

Written testimony of
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Environment and Technology Committee
CT General Assembly
March 8, 2011

Reference: RAISED BILL NO. 1080: AN ACT CONCERNING THE REGULATION
OF PROPANE

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Good morning. I am Mike Morrissey, from Glastonbury. I am here today on behalf of 50 plus companies providing propane service to over 200,000 customers in the State of Connecticut. We are concerned that RAISED BILL NO. 1080 will reduce safety of our customers.

Propane retailers pride themselves on their relationships with their customers, the vast majority of who are pleased with the service they receive. Companies that do not maintain favorable relationships with their customers are quickly replaceable by other companies hungry for their business. This is a key aspect of the business – a high level of competitiveness among fuels and among companies providing them.

Furthermore, the legal changes contemplated by the legislation will undo decades of regulation by other agencies in Connecticut. Storage is regulated by the State Fire Marshal's office, which has adopted the 1995 edition of Standard 58 written by the National Fire Protection Association. Vehicles and training requirements are addressed by the U.S. Department of Transportation, and significant security planning requirements are administered by the U.S. Department of Homeland Security.

With this in mind, we are confused as to why the bill sponsors believe consumers would benefit from a fundamentally changed regulatory structure. We are also worried that the change would disrupt the carefully crafted safety regime that currently exists.

Our industry has grown significantly over the years, and our state is well-equipped to deal with consumer issues. The Departments of Public Safety, Consumer Protection, the Attorney General's Office, and the Legislature have actively worked with us to address consumer issues as they have arisen. Indeed, with so many media articles about rising gas prices in the country, we are more sensitive to this issue than ever before.

It is critical to note that our industry has spent over a year working with the Department of Consumer Protection in developing new regulations designed to improve consumer interaction with our industry. These new regulations will be considered by the Regulation Review Committee in the very near future. Our constructive experience with DCP demonstrates, I believe, our willingness to address complex issues affecting the citizens of Connecticut. Considering the importance of these new rules, they should be given a chance to work. We would be happy to provide you with a briefing on these rules and the process for getting them developed.

In closing, there are many reasons why regulating the propane industry as a public utility is not a good solution. We would be happy to explain our position in greater detail at your convenience. In the meantime, I have attached to my testimony a White Paper explaining our industry and position on this issue. Before the legislature decides to place our industry under the authority of the Department of Public Utility Control, we urge you to seek ways to make the current regulatory structure better for the propane consumers in Connecticut.

Thank you for this opportunity to present testimony. I look forward to addressing any questions you may have.

EXECUTIVE SUMMARY

It is the position of the National Propane Gas Association that the sale and delivery of propane to consumers by propane dealers should not be subject to regulation with respect to either price or terms and conditions of service by state public utility commissions.

1. The sale and delivery of propane are not similar to the sale and delivery of services which are traditionally regulated by public service commissions, such as electricity, natural gas, and water. Propane dealers do not have the attributes of a public service company: they do not deliver propane to consumers by way of permanent physical connections, they do not have an exclusive service territory in which the state has authorized them to operate, they are not monopolies, and they do not have the power of eminent domain. In sharp contrast, providers of regulated public utility services deliver their services by way of a permanent physical connection and are franchised by the state to operate as monopolies exclusively within a given service territory. Such attributes necessitate regulatory control of these entities' prices and services.

2. The sale and delivery of propane is not so affected with the public interest that it should be placed under the jurisdiction of a public utility commission. Propane dealers do not have an "obligation to serve" (*i.e.*, an obligation to sell to the public at large); instead, they market to a limited number of customers through individual transactions. There is not sufficient propane to supply the needs of all consumers within a particular area. While propane may be viewed as a necessity of life by some customers who use it as a fuel for heating and cooking, that fact alone does not justify its regulation. Other fuels which are sold and distributed in a fashion similar to propane (such as fuel oil, coal, wood, kerosene, and others) are not said to be affected with the public interest and have not been subjected to regulation. Food, clothing, gasoline, and housing are also necessities of life, but these industries are not regulated as public utilities.

3. Given that propane is a liquid until such time as it is consumed by the end-user; attempts to characterize or define propane as a "gas" so as to bring propane within the ambit of state statutes or regulations that define a public utility service are tenuous at best. Propane is

manufactured or produced, transported, stored, distributed, delivered, and sold as a liquid; propane is only converted to its gaseous state after it has been sold and delivered to the consumer. Most transactions involving propane utilize liquid measurements. In contrast, natural gas generally exists in a gaseous state during each of these steps.

4. Court and public service commission rulings have consistently upheld the view that propane is not a regulated public utility service. Practically speaking, given the current status of the industry, it would be difficult for public utility commissions to apportion propane dealers' service territories, set rates, and apply other traditional regulatory measures to the sale and delivery of propane. At this point, subjecting propane dealers to control by public utility commissions would result in a severe disruption in service as extensive hearings would be required to determine which dealer would become the exclusive supplier in a given area and how the "losing" dealers would be compensated for the loss of their business. The latter issue could engender claims that certain dealers are being deprived of their property rights in violation of the United States and state constitutions, further disrupting what is now a well-functioning industry.

