IN THE SUPREME COURT OF OHIO

COLUMBIA GAS TRANSMISSION CORPORATION	)	
	)	Case No. 06-1443
Appellee/Cross-Appellant,	)	
	)	Appeal from the Ohio Board of Tax Appeals
- v. -	)	
	)	
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO	)	Board of Tax Appeals Case No. 2003-K-1876
	)	
Appellant/Cross-Appellee.	)	

BRIEF OF APPELLEE/CROSS-APPELLANT COLUMBIA GAS TRANSMISSION CORPORATION

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INTRODUCTION AND STATEMENT OF CASE

Starting in tax year 2001, Ohio began taxing the personal property of "natural gas companies" differently from that of "pipe-line companies," assessing the former at 25% of true value and the latter at 88%. The question here is which tax treatment Columbia Gas Transmission Corporation ("Columbia Transmission") should receive. The Commissioner assessed Columbia Transmission as a pipe-line company, but the Board of Tax Appeals ("BTA") rejected that conclusion, holding that the company should be taxed as a "natural gas company."

Both statutory language and constitutional mandates confirm that the BTA's conclusion is correct. Given recent changes in the structure of the natural gas industry, under the statute's plain language, Columbia Transmission satisfies the definition of both a "natural gas company" and a "pipeline company." R.C. 5727.01(D). Under settled principles of tax law, when a taxpayer falls within more than one tax category, the taxpayer may claim whichever category provides the more favorable tax treatment.

Because the Commissioner can't win <u>on</u> the statute, he resorts to everything <u>but</u> the statute. He argues that a taxpayer is a natural gas company only if its "primary business" is supplying natural gas to consumers, even though the statute requires only that the taxpayer be "engaged in the business" of doing so. He relies on PUCO's interpretation of an entirely distinct statute, without recognizing the significant preemption issues that color interpretation of that statute but are irrelevant to the tax statutes. And he urges deference to his "settled administrative practice" of treating Columbia Transmission as a pipe-line company, without acknowledging that this interpretation only recently came to have any personal property tax consequence.

Moreover, assessing Columbia Transmission at the 88% "pipeline" rate is not only incorrect as a matter of statutory construction, it is also impermissible, as Columbia Transmission argues on cross-appeal, as a matter of constitutional law. Under the

Commissioner's framework, property used in transporting and storing natural gas is taxed differently depending on whether it is owned by a "natural gas company" or a "pipe-line company." This is so even though the property is identical in form and function, and even though the companies use the property to compete with one another. This arbitrary distinction violates Due Process and Equal Protection. Moreover, because the differing assessment rates benefit local distribution companies and Ohio consumers at the expense of interstate pipelines and out-of-state customers, they violate the dormant Commerce Clause. Differing rates would also violate the Supremacy Clause as the differing rates would conflict with the Natural Gas Act, 15 U.S.C. § 717 and federal regulatory policy.

Tax Department personnel themselves have expressed legal concerns about the rate inequality. The Administrator of the Public Utility Tax Division cautioned about an "equal protection problem," recognizing that the rate difference "gives natural gas companies an advantage." Infra 40. Other tax personnel, too, recognized that the differential rates create "question[s] of equity" and "inequities . . . within the gas industry." Infra 40.

In short, the BTA's decision that Columbia Transmission must be treated as a "natural gas company" and assessed at 25% for tax year 2001 is both statutorily-correct and constitutionally-mandated. Further, because Columbia Transmission also competes with companies that "gather" natural gas and with pipelines carrying alternative fuels, many of which were treated as general businesses assessed at 25% for both tax years 2000 and 2001, the Constitution requires application of the 25% rate for tax year 2000 as well.

STATEMENT OF FACTS

A. Background and Procedural History.

In petitions for reassessment of its public utility personal property tax, Columbia Transmission argued, for tax year 2001, that it satisfied the definition of a "natural gas company" and should be assessed at 25% under R.C. 5727.111(C), and, for both 2000 and 2001, that its assessment at 88% violated the U.S. and Ohio Constitutions. After a hearing, the Commissioner affirmed the preliminary assessments. (Second Supp. 1-5).

