SOUTH JERSEY GAS COMPANY,  
Petitioner,  
v.  
SUNOLIN CHEMICAL COMPANY and  
THE B.F. GOODRICH COMPANY,  
Respondents.

Initial Decision: June 9, 1987  
Final Agency Decision: August 18, 1987  

SYNOPSIS

South Jersey Gas Company applied to the Board of Public Utilities for injunctive relief prohibiting SunOlin from selling manufactured gas to a Goodrich plant in New Jersey. The matter was transmitted to the Office of Administrative Law as an investigation, pursuant to N.J.S.A. 52:14F-5(o), rather than as a contested case.

SunOlin is a Delaware corporation which delivers refinery products to New Jersey by pipeline. It contracted with Goodrich to provide manufactured gas, a product that is used in industry but is not suitable for residential purposes. Goodrich had been obtaining natural gas from South Jersey Gas Company. South Jersey contended that the sale of gas by SunOlin to Goodrich constituted the provision of a public utility service, but SunOlin had not obtained municipal consents as required by N.J.S.A. 48:2-14 and 48:9-17. Further, South Jersey argued that SunOlin should be restrained from providing gas to Goodrich because that service diverted sales from South Jersey, thus lowering revenues and leading to the possibility of increased costs for South Jersey ratepayers.

The main issue in the investigation before the Office of Administrative Law was whether SunOlin should be considered a public utility within the meaning of N.J.S.A. 48:2-13 and therefore subject to regulation by the Board of Public Utilities. SunOlin contended its service was private and limited to only one customer. The administrative law judge assigned to the matter disagreed, concluding that SunOlin was in fact a public utility within the meaning of the law. The test was not how many customers SunOlin served, but rather the purposes of the Legislature in enacting laws to regulate public utilities. SunOlin's service to Goodrich would affect the public, since lost revenues to
South Jersey would lead to higher rates as well as loss of tax revenues to the State. The judge recommended that SunOlin be considered a service for public use and therefore a public utility subject to regulation by the Board.

Upon review, the Board of Public Utilities agreed with the recommendations of the administrative law judge. The determination as to whether SunOlin was subject to the Board's jurisdiction should be made in light of its overall operations in New Jersey and the extent to which the public interest would be affected. Contracts like the one between SunOlin and Goodrich affect the public convenience and necessity by diverting revenue from regulated public utilities such as South Jersey Gas Company. The Board has authority to restrict such competition in order to protect the public interest.

The Board ordered SunOlin to cease sales to Goodrich until such time as appropriate municipal consents have been approved. In the event that SunOlin obtains municipal consents, the question of whether SunOlin should be restrained from providing service to Goodrich would be determined in the context of a proceeding before the Board to approve the municipal consents.

The Appellate Division affirmed.

Ira G. Megdal, Esq. for South Jersey Gas Company (Davis, Reberken-ny & Abramowitz, attorneys)

Michael T. Mishkin, Esq., member of Washington, D.C. bar, admitted pro hac vice, for SunOlin Chemical Company and the B.F. Goodrich Company (Squire, Sanders & Dempsey, attorneys)

Attorney of Record: Richard C. Cooper, Esq.

Allen Washington, Deputy Attorney General, for the Staff of the Board of Public Utilities (W. Cary Edwards, Attorney General of the State of New Jersey, attorney)

Claude E. Salomon, Deputy Attorney General, for the Department of Commerce and Economic Development (W. Cary Edwards, Attorney General of the State of New Jersey, attorney)

James M. Hirshborn, Esq., and Menasha J. Tausner, Esq., for the Department of the Public Advocate, Division of Rate Counsel (Alfred A. Slocum, Public Advocate, attorney)

James R. Lacey, Esq., and Shawn P. Leyden, Esq., for Public Service Electric & Gas Company

Mary Patricia Keefe, Esq., and Paul J. Chymiy, Esq., for Elizabethtown Gas Company
Kenneth P. Westreich, Esq., for New Jersey Natural Gas Company
(Conway, Reisman, Mattia & Sharp, attorneys)
William R. Watkins, Esq., for New Jersey Industrial Energy Users
(Lindabury, McCormick & Estabrook, attorneys)
Keith R. McCrea, Esq., for the Industrial Customer Group (Squire,
Sanders & Dempsey, attorneys)

McGILL, ALJ:

This investigation was initiated by the Board of Public Utilities
("Board") as the result of a petition filed by South Jersey Gas Com-
pany ("South Jersey" or "petitioner") seeking preliminary and per-
manent injunctive relief against SunOlin Chemical Company
("SunOlin") and the B.F. Goodrich Company ("Goodrich" or collect-
ively with SunOlin "respondents") for the purpose of prohibiting
SunOlin from selling and delivering manufactured gas to Goodrich's
plant in Pedricktown, New Jersey.

PROCEDURAL HISTORY

The petition was filed on February 13, 1987. At its meeting on
March 5, 1987, the Board denied South Jersey's request for a
preliminary restraining order, and by letter dated March 6, 1987, the
Board requested that the Office of Administrative Law ("OAL")
accept the matter as an investigation. The purpose of the transmittal
was to make a determination whether SunOlin Chemical Company
is a public utility in the State of New Jersey and subject to the Board's
jurisdiction pursuant to N.J.S.A. 48:2-13. At a scheduling conference
on March 10, 1987, Chief Judge Ronald I. Parker stated that the OAL
was accepting the matter as an investigation pursuant to N.J.S.A.
52:14F-5(o) as opposed to a contested case.

At a prehearing conference on March 19, 1987, a schedule was
established to complete the matter on an expeditious basis as re-
quested by the Board. In addition to petitioner and respondents, the
parties to this proceeding include Board Staff; the Department of the
Public Advocate, Division of Rate Counsel; the Department of Com-
merce and Economic Development; the New Jersey Industrial Energy
Users; the Industrial Customer Group; Public Service Electric and
Gas Company; New Jersey Natural Gas Company; and Eliza-
bethtown Gas Company. After extensive discovery, the matter was
brought to hearing on April 13, 14, 15, 27 and 28, 1987 at the Office of Administrative Law in Newark, New Jersey. The parties filed simultaneous briefs, and the record was closed on May 22, 1987.

ISSUES

The main issue in this proceeding is whether SunOlin is a public utility within the meaning of N.J.S.A. 48:2-13. This statute states in part as follows:

The term "public utility" shall include every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, canal, express, subway, pipeline, gas, electric light, heat, power, water, oil, sewer, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

At the prehearing conference, the parties agreed to the following stipulations:

(a) SunOlin Chemical Company is a corporation.

