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April 22, 2003

FILED⁴
APR 2 2 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Missouri Public Service Commission

Re: Staff of the Missouri Public Service Commission v. Southern Union Company Case No. GC-2003-0348

Dear Mr. Roberts:

DAVID V.G. BRYDON

JAMES C. SWEARENGEN

WILLIAM R. ENGLAND, III

JOHNNY K. RICHARDSON

GARY W. DUFFY PAUL A. BOUDREAU

SONDRA B. MORGAN

On behalf of Southern Union Company, I deliver herewith an original and eight (8) copies of:

- Answer of Respondent Southern Union Company;
- Motion to Dismiss Complaint and Suggestions in Support Thereof or, Alternatively, for Referral for Voluntary Mediation (HC); and
- Motion to Dismiss Complaint and Suggestions in Support Thereof or, Alternatively, for Referral for Voluntary Mediation (Nonproprietary) (original only)

for filing with the Commission in the referenced matter. I would appreciate it if you would see that the copies are distributed to the appropriate Commission personnel. Service copies have been mailed or hand-delivered this date.

I have also enclosed an extra copy of each document which I request that you stamp "Filed" and return to the person delivering them to you.

Thank you for your attention in this matter.

Mr. Dale Hardy Roberts April 22, 2003 Page 2

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

Ву:

Paul A. Boudreau

PAB/ccp Enclosures

cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

	ED4
APR 2	2 2003

Staff of the Missouri Public Service Commission,))	Missouri Public Service Commission
Complainant,	ý	
v.)	Case No. GC-2003-0348
Southern Union Company,)	
Respondent.)	

MOTION TO DISMISS COMPLAINT AND SUGGESTIONS IN SUPPORT THEREOF OR, ALTERNATIVELY, FOR REFERRAL FOR VOLUNTARY MEDIATION

COMES NOW, Southern Union Company ("Southern Union") d/b/a Missouri Gas Energy ("MGE"), by and through counsel, and moves the Missouri Public Service Commission ("Commission") for an order dismissing the Complaint in the captioned cause because, among other things, the Commission has no statutory authority pursuant to which it may authorize its General Counsel to seek statutory penalties with respect to the conduct alleged in the Complaint by the Commission's Staff ("Staff") and the Complaint otherwise fails to state a claim upon which relief can be granted against Southern Union. In support thereof, Southern Union states as follows:

Overview of Staff's Complaint

1. Staff has filed a complaint to seek the authority of the Commission to go to Circuit Court to obtain monetary penalties because Southern Union did not get the Commission's permission to sell Southern Union's natural gas distribution business located in the State of **Texas** (hereinafter, the "Complaint"). That transaction did not result in the

sale, assignment or transfer of control of MGE's distribution network, plant, permits or franchises. To the contrary, MGE still provides natural gas service within the service areas certificated to it by the Commission without any impairment or interruption and Staff has not asserted otherwise. Southern Union's Missouri customers continue to be served effectively and efficiently by MGE, and MGE continues to be owned by Southern Union. Yet, Staff believes that the sale of operations in Texas is reason enough to seek to penalize Southern Union.

- 2. The **stated** basis for the Complaint is set out in paragraph 15 thereof wherein Staff states that the sale of "Texas-based" property included an allocation of gross plant overhead and certain computer equipment and software.¹
- 3. The **real** basis for the Complaint, however, has nothing to do with financial and human resources computers and software. This is merely a legal sleight of hand. Rather the actual reason for the Complaint is apparent from the allegations appearing in paragraph 16 wherein Staff mentions ten (10) different **services** which will be provided by ONEOK to Southern Union's Missouri operating division for a short transition period of three (3) months.² Of these services, Staff contends that Southern Union should not have

¹ The property to which Staff makes general reference in paragraph 15 of the Complaint was approximately 45% of \$6.6 million (about \$3.6 million) of costs related to the Financial General Ledger and Human Resources computer software (including associated computer hardware housing the programs) allocated to MGE's rate base. This equipment and software has been located in MGE's offices in Kansas City, Missouri since 1995 and, consequently, are not "Texas-based" assets at all. Moreover, Southern Union continues to own and use this property in connection with its regulated utility operations in Missouri. See, infra., ¶20-21.

² The basis of the Complaint is even more fundamental than Staff's cryptic references throughout to "services" and "functions." In paragraph 13 of the Complaint Staff makes reference to the fact that Southern Union "transferred employees" previously involved in its gas procurement group. Ultimately, the language in the Complaint about transfers of utility functions is merely a euphemism for transfers of people. What Staff is *really* asking the Commission to do in this case is to insert itself into the company's hiring, promoting, reassignment and firing practices as some sort of superceding human resources authority. In addition to being unlawful, this would be an unprecedented and unwise role for the

permitted ONEOK to provide gas supply services to MGE because the gas supply "function" is an "essential" activity. Complaint, ¶ 11. This criticism is groundless.