Columbia Transmission appealed to the BTA and presented extensive evidence in a nine-day hearing. The Board reversed the Commissioner's final determination, finding that Columbia Transmission qualified as a "natural gas company" under R.C. 5727.01(D)(4), and, as such, was entitled to be assessed at 25%. (Appx. 28). Citing jurisdictional limitations, though, the Board did not address Columbia Transmission's constitutional arguments. (Appx. 16).

The Commissioner appealed to this Court. (Appx. 33). Columbia Transmission cross-appealed, re-raising its constitutional challenges. (Appx. 1).

B. Columbia Transmission's Business.

Columbia Transmission, a Delaware corporation headquartered in Virginia during the period at issue (Supp. 662; Tr. I 21), and now headquartered in Texas, offers natural gas transport service through a network of pipelines in ten states. (Supp. 61, 662; Tr. VII 226; Tr. I 24; Second Supp. 871). The Federal Energy Regulatory Commission ("FERC") establishes the rates that Columbia Transmission may charge. (Supp. 664, 219-20; Tr. I 29-30; Tr. II 180-81).

Columbia Transmission's customers for natural gas transportation include state-regulated "local distribution companies" or "LDCs." (Supp. 663; Tr. I 25-26). LDCs pay Columbia Transmission to transport gas to them, and the LDCs in turn transport it to consumers or other utilities. (Supp. 663, 579, 18; Tr. I 25-26; Tr. VI 74; Tr. VII 53-55). In Ohio, the PUCO establishes the rates LDCs may charge, much like FERC establishes rates for Columbia Transmission. <u>See</u> R.C. 4909.15; (Supp. 672, 219-20; Tr. I 64; Tr. II 180-81).

Columbia Transmission also provides transportation service to power companies, industrial and commercial customers, and natural gas marketers. (Supp. 663; Tr. I 25-27).

Columbia Transmission sometimes delivers such customers' gas to a transfer point into an LDC, and sometimes delivers the gas to the customer itself via a "direct connect." (Supp. 69, 1265-66; Tr. VII 258). Columbia Transmission has "direct connects" to several large power and industrial customers in Ohio, as well as tens of thousands of farm customers. (Supp. 69-72, 450; Tr. VII 260-69; Tr. III 94; Supp. 1265-66, 1269; Second Supp. 2).

Columbia Transmission also provides natural gas storage services. Its storage customers include LDCs; power, industrial, and commercial customers; and marketers. (Supp. 74-75, 457, 662-63, 1249; Tr. I 23-27; Tr. III 122-23; Tr. VII 277-78, 281).

C. The Evolving Natural Gas Industry.

Historically, the movement of natural gas from producer to consumer involved several changes of ownership. Interstate pipeline companies[1] purchased natural gas from producers and transported it throughout the country. (Supp. 664-65; Tr. I 32-33). They then sold the gas to downstream pipelines or LDCs, which ultimately sold and transported it to consumers.

In the last three decades, this scheme has changed entirely. As a result of federal regulatory changes, interstate pipelines were largely forced out of the business of owning and selling natural gas. (Supp. 664, 221-23' Tr. I 32; Tr. II 187-96). Instead, they became essentially "common carriers"—transporting gas owned by others. (Supp. 662, 222; Tr. I 32; Tr. II 189-90).

With these regulatory changes came a change in Columbia Transmission's customer base. Prior to restructuring, "virtually all of Columbia [Transmission's] services were offered to local distribution companies." (Supp. 665; Tr. I 35). Now, Columbia Transmission "move[s] significant volumes of gas on behalf of [non-LDC] customers." (Supp. 665; Tr. I 33). Indeed, in

[1] Columbia Transmission and other companies treated as "natural-gas companies" under the Natural Gas Act, 15 U.S.C. § 717 et seq., will be referred to as "interstate pipelines" to signify their interstate character and to avoid confusion with the "natural gas company" terminology of R.C. 5727.01. This in no way sanctions the treatment of such companies as "pipe-line companies" under that section.

tax year 2000, 51.7% of the natural gas Columbia Transmission moved through its Ohio pipelines was on behalf of customers other than LDCs. (Supp. 665, 696; Tr. I 34-35, 158).