(b) SunOlin Chemical Company owns, operates, manages or controls pipeline or gas system, plant or equipment in the State of New Jersey. The purpose of using the term "pipeline or gas" is to clarify that South Jersey Gas Company is not stipulating that SunOlin Chemical Company owns, operates, manages or controls pipeline system, plant or equipment, and that SunOlin Chemical Company is not stipulating that it owns, operates, manages or controls gas system, plant or equipment.

(c) SunOlin Chemical Company operates under privileges granted by this State or a political subdivision thereof.

As a result of these stipulations, the issue was narrowed to whether SunOlin provides service "for public use" within the meaning of N.J.S.A. 48:2-13.

Another issue concerns the nature of this proceeding which was transmitted as an investigation. As stated in the Prehearing Order, the issue in regard to the nature of the proceeding is whether this investigation will lead to a determination of the rights and duties of SunOlin and Goodrich, or whether the proceeding will provide fact findings and legal discussion based upon which the Board may decide to assert jurisdiction or initiate other proceedings.
SUMMARY OF EVIDENCE

Gerald S. Levitt, an executive vice president with South Jersey Gas Company, testified as to the impact of present and potential sales by SunOlin on South Jersey’s revenues and earnings. The witness also testified as to the need for rate relief to offset the lost revenues and the effect on gross receipts and franchise taxes paid to the State of New Jersey.

Gerald J. O’Rourke, an engineering and technical manager for SunOlin, described the methane-rich fuel (MRF) provided by SunOlin and also SunOlin’s pipeline network. William J. Stout, an employee of Sun Oil Company on special assignment to SunOlin, testified as to SunOlin’s contract with Goodrich and SunOlin’s discussions with other potential customers.

Harold G. Miller, Jr., an engineer with Goodrich, testified as to the contract between Goodrich and SunOlin, Goodrich’s purposes in seeking MRF from SunOlin, and Goodrich’s uses of fuel.

Robert C. Means, testifying on behalf of Industrial Customer Group, provided an economic analysis of the sale from SunOlin to Goodrich and generally viewed the transaction as beneficial.

FINDINGS

The facts in this matter are largely undisputed, as the issue concerns the application of the law to the facts. After consideration of the entire record, I FIND as follows.

a. Parties

South Jersey is a natural gas distribution company operating in all or part of the seven southern counties of the State of New Jersey. South Jersey serves approximately 180,000 residential, commercial, and industrial customers in municipalities for which it has franchises approved by the Board.

Goodrich is a manufacturing concern with a facility located in Pedricktown, New Jersey within petitioner’s franchised service territory. At its Pedricktown facility, the Goodrich Geon Vinyl Division manufactures polyvinyl chloride resins and components and acrylic latexes. The Goodrich facility in Pedricktown has been a customer of petitioner since approximately 1970. Goodrich received gas under South Jersey’s interruptible tariffs prior to 1980, and in 1980 or 1981 an agreement was executed for LVS (firm) service. Goodrich received
firm service from petitioner until March 1, 1987. Throughout this period, Goodrich also received interruptible service from petitioner. Goodrich received firm service for its dryers used in chemical processes which use approximately 650 mcf per day. Goodrich also received interruptible service for its boilers which use approximately 1,800 mcf per day. The total capacity for natural gas usage of the Goodrich plant is 2,450 mcf per day. In August 1986, Goodrich notified petitioner that it was terminating its LVS contract effective March 1, 1987. Goodrich terminated its LVS service with the intention of replacing natural gas with MRF from SunOlin. Petitioner discovered that its natural gas was being replaced with MRF in February 1987. Deliveries of MRF from SunOlin to Goodrich commenced on April 20, 1987. Goodrich's intention is to purchase gas from petitioner only in the event that MRF is not available from SunOlin. Goodrich intends to burn the MRF in the same facilities in which Goodrich has previously burned South Jersey's natural gas.

SunOlin, a Delaware corporation, is a joint venture between Sun Oil Company and Olin Corporation. Sun Oil Company and Olin Corporation are each 50 percent owners of SunOlin. SunOlin operates a chemical complex in Claymont, Delaware, adjacent to Sun Refining and Marketing Company's refinery in Marcus Hook, Pennsylvania. SunOlin exists primarily to convert "off gas" material from the Sun refinery into other chemicals. SunOlin's primary products are ethylene, ethylene oxide, hydrogen, carbon dioxide and carbon monoxide. As a by-product of its cryogenic ethylene manufacturing process, SunOlin recovers a gaseous stream with a high methane content. This gaseous stream, known as methane rich fuel, has at times been used as a fuel by SunOlin and at other times has been returned to the Sun refinery. SunOlin has neither sought nor received any franchise to provide public utility service from any municipality or from the Board.

b. Methane Rich Fuel

MRF is a manufactured gas and is similar to natural gas. MRF is 90 percent methane, and natural gas is approximately 96 percent methane. The BTU content of a cubic foot of MRF is 940, while the BTU content of a cubic foot of natural gas is 1,032. MRF is generally suitable for those industrial purposes for which natural gas is used. MRF is not suitable for residential gas-fired equipment unless such equipment has been especially adapted. SunOlin has available 8,000 to 10,000 mcf per day of MRF.
c. SunOlin's Pipeline Network

SunOlin maintains a T-shaped network of pipelines beginning at its facility in Claymont, Delaware. A total of eight lines cross under the Delaware River to a valve manifold station in Oldmans Township, New Jersey. One line is presently capped at both ends. From the valve station, two pipe lines proceed in both a northerly and southerly direction, two extend only southerly and three extend only northerly. Thus, four pipelines run in a southerly direction to Deepwater, New Jersey, and five pipelines run in a northerly direction to Paulsboro and Woodbury, New Jersey. The diameter of the lines ranges from four to eight inches. These pipelines have been in operation since approximately 1962 and have been used by SunOlin to deliver its primary products to customers in New Jersey and to deliver refinery products for or on behalf of Sun Oil Company. Each SunOlin pipeline is a single and continuous line from its point of origin in Delaware to its terminus in New Jersey. Each pipeline is physically separate from the others, and there are no physical interconnections between one line and another. However, there does not appear to be any obstacle to interconnecting the lines as SunOlin may see fit at the valve manifold in Oldmans Township. One six-inch line running in a southerly direction provides MRF to the Goodrich facility in Pedricktown, New Jersey. The same line could provide MRF to a facility owned by E.I. duPont deNemours and Company, Inc. (Dupont) in Deepwater, New Jersey. This six-inch line has a capacity of four to five million standard cubic feet per day. This line could be interconnected with a four-inch line at the valve manifold to provide service to Dupont's Repauno facility on the northern branch of SunOlin's pipeline system. All lines are physically capable of delivering MRF. SunOlin could deliver MRF through the existing pipeline network to portions of petitioner's service territory within Salem and Gloucester counties.

d. Contract between SunOlin and Goodrich

In 1983, Goodrich made its first contact with SunOlin after a Goodrich employee noticed signs marking the location of the underground pipelines near Goodrich's plant. Goodrich was interested in continuing its exploratory discussions with SunOlin and entered into negotiations concerning the purchase and sale of MRF. These negotiations took place between September and December 1983. Discussions between Goodrich and SunOlin concluded in December 1983, when SunOlin notified Goodrich that it did not wish to sell
MRF. From December 1983 to October 1985, there were no discussions or conversations between SunOlin and Goodrich concerning the purchase of methane rich fuel. The discussions ended because SunOlin was not prepared to invest the necessary capital in a new pipeline dedicated to methane rich service.

