Adequate representation and protection of consumer interests has recently become a matter of considerable debate. Special concern has arisen when the consumer has his interests theoretically represented by governmental agencies but those agencies seem less than energetic in fulfilling their duty of representation. Cries for added consumer representation have thus become loud and insistent.

One possible, but often overlooked, source of consumer representation is an energetic Attorney General, exercising powers of public protection bestowed upon him by common law doctrines or intervention rights conferred by state statute. In *City of York v. Pennsylvania Public Utility Commission*, an active Pennsylvania Attorney General sought to afford the consuming public just such representation, only to have the Pennsylvania Supreme Court deny him that right. This Comment will endeavor to explore the policy considerations concerning such Attorney General intervention and analyze the bases of the *York* decision. Although the whole area of consumer representation is of intense interest at the present time, this Comment will discuss only these relatively narrow issues and no attempt will be made to explore generally the area of consumer representation or the attorney general’s proper place in it.

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The common law powers of the attorney general are extremely ill-defined and can only be found through a thorough reading of the cases. *See generally National Association of Attorneys General, Report on the Office of Attorney General* 32–61 (1971).


6 Nothing in this Comment should be taken as opposing public interest representation by persons other than the PUC and the Attorney General. For the same reasons that the PUC should not be allowed the sole privilege of defining the public interest, additional representation from other sources should be welcomed. However, additional consumer representation raises issues which Attorney General intervention does not: questions of funding and problems of multiplicity and delay. It is hoped that experience with active Attorney General representation will shed new light on the feasibility and desirability of
In *York*, three telephone corporations applied for a certificate of public convenience approving their proposal to merge. The City and County of York filed complaints opposing the application. After the prospective merger was approved by the Public Utility Commission (PUC), complainants appealed to the commonwealth court. There the telephone corporations were allowed to intervene as appellees. Subsequently the state Attorney General petitioned the court for leave to intervene as appellant. This the court denied. *York* was an appeal taken from that lower court decision.

Writing for the supreme court, Justice Roberts disposed of four issues. First, he found that the previous standard for approval of proposed mergers articulated in *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*—that a merger should be approved unless it was established that it would adversely affect the public—was not in accord with clear statutory provisions which permit the granting of the certificate only where the merger is necessary or proper for protection of the public interest. Second, he held that on the particular facts of *York* the PUC had made an adequate finding that the proposed merger would affirmatively benefit the public, and that the complainants had produced no evidence of a detrimental impact. Third, he held that one of the merging companies, in redeeming certain mortgage bonds, had not effected a change in their terms, conditions or date which would have required prior registration of a securities certificate. Finally, he arrived at the important conclusion which is the subject of this Comment: that the Attorney General’s petition for intervention had been properly denied below. He reached that conclusion on two separate and independent grounds: first, that the Attorney General’s right to control PUC counsel meant that intervention would create an irreconcilable conflict of interest, and deprive the PUC of effective assistance of counsel; second, that enactment of the Pennsylvania Public Utility Code impliedly repealed the preexisting statutory right of intervention claimed by the Attorney General.

I. Possible Forms of Attorney General Intervention

Before examining the doctrinal bases of the *York* result, the twin problems of the desirability and the legal foundation of intervention broader consumer representation, and effectively rebut the assertion that such representation will pose an unbearable burden on utility regulation.

7 This is required by the Pennsylvania Public Utility Code, PA. STAT. ANN. tit. 66, § 1122(e) (Supp. 1972).
9 333 Pa. 265, 5 A.2d 133 (1939).
11 See id. § 1241(a).
13 See PA. STAT. ANN. tit. 12, § 145 (1953).
merit consideration. There seems little question that the regulatory process, whether at the federal\textsuperscript{14} or state\textsuperscript{15} level, is currently barraged by suspicion and criticism. Scathing dissents which have issued from within the Pennsylvania Public Utility Commission, with Commissioner Louis J. Carter calling into question the basic health and good faith of the regulatory process,\textsuperscript{16} cannot be lightly dismissed.

Despite the suggestion by commentators that economic theories long adhered to by the Commission are urgently in need of reexamination,\textsuperscript{17} the Commission steadfastly has concluded that, as a tribunal, it alone is competent—with intervention by the Attorney General only when he can show a "vital interest"\textsuperscript{18} of the commonwealth—to weigh public and private interests. Accordingly, it has denied even its own counsel the opportunity to present the consumer’s case.\textsuperscript{19}

\textsuperscript{14}See Public Participation, supra note 2, at 707.

\textsuperscript{15}See, e.g., Griswold, The Problem of Public Confidence, 43 Pa. B. Ass'n Q. 253 (1972).

