1971.

PUBLIC UTILITY—DOMESTIC CORPORATION ENGAGED IN TRANSPORTATION, DISTRIBUTION AND SALE OF NATURAL GAS IS PUBLIC UTILITY AND SUBJECT TO CONTINUING REGULATIONS OF PUBLIC UTILITIES COMMISSION WHEN.

SYLLABUS:

Where a domestic corporation engaged in the transportation, distribution and sale of natural gas to domestic and industrial consumers has for a number of years since its incorporation and organization submitted to the jurisdiction of the Public Utilities Commission by the filing of rate schedules and otherwise, and has invoked the power and authority of that Commission in securing an increase in the rates at which its gas can be sold to consumers, such company has thereby given its business the status of a public utility, and such company is subject to the continuing regulations of the Public Utilities Commission.

COLUMBUS, OHIO, December 8, 1933.

The Public Utilities Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of a recent communication from you, which reads as follows:

> "In response to repeated requests by this Commission, the Industrial Gas Company has refrained from filing a report for the year 1932 on the ground that it holds itself not to be a public utility. It advises through its counsel, Mr. James Fitzgibbons of Newark, Ohio, that it has raised the same question with the Tax Commission. For this reason and because of our knowledge of the fact that the Tax Commission has advised you as to all of the facts surrounding the operation of this company, we do not repeat. This Commission requests your opinion as to whether the operations of this company are such as to bring it within the purview of our regulation."

It appears from your communication that the Industrial Gas Company has refused to file the report for the year 1932 required of it as a public utility, and that its position in this respect is predicated upon its claim that it is not in fact a public utility. You request my opinion upon the question, whether the operations of this company are such as to bring it within the regulatory powers of your commission.

In consideration of this question, no facts have been presented to me with respect to the operations of this company or the manner in which it conducts its business, other than those appearing in a brief which counsel for the company has submitted to me, and those which I have ascertained from an examination of the files of your office and of the Tax Commission of Ohio.

The Industrial Gas Company was organized in 1926 for the following stated purposes, as the same appear in the purpose clause of the articles of incorporation of the company:

> "For the purpose of producing, acquiring, distributing, furnishing, supplying, transmitting and selling natural gas for light, power and other

purposes and in connection therewith, acquiring, holding, operating and disposing of properties, franchises, rights, privileges and leases and doing all things necessary and incidental thereto."

It is obvious from a consideration of the purpose clause in the articles of incorporation of the company that under the same it is authorized to produce or otherwise acquire natural gas and to transport, distribute and sell the same as a public utility. As to this, it is to be observed, however, that the question of whether this corporation is a public utility and as such is subject to the regulatory power and authority of the Public Utilities Commission, depends upon what it does or has done, rather than upon what it has power to do under its articles of incorporation. *Ford Hydro-Electric Company* vs. *Town of Aurora,* 206 Wis. 489; *Terminal Taxicab Company* vs. *District of Columbia,* 241 U. S. 252; *State, ex rel. Danciger and Company* vs. *Public Service Commission,* 275 Mo. 483.

In this view, it is obvious that the question of whether this corporation has the status of a public utility must be determined upon considerations other than the statement of its purposes, as the same are set out in the purpose clause of its articles of incorporation. Section 614-2, General Code, which is one of the sections of the chapters relating to the powers and duties of the Public Utilities Commission and of corporations and other persons having the status of public utilities, provides among other things that any person or corporation "when engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state, is a natural gas company."

Sections 614-2a and 614-3, General Code, provide as follows:

Sec. 614-2a.

"The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as 'railroads' in sections 501 and 502 of the General Code, and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act."

Sec. 614-3.

"The public utilities commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate 'public utilities' and 'railroads' as herein defined and provided and to require all public utilities to furnish their products and render all services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public."

Upon an examination of the statement filed by this company with the Tax Commission for property tax purposes for the year 1932, under the provisions of section 5420, General Code, I find that this company procures its supply of natural gas from the Gas Products Company of Ohio and from the Hopewell Fuel and Gas Company, and that it distributes and sells the same for both industrial and domestic purposes at Cambridge, Zanesville, Crooksville and

Roseville and in said respective vicinities. It appears that in Cambridge and vicinity the company is furnishing gas to twenty-two domestic consumers and to four industrial consumers; in Zanesville and vicinity it is furnishing gas to twenty domestic consumers and to six industrial consumers; at Crooksville it is furnishing gas to six industrial consumers; and at Roseville to eleven industrial consumers. It further appears from said report that the total amount of gas furnished by this company during the year to domestic consumers was 3,667,000 cubic feet, and that the amount of gas furnished to industrial consumers during the year was 1,458,123,000 cubic feet.