In the fall of 1985, SunOlin received notice from Dupont that it would terminate its purchase of carbon dioxide from SunOlin. Dupont had begun to build its own carbon dioxide plant. As a result, SunOlin had a six-inch line available to transport methane rich fuel. In October 1985, SunOlin contacted Goodrich about the possible purchase and sale of methane rich fuel. Mr. Stout was assigned to SunOlin in the fall of 1984 to strengthen SunOlin's position with respect to its five primary product lines. Mr. Stout was primarily responsible for negotiating contracts with major customers and suppliers and secondarily was responsible for developing opportunities for new business relationships. At a meeting held on October 16, 1985, Goodrich requested SunOlin to proceed with formulating a proposal for methane rich service for its boilers and dryers. Goodrich's purpose was to obtain a more economical arrangement for its firm energy requirements. In August 1986, Goodrich gave notice to South Jersey of its intention to terminate its gas service agreement under South Jersey's rate schedule LVS effective March 1, 1987. In late 1986, an agreement in principle was reached between Goodrich and SunOlin for the purchase and sale of methane rich fuel. SunOlin thereafter began to construct a small connecting line from its six-inch line which was to be converted to transportation of methane rich fuel to the Goodrich plant. A written contract was executed by Goodrich and SunOlin in March 1987. Start-up difficulties with respect to Dupont's new Linde plant caused SunOlin to keep its carbon dioxide line in service thereby delaying the conversion of the six-inch line to methane rich fuel and commencement of deliveries to Goodrich. SunOlin actually began to deliver methane rich fuel to Goodrich through its six-inch line on April 20, 1987. Pursuant to the contract, SunOlin provides Goodrich with 617 mcf per day of firm MRF and 1,628 mcf per day of interruptible MRF. This translates to approximately 20 percent of the 10,000 mcf per day of methane rich fuel which SunOlin has available.

e. Other Potential Customers

Between October 1985 and April 1986, Mr. Stout had discussions with other potential customers concerning possible purchase of meth-
ane rich fuel. On January 24, 1986, SunOlin offered to provide to the Dupont Deepwater facility a maximum of 3,000 mcf per day of MRF. On that same date, SunOlin offered to provide to the Dupont Repauno facility a maximum of 5,000 mcf per day of MRF. The Repauno facility is on the northern branch of SunOlin's pipeline system. The offer to sell MRF to the Dupont Repauno facility was incorporated into a draft agreement and transmitted to Dupont on July 29, 1986. Those negotiations are presently held in abeyance.

On March 3, 1986, SunOlin offered to sell to South Jersey between 8,000 and 10,000 mcf per day of MRF. South Jersey was considered as a potential customer because of the large volumes of gas it was thought to purchase. However, the negotiations did not lead to a sale.

SunOlin has had some discussions with other customers of South Jersey including Mobil Oil Research and Monsanto Industrial Chemical Company concerning sale of MRF. Mobil's present usage is small but that may increase as a result of a cogenerator to be built by Mobil. SunOlin has stated in corporate memoranda an intention to make sales to other customers once the Goodrich transaction is in place. The following have been mentioned as potential customers: Monsanto Industrial Chemical Company, Public Service Electric and Gas Company, and Atlantic City Electric Company, as well as companies outside New Jersey. At the same time, SunOlin has never accepted an obligation to provide service to the public generally or any portion thereof. SunOlin seeks selected customers based upon their proximity to SunOlin's pipeline and general considerations of profitability.

f. Impact on South Jersey

Sales by SunOlin of MRF will impact the revenues and earnings of South Jersey. A loss of the Goodrich sales will result in a loss of revenues to South Jersey of $1.3 million per year. The annual net income attached to that revenue loss would be approximately $76,000. Rate relief of approximately $400,000 would be required, if South Jersey were to recover the loss caused by SunOlin's sales to Goodrich.

If South Jersey were to lose sales that it currently makes to the Dupont Repauno facility, the result would be approximately $1.4 million in lost annual revenues. The net income impact would be approximately $94,000. In order to recover these lost sales, South Jersey would require rate relief of approximately $500,000.

If South Jersey were to lose sales to the Dupont Deepwater
facility, it would lose approximately $1.2 million in annual revenues, and the income effect of such a loss would be approximately $76,000. Were the Board to award South Jersey sufficient rate relief to recover those lost sales, the amount of rate relief would be approximately $400,000.

In order for South Jersey to be made whole from the loss of these three customers alone there would be a rate relief requirement of $1.3 million. Revenue loss associated with these three customers would approximate $4.0 million per year.

If Monsanto were lost to South Jersey, there would be an annual revenue loss of approximately $1.2 million. In terms of net income there would be a loss of approximately $9,000. In order for South Jersey to be made whole from this loss, there would be a requirement of rate relief of $60,000.

If South Jersey were to lose sales to Mobil, the result would be a loss of annual revenues of approximately $1,500. The net income impact would be approximately $400, and the rate relief required to make South Jersey whole from these sales would approximate $800. The dollar impact associated with the loss of sales to Mobil would not address the entire impact of such a loss, because Mobil is currently involved in discussions with South Jersey for the eventual installation of a large cogeneration facility which will make Mobil's potential load much larger than its current load.

If South Jersey were to lose its sales to Shell Oil Company, there would be an impact of approximately $200,000 in annual revenues, $1,600 in net income, and replacement of these sales would require a rate increase of approximately $10,000.

Were South Jersey to lose its sales to Atlantic City Electric Company's Deepwater facility to SunOlin, it would lose approximately $2.0 million in annual revenues. The net income associated with the $2.0 million is approximately $18,000. Were the Board to make South Jersey whole for a loss of these sales, the amount of rate relief would approximate $120,000.

The total impact of the loss of revenues associated with the specifically discussed customers would be $7.1 million. The loss of net operating income would be approximately $275,000. The amount of rate relief required to make South Jersey whole from the loss of these sales would approximate $1.5 million.

Were South Jersey to lose all of the 8,000 to 10,000 mcf of MRF that SunOlin has available from its firm sales, South Jersey would suffer a revenue loss of approximately $19 million. South Jersey would
suffer a net operating income loss of approximately $1.2 million, and if the Board were to make South Jersey whole from a loss of this magnitude, the amount of rate relief required would approximate $6.3 million.