4. Practically speaking, essential services and functions of public utilities are routinely outsourced and provided by third parties. The Commission expressly has recognized this fact. See, Re Drexel Telephone Company, 19 Mo. P.S.C. (N.S.) 281 (1974).³ Historically and currently, public utilities in this state rely on third party providers to supply essential functions such as legal services⁴, 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 no one seriously questions the right of the public utility to use such qualified vendors and providers as are necessary to fulfill these essential functions, whether it be for an indefinite period or for a short transitional period of time. Ultimately, it is the responsibility of the company's management team to determine how to get the job done. No provision of Missouri law requires that these activities be kept "in house." No provision of Missouri law permits the Commission to veto such decisions.

Commission. Were the Commission to exercise a veto power over the employment practices of those companies it regulates, it would be bound by the decisions made by those individuals it authorizes to be hired, including for ratemaking purposes. The Commission previously has recognized this conundrum. In fact, the Commission is on record that it would be a conflict of interest for it to assume the dual role of manager and regulator. State ex rel. Public Service Commission v. Bonacker, 906 S.W.2d 896 (Mo. App. 1995). [The Commission argued that a Circuit Court order appointing the Commission as receiver for a sewer company would put Commission "in the conflicting position of regulator and regulated." Id. at 899]

³ This was a case pursuant to which the Commission authorized Continental Telephone Company ("Continental") to acquire all of the assets of Drexel Telephone Company ("Drexel"). Drexel was a telecommunications company that had been providing local and long distance service to its 758 customers. The Commission observed that "since Drexel has *no employees* of its own, it must contract with Continental for *all work* to be done." <u>Id</u>. at 281. (emphasis added)

Staff's effort to induce the Commission to impose such a requirement through the artifice of its Complaint is no more than an effort to usurp management discretion and to impose a new general standard on the utility industry without the procedural safeguards provided by the rulemaking process set forth in Chapter 536 RSMo.

5. Staff's Complaint represents regulatory overreach of Herculean proportions. Staff has failed to consider the purpose of the statutes to which it makes reference. Unfortunately, common sense has been the victim. Clearly, Staff has missed the obvious purpose of the regulatory framework put in place by the General Assembly. This Motion will explain the many errors, misconceptions, oversights and fallacies in Staff's reasoning as evidenced in the Complaint. Southern Union will demonstrate why Staff has failed to state a claim upon which relief can be granted against Southern Union and why the Complaint should be dismissed.

The Sale of Southern Union's Texas Operating Division

- 6. 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.
- 7. Southern Union Gas Company ("Southern Union Gas") was the natural gas operating division of Southern Union located in the State of Texas. Headquartered in

⁴A private law firm is filing this Motion to Dismiss on behalf of Southern Union d/b/a MGE.

Austin, Texas, Southern Union Gas served approximately 535,000 customers in that State, including the cities of Austin, El Paso, Brownsville, Galveston and Port Arthur. Pursuant to the terms of a Purchase and Sale Agreement, 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, a copy of which was provided to Staff. A copy of the press release is attached hereto as **Appendix** 1.

8. There was no operational interconnection between the service territories 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 dedicated and geographically discrete municipal franchises, works and systems.

Staff's Complaint

- 9. On March 21, 2003, Staff filed a Complaint against Southern Union alleging Southern Union had sold its operations in Texas unlawfully. Generally, Staff alleges in the Complaint that Southern Union failed to obtain Commission approval before selling its Texas operating division to ONEOK. For its legal authority, Staff places principal emphasis on the provisions of §393.190.1 RSMo 2000 and §393.250 RSMo 2000. The Commission's April 4, 2003, Additional Notice of Complaint was duly served on MGE.
- 10. Staff alleges that Southern Union sold "property, assets and functions that were used to provide service to Missouri customers" when Southern Union Gas was sold

by Southern Union to ONEOK, Inc. Staff has concluded that the transaction is "void" and is seeking authority from the Commission to authorize its General Counsel to seek statutory penalties in Circuit Court in the amount of \$2,000 per day for each day since the transaction closed until approval is obtained from the Commission.

Southern Union's Texas Operating Division Was Not Part of MGE's Franchise, Works or System Necessary or Useful in the Performance of Its Duties to the Public in the State of Missouri

11. At the outset, Staff's Complaint points to the language of §393.190.1 RSMo 2000 that states, in pertinent part, 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, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person, or public utility, without having first 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 same shall be void.