LDCs are also evolving toward a "common carrier" role. The volume of LDCs' Ohio throughput carried on a "transportation only" basis has gone from about 20 percent in 1986 to over 60 percent today. (Supp. 228, 569; Tr. II 214-16; Tr. VI 35; Second Supp. 353). For industrial and power customers, the vast majority of natural gas that Ohio LDCs deliver is carried on a transportation-only basis. (Supp. 569; Tr. VI 35; Second Supp. 356, 358). Moreover, as a result of "Choice" programs—now statutorily-mandated for most LDCs, Sub. H.B. 9, 124th Gen. Assem., Reg. Sess. (June 26, 2001); (Supp. 225; Tr. II 201-04; Second Supp. 352)—an increasing number of residential customers buy their natural gas from marketers who then ship it through LDCs. (Supp. 10, 576; Tr. VII 23-24; Tr. VI 61-62). Indeed, some LDCs, including East Ohio Gas Company, are seeking to move solely into the transport business, just as interstate pipelines have done. (Supp. 10, 607-08; Tr. VII 23-24; Tr. VI 188-89).

D. Columbia Transmission's Competitors.

The record includes extensive testimony about the competition Columbia Transmission faces in this restructured industry. This competition comes from several fronts. For example, Columbia Transmission competes with LDCs in (1) transporting natural gas, infra 31-32; (2) in providing delivery of natural gas to end users, infra 32-34; and (3) in providing natural gas storage, infra 34-35. Columbia Transmission also competes with transporters of fuels that are alternatives to natural gas, including refined petroleum products, infra 45-46; and competes with LDCs and other non-utility entities that provide natural gas "gathering" services, infra 35-36. Columbia Transmission's competitors in each of these areas receive the 25% assessment rate in contrast to the 88% assessment rate that the Commissioner imposed here. Infra 27, 46-47.

ARGUMENT

PROPOSITION OF LAW NO. 1: An Ohio taxpayer that transports natural gas interstate by pipeline and that engages in the business of delivering natural gas to Ohio consumers both directly and indirectly satisfies the definition of a "natural gas company" under R.C. 5727.01(D)(4) and is entitled to be treated as such for purposes of determining the proper assessment rate to apply for public utility personal property tax under R.C. 5727.111.

A. S.B. 287 Purports to Apply Differing Assessment Rates to Overlapping Categories of Taxpayers.

Since at least 1911, Ohio statutes have listed natural gas companies and pipe-line companies as two categories of "public utilities." Originally, personal property of "public utilities" was uniformly assessed at 100% of true value. Other businesses' personal property, by contrast, was assessed at a lower percentage. G.C. 5388 (114 Ohio Laws 720). Thus, the key question was whether a given entity was a public utility—not which kind. As time passed, however, the legislature enacted differing assessment rates for different public utility categories. E.g., G.C. 5388-5 (119 Ohio Laws 185)(May 8, 1941)(reducing rate for rural electric companies to 50%); R.C. 5727.12 (138 Ohio Laws 1784-85)(Dec. 31, 1979)(reducing rate for railroads); R.C. 5727.111 (143 Ohio Laws 9211)(Dec. 31, 1989)(reducing rate for most utilities, including natural gas and pipe-line companies, from 100% to 88%). But even then the assessment rate applicable to natural gas companies and pipe-line companies remained identical, and the distinction between the two thus remained largely inconsequential.

This changed in 1999. Under Am. Sub. S.B. No. 287, 123rd Gen. Assem., Reg. Sess. (Dec. 21, 2000) ("S.B. 287"), beginning in tax year 2001, personal property of natural gas companies and pipe-line companies was for the first time subject to significantly different assessment rates. R.C. 5727.111. (Appx. 18). Thus the distinction between these two statutory categories—although historically inconsequential—became critical.

Unfortunately, while this distinction imposes large tax consequences, the legislature has not updated the statutory definitions to account for industry changes. As a result, the definitions now create overlapping categories. Under the relevant definitions, an entity is a "natural gas company" "when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within [Ohio] . . . ." R.C. 5727.01(D)(4) (2000). An entity is a "pipe-line company," by contrast, "when engaged in the business of transporting natural gas . . . through pipes or tubing. . . ." R.C. 5727.01(D)(5). But today, companies traditionally thought of as "pipe-line companies" not only "transport" natural gas, they supply it directly to consumers. (Supp. 433, 1265-66, 1269; Tr. III 26-27; Second Supp. 355, 357). And companies traditionally considered "natural gas companies" not only "supply" gas to end users, they "transport" natural gas—indeed, much of their throughput is transportation-only. <u>Supra</u> 5.