5. Antitrust laws, fair trade practices, and the like currently exist and can be used to address problems that could arise concerning the propane industry. Hence, additional state public utility commission oversight is neither desirable nor necessary.

6. Recent developments in state regulation of natural gas and electricity show a growing trend towards deregulating the commodity (*i.e.*, the natural gas or the electricity) by permitting marketers, brokers, and other third-party suppliers to sell the natural gas commodity in competition with one another, and to have that commodity delivered by way of the distribution system of the regulated public utility company. This illustrates that even traditional notions of public utility service are changing in favor of competition between providers of the commodity as opposed to delivery of the commodity. Hence, the trend is to encourage multiple suppliers of even traditionally-regulated commodities such as natural gas and electricity, much like the

situation that already exists in the propane industry. Subjecting propane and propane dealers to state regulatory controls would be inconsistent with the goals of fostering competitive commodity markets for energy supplies.

7. The sale and delivery of propane involves the sale and delivery of a commodity, rather than a service, such as the natural gas service provided by public utility companies. As discussed above, regulated natural gas service is provided through a series of permanent connections (consisting of a system of underground pipes) between the utility and its customers. A public utility company generally has a franchise which permits *only* that company to provide a distribution service within a specific service area subject to regulation by a public service commission. Propane is generally distributed by motor carrier, or, in cases of larger quantities, by rail car. Moreover, within any particular service area, there can be many propane distributors.

8. Propane dealers sell a tangible commodity or product. Propane can be, and often is, packaged and sold under brand names. Gas service provided by public utility companies does not share this characteristic; the commodity is generic in nature.

9. The physical properties of propane (generally propane and butane) and natural gas (methane) vary widely. Propane and butane have different chemical formulae and properties than those common to manufactured or synthetic gases. The basic composition of propane is not altered from the time it is recovered or refined through conversion to a gaseous state for ultimate consumption (following delivery to a consumer), unlike many manufactured and/or synthetic gases.

10. Propane has many uses in addition to those that are similar to uses for natural gas. Appliances, fuel systems, and many other products are engineered and built specifically for propane. Separate and specialized equipment is used for the distribution, storage, transportation, and handling of propane. Testing facilities conduct studies unique to propane products and equipment. Propane is the world's third leading motor fuel.

11. Propane is a competitive product offering; among other things, it competes as a source of heating fuel with natural gas, electricity, oil, wood, etc. Consumers not only can choose if they want to use propane, but may also choose from which propane dealer they will purchase the product. Propane dealers compete not only with other fuels, but also among themselves; thus, consumers are free to "shop for price" at any time. The fact that propane is traded as a commodity on the New York Commodity Exchange supports the conclusion that it is not a regulated public utility service but a product.

12. Subjecting propane dealers to the jurisdiction of state public utility commissions would raise difficult issues concerning preemption. Many aspects of the propane industry -- such as those pertaining to safety -- have already been addressed by specific federal statutes or regulations.

For the above reasons, and as supported in the following policy statement, the National Propane Gas Association takes the position that any and all initiatives, whether legislative or regulatory in nature, to subject propane or propane dealers to the jurisdiction of state public utility commissions must be opposed.

**THE SALE AND DELIVERY OF PROPANE
TO CONSUMERS WITHIN A PARTICULAR STATE
IS NOT A PUBLIC UTILITY SERVICE
AND, THEREFORE, SHOULD NOT BE REGULATED AS SUCH**

A. Introduction .

This position paper originated as an article published in the early 1950's in an industry publication entitled *Public Utilities Fortnightly*. It was previously updated in 1975 in response to a significant increase in legislative efforts to place the propane industry under control of state public utility commissions. This update was prepared in December of 2002, and is designed to provide a current review of issues concerning the regulation and control of propane and propane dealers by state public utility commissions.

Propane is often referred to by various names, including propane, liquefied petroleum gas, and propane gas. For consistency and simplicity, this position paper uses the term "propane," which is the term commonly used by consumers. Also for consistency, this position paper uses the generic term "public utility commissions" or "PUCs" to refer to the state regulatory bodies that regulate the price, terms, and conditions of service provided by public utility companies. State regulatory bodies may also be known as public service commissions, public utility boards, etc.

It is not the purpose of this position paper to address existing regulation of products or oil pipelines engaged in interstate commerce by the Federal Energy Regulatory Commission, or any existing safety legislation or regulations that apply to propane dealers, motor carriers, or the like. The specific issue addressed in this position paper is whether the price and terms of the sale and delivery of propane by dealers to consumers should be subject to regulation by state PUCs. As previously stated, for a variety of reasons, this question should be answered in the negative.

B. Factors That Influence Continuing Attempts To Regulate Propane As A Public Utility Service .

Four major factors influence continued attempts to have propane designated as a regulated public utility service. First, legislative or other proposals to place propane under PUC jurisdiction are often grounded in isolated consumer complaints addressing some aspect of a propane dealer's normal business practices, such as delivery problems. These isolated complaints are communicated to a state senator or representative, which, in turn, may lead to the introduction of legislation proposing to place propane under PUC jurisdiction. On occasion, a PUC has itself initiated action for asserting and/or extending its jurisdiction over the propane industry. Motivating factors for such action by a PUC may include a desire for an increase in budget and personnel. Once proposed, such legislation is subject to the usual vagaries and

mysteries of the legislative process, which may or may not address the real issues associated with subjecting propane to PUC control.