* * * * *

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. (emphasis added)

⁵ Subsequent informal representations by Staff have satisfied Southern Union that Staff has no interest in overturning or invalidating the sale of the Texas operating division to ONEOK. To the contrary, Staff's stated interest is limited to the implications the transaction may have for Missouri-jurisdictional property and the impact, if any, on service to Missouri customers.

- 12. Any claim under this section has three elements. First, the property sold or transferred must be part of the "franchise, works or system" of the public utility. Second, it must be "necessary or useful in the performance of its duties" to the utility's customers in this state. Third, the sale or transfer must have occurred without the approval of the Commission. As will be demonstrated hereafter, the circumstances about which Staff has lodged its Complaint do not meet the elements of this test.
- 13. In paragraphs 5 through 7 of the Complaint, Staff recites, generally, the circumstances of the sale and transfer by Southern Union of "Texas based assets" by Southern Union to ONEOK. Staff appears to believe that the term "assets" is synonymous with the phrase "franchise, works or system." Staff also appears to be of the opinion that "services impacted" by the sale are covered by the statute. Staff's assumptions are incorrect and not grounded in law or fact. While MGE's franchise, works or system may be comprised of various of its assets, the converse is not true; that is, not all of Southern Union's assets are part of MGE's franchise, works or system. Moreover, the provisions of \$393.190.1 RSMo 2000 have no relevance whatsoever to the services identified in the Complaint.
- 14. Significantly, the statutory language cited by the Staff does not use the words "assets", "functions" or "services" so the premise of Staff's argument is defective from the outset. Rather, Subsection 1 of §393.190 RSMo, specifically makes reference only to the "franchise, works or system necessary or useful in the performance of [the utility's] performance of its duties to the public." Thus, the question is not whether Southern Union's Texas based properties were comprised of assets, or whether certain functions or

services have been internally reassigned or outsourced to third parties. The relevant question is whether the Texas properties sold by Southern Union were part of MGE's franchise, works or system necessary or useful in providing gas service to its customers in the State of Missouri. As will be shown below, the answer is an unqualified "no."

Southern Union Gas Was Not Part of MGE's Portfolio of Municipal Franchises

15. 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). The sale by Southern Union of Southern Union Gas did not include any franchises pursuant to which MGE provides natural gas service to any municipality in this state. This is confirmed by the fact that the Staff makes no such allegation in its Complaint.

Southern Union Gas Was Not Part of MGE's Works

16. Likewise, Southern Union's sale of its Texas based Southern Union Gas division is not part of MGE's works. The term "works" is not defined by statute. 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:

⁶ Citing State ex inf. Chaney v. West Missouri Power Company, 281 S.W. 709 (Mo. 1926).

⁷ In the absence of a statutory definition, words of a statute should be given their plain and ordinary meaning but technical words should be given their technical import. §1.090 RSMo 2000.

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 or furnishing of gas, natural or manufactured, for light, heat and power.

Thus, the term "works" is limited in scope to that real or tangible operational property (i.e., right-of-ways, pipes in the ground, valves, compressors, regulators etc.) actually used to deliver gas to the public in this state. The definition makes no reference whatsoever, directly or indirectly, to what Staff refers to as "critical gas supply **functions** including: purchasing natural gas, contract management and billing support." Complaint, ¶ 4. Simply put, the term "gas plant" does not encompass the gas procurement or other routine business activities that Southern Union Gas previously provided to MGE.

Southern Union Gas Was Not Part of MGE's System

17. Likewise, these business "functions" or activities undertaken by MGE, or provide by Southern Union Gas to MGE, are not part of MGE's gas delivery system. The term "system" is not separately defined in Chapter 386 RSMo. However, the terms "sewer system" and "water system" are defined at §386.020(49) and (59) RSMo 2000, respectively. Each of these 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

⁸ The Oregon Supreme 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. <u>Yamhill Electric Company v. City of McMinnville et. al.</u>, 130 Ore. 309, 274 P. 118, 126 (Ore. 1929).

providing service to the public. Again, the business "functions" or activities of a utility are not part of its property.

18. There are no Missouri court cases interpreting the exact meaning and scope of the phrase "franchise, works or system" as that phrase appears in §393.190.1 RSMo. However, while interpreting a nearly identical provision of Indiana law, 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). 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. 10 The Indiana Supreme Court found that the transfer by the utilities of their gas procurement departments to the special purpose affiliate did not require prior regulatory approval from the IPSC because the utilities remained in control of their own physical gas delivery facilities, remained providers of gas in their service areas, continued

⁹ 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 is *ejusdem generis* must be construed to refer back to the subjects set out in the preceding words.]