\textsuperscript{16}See South Pittsburgh Water Co., No. 19313 (Pa. PUC, May 24, 1972) (dissenting opinion at 8) ("[T]his Commission assumes the posture of the Goddess of Justice, blindfolded, with only one eye covered, and deaf, but only to the ratepayers and not to the utility."); Philadelphia Suburban Water Co., No. 19385 (Pa. PUC, May 15, 1972) (dissenting opinion at 1) ("The Commission "intends to do everything possible to avoid its responsibilities as a guardian of the consumers' interest by preventing its counsel from discharging those responsibilities.").

\textsuperscript{17}See Pontz & Sheller, supra note 2. The authors suggest persuasively that such concepts as rate base, rate of return, fair value, operating expenses, reparations, service, and environment and aesthetics all require fresh analysis, and allude to the PUC's "dismal record of failure to protect the public interest" on its own. Id. 316.

\textsuperscript{18}See Philadelphia Suburban Water Co., No. 19385, at 6 (Pa. PUC, May 15, 1972). While it is true that In re Mellon's Estate, 347 Pa. 520, 32 A.2d 749 (1943), cited by the PUC in support of its denial of the Attorney General's petition to intervene, stated in dictum that the intervention statute, PA. STAT. ANN. tit. 12, § 145 (1953), did not give the commonwealth an absolute right to intervene however remote its interest in a case, the Mellon court never developed a test for remoteness, and barred intervention on grounds of laches. Moreover, municipal corporations have long been permitted to intervene without meeting such rigorous tests. See No. 19385 (dissenting opinion at 3).

The PUC used other suspect rationales to deny attorney general intervention. It relied, at one point, on City of Pittsburgh v. Pennsylvania PUC, 153 Pa. Super. 83, 33 A.2d 641 (1943), for the proposition that intervention is appropriate only upon a showing of need. See No. 19385 at 3. Yet there the court merely stated that the extent to which "consumers, whose intervention is bound to impose a hampering restriction upon the functioning of the administrative process, should be permitted to intervene is within the sound discretion of the Commission ..." 153 Pa. Super. at 87, 33 A.2d at 642-43. That language clearly cannot bear the weight the PUC places upon it. Multiplicity and obstructionism, though conceivably characteristic of a broad class of consumer intervenors, cannot be attributed to the unitary and duty-bound Attorney General.

At still another juncture the PUC argued that establishment of the Pennsylvania Bureau of Consumer Protection, see PA. STAT. ANN. tit. 71, §§ 307-1 to -6 (Supp. 1973), supports the conclusion that the legislature opposed reduplication of effort within the executive branch. See No. 19385 at 6. It then moved quickly to the further conclusion that the legislature would equally reject reduplicated effort by the Attorney General. It is true that the act in question explicitly provides that consumer counsel shall not perform functions entrusted to the Public Utility Commission, PA. STAT. ANN. tit. 71, § 307-5 (Supp. 1973). But there is a broad difference between newly-created consumer counsel and the time-honored office of Attorney General, with its attendant extraordinary powers.

\textsuperscript{19}See South Pittsburgh Water Co., No. 19313 (Pa. PUC, May 24, 1972) (dissenting opinion); cf. Philadelphia Suburban Water Co., No. 19385 (Pa. PUC, May 15, 1972) (dissenting opinion at 2) ("Not in my memory has this Commission offered affirmative evidence in a rate case in opposition to the utility's case.").

According to the PUC, the adversary system properly places consumer against utility,
There may be some merit in the Commission’s policy of self-reliance and resistance to outside assistance, since the fate of the Pennsylvania consumer is heavily dependent upon the good faith, industry and talent of the Commission. Intervention, after all, is only possible in the more egregious cases given a world of limited resources. It is denied by almost none that added staffing would do much for both Commission and consumer, enabling the former to more energetically pursue its responsibilities, and perhaps accomplishing more than could ever be gained by the intervention of the Attorney General or the public interest "ombudsman" that some advocate. Nonetheless, there seems an absolute minimum of harm and vast potential good (at the least such intervention would prod the PUC into fuller awareness of consumer interests and demands) that Attorney General intervention into public utility matters might accomplish.

This intervention may take several forms. Apart from the arguable right to intervene on appeal—as in York—the Attorney General may have a right to intervene before the PUC itself. These two forms of intervention, though bottomed on the same putative statutory authority, involve slightly different considerations.