In short, as the BTA recognized, "regulatory changes and increased competitive forces have significantly altered the natural gas industry during the last three decades, blurring former distinctions which may have existed between interstate pipeline companies and LDCs." (Appx. 23). While the Commissioner assessed Columbia Transmission as a "pipe-line company" at 88%, as shown below, it equally satisfies the definition of a "natural gas company."

B. Under the Plain Language of R.C. 5727.01(D)(4), Columbia Transmission Qualifies as a "Natural Gas Company."

An entity meets R.C. 5727.01(D)(4)'s definition of a "natural gas company" if it is "engaged in the business" of "supplying" natural gas to "consumers." Columbia Transmission meets this test in several ways.

First, in delivering natural gas to LDCs for subsequent delivery to customers, Columbia Transmission is "supplying" natural gas to Ohio "consumers." There is nothing in the statute that limits these terms to the final transfer of natural gas to the end user. <u>Cf. Buckeye Power,</u>

Inc. v. Kosydar (1973), 35 Ohio St.2d 137, 140 (company held to "supply" electricity to consumers although it only generated electricity, and did not transmit electricity to end users).

Second, even if there is a direct-delivery-to-end-user requirement, Columbia Transmission showed below that it directly delivers natural gas to numerous "consumers." Indeed, the Commissioner admitted that it is an "undisputed fact that some consumers directly connect and receive certain volumes of gas from" Columbia Transmission. (Br. to BTA 12.)

For example, Columbia Transmission delivers natural gas to its LDC affiliate Columbia Gas of Ohio, Inc., which in turn keeps a portion of the gas for its own use and hence constitutes a "consumer." (Supp. 1269). Indeed, in Carnegie Natural Gas Co. v. Tracy (Nov. 17, 1995), BTA No. 94-K-526, 1995 Ohio Tax LEXIS 1357, the BTA concluded that Columbia Gas of Ohio's use of just .013% of the gas it received made it a "consumer" under R.C. 5727.01, id. at *4, a conclusion that followed from this Court's decision in Shopping Ctrs Assn. v. Pub. Util. Comm. (1965), 3 Ohio St.2d 1, syllabus ¶ 2.

Moreover, "the record demonstrates that [Columbia Transmission] directly supplies natural gas to industrial, power-generating, residential, and farm customers for the purposes delineated in R.C. 5727.01(D)(4)." (Appx. 28). Although the Commissioner now seeks to minimize the significance of these direct connects (T.C. Br. 7-8, 12-13),[2] the record belies his efforts. Columbia Transmission witness Carl Levander explained that farm tap customers are "residential or small groupings of residential customers who do receive service directly off of the pipeline," using a regulator to reduce pressure to residential levels. (Supp. 450; Tr. III 94-95). The BTA recognized that Columbia Transmission "has groups of residential and 'farm tap' customers, totaling almost 32,000." (Appx. 21); accord (Supp. 1265-66, 1269; Second Supp. 2).

[2] "T.C. Br." refers to the Brief of Appellant / Cross-Appellee Tax Commissioner. "OSBA Br." refers to the Brief of Amicus Curiae Ohio School Boards Association.

Because this factual conclusion is "reasonable and lawful," it should not be revisited. R.C. 5717.04; Aluminum Co. of Am. v. Kosydar (1978), 54 Ohio St. 2d 477, 479.

Further, Columbia Transmission actively seeks out industrial and power direct connects, which can provide benefits by filling latent capacity and by creating opportunities for capital investments. (Supp. 70-71; Tr. VII 263-65). Witness Jim Crews explained that as manager of market development for Columbia Transmission during the relevant period, his focus was "to try to attract and attach direct connect customers to the interstate pipeline." (Supp. 69; Tr. VII 260). He explained that these are typically "large-volume customers," and he identified several: (1) a 500-megawatt power plant built by FirstEnergy in Lorain; (2) an older nearby Edgewater plant; (3) two Pacific Gas & Electric plants in Morrow County and Bowling Green; and (4) a Canton-area wall board plant. (Supp. 71; Tr. VII 267-68). Columbia Transmission identified these same end users in a chart it presented to the Tax Commissioner. (Supp. 1265-66, 1269).[3] Based on all this evidence, the BTA appropriately recognized Columbia Transmission's direct connections to "large industrial and electric generating companies." (Appx. 21).