¹⁰ Quoting <u>Illinois-Indiana Cable Television Association v. Public Service Commission</u>, 427 N.E.2d 1100, 1108 (Ind. Ct. App. 1981) [Held: The IPSC lacked jurisdiction under §8-1-2-83(a) over a public utility's lease of pole space to accommodate cable television attachments.]

to review and approve supply plans, and continued to operate their gas storage fields. The 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." <u>Id.</u> at 802. (A copy of the entire text of the decision of the Indiana Supreme Court is attached hereto as **Appendix 2**.)

19. A similar result is appropriate in the circumstances presented by the Complaint in this case. Simply put, the personnel employed and the activities and functions performed by the MGE operating division, or by Southern Union on behalf of MGE, are not a part of MGE's franchise, works or system as that phrase is used in §393.190 RSMo 2000. Significantly, 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. Rather, the focus is on the fact that personnel have changed or that the responsibilities of certain employees have been reassigned.

Southern Union Has Not Sold, Transferred or Assigned Any Property That Is Necessary or Useful in the Performance of its Duties to the Public

20. The only property specifically identified by Staff in the Complaint is the "Financial General Ledger and Human Resources software valued at \$6,640,177." Complaint, ¶15. Contrary to Staff's allegations, however, this software (formerly known as "S2K and now known as "Infinium") and the hardware on which it operates (an IBM AS400 computer system) is housed at MGE's Broadway office in Kansas City, Missouri. Staff was

well aware of the location of this property prior to the filing of the Complaint. (See, Direct Testimony of Charles R. Hyneman, Case No. GR-2001-292, page 17, lines 19-21)¹¹ This property was excluded from the assets sold by Southern Union to ONEOK, a fact of which Staff was made aware prior to filing the Complaint because the information was provided to Staff on February 28, 2002.¹²

Staff to realize that it was not possible for anything beyond a *de minimis* amount of corporate property allocated to MGE in its most recent rate case (Case No. GR-2001-292) to have been sold to ONEOK. During that rate case, total allocable plant amounted to \$24,907,978.¹³ Of this total amount, \$10,776,648 was allocated by Staff to MGE.¹⁴ More than 93% of this allocated amount (or \$10,034,929) related to Information Technology ("IT") the hub of which, as Staff testified in Case No. GR-2001-292, is located in MGE's headquarters in Kansas City.¹⁵ The remainder of this allocated amount – less than \$750,000 – related to furniture and fixtures, structures and improvements, communications equipment and miscellaneous equipment used in the process of providing various corporate support functions, functions which continue to be provided by Southern Union to MGE out of Wilkes-Barre, Pennsylvania due to the move of Southern Union's corporate

¹¹ A copy is marked **Appendix 3**, and attached hereto.

¹² See, Schedule 1.1(a) Excluded Assets; supplied in response to Staff Data Request 5024 in Case No. GM-2003-0238, a copy of which has been marked **Appendix 4 (HC)**, and attached hereto.

¹³ See, Staff Accounting Schedule 3-2, line 52, column C, a copy of which is marked **Appendix 5**, and attached hereto.

¹⁴ See, Appendix 5, column F.

¹⁵ See, Appendix 5, line 45 plus line 46 (both of column F) divided by line 52 of column F.

headquarters in early 2002, *prior to* the sale of the Texas operating division. Consequently, no property of Southern Union which is necessary or useful in the performance of its duties to the public in Missouri have been sold, transferred or assigned by Southern Union.

MGE Has the Right to Manage Its Affairs and Conduct Its Business

- 22. 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 Public Service Commission Law 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).
- 23. How MGE goes about setting up and running its gas procurement activities and the personnel to be involved now that Southern Union Gas will not be supplying that service, is not a matter that can be directed or determined by the Commission or by 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 Comm'n, 30 S.W.2d 8 (Mo. banc 1930).

24. The <u>City of St. Joseph</u> 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 so doing, 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 Commission 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)

<u>ld</u>. at 14.

25. More recently, the Missouri Western District Court of Appeals also addressed this topic in State ex rel. Harline v. Public Service Comm'n, 343 S.W.2d 177 (Mo. App 1960). This was an appeal by resident landowners in Jackson County, Missouri of the Commission's dismissal of their Complaint challenging the authority of Missouri Public Service Company ("MPS") to construct an electric transmission line. The Commission

concluded that MPS was authorized to construct the line under its existing certificate of convenience and necessity. Appellants contended that the Commission's decision amounted to an abdication of its police powers to the utility. The Court of Appeals disagreed.