South Jersey's 16 large volume industrial customers represent nearly 20 percent of South Jersey's firm sales. 10,000 mcf per day to these 16 customers also represent in excess of 10 percent of South Jersey's net income. The large volume class as a whole has shown rates of return up to 56.06 percent to South Jersey. The large volume industrial customers which SunOlin has targeted are the highest profit customers on the South Jersey system.

g. Gross Receipts and Francise Taxes

Sales by SunOlin would deprive the State of New Jersey of gross receipts and franchise tax revenues. The following customers represent the stated amounts of gross receipts and franchise taxes respectively: Goodrich, $210,000; Dupont at Repauno, $210,000; Dupont at Deepwater, $180,000; Monsanto, $180,000; Mobil Oil Company, $225; Shell Oil Company, $30,000. The total potential loss to the State of New Jersey in terms of gross receipts and franchise taxes from SunOlin's sales of MRF would be $2.7 million annually. The SunOlin/Goodrich transaction was structured so as to avoid New Jersey taxes.

APPLICABLE LAW

The issue in this proceeding is whether SunOlin is providing service "for public use" within the meaning of N.J.S.A. 48:2-13. As an overview, the New Jersey case law provides the foundation for legal analysis. However, none of the New Jersey cases is particularly similar to the facts in this matter. Cases from other jurisdictions have considered fact patterns which are very similar to this one.

The leading New Jersey case is Lewandowski v. Brookwood Musconetcong River, etc., Ass'n, 37 N.J. 433 (1962), wherein the Supreme Court affirmed a Board determination that a water system operated by a property owners' association in a residential development was a public utility. The development consisted of approximately 1000 lots, and the water system was comprised of a well, related equipment, and approximately 24,000 feet of water mains. The court stated as follows:

Whether a water system is operated "for public use" depends upon
the character and extent of the use and not upon agreements or understandings between the supplier and those supplied. (Emphasis in original.) *Id.* at 445.

Applying this standard, the court stated: "If a water supplier diverts significant quantities from the State's natural resources for the ultimate use of a broad group of consumers, the system is operating for public use; ..." *Id.* at 445. As to the character and extent of the use, the court stated:

The character of the use is clear, *i.e.*, to serve all members of the public who buy lots from the Developer. The extent of the use is equally clear, *i.e.*, an entire housing development is dependent upon the Association for a prime necessity of life. *Id.* at 447.

The Court observed that it is immaterial with respect to jurisdiction that the supplier is under no obligation to supply water to the general public or any portion thereof. *Id.* at 445.

A similar fact pattern arose in *In re Petition of N.J. Natural Gas Co.*, 109 N.J. Super. 324 (App. Div. 1970). Rele, Inc. and Redi-Flo Corporation of New Jersey distributed oil from two 20,000-gallon storage tanks through a pipeline distribution system in a housing development known as Holiday City. Each purchaser of the 1300 homes had entered into a contract to purchase oil from Rele. Rele, Inc. and Redi-Flo contended that they were not public utilities because there was no "locked-in consumer group" and therefore there was no need to protect consumers from over-reaching or poor service. The court rejected these arguments and affirmed the determination of the Board that Rele, Inc. and Redi-Flo Corporation of New Jersey were public utilities.

*Junction Water Co. v. Riddle*, 108 N.J. Eq. 523 (1931) is a case in which provision of water service was determined not to be for public use. The defendant was the owner of nine houses in the Borough of Hampton, one of which he occupied and the other eight were rented to tenants. Dissatisfied with the service from the local water company, the defendant connected each house to a well on one property. The mains were primarily on his own land, but some were in the public streets with the permission of the borough. The court concluded that defendant was not a public utility because defendant was providing water services exclusively to houses and property which he owned. The court stated:

A true criterion by which to judge of the character of the use of any plant or system alleged to be a public utility, is whether or not the public may enjoy it of right or by permission only. *Id.* at 526.
It should be noted, however, that this observation appears to be at variance with the statement in Lewandowski at 445 that it is immaterial with respect to jurisdiction that the supplier is under no obligation to supply water to the general public or any portion thereof.

East Jersey Water Co. v. Bd. Pub. Utility Com., 98 N.J.L. 449 (1923) involves a company which provided water at wholesale to various municipalities and water companies which in turn provided water to end-users. East Jersey Water Company did not itself have any end-user customers. Quoting from Munn v. Illinois, 94 U.S. 113, the court stated:

Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.

This case, cited with approval in Lewandowski at 445, supports the view that "for public use" means a use which is of public consequence and affects the community at large.

In In re The Texas Pipeline Company, OAL Dkt. No. PUC 6060-80, BPU Dkt. No. 808-650 (Initial Decision April 5, 1982), (Decision and Order May 6, 1982), the Board determined that a pipeline company was not a public utility. The Texas Pipeline Company, a wholly-owned subsidiary of Texaco, was seeking to exercise the power of eminent domain. Texas Pipeline operated an interstate pipeline from Staten Island to Bayonne and transported various petrochemical products such as diesel fuels, heating oils, gasoline and jet fuel. Texas Pipeline did not buy or sell the petroleum products at any level, wholesale or retail. The extent to which products were transported to wholesalers who in turn sold in New Jersey appeared to be an insubstantial portion of the business. Texas Pipeline did not set prices to the ultimate consumer and, in fact, was two to three steps from the ultimate consumer. The determination was that Texas Pipeline did not operate a pipeline for public use.

In Re Dome Pipeline Corporation, 78 PUR 4th 1 (Mich. 1986), the Michigan Public Service Commission was confronted with a set of facts very similar to this one. Dome, the operator of an interstate pipeline, had a contract with one industrial customer, Guardian Industries Corp., to transport liquid ethane to the Guardian facilities located in the State of Michigan. Pursuant to the agreement, the point of delivery was outside the State of Michigan. The Industrial Inter-
venors argued that the word "public" as used in the Michigan statute does not contemplate a limited number of industrial customers, that industrial customers are sophisticated, self-sufficient and not in need of the protection of a regulatory agency, that competition exists in the form of other fuels, and that the effect of non-regulation would be nil.

In rejecting these arguments, the Commission stated as follows:

The Commission agrees with the Utility Intervenors that the case of Panhandle Eastern Pipe Line Co. v. Michigan Pub. Service Commission, 328 Mich. 650, 86 PUR NS 1, 44 N.W.2d 324 (1950) (Michigan Panhandle), controls the outcome of this issue. In the Michigan Panhandle case, Panhandle sought to directly sell its gas to Ford Motor Company. Like Dome, Panhandle was interested in serving directly only certain large industrial customers. The Commission determined that the number of customers to be served is not controlling. Indeed, the Michigan Supreme Court realized that Panhandle was only attempting to "skim the cream off the local market for natural gas" without regard to the public convenience and necessity. (328 Mich. at p. 664, 86 PUR NS at p. 9). The court found that the Commission has the power under Act 69 to prohibit Panhandle from competing at will in such markets and taking the cream of the business in order to protect the public. Given the Michigan Panhandle decision, the Commission believes the ALJ was correct in finding that the Dome/Guardian contract subjects Dome to regulation as a "public" utility under Act 69. Id. at 13.