Second, increased scrutiny of the propane industry may be the result of the relatively rapid growth in the use of propane for domestic heating and other purposes. While still a small segment of the overall total home heating market, propane has posted significant gains over the past few years. As propane draws more and more customers, it likewise draws more and more attention from legislators, consumers, and others.

Third, the current overall national energy situation may foster increased interest in regulating the propane industry at the state level. The entire energy industry has received a great deal of attention in recent months as the result of financial failures, questionable accounting, and manipulation of markets. This is in addition to more common concerns with the energy industry, such as accidents, real or perceived shortages, or changes in the regulatory framework. Thus, it is not difficult to see how propane -- like other energy sources -- may be the target of campaigns to impose stricter scrutiny and control.

Fourth, descriptions of propane as "liquified petroleum gas" or "propane gas" may draw regulatory attention. Thus, use of the word "gas" in describing propane may lead to the erroneous conclusion that propane assumes regulated public utility status because it is used for many of the same fuel purposes as those gases (either "natural" or "artificial") that are distributed by regulated public service companies.

The National Propane Gas Association has consistently and successfully opposed public utility-type controls over the propane industry in the past, and will continue to oppose the imposition of such controls in the future.

C. Background -- A Brief Description Of Propane, Its Measurement, And Its Uses .

Liquefied petroleum gas (also known as LP-gas or LPG) is a hydrocarbon which is recovered from natural gas plants, cycling plants, and the cracking and refining of crude oil for gasolines, oils, greases, and other distillates. Its components include propane, propylene, butane, and butylene. Propane exists in combination with other hydrocarbons as a liquid in its natural state. Once separated at processing plants, it is maintained under pressure in a liquid form for storage and transport. It is transported to bulk stations or storage facilities across the nation by rail tank car, highway tank truck, water tanker, barge or pipeline. Propane is transformed into a gas vapor only when the pressure is released, which is generally after the product has been delivered to the ultimate end-user.

Bulk stations or storage plants serve as distribution points. Here propane is pumped from bulk storage tanks into bulk delivery trucks for subsequent delivery into permanent, stationary containers ("permanent tank system") located on the customer's premises (underground or above ground). Portable containers (cylinders) can also be used by a customer ("portable cylinder system"). These are filled at the bulk station and delivered directly to the consumer, or indirectly through a local dealer.

Tank system gallonage consumption is measured by liquid meters and gauges, located on either the installed tank system or the bulk delivery truck. Consumption may also be measured by vapor meters located in the system, which provide a method for gaseous measurement.

If the customer owns a stationary tank, product delivered into it will become the customer's property and will be measured by the gallon through a liquid meter mounted on the truck. If the stationary tank is the property of a propane dealer (*i.e.*, it is rented or leased to the customer), sales may be made either (1) by the gallon, measured through a liquid meter mounted on the truck, in which case title to the fuel passes on delivery, or (2) by cubic feet, measured through a vapor meter located between the tank and the customer's equipment or appliance, in which case the product in the tank remains the property of the dealer until it is actually used.

Portable cylinder systems are normally replenished by replacing empty ones, and invoiced by weighing full cylinders on inspected scales at the bulk stations. In some rare instances, cylinder sales may be made by vapor meter.

Thus, units of sale to the consumer can be in gallons, when propane is measured in the liquid stage, or in cubic feet, when propane is measured in the vapor stage. Gallons are billed upon delivery; vapor units are billed only when used. Industrial, commercial, and other large users generally have large bulk storage facilities on their premises into which product is transferred from rail tank car or truck. In non-urban areas, a small community or project might be served from bulk tanks with a distribution system similar to that of a natural or manufactured gas system. In a few cases, the liquefied petroleum gas is mixed with air, then piped and sold as a propane air or butane air mixture. Percentage-wise, nearly all tank installations serve a single user. There are a few systems serving more than one consumer that generally have the bulk tank and all necessary equipment located entirely on private property. In these instances, vapor meters are installed for each customer.

Propane is used for residential cooking, water heating, refrigeration, and home heating. It is also employed for over 1600 other diverse purposes, such as tractor fuel, heating for chicken and pig brooders, tobacco curing, crop drying, metal and concrete drying, welding and cutting, refinery and petrochemical operations, and various other applications. Propane is the third most widely used motor fuel in the world, after gasoline and diesel.

D. Propane Is Easily Distinguishable From The Natural Or Manufactured Gas Provided By Regulated Utilities

This section enumerates the differences in the physical characteristics between propane and the natural or manufactured (or artificial) gas that is distributed by regulated public utility companies. These differences provide a factual and legal basis for opposing attempts to have

propane characterized as a regulated public utility service by demonstrating that propane is not a "gas" as that term is used in most statutes permitting regulation of such.

First, one of the most significant differences between propane and natural gas is that propane is a liquid throughout most of its "life." While the word "gas" is included within the generic term "liquefied petroleum gas," propane generally exists as a liquid until used by the ultimate consumer. Thus, during its manufacture, production or recovery, transportation, injection to and withdrawal from storage, distribution, and sales, propane is a liquid, and is treated and handled as such.