26. The Court of Appeals in <u>Harline</u> observed that the Commission's powers are "purely regulatory." <u>Id</u>. at 181. Further, the Public Service Commission Act provides "regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use." <u>Id</u>. The Court 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. (emphasis added)

27. It is clear from the foregoing that 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. Significantly, Staff has made no claim that MGE is not meeting, or has not met, its public service obligation to provide safe and adequate service to its customers as a consequence of selling its operations in Texas.

Staff's Complaint Does Not State A Claim Under §393.190.1 RSMo

28. In its Complaint, Staff simply alleges that it is displeased with the manner in which Southern Union/MGE has gone about managing its gas supply function, and more specifically, that Southern Union has made certain personnel changes. Staff seems particularly troubled that Southern Union is meeting its obligations by hiring "new employees" although it is interesting to note that Staff does *not* allege that the new employees of MGE are unqualified to perform their duties or, more importantly, that MGE has failed to adequately provide for its gas supply requirements. Certainly, the Complaint contains no allegation whatsoever that MGE has failed to provide efficient service or has caused any specific definable harm to the public welfare, circumstances which would not give rise to a violation of §393.190 RSMo 2000 in any event.

The Sale of Southern Union Gas to ONEOK is Not a Reorganization of Southern Union

29. In paragraphs 12 and 13 of the Complaint, Staff alleges, generally, that the sale by Southern Union of its Texas properties to ONEOK is a "reorganization" as that term is used in Section 393.250 RSMo 2000. This is simply not the case. Section 393.250 RSMo has no application to the circumstances presented in Staff's Complaint. The sale of Southern Union's Texas gas distribution division was not a part of a liquidation of MGE's business or a receivership or bankruptcy of Southern Union, nor did it result in a material change in the capitalization of Southern Union. Southern Union has not restructured itself as a holding company nor has it changed it business character from that of a corporation

¹⁶ A 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 <u>Corporations</u>; Blacks Law Dictionary, 7th Ed.

to any other type of business organization. To the contrary, Southern Union has merely sold a discrete and geographically remote business unit located in the State of Texas. Staff cites no Court or Commission decision suggesting that §393.250 RSMo 2000 has any application whatsoever to the sale by a public utility of an operating division located entirely in another state.¹⁷

Conclusion

- 30. It is apparent from the foregoing that there are no facts, and there is certainly no law, that would suggest that Staff's Complaint has stated a claim against Southern Union/MGE upon which relief may be granted. Clearly, the sale by Southern Union of its operating division in Texas did not involve the sale of the whole or any part of MGE's franchise, works or system necessary or useful in the performance of its duties to the public in Missouri. The gravamen of Staff's Complaint appears to be related to what personnel MGE may assign to meeting its gas supply obligations. How MGE goes about meeting its gas supply obligations is a matter reserved exclusively to the company's management so long as it does not impair service quality or reliability. On this point, the Complaint contains no allegations that the quality of MGE's service has been impaired.
- 31. To the extent the Commission is of the opinion that further inquiry about the matters alleged in the Complaint is warranted under its general jurisdiction to keep apprised of the practices of public utilities subject to its supervision and control, the

¹⁷ Although the issue need not be decided in ruling on this Motion, the viability of §393.250 RSMo itself is in serious question. Enacted in 1913, it appears to have be 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 reorganizations, "notwithstanding any otherwise applicable nonbankruptcy law". 11 U.S.C. §1123(a)(5); Re Pacific Gas and Electric Co., 283 B.R. 41 (N.D. Cal., 2002). See also, Chapter 11 Reorganization of Utility Companies, 22 Energy L. J. 277 (2001).

Complaint should be dismissed and these matters investigated in Case No. GO-2003-0348⁻¹⁸

32. Alternatively, Southern Union requests that the Complaint be referred to a neutral third-party mediator for voluntary mediation in lieu of a formal hearing if such a procedural alternative is acceptable to Staff. Under the special circumstances of this case, such an approach would facilitate an informal dialogue between Staff and Southern Union that may lead to an amicable resolution of the Complaint.

WHEREFORE, for good cause shown, the Complaint should be dismissed for failure to state a claim with respect to which relief can be granted and for lack of statutory authority for the Commission to authorize the General Counsel to seek statutory penalties for the involved conduct or, alternatively, and with Staff's agreement, that the Complaint be referred to a neutral third party mediator for voluntary mediation.

Respectfully submitted

Paul A. Boudreau

MO #33155

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Jefferson City, MO 65102

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Attorneys for Respondent Southern Union Company d/b/a Missouri Gas Energy

¹⁸ In the Matter of the Transfer of Assets, including much of Southern Union's gas supply department to EnergyWorx, a wholly owned subsidiary.