The York conflict-of-interest rationale is inapplicable to intervention before the PUC, since PUC counsel provides representation only when there is a Commission order to defend. Thus this form of intervention rests upon firmer doctrinal footing than appellate intervention. As a policy matter, it may have an additional advantage. This is the opportunity to participate in the factfinding process, and to advance regulatory theory before the Commission.

with the only role of the PUC being that of public interest umpire, Pontz & Sheller, supra note 2, at 348. See also City of Pittsburgh v. Pennsylvania PUC, 182 Pa. Super. 376, 392, 126 A.2d 777, 785 (1956). But see L. Metcalf & V. Reinemier, Overcharge 91 (1967):

'The Public Service Commission is not a mere judicial body to act solely as umpire between complaining consumer or the complaining investor on the one hand, and the great public utility system on the other hand. . . . The regulating commission . . . must be a tribune of the people, putting its engineering, its accounting and its legal resources into the breach for the purpose of getting the facts and doing justice to both the consumers and investors in public utilities.' (quoting Franklin D. Roosevelt).

20 See sources cited note 31 infra.

21 See, e.g., Pontz & Sheller, supra note 2: "If the . . . Commission fails to meet its responsibility as protector of the public interest, then, at the very least, a utility consumers' counsel is required." Id. 349.

22 Intervention is almost invariably easier to support than a right to initiate a new proceeding, for intervention merely means participation in a proceeding already begun. Minimally affected interests may be adequately protected through participation carefully limited by the court. And the central problem created by intervention is the disadvantage to the forum and other parties of extended cross-examination (a problem virtually eliminated at the appellate level, as in York). See 3 K. Davis, Administrative Law Treatise § 22.08 (1958).


25 The Attorneys General of several states, including Kentucky, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, and
predominantly concerned with these matters, appellate intervention—which might take the form of an amicus brief—would be of little benefit.\textsuperscript{26}

If, on the other hand, the Attorney General is satisfied that the consumer’s “factual” cause is adequately represented before the PUC, he will have no overriding need or desire to intervene there; but should the PUC commit an error of law, and should the consumer choose to drop the litigation, he will need to intervene at an appellate level to keep the PUC within the bounds of law and due process by which it is theoretically circumscribed.\textsuperscript{27}

It seems undesirable to deny the Attorney General the absolute right to intervene before either Commission or court. Although it is certain that in some cases intervention by the Attorney General will prove superfluous in retrospect, it would seem unwise to condition intervention on a special showing of need.\textsuperscript{28} No single advocate can be wholly adequate to represent the diffuse “public interest.”\textsuperscript{29} Moreover, there may be many occasions when it is uncertain whether counsel—even those counsel wholly adequate in their presentation to the Commission—intend to press their case on appeal. And the Attorney General’s ability to intercede effectively for consumers on appeal might be severely restricted by his nonparticipation below.\textsuperscript{30} Clearly there will be other occasions when the Attorney General will be unable to predict the competence and effectiveness of consumer counsel, or to foresee how necessary his own participation will be to protect commonwealth interests. While, in view of understaffing problems,\textsuperscript{31} the Commission must be sensitive to avoiding excess delay in its proceedings, Attorney

Virginia, have been allowed to appear before state regulatory agencies on behalf of the public. While the authority for this action is often unclear (the Oklahoma Attorney General makes such appearances solely upon the basis of his common law powers), North Carolina and Virginia have given their Attorneys General the statutory duty so to represent the public interest. \textit{National Association of Attorneys General, Report on the Office of Attorney General} 413-14 (1971). For an explanation of the North Carolina system by the North Carolina Attorney General see Morgan, \textit{The People’s Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection}, 6 Wake Forest Intra. L. Rev. 1 (1969).

\textsuperscript{26} Meaningful consumer advocacy in the agency process may never be fully realized if an intervenor is excluded below. See \textit{Public Participation}, supra note 2, at 720.


\textsuperscript{28} See notes 33-34 infra & accompanying text.


\textsuperscript{30} If no party appeals and the Attorney General does not participate below, there will be no appeal, \textit{see Pa. Stat. Ann. tit. 66, § 1431(a)} (Supp. 1973), and no opportunity for the Attorney General to intervene. \textit{See also} note 26 supra.

\textsuperscript{31} See Pontz & Sheller, supra note 2, at 343; Brief for Attorney General at 16 n., City of York v. Pennsylvania PUC, 449 Pa. 136, 295 A.2d 825 (1972). \textit{But see} Pontz & Sheller, supra note 2, at 348. When asked by a federal government questionnaire in 1967 if its current appropriations were adequate, the PUC responded “Yes.” \textit{Id.}
General intervention creates no precedent encouraging multiplicity of intervenors. Moreover, institutional and financial pressures as well as ethical commitments should ensure that the Attorney General will not abuse his "gadfly" role by obstructing Commission proceedings. Until the seemingly small potential for abuse is shown to be damaging to utility regulation in the commonwealth, the Attorney General should be granted a right of intervention considerably broader than that required in any particular case. Denying him the discretion which would flow from such a right would adversely affect his capacity to ensure adequate protection of the public interest.\textsuperscript{32}

II. The Commonwealth's Interest as Parens Patriae

Once the desirability of Attorney General intervention is established, the question arises as to whether there exists an interest\textsuperscript{33} which would form the basis of a complaint by the commonwealth when no consumer lifts his voice in protest and the state \textit{qua} consumer is unaffected.\textsuperscript{34} Traditional \textit{parens patriae}\textsuperscript{35} theory supports the assertion of such an interest by the state.