From this statement of facts, it is quite clear that within the definatory provisions of sections 614-2 and 614-2a, General Code, this corporation is a public utility. In this connection it is to be observed, however, that in the consideration of the question of whether this corporation is in fact a public utility and as such is subject to the regulations and orders of the Public Utilities Commission, the definatory provisions of the sections of the General Code above referred to must be read in connection with the subject matter to which they relate, and are to be construed as applying only to such corporations or other persons as have in some way devoted their properties to a public use or have impressed the same with a public interest; for the question, whether or not a given business, industry or service is a public utility, does not depend entirely upon legislative definition, and a business that is essentially private in its nature cannot be made a public utility by mere legislative fiat. *Producers Transportation Company* vs. *Railroad Commission of California,* 251 U. S. 228; *Michigan Public Utilities Commission* vs. *Duke,* 266 U. S. 570; *The Southern Ohio Power Company* vs. *Public Utilities Commission,* 110 O. S. 246; *Hissam* vs. *Guran,* 112 O. S. 59; *Jonas* vs. *Swetland Company,* 119 O. S. 12.

In this view of the law the question of whether the Industrial Gas Company is in fact a public utility, must be determined to some extent on considerations other than the applicable provisions of sections 614-2 and 614-2a, General Code, above noted. This corporation in taking the position that it is not a public utility such as is required to comply with the statutory provisions, rules and regulations applicable to corporations and persons having this status, claims that there has never been a dedication of its business to public service, and that, in this connection, it has never held itself out as willing to serve the public indiscriminately in the distribution and sale of gas at its command. As to this, its further claim is that it sells its gas principally to select concerns for industrial purposes by private contracts for a stated term of years. It is further stated on behalf of this corporation that occasionally in negotiating for private rights-of-way for its gas pipes and conduits, the company as consideration therefor contracts and agrees to furnish gas for domestic use to the owners of property in and upon which such private rights-of-way are secured; and that the furnishing of this gas to individuals for domestic use is only an incident to the corporation's business of selling gas pursuant to private contracts to select industrial concerns. As considerations pertinent to the question here presented, the Industrial Gas Company claims that it has never exercised the right of eminent domain and that it has not at any time accepted franchises for the use of streets and other public ways for the purpose of transporting, distributing and selling its gas. As to this, it is a matter of some difficulty to see how this corporation can distribute and sell its gas in the municipalities above named, and in the respective vicinities thereof, without laying its gas pipes or conduits in or across some street or highway upon franchise or permit therefor

granted by the county, township or municipality, as the case may be. Section 10129, General Code.

With respect to the claim of the company that it has never exercised the right of eminent domain for the purpose of acquiring lands in and upon which to lay its pipes and conduits, or otherwise, it may be observed that although this statement may be accepted as a fact, it is of some significance in the consideration of the status of this corporation as a public utility, or otherwise, to know that it is organized for a purpose which under the statutes of this state give to it the power to appropriate lands for pipe line and conduit purposes. Under the provisions of section 10128, General Code, any company organized for the purpose of transporting natural gas through tubing, pipes or conduits may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes or conduits, and may appropriate so much thereof as it is deemed necessary for laying down such tubing, pipes or conduits. By section 10129, General Code, it is provided that such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. It has been held that the provisions of these sections conferring the power of eminent domain apply as well to a gas company which is engaged in the business of distributing and selling its gas to consumers, as well as to a corporation which is engaged only in a business of transporting gas through its pipes. *City of Columbus* vs. *Federal Gas and Fuel Company,* 13 N. P. (N. S.) 394. Although there is authority to the point that a corporation is not made a public utility by the mere fact that under its articles of incorporation it may exercise the power of eminent domain *(McCullagh* vs. *Railroad Commission,* 190 Cal. 13), the fact that this corporation has voluntarily sought corporate existence to engage in an enterprise which invested it with the power of eminent domain, is of some significance in determining whether its business is one effected with a public interest, and that the corporation is to this extent a public utility. *Inter-Ocean Publishing Company* vs. *Associated Press,* 184 Ill. 438. Under the Constitution of this State, the power of eminent domain, whether it is invoked by public authorities or by private corporations, can be exercised only for public purposes. Touching this question, the Supreme Court of the state in the case of the *Pontiac Improvement Company* vs. *the Board of Commissioners of The Cleveland Metropolitan Park District,* 104 O. S. 447, held:

> "The phrase, 'where private property shall be taken for public use', contained in section 19, article I of the Constitution of Ohio, implies possession, occupation and enjoyment of the property by the public, or by public agencies, to be used for public purposes."