Substantial quantities of propane can be shipped and stored as a liquid in a relatively small space and then expanded into a gas for consumption. In a gaseous state, the same amount of liquid propane will occupy 230 to 275 times as much volume. Propane is thus an easy material to handle from an engineering standpoint and its liquid state provides certain economic advantages given that less space is required for its transportation and storage.

Because propane is almost exclusively delivered as a liquid, distribution to the ultimate consumer is generally accomplished by means of rail car or truck, thus permitting dealers to compete on the basis of price or other characteristics within the same area. This is far different from the gas delivered by regulated public utilities to their consumers, which is generally distributed exclusively within PUC-designated service territories through a series of permanent physical connections.

Second, and related, the fact that propane is converted from liquid to gas form prior to use does not render it identical or similar to natural or artificial gas. A release of pressure is necessary to convert propane to its gaseous state, although in some instances, a substantial increase in temperature may also vaporize the gas. In contrast, natural or manufactured gas is generally produced and transported in its gaseous state. In determining that propane is not a

public utility service, the Supreme Court of Ohio focused in part on the fact that propane is a liquid until used by a consumer:

The appellants argue that it is irrelevant that the product delivered by Rutland and Level to their customers is a liquid, because it is a gas when it is consumed by them. However, R.C. 4905.03(A)(5) refers to the "supplying" of a product, not to the "consuming" of that product, and appellants' argument ignores the fact that the product "supplied" by Rutland and Level is a liquid when possession and ownership of the product are transferred to the consumer.¹

Third, the various liquefied petroleum gases -- including propane -- are hydrocarbons, which possess specific, distinguishing chemical properties that are not common to natural or manufactured (artificial) utility gases. Propane comes from the natural gas stream and from the refining processes of crude oil. Its composition is not altered to enable use, or to transfer it from a liquid to gaseous state. Thus, propane is not an artificial or a "manufactured" gas.

The two types of gas distributed by regulated public utility companies -- natural and manufactured -- differ from propane in chemical makeup. Methane, ethane, and mixtures thereof are the hydrocarbons comprising natural gas. Manufactured or artificial gases are complex mixtures of different forms of hydrocarbons, varying substantially depending on manufacture. Manufactured gas formulas are not similar to liquefied petroleum gas formulas. Manufactured gases are created through a process changing the composition and chemical properties of the original materials.

Fourth, the simple fact that a commodity can produce a gas should not lead to its classification as such for purposes of determining whether the commodity is subject to public utility regulation. All products designated as fuels, including coal and wood, are capable of producing gas, and burn as vapors of gas, not as solids. These products, like propane, are not and should not be considered public utility services, nor should they be regulated by PUCs. As the Supreme Court of Ohio recently stated in

¹*Haning v. Public Service Commission*, 712 N.E.2d 707, 710 (Supreme Court of Ohio, 1999).

determining whether propane was an artificial gas within the meaning of public utility statutes:

[A]ppellants' argument leads to an absurd result. If all products other than "natural gas" that are consumed in gaseous form to supply heat, light or power are included in the term "artificial gas," then R.C. Chapter 4905 would require that we consider their suppliers to be "public utilities." This would mean that suppliers of acetylene used by welders, neon used in tubes for advertising signs, and krypton, halogen, and mercury vapor used in light bulbs would all be regulated public utilities, as well as the suppliers of gasoline, fuel oil, kerosene, methanol, and butane.²

Fifth, propane differs from manufactured and natural gas because of its many varied uses and applications. Although consumed for some similar domestic and industrial purposes as natural or manufactured gas (for example, heat, cooking, and crop drying), propane is used in many fields and for many applications not adaptable to the former. As discussed above, propane is the third largest motor fuel in the world, and is used for such diverse purposes as heating, cooking, welding, refinery and petrochemical operations, and various other applications. The uses of propane are far more varied and wide-ranging than either natural or manufactured gases. This diversity illustrates that propane is a commodity which should not be subject to regulation as a public utility service.

Sixth, the distinct characteristics of propane with respect to applications, systems, distribution, storage, transportation, and handling have been recognized by the issuance and promulgation of separate rules, standards and regulations for the use of propane by such bodies as the National Fire Protection Association, American Society of Mechanical Engineers, American National Standards Institute, and others. Testing facilities, such as Underwriters Laboratories, also recognize the differences between propane and manufactured or natural gas equipment by issuing

²*Haning v. Public Service Commission*, 712 N.E.2d at 710.

separate studies and test results for propane equipment. The Federal Trade Commission and the Department of Energy have recognized the distinction between propane and natural gas in conjunction with energy efficiency labeling programs.