The doctrine of \textit{parens patriae} confirms the power of the state to protect persons under a disability or incapable of managing their own affairs. While the doctrine usually is asserted in support of the right of the state to take a child from depraved parents,\textsuperscript{36} to take custody of a delinquent child,\textsuperscript{37} or to prescribe rules and regulations for the management of the property of infants and incompetents,\textsuperscript{38} the United States Supreme Court has given the doctrine broader scope. When it was alleged that Georgia railroads had conspired illegally to fix prices, it was held that Georgia could properly invoke the Court's original juris-

\textsuperscript{32} The PUC may itself act as a complainant. \textit{See} note 57 \textit{infra}. When it does, affected consumers may be led to presume that their interest is fully represented. Where practical difficulties are great enough, it is hardly to be expected that the consumers will be present at hearings to see if the PUC is vigorously representing them. \textit{See}, e.g., South Pittsburgh Water Co., No. 19313 (Pa. PUC, May 24, 1972) (rate hearings held 200 miles from affected consumers).

\textsuperscript{33} Under the general intervention statute the commonwealth can only intervene in cases in which it has an interest. \textit{Pa. Stat. Ann. tit. 12, § 145} (1953); \textit{see} note 18 \textit{supra}. Also, complainants before the PUC must have "an interest in the subject matter." \textit{Pa. Stat. Ann. tit. 66, § 1391} (1959). Intervenors in appeals from PUC decisions are not required to have such an interest, although intervention is at the discretion of the court. \textit{Id.} § 1434.

\textsuperscript{34} When the commonwealth itself is a large consumer of the affected utility, even traditional analysis requires that, as an injured party, it be able to seek redress. \textit{See} 1 K. Davis, \textit{Administrative Law Treatise} § 7.02 (1958). The PUC itself quietly acknowledges this. \textit{See} text accompanying note 58 \textit{infra}.

\textsuperscript{35} "Father of his country; parent of the country. . . . [T]he state, as a sovereign—referring to the sovereign power of guardianship over persons under disability . . . ." \textit{Black's Law Dictionary} 1269 (rev'd 4th ed. 1968).

\textsuperscript{36} \textit{See} \textit{In re} Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

\textsuperscript{37} \textit{See} \textit{In re} Turner, 94 Kan. 115, 145 P. 871 (1915); Johnson \textit{v.} State, 18 N.J. 422, 114 A.2d 1 (1955).

\textsuperscript{38} \textit{See}, e.g., McIntosh \textit{v.} Dill, 86 Okla. 1, 205 P. 917 (1922).
dition in an action for injunctive relief because of its interest as *parens patriae* in the welfare of its citizens.\(^3\) And in *Pennsylvania v. West Virginia*,\(^4\) when a state Attorney General sought to represent public and private natural gas users to prevent an interruption of the flow of gas into the state, the Court observed:

>This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.\(^4\)

Though Pennsylvania courts seemingly have not dealt with the question whether the Attorney General retains these *parens patriae* rights when the public interest has been entrusted to an administrative body,\(^4\) several courts in other jurisdictions have confronted similar problems. Perhaps most nearly on point is *Muench v. Public Service Commission*,\(^4\) in which the Wisconsin court rejected the contention that the state could not intervene through its Attorney General because public protection had become the sole province of the Public Service Commission. There, where controversy centered around the erection of a dam, the court took note of possibly conflicting interests between those who would benefit from the dam and those who opposed it, and concluded:

>To hold that the Public Service Commission should not only decide between these conflicting interests in its judicial capacity, but also should represent the state in protecting public rights, would make the Commission both judge and advocate at the same time. Such a concept violates our sense of fair play and due process which we believe administrative agencies acting in a quasi-judicial capacity should ever observe.\(^4\)

Others courts have reasoned similarly. In *Attorney General v. Trustees of Boston Elevated Railway*,\(^4\) a Massachusetts court concluded that,

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\(^{31}\) The Supreme Court recently had occasion to consider the applicability of the *parens patriae* doctrine to § 4 of the Clayton Act, 15 U.S.C. § 15 (1970). In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), Hawaii brought an action as *parens patriae* to recover damages to its citizens due to alleged violations of the antitrust laws. The Court held that Hawaii could not sue under § 4 for damages, even though suit would still be allowed under § 16 for injunctive relief, because the language of the section "does not authorize recovery for economic injuries to the sovereign interests of a State." *Id.* at 265.\(^{32}\)

\(^{32}\) 262 U.S. 553 (1923).