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 22nd day of April 2003 to the following:

Ms. Lera L. Shemwell
Office of the General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Douglas Micheel
Deputy Public Counsel
Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 7800
Jefferson City, MO 65102

APPENDIX 1

BW2187 OCT 16,2002

6:15 PACIFIC

09:15 EASTERN

(BW)(PA-SOUTHERN-UNION)(SUG) Southern Union Company to Sell Texas Division to ONEOK

Business Editors

WILKES-BARRE, Pa.--(BUSINESS WIRE)--Oct. 16, 2002--Southern Union Company ("Southern Union" or the "Company") (NYSE:SUG) announces today that it has entered into a definitive agreement with ONEOK, Inc. ("ONEOK"), of Tulsa, Oklahoma, to sell its Southern Union Gas Company Texas division and related assets to ONEOK for approximately \$420 million in cash.

Southern Union Chairman and Chief Executive Officer George L. Lindemann stated, "This is an excellent deal for our shareholders. This transaction represents the first step in our plan to create value for our shareholders by strengthening our balance sheet and by providing sufficient liquidity to explore investments in other energy-related opportunities."

Southern Union Gas Company is Southern Union's oldest natural gas distribution operating division. Headquartered in Austin, it serves approximately 535,000 customers, including the cities of Austin, El Paso, Brownsville, Galveston and Port Arthur. Related assets being sold to ONEOK include SUPro Energy Company, Southern Transmission Company, Mercado Gas Services, Inc., and the Company's natural gas distribution investments in Mexico. ONEOK is a diversified energy company that distributes natural gas to approximately 1.4 million customers in Kansas and Oklahoma.

The transaction, which has been approved by the boards of directors of both companies, will close as soon as possible following clearance by the Federal Trade Commission under the Hart-Scott-Rodino Act and approval by certain Texas municipalities.

J.P. Morgan Securities Inc. acted as financial advisor to Southern Union Company on this transaction. Southern Union Company is an energy distribution company serving nearly 1.5 million customers through its natural gas operating divisions in Texas, Missouri, Pennsylvania, Rhode Island, Massachusetts and Mexico. For more information, visit www.southernunionco.com.

This release and other Company reports and statements issued or made from time to time contain certain "forward-looking statements" concerning projected future financial performance, expected plans or future operations. Southern Union Company cautions that actual results and developments may differ materially from such projections or expectations.

Investors should be aware of important factors that could cause actual results to differ materially from the forward-looking projections or expectations. These factors include, but are not limited to: weather conditions in the Company's service territories; cost of gas; regulatory and court decisions; the receipt of timely and adequate rate relief; the achievement of operating efficiencies and the purchase and implementation of any new technologies for attaining such efficiencies; impact of relations with labor unions of bargaining-unit employees; the effect of any stock repurchases; and the effect of strategic initiatives (including: any recent, pending or potential acquisition or merger, recent corporate restructuring activities, any sales of non-core assets, and any related financing arrangements including refinancings and debt repurchases) on earnings and cash flow.

APPENDIX 1

--30--DM/ph*

CONTACT: Southern Union Company Richard N. Marshall, 570/829-8662

www.scuthernunionco.com

KEYWORD: PENNSYLVANIA TEXAS

INDUSTRY KEYWORD: BANKING ENERGY QIL/GAS MARKETING AGREEMENTS

SOURCE: Southern Union Company

APPENDIX 2

Service: Get by LEXSEE® Citation: 735 ne2d 790

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

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

PRIOR HISTORY: [**1] APPEAL FROM THE INDIANA UTILITY REGULATORY COMMISSION. Cause No. 40437. Court of Appeals No. 93A02-9710-EX-667.

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,

APPENDIX 2

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.
- 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.
- Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions

 **** 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.
- 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).
- 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.
- ☐ Energy & Utilities Law > Utility Companies

 #N6 Ind. Code § 8-1-2-1(a) specifically exempts municipally owned facilities from the

 definition of "public utility."
- Energy & Utilities Law > Utility Companies > Utility Rates

- **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.
- 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).
- 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.
- 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 § 8-1-2.5-5(a) (Supp. 1999).
- 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.
- 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).
- 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 § 81-2-83(a).

☐ 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.

Energy & Utilities Law > Utility Companies

#N16 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.

in Energy & Utilities Law > Utility Companies

**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.

Governments > Legislation > Interpretation

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

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.

COUNSEL: FOR APPELLANTS UNITED STATES GYPSUM, ET AL.: John F. Wickes, Jr., Todd A. Richardson, Pamela H. Sherwood, Indianapolis, IN.