The simple conclusion to be drawn from these facts is that propane is not a "gas" as that term is used in statutes providing for the regulation of gas. Indeed, it has been held that "not all purveyors of energy commodities are "public" utilities, even though they sell and distribute their products under statutory regulation."³ For example, a company engaged in the business of selling, distributing, storing and transporting a liquified petroleum gas called propane, an "admittedly dangerous" commodity, was found not to be a public utility company although it is subject to the provisions of the Alabama Liquified Petroleum Gas Act.⁴ Likewise, it was held that gas subject to regulation by the Arkansas Public Service Commission did not encompass liquid petroleum gas; thus, liquid petroleum distributors were not public utilities.⁵ Similarly, it was held that a liquid petroleum gas company was not subject to regulation as a utility by the New Hampshire Public Utilities Commission.⁶

E. Propane Is Sold As A Commodity In A Competitive Market, Rendering State Regulation Unnecessary .

Unlike regulated public utility service, propane is sold as a commodity and its distribution is treated as a merchandising transaction. Propane is a tangible commodity. Sales of this commodity are treated like the sales of any other bulk item and not as a service. For

³*Coastal States Gas Transmission Company v. Alabama Public Service Commission*, 524 So.2d 357, 360 (Supreme Court of Alabama, 1988).

⁴*Hall v. Dexter Gas Company*, 170 So.2d 796, 799 (Supreme Court of Alabama, 1964). The Court further stated that "[t]he undertaking by a supplier of liquified petroleum gas to furnish its product to the tanks of its customers calls for the same degree of care required of public utilities generally in their service to the public."

⁵*Summers Appliance Company v. George's Gas Company*, 424 S.W.2d 171, 172-73 (Supreme Court of Arkansas, 1968).

⁶*Allied New Hampshire Gas Co v Tri-State Gas & Supply Co, Inc*, 221 A.2d 251, 254 (Supreme Court of New Hampshire, 1966).

example, cylinder and bottled gas sales are "packaged" commodities, purchased at the point of sale and taken by consumers to their homes or businesses and installed by those consumers. Various courts and utility commissions have held that propane sales, even when transmitted through an underground piping system from a common storage tank, are simply merchandising operations.⁷

The fact that propane has always been parceled and sold under brand names, such as Philgas, Skelgas, Protane, and others, indicates that sales of propane are merchandising transactions of a specific, branded, identifiable commodity. Likewise, the trading of propane futures as a commodity is actively conducted on the New York Cotton Exchange and the New York Mercantile Exchange, which are regulated commodities markets.

The fact that propane is sold by metered sales does not alter the fact that propane is sold as commodity. Propane business transactions involve the sale of a product which can be and is packaged, whereas a public utility deals primarily with providing a service and supplying a commodity that is intangible in the sense that it cannot be packaged but is provided continuously through a series of permanent connections. As to the latter, as discussed below, the current national trend is for states to consider even natural gas (as well as electricity) as a commodity -- albeit a somewhat intangible one -- that may be purchased from a variety of third-party suppliers other than the public utility company. Surely, if an intangible product that was previously regulated is now to be considered a commodity for purposes of fostering a competitive market, then propane, which has always been a tangible commodity, must also be a commodity that is exempt from regulation.

F. Legal Issues .

⁷ See, e.g., *Paramount Gas Utilities Company v. Ohio Public Utilities Commission*, 180 N.E. 897, 899 (Supreme Court of Ohio, 1932).

1. **By Definition, Propane Dealers Are Not Public Utility Companies .**

Over the years, definitions of what constitutes a public utility company and a public utility service have been developed. While there have been many, many cases addressing these issues, the basic concepts can be set forth succinctly. As will be shown, propane dealers possess none of the general attributes of public utility companies, which again demonstrates that they should not be regulated as such by state PUCs.

There are two major classes of public utility companies. First, public utility companies are companies that supply continuous or repeated services through permanent physical connections between the supplier and the consumer -- generally, electricity, gas, communications, and water and sewer. Observe that this definition does not fit the characteristics of the propane industry where, in general, the propane commodity is *not* supplied through a permanent physical connection and is *not* provided on a continuous basis. Instead, propane is generally delivered in batches by rail car or truck. This distinction has been used to determine that propane is not subject to regulation under a statutory definition of public utility companies:

The plaintiff points to the literal words of the statute which include the "furnishing of light, heat, power" as indicating the defendant is a public utility. This language, in isolation, is broad enough to include those who distribute coal, wood, gasoline, oil or liquefied petroleum gas in bottles, cylinders, drums or tanks. However, the Public Utilities Commission has never regulated such activities under the statute and has confined its regulatory control to pipeline companies and gas companies using a system of underground mains for the distribution of gas to an entire community or area. The statute has been amended on two occasions and no attempt has

been made by the Legislature to include these unregulated activities as public utilities under the statute. We agree with the administrative interpretation placed on the quoted words of the statute by the Public Utilities Commission as reflecting the legislative intent not to include in the category of a public utility the sale and distribution of liquefied petroleum gas in the manner disclosed by the evidence in this case.⁸

Second, public utility companies are defined as public transportation agencies -- airlines, bus companies, motor freight carriers, gas and oil pipelines, and railroads. Thus, while the means used to distribute propane -- *e.g.*, motor freight carriers and railroads -- may be subject to regulation as utilities or common carriers, it is the means that is subject to regulation, and not the products transported by those means.

Public utility companies generally share four basic characteristics. First, public utility companies tend to be monopolies because the given industry -- *e.g.* electricity, natural gas, water -- operates more efficiently as a monopoly. Second, it is less costly for a single firm to provide service in a given area than it is to have multiple firms competing to provide that service. Third, public utility companies are generally privately-owned businesses, although there are a large number of publicly-owned electric utilities, as well as publicly-owned gas utilities. Fourth, public utility companies are generally granted "exclusive" franchises by the state in return for an agreement to serve all customers that seek service at tariffed rates.