\(^{33}\) *Id.* at 592.

\(^{34}\) The court in *York* itself did not address the *parens patriae* issue. Yet its very silence may say much, for the lower court had agreed with the PUC that the PUC alone could represent the public interest. *See City of York v. Pennsylvania PUC*, 3 Pa. Commw. 270, 282, 281 A.2d 261, 267 (1971).

\(^{35}\) 261 Wis. 492, 53 N.W.2d 514 (1952).

\(^{36}\) *Id.* at 514, 53 N.W.2d at 523.

because the Attorney General represented the public interest, he had the power to require other public officers to perform duties which they owed to the public. And in *State ex rel. Olsen v. Public Service Commission*,46 where Montana's Attorney General questioned the reasonableness of the result of a rate proceeding, the court concluded that when the Attorney General judged that there was good cause to believe a public service corporation had allowed unreasonable rates, it became his common law duty to institute proceedings by which the rights of the state, exercised on behalf of all the people, might be preserved and vindicated. It noted, moreover, that this was a "well-recognized power and duty of such an officer."

### III. IMPLIED REPEAL

In light of the desirability and legal justification of Attorney General intervention in PUC cases discussed above, the two bases of the *York* decision merit critical consideration. The strongest support for the court's result is found in its conclusion that proper construction of relevant statutes precludes intervention. But this rationale has inherent flaws which seem never to have been squarely faced.

First, the *York* court devoted little time to analyzing its conclusion that the omission of the word "commonwealth" from the statutory list of permissible intervenors in appeals from PUC decisions was fatal to the Attorney General's petition. Yet clearly enough the list of inter-

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47 Id. at 116-17, 283 P.2d at 600, quoting State v. Pacific Express Co., 80 Neb. 823, 834-35, 115 N.W. 619, 623 (1908). *Pacific Express* had held that, even absent a state pecuniary interest, the Attorney General could bring suit, on behalf of the public, against an express company to enforce rate regulations which had been set by a state railway commission. According to the court:

> To hold otherwise would be to divest the state of the most efficient manner of exercise of its regulatory and supervisory powers over the instrumentalities which it has created for its own public purposes, which we cannot believe it ever was the intention of the makers of the organic law to do.

Id. at 835, 115 N.W. at 623.

*Cf.* United States v. ICC, 337 U.S. 426 (1949). (The United States was allowed to become both plaintiff and statutory defendant in a proceeding to set aside an ICC order. The Court saw an anomaly in the fact that the U.S. Attorney General was on both sides of the case, but noted that the anomaly stemmed from statutes defining the Attorney General's duties, and asserted that Congress could not have intended to make it impossible for the Government to press a claim which could be vindicated only by a court challenge to an ICC order); State v. State Bd. of Equalization, 56 Mont. 413, 185 P. 708 (1919).

49 Statutory treatment in at least one other jurisdiction is considerably different. See, e.g., Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952), in which the applicable intervention statute provided only that "[t]he court, in its discretion, may permit other interested persons to intervene." Wis. STAT. ANN. § 227.16(1) (Supp. 1973). The court suggested that "[i]t would have to be a highly unusual case in which it would not be an abuse of discretion for the trial court to deny the state the right to intervene in review proceedings where public rights are at stake." 261 Wis. at 513, 53 N.W.2d at 523 (emphasis added).

It is critical to note that the Attorney General would not desire to qualify solely under PA. STAT. ANN. tit. 66, § 1434 (Supp. 1973) since that section confers only eligibility for, but not a right to, intervention. See text accompanying notes 29-30 supra. Yet once it is concluded that he is within the intendment of that section, it follows that the two statutes no longer conflict, and he can claim the right of intervention granted by PA. STAT. ANN. tit. 12, § 145 (1953).
venors contemplates the necessity for public interest representation by intervenors including virtually anyone in the commonwealth except its chief law officer. Given the generosity of the statutory definitions of "person" (including "associations other than corporations") and "municipal corporation" (including "any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility"), along with the existence of broad powers in the Attorney General both at common law and, arguably, under statute, the context reasonably allows the conclusion that the commonwealth was an intended intervenor. Also, it is not unreasonable to suggest that "persons" might include public officials exercising the inherent powers of their offices.

This interpretation would require granting the Attorney General's petition to intervene in York, despite the principle that rights of appeal and intervention are purely statutory and must be pursued strictly according to statute. For nothing is added to the statute by this reading; it would have been scrupulously followed in granting the petition. The reasonableness of this reading of the statute is enhanced by the fact that the court's reading has the inevitable effect of eliminating the commonwealth from the list of possible complainants before the Commission; that list is phrased in similar language.