A similar problem arose in Mobile Gas Serv. Corp. v. Coastal States, 77 PUR 4th 109 (Ala. 1986). Coastal States Transmission Company, Inc. operated an interstate pipeline and had contracts to sell gas to two industrial customers of the franchised public utility, Mobile Gas Service Corporation. The evidence indicated that Coastal States sought other industrial customers. The issue was whether Coastal States was a utility, as defined in the Alabama statute. Coastal States argued that two elements were necessary to be classified as a public utility: first, that the entity holds itself out to the public as a public utility; and second, that the entity is serving and is constituted to serve all inhabitants in the area indiscriminately.

The Alabama Commission rejected this argument and stated as follows:

If Coastal States is correct, then any company could be formed to market natural gas on a nonregulated basis to selected portions of the public throughout the state. The only customers left to be served by the major distribution companies regulated by this Commission would be the small residential and commercial customers
with insufficient economic clout to purchase directly from a nonregulated company. This would render totally meaningless this Commission’s ability to effectively regulate the natural gas industry in the State of Alabama. Regulation would be reduced to a sham and mockery with no effective regulation to protect the interests of the distribution companies, or the small residential and commercial consumers. *Id.* at 117.

In concluding that Coastal States was a public utility, the Alabama Commission stated as follows:

The meaning of “to or for the public” must necessarily focus on the facts of each case and the effect of the company’s activities upon the public at large. Our duty as a regulatory body is to balance the interests of the companies involved in the sale, distribution and transportation of natural gas on the one hand and the public on the other hand. The public is made up of all users of natural gas, whether individual, commercial or industrial. The sales to one class of customers necessarily affects the sales to other classes of customers.

It is clear in this case that the sales contemplated by Coastal States will have a much broader effect on the market than just that which it will have upon Coastal States and the two customers with which it presently has a contract. It will affect the price which each and every consumer of natural gas in the Mobile Gas service area will pay for the gas which he or she uses. *Id.* at 118.

The *Dome* and *Mobile* cases are consistent with the weight of authority from earlier cases in various jurisdictions. In *Public Service Commission v. Panhandle Eastern Pipeline Co.*, 71 N.E. 2d 117 (Ind. 1947), *aff’d*, 332 U.S. 507, 68 S. Ct. 190, 92 L.Ed. 128 (1947), the issue before the Indiana Supreme Court was whether an interstate pipeline company which primarily sold gas for resale became subject to state regulation by virtue of its direct sales to industrial end users. At the time the proceedings were initiated, Panhandle served only one industrial end user within the state, and while the proceeding was pending, Panhandle added another industrial customer. In holding that these direct contractual sales constituted public utility service, the Indiana Supreme Court stated as follows:

Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utilities in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over customers of
the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. 71 N.E. 2d at 125.

The Michigan Supreme Court considered a similar problem in Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission, 44 N.W. 2d 324 (Mich. 1950), aff'd, 341 U.S. 329, 71 S. Ct. 777, 95 L.Ed. 993 (1951). An interstate pipeline company had one industrial customer and had expressed the intention to make other direct sales within Michigan. In granting a restraint against the unauthorized service, the court stated as follows:

Obviously, Panhandle seeks to skim the cream off the local market for natural gas in the municipality where the intervening defendant now provides such services, by selling gas to Ford Motor Company and other industrial users, without regard to the public convenience and necessity for natural gas by other users in the Detroit area, particularly for domestic use. If Panhandle is free to compete at will for such local markets, and take the cream of the business, any other utility providing the same service in the same area might be forced to obtain higher rates for its services when it must obtain its natural gas from Panhandle, and thus would face a distinct disadvantage. The right to exclude such competition, where the general public convenience and necessities so require, had been delegated by the legislature to the Michigan public service commission. It is within the power of that commission, after a proper hearing and upon a proper showing of the facts and the necessities, to determine whether Panhandle, by selling natural gas direct to industrial users in Detroit, would thus serve the public convenience and the necessities of users of natural gas in that area where Panhandle now claims the absolute right to engage in such service. 44 N.W. 2d at 330.

In Industrial Gas Co. v. Public Service Commission of Ohio, 21 N.E. 2d 166 (Ohio 1939), the Supreme Court of Ohio considered a case involving a pipeline company which served 19 industrial and 12 private consumers. The pipeline company argued that it was not a public utility because: (a) it had never invoked the power of eminent domain, (b) it did not hold itself out to serve the public generally or any portion thereof, (c) it carried on its business through private contracts only, (d) its contracts were in competition with other fuels, and (e) the contracts varied depending upon the specific circumstances
surrounding each customer. In rejecting this argument, the Ohio Supreme Court stated as follows:

It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would be a sham and delusion.

What appellant seeks to do is pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. . . . If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures. . . .

Yet it is not a controlling factor that the corporation supplying service does not hold itself out to serve the public generally. It has been held that a business may be so far affected with a public interest that it is subject to regulation as to rates and charges even though the public does not have the right to demand and receive service. Id. at 168.

Courts of other states have held that interstate pipeline companies which engage in local sales to end users are public utilities subject to state regulation. See, e.g., Iowa State Commerce Commission v. Northern Nat. Gas Co., 161 N.W. 2d 111 (Iowa 1968); Cities Service Gas Co. v. State Corporation Commission, 567 P. 2d 1343 (Kan. 1977); Northern Natural Gas Co. v. Minn. Pub. Serv. Commission, 292 N.W. 2d 759 (Minn. 1980).

The "public use" concept has also been interpreted in the context of two-way radio communication service. In holding the service to be a public utility, the North Carolina court stated:

. . . whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulative definition of "public" to be thereafter universally applied. What is the "public" in any given case depends rather on the regulatory circumstances of that case. . . . The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances . . . accomplish "the legislature's purpose and comports with its public policy" [citation omitted]. State Ex

Other jurisdictions have held that a "holding out" of service to all members of the public is the appropriate test for whether an entity is a public utility. In Public Utilities Comm'n v. Colorado Interstate Gas Co., 351 P. 2d 241 (1960), the Supreme Court of Colorado quoted from City of Englewood v. City and County of Denver, 229 P. 2d 667, 672 as follows:

We find little need to enter into a lengthy discussion of what is or what is not a public utility, because we would ultimately apply the almost universally accepted test, which summarized is, that to fall into the class of a public utility ... those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may so require it to the extent of their capacity. The nature of the service must be such that all members of the public have an enforceable right to demand it.