In light of the various types of consumers who receive natural gas directly and indirectly from Columbia Transmission, there can be no question that Columbia Transmission is "engaged in the business of" supplying natural gas to Ohio consumers. R.C. 5727.01(D)(4). The Commissioner complains that the record identified only "a few industrial end-user customers." (T.C. Br. 12). But even delivering natural gas to a comparatively small number of consumers, especially "large-volume" consumers such as the power and industrial customers specified,

[3] The Commissioner's attacks on this chart (T.C. Br. 12-13) are unwarranted. While the chart reflects usage for 2002, Jim Crews testified that the same five end users specified were direct connects in the tax years at issue. The Commissioner also complains that the source documents used to compile the chart were not produced. But this was not required, as the document was part of the statutory transcript from the Tax Commissioner, which automatically becomes part of the record before the Board of Tax Appeals. See Ohio Locomotive Crane Co. v. Tracy, (July 16, 1999), BTA No. 97-K-918, 1999 WL 513805, fn 1, unreported, aff'd in part and rev'd in part on other grounds, Aug. 10, 2000), Cuyahoga App. No. 76805, 2000 WL 1144802, unreported.

(Supp. 71; Tr. VII 267-68), is adequate to put Columbia Transmission "in the business of" supplying and distributing natural gas. R.C. 5727.01(D)(4). See Commonwealth Nat. Resources, Inc. v. Virginia (1978), 219 Va. 529, 536 (concluding, for franchise tax purposes, that pipeline that primarily delivered gas to LDCs but also delivered to an industrial customer was engaged in the "business of distributing and selling natural gas").[4]

C. The Principle of Strict Construction Applies.

"Strict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St.2d 208, syllabus ¶ 1. As such, "[s]tatutes imposing a tax will be construed strictly against the state and liberally toward the taxpayer." Akron Transp. Co v. Glander (1951), 155 Ohio St. 471, 474. Under these principles, because Columbia Transmission satisfies the definitions of both a "natural gas company" under R.C. 5727.01(D)(4) and a "pipe-line company" under R.C. 5727.01(D)(5), the statute must be construed to give Columbia Transmission the benefit of the more favorable category.

Below, the Commissioner sought to evade this well-settled principle by claiming that the statutes at issue "are not ones that define the subjects of taxation as such." (T.C. Br. to BTA 15-16). But this Court has never understood the principle of strict construction to be so limited. See, e.g., Gulf Oil, 44 Ohio St.2d at syllabus ¶ 1; Bowman v. Tax Comm. (1939), 135 Ohio St. 295, 304 ("All tax laws as well as the application of such laws are to be construed strictly against the state."). Consistent with this inclusive formulation, strict construction has been applied to

[4] Cf. R.C. 5739.01 (F), (G) (for sales tax purposes, defining "engaging in business" as "commencing, conducting, or continuing in business . . ." where "business" is defined as "any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect") (emphasis added); accord State ex rel. City Loan & Sav. Co. v. Zellner (1938), 133 Ohio St. 263, 263, 272 (Where lender's sale of repossessed property was "continually and systematically" conducted, lender was "engaged in the business of selling tangible personal property" even though such sales represented only "about 1/1000 of the volume of its business").

statutes not defining "subjects of taxation." See Gulf Oil, 44 Ohio St.2d at 216-18 (where business fell within two statutory descriptions leading to different apportionment methodologies, method most favorable to taxpayer applied); Roxane Laboratories v. Tracy (1996), 75 Ohio St.3d 125, 127 (strict construction applied to question whether report of combined income was timely). In any event, because a taxpayer's classification as a "natural gas company," "pipe-line company," or both determines whether its property is subject to the public utility personal property tax of Chapter 57, R.C. 5727.01, 5727.06, the definitions here do define "subjects of taxation" and should be strictly construed even under the Commissioner's theory.