Applying these basic characteristics to the sale and delivery of propane can result in only one conclusion: propane dealers do not possess the major distinguishing characteristics of public utility companies. Propane dealers are not monopolies; in fact, several propane dealers can efficiently and economically operate in the same area at the same time, and will compete directly

⁸*Allied New Hampshire Gas Co v Tri-State Gas & Supply Co, Inc*, 221 A.2d at 253.

on the basis of price and service. Propane dealers do not have an exclusive franchise to serve any particular area in a given state. While propane dealers are generally privately owned, that simple fact is not dispositive given the complete absence of the remaining distinguishing characteristics.

In sharp contrast, public utility companies that supply gas to consumers use gas mains and distribution lines as a permanent conduit for deliveries to consumers. Installation of these mains and distribution lines requires easements along, across, or under public highways, as well as the exercise of eminent domain over private property. Further, public utility companies are granted monopoly status by the state in return for an agreement to be subject to regulation of price and services. This grant is premised in part on the conclusion that having duplicate gas mains (as well as electric wires and water lines), would result in unnecessary and wasteful duplication of facilities, with obvious economic and safety ramifications.

In addressing the issue of what constitutes a "public utility," the Supreme Court of Alabama referenced the following definition from Black's Law Dictionary (5th ed. 1979):

A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly.⁹

Obviously, propane dealers do not have monopolies -- virtual or otherwise -- to serve particular areas. In fact, propane dealers not only have none of the traditional indicia of public service companies, they likewise receive none of the benefits. Significantly, they are not

⁹*Coastal States Gas Transmission Company v. Alabama Public Service Commission*, 524 So.2d at 360.

awarded a franchise to serve a particular area as a monopoly, nor are they given the power of eminent domain. Instead, any dealer may elect to serve any area, and to compete on the basis of price. Hence, propane dealers are not public service companies.

2. **The Sale And Delivery Of Propane By Propane Dealers Is Not A Business That So Affects The Public Interest As To Justify PUC Regulation .**

In *Munn v. Illinois*, 94 U.S. 113 (1877), the Supreme Court of the United States addressed the issue of what constitutes a public utility:

Property does become 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.

Thus, in considering whether there is a legal or justifiable basis for public service control, the concept of the “public interest” deserves close scrutiny; stated differently, the “public interest” test is the basis for any lawful assertion of jurisdiction over the propane industry by state PUCs.

To be “affected with a public interest” means that the service offered by a particular business must be such that it affects the public at large. To ascertain whether a business affects the “public interest,” the nature of the commodity sold, the method of distribution, the existing market, and the relationship between the dealer and the consumer must be considered. Simply stating that a business affects the public interest is not enough. Similarly, mere legislative

declaration that a business is "affected with a public interest" is not sufficient to subject an industry to regulation by state PUCs.

It has been said that, to constitute a public utility, "the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state."¹⁰ Applying these general principles to the sale and delivery of propane demonstrates that the retail propane business is not a business which affects the community at large. Aside from the fact that propane dealers do not enjoy any of the privileges normally granted to public utility companies by the state (such as the power of eminent domain), there is no open offer either to sell to, or to serve, the public at large. Propane dealers do not have an obligation to serve all customers; in fact, each propane sale is an independent transaction with the individual customer, like the sale of any other unregulated product or commodity. Rather than selling to the public at large, propane is sold to a limited number of customers by many different dealers in any given geographic area. Moreover, there has been and can be no offer by propane dealers, either collectively or individually, to supply everyone's needs. Stated simply, there is not enough propane to supply the heating and other needs of all consumers in any particular area. Naturally, as with other industries, business is solicited, but the product is not offered to the "community at large" such that propane dealers could be described as public utility companies.

To be affected with a public interest a business must, by its very nature, create peculiar dependence upon it by the public. The mere fact that a limited portion of the public has a feeling of dependence with respect to its maintenance is not sufficient cause to label a business as affected with a public interest. Neither does the fact that the commodity is of the nature of one

¹⁰*Higgs v. City of Fort Pierce*, 118 So.2d 582, 585 (District Court of Appeal of Florida, Second District, 1960).

of the necessities of life justify the creation of this public utility impression. There must be some action on the part of the industry in question to initiate this actual reliance on it.¹¹

The public is no more dependent on liquefied petroleum gas than it is on other fuels distributed in a similar manner such as fuel oil, coal, wood, or kerosene and other middle distillates, whose distribution and sale have not been categorized as affecting the public interest. Innumerable other necessities of life, including food, clothing, shelter, and medical treatment, all of which directly bear on public welfare, have not been designated as public utilities. They, like propane, are subject to the conditions of a free market.

