THE integration provisions of the Act require the Commission to limit each holding company system to a single integrated public utility system, "and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system," and further specify that "The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems." The first quotation in the foregoing sentence is known as the first other businesses clause, and the latter quotation is known as the second other businesses clause. The earliest interpretation of these two clauses was that the Commission must permit the retention of other businesses, including investment interests in utilities which are not statutory subsidiaries of the system involved, which are found to be reasonably incidental, or economically necessary or appropriate to the operations of a retainable integrated public utility system, and that as to both investments in nonutilities and interests in nonutilities sufficient to create the statutory parent-subsidiary relationship, these requirements may be met if their retention is found to be necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper

391 Section 11(b)(1) of the Act.
functioning of such system or systems. The primary distinction in this instance was between nonutility subsidiaries and investments in nonsubsidiary utilities. There was also some confusion early in the history of the Act as to whether the gas operations of a company primarily engaged in business as an electric utility might be retained under the other businesses clauses of the Act. This question was answered in the negative. In another instance, the Commission definitely held that utility subsidiaries not forming a part of the principal system or of permissible additional systems could not be retained under the provisions of the other businesses clauses.

In The North American Company case, the Commission took occasion to make a few general observations relative to the other businesses requirements of the Act. They were as follows:

"If it be recalled that the Commission may permit retention of an interest in a nonutility business as 'reasonably incidental, or economically necessary or appropriate' to the operations of an integrated public utility system or systems, when it finds retention of such interest to be 'necessary or appropriate in the public interest or for the


308 Section 2(a) (8) of the Act defines the term "subsidiary" to mean "(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and (B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."


305 The United Gas Improvement Company, 9 S.E.C. 52 (1941).
protection of investors or consumers and not detrimental to the proper functioning of such a system or systems; and if it be recalled that the phrase 'public interest' is used in connection with the policy of curing evils which result 'when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties' (Section 11(b)(4)), it becomes apparent that the historical background of the joint control of a nonutility business with a utility business has little or no bearing on the permissibility of its retention in a public utility holding company system. Interests held for a long period do not, by reason of that fact alone, achieve any relation to 'economy of management and operation' or 'the integration and coordination of related operating properties.' Indeed, it is the very purpose of Section 11(b)(1) to require the severance of those interests acquired in the course of the historical 'growth and extension' of a holding company which do not satisfy the policy of the Act.”396 (Emphasis added)

Furthermore, the Commission stipulated that the substantiality and stability of income afforded by nonutility interests is not, by itself, a factor warranting their retention in a public utility holding company system, since substantial and stable income might be afforded by businesses having no imaginable relationship to the economy of management and operation of integrated public utility systems. Therefore, the fact that a nonutility business is profitable does not constitute one of the essential elements for its retainability under the other businesses clauses. The same is true of economies resulting from joint use of personnel. The rule laid down by the Commission in this regard, similar to the test under Clause A, was that "unless the nonutility business is such

that resulting economies are *economies in the operation of an integrated utility system*, or systems, the mere showing of economies is of little weight in determining whether the nonutility business may be retained."\(^{397}\)

In the same North American case the company contended that many of its nonutility properties should be retainable for the reason that their disposition would be very difficult, and that losses would be incurred upon the sale thereof. There were two answers to these contentions. The first was that the alleged losses most likely occurred in the past but were merely not recognized because no sale was made, and the fact that losses might be recognized upon the sale of these properties after the issuance of an order of the Commission did not necessarily mean that the market values thereof dropped because of such order. The second answer was that if there should be no market at a reasonable price, then an extension of time in which to dispose of the properties might be granted under Section 11(c) of the Act.

Another general principle laid down in the North American case was that the other businesses tests are not to be applied to operations grossly out of proportion to the utility business with respect to which they are claimed to be retainable. In other words, the other businesses of an integrated system should be clearly subordinate in size and importance to the utility business.\(^{398}\)

Again, in the North American case, the company insisted that it need show no affirmative public benefit resulting from the retention of certain nonutility interests, it being sufficient to show that retention of such interests was compatible with the public interest. The Commission rejected this test and in-


sisted that the phrases "public interest" and "proper functioning" of an integrated system in the other businesses clauses required that the activities of public utility systems be limited to those related to economy of management and operation of the public utility system and the integration and coordination of related operating properties.

The next occasion for a definitive interpretation of the other businesses clauses of the Act arose in the Engineers Public Service Company case. The company there contended that the second other businesses clause relates back to the first other businesses clause and sets out standards in accordance with which the incidental nature or economic appropriateness of a proposed other business must be measured. The Commission agreed that both clauses must be read together but insisted that the two provisions do not contain isolated standards. It was observed that they were a closely knit part of a statute which has a clearly expressed policy, and that they appear in a section of that statute which was designed to limit the operations of a holding company system to a single integrated public utility system and to reasonably incidental or economically necessary or appropriate nonutility businesses. Consequently, according to the Commission, the phrases "public interest," "protection of investors or consumers" and "detrimental to the proper functioning of such system" not only illuminate the meaning of "reasonably incidental or economically necessary or appropriate," but also derive content from their context in the section and the

statute. Furthermore, it was pointed out by the Commission that Congress did not say that "the Commission shall permit the retention of a business which it finds to be necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems." Instead it required that the Commission examine such factors in determining whether a business was retainable as reasonably incidental or economically necessary or appropriate to the operations of an integrated utility system. Counsel for Engineers Public Service Company argued that the basic questions before the Commission at this point were whether the retention of the business was appropriate for the protection of investors, or whether it was appropriate in the public interest, or whether it was detrimental to the proper functioning of an integrated utility system. The Commission felt that the questions suggested by the company were relevant in arriving at the solution to the ultimate issue, but that they did not constitute the true tests for retention of such a business. Instead, the fundamental question proposed by the Commission was this: Having in mind the protection of investors, the public interest and the proper functioning of an integrated utility system, is the retention of a particular nonutility business reasonably incidental to or economically necessary or appropriate to the operations of a retainable utility system?

The legislative history of the Act was cited by the Commission in the Engineers case in support of the foregoing conclusions. It was noted that Section 11 of the Senate bill provided for divestment—

"... to the extent that the Commission finds necessary or appropriate to limit the operations of the holding

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company system . . . to a single geographically and economically integrated public-utility system and such business as is reasonably incidental, or economically necessary or appropriate, to the operations of such system; the Commission may permit as reasonably incidental or economically necessary or appropriate to the operations of such system the retention of an interest in any business (other than the business of a public utility company as such) . . . if the Commission finds (1) that such business is affected with a public interest and its rates or charges are regulated by law, and that the retention of such interest in such business is not detrimental to the proper functioning of a single geographically and economically integrated public utility system. . . ."\footnote{Engineers Public Service Company, 12 S.E.C. 41, 47, footnote 5 (1942).}  

The provisions empowering the Commission to include, among other businesses reasonably incidental or economically necessary or appropriate, those businesses affected with a public interest and regulated by law were changed by the so-called "Minton Amendment" in conference, where the language now set forth in Section 11(b)(1) was substituted for the more limited language in the Senate bill. The conclusion of the Commission in connection with this change in the bill was that it permitted the inclusion, among reasonably incidental or economically appropriate other businesses, of enterprises other than those affected with a public interest and whose rates or charges were regulated by law. It was observed that the mere fact that a business falls within this description, however, did not under the Senate bill, and more clearly does not under the Act as passed, render it ipso facto "reasonably incidental or economically necessary or appropriate" to the operations of an integrated utility system, and that in each case it was necessary to examine the character and operation of the specific business sought to be retained and
its relationship to retainable utility operations, and to determine whether it is reasonably incidental or economically necessary or appropriate to the operation of the utility system to which it is sought to be appended.\textsuperscript{403}

The test laid down by the Commission in the Engineers Public Service Company case relative to the retention of other businesses, which required a functional relationship between the operation of such other businesses and the operation of the utility system to be retained, was rejected by the United States Court of Appeals for the District of Columbia upon an appeal of the case.\textsuperscript{404} The court felt that Congress did not contemplate the result reached in the Engineers case, but intended, on the contrary, to forbid the divestment of other businesses not detrimental to the functioning of the principal system if retention would serve the interests of the general public or the interests of investors or consumers, irrespective of the functional relationship between such businesses and the principal system. The court stated its basic premise as follows:

"... The purpose to eliminate the evils of holding company systems is expressed in the Act in unmistakable terms, but in the provisions of the compromise measure, worked out in the legislative process, it also clearly appears that Congress realized that it was dealing with existing corporate structures that had been operated under common control for a long time and could not be cut down to a single ideal system in every case without disastrous consequences to public and individual inter-

\textsuperscript{403} Ibid.

\textsuperscript{404} Engineers Public Service Company v. Securities & Exchange Commission, 138 F. (2d) 936 (C.A., D.C., 1943). The contrary decision in The North American Company case, 133 F. (2d) 148 (C.C.A., 2d Cir., 1943), was noted, but it was observed that in the case of American Water Works & Electric Company, Inc., 2 S.E.C. 972, 983-985 (1937), the Commission permitted retention of numerous other businesses which had no functional relationship to the other companies in the retainable system.
The purpose to protect these interests is made abundantly clear by an examination of the legislative history of the Act.

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"The general purposes of the Act will not be frustrated by this interpretation. The Commission has the power and duty to determine whether the interests of the public or investors or of consumers will be served by the retention of other businesses, and even if it so finds, it must nevertheless require the severance of the other businesses from the system if it further finds that the combination is detrimental to the proper functioning of the system. If all of these findings are favorable to the continuance of the combination, the practical advantages shown by experience to flow from joint operation may still be enjoyed."

The court in this case did not presume to decide what other businesses were retainable under its test, since such final determinations of fact lay within the jurisdiction of the Commission, but instructed the Commission to ascertain the relevant facts and apply them in the light of the court's interpretation of the other businesses clauses.

The decision of the Circuit Court of Appeals for the Third Circuit in The United Gas Improvement Company case was rendered contemporaneously with the decision of the Court of Appeals for the District of Columbia in the Engineers Public Service Company case, and obviously each of these opinions was completely independent of the other.

In the UGI case the Commission had found that the company's interest in certain other companies which were not statutory public utility companies was not reasonably inci-

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dental, economically necessary or appropriate to the operations of any integrated public utility system retainable by UGI. UGI contended that such finding was not adequate, arguing that the provisions of the second other businesses clause required the Commission to find, as to businesses other than statutory public utilities, that the retention of such businesses was not necessary or appropriate in the public interest or for the protection of investors or consumers and detrimental to the proper functioning of the integrated system or systems. Briefly stated, the position of UGI was that the Commission had no power to compel the divestiture of a nonpublic-utility business from an integrated system unless it was affirmatively found that the retention of such property would be detrimental to the proper functioning of the holding company system in interstate commerce. This was, of course, the substance of the holding of the Court of Appeals in the Engineers Public Service Company case.

The court in the UGI case expressed the opinion that the word "may" occurring as the third word of the Minton Amendment, the second other businesses clause, should be construed to read "shall." The court further stated its position as follows:

"... The Minton Amendment serves to define what 'other businesses' designated in the first sentence of Section 11(b)(1) are reasonably incidental, or economically necessary or appropriate to the operations of the integrated system. The standard is plain. We conclude that unless the Commission finds affirmatively that the other businesses which the utility holding company seeks to retain meet the requirements of the amendment, they are subject to divestiture. The burden is upon the holding company to show that the businesses to be retained

401 To the same effect see Engineers Public Service Company v. Securities & Exchange Commission, 138 F. (2d) 936, 947, footnote 2 (CA., D.C., 1943).
fall within the accepted categories. If the holding company fails to do this, such businesses must be divested when so ordered by the Commission. UGI has had full opportunity to make its proof in this respect. It has not done so. . . . It follows that UGI's contentions must fall."

Thus there arose a divergence of opinion as to the interpretation of the other businesses clauses as between the Commission and the Circuit Courts of Appeals for the Second and Third Circuits in The North American Company and The United Gas Improvement Company cases, on the one hand, and the Court of Appeals for the District of Columbia in the Engineers Public Service Company case on the other hand. The Commission has subsequently proceeded on the assumption that the Supreme Court of the United States in The North American Company case approved its requirement of functional or operating relationship for other businesses by stating that "other holdings may be retained only if their retention is related to the operations of the retained utility properties." Also, in a number of instances the Commission

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409 In Arkansas Natural Gas Corporation v. Securities & Exchange Commission, 154 F. (2d) 597, 599-600 (C.C.A., 5th Cir., 1946; cert. denied, 329 U.S. 738), it was noted that the Supreme Court had granted certiorari in both the North American and the Engineers cases, and therefore that neither case stood as a precedent. The view of the Fifth Circuit Court in this case was that "This sentence (the second other businesses clause) is not a redefining of the 'other businesses' previously mentioned as retainable, but is an enlargement, an addition thereto. In the first mention the operations of the utility system are in the foreground, and what is merely incidental to them, or what is economically necessary or appropriate to them may be retained. In the second mention of other businesses the public interests, and the protection of investors and consumers are in the foreground, and retentions necessary and appropriate to protect these are permissible additionally, if not detrimental to the proper functioning of the system." Id. at 599. Although this decision is not clear cut, apparently this court tended to favor the Second Circuit's interpretation of the other businesses clauses as set forth in the North American case.
410 The North American Company v. Securities & Exchange Commission, 327 U.S. 686, 697 (1946). Although writs of certiorari were granted to the
has held that under either interpretation certain other businesses were not retainable.\footnote{\textsuperscript{411}}

It may be observed further that, although the argument centered largely around the terminology of the other businesses clauses, the underlying philosophy of the Commission as to the Act as a whole was obviously tangential to that of the Court of Appeals. It has already been stated that the Commission did not believe that historical association constituted a valid reason for the retention of other businesses. In addition, the Court of Appeals of necessity imposed the requirement that the combination not be "detrimental to the proper functioning of the system as a whole." In view of the "intangible benefits" theory developed by the Commission under Clause A, which was to the effect that there were certain advantages arising from the separation of properties, such as electric and gas utilities, that could not be measured in terms of dollars but were substantial nevertheless, it would appear that if pressed on the point, the Commission would have applied a similar theory to the separation of other

businesses. Consequently, if obliged to follow the rule of the Court of Appeals, the Commission might well have said the intangible benefits resulting from the disposition of many other businesses were so great that the retention of such businesses would be “detrimental to the proper functioning of the system as a whole.” Thus the end result would likely have been the same under either approach.412

One of the reasons given most frequently in justification of the retention of other businesses is the joint use of personnel and facilities between the other businesses and the integrated utility system. The Commission has taken the position that unless the economies arising from such joint use of personnel and facilities are economies in the operation of the integrated

412 An indication of this may be found in Philadelphia Company, Release No. 8242 (June 1, 1948), at mimeo. pages 47-48, where the Commission used this language: “In weighing considerations affecting the public interest and the interests of investors and consumers, we cannot overlook the possibilities inherent in common control of properties of such a character that transactions between them and the conduct of their operations may be influenced to favor one property rather than another and the consequent potentialities for substantial detriment to investors, consumers and the general public. It has been suggested, for example, that Philadelphia Company’s control of Pittsburgh Railways may have impeded or will impede the natural growth of motor bus service in order to maintain and foster Duquesne’s electricity revenues from the electric street railways, and that there may have been or will be overreaching in the fixing of the rates charged Pittsburgh Railways for power. We do not mean to intimate that the evidence in the present record proves that such overreaching has in fact taken place. It is enough to point out here the potentialities for such overreaching while the properties remain under common control. We think these factors must be given due consideration in determining whether a showing has been made that common control of the utility and transportation systems is affirmatively in the public interest or for the protection of investors or consumers.” See, also, The Middle West Corporation, 18 S.E.C. 296, 301 (1945), where the Commission stated that “Whether this last sentence (of Section 11(b)(1)) be regarded as setting the framework within which to interpret the standards ‘reasonably incidental or economically necessary or appropriate’ (See North American Company v. S.E.C., 133 F. (2d) 148 . . .) or be read as a substitute for those standards (See Engineers Public Service Company v. S.E.C., 138 F. (2d) 936 . . .) the sentence cannot be torn from its context in the Act. The express policy of the Act in this respect is to permit retention only when necessary for ‘economy of management and operation or the integration and coordination of related operating properties.’ (Section 1(b)(4), emphasis supplied)” Cf., Texas Utilities Company, Release No. 6373 (January 17, 1946).
system, they have little bearing upon the question. The attitude of the Commission is that the fact that a completely unrelated enterprise enjoys certain advantages from its connection with a utility business is irrelevant in determining whether the nonutility business is "reasonably incidental, or economically necessary or appropriate" to the utility business. But conversely, some advantages in common use of personnel may be found resulting to utility operations from their connections with even the most unrelated types of properties.

It is well settled that the burden is upon the holding company to show that the "other businesses" sought to be retained meet the standards of the Act. The disposition of other businesses may be ordered even though the location of the principal system has not been finally determined, where it appears that such businesses could not meet the statutory tests as to any possible combination of retainable properties. In spite of the fact that both counsel for the

413 Cities Service Power & Light Company, 14 S.E.C. 28 (1943). In The Middle West Corporation, 18 S.E.C. 296, 301-302 (1945), the principle was stated as follows: "The sharing of personnel as between utility and nonutility, the servicing of the same customers by both, the provision of electricity by the utility to the nonutility and difficulty in disposition of the nonutility are factors which may exist no matter how unrelated the nonutility business may be. By themselves these factors do not warrant a finding of retainability in the light of the policy of the Act. When combined with other factors which show a relation to the management of an electric utility business—as a functioning unit rather than as a revenue producing vehicle—these considerations may be given weight. But to lose sight of the essential requirement of operating relationships is to depart from the basic policy of the statute. The standards of 'public interest,' 'protection' of investors and consumers, the 'proper' functioning of utility systems do not exist in a vacuum. They are parts of an Act whose critical function is to simplify the operations and structures of holding company systems. These standards, when viewed in their statutory context, cannot be read to permit the retention of properties which have no relation to the operation of the utility business." Cf., The Commonwealth & Southern Corporation, Release No. 7615 (August 1, 1947).


415 The United Gas Improvement Company, 9 S.E.C. 818 (1941).
Public Utilities Division of the Commission and counsel for the company involved have agreed that certain other businesses should be divested, the Commission must pass judgment upon each one individually under the Act. One of the reasons for this is that certain tax benefits are available where disposition of properties is ordered pursuant to the Act. On the other hand, where counsel for the Public Utilities Division agreed with company counsel that certain other businesses were retainable, but the Commission was of a contrary opinion, the case was reopened to allow the company to present a full record upon a claim of surprise by the company.

The foregoing observations give the general background for the application of the other businesses clauses. Set forth below are discussions of the principal specific types of incidental businesses which have been presented to the Commission and to the courts for approval.

**Investments**

The term "investment" as used under this subheading refers to the ownership of an interest in a statutory utility or a nonutility company not sufficient to make such company a subsidiary of the public utility holding company as provided in Section 2(a)(8) of the Act. The reference is not to subsidiaries engaged in the investment business, another type of incidental business. It has been held that utility subsidiaries

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417 Cf., Sections 112(b)(8), 371 and 1808 of the Internal Revenue Code of the United States.
418 Cities Service Power & Light Company, 14 S.E.C. 233 (1943).
419 Such subsidiaries have generally been held not to be retainable under the other businesses clauses. The main argument for their retention has been that they contribute "diversity" to the holding company system. The Commission has noted that the argument that mere diversity of investment justified the retention of an unlimited number of varied interests was presented at length to Congress at the time the holding company act was under consideration and concluded that Congress clearly indicated its rejection of this argument. The North
cannot be retained under the provisions of either of the other businesses clauses.\textsuperscript{420} The second clause, of course, specifically excludes the business of a public utility company as such, and the Commission observed that it was the intention of Congress to require that utility subsidiaries, if they were to be retained, must be fitted into the single integrated system or any additional systems meeting the standards of the ABC clauses. In the UGI case, the holding company owned an interest in certain Connecticut utility properties which fell within the statutory definition of subsidiaries. However, the company contended that the Connecticut properties should not be so considered because of a Connecticut statute prohibiting the control of Connecticut utilities by a foreign holding company. In other words, the company contended that the Connecticut properties constituted investments rather than subsidiaries. The Commission held that the Connecticut properties were utility subsidiaries within the meaning of Section 2(a)(8) of the Act and that therefore, upon the basis of the rule set forth above, they were not retainable under the other businesses clauses.\textsuperscript{421}

In one of the first cases interpreting the Act, the Commission indicated that the other businesses clauses permitted the retention of investment interests in utility properties which were not subsidiaries of the holding company.\textsuperscript{422} This led company counsel to take the position that investment interests of holding companies, i.e., interests insufficient to create the statutory parent-subsidiary relationship, in both utilities and nonutilities were beyond the scope of any of the provisions of Section 11(b)(1) and that no order could issue under that

\textsuperscript{420} The United Gas Improvement Company, 9 S.E.C. 52 (1941).
\textsuperscript{421} Ibid.
\textsuperscript{422} The United Gas Improvement Company, Release No. 2500 (January 18, 1941).
section requiring the divestment of such investment interests. The argument was that Section 11(b)(1) referred to "operations" of holding company systems, that nonsubsidiary interests were not "operations," and consequently that the provisions of Section 11(b)(1) did not affect them. It was further argued that both of the other businesses clauses referred only to nonutility interests which were "operated," which was interpreted to mean only interests which were subsidiaries. The Commission rejected this construction of the Act. The first reason given was that by the very nature of a holding company its operations consisted largely of the mere holding of securities in other businesses, the investment of funds being a necessary and important part of its business. It was observed that such investment function, even when it did not result in control by the holding company of the companies in which the funds were invested, was just as surely a part of the operations of the holding company and of the holding company system as were its other activities. Another reason propounded by the Commission was that the terminology of Section 9, Section 10, and Section 11(a) of the Act left little doubt that Congress intended that the provisions of Section 11(b)(1) should cover both controlled properties and other interests of the holding company. This decision was affirmed on appeal, where the court stated the case as follows:

"... But UGI makes the contention that no power was conferred upon the Commission to compel divestiture of any interest which a holding company may have in a statutory public utility which it does not operate; that is to say, which is not a subsidiary of the holding company. UGI contends that significant words lie in the first sentence of Section 11(b)(1) which provides that the Commission shall take such action as may be appropriate "* * * to limit the operations of the holding-

428 The United Gas Improvement Company, 9 S.E.C. 52 (1941).
company system * * *. If an investment in a company is not such an interest as will permit the holding company to operate the company of which the interest is held, then, says UGI, the Commission has no power to limit the holding company system by compelling the holding company to divest itself of its interest or investment in such a company. UGI takes the position that the stated purpose of the Act as contained in Section 1(a) . . . and the abuses sought to be corrected as set out in Section 1(b) . . . demonstrate that it was the intention of Congress to so limit the power of the Commission.

"While control by a holding company of a subsidiary generally connotes management or at least some measure of supervision, this is not always the case. It is always true however, that the functioning of a holding company includes the holding of stocks of other companies. In every case the 'operations' of a holding company consist largely of holding stocks. The word 'operation' in its commonest usage means simply the "* * * act, process, or effect of operations" (citing Webster's New International Dictionary, Second Edition) and there is nothing in the Act or in its history which would lead us to conclude that Congress intended another or different meaning for this word. . . . We think that Congress did not intend the strained construction which UGI seeks to put upon the statute. The obvious intention of Congress in enacting Section 11(b)(1) was to integrate public utility holding company systems and to compel holding companies subject to the Act to relinquish interests in unrelated utilities as well as unrelated non-utility companies. The myriad, promiscuous activities and investments of some of the holding company systems was (sic) a prime cause of investors' losses.

"That the jurisdiction of the Commission to limit holding company systems goes as far as we have indi-
cated is made plain by an examination of Section 11(a), . . . of the last sentence of Section 11(b)(1) and Sections 9(a) and 10. . . .

In the proceedings involving the Engineers Public Service Company it was contended by the holding company that the Commission’s order of divestment relative to properties found to violate the standards of Section 11(b)(1) should go no further than to require the company to divest itself of control over such properties, and should not require the company to divest itself of all interest therein. The argument was that, even though Section 11(b)(1) prohibited the company from operating or controlling the non-conforming utility systems and other businesses, its provisions would permit the company to retain an investment interest therein. The Commission rejected this proposition, holding that the reduction of ownership to less than 10%, thereby formally falling outside of the provisions of Section 2(a)(8) defining subsidiaries, and the retention of such property as an investment could not be allowed.425 In the first place, the Commission felt that an investment interest in a company which had been dominated, controlled, and serviced by the holding company for a number of years as in this case was substantially different from the ownership over a period of years of an investment interest in a non-affiliated company, as in the UGI case discussed immediately above. The Commission doubted that the proposed procedure would effectively eliminate the controlling influences of the holding company. In the second place, the Com-


425 Engineers Public Service Company, 9 S.E.C. 764 (1941).
mission was of the opinion that the provisions of Section 2(a)(8) were not designed as a means of obstructing and delaying integration proceedings and reasoned that Congress could not be thought to have intended any such inconclusive disposition of questions under Section 11(b)(1), which calls not only for finality of action but also for promptness of action which would be precluded by the injection of Section 2(a)(8) proceedings wherever divestment of the securities of a subsidiary was involved.

It will be recalled that the second other businesses clause specifically excludes from consideration thereunder the business of a public utility. By virtue of the overlapping language of the two other businesses clauses the Commission has held as indicated above, that the two clauses must be read together and that the factors listed in the second clause should be examined in all cases. The Commission has gone one step further and considered whether the exclusion of public utility businesses in the second clause should also be applied to the first clause, thereby preventing entirely the retention of interests in non-subsidiary utilities as other businesses. Although the question was not decided, the Commission stated that such conclusion had much to support it. It was noted that the provisions of Section 10(c)(2) indicated that such a construction of the other businesses clauses was proper. Under the latter section, an investment interest in a non-subsidiary utility property could not be acquired by a holding company in the absence of an affirmative showing that such acquisition would serve the public interest by tending towards the economic or efficient development of an integrated public utility system. No subsequent case has been found, however, in which the issue as to non-subsidiary utility investments has been raised. The exact meaning of the Act in this situation is

426 Engineers Public Service Company, 12 S.E.C. 41 (1942), and The United Gas Improvement Company, 11 S.E.C. 338 (1942).
very obscure, but in view of the early stand of the Commission to the effect that it was possible to retain such investments as other businesses, provided that they met the other tests of retainability, it is quite likely that such precedent will not be altered.

**Coal**

The Commission at an early date held that a coal business bearing an intimate relationship to the operations of the permissible utility system was retainable.\(^{427}\)

In *The North American Company* case it appeared that one of its subsidiaries, Union Colliery Company, operated coal mines in Illinois, 85 miles southeast of St. Louis, which supplied most of the coal used by the electric properties of the system in and around St. Louis. Over 80% of the output of these mines was used by the St. Louis (Union) group for generating electricity. These mines were shown to be a convenient and economical source of a commodity vital to the utility operations of the system. The economies resulting from joint operation of the coal company and the Union group were related to the economic and efficient management of the electric utility system. Furthermore, the coal company was wholly owned by Union Electric Company of Missouri, the owner of the principal system, and appeared to be operated as a mere department of the Union group. For these reasons the Commission held that the business of Union Colliery Company was retainable by the Union Group and by North American as an incidental business.\(^{428}\)

On the other hand, the Commission held that the coal mining business operated by West Kentucky Coal Company, a North American subsidiary, was not retainable.\(^{429}\) The coal


\(^{429}\) *Id.* at 223-224.
output of this company during 1940 and prior years had been sold almost exclusively to nonaffiliated purchasers. The reason given in support of the retainability of this property was that the company's mines would afford a source of supply for the Union electric operations of North American if other sources were closed off. There was no evidence that such contingency had occurred in the 35 years of the coal company's existence. It therefore appeared that the stock of this company represented merely an investment in a business which bore no relation to the permissible utility operations.

North American refused to capitulate in the matter of the properties of the West Kentucky Coal Company. Six years later it approached the Commission with an offer to prove that the electric energy demand of Union had increased by 65% since 1940 and that the existing demand would be almost doubled by 1962; that this increase in demand for electric power caused a corresponding increase in the coal requirements of Union; that although Union obtained only 35% of its coal from outside sources in 1940, it then purchased 77% from such sources: that West Kentucky had developed new processes which made available a superior type of generating fuel; that additional mines of the special type of coal preferred by Union could be developed if firm commitments for future years were secured from Union; and that annual savings of $2,000,000 would result from the combination of properties. The Commission pointed out that in 1947 Union obtained only 15% of its coal from West Kentucky, and that West Kentucky only sold 8% of its output to Union. North American contended, however, that the Commission should go beyond the then existing relationship and consider its estimates of future operations of Union and West Kentucky; that in 1962 it was probable that Union would obtain 56% of its coal from West Kentucky, which would equal 42% of the latter's production in 1947. It was
noted, further, by the Commission that West Kentucky had grown in the intervening years so that in 1947 it was the eighteenth largest bituminous coal producer in the country and its net income was approximately one-third the consolidated net income of Union. The Commission indicated that in determining the retainability of nonutility properties as incidental businesses, primary emphasis should be given to presently existing facts rather than to estimates for many years in the future, but it did give consideration to the prospective plans of Union. The relative size of West Kentucky was also taken into consideration, and it was observed that the company was a substantial industrial enterprise, well able to stand by itself, whose only relation to the electric utility business was that of a normal commercial supplier. And since the major function of West Kentucky, even pursuant to the future projections of North American, was its outside sales, the Commission felt that its coal business was not and would not be devoted primarily to furthering the operations of Union, but would be essentially devoted to independent ends. Consequently, it was held that the change of conditions since 1940 was not an adequate basis upon which to predicate a modification of the earlier divestment order.\footnote{The North American Company, Release No. 8626 (November 4, 1948).}

Nothing daunted, North American returned to the fray with a proposition to segregate the Sturgis Division coal properties of West Kentucky, the properties which produced the coal desired by Union, from the other properties of the company and to retain only the former. It was contemplated that by 1953 all of the Sturgis Division coal production would be used in the operation of Union's electric system. In spite of the fact that much of the record was based upon conjecture and estimates for the future, the Commission noted that the electric utility system of Union would remain subject to its jurisdiction and therefore could be reexamined in the light
of future developments. It was held that the Sturgis Division coal properties were retainable and the plan of North American was approved.\(^431\)

In another case it appeared that all of the coal produced by a coal company and an associated mining company was used by a generating station of the parent electric utility system, except for incidental sales to employees. In normal years all of the coal used by the particular generating station came from this source. Retention of these other businesses was permitted.\(^432\)

Production and Transmission of Gas

In many natural gas utility systems the facilities include not only distribution lines but also production and transmission properties. The question has arisen whether the latter properties may constitute part of the integrated utility system or whether they may be retained, if at all, under the terms of the other businesses clauses of the Act.\(^433\) It has been held, for example, that production and transmission properties may be retained either as part of the integrated system or as other businesses.\(^434\) The issue was raised in the appeal of Arkansas Natural Gas Corporation, a subsidiary of Cities Service Company, and the Circuit Court of Appeals for the Fifth Circuit decided that the production and transmission of natural gas was not part of the integrated system but could be retained as other businesses.\(^435\)

\(^433\) Cities Service Company, 15 S.E.C. 962 (1944).
\(^434\) Ibid. and The Middle West Corporation, 15 S.E.C. 309 (1944).
In the Lone Star Gas Corporation case, it appeared that the natural gas production operations of this gas utility system were substantially subordinate in size to the utility operations of the retainable system. Approximately 30% of the system's natural gas requirements was produced by these properties. The gas fields owned by the company were all located within or adjacent to the system area. The gas transmission operations of the system were approximately equal in size to the utility operations. Its pipe lines transmitted all of the requirements of its distribution properties, and with a minor exception the company itself distributed all of the gas which it produced and transmitted. There existed close operating coordination between the production, transmission, and distribution operations to assure that the production and transmission facilities would be adequate to meet the varying distribution demands. The three operations were essentially limited to the State of Texas. It was held by the Commission that the gas production and transmission operations of the Lone Star system were retainable under the other businesses clauses.\footnote{Lone Star Gas Corporation, 12 S.E.C. 286 (1942).}

In The North American Company case one of its natural gas utility subsidiaries, Northern Natural Gas Company, sought to retain its production and transmission properties, which extended from Texas to Minnesota, along with its distribution system in Nebraska, Iowa, Minnesota, North Dakota, and South Dakota. In contrast to the Lone Star situation, the great bulk of Northern's assets was represented by its production and transmission properties. The Commission observed that, generally speaking, the other businesses clauses should not be applied to operations grossly out of proportion to the utility business with respect to which they were claimed to be reasonably incidental, or economically
necessary or appropriate, and that the utility function should constitute the primary business of a system with retainable nonutility interests occupying a clearly subordinate position thereto. Nevertheless, an exception to such rule was made in this case because of the nature of the natural gas utility industry in general and the problems of this system in particular. The pipe lines of the system supplied all of the gas distributed by it and were vital to its operations. The joint ownership of these facilities was found to be in compliance with the other businesses clauses.\textsuperscript{437}

In a later decision the transmission lines of another North American and Northern Natural subsidiary, Argus Natural Gas Company, were held to be retainable as other businesses in combination with the properties described above.\textsuperscript{438} The gas transmission and distribution facilities of Argus had previously been held nonretainable as an additional system to Northern. However, it was shown that the transmission system of Argus in Kansas was essential to the gas utility operations of Northern, because such system constituted the means by which Northern might secure gas from another field, it appearing that the gas supply of the field then being used by Northern was diminishing while the demand was rapidly rising. Among the industrial consumers of Northern were several concerns engaged in important war work. It was felt that the wartime building restrictions would prevent the construction of new gas transmission lines where presently existing facilities, such as those of Argus, were available. Northern was also depending upon the transmission lines of Argus in an increasing degree for the transmission of gas from Northern's gas leaseholds to its own pipe lines. Therefore, these lines of Argus formed a logical part of the retainable pipe lines of Northern.

\textsuperscript{437} The North American Company, 11 S.E.C. 194 (1942).
\textsuperscript{438} The North American Company, 13 S.E.C. 98 (1943).
The gas utility systems of the Columbia Gas & Electric Corporation presented a different picture. Panhandle Eastern Pipe Line Company was a subsidiary of Columbia engaged in the business of producing, purchasing, transmitting, and selling natural gas. At the time in question it obtained its gas from Texas, Oklahoma, and Kansas, and its pipe lines extended through those states and Missouri and Illinois. Subsidiaries of Panhandle Eastern also served areas in Indiana, Ohio, and Michigan. There were no connections between the lines of Panhandle Eastern and its subsidiaries and those of any other company in the Columbia system, except for a connection in Ohio. This connection was separated by a valve which was usually closed, and the interchange of gas at this point was negligible. Panhandle and its subsidiaries bought no other gas from, sold no gas to, and had no operating relationship with any other company in the Columbia system. Furthermore, the entire capacity of Panhandle was required for its own customers. All parties agreed, and the Commission held, that the nonutility properties of Panhandle Eastern and its subsidiaries were not retainable as other businesses in connection with any of the gas utility systems of Columbia.\(^{439}\)

In the Cities Service Company gas utility system in the Mid-Continent area, gas was supplied by Cities Service Gas Company, a subsidiary of Cities. This gas company produced and transported natural gas, its pipe lines being located in Texas, Oklahoma, Kansas, Missouri, and Nebraska. It produced about one-half of the gas which it supplied through its pipe lines. There was complete coordination between the gas company and the three distributing companies, all Cities subsidiaries, which it supplied. A private telephone system owned

\(^{439}\)Columbia Gas & Electric Corporation, 11 S.E.C. 80 (1942). The closely coordinated gas production and transmission facilities operated in connection with the retainable gas utility systems met the tests of the other business clauses, however. Columbia Gas & Electric Corporation, 17 S.E.C. 494 (1944).
by the gas company connected it with all of the distribution systems, and the dispatching office of the gas company operated on a 24-hour basis in order to keep in touch with the requirements of all of the distributing outlets and with every source of supply. Ninety-seven per cent of the gas distributed by the utility companies was furnished by the gas company, and the latter's lines connected the many separated distribution systems. It thus appeared that this combination of properties operated as a synchronized whole, and that the production and transmission assets were properly retainable as other businesses.  

Cities Service Company also sought to retain two other subsidiaries in connection with Cities Service Gas Company. These were Texoma Natural Gas Company, a gas producing company, and Natural Gas Pipe Line Company of America, a transmission and wholesale distribution system. Practically all of the gas produced by Texoma was sold to Natural, and this was 75% of the requirements of Natural. Natural sold its gas to non-system companies in Iowa and Illinois. The pipe line of Natural extended 900 miles from Texas into Oklahoma, Kansas, Illinois, Iowa, and Nebraska. In Kansas it crossed the lines of Cities Service Gas Company. Natural and the latter company had contracted for emergency purchases of gas by Cities Service Gas from Natural. Several times, when breaks had occurred in its own lines, Cities Service Gas had exercised its right to purchase gas from Natural. And between Texoma and Cities Service Gas there was a contract providing for the exchange of natural gas in the field when, on occasion, the production of one company might more conveniently be gathered by the other. The Commission thought that such connecting relationships were too remote and were operationally infrequent and insignificant. Further, such contractual relations did not depend upon the existence or con-

tinuation of common control but could well exist under separate ownership. Divestment of Natural and Texoma was ordered.\footnote{\textit{Ibid.}}

A novel situation arose in connection with the gas utility system of American Light & Traction Company, a subsidiary of The United Light & Railways Company. American organized a corporation, Michigan-Wisconsin Pipe Line Company, for the purpose of constructing and operating a natural gas pipe line extending from Texas to Michigan and Wisconsin. It had organized another corporation, Austin Field Pipe Line Company, for the purpose of constructing a pipe line from the Austin storage field in central Michigan to Detroit and other points. The purpose of these pipe lines was twofold: to provide an adequate supply of gas, and to unite and interconnect the scattered units of the American gas properties into an integrated system.\footnote{\textit{Ibid.}} Thus the question was presented for the first time whether nonutility properties not yet constructed might be held to meet the requirements of the other businesses clauses. The Commission believed that the operations of these two pipe line companies were intimately related to the utility properties which would be retainable by American upon completion of the pipe lines. It was noted that the pipe lines were the integrating factor which would permit coordinated operation of the properties and which would bring about substantial economies in the system. The conclusion was that the pipe line companies were retainable as other businesses.\footnote{\textit{The United Light & Railways Company, Release No. 7951 (December 30, 1947).}}

Panhandle Eastern Pipe Line Company, the principal gas supplier of American at that time and a non-affiliated company, vigorously attacked this finding in an appeal of the
case to the United States Court of Appeals for the Eighth Circuit. It contended that the Commission was without power or authority to anticipate the construction of the two pipe lines in determining whether an integrated system would exist and was required to deal with the holding company system as it then existed, not as it might appear at some future time after the construction of the pipe lines. Panhandle Eastern also contended that the Commission had not specifically found that the non-utility properties of American were necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of the integrated utility system, as required by the second other businesses clause. The court answered the first argument by stating that the pipe line project was not so illusory at the date of the Commission's decision that the Commission could not consider its construction in determining the propriety of American's proposed plan of compliance with Section 11(b)(1), and replied to the second argument by finding that the Commission had set forth factual determinations more than adequate to meet the requirements of the other businesses clauses, thereby affirming the Commission's order.444

Other decisions favorable to the retention of gas production and transmission properties are set forth in the footnote below.445 In the usual case it appears that the retainable gas utility system is so closely intertwined operationally with the

445 The Mission Oil Company, Release No. 10969 (December 21, 1951) (natural gas production and transmission and gasoline extraction for gas utility system); Philadelphia Company, Release No. 8242 (June 1, 1948) (natural gas production for gas utility system); The Middle West Corporation, 15 S.E.C. 309 (1944) (production and transmission of natural gas for use as generator fuel in electric utility system); Community Gas & Power Company, 13 S.E.C. 532 (1943) (purchasing and reforming of natural gas and manufacturing of artificial gas for gas utility system); and Southern Union Gas Company, 12 S.E.C. 116 (1942) (production of natural gas for gas utility system).
production and transmission properties which serve it that an order of divestment of such properties is a rarity.

Production and Sale of Petroleum Products

A number of holding company systems were engaged in the production, processing, and sale of various petroleum products, such as oil, gasoline, butane gas, and propane gas. Particularly was this true of the companies just discussed which were engaged in the production of natural gas. Natural gas, gasoline, and oil may all be produced by the same well, and if not by the same well they are all usually found in the same field. Exploration cannot be limited to one of these commodities, and a natural gas distributing company which seeks to establish its own sources of supply by drilling operations will almost invariably find itself in the oil business also if gas is located. The tail may wag the dog, however, and in a few instances it has appeared that the gas utility business of a holding company was minor compared to its petroleum business. A leading example of this was Standard Oil Company of New Jersey. Standard owned four natural gas utility subsidiaries, but its principal business consisted of owning securities in corporations engaged in the production, refining, transporting, buying, and selling of petroleum and petroleum products. Standard conceded and the Commission found that its petroleum business was not incidental to its gas utility business, and separation was ordered.446

Cities Service Company was in a similar position but refused to capitulate so readily. Cities Service Oil Company controlled a vast oil business involving the production, refining, transmission, and marketing of petroleum products in 45 states, Canada, and Mexico. The petroleum business was widespread, but it was operated as a unit in a coordinated

446 Standard Oil Company (New Jersey), 14 S.E.C. 342 (1943).
manner. It was shown that the production of oil and natural gas were closely related, as indicated above; that the three largest gas fields were the result of exploration by oil companies; that the exploratory activities of oil companies were of the highest importance to gas companies; and that, therefore, it was a great advantage to a gas company to be affiliated with a large oil company which conducted exploratory activities in the general area of the gas company’s property. The Commission commented, however, that the operational relation between the oil and gas businesses existed only in the gas production and conditioning phases, and not directly at any other point, and further, that the oil business must be related to the retainable utility properties, not merely to the nonutility gas production facilities, in order to be retainable. It was noted by the Commission that the vastness and complexity of Cities’ oil business exceeded those of any other nonutility business ever presented to it for consideration under the other businesses clauses. The assets of the oil business of Cities were shown to be approximately twelve times as large as those of the gas distributing properties. Under any construction of the meaning of the other businesses clause, the Commission decided that the oil business of Cities was not retainable with the gas utility operations.447

On the other hand, in the Lone Star Gas Corporation case, the gasoline production operations of the system were clearly subordinate in size to the gas utility operations and bore a close relationship to the natural gas production operations. Such gasoline operations were confined to the extraction of natural gasoline from natural gas, a process necessary to

447 Cities Service Company, 15 S.E.C. 962 (1944). The same ruling was applied to another subsidiary of Cities Service Company, Arkansas Fuel Oil Company, in this case. This decision was affirmed in the case of Arkansas Natural Gas Corporation v. Securities & Exchange Commission, 154 F. (2d) 597 (C.C.A., 5th Cir., 1946; cert. denied, 329 U.S. 738).
prepare the gas for distribution to the ultimate consumer. The Commission regarded the gasoline as a by-product of the gas production operations and its extraction as a step in the production and conditioning of the gas. Likewise, the oil production functions of Lone Star were subordinate in size to the utility operations and bore a direct and close relationship to the production of natural gas. Most of the oil produced by Lone Star came from wells which also produced natural gas, and all of the oil was produced from wells which were originally drilled for gas in fields where gas was known to exist. It had never been the policy of the system to explore and drill for oil. The natural gas produced from wells which also produced oil was considered substantial in amount, being 9% of the total natural gas produced by the system. The Commission concluded that both the gasoline and oil operations of Lone Star were retainable as other businesses with the principal natural gas utility system of the company.  

Substantially the same situation prevailed in connection with the gas utility operations of the Columbia Gas & Electric Corporation system, where gasoline and oil operations were held to be retainable.

**Transportation**

The first case involving the retention of transportation properties under the other businesses clauses was that of the American Water Works & Electric Company. Among other enterprises, Water Works was engaged in the electric railway and bus business. The explanation of this business was historical. The interurban railway business was once flourishing but had declined and had been abandoned where possible. In

448 Lone Star Gas Corporation, 12 S.E.C. 286 (1942).
some cases, however, due to state regulatory commissions, the interurban lines could only be abandoned by substituting bus lines. The transportation functions of the company were carried on in the same territory with the integrated utility systems and contributed some revenues. There was evidence of economies resulting from the joint use of personnel and facilities by the utility and transportation businesses. In the light of these facts and of the minor importance of the company's interest in the transportation functions, and in consideration of the difficulty the company would face in satisfactorily disposing of its interests in such businesses, the Commission held that their retention was necessary and appropriate in the public interest and not then detrimental to the proper functioning of the integrated utility system, but provided that the company should not expand its transportation interests, except to the extent necessary to furnish adequate service to the territory then served, without express approval of the Commission. It will be noted that each of the reasons given by the Commission to justify retention in this case was later rejected as invalid in other cases.

In The North American Company case, the Union electric properties included an electric railway company which operated a freight line 111 miles long over which most of the coal requirements of the system were shipped. Purchasing, warehousing, accounting, recording, property valuation, and tax matters were centrally handled for the railway company by the Union group. The railway purchased the current used in its operations from Union. North American claimed that the ownership of this road was good insurance against a coal car shortage. The Commission did not agree with this latter contention, since all cars were subject to the orders of the Interstate Commerce Commission and the government, but due

to the small size, the location, and the use of the road it was
held to be retainable.\textsuperscript{451} It was indicated, however, that the
Commission believed that this approached the limits of verti­
cal ownership permitted by the Act.

North American also was the parent of Capital Transit
Company, which operated the bus and trolley system in the
District of Columbia and adjacent portions of Maryland. Re­
tention of this property was sought along with the integrated
electric utility system of Washington Railway & Electric
Company. The company pointed to the long historical associa­
tion between the electric and transportation properties of the
system. Evidence of joint ownership of electric facilities by
these systems and their interchange of facilities was adduced.
North American claimed that the transportation properties
were retainable under the other businesses clauses and,
further, that it was beyond the power of the Commission to
order a divestment thereof by virtue of a joint resolution of
Congress dating back to 1933 which appeared to prohibit
divestment. The Commission held that this resolution and
the Act were inconsistent and that the later law should pre­
vail, and also that the vast and complex transportation bus­
iness of Capital Transit could not be retained under the other
businesses clauses.\textsuperscript{452}

North American further sought to retain the transportation
properties of a subsidiary in the electric utility system of
Illinois Traction Company. These properties consisted of a
steam and electric railroad operating in a web around St.
Louis and East St. Louis, and also running to Peoria, Spring­
field, Bloomington, Decatur, and Danville, Illinois. Also
included were a dock and barge loading plant for the Missis-

delphia Company, Release No. 8242 (June 1, 1948), and American Gas &

\textsuperscript{452} The North American Company, 11 S.E.C. 194, 233 (1942).
sippi River coal and coke traffic, passenger buses, terminal facilities, and a toll and railroad bridge across the Mississippi River. The reasons advanced to support retention were (1) historical association of electric and railroad facilities; (2) the fact that the railroad was the largest customer of one of the main electric companies in the system; (3) that much equipment owned by such electric company was primarily devoted to serving the road and that telephone facilities owned by the road were also used by the power company; (4) that certain joint facilities were cared for by joint personnel; (5) that economies resulted from common ownership; and (6) that it was difficult to sell the railroad properties. The first, second, and sixth reasons were held to have no bearing on the question. The third, fourth, and fifth reasons were held to have some pertinency, but the Commission found that the relationship of the railroad and related properties to the electric utility operations of the retainable systems was not such as to warrant the retention of such properties.453

In the Engineers Public Service Company case it appeared that Virginia Electric & Power Company owned and operated street railway and bus facilities serving four cities in Virginia, and an interurban bus service between two of such cities. These four cities were all within the company's electric service area. On behalf of the retention of the transportation properties the company relied upon (1) the long historical association of the two businesses; (2) the joint use of personnel (2,355 out of 3,000 employees); (3) the joint use of facilities (the electric and transportation departments shared space in certain office buildings and storehouses, and also shared office furniture and equipment, a heating plant, manholes, poles, rights of way, and some garages and trucks); and (4) the fact that the combined railway and bus operations returned a net in-

come. The Commission felt that these reasons were of no aid in distinguishing between a reasonably incidental or economically necessary or appropriate business and any other business, and observed that the existence of a long historical association or the joint use of personnel and facilities, or net profits was perfectly compatible with a combination whose components were not remotely incidental, or economically necessary or appropriate, although owned and operated under common control. Engineers also claimed that disposition of the transportation properties would be costly and difficult, but this was quickly brushed aside. It was further argued that the transportation department was incidental because it furnished free transportation to a portion of the employees of the electric system, because its vehicles carried advertising displays for the electric system without charge, and because it purchased a portion of the latter’s electric energy. The answer to these contentions was stated by the Commission in this manner:

"... While the furnishing of products or services which are useful in conducting the electric utility business is relevant to a determination of the incidental character of the proposed other business, the weight to be attributed to these factors, of course, varies with their significance for the successful operation of the business concerned. The record in this case discloses that only a minute portion of the transportation system advertising is devoted to the requirements of the electric system. And a similarly insignificant portion of the transportation system’s passengers consist of electric employees using free service. ... Virginia’s transportation properties are not devoted primarily to furthering the operations of its electric system. The transportation department’s purchases of electricity amount to less than 4 percent of the total sales of the electric department. And in its physical operations the transportation system
is entirely unrelated to, and involves operating problems different from the electric business.\footnote{Engineers Public Service Company, 12 S.E.C. 41, 50 (1942). It was also noted that informal exchange of services between the electric and the transportation departments, wholly unaccounted for on the company books, was not conducive to the proper operation of the electric utility system.}

Still another line of argument was presented by the company to demonstrate the retainability of the transportation system. It was claimed that separation would increase the operating expenses of both systems. The Commission did not believe that there would be any significant increase in such expenses and that the company failed to take into account numerous savings to be affected by the severance of the transportation system. In regard to the use of joint personnel by the two systems, it was observed that such a situation obtained in practically all cases of this type, and that if controlling weight should be given to the difficulties involved in reallocating the staff and salaries in this case, there would be no reason for not doing so in other cases, no matter how tenuous the relationship between the other business and the utility business.

The record in this case disclosed that the railway property had been carried in the electric plant account and there was an allocation of interdepartmental charges by which the transportation system was charged considerably less than the cost of the electric energy obtained from the electric system, and substantially less than the cost for the use of the other facilities of the electric system. The Commission was of the opinion that these practices were adverse to the interests of consumers, investors, and the public.

For all of the foregoing reasons, it was concluded that the transportation properties of Virginia were not retainable under the other businesses clauses.\footnote{Engineers Public Service Company, 12 S.E.C. 41, 53 (1942). For almost identical reasons it was contended in the same case that the street railway and
To the contrary, on the appeal of this case, the Court of Appeals for the District of Columbia stated that substantial evidence had been presented by Engineers from which the Commission might have found that the retention of the transportation businesses of the various Engineers subsidiaries was necessary in the public interest or for the protection of investors or consumers, or if not necessary, at least appropriate for such purposes. Although it was pointed out that the responsibility of making final determinations of fact lay with the Commission, the court reversed the decision of the Commission and directed that further consideration be given the matter by the Commission.\textsuperscript{456} The reasons advanced for the reversal were (1) that the Commission had based its decision upon the theory that other businesses must bear a functional relationship to the utility system, and (2) that the Commission had relied upon its finding that the retention of the transportation system had been detrimental in the past, with no clear finding as to conditions existing at the time of the decision. This conflict between the Court of Appeals, on the one hand, and the Commission and the Circuit Courts of Appeals for the Second and Third Circuits on the other, has previously been discussed at length. It was noted that by

\textsuperscript{456} Engineers Public Service Company v. Securities & Exchange Commission, 138 F. (2d) 936 (C.A.,D.C., 1943; cert. granted, 322 U.S. 723; issues became moot because of divestment of properties in question, 332 U.S. 788 (1947)).
virtue of the weight of authority and an indirect reference to
the matter by the Supreme Court in The North American
Company case, the issue has apparently been decided in favor
of the functional and operational standard imposed by the
Commission under the other businesses clauses. Consequently,
the review of the Engineers case directed by the Court of
Appeals was never consummated and the decision of that
court was tacitly overruled.

A new proposition was advanced in the Cities Service
Power & Light Company case, where retention of a subsidiary
operating trolley cars, coaches and motor coaches in Toledo
was sought in connection with the Ohio electric properties
of the system. It was contended, among other things, that
the territory served by the electric utility was improved by
the existence of an adequate transportation system to attract
industries to that locality. The Commission could find little
point in this argument and stated that the issue was not
whether the transportation properties should be abandoned
and dismantled, but whether they were properly to be joined
with the utility properties, and that there was nothing to
indicate that the achievement of benefit to the area by the
location of the transit properties was in any way dependent
upon Cities' ownership thereof. Disposition was accordingly
ordered.457

Still another new argument was presented by The Com­
monwealth & Southern Corporation in connection with the
retention of the street railway, trackless trolley, and bus
operations of the southern companies in Atlanta, Augusta,
Macon, and Rome, Georgia, along with the electric utility
properties of the southern system. The city governments of

457 Cities Service Power & Light Company, 14 S.E.C. 28 (1943). Also, see
The United Gas Improvement Company, 11 S.E.C. 338 (1942), where it was
argued, to no avail, that transportation properties were retainable because such
properties had derived substantial financial and other benefits from the holding
company.
the said cities and the Georgia Public Service Commission each presented resolutions in opposition to any divestment of the transportation properties in those cities. The resolutions were based upon the propositions that the transportation systems were largely electric operations, with power being supplied from the integrated system, and that joint use was made of facilities. This bolstering of the customary arguments for retention was to no avail and retention was denied.  

The latest decision on this question by the Commission was rendered in the Philadelphia Company case. There the company sought to retain its electric railroad and motor bus lines with its electric utility system. In addition to the customary arguments in favor of retainability, the company contended that certain benefits were derived from the use of the "General Departments" of the company. Similar arguments have been discussed under Clause A and were rejected in a like manner here, principally for the reason that the administrative functions supplied by the General Departments had no operating relationship between the transportation system and the operations of the electric utility system. It was noted that the railway properties had a long history of financial difficulties and were an undue burden upon the electric system. Further, there was a possibility that the electric system might be tempted to retard the natural growth of the bus system in order to favor the electric railway. A final argument presented by the company, new in this situation, was that various guarantees and commitments of the Philadelphia Company in respect of the Pittsburgh

458 The Commonwealth & Southern Corporation, Release No. 7615 (August 1, 1947). See Texas Utilities Company, Release No. 6373 (January 17, 1946), where an electric system proposed to acquire the stock of a street railway and bus system in Dallas, Texas. The City of Dallas urged approval of the acquisition in order to keep the electric and transportation properties under a financially strong common parent. This and other contentions were rejected, and such acquisition was not permitted under the provisions of Section 10 (c) of the Act.
Railways required the continued retention of the transit system. This argument was considered to be without merit for the reason that it assumed that by means of pre-existing contracts the objectives of the Act could be avoided. The conclusion of the Commission was that the requirements of the other businesses clauses were not met by these transportation properties.\textsuperscript{459}

**Steam and Hot Water**

Where electricity is produced by the use of steam turbines, as distinguished from water power, one of the by-products of the utility business is a supply of steam. In numerous instances utilities have capitalized upon this by-product to their financial advantage. For example, one of the Engineers Public Service Company electric utility subsidiaries sold the steam which it produced in connection with the generation of power to three large industrial customers located in the immediate vicinity. The plant was designed to burn a variety of fuels, which were obtained as waste from the industrial establishments supplied with steam. The record disclosed that the production of steam in the generating plant, through the use of machinery specially designed to enable the combined operation, was both in intent and in fact integrally related to the production of electric energy, according to the Commission, and therefore retention of the steam business was permitted.\textsuperscript{460}

In the Cities Service Power & Light Company case it appeared that exhaust steam from the boilers of one of the electric generating plants was sold commercially. The operation of this steam business made it possible to keep the boilers


\textsuperscript{460} Engineers Public Service Company, 12 S.E.C. 41 (1942).
in a ready condition for electric service. This business was held to be retainable. The same company also provided hot water service. The latter was provided by facilities not connected with and distinct from the steam and electric properties. The hot water system had been acquired in the course of growth of the company in connection with the acquisition of certain small electric generators and non-condensing steam engines. Although this equipment had been abandoned for electric purposes, the boilers were being used to provide the hot water heat. Since there was a complete operational separation between the hot water heating and the electric systems, the retention of the former was not permitted.

On the other hand, one of The North American Company electric subsidiaries also operated a hot water heating business. Part of the steam produced in connection with the generation of the company’s electricity passed through heat exchangers, as a result of which the heat contained in the steam was transferred to the water in the heating system. The hot water was then pumped through mains to the customers’ premises and then back through the mains of the heat exchanger. For the twelve months ended June 30, 1950, the hot water business resulted in a net loss of $6,767.00. Retention of this heating business as incidental to the electric operations of the system was permitted.

Again, in the Cities Service case one of the company’s subsidiaries sold steam industrially from a site acquired and designed to serve as a generating plant when future conditions so required. The installation of boilers which supplied the steam and which were designed for future use in generating

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operations helped to carry the plant site profitably. This business was held to be retainable. An even more liberal decision may be found in the American Gas & Electric Company case, where retention was permitted of an old boiler plant from which the generator turbine had been removed.

Another Cities Service subsidiary operated a small steam business in the City of Denver, Colorado. The steam business was not physically connected with the electric business of the company, separate boilers being used to generate steam for heating purposes. The company contended, however, that this business fostered good will, and that if some of the present steam customers were forced to install local facilities for heating, they might also install their own electric generating equipment. The Commission did not believe that the historical connection of the steam and electric businesses and the company's desire to create good will by expansion into unrelated fields made the steam business reasonably incidental or economically necessary or appropriate to the utility operations. This would seem to be a highly objective approach to a highly subjective problem, probably of considerable moment to the utility company. In the Philadelphia Company case, one of the system subsidiaries operated three steam plants in the downtown business section of Pittsburgh, furnishing steam heating service to certain buildings. Only one of these plants was physically connected with the electric properties of the systems, and it furnished steam for the operation of a generating station of the electric system, with the exhaust steam being returned and delivered to its customers. It was noted that the steam heating service made it possible for the power company to sell electricity to consumers

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466 Cities Service Power & Light Company, 14 S.E.C. 28, 68 (1943).
who might otherwise generate their own current in connection with their steam heating, a situation identical with that of the Denver steam properties of Cities Service. However, it was held here that the steam heating business as a whole was reasonably incidental and economically appropriate to the electric utility operations of the company.\textsuperscript{467}

**Water**

In the early American Water Works & Electric Company case, the facts showed that, in addition to the integrated electric and gas utility systems and certain other businesses, the company owned or controlled a substantial number of water operating and holding companies which did 30\% of the business of the entire system. The Commission observed that the water properties had been a substantial and stable source of revenue and that many of the problems of management of the water companies were closely related to those arising in connection with the management of the gas and electric utilities. Retention of the water businesses was permitted.\textsuperscript{468} Although this decision has not been reversed, its reasoning has been rejected on numerous subsequent occasions, and the case should not be considered authoritative.

The Southern Union Gas Company gas utility system included two small water systems, one serving 24 customers in Pyote, Texas, and the other serving 184 customers in Lovington, New Mexico. Both of these towns were supplied with gas by the system. In the light of the small size of these enterprises they were held to be retainable.\textsuperscript{469} This is, of course, another questionable decision.

The Commission was in better form in the Engineers Public Service Company case. There it was shown that Gulf

\textsuperscript{467} Philadelphia Company, Release No. 8242 (June 1, 1948).
\textsuperscript{469} Southern Union Gas Company, 12 S.E.C. 116 (1942)
States Utilities Company owned and operated a water business serving seven communities. The company pointed to the joint use of supervisory, administrative, and repair personnel and water testing, automotive and other facilities by the water and electric systems, and to the difficulty of disposing of the water properties, since the water equipment was located on the site of the electric equipment. It was asserted that the water facilities were "inextricably interspersed" with the electric facilities. The company also claimed that increased expenses would result from a severance. The Commission took the position that the freed time of the employees who formerly worked part time for the water business would not be wasted and adverted to anticipated beneficial effects upon the electric business arising out of the concentration of the undivided attention of the company's organization to the electric operations. The joint use of personnel and equipment was observed to be mainly non-operational in character, and the difficulties of severing the water properties were not deemed to be acceptable as tests of their retainability. As a consequence, compliance with the other businesses clauses was not found.  

Certain subsidiaries of Cities Service Power & Light Company owned water rights necessary to supply condensing water to steam boilers of the Rocky Mountain electric system, and water storage facilities for use in the generation of electricity. It was held that these water operations were clearly reasonably incidental and economically necessary and appropriate to the proper functioning of the electric utility system. Another subsidiary in the same system rendered water service in Santa Fe, New Mexico. There appeared to be


some operating connection between the water works facilities and a small generating plant of the system at that point, but the distribution facilities of the water operations had no connection with the generating plant. Disposition was ordered of the portion of the water facilities in Santa Fe not necessary for the proper maintenance and operation of the generating plant.\textsuperscript{472}

In The Middle West Corporation case it was argued, in addition to the usual reasons for retention, that the water operations were powered by electricity from the company's system and that water operations were continued in order to maintain good will. The Commission considered these to be factors which might exist no matter how unrelated the non-utility business might be, observing that "to lose sight of the essential requirement of operating relationships is to depart from the basic policy of the statute," and ordered disposition of the water properties.\textsuperscript{473}

In the General Public Utilities Corporation case one of its subsidiaries owned a dam and reservoir about five miles from a steam generating station in the integrated electric utility system. Water from the reservoir was carried through a main to the generating station where it was used in the boilers. Along the route taps were taken off to supply about 375 domestic customers. At December 31, 1950, the plant account of the water company amounted to $474,716 gross and $371,949 net. Operating revenues for 1950 were $55,818, of which 73\% was received from the GPU system. The company sold 85\% of its water to the system. The Commission found that these water operations were functionally related to the electric

\textsuperscript{472} Ibid. See, also, The Middle West Corporation, 18 S.E.C. 296 (1945), where it was held that the water supply and transmission properties of a water system, but not the water distribution properties, were retainable with an electric utility system. Considerable emphasis was placed upon the difficulty of segregating the electric and water supply and transmission properties.

\textsuperscript{473} The Middle West Corporation, 18 S.E.C. 296, 302 (1945).
utility business of the system and were retainable under the other businesses clauses.\textsuperscript{474}

In numerous other cases water properties have been held not to comply with the requirements of the other businesses clauses, and the general rule seems to be that they are not retainable.\textsuperscript{475}

**Ice and Cold Storage**

Virginia Electric & Power Company owned a small ice business in Williamsburg, Virginia. The ice plant was located in the company's electric service building in that city and functioned primarily as a cooling system for the building in the summer and a heating system in the winter. This ice business was found to be subservient and supplemental to the operation of the electric system and was a by-product of cooling and heating the electric service building. Accordingly, it was held to be retainable.\textsuperscript{476} Another Engineers Public Service Company subsidiary, Gulf Public Service Company, produced and distributed ice in nine communities. The ice properties were acquired together with the electric properties of the system and shared joint facilities and employees with the electric system. Contrary to the situation in Williamsburg, however, these ice operations did not assist in the electric business and were conducted primarily as an independent enterprise. Further, the ice business was unprofitable. Severance of the ice properties was ordered.\textsuperscript{477}

The historical relationship of ice and electric utility plants was set forth in The Middle West Corporation case. The

\textsuperscript{474} General Public Utilities Corporation, Release No. 10982 (December 28, 1951).

\textsuperscript{475} Cf., American Utilities Service Corporation, 16 S.E.C. 173 (1944); Central Power & Light Company, 14 S.E.C. 452 (1943); American States Utilities Corporation, 13 S.E.C. 93 (1943); Peoples Light & Power Company, 13 S.E.C. 81 (1943); and Federal Water & Gas Corporation, 12 S.E.C. 766 (1943).

\textsuperscript{476} Engineers Public Service Company, 12 S.E.C. 41 (1942).

\textsuperscript{477} Ibid. Accord: The Middle West Corporation, 15 S.E.C. 309 (1944); Cities Service Power & Light Company, 14 S.E.C. 28 (1943).
initial developments of both industries occurred at about the same time, the end of the 19th century and the beginning of the 20th century. The original method for producing clear ice was by the use of water from which impurities had been removed by distillation. The electric industry provided steam for both power and distilled water. Further, the ice business had complementary seasonal variations with respect to the use of power, and daily production of ice could be scheduled to increase power production in off-peak hours. The result was that many electric utility companies engaged in the ice business and many properties acquired in the expansion of electric utility companies were joint ice and electric plants. During the 1920's and 1930's, however, ice began to be produced by the use of raw water in an ammonia process, and the use of exhaust steam for distillation was no longer necessary. Also, the decline in domestic consumption of ice due to mechanical refrigeration considerably narrowed the market for ice, and many companies abandoned their ice plants. Some, however, retained and improved their ice businesses. As a general rule, then, there usually does not now exist a high degree of operational relationship between ice and electric utility businesses and the ice business is merely a remnant of a once feasible economic union.\textsuperscript{478}

One of the Middle West electric utilities operated ice manufacturing and distributing facilities in over 50 localities in its service area. The ice business and the electric business jointly utilized substantial personnel, offices, equipment, supplies, and material. It was indicated that substantial increases in expenses (not set forth) would occur in both the electric and the ice businesses if they were separately owned. The ice operations secured power from the company's electric facilities. It was characteristic of the ice business in the territory served that heavy use of power for ice manufacturing offset

\textsuperscript{478} The Middle West Corporation, 18 S.E.C. 296, 302-303 (1945).
low seasonal retail power demands, and that the daily power demands of the ice business could be satisfied during daily off-peak power periods on a system-wide basis. The predominant business throughout the area served was the production of fruits and vegetables. The company’s ice plants operated in a pool which coordinated all ice production, shipping, and distribution facilities so that all areas might be adequately served. Because of the size of the territory involved, planting and harvesting were staggered. Centralized operation of the ice facilities and joint ownership with the electric facilities prevented a heavy drain in any one area and permitted scattered plants to share in meeting the ice load. It was consequently held that this ice business was substantially related to the electric utility operations of the company, and hence retainable.479

Another Middle West subsidiary operated ice production, storage, and distribution facilities in its electric service area in west Texas. The operational relationships between the ice and the electric businesses were substantially the same as those described in the foregoing paragraph. In addition, it was indicated that in many instances it would be physically impracticable to separate the ice and power production facilities and impracticable to permit outside control of the ice production facilities, since they were so near to and closely related to the electric plants. The Commission found that the ice business not only facilitated efficient use of the electric properties, but was also so closely related thereto as to create extreme difficulty in a separation of the businesses or a hazard to the electric properties if the ice facilities were operated by personnel not subject to the control of the electric staff. Retention was permitted.480

479 The Middle West Corporation, 18 S.E.C. 296, 303 (1945).
Other Middle West subsidiaries operated ice plants in various locations where electric service was provided by the system companies. Evidence was adduced to show considerable joint use of personnel and facilities by the ice and electric businesses. Also, it was shown that physical separation of the two functions would be extremely difficult. However, the Commission requested power consumption figures and discovered that the ice properties augmented the peaks in electric consumption rather than aided in the equalization of power production. Physical proximity and mechanical difficulty of separation, the Commission felt, were problems relating only to the time and manner of disposition rather than to the issue of retainability. The lack of a showing of operational relations between the two businesses prevented a finding of compliance with the Act.\textsuperscript{481}

In a more recent case, involving The North American Company system, retention was sought of two ice properties belonging to the electric system in Missouri. One of the ice and storage plants involved shared certain premises with the electric properties. Both of the ice properties obtained their electricity from the electric system at regular rates and their steam and distilled water at cost. The Commission commented that there had not been shown in this case the type of operating or functional relationship which Congress contemplated when it established the standards of the other businesses clauses, and accordingly ordered disposition of the ice properties.\textsuperscript{482}

**Appliances**

Several of the electric and gas utility subsidiaries of Engineers Public Service Company were also engaged in the

\textsuperscript{483} The Middle West Corporation, 18 S.E.C. 296, 308 and 310 (1945). Permission was given the company to adduce further evidence on the issue of the complementary use of power by the ice properties. Such evidence was held
business of merchandising and jobbing appliances. These activities were not conducted for profit but were designed to promote the sale of electricity and gas by educating the public as to the benefits to be derived from the use of appliances that had not then found wide acceptance. It appeared that sales efforts were discontinued in cases where the appliances met with public approval. The appliance sales themselves resulted in an operating deficit but increased sales of gas and electricity. The Commission held that the electric appliance business was reasonably incidental or economically necessary or appropriate to the operations of the integrated electric utility system to which it pertained, and that the gas appliance business was likewise retainable with the integrated gas utility system with which it was connected. It was noted that there had been earlier efforts on the part of independent appliance dealers to prohibit public utilities from engaging in the appliance business. Between 1930 and 1937 the legislatures of 23 states were presented with bills designed to prohibit utility merchandising. In only two states, Oklahoma and Kansas, were such bills enacted into law, and the law of the latter state was declared unconstitutional. Congress, however, did not pass upon the question in the Act.

One of the integrated gas utility subsidiaries of Cities Service Company maintained a "new business" department which handled the sale of gas appliances and made routine adjustments to such appliances so that customers could use gas more effectively and economically. The essential purpose of the

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to be unsatisfactory and disposition was ordered in The Middle West Corporation, 19 S.E.C. 743 (1945).


484 Engineers Public Service Company, 12 S.E.C. 41 at 55, footnote 9 (1942).
department was to promote competition with other types of fuel. This business was held to be retainable with the integrated gas utility system.\(^{485}\)

**Service Companies**

Service companies were the source of many of the abuses which the Act was designed to correct, and consequently received special attention in the Act.\(^{486}\) However, they also fall within the category of “other businesses,” and must therefore meet the tests of the other businesses clauses in order to be retainable.

In the case of American Gas & Electric Company it appeared that a service company owned by the system furnished management, advisory, engineering, and other services to the system companies. Such services were rendered through the following departments: administrative; finance and accounting; legal; statistical; filing, mail and telephone; stock, record and dividend disbursement; commercial and new business; purchasing; insurance and retirement records; auditing; field auditing; field appraisal; and engineering. The cost of these services was recovered from the various system companies on a complicated allocation basis. It appeared that control and coordination of the entire system was effected through the service company. All of the principal officers in the system were paid through the service company. The Commission found that such of the operations of the service company that were related to the Central system of American Gas & Electric Company were retainable as other businesses.\(^{487}\)

Other decisions have ordered divestment of service com-

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\(^{485}\) Cities Service Company, 15 S.E.C. 962 (1944). Also see Community Gas & Power Company, 13 S.E.C. 532 (1943), and Lone Star Gas Corporation, 12 S.E.C. 286 (1942).

\(^{486}\) See Sections 13 and 14 of the Act, 15 U.S.C.A., Sections 79m and 79n.

panies because they were not related to a utility business, they were not related to a retainable utility business, or were they far too large in scope in comparison with the retainable system.488

REAL ESTATE AND RELATED ENTERPRISES

It is obvious that the ownership of water rights and water storage facilities necessary to supply condensing water to the steam boilers of the generating station of an integrated electric utility system is permissible.489 Also, the business of owning dams and land adjacent thereto, flowage rights on various lakes and rivers, and a system of canals through which water for power is delivered to the generating stations of an electric utility system is retainable by such system.490

In the early case of American Water Works & Electric Company, it appeared that the system owned a toll bridge which it had acquired in connection with its operation of an interurban line. This bridge was located in the electric and gas service territory of the system and contributed some revenues. There was some evidence of the joint use of personnel and facilities. In view of these facts and of the minor importance of the system's interest in this property, and in consideration of the difficulty of disposing of the property in a satisfactory manner, the Commission held that the toll bridge was retainable.491 It has been previously noted, however, that the Commission has subsequently taken the position that the existence of an unfavorable market has no pertinency to the ques-

488 Cities Service Company, 15 S.E.C. 962 (1944), and Engineers Public Service Company, 12 S.E.C. 41 (1942). The latter situation prevailed in Standard Power & Light Corporation, 9 S.E.C. 862 (1941), and the Commission deferred entry of an order pending reduction in the scope of the functions of the service company.
489 Cities Service Power & Light Company, 14 S.E.C. 28 (1943).
tion whether property may be retained under the Act.\footnote{The North American Company, 11 S.E.C. 194 (1942).} Further, in regard to the toll bridges owned by one of the electric utility systems of Engineers Public Service Company, the Commission held that the common origins and development of the properties, the joint use of certain personnel and facilities, and the profitable character of the business did not render it reasonably incidental or economically necessary or appropriate to the operations of the electric system, nor did such factors make retention of the properties necessary or appropriate in the public interest or for the protection of investors or consumers.\footnote{Engineers Public Service Company, 12 S.E.C. 41 (1942).}

In the American Gas & Electric Company case, it was shown that the real estate of the electric utility systems was owned by separate companies. The reason for this was to provide flexibility in the purchase and disposition of real estate and to avoid incurring the complications of restrictive provisions in the mortgages of the operating companies. Such allied business was held to be retainable\footnote{American Gas & Electric Company, Release No. 6333 (December 26, 1945), mimeo. p. 24.} The same system also included a company which owned a housing project designed to provide proper housing conditions for employees of the system near one of its generating stations. Included in the project were 183 lots, one house and lot, and a water supply and sewerage system. The company had also advanced money on mortgage loans to two employees. There was evidence to show that it would have been extremely difficult to provide proper accommodations for the system employees in any other manner, and consequently retention of this real estate company was permitted under the other business clauses.\footnote{Ibid.}

Another subsidiary company in the American Gas & Electric Company system carried on quarrying operations which
originally had their origin in connection with the building of one of the dams in the system. At the time in question, the quarrying business had no direct relationship to the electric operations of the system. However, the quarry was near the dam and it was proved that the blasting operations of the quarrying business had to be done very carefully in order not to imperil the dam. Retention was urged by the system because an independent operator might so conduct the quarrying business as to endanger the dam. This was a marginal case, but in view of these practical considerations and the small size of the business its retention was permitted.\textsuperscript{496}

The North American Company sought to retain an amusement park operated in conjunction with its electric and transportation business in the District of Columbia and adjacent portions of Virginia and Maryland. The park was operated by Glen Echo Park Company, a subsidiary, in Maryland close to the District of Columbia. The system claimed that this business increased traffic on the transit lines, which in turn increased the consumption of electricity, and that it was profitable. The Commission ordered divestment of this business, noting that one of the clearest of the Congressional objectives in enacting Section 11(b)(1) was to require that public utility systems divest themselves of large investments in unrelated fields such as this.\textsuperscript{497}

One of the subsidiaries in the natural gas utility system of Peoples Light & Power Company owned and operated a rice farm composed of 5,700 acres of land and warehouses for the storage of rice. The system contended that there was a definite possibility of discovering gas reserved on the farm properties and that consequently the system was in a better bargaining position in dealing with the various possible suppliers of gas for the system. It was also contended that the

\textsuperscript{496} Ibid.
\textsuperscript{497} The North American Company, 11 S.E.C. 194 (1942).
property had good oil prospects and that such potentialities gave the land a latent value of which the system’s stockholders would be deprived if the property were sold before it was fully prospected. The Commission considered that such arguments were primarily directed to the retainability of the mineral rights and held that the farm business must be divested, although disposition of the mineral rights was not required.498

**Miscellaneous**

One of the subsidiaries of General Public Utilities Corporation was engaged in servicing the system’s life insurance plan for employees. The annual premiums handled by the company aggregated about $1,900,000.00, and its expenses of operation were about $25,000.00 a year. The company made no profit on its operations. In addition to administering the life insurance plans of other companies in the system, it also performed the same function for certain companies which had been divested by General Public Utilities Corporation. The Commission found that the activities of the company relating to the servicing of the insurance policies of the employees in the system were reasonably incidental and economically necessary and appropriate to the operations of the system, but required discontinuance of the servicing of insurance policies of employees of companies which were no longer part of the integrated system.499

Another subsidiary in the same system was the settlor of a pension trust created in 1937. Its original capital was delivered to the individual named as the pension trustee and

498 Peoples Light & Power Company, 20 S.E.C. 357 (1945). Also see American Water Works & Electric Company, 2 S.E.C. 972 (1937), holding that unrelated farm land and office buildings did not meet the requirements of the other businesses clause.
since that time it had never had any receipts or disbursements. Deposits were made in the pension fund on an actuarial basis by various system companies until 1939, when the various participants either adopted new plans or discontinued their old plans. All of the new pension plans called for liquidation of the deposits under the old plan by the payment of pensions to retired employees out of the old pension fund before using the accumulations under the new plans. Almost all of the participating companies which did not establish new plans were no longer in the system, but it was evident that some time would elapse before the final liquidation of their trust accounts could be made in accordance with their trust agreements. The 1937 trust agreement was irrevocable and it was the opinion of company counsel that the settlor company should be kept alive in order to eliminate any possibility that the trust would be defective. The Commission held that retention of this company was permissible, but indicated that it should be liquidated at the earliest practicable date.\footnote{500}

Situations involving the retainability of telephone facilities have seldom arisen under the Act. This is probably due to the widespread domination of that field by American Telephone & Telegraph Company. In one early case, decided before the Commission had adequately oriented itself, the retention of a small telephone property was permitted in connection with a combined electric and gas utility system.\footnote{501} No operational relationship was shown between the telephone business and the utility business. In later decisions, however, divestment of telephone properties was ordered.\footnote{502} Under the current interpretation of the other businesses clauses by the Commission, it would be extremely difficult for an applicant

\footnote{500} Ibid.\footnote{501} Republic Electric Power Corporation, 3 S.E.C. 992 (1938).\footnote{502} American Utilities Service Corporation, 16 S.E.C. 173 (1944); American States Utilities Corporation, 13 S.E.C. 93 (1943).
to succeed in retaining a telephone system with either a gas or an electric utility system.

Several utility systems engaged in the water business also provided sewerage facilities. One of these, Southern Union Gas Company, a natural gas utility company, furnished sewerage disposal services to 213 customers in a small New Mexico town. In consideration of the small size of this enterprise the Commission permitted its retention under the other business clauses. The validity of this holding at the present date is questionable. Disposition of sewer facilities was ordered in a later case.

A subsidiary in the American Light & Traction Company system, Milwaukee Solvay Coke Company, manufactured and sold coke and coke by-products, and furnished the system with a substantial portion of its requirements of manufactured gas for the City of Milwaukee. The introduction of natural gas into the area was contemplated, in which event Milwaukee Solvay would continue in business but would reduce its gas supplies to a stand-by basis and for peak-shaving. The Commission found that Milwaukee Solvay was currently retainable as an incidental business, but reserved jurisdiction to reconsider the question if and when it appeared that there had been a substantial change in the relationship of the company to the gas utility system. The future answer may be found in the case of Cities Service Power & Light Company. In this case one of the subsidiaries of the system had originally produced manufactured gas for system use and had also de-

603 Southern Union Gas Company, 12 S.E.C. 116 (1942).
604 Federal Water & Gas Corporation, 12 S.E.C. 766 (1943). It should be noted that the divestment in this case was proposed by the utility system itself. Also see Peoples Light & Power Company, 13 S.E.C. 81 (1943), where divestment of irrigation properties was ordered.
developed a market for tar compounds which were by-products of the company’s manufactured gas business. After the system changed to natural gas, this company continued the tar business, obtaining its tar from other gas manufacturers. The Commission was unable to discern any relationship between the tar works and the utility operations of the system, and disposal of the tar business was decreed.\textsuperscript{506}

**Summary of the Requirements of the Other Businesses Clauses**

The problems arising from Congressional revisions of complicated bills are well exemplified by the other businesses clauses. The second other businesses clause appended at the end of Section \(11(b)\)(\textit{i}) was the result of the “Minton Amendment” which was inserted in the holding company bill in the hectic closing days of the first session of the 74th Congress. The second clause is inconsistent to a certain extent with the first clause, and this led to considerable difficulty in the proper interpretation of these provisions of the Act. The same situation prevailed in the case of Clause \(B\), where the Barkley Compromise provisions were hastily inserted into the bill. In both instances various holding company systems justifiably took advantage of the ambiguities in the law to urge the retention of many properties contrary to the intention of the original authors of the bill. However, the Commission consistently applied a narrow interpretation of the questionable provisions so as to effectuate the fundamental purposes of the Act.

More explicitly stated, the issue was whether all “other businesses” sought to be retained by an integrated utility system must be functionally and operationally related to the utility system, as required by the first other businesses clause,

\textsuperscript{506} Cities Service Power & Light Company, 14 S.E.C. 28 (1943).
or whether nonutility "other businesses" can be retained upon a mere showing that they are necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of the utility system concerned. The test imposed by the Commission was stated as follows: Having in mind the protection of investors, the public interest and the proper functioning of an integrated utility system, is the retention of a particular nonutility business reasonably incidental to or economically necessary or appropriate to the operations of a retainable utility system? This, of course, is the functional or operational test. In three test cases the Commission was supported in this view of the matter by the Courts of Appeals of two circuits and was reversed by the Court of Appeals for the District of Columbia. The Commission considers the matter to have been tacitly settled by the Supreme Court of the United States in The North American Company case and has continued to apply the functional requirement described above.

Various and sundry reasons have been advanced in support of the proposition that certain other businesses were functionally and operationally related to the utility system concerned. Among these have been long historical association and common origins of the utility and other businesses, physical proximity of the properties, substantial and stable income of the other businesses, and the difficulties involved in separating the utility and the other businesses or in disposing of the latter. Each of these reasons has been condemned by the Commission as having no bearing upon the issue of operational relationship to the utility enterprise. It has also often been urged that the joint use of personnel and facilities by the utility and the incidental businesses made retention possible. However, the Commission insists that unless the economies arising from such joint use of personnel and facilities are economies in the operation of the integrated utility system, they do not furnish
adequate grounds for a finding of compliance with the other businesses clauses.

Another restriction imposed by the Commission upon other businesses is that they must not be grossly out of proportion in size to the utility system concerned. The rule seems to be that the other businesses must be subordinate in size and importance to the utility business. This requirement is not stated in the Act but is probably justified by the context of the other businesses clauses and the announced purposes of the Act. The Commission has permitted an exception to this rule in the case of natural gas production and transmission properties of a natural gas utility system, in view of the nature of the industry and the particular problems involved.

A number of holding companies contended that the Act did not require divestment of "investment" interests, that is, interests in companies insufficient to make them subsidiaries of the holding company within the definition of the Act. It was argued that such non-subsidiary interests were not "operations" of the holding company system as provided in Section 11(b)(1) of the Act. The Commission held that the ownership of such investments did constitute an "operation" of the utility system, and that they were definitely subject to the provisions of the other businesses clauses. Furthermore, the Commission has indicated, but not held, that nonsubsidiary utility investments are possibly not retainable under either clause.

Turning to the retainability of specific enterprises, it may be said that, generally speaking, retention has been permitted in cases involving the production of coal for an electric utility using steam power, the production and transmission of gas for a natural gas utility, the sale of steam and hot water for heating purposes by a steam electric utility, the merchandising and jobbing of appliances by both electric and gas utilities, and the furnishing of administrative and other services for such
utilities. There have been notable exceptions in each instance, however. Divestment has usually been ordered of petroleum, transportation, and water businesses by virtue of the fact that they are not ordinarily operationally related to the functions of electric and gas utilities. The cases are fairly well divided as to the retainability of real estate businesses and ice and cold storage facilities, the decision in each instance depending upon the evidence or lack of evidence as to the functional connection between the other business and the utility business.

Except for a few early cases involving other businesses small in size, the Commission has adhered rather strictly to its narrow interpretation of the other businesses clauses in spite of the ambiguity of the second clause. It has been said that the myriad, promiscuous activities and investments of some of the holding company systems were a prime cause of investors' losses. If so, the Commission has furthered the ultimate objectives of the Act by its application of the other businesses clauses.