D. Treating Columbia Transmission As A Natural Gas Company Is Necessary to Avoid Serious Constitutional Issues.

The BTA's interpretation not only honors the statute's terms, it also avoids the serious constitutional questions that result from the Commissioner's reading. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." Jones v. United States (1999), 526 U.S. 227, 239 (citation and quotation omitted); see also, e.g., Co-operative Legislative Commt. of Transp. Bhds. v. Pub. Util. Comm. (1964), 177 Ohio St. 101, syllabus ¶ 2. Because treating Columbia Transmission as a pipe-line company results, at least, in serious constitutional questions, infra 25-50, avoiding that reading is warranted.

E. The Commissioner's Arguments For Not Treating Columbia Transmission as a Natural Gas Company Are Unavailing.

This Court has repeatedly stated that "[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." Vought Industries, Inc. v. Tracy, 72 Ohio St.3d 261, 265-66, 1995-Ohio-18 (quotation omitted). Rather, a court's "obligation is to apply the statute as written." Id. at 266. Yet, here, to avoid the statute's actual terms, the Commissioner offers up a series of non-statutory arguments for refusing to treat Columbia Transmission as a "natural gas company." The Court should decline this invitation to rewrite the statute. See State ex. rel. Foster v. Evatt (1944), 144 Ohio St. 65, 104 ("In seeking legislative intention courts are to be guided by what the legislative body said rather than what we think they ought to have said.").

1. The Commissioner's "Primary Business" Reading Lacks Support in the Statute.

(a) The statute considers only whether the taxpayer is "engaged in the business" of supplying or distributing natural gas.

The Commissioner engrafts the word "primarily" onto the statute, limiting "natural gas companies" to entities primarily "engaged in the business of supplying or distributing natural gas to consumers." R.C. 5727.01(D)(4). But that word appears nowhere in the text. As discussed, an entity can be "in the business of" supplying natural gas based on even a relatively small number of customers, and regardless of whether it may be "primarily" engaged in a different business. Supra 10. Changes to statutory text are the Legislature's purview, not this Court's. Cf. Storer Communications, Inc. v. Limbach (1988), 37 Ohio St.3d 193, 194 (where tax statute considered whether "the income-producing activity" involved solicitation, Commissioner and BTA erred in interpreting as "the principal income-producing activity").

(b) R.C. 5727.02 does not apply here.

The Commissioner argues that R.C. 5727.02(A) is the "dispositive statute" requiring adoption of a "primary business" test. (T.C. Br. 19). Tellingly, however, the Commissioner did not even cite this now-"dispositive" provision before the BTA. See Bd. of Edn. v. Kinney (1986), 24 Ohio St.3d 184, 185 ("As a general rule, this court will not consider matters which were not presented to the Board of Tax Appeals.").

In any event, the Commissioner was correct not to raise this argument below—the provision has nothing to do with this case. R.C. 5727.02(A) does not address how to distinguish between types of public utilities or, more specifically, between a "pipe-line company" and a "natural gas company." Rather, it establishes a test for determining whether an entity is a "public utility" at all. Under R.C. 5727.02(A)(1) if an entity is engaged in "some other primary business to which the supplying of electricity, heat, natural gas, water, transportation, steam or air to others is incidental," then it is excluded from the definition of a "public utility" and from the definitions of specific types of public utility (e.g. "electric company," "natural gas company," or "pipe-line company"). The remaining subsections of R.C. 5727.02 are similar, providing that certain taxpayers that undertake minor utility-type activity are not public utilities at all. See R.C. 5727.02(B) (entity supplying utility services to tenants); R.C. 5727.02(C) (petroleum producers and refiners); R.C. 5727.02(D) (natural gas producers and gatherers).

The flaw in applying R.C. 5727.02 here, then, is obvious. The Commissioner argues that Columbia Transmission falls outside the category "natural gas company" because it is "engaged in some other primary business to which the supplying of...natural gas is incidental." R.C. 5727.02(A)(1). But if that is true, then not only would it fail to qualify as a "natural gas company," it would not qualify as a "pipe-line company" or as a "public utility" at all. Id.

Because no one, including the Commissioner, has suggested that R.C. 5727.02 takes Columbia Transmission outside the definition of a "public utility," that necessarily means that Columbia Transmission is not "engaged in some other primary business to which the supplying ...of natural gas is incidental." R.C. 5727.02(A)(1). Rather, the structure of R.C. 5727.02 confirms that "supplying natural gas" is a central, not an "incidental" role of an interstate pipeline—whether by delivery to LDCs or directly to consumers. Supra 3-4, 7-10.