Yet in Philadelphia Suburban Water Co., the PUC itself inferred that the Attorney General could have intervened to represent the commonwealth as a utility customer if he had done so in a timely manner.

The application of the "implied repeal" concept used by the York court also warrants close scrutiny. The court used that theory to deny the Attorney General's claim to a preexisting right of intervention. Yet in doing so, the court ignored vital considerations.

Before considering this aspect of the court's opinion, it may be helpful to view the broad language of the claimed statutory grant:
In all cases at law or in equity, in any court or before any officers, board, commission, or other body having jurisdiction of the matter, in which the Commonwealth or any officer thereof may be a party, or in which the Commonwealth may have an interest, the Commonwealth shall have the right to intervene, and to appear, plead, prosecute, defend, or appeal, as other parties litigant; but in no case shall be required to give any bond or other security for costs or for any purpose whatever.\textsuperscript{59}

Despite the compelling public policy expressed in this statute, the \textit{York} court merely noted that the Public Utility Code creates a "'[c]omprehensive and exclusive system of regulation for utilities,'\textsuperscript{60}" pointed to the maxim of statutory construction dealing with implied repeal,\textsuperscript{61} and found the statute repealed insofar as it applied to appeals from PUC decisions. This is troubling for two reasons. First, the very statute establishing the Public Utility Commission provided that the Attorney General was to retain his former powers, and granted him additional, not lesser duties.\textsuperscript{62} If, then, the \textit{York} court thought that the Public Utility Code was intended to withdraw the Attorney General's earlier intervention rights, the conclusion ought to be based upon stronger evidence than that relied upon by the court.

Second, the court did not closely analyze the very maxim it applied. The same statute which announces limited conditions under which repeal may be implied also announces a presumption against such repeal except under those limited conditions:

\begin{quote}
Whenever a law purports to be a revision of all laws upon a particular subject, or sets up a general or exclusive system covering the entire subject matter of a former law and is intended as a substitute for such former law, such law shall be construed to repeal all former laws upon the same subject.

Whenever a general law purports to establish a uniform and mandatory system covering a class of subjects, such law shall be construed to repeal pre-existing local or special laws on the same class of subjects.

In all other cases, a later law shall not be construed to repeal an earlier law unless the two laws be irreconcilable.\textsuperscript{63}
\end{quote}

The extraordinary circumstances under which repeal may properly be implied are not present in \textit{York}. Although the Public Utility Code is a "general or exclusive system" covering the regulation of public utilities, it is not a general or uniform law on the subject of intervention which

\textsuperscript{59} PA. STAT. ANN. tit. 12, § 145 (1953).
\textsuperscript{61} \textit{See} PA. STAT. ANN. tit. 46, § 591 (1969).
\textsuperscript{62} \textit{See} PA. STAT. ANN. tit. 66, § 1344 (1959).
\textsuperscript{63} PA. STAT. ANN. tit. 46, § 591 (1969).
would repeal all preexisting laws on the same subject.\textsuperscript{64} Thus, the first two paragraphs of the construction statute do not apply in this case and the third paragraph must be brought into play. Implied repeal due to the irreconcilability of two statutes is not favored by the courts\textsuperscript{65} and they will strain to find any fair construction of a statute to avoid such a result.\textsuperscript{66} Given this policy against implied repeal, a court in the York situation should adopt the interpretation of the Public Utility Code\textsuperscript{67} suggested above which includes the Attorney General as a permissible intervenor,\textsuperscript{68} or conclude that the Code was not intended to cover commonwealth intervention rights since those rights are dealt with in a previous comprehensive intervention statute. Either of these constructions of the statute would allow the court to recognize the Attorney General's preexisting intervention right and permit the operation of both statutes.\textsuperscript{69}

IV. CONFLICT OF INTEREST

The conflict of interest problem raised by the York court is no more compelling than its holding on implied repeal.\textsuperscript{70} It is important to note at the outset that the doctrine as applied in York is nowhere clearly developed in Pennsylvania law;\textsuperscript{71} and cases similar to York have generally evoked little concern over conflict of interest outside of the commonwealth.\textsuperscript{72} Yet the York court chose to rely solely