See also, City of Phoenix v. Kasun, et al., 97 P. 2d 210, 212 (Ariz. 1939) ("The distinguishing characteristics of a public utility is the devotion of private property by the owner to such a use that the public generally, or at least the part of the public that has been served and has accepted the service, has the right to demand that such service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges.") Pennsylvania v. Lafferty, 233 A. 2d 256, 260 (Penn. 1967) ("The distinctions between a public utility and a business entity which is not a public utility are well known. For example, a public utility holds itself out to the public generally and may not refuse any legitimate demand for service, while a private business independently determines whom it will serve.").

RESPONDENTS' CONTENTIONS

Respondents argue that in order to conclude that the character and extent of the use is such that the pipeline is "for public use," the Board must find a fact pattern which includes at least one of the following: "(1) the construction of extensive facilities intended to serve a broad group of consumers; (2) a virtual monopolization over the service provided by those facilities in the geographic area which they serve; (3) a need for utility-type rate regulation to protect ultimate consumers against rate discrimination; and (4) a 'holding out' of service to the general public." (Respondent's brief at 13-14). According to respondents, none of these features is present in this matter.
The character and extent of the use of SunOlin’s pipeline is private and limited to one customer. SunOlin does not monopolize a service in a geographic area. There is no need for utility-type regulation of SunOlin’s rates where the customers are large industrial concerns on relatively equal economic footing. Finally, SunOlin has not held itself out as ready to serve the general public.

**ANALYSIS**

The major difficulty with respondents’ approach is that it is based on several New Jersey cases which considered factual circumstances that are very different from the facts in this case. The facts in those cases were found to be sufficient to make the provider a public utility. However, respondents make an unwarranted inference that those characteristics are necessary for the provider to be a public utility. Under present circumstances, the question whether a company operating an interstate pipeline and supplying one large industrial customer is a public utility remains one of first impression in this State.

The weight of authority from other jurisdictions supports the view that an interstate pipeline providing service to one or more industrial customers is a public utility. Those cases have rejected the arguments made by respondents. Whether an enterprise is a public utility does not depend on any abstract, formulative definition of “public” but rather the interpretation must accomplish the Legislature’s purposes in enacting the statute. *State Ex Rel. Utilities Commission v. Simpson*, 246 S.E. 2d 753, 756-757 (N. Car. 1978).

Courts have emphasized the tendency of unregulated sales by pipeline companies to undermine the ability of franchised public utilities to carry out their statutorily imposed duties. In *Public Service Commission v. Panhandle Eastern Pipeline Co.*, *supra*, at 125, the court noted that the local regulated utility would be at a competitive disadvantage resulting in loss of revenues, which would lead to rate increases, further loss of revenues, and ultimately a breakdown in the state system of regulation. In *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, *supra*, at 330, the court flatly stated that the public service commission must have jurisdiction to prevent Panhandle from skimming the cream off the local market for natural gas without regard to the public convenience and necessity. The authority to exclude competition is clearly envisioned by the legislature. Similarly, in *Industrial Gas Co. v. Public Utilities Commission of Ohio*, *supra*, at 168, the court recognized the possibility of un-
regulated competition undermining public regulation of bona fide utilities and held that the pipeline company was a public utility.

The New Jersey case of East Jersey Water Co. v. Bd. Pub. Utility Com., supra, supports a similar interpretation of the phrase "for public use." The court quoted from Munn v. Illinois, endorsing the view that property is subject to regulation when used in a manner to make it of public consequence and affect the community at large. Thus, service to any segment of the public, even one customer, is for public use when the character and extent of the use is of public consequence and affects the community at large.

The cases cited by respondents for the proposition that there must be a "holding out" of service to the public, do not seem to recognize the authority to exclude competitors to protect the public convenience and necessity. Under the statutory framework in New Jersey, the Board is intended to have the authority to limit entry into the market. N.J.S.A. 48:2-14; N.J.S.A. 48:9-17. The Industrial Customer Group's testimony that competition would be beneficial would be more pertinent in a proceeding for approval of a franchise than in a jurisdictional proceeding.

In this jurisdiction, whether an entity is a public utility depends on the character and extent of the use. Lewandowski at 445. Here, the character of the use is the sale of manufactured gas to only the most profitable industrial customers. The extent of the use is presently one industrial customer, with efforts to obtain other industrial customers held in abeyance. The sale to one customer equates to a revenue loss to South Jersey of $1.3 million and a loss to the State of New Jersey of $210,000 in gross receipts and franchise taxes. The effect on the public could be a rate increase of $400,000. Thus, the sale by SunOlin to one customer is sufficiently substantial to be of consequence to the public. Moreover, if sales of this nature were allowed to proliferate without consideration of the public convenience and necessity, the ability of franchised public utilities to carry out their substantial responsibilities under Title 48 would be jeopardized. Under these circumstances, the conclusion is warranted that SunOlin is providing service "for public use" within the meaning of N.J.S.A. 48:2-13.

This matter was transmitted to the Office of Administrative Law as an investigation rather than a contested case. As a result, the disposition will be in the nature of a recommendation rather than an order determining the right, duties, obligations, or privileges of the parties.
Accordingly, it is RECOMMENDED that the Board determine that SunOlin Chemical Company is a public utility within the meaning of N.J.S.A. 48:2-13.

I hereby FILE my Report and Recommendations with the BOARD OF PUBLIC UTILITIES for consideration.

FINAL DECISION BY THE BOARD OF PUBLIC UTILITIES:

On February 13, 1987, South Jersey Gas Company filed a petition seeking, inter alia, a preliminary restraining order which would prohibit SunOlin Chemical Company from selling and delivering manufactured gas to the BF Goodrich Company plant in Pedricktown, New Jersey.

SunOlin, a Delaware corporation duly registered as a foreign corporation to do business in the State of New Jersey, owns and operates petrochemical manufacturing facilities in Claymont, Delaware. In addition, SunOlin owns and operates several pipelines, ranging in diameter from three to eight inches, which traverse the Delaware River to transport different refinery products to various customers in New Jersey.

As a by-product of its petrochemical operations, SunOlin manufactures a product which it calls "methane-rich" fuel. Although it has a chemical composition similar to that of natural gas, methane-rich fuel, according to SunOlin, is a manufactured substance whose quality and composition depend upon intensive processing. Because it has a lower Btu content than natural gas, the methane-rich fuel is not suitable for residential purposes in the absence of specifically modified equipment, but is suitable for industrial operations. As indicated by SunOlin, various labels, including "artificial gas", "synthetic", and "manufactured gas" have been historically applied to such substances for the purpose of distinguishing them from natural gas.