FOR APPELLANTS OFFICE OF UTILITY CONSUMER COUNSELOR: Anne E. Becker, Christopher C. Earle, Timothy Stewart, Indianapolis, IN.

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FOR APPELLANTS ENTRON CAPITAL & TRADE: L. Parvin Price, George T. Patton, Jr., Jeffrey M. Reed, Indianapolis, IN.

FOR APPELLEES INDIANA GAS: Ronald E. Christian, Robert H. Heidorn, Daniel W. McGill, Stanley C. Fickle, Indianapolis, IN.

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FOR APPELLEES PROLIANCE ENERGY: Wayne C. Turner, Steven M. Sherman, Indianapolis, IN.

FOR AMICI CURIAE OHIO VALLEY GAS CORP. ET AL.: George A. Porch, Evansville, IN., Peter L. Hatton, Merrillville, IN.

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.

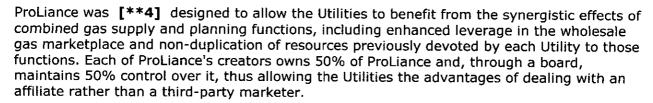
Facts and Procedural History

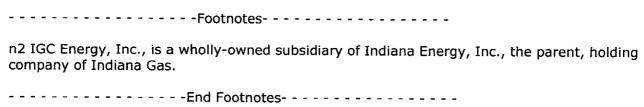
Indiana Gas Company, Inc., and Citizens Gas & Coke Utility (collectively "the Utilities") provide natural gas to retail customers through their intrastate pipelines at rates regulated by the Commission. The Utilities, known as local distribution companies ("LDC's"), receive gas at city gates where interstate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

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).

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, 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 1017 (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]

*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 Indiana, 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 Northwestern Indiana 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. Commin v. City of Indianapolis, 235 Ind. 70, 131 N.E.2d 308 (1956).

I. Jurisdiction

HN2The 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 **N3** 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). **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).

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

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.

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). **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

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 § 8-1-2-54) 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 Office of 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, 478-82, 339 N.E.2d 562, 568-71; Re Northern Indiana Public Serv. Co., No. 40180, 166 P.U.R.4th 213, 224 (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.

HN7Traditional 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 of 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,
HN112

- (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.

**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

				-	-	-	-					-Footnotes-	_			-	-	-	-	_	-	-	-	_	-	-	-	-
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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 P.U.R.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 1282 (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

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").

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 gassupply 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 **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 § 8-1-2-91 (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 768, 773 (Ind. Ct. App. 1997), trans. denied.

n9 As pertinent here, **M17***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.

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

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

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 1108). 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." Underwood v. Fairbanks, Morse & Co., 205 Ind. 316, 334, 185 N.E. 118, 124 (1933). 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. **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 § 8-1-2-25. In other words, a settlement approved by the Commission "loses its status as a strictly private contract and takes on a public interest gloss." Citizens Action Coalition v. PSI Energy, Inc., 664 N.E.2d 401, 406 (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.

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Date/Time: Thursday, April 3, 2003 - 3:05 PM EST

APPENDIX 3

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Schedule H-8 of MGE witness Noack's Updated Test Year Direct Testimony, and is shown below.

| | <u>Payroll</u> | NonPayroll | <u>Total</u> |
|-----------------|----------------|--------------|--------------|
| Corporate Costs | \$17,198,098 | \$11,661,204 | \$28,859,302 |
| % to MGE | 37.182% | 35.765% | 36.61% |
| MGE allocated | \$6,394,591 | \$4,170,677 | \$10,565,268 |
| Exp Factor | 79.2495% | 79.2495% | 79.2495% |
| MGE Expense | \$5,067,681 | \$3,305,241 | \$8,372,922 |

Also, while not included in Southern Union's cost allocation model, all insurance premiums are paid out of the corporate headquarters in Austin Texas and allocated to the divisions and subsidiaries. MGE is being allocated approximately \$716,952 in insurance premiums before applying the expense factor.

- Q. What amount of corporate plant is Southern Union proposing to allocate to MGE?
- A. Southern Union is proposing to allocate \$11,791,245 in corporate plant to MGE with \$11,049,549 consisting of computer and software related plant, which Southern Union refers to as IT (Information Technology) plant. Southern Union maintains substantially all of the Company's computer hardware, software and network plant on its corporate books. While the hub of Southern Union's computer network is at MGE's headquarters in Kansas City (referred to as the KC Data Center), all IT hardware, software, and employees are assigned to corporate. Plant adjustments P-29.1, P-30.1, P-31.1, P-32.1, P-33.1 and P-34.1 found on Accounting Schedule 4, Adjustments to Total Plant add Southern Union's proposed level of allocated corporate plant to MGE's plant in service for rate purposes.
- Is the Staff proposing any adjustments to Southern Union's proposed level of allocated plant to MGE?