The Supreme Court of Arkansas explained the difference between a public utility company and a liquified petroleum gas dealer this way:

The Legislature has not declared the LP gas business to be a public utility. It has not imposed on LP gas distributors the mandatory duty to obtain a certificate of public convenience and necessity. It has merely directed the LP Gas Board to *consider* public convenience and necessity. That phrase is not so rigid in meaning as to require that it be interpreted to mean the same thing in every legislative act in which it is used. In the Public Utilities Act it is used with reference to those utilities -- natural gas companies, public carriers, and electric power companies -- operations devoted to public use to the extent that their use is thereby granted to the public. So much so that matters such as their rates, their territories, and methods of detailed operation must be supervised by the sovereign. In turn, those utilities enjoy exclusive privileges which the Legislature has declared in the public interest, such as long-term franchises, the right of eminent domain, and security of their enormous investment from unnecessary competition.

The legislative directive that the LP Gas Board *consider* public convenience and necessity was not intended to vest in the Board the power to regulate competition in a field of private endeavor. There are many commodities just as inherently dangerous as butane and propane. We need only point to dynamite, drugs, and gasoline as some examples. Stringent regulations governing the

¹¹See, *Munn v. Illinois*, *supra*.

manufacture and distribution of those items are required and justified under the police power. When it is considered necessary for the public welfare to remove those pursuits from the field of free enterprise, it should certainly be spelled out and justified.¹²

As this discussion makes clear, propane is not a business that is so affected with the public interest that it should be subjected to further regulation by state PUCs.

3. Propane Sales Are Subject To Competitive Market Forces And Do Not, Therefore, Require Regulation By State PUCs .

One important factor in determining whether a particular product is “affected with a public interest” is whether there is competition in the sales of that product. Where it has been determined that it is more efficient, economic, and practical for one firm to provide a service rather than many firms, public utility companies are granted a monopoly to provide service within a given area. In exchange for this right, and to protect the public from the abuse of monopoly power, public utility companies are regulated with respect to price and terms of service. But where competition is present among many sellers with respect to a particular product, competition, rather than regulation, will protect the consumer from anticompetitive pricing. Where competition is thriving, there is no need for regulatory controls, because competition will tend to keep prices down.

By any measure, the market for propane is a vibrant, competitive market that evidences no need for regulation. As discussed above, propane dealers do not enjoy monopoly status, nor are they awarded exclusive service territories. They do not generally have any right to condemn property; such rights are unnecessary given that distribution of propane is not accomplished by way of permanent connections between the supplier and the consumer. Within any given market

¹²*Summers Appliance Company v. George's Gas Company*, 424 S.W.2d at 172-73 (emphasis in original).

there may be two, three, or more propane dealers vying for their share of the domestic, commercial, and industrial energy requirements. The sales and distribution of propane are fully competitive, and the existence of this competitive market not only provides consumers the opportunity to shop for price, but the opportunity to shop for the best service.

Given the competitive nature of the propane market, there is no "public interest" reason to subject propane or propane dealers to state regulation. One traditional job of state regulators is to establish prices for service that (1) do not permit monopolists to abuse their monopoly power over consumers and (2) mimic the prices that would be achieved in a competitive market. As discussed, propane dealers do not have monopolies in the sales and distribution of propane and prices are established by competitive market forces. Hence, there is no need for price regulation by state PUCs.

Moreover, from a practical standpoint, placing a keenly competitive, private enterprise segment of the business community under the jurisdiction of a PUC would do far more harm than good. If propane dealers are decreed to be public utility companies, a PUC would be forced to decide which of the two, three, four, or more propane dealers that are in business in the same general geographic area would become the single dealer for that specific area. Not only would this eliminate both choice and price-on-price competition for the consumer, serious issues concerning the taking of the "losing" propane dealers property would arise. At a minimum, protracted hearings would be necessary to insure individual property rights are not infringed, affording each propane dealer the opportunity to be heard.

Any attempt to impose a public utility regulatory scheme on propane dealers may also raise issues concerning restraint of trade and potential violations of the Commerce Clause of Article I, Section VIII, of the Constitution of the United States. Granting monopoly status to a single propane dealer at the expense of other propane dealers that have been operating in the same area would no doubt foster a long series of legal battles concerning which dealer is to be

designated as the sole provider of propane within a given area and how the losing dealers would be compensated for the loss of their business.

Even the propane dealer that was designated as the sole provider of propane within an area would be required to make radical changes to its business. For example, that dealer may be forced to purchase the facilities and equipment of the losing dealers, and would become subject to the jurisdiction of the state PUC with respect to price and services. Rather than competing directly against other dealers on the basis of price and service, that dealer would now have to make application to a PUC to increase or decrease rates, or to change services, which would involve production of data, preparation of testimony, and participation in hearings, all of which would add significantly to the cost of providing propane service.

An Ohio court perhaps best summed up the pitfalls of subjecting a competitive business to unnecessary regulation:

If any mercantile establishment, selling its goods to the public in general, could have its business adjudged as falling within the jurisdiction of the commission, and thereby eliminate, or at least greatly diminish, competitors from unfairly coming into a determined field, evidently all distinction between mercantile operations, carried on by persons, partnerships, corporations or associations, and public utilities, as now generally recognized by law, would promptly disappear, and the commission would, quite as promptly, be completely swamped in any effort the commission might make to take care of the situation thus arising, and the general provisions of the public utilities law would become broadened far beyond anything that the Legislature ever had in mind in the enactment of the public utilities statutes.¹³

Clearly, attempting to impose a regulatory scheme on propane dealers now would not only eliminate a functioning, competitive market for propane, but would unnecessarily eliminate competitors in the field, to the ultimate detriment of propane consumers.