\begin{itemize}
\item \textsuperscript{64} For an example of a situation where a comprehensive statute was found to repeal by implication earlier statutes on the same subject see Girard Trust Co. v. City of Philadelphia, 336 Pa. 433, 9 A.2d 883 (1939) (comprehensive statute giving a state agency power and authority to inspect all elevators in state impliedly repealed earlier statute giving City of Philadelphia such power and authority inside the city).
\item \textsuperscript{65} See, e.g., Scott v. Bell, 344 Pa. 243, 25 A.2d 308 (1942).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} PA. STAT. ANN. tit. 66, § 1434 (Supp. 1973).
\item \textsuperscript{68} See notes 50-55 supra & accompanying text.
\item \textsuperscript{69} The problem posed by two irreconcilable statutes has not been considered often in Pennsylvania and the few existing cases offer little guidance. See In re Public Parking Auth., 366 Pa. 10, 76 A.2d 620 (1950) (act authorizing public parking authorities and allowing them to enter into contracts held not to imply repeal earlier statute requiring separate bids for the various branches of construction work on public buildings); Borough of Kingston v. Kalanosky, 155 Pa. Super. 424, 38 A.2d 393 (1944) (acts providing for licensing of sale of alcoholic beverages held not to imply repeal earlier statute empowering boroughs to regulate and restrict the use of buildings in order to protect the public welfare).
\item \textsuperscript{70} The PUC has also denied the Attorney General the opportunity to intervene before it on the theory that he and PUC counsel would simply duplicate each others' efforts. See Philadelphia Suburban Water Co., No. 19385 (Pa. PUC, May 15, 1972); note 18 supra.
\item \textsuperscript{71} The Pennsylvania Constitution is virtually silent on conflict of interest. It indicates only that no employee or officer of the commonwealth shall be allowed an interest in commonwealth purchases, Pa. Const. art. 3, § 22, and that a legislator with a personal interest in a bill proposed or pending before the General Assembly shall disclose that fact to the house of which he is a member, and abstain from voting on the bill. Pa. Const. art. 3, § 13.
\item \textsuperscript{72} See United States v. ICC, 337 U.S. 426 (1949) (U.S. Attorney General appeared
upon the lower court's analysis of the problem, an analysis that in turn relied extensively upon a precedent not squarely on point. In the case from which the York logic was borrowed, Ault v. Unemployment Compensation Board of Review, the Attorney General was specifically charged with a duty to represent the Unemployment Compensation Board. Instead, he elected to argue the case of the claimant against the Board in an appeal from its decision. The result was that the Board was literally deprived of representation before the court. Judge Woodside, who had allowed the Attorney General to appear before him on Ault's behalf, concluded after the fact that the Attorney General should have acted otherwise. York presented an entirely different situation. Although the Attorney General was statutorily charged, as in Ault, with the duty of representing Pennsylvania commissions, the PUC had its own statutorily-provided counsel, who represented it in York without regard to the Attorney General's presence in the case.

It is undeniable that to some extent a conflict of interest nonetheless existed due to the Attorney General's power of appointment over PUC counsel. Yet that conflict was one inherent in the broad responsibilities of the Attorney General, and was the sort of conflict resolved routinely through the observance of statutory and ethical duties. It is inevitable, given the requirements of the Administrative Code which demands that the Attorney General furnish legal advice and representation to nearly every branch of state government, that he must at times represent parties with conflicting interests. Were he merely a typical private attorney, such a conflict would not likely be permitted; but because of his unique historical role the Attorney General has been granted broad discretion to meet competing demands. He routinely

on both sides of a proceeding to set aside an ICC order. The Court noted that his representation of the government as plaintiff in no way prevented full defense of the Commission's order, as the Commission and the railroads, the real parties in interest, were authorized to interpose all proper defenses to the government's charges.); State ex rel. Olsen v. Public Serv. Comm'n, 129 Mont. 106, 283 P.2d 594 (1955) (Attorney General allowed to represent both sides on appeal from Commission order); Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 74 A.2d 580 (1950) (Attorney General allowed to represent both sides on appeal from Board's order). See also notes 43-47 supra & accompanying text.

74 See PA. STAT. ANN. tit. 71, § 293(b) (Supp. 1973).
75 188 Pa. Super. at 262-64 n.1, 146 A.2d at 730-31.
76 PA. STAT. ANN. tit. 71, §§ 51-732 (1962), as amended, (Supp. 1973); see id. § 293(b).
78 See id.
82 See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.01 (1958). Although regulatory agencies have themselves been criticized for combining incompatible functions,
fulfills his duty by appointing deputies and special counsel.\textsuperscript{82} PUC counsel is not among these;\textsuperscript{83} the Attorney General's only control over him is the power of dismissal.\textsuperscript{84} Thus, the effectiveness of PUC counsel in the light of this single threat becomes the nub of the conflict of interest issue in the instant case.