(c) Case Law Does Not Support The "Primary Business" Interpretation.

The Commissioner argues that even if R.C. 5727.02 has no application here, a "primary business" interpretation of R.C. 5727.01(D) is nonetheless appropriate. (T.C. Br. 20-21). The cases the Commissioner cites, however, do not support him.

Three of the cited cases apply a "primary use" test to determine whether a transaction is excepted from sales tax because of the transferred item's direct use for statutorily specified purposes.[5] The Commissioner cites no authority for using this test outside the sales tax context. See Kroger Co. v. Lindley (1978), 56 Ohio St.2d 138, 142 ("The primary use test has been limited in its application by this court solely to the confines of R.C. 5739.01."). Moreover, these cases involve sales tax exemptions, which, unlike other tax statutes, are construed against the taxpayer. E.g., Natl. Tube Co. v. Glander (1952), 157 Ohio St. 407, syllabus ¶ 2. Finally, the statutes contained nothing resembling R.C. 5727.01(D)'s "engaged in the business of" language.

The other cases the Commissioner cites considered an item's primary use in addressing whether it had lost its character as personalty due to attachment to and dedication to the purposes of land or a vehicle.[6] But that inquiry is necessarily a matter of degree, making consideration of the property's "primary use" natural and appropriate. That is a far cry from simply engrafting the word "primarily" into the statute's "engaged in the business of" formulation here.

Finally, each of the Commissioner's cases involved determining the primary functions of a piece of property, not the primary roles of a taxpayer, which is the question here. In fact, in Manfredi, the Court rejected the BTA's analysis for wrongly focusing on the activity in which

[5] Mead Corp. v. Glander (1950), 153 Ohio St. 539; A.J. Weigand, Inc. v. Bowers (1960), 171 Ohio St. 78, 79; Manfredi Motor Transit Co. v. Limbach (1988), 35 Ohio St.3d. 73.

[6] Zangerle v. Std. Oil Co. of Ohio (1945), 144 Ohio St. 506 (land); Parisi Transport. Co. v. Wilkins, 102 Ohio St.3d 278, 2004-Ohio-2952 (vehicle).

the taxpayer was "primarily and principally engaged." According to the Court, that was "not the question." Id. at 76. Rather, the question was the primary use of the particular property.

The distinction is important. Part of the tax scheme's problem here is that it imposes different assessment rates for different taxpayers, even if they use the same types of property for the same functions in competing with one another. Thus, while LDCs in Ohio own substantial property whose "primary use" is long-distance natural gas transport and storage, under the Commissioner's approach, that property is taxed more favorably than Columbia Transmission property which has an identical primary use. Infra 28-31; cf. State ex rel. Hostetter v. Hunt (1937), 132 Ohio St. 568, 582 (legislature can "classify personal property for the purpose of taxation" but not "classify taxpayers so as to distribute the burdens of taxation unequally").

(d) Where the General Assembly Intends to Focus on a Taxpayer's "Primary Business," It Has Done So.

Where the General Assembly wishes to base statutory distinctions on a taxpayer's "primary" business, it does so expressly. [7] For example, R.C. 5727.01(D)(2) defines telephone companies as those "primarily engaged in the business of providing local exchange telephone service." In turn, R.C. 5727.01(H) defines an "interexchange telecommunications company" as "a person that is engaged in the business of transmitting telephonic messages to, from, through, or in this state, but that is not a telephone company." This pairing of definitions—unlike those for natural gas companies and pipe-line companies in the same section—ensures that "telephone companies" and "interexchange telecommunications companies" are disjoint categories. "Having used certain language in the one instance and wholly different language in the other, it

[7] E.g., R.C. 5709.55 (exempting from personal property tax property used to process grapes if used by holder of liquor permit whose "primary business" is production of wine); R.C. 5725.01 (defining "dealer in intangibles" as engaging in "a business that consists primarily of" lending money or other listed activities); R.C. 5733.09(D)(1) (defining "commercial printer" as a person "primarily engaged in the business of commercial printing"); R.C. 3734.31 (defining "commercial hazardous waste landfill" in terms of its "primary business activity").

will . . . be presumed that different results were intended." Metro. Sec. Co. v. Warren State Bank (1927), 117 Ohio St. 69, 76; accord State v. Edmonson, 86 Ohio St. 3d 324, 326 1999-Ohio-110 (discerning from "difference in the language of . . . sections within the same chapter and on the same subject" that had the legislature intended a particular interpretation in one provision, "it would have explicitly expressed that intent as it did in" the other).