¹³*Paramount Gas Utilities Company v. Ohio Public Utilities Commission*, 180 N.E. at 898.

4. The Current National Trend Is To Deregulate The Sales Of Traditionally Regulated Commodities Such As Natural Gas And Electricity .

There is a growing national trend to “deregulate” the sale of certain commodities at the state level, notably natural gas and electricity, which have traditionally been subject to regulation by state PUCs. Typically, such programs “unbundle” the commodity from the facilities and services necessary to deliver that commodity to consumers. PUCs would continue to regulate the rates and services of public utility companies that provide the delivery of the commodity to consumers through either the gas distribution system or the electric transmission and distribution system. The price of the commodity itself, however, would be deregulated, permitting third-party suppliers of natural gas and electricity to compete with each other for a consumer’s business. Thus, PUCs will regulate the delivery of the commodity through distribution systems owned by public utility companies, but the commodity itself may be purchased from a variety of unregulated suppliers.

While a detailed discussion of the reasons for, and evolution of, the current deregulation of natural gas and electricity is beyond the scope of this position paper, a brief summary of the current status of such programs is illuminating. According to the Energy Information Administration (“EIA”), as of June, 2002, twenty states and the District of Columbia have programs that permit residential and other small volume gas users to purchase natural gas from someone other than a traditional, regulated public utility company. EIA notes that the availability, characteristics, and participation rates of these “customer choice” programs vary widely across the states. For example, five states and the District of Columbia allow all residential customers to choose their natural gas suppliers, although participation levels vary greatly. Seven other states have begun to implement statewide programs, and eight states have

pilot programs or partial unbundling programs in place. An additional ten states are considering such programs, and eighteen states have taken no action.¹⁴

States are also beginning to restructure the electric industry to introduce more competition. In general, states are considering the deregulation of, or have deregulated, the generation function, and continue to regulate the distribution function. The idea is to promote competition among alternative electric suppliers. EIA reports that twenty-four states and the District of Columbia have either enacted enabling legislation or issued a regulatory order to implement retail access.¹⁵ Under these programs, the local distribution company continues to provide transmission and distribution services (delivery of energy), and customers may choose their own supplier of generation energy service. As with retail natural gas programs, the details of the programs vary widely by state. For example, Maryland has recently passed the "Electric Customer Choice and Competition Act of 1999." The Act has a number of major purposes: (1) to establish customer choice of electricity supply and electricity supply services; (2) to create competitive retail electricity supply and electricity supply services markets; (3) to deregulate the generation supply, and pricing of electricity; and (4) to provide benefits for all customer classes.¹⁶

Thus, the natural gas and electricity business at the state level is beginning to emulate the propane industry. The sales of the commodity will be deregulated and subjected to competitive market forces, as is currently the case with propane. The delivery of these commodities to consumers will remain regulated, as are interstate propane pipelines and the trucking and rail industries.

¹⁴EIA, *Natural Gas Residential Choice Programs*, United States Summary, updated June, 2002.

¹⁵EIA, *Status Of State Electric Industry Restructuring Activity*, December, 2002.

¹⁶Public Utility Companies Article, MD CODE ANN, §§ 7-501, *et seq.*

This discussion illustrates that even traditional notions of public utility service are changing in favor of permitting competition between providers of the commodity to establish price for the commodity rather than PUC regulation. Hence, the trend is to encourage multiple suppliers of even traditionally-regulated commodities such as natural gas and electricity, much like the situation that already exists in the propane industry. Subjecting propane and propane dealers to state regulatory controls would be inconsistent with this trend and the goal of fostering competitive commodity markets for energy supplies.

5. Other Considerations Do Not Support State PUC Regulation Of Propane Sales And Distribution.

There are a number of additional factors that have a bearing on the issue of whether propane and propane dealers should be subject to regulatory controls by state PUCs.

First, even in the unlikely event that a dealer would face charges of price manipulation, such as charges of discriminatory pricing, price grouping, market manipulation, conspiracy, or other such violations, antitrust laws, as well as state fair trade acts, provide adequate recourse for relief from any alleged illegal activity. Stated differently, existing laws already provide a sufficient remedy, thereby rendering PUC control unnecessary.

Second, if supply shortages are a cause for concern, regulation is powerless to remedy that situation. Subjecting propane dealers to PUC control cannot and will not produce a supply of propane that simply does not exist. To the contrary, regulatory requirements imposed on the propane industry may have the effect of reducing the flow of product by discouraging competitors from entering a business. Certification, licensing, recordkeeping, forecasting, reporting, and other requirements associated with PUC regulation generally serve to discourage companies from entering a market and encourage those same companies to operate in other states without these requirements. Simply stated, it may make better economic sense for a propane

dealer to concentrate its resources in a state that does not have burdensome regulatory requirements.

CONCLUSION

For the reasons set forth in this position paper, the National Propane Gas Association's position is that the sale and delivery of propane by propane dealers to consumers should not be subject to regulation by state PUCs. Propane dealers do not fit the classic definition of public service companies, nor is propane the type of service that has traditionally been subjected to regulation. For further information, please contact the National Propane Gas Association.

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