced supply arrangement in the ProLiance agreements allowed Citizens Gas and the parent of Indiana Gas an opportunity to profit indirectly from the commodity cost of gas. It characterized this as "a result not specifically contemplated in the pertinent subsections of Section 42." (R. at 1641.) The Commission expressed a preference for considering such an arrangement as a proposal under the AUR Act. Nevertheless, it noted that both Utilities had gas cost adjustment proceedings pending, concluded that "this situation could be remedied through proper notice, hearing, and findings in connection with the [Utilities'] GCA [gas cost adjustment] filings" and that "such an alternative measure should be explored in that proceeding." (R. at 1642.)

Contrary to Opponents' claim on appeal, the Commission was not constrained [*799] to considering the ProLiance agreements as a proposal under the AUR Act. HN9 The Act permits a utility to propose, and the Commission to adopt, alternatives to traditional regulation. Citizens Action Coalition, Inc. v. Indiana Statewide Ass'n Rural Elec. Cooperatives, 693 N.E.2d 1324 (Ind. Ct. App. 1998). Our examination [**20] of the Act reveals that it is concerned with the regulation of retail service, rates and charges, not wholesale supply arrangements to a utility.

The legislative findings prefacing the Act, passed in 1995, refer to the Commission's goal of providing "safe, adequate, efficient, and economical retail energy services. . . ." Ind. Code § 8-1-2.5-1(1)(West Supp. 1999)(emphasis added). They note that "an environment in which Indiana consumers will have available state-of-the-art energy services at economical and reasonable costs will be furthered by flexibility in the regulation of energy services." Id. at (4) (emphasis added). Further, they note the need for the Commission to exercise its authority in a flexible manner to "regulate and control the provision of energy services to the public in an increasingly competitive environment, giving due regard to the interests of consumers and the public, and to the continued availability of safe, adequate, efficient, and

economical energy service." Id. at (6) (emphasis added). The AUR Act defines "retail energy service" to mean "energy service furnished by an energy utility to a customer for ultimate consumption." Ind. [**21] Code § 8-1-2.5-3 (West Supp. 1999).

HN10 The AUR Act allows the Commission two alternatives to traditional regulation. First, the Commission may, after notice and a hearing, "commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over either the energy utility or the retail energy service of the energy utility, or both." Ind. Code § 8-1-2.5-5(a)(West Supp. 1999). Or, second,

HN11

(a) In approving retail energy services or establishing just and reasonable rates and charges, or both for an energy utility electing to become subject to this section, the commission may do the following:

(1) Adopt alternative regulatory practices, procedures, and mechanisms, and establish rates and charges that:

(A) are in the public interest . . .; and

(B) enhance or maintain the value of the energy utility's retail energy services or property;

including practices, procedures, and mechanisms focusing on the price, quality,

reliability, and efficiency of the service provided by the energy utility.

(2) Establish rates and charges based on market or average prices, price caps, index based prices, and prices that:

(A) use performance [**22] based rewards or penalties, either related to or unrelated to the energy utility's return or property; and

(B) are designed to promote efficiency in the rendering of retail energy services.

. . . .

(c) An energy utility electing to become subject to this section shall file with the commission an alternative regulatory plan proposing how the commission will approve retail energy services or just and reasonable rates and charges for the energy utility's retail energy service.

Ind. Code § 8-1-2.5-6(a), (c)(West Supp. 1999)(emphasis added). A utility's request for relief under Section 6 "shall be limited to approval of its energy services or the establishment of its rates and charges, or both." Ind. Code § 8-1-2.5-4 (West Supp. 1999).

These repeated references to retail energy services and the establishment of rates and charges persuade us that the legislature did not intend to compel the Commission to exercise jurisdiction over a wholesale gas supply arrangement based on index pricing, even one between a utility and its affiliate, solely under AUR procedures. The Commission found that it [*800] had the authority under traditional regulatory practice to consider [**23] the ProLiance agreements, including their index-based pricing of wholesale gas supply. We agree. HN12 The AUR Act was intended to supplement, not restrict, the authority that the Commission enjoys under traditional regulation.