In this view it would seem that the fact that this company has been incorporated and organized for a purpose which gives it the right to invoke the power of eminent domain, characterizes the business of the company as one affected by a public interest, and as such subject to the proper exercise of the police power of the state. However, as I view this question, the most significant circumstance reflecting upon the status of the Industrial Gas Company is the fact that this company has heretofore by its voluntary action submitted to the jurisdicion of the Public Utilities Commission, and as such public utility has invoked the power and authority of the Commission with respect to the rates to be charged by it as a public utility. As to this, it appears that sometime after the incorporation and organization of the Industrial Gas Company, it filed with

the Public Utilities Commission a schedule of its rates for furnishing gas to consumers at Cambridge and vicinity; that thereafter, on or about December 14, 1928, it filed another schedule superceding its former schedule, by which provision was made for increased rates to be charged by it for gas furnished to consumers at Cambridge and vicinity, effective January 15, 1929. When this schedule providing for such increased rates was filed, a number of industrial consumers in this locality filed a complaint against such increased rates in the manner provided by section 614-20, General Code, and thereupon, as further provided in said section, the Public Utilities Commission made an order suspending the rates provided for in said schedule for a period of one hundred and twenty days. The matter not having been determined by the Public Utilities Commission within this period of one hundred and twenty days, the company filed the bond provided for in the section and thereby put the new schedule of rates into effect. Thereafter, in May 1930, the Public Utilities Commission made an order rescinding its former order suspending the increased rates provided for in this schedule, and thereby approved the same.

With respect to the service of this company at Zanesville and at Roseville, and in the respective vicinities of these municipalities, it appears that the Industrial Gas Company has been operating under rates provided for in schedules filed by the Swingle Gas and Oil Company, under date of June 21, 1926, and which became effective on August 1, 1926. It appears that thereafter the Industrial Gas Company, upon approval of the Public Utilities Commission in the manner provided for in section 614-60, General Code, purchased the property and business of the Swingle Gas and Oil Company, and with the approval of said Commission adopted the rates provided for in the schedule filed by the Swingle Gas and Oil Company. I do not find in the files of your office any schedule of rates filed by this company with respect to the sale of its gas at Crooksville and vicinity; but, by reason of the proximity of Crooksville to Roseville, I assume that the company has been furnishing gas to its consumers at Crooksville and vicinity under the rates provided for in its Roseville schedule.

In the situation disclosed by the foregoing statement of facts, I am inclined to the view that the Industrial Gas Company has made an unequivocal dedication of its business to public service in such way as to make it a public utility and, as such, subject to statutory enactments and to regulations of the Public Utilities Commission relating to corporations having this status. In the case of *Southern Ohio Power Company* vs. *Public Utilities Commission,* 110 O. S. 246, it was held that to constitute a "public utility" there must be such a devotion of the company's business to public service that the products and service of the company are available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or a calling to its aid of the police power of the state. As to this, it is to be observed that section 614-16, General Code, requires public utilities to file rate schedules. Section 614-20, General Code, providing for the hearing by the Public Utilities Commission of complaints as to increased rates, as well as section 614-60, General Code, requiring the approval of the Public Utilities Commission of the purchase by one public utility of the property and business of another, have each and all been enacted by the legislature in the exercise of the police power of the state. And the Industrial Gas Company, having voluntarily complied with these statutory provisions, and having invoked the power and authority of the Public Utilities Commission granted by these enactments, has, I believe, made such a dedication of its business to public service as makes it a public utility.

In the case of *Palermo Land and Water Company* vs. *Railroad Commission,* 173 Cal. 380, it was held:

> "The application to the railroad commission by a private water company engaged in supplying water for private use, to have its rates for water established, and an order of the commission allowing an increase in the rates theretofore in effect, operated, as against the company, as a submission to the authority of the regulating body, and was effective to change the use from a private and particular use to a public use so as to make the service and terms of delivery subject to regulation and control by public authority."