(e) The Commissioner's Factual Assertions Regarding Columbia Transmission's "Primary Business" Are Irrelevant.

The Commissioner spends significant portions of his brief setting forth factual assertions that he believes demonstrate that Columbia Transmission's "primary business" is something other than supplying natural gas directly to consumers. (T.C. Br. 7-14, 19-20). As R.C. 5727.01 does not include a "primary business" test, however, those assertions are irrelevant.

Moreover, the Commissioner's arguments fall short on their own terms. The Commissioner's flawed efforts to minimize Columbia Transmission's deliveries to end users have already been discussed. Supra 7-10. The Commissioner also emphasizes that Columbia Transmission classifies its property as "transmission" rather than "distribution" under FERC's uniform system of accounts. (T.C. Br. 8-12). But under the FERC accounts, "distribution" property includes only property used primarily for delivery of gas "within a distribution area." ¶ 29, Part 201, Title 18, C.F.R. See also infra 30. While Columbia Transmission delivers substantial amounts of natural gas directly to isolated, often large consumers near its pipelines, supra 8-9, these deliveries are not within a "distribution area." As such, it is neither surprising nor informative that Columbia Transmission does not characterize its property as "distribution" property and it certainly does not mean that Columbia is not distributing gas.[8]

[8] Moreover, any claim that a taxpayer that characterizes its property largely as "transmission" property under the FERC accounts cannot be a "natural gas company" is inconsistent with the record, which demonstrates that other taxpayers that are treated as natural gas companies report large quantities of "transmission" property under the FERC definition. Infra 28-31.

2. The Commissioner's Reliance on Columbia Transmission's Regulatory Treatment is Misguided.

(a) The Distinction Between Federal and State-Regulated Entities Does Not Track the Ohio Definitions.

The Commissioner's effort to justify his interpretation of "pipe-line companies" and "natural gas companies" as somehow paralleling federal statutes that distinguish between entities subject to federal and state control falls flat. (T.C. Br. 5-6). To begin with, the Ohio tax statutes make absolutely no reference to the federal statutes that create this regulatory division. Moreover, those federal statutes employ entirely different terminology, making any implicit cross reference to them more confusing than helpful. <u>See, e.g.,</u> 15 U.S.C. § 717a(6)(defining "natural gas company" to include interstate pipelines). Finally, any suggestion that the Ohio definitions of "natural gas company" and "pipe-line company" track the distinction between state- and federally-regulated entities founders on the fact that some companies taxed as pipe-line companies are in fact regulated by PUCO, not FERC. (T.C. Br. 6).

(b) Regulatory Definitions Do Not Control in Interpreting Tax Provisions, and It Is Inappropriate to Rely on Such Regulatory Definitions Here.

In other places, the Commissioner argues that R.C. 5727.01's definitions must be interpreted to track the PUCO's interpretation of similar definitions in R.C. 4905.03. (T.C. Br. 15-19). But the interpretation of regulatory statutes is "not controlling" in a tax case. <u>See</u> <u>Akron Transp. Co.,</u> 155 Ohio St. at 474. Instead, the definitions of "public utility" in Chapter 4905 and 5727 "are relevant solely to the statutory chapters in which they are located." <u>Castle Aviation, Inc. v. Wilkins,</u> 109 Ohio St.3d 290, 293 2006-Ohio-2421 (quotation omitted).

The Commissioner's cases are not to the contrary. <u>Chrysler</u> looked to a PUCO order as a tool in interpreting particular terminology, but did not suggest that this cross referencing was mandatory. <u>Chrysler Corp. v. Tracy,</u> 73 Ohio St. 3d 26, 28, 1995-Ohio-124. And while the

Tenth District dredged from MCI Telecomm. Corp. v. Limbach, 68 Ohio St. 3d 195, 1994-Ohio-489, the principle that the Tax