At least two traditional regulatory tools pre-dating the AUR Act allow the Commission to exercise regulatory authority here. The first, discussed above, requires that certain affiliate contracts be filed with the Commission before becoming effective and allows the Commission to disapprove them if they are not in the public interest. See Ind. Code § 8-1-2-49(2). Here, the Opponents themselves invoked Section 49 as authority for the Commission to consider the ProLiance agreements. In the end, the

Commission concluded under Section 49 that the ProLiance agreements were in the public interest.

The second method, a gas cost adjustment proceeding under Indiana Code § 8-1-2-42(g), has also been discussed above. The Commission found that the ProLiance agreements raised concern because they created the possibility for Citizens Gas and the parent of Indiana Gas to profit from the commodity cost of gas. Yet the Commission was satisfied that those concerns could and should **[**24]** be addressed in the Utilities' pending gas cost adjustment proceedings. (R. at 1642, 1652.) The Commission also expressed a willingness to scrutinize carefully the gas costs associated with ProLiance: it explicitly warned that the actual costs the Utilities pay for gas will not necessarily be allowed as reasonable gas costs under these circumstances because risks and opportunities have been shifted among the Utilities, their investors, and customers. (R. at 1654.)

Opponents object to consideration of the ProLiance index-pricing arrangements in a gas cost adjustment proceeding because, they say, the OUCC will not have access to critical ProLiance records and information, including its actual cost of gas. The Opponents' fear is not well founded in light of the provisions in Ind. Code § 8-1-2-49(2) affording the Commission access to records of a utility's "affiliated interests" while it is pursuing matters within the Commission's jurisdiction. n6 Thus, we conclude that this index-based pricing of wholesale gas supply to the Utilities did not require approval under the AUR Act. n7

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n6 When asked at oral argument about the Opponents' contention that the OUCC would not have access to ProLiance's data in gas cost adjustment proceedings, counsel representing ProLiance stated that he disagreed. **[**25]**

n7 Our conclusion is bolstered by the Commission's approval of another gas utility's recovery of gas costs, prior to the AUR Act, based in part on index-based pricing of gas sold by a marketer to the gas utility. See Re Ohio Valley Gas Corp., slip op., No. 37354-GCA41, 1994 WL 121361 (IURC March 4, 1994). Indeed, the Commission noted that Opponents did not appear to object to an LDC's use of indexes in gas cost adjustment filings or to marketers profiting from the sale of commodity gas to an LDC; instead, the Commission noted, Opponents objected to an affiliate profiting from the commodity sale of gas to an affiliated LDC. (R. at 1642.)

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We conclude also that the Commission may consider the reasonableness of the transportation credit and the administration fee in the gas cost adjustment proceeding, as it has indicated an intent to do. (R. at 1651.) HN13↑Gas costs "may include the gas utility's costs for gas purchased by it from pipeline suppliers . . . and other expenses relating to gas costs as shall be approved by the commission." Ind. Code § 8-1-2-42(g); see Re Northern Indiana Public Serv. Co., 166 F.U.S.4th at 226 **[**26]** (gas costs calculations include commodity, pipeline capacity and storage costs, as well as credits generated against costs, including those received by LDC's from pipeline suppliers and revenues to LDC's from release of capacity); accord Teledyne, 666 N.E.2d at 1252 (gas costs properly included extra expense that gas utility incurred as a result of tariffs imposed by interstate **[*801]** pipelines to cover their transition costs in implementing FERC order to unbundle services).

We hold that the Commission was not constrained to considering these agreements only as a proposal under the AUR Act. n8

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n8 Our resolution of the AUR issue as a matter of state statutory interpretation, as well as our affirmance of the Commission's ruling that it has no plenary jurisdiction over ProLiance under Section 54, make it unnecessary to address ProLiance's argument that federal law preempts state regulation of ProLiance's gas purchases and sales. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988) (The National Gas Act of 1938 confers upon FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale").