It was the contention of South Jersey that the sale and delivery of the manufactured gas by SunOlin through its pipeline to Goodrich and the direct solicitation of E.I. Dupont Nemours and Company and possible other customers for similar sales and deliveries constituted the provision of a utility service pursuant to N.J.S.A. 48:2-13. As SunOlin did not have consents granted by appropriate local governing bodies and approved by this Board as required by N.J.S.A. 48:2-14 and 48:9-17, South Jersey further argued that restraints were appropriate because of what it characterized as the irreparable harm that would
be done to South Jersey and its ratepayers as a result of the loss of revenues from the sale of natural gas to Goodrich.

Oral argument in this matter was heard before the Board on February 27, 1987. By Order dated March 24, 1987, the Board (Commissioner Barbour dissenting) ordered that:

1. This matter be immediately transmitted to the Office of Administrative Law with a request that a determination of whether SunOlin Chemical Company is a public utility in the State of New Jersey subject to the jurisdiction of this Board, pursuant to N.J.S.A. 48:2-13, be submitted to the Board for its consideration within sixty (60) days of said transmittal; and

2. The request for a preliminary restraining order prohibiting SunOlin Chemical Company from providing gas service to BF Goodrich Company pending final determination in this matter is denied.

In addition to South Jersey, SunOlin and Goodrich, the parties to this proceeding include:

Board Staff;
Division of Rate Counsel;
Department of Commerce and Economic Development;
New Jersey Industrial Energy Users (N.J.I.E.U.);
Industrial Customer Group;
Public Service Electric & Gas Company;
New Jersey Natural Gas Company; and
Elizabethtown Gas Company.

Hearings were held at the Office of Administrative Law (OAL) on April 13, 14, 15, 23 and 28, 1987.

On June 10, 1987, the OAL submitted to the Board the Report and Recommendations prepared by Administrative Law Judge Richard McGill and dated June 9, 1987. Joint exceptions thereto were filed by SunOlin and Goodrich (which were joined in by the Industrial Customer Group) and by N.J.I.E.U. Replies to exceptions were filed by Rate Counsel, South Jersey and jointly by PSE&G and Elizabethtown Gas.¹

¹On July 28, 1987, the Department of Commerce and Economic Development belatedly submitted a position paper which primarily discussed issues regarding competition. For reasons set forth below, the Board has determined that said submission should be considered within the context of a proceeding wherein approval of municipal consents is sought.
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After a review of the entire record, the Board finds that the ALJ's discussion of the applicable law and his analysis thereof are fundamentally sound and adequately support his conclusion "... that SunOlin is providing service 'for public use' within the meaning of N.J.S.A. 48:2-13." (R&R at 24).

N.J.S.A. 48:2-13 provides in pertinent part that:

The Board shall have general supervision and regulation of and jurisdiction and control over all public utilities ... and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title.

The term 'public utility' shall include every individual, co-partnership, association, corporation, or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any ... pipeline or gas ... system, plant or equipment for public use, under privileges granted or hereafter to be granted by the State or by any political subdivision thereof.

In construing N.J.S.A. 48:2-13, the courts have uniformly held that the Board was intended by the Legislature to have the widest range of regulatory power over public utilities. County of Bergen v. Dept. of Pub. Util. of N.J., 117 N.J. Super 304, 312 (App. Div. 1971); Daaleman v. Elizabethtown Gas Company, 142 N.J. Super 531, 535 (1976), aff'd 77 N.J. 267 (1978), In re Application of Saddle River, 71 N.J. Super 14, 33 (1976) (Schreiber, J. concurring). To this end, the courts have directed that the provisions of Title 48 are to be construed liberally and that the powers delegated to the Board are to be read broadly with any exception thereto being carefully circumscribed. See, e.g., In re Petition of South Lakewood Water Company, 61 N.J. Super 230, (1972); Deptford Twp. v. Woodbury Ter. Sewerage Corp. 54 N.J. Super 418, 424 (1969); County of Bergen v. Dept. of Pub. Util. of N.J., supra, at 312. At the core of Title 48 is the legislative recognition that the interest of the general public in the proper regulation of industries classified as public utilities transcends the relatively parochial interests of any subdivision of the public, and that centralized control must be trusted to an agency whose continually developing expertise will ensure uniformly safe, proper and adequate service by utilities throughout the State. In re Public Service Electric and Gas Company, 35 N.J. Super 358, 371 (1961); County of Bergen v. Dept. of Pub. Util. of N.J., supra, at 312; Daaleman v. Elizabethtown Gas Company, supra
at 535-536. Such exclusive powers, jurisdiction and supervision are necessitated by the overwhelming public interest in protecting the interests of residential, commercial and industrial consumers of utility services and protecting utilities from ruinous competition.

In sum, the statutes conferring powers upon the Board clearly evidence a legislative intent to vest this regulatory agency with jurisdiction over and regulation of all persons performing utility services in this State to the extent that they are not regulated under federal laws or federal agencies. It is against this backdrop that the ALJ's conclusion that SunOlin is a "public utility" must be examined.

Pursuant to N.J.S.A. 48:2-13, two conditions are required to bring SunOlin within the definition of a "public utility", i.e., (1) that it owns, operates, manages or controls a gas or pipeline system for public use, and (2) that it does so under privileges granted by the State or any of its political subdivisions. *Lewandowski v. Brookwood Musconetcong River Property Owner's Association*, 37 N.J. 433, 443 (1962);

In support of its claim that the service it offers is for "private use" rather than "public use", SunOlin asserts that in order to conclude that facilities are for public use, New Jersey case law requires (1) construction of extensive facilities intended to serve a broad group of consumers, (2) a virtual monopolization of service provided by those facilities in the areas in which they serve, (3) a need for utility type regulation to protect consumers against rate discrimination, and (4) a holding out of service to the public generally. *Lewandowski, supra; In re Petition of N.J. Natural Gas Company*, 108 N.J. Super 324 (App. Div. 1970); and *Aquackanonk Water Company v. Board of Public Utility Commissioners*, 97 N.J.L. 366 (Sup. Ct. 1922). SunOlin argues that it is these factors and not the public interest consequences of its actions, that should solely determine the "public use" question. We agree with the ALJ that while "the facts in those cases were found to be sufficient to make the provider a public utility... respondents make an unwarranted inference that those characteristics are necessary for the provider to be a public utility." We further agree that the determination of whether SunOlin is properly subject to the Board's jurisdiction should be made in light of its overall operations in New Jersey and the extent to which the public interest is affected.

New Jersey law supports this view. As noted by the ALJ, the court in *East Jersey Water Company v. Board of Public Utility Commissioners*, 98 N.J.L. 448, 452 (E&A 1922) (quoting *Munn v. Illinois*, 94 U.S. 113 (1876)), concluded that a utility may be recognized by
its predominant characteristic, *i.e.*, whether its operations are impressed with a public interest:

Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.