The court in its opinion in this case, after discussing other facts relating to the status of the Palermo Land and Water Company as a public utility, said:

> "But, apart from this consideration, it appears that in December, 1912, the Palermo company applied to the railroad commission to have its rates for water established and that the commission made its order allowing an increase in the rates theretofore in effect. (Opinions and Orders of the Railroad Commission, vol. 111, p. 1247). The case, therefore, falls directly within the doctrine of *Franscioni* vs. *Soledad Land & Water Co.,* 170 Cal. 221, (149 Pac. 161), where we held that as against the water company such submission to the authority of the regulating body was effective to 'change the use from a private and particular use to a public use so as to make the service and terms of delivery subject to regulation and control by public authority.' No valid distinction can be drawn between the Franscioni case and the one before us."

In this connection it is quite clear that the action of the Industrial Gas Company in taking upon itself the status of a public utility by submitting to the jurisdicion of the Public Utilities Commission, and by invoking the power and authority of that body with respect to the rates to be charged by it in the sale of gas to consumers, thereby by operation of law conferred upon such consumers the right to rely upon the continuing status of the company as a public utility.

In the case of *Brewer* vs. *Railroad Commission,* 190 Cal. 60, 81, it was held that a water company which had dedicated its water to a public use could not revoke such dedication and convert its water into a private use without the consent of all the beneficiaries of such use. Upon this point, the court in its opinion said:

> "Having thus dedicated its water to a public use the company could not revoke such dedication and convert its water into a private use without the consent of all of the beneficiaries of such use. *Franscioni* vs. *Soledad L. & W. Co.,* 170 Cal. 221, 228; *Leavitt* vs. *Lassen Irr. Co.* 157 Cal. 82, 89."

Upon the consideration above noted, I am of the opinion that the Industrial Gas Company has the status of a public utility and that as such it is required to file the annual reports required of it by section 614-48, General Code. The conclusion here reached, as above indicated, is not, I believe, in any way inconsistent with the decision of the Supreme Court of this state in the case of *Para-*

mount Gas Utilities Company vs. *Public Utilities Commission,* 125 O. S. 211. The facts in that case as compared with those attending the normal operations of gas companies in the transportation, distribution and sale of gas to consumers, were admittedly *sui generis.* In the case above cited, it appeared that a corporation by cooperation with certain designated persons residing in rural and suburban territory sold to such designated persons, as consumers, petroleum gas from and through a tank and plant which such consumers by financial contributions had helped to install. Even in this case there were circumstances which made it a close question in the mind of the court whether the corporation selling this gas, in the manner above indicated, was not a public utility. However, the court in this case was inclined to the view that the sale of gas in this manner was a merchandising operation, and that the corporation engaged in the sale of the gas was engaged in a private business. Manifestly, if, as conceded by the court, in the case cited, a close question was presented as to whether or not the corporation there involved was engaged in a public utility operation, there can be no question of the status of the Industrial Gas Company as a public utility after it has openly operated as a public utility ever since its incorporation and organization, and after it has invoked the powers of the Public Utilities Commission in securing increased rates for the sale of its gas.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1972.

BOARD OF EDUCATION—BUDGET SUBMITTED TO BUDGET COMMISSION MUST CONTAIN ALL ESTIMATED RECEIPTS INCLUDING LIQUID FUEL TAX—UNAUTHORIZED TO LEVY AT GREATER RATE THAN NECESSARY TO PROVIDE FOR NEXT ENSUING YEAR —BUDGET COMMISSION MAY APPROVE TAX LEVY AT RATE LESS THAN 4.85 MILLS WHEN.

SYLLABUS:

1. *When a board of education submits its budget to the budget commission pursuant to the requirements of Sections* 5625-20 *et seq. General Code, Section* 5625-21, *General Code, requires that there be set forth therein all estimated receipts from sources other than general property tax, and including the amount estimated to be received during the ensuing year from the proceeds of the liquid fuel tax by virtue of the provisions of Section* 5542-18, *General Code.*

2. *When the budget of a board of education prepared in compliance with the provisions of Section* 5625-1, *General Code, shows that in order to provide revenue for the purposes of the subdivision it is unnecessary to levy taxes on the general property at a rate equal to, or greater than* 4.85 *mills and at a rate outside of constitutional limitations equal to the maximum rate authorized by the vote of the people, there is no provision of law which requires or authorizes the tax levying authority of the subdivision to levy such taxes at a greater rate than necessary to provide the necessary funds for the estimated needs of the subdivision during the next ensuing year.*

3. *When the budget of a board of education prepared in compliance with the provisions of Section* 5625-1, *General Code, shows that, in addition to a levy of taxes theretofore authorized by a vote of the people outside of constitutional limi-*