APPENDIX 4

HAS BEEN DEEMED HIGHLY CONFIDENTIAL IN ITS ENTIRETY

APPENDIX 5

Accounting Schedule: 3

uens

14:33 06/22/2001

Missouri Gas Energy Case: GR-01-292F December 31, 2000

Total Plant in Service

| ine
Io | Acct | Description | otal
ompany | otal Co
djustment | Alloc
Factor | risdictional
ljustment | | | ijusted
urisdictional |
|-------------|---------|------------------------------------|------------------|----------------------|-----------------|---------------------------|------|----|--------------------------|
| . - | | (A) |
(B) |
(C) | (D) |
(E) | | | (F) |
| | Genera | l Plant-Direct | | | | | | | |
| 32 | 389.000 | Land | \$
610,049 | \$
0 - | 100.0000 | \$
C | P-17 | \$ | 610,049 |
| 33 | 390.100 | Structures | 465,528 | 51,773 | 100.0000 | 0 | P-18 | | 517,301 |
| 34 | 390.200 | Leasehold Improvements | 0 | 0 | 0.0000 | 0 | | | 0 |
| 35 | 391.000 | Office Furniture & Equipment | 3,017,576 | 9,254 | 100.0000 | 0 | P-20 | | 3,026,830 |
| 36 | 392.000 | Transportation Equipment | 4,601,351 | o | 100.0000 | 0 | P-21 | | 4,601,351 |
| 37 | 393.000 | Stores Equipment | 499,757 | 0 | 100.0000 | 0 | P-22 | | 499,757 |
| 38 | 394.000 | Tools, Shop & Garage Equipment | 4,535,973 | 3,333 | 100.0000 | 0 | P-23 | | 4,539,306 |
| 39 | 395.000 | Laboratory Equipment | 0 | 0 | 100.0000 | 0 | P-24 | | ٥ |
| 40 | 396.000 | Power Operated Equipment | 535,765 | 0 | 100.0000 | 0 | P-25 | | 535,765 |
| 41 | 397.100 | Communication Equipment - AMR | 32,969,219 | o | 100.0000 | 0 | P-26 | | 32,969,219 |
| 42 | 397.200 | Comm Equipment | 1,478,273 | 38,562 | 100.0000 | ٥ | P-28 | | 1,516,835 |
| 43 | 398.000 | Miscellaneous Equipment | 166,410 | 8,192 | 100.0000 | 0 | P-27 | | 174,602 |
| 44 | | Total | \$
48,879,901 | \$
111,114 | * | \$
0 | | \$ | 48,991,015 |
| | Alloca | ted General Plant | | | | | | | |
| 45 | 391.000 | Allocated Corporate IT Plant | \$
0 | \$
21,722,043 | 46.2720 | \$
(1,014,620) | P-29 | \$ | 9,036,604 |
| 46 | 391.000 | Direct Assigned Corporate IT Plant | σ | 998,325 | 100.0000 | o | P-30 | | 998,325 |
| 47 | 391.100 | Furniture & Fixtures | 0 | 1,510,720 | 29.0714 | 0 | P-31 | | 439,187 |
| 48 | 390.000 | Structures & Improvements | 0 | 658,891 | 44.8883 | 0 | P-32 | | 295,765 |
| 49 | 397.000 | Communication Equipment | 0 | 11,224 | 37.5972 | 0 | P-33 | | 4,220 |
| 50 | 398.000 | Miscellaneous Equipment | 0 | 6,775 | 37.5972 | 0 | P-34 | | 2,54 |
| 51 | 303.000 | Miscelaneous Intangible Plant | 0 | 0 | 100.0000 | 0 | | | |
| 52 | | Total | \$
0 | \$
24,907,978 | | \$
(1,014,620) | | \$ | 10,776,64 |
| | Projec | eted Plant Increases- 6/30/01 | | | | | | | |
| 53 | i | Projected Increase - Intangible | \$
0 | \$
441,748 | 100.0000 | \$
0 | P-46 | \$ | 441,74 |
| 54 | Ŀ | Projected Increase - Distribution | 0 | 18,924,141 | 100.0000 | Ó | P-47 | , | 18,924,14 |
| 55 | i | Projected Increase - General Plant | О | (10,341) | 100.0000 | 0 | P-46 | 3 | (10,34) |
| 56 | ; | Total | \$
0 | \$
19,355,548 | | \$
0 | | \$ | 19,355,54 |

Accounting Schedule: 3-2