In *Jersey Central Power & Light Company v. Tri-County Rural Electric Company, Inc.*, 39 PUR N.S. 48, (1941), this Board addressed the issue of the Legislative intent in its usage of the words "for public use" and concluded that:

... the Public Utility Act was designed by the legislature to set up a broad and inclusive scheme of regulation and that the words ‘for public use’ were employed to exclude only operations that were wholly private; operations in which no public interest was involved ...  

In New Jersey, public utility status has never solely depended upon the number of customers served and it should also not depend upon the putative utility’s “holding out” to serve indiscriminately all customers. The record is clear that SunOlin has actively attempted to sell methane-rich fuel to a number of South Jersey’s industrial customers. In *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission*, 44 N.W. 2d 324 (1950), aff’d., 341 U.S. 329 (1951), it was held that a proposed sale of gas to an industrial customer and the intent to sell to other industrial end users constituted holding out a utility service to the public.

As indicated above, public utility status should be determined from the characteristics of the servicing entity, particularity whether there is a public interest in the entity’s rates, charges and method of operation.

Regulatory agencies and courts of numerous states construing statutes substantially similar to *N.J.S.A. 48:2-13* have concluded that activities like those undertaken by SunOlin are clothed with a public interest including competing utilities and all classes of customers—industrial, commercial and residential. As noted by the ALJ, factual situations almost identical to those pending before the Board were before the regulatory commissions in Michigan, in *In Re Dome Pipeline Corp.* 78 PUR 4th 1 (1986), appealed to Michigan Court of Appeals, Docket No. 100809, and in Alabama, in *Mobile Gas Service Corp. v. Coastal States Gas Transmission Company, Inc.*, 77 PUR 4th

In *Dome*, an application was filed to construct a line connecting a pipeline company with a manufacturing plant pursuant to a contract for the delivery and sale of ethane. In concluding that service by the pipeline company to one industrial customer constituted utility service, the Michigan Commission relying on the holding in *Panhandle Eastern Pipeline Company, supra*, noted at pg. 13 that:

The Commission determined that the number of customers to be served is not controlling. Indeed the Michigan Supreme Court realized that Panhandle was only attempting to 'skim the cream off the local market for natural gas' without regard to the public convenience and necessity. The Court found that the Commission has power under Act 69 to prohibit Panhandle from competing at will in such markets and taking the cream of the business in order to protect the public. Given the Michigan *Panhandle* decision, the Commission believes the ALJ was correct in finding that the Dome/Guardian contract subjects Dome to regulation as a 'public' utility under Act 69. (Citations omitted.)

Similarly, the Alabama Commission held an interstate pipeline which had contracts to sell to industrial customers of the franchised public utility corporation to be a public utility, noting as follows:

If Coastal States is correct, then any company could be formed to market natural gas on a nonregulated basis to selected portions of the public throughout the state. The only customers left to be served by the major distribution companies regulated by this commission would be small residential and commercial customers with insufficient economic clout to purchase directly from a nonregulated company. This would render totally meaningless the commission's ability to effectively regulate the natural gas industry in the state of Alabama. Regulation would be reduced to a sham and mockery with no effective regulation to protect the interests of the distribution companies, or the small residential and commercial consumers.

... The meaning of 'to or for the public' must necessarily focus on the facts of each case and the effects of the company's activities upon the public at large. Our duty as a regulatory body is to balance the interests of the companies involved in the sale, distribution and transportation of natural gas on the one hand and the public on the other. The public is made up of all users... whether individual, commercial or industrial. The sales to one class of consumers necessarily affects the sale to other classes of customers. (*Mobile* at 117-118.)
The *Dome* and *Mobile* cases are consistent with the decisions of the highest courts in many states that have held that service to end users by interstate pipeline companies constitute public utility service such as to bring said pipeline companies within the scope of state regulation. *Cities Service Gas Company v. Ohio Public Utilities Commission*, 21 N.E. 2d 166 (Ohio 1939); *Iowa State Commerce Commission v. Northern Natural Gas Company*, 161 N.W. 2d, 111 (Iowa 1962); *Northern Natural Gas Company v. Minn. Pub. Serv. Commission*, 292 NW 2d 759 (Minn. 1980); *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, supra, *Public Service Commission v. Panhandle Eastern Pipeline Company*, 71 N.E. 2d 117 (Ind. 1947), aff'd 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

Applying the foregoing analysis, it is apparent that SunOlin, by making sales to Goodrich, is providing service that is cloaked in the public interest to such an extent as to require this Board's regulatory supervision.

The need for the Board to assume jurisdiction over operations such as those carried on by SunOlin was recognized by the ALJ when he noted that:

...if sales of this nature were allowed to proliferate without consideration of the public convenience and necessity, the ability of franchised public utilities to carry out their substantial responsibilities under Title 48 would be jeopardized.

The ALJ also recognized the Board's authority to exclute competitors in order to protect the public convenience and necessity, noting that, pursuant to *N.J.S.A. 48:2-14* and *N.J.S.A. 48:9-17*, the Board is intended to have the authority to limit entry into market.

Therefore, the degree to which there should be competition is a matter that has been charged to the Board for decision, taking account of public interest factors such as the effect of lost sales on the remaining customers of South Jersey. The Board believes, however, that questions associated with competition are best left to a proceeding for approval of a municipal consent.

Accordingly, while we agree with the ALJ that the actual economic impact of the SunOlin/Goodrich transactions on South Jersey, its ratepayers and the State affects the public interest, the Board is of the opinion that findings of economic impact are not necessary in order to allow the Board to render a determination on the jurisdictional issue that is now before it. Rather, as noted above, said factors are better suited for consideration within a review of an application
for the approval of municipal consents. In all other respects, the Board adopts the findings and conclusions of the ALJ set out in his Report and Recommendations.

Based upon the foregoing, the Board HEREBY FINDS that SunOlin is providing service "for public use" and that it is a public utility within the meaning of N.J.S.A. 48:2-13.

Therefore, the Board HEREBY ORDERS that:

1. SunOlin Chemical Company, within two weeks of the date of this Order, cease and desist from all sales of methane-rich fuel to BF Goodrich Company or any other entity located in the State of New Jersey until appropriate municipal consents have been approved by this Board as required by N.J.S.A. 48:2-14 and 48:9-17, such cessation to be in accordance with all applicable safety requirements; and

2. South Jersey Gas Company shall provide gas service to BF Goodrich, if so desired by Goodrich, pursuant to that classification of service and rates under which Goodrich would have been served by South Jersey had it not contracted with SunOlin.

In the event that SunOlin obtains appropriate municipal consents and submits them for Board approval, the Board will consider such consents in as expeditious a manner as is possible.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.