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III. Transfer or Merger of Utility Works

HN14 A public utility may not "sell, assign, transfer, lease, or encumber its franchise, works, or system to any other person, partnership, limited liability company, or corporation, or contract for the operation of any part of its works or system by any other person, partnership, limited liability company, or corporation, without the approval of the Commission after hearing." Ind. Code § 8-1-2-83(a). In this section, we decide whether the Commission was required to disapprove the ProLiance agreements because transfers associated with them had not been preapproved by the Commission.

The Commission rejected the Opponents' arguments that the ProLiance agreements required preapproval as a transfer of Indiana Gas's works or system to ProLiance. It construed "works" and "system" in light of Illinois-Indiana Cable Television Ass'n v. Public Service Comm'n, 427 N.E.2d 1100, 1108 (Ind. Ct. App. 1981). In Illinois-Indiana Cable, the Court of Appeals determined that the Commission lacked jurisdiction under Section 83 over a public utility's lease of part of its poles to accommodate attachments by a cable television company. [**28] Id. The court HN15 construed a utility's franchise, works or system to mean "an entire operational unity of a utility." Id.

Applying Illinois-Indiana Cable here, the Commission found that the agreements provide for Indiana Gas to retain ownership, management and "complete unilateral control of its physical gas delivery, distribution transportation and storage facilities." (R. at 1606.) Likewise, the Commission concluded that Indiana Gas remains the certified provider of gas to customers in its service area and has not contracted with ProLiance for the operation of any part of its franchise, works or system. (R. at 1606.) The Commission also noted that Indiana Gas will continue to develop demand forecasts, review and approve supply plans developed by ProLiance, operate gas storage fields, etc. (R. at 1606.)

On appeal, the Opponents argue that the Commission erred by reading the words "works" and "system" too narrowly to include only physical facilities. They claim that Indiana Gas's assignment of existing gas supply contracts and transfer of pipeline capacity and some gas-supply and planning personnel to ProLiance constituted a transfer of a part of Indiana Gas's works or system. [**29]

The statutes do not define the terms "works" and "system." n9 For our purposes, it is important that HN16 the legislature has defined a "utility" as any "plant or equipment" in the state used for, inter alia, the transmission, delivery, or furnishing [*802] of power. Ind. Code § 8-1-2-1(g) (emphasis added). A public utility is an entity that may "own, operate, manage, or control any plant or equipment" in the state for the same purposes. Ind. Code § 8-1-2-1(a) (emphasis added). In another utility statute, the legislature refers to a "franchise to own, operate, manage, or control any plant or equipment of any public utility. . . ." Ind. Code § 8-1-2-81 (emphasis added). More generally, the primary focus of public utility regulation is ensuring that the utilities provide "reasonably adequate service and

facilities." Ind. Code § 8-1-2-4. "This service includes the product itself, the use or accommodation afforded the customers and the equipment employed by the utility in performing the service." Prior v. GTE North, Inc., 681 N.E.2d 765, 773 (Ind. Ct. App. 1997), trans. denied.

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n9 As pertinent here, HN17 common definitions of "works" include "[a] factory, plant, or similar building or complex of buildings where a specific type of business or industry is carried on" or "internal mechanism: the works of a watch." The American Heritage Dictionary of the English Language 2056 (3d ed. 1996). A system is "[a] group of interacting, interrelated, or interdependent elements forming a complete whole . . . functionally related groups of elements, especially . . . a network of structures and channels, as for communication, travel or distribution. . . ." The American Heritage Dictionary of the English Language at 1823.

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[**30] HN18

Where statutes address the same subject, they are in pari materia, and we harmonize them if possible. See Citizens Action Coalition v. Northern Indiana Public Serv. Co., 485 N.E.2d 610, 617 (Ind. 1985), cert. denied, 476 U.S. 1137, 90 L. Ed. 2d 687, 106 S. Ct. 2239 (1986). Consequently, we agree with the Commission that Indiana Gas did not transfer ownership or control over its works or system. Indiana Gas did not transfer to ProLiance any plant or equipment for distributing gas. And although wholesale gas supply and the planning and scheduling thereof are unquestionably important to Indiana Gas, none of the matters relied upon by the Opponents constitute an indivisible part of Indiana Gas's system or works absent some closer nexus with the Utilities' customer service or distribution functions. n10

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n10 In recently holding that a transfer of outstanding stock by a utility or its parent does not constitute a transfer of a franchise, works or system under Subsection 83(a), a majority of this Court declined to use an operation-and-control test that was based on language from Illinois-Indiana Cable. See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm'n, 715 N.E.2d 351, 359 (Ind. 1999). The Court agreed, however, that the Court of Appeals in Illinois-Indiana Cable had correctly determined that Subsection 83(a) confers no jurisdiction in the Commission where the utility leases a "'divisible part of a utility's works'" to a third party. Id. (quoting Illinois-Indiana Cable, 427 N.E.2d at 1103). The result here is consistent with Indiana Bell inasmuch as Indiana Gas has not transferred ownership or control over any indivisible part of its utility system or works to ProLiance.

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Opponents also claim that certain prohibitions in Indiana Code § 8-1-2-84 regulating mergers between two public utilities prohibited the agreements between Indiana Gas and ProLiance absent prior approval by the Commission. However, as we previously held, the Commission properly determined that ProLiance is not a public utility. Still, Opponents insist that Indiana Gas violated at least Indiana Code § 8-1-2-84 (f), which applies to a single public utility and reads, "No such public utility shall encumber its used and useful property or business or any part thereof without the approval of the Commission and the consent, authority, and approval of the owners of three-fourths (3/4) of its voting stock." The term "encumber" usually means "to charge, or burden with financial obligations or mortgages." Dunmore v. Fairmount, Morse & Co., 203 Ind. 510, 524, 181 N.E. 113, 124 (1932). Opponents do not argue, much less demonstrate, how these transfers were an encumbrance.

IV. Earlier Settlement

The Commission also rejected the Opponents' argument that the ProLiance agreements should be disapproved because they violated earlier settlements that Indiana Gas made **[**32]** with some transportation customers and the OUCC in 1994-95. In those settlements, Indiana Gas agreed not to request "sharing" of revenues from its capacity releases and to "reduce its gas costs with all amounts realized from capacity release." (R. at 1624.) Indiana Gas also agreed that its customers could negotiate for pre-arranged capacity releases on a long-term basis, based on Indiana Gas's "determination of available capacity," and that capacity would be awarded by "determining the greatest economic value among **[*803]** offers available for that capacity." (R. at 1624.) The Commission approved these settlements. (R. at 1618, 2772, 3098-99.)

The Commission rejected the Opponents' argument that Indiana Gas breached the settlements by transferring its pipeline capacity to ProLiance or by arranging for the "sharing" of revenue from capacity releases through transportation credits. The Commission explained that the releases contemplated in the settlements would be based on Indiana Gas's own determination of what capacity became available after its needs were met. The Commission reasoned that ProLiance did not receive from Indiana Gas capacity "available" for release because ProLiance was **[**33]** bound to use that capacity first to meet the needs of the Utilities. Only after those needs are met will capacity become "available" for release within the meaning of the settlements. (R. at 1628-29.)

Moreover, it pointed out that Indiana Gas receives the transportation credit in advance of the release of any capacity by ProLiance and will pass along that entire credit to reduce gas costs. (R. at 1626.) The Commission also found that Indiana Gas's release of capacity to ProLiance was consistent with the settlements long-term release provision because it occurred at "maximum pipeline rates" and created an "unequalled economic value." (R. at 1629, 1631.) The Commission estimated that ProLiance will allow Indiana Gas to reduce its winter service cost over four years by $ 16 million, a figure far exceeding the $ 1.8 million it received from capacity releases in 1995. (R. at 1630.) These considerations led the Commission to conclude that Indiana gas did not breach the settlements. (R. at 1630.)

On appeal, Opponents repeat their claim that Indiana Gas breached the settlements by transferring its capacity to an affiliate that has the potential for profiting by selling capacity releases. **[**34]** They also claim that, at the least, Indiana Gas breached the settlements by rendering itself unable to perform its contractual obligations, relying on Strodtman v. Integrity Builders, Inc., 668 N.E.2d 279 (Ind. Ct. App. 1996), trans. denied.

The Opponents' arguments have some allure. It is apparent that what the settling parties anticipated from the settlement is different from what they will now receive. On the other hand, settlements were not ordinary contracts. In proposing the settlements to the Commission, the parties cited Indiana Code §§ 8-1-2-24 8-1-2-25. HN19[↑] Indiana Code § 8-1-2-24 allows a public utility to enter an arrangement with its customers or consumers, subject to the Commission's finding that the arrangement is reasonable, just and consistent with the purposes of Indiana Code Chapter 8-1-2. Such settlements are under the Commission's supervision and regulation. See Ind. Code § 8-1-2-24. The Commission may order rates and regulations as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges and regulations as the Commission may ascertain and determine to be necessary **[**35]** and reasonable, and the right to revoke its approval and amend or rescind all orders relative thereto, is reserved and vested in the Commission, notwithstanding any such arrangement and mutual agreement.

Ind. Code § 8-1-2-24. In other words, a settlement approved by the Commission "loses its status as a strictly private contract and takes on a public interest gloss." Citizens Action Coalition v. PSI Energy, Inc., 664 N.E.2d 401, 414 (Ind. Ct. App. 1996).

Here, the Commission found not only that the settlements were not breached, but also that the ProLiance agreements were in the public interest and that the reasonableness of the transportation credit can be explored in pending gas cost adjustment proceedings. (R. at 1651, 1653.) In light of the Commission's factual findings and the substantial deference owed to the [*804] Commission in supervising settlements and even modifying or revoking orders entered attendant thereto, we find no error.

V. The Public Interest

The Opponents finally claim that the Commission used the wrong legal standard to evaluate the public interest under Section 49. They argue that the Commission's public interest analysis focused [**36] almost exclusively on the immediate cost impact to customers without sufficiently considering the public interest in preventing abuses associated with affiliate transactions, including excessive charges, lack of arm's-length bargaining and restraint on free competition. Yet the Commission began its analysis by acknowledging that the public interest is not confined to customer interests and that it encompasses "a wide range of considerations" including the concerns that the Opponents identify. (R. at 1613.)

The Commission accordingly considered much more than just the cost effect to consumers. It examined Indiana Gas's earlier settlements and the negotiations surrounding ProLiance's formation. It considered the lack of competitive bidding in the formation of what became ProLiance, but it found that the Utilities would be unable to match ProLiance's benefits by using a non-affiliated supplier. (R. at 1616, 1618-19.) It noted too that anti-competitive price patterns have not emerged, that ProLiance has not detrimentally affected the gas transportation market, and that ProLiance has left "the affected markets . . . as robust after the formation of ProLiance as they were prior to its formation. [**37] " (R. at 1636-37, 1650.)

Regarding its continuing ability to monitor the effects of ProLiance, the Commission found, as we do, that gas cost adjustment proceedings will allow the Commission to ensure that charges for gas, as well as the transportation credit and administration fee, are reasonable. Similarly, the Commission explained that it could scrutinize any unreasonable rate impact resulting from ProLiance in a rate proceeding. (R. at 1615.)

These findings dispel the Opponents' argument that the Commission's public interest determination was too limited.

Conclusion

We affirm the Commission's order.

Dickson, Sullivan, and Boehm, JJ., concur.

Rucker, J., not participating.