The Pennsylvania Supreme Court long ago rejected the notion that it could presume that high officials might improperly execute their duties.\textsuperscript{85} Moreover, even assuming that the Attorney General would exert an adverse influence on the quality of PUC representation as a result of his power of dismissal, that adverse influence would exist irrespective of his intervention in the instant proceeding. If the law can sanction a quiet removal of PUC counsel and allow the Attorney General to appoint a more compliant individual to that post, it seems unreasonable to impose an absolute ban on conflict between the PUC and Attorney General in open court. For in court the bench may note improper exertions of Attorney General influence and take remedial measures to provide for effective representation.

The \textit{York} court itself noted that in Pennsylvania the Attorney General and Commission counsel may frequently find themselves on opposite sides of the courtroom, as when the Highway Department appeals from a PUC decision. It allows these conflicts because the result is mandated by statute.\textsuperscript{86} Since the court's conflict of interest rule is independent of its analysis of relevant statutory construction, it may be observed that intervention in \textit{York}—unless the court’s implied repeal analysis is adopted—is similarly mandated by statute. The sole difference between \textit{York} and a typical Highway Department case\textsuperscript{87} would be that appearance by the Attorney General in the latter case would be obligatory, not discretionary. This seems a slim distinction upon which to base so crucial a result. The slight risk that the Attorney General

\textsuperscript{82} See PA. STAT. ANN. tit. 71, § 296 (Supp. 1973).

\textsuperscript{83} Id.; see PA. STAT. ANN. tit. 66, § 460 (1959).


\textsuperscript{85} Even if it is concluded that the PUC's counsel is a deputy of the Attorney General, it should be noted that the Attorney General is under a duty to remove from office underlings who perform their appointed work with less than requisite diligence. See PA. STAT. ANN. tit. 71, § 816 (1962).

\textsuperscript{86} Lane v. Commonwealth, 103 Pa. 481 (1883); see, e.g., Creamer v. Twelve Common Pleas Judges, 443 Pa. 484, 281 A.2d 57 (1971). "We cannot assume a public official will abuse his trust, or act with a view to evade the duties of his office. The presumption is to the contrary." Id. at 496, 281 A.2d at 62, quoting Commonwealth ex rel. Lafean v. Snyder, 261 Pa. 68, 104 A. 494, 497 (1918) (citations omitted).

\textsuperscript{87} The Attorney General is required to represent almost all elements of the commonwealth government regardless of the identity of the opposing party. See PA. STAT. ANN. tit. 71, § 293 (Supp. 1973).

might abuse his power of dismissal over Commission counsel does not justify *York*’s circumscription of the Attorney General’s function.

V. CONCLUSION

Because of the complexities of public utility regulation, it is natural that Pennsylvania has entrusted the interests of commonwealth utility consumers to a Public Utility Commission. Yet the PUC has not been granted unbridled discretion. It should not, therefore, be necessary for the commonwealth to reform the Commission legislatively each time its membership seems to become lethargic in discharging its duties to the public. Since Pennsylvania’s Attorney General retains his broad duty to represent the public, it is only sensible that he be allowed to attempt to check abuse by a Commission initially established to protect the public. As a New Jersey court observed, the Commission is a creature of statute operating legitimately only within definite statutory limitations. It would be an odd situation indeed if the people, through the executive, were unable to enforce the legislative restrictions placed upon its functions.

In *York* itself, the presence of the City and County of York may have ensured the enforcement of legislative restrictions, and adequately protected the public. Yet the rationale emerging from *York* threatens to eliminate necessary safeguards when those aggrieved by a Commission action are not a city and a county, but a scattered collection of consumers unable to secure adequate representation.

The doctrinal grounds which moved the *York* court to this result are by no means compelling. A holding as weighty as *York*’s should be supported by more rigorous logic. It must be hoped that the Pennsylvania Supreme Court will entertain a proper challenge to *York*. If, after more exacting scrutiny of *York*’s doctrinal grounds, it concludes that it must affirm its prior result, there will be a clear need for statutory reform to relax the rigid and unreasonable procedures which currently bar the door to effective representation of the public interest.

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88 See note 27 supra.
89 The Pennsylvania Attorney General has all powers and duties that the law associates with that office, PA. STAT. ANN. tit. 71, § 244 (1962), which include the representation of the public interest. See text accompanying notes 40-41 supra. The Public Utility Code was not intended to restrict those powers and duties. See text accompanying note 62 supra.
91 It cannot lightly be ignored that the Pennsylvania consumer is more thoroughly deprived of counsel than is the Commission. When consumers, even those aware of an unreasonable rate hike, are scattered and minimally affected, they may go unpresented. Cf. note 1 supra. Though the Commission has suggested that consumer causes are scrupulously protected by its counsel and staff, see Philadelphia Suburban Water Co., No. 19385 (Pa. PUC, May 15, 1972), currently the Commission does not allow its counsel to act as an advocate for consumers. See id. (dissenting opinion at 1 n.1); note 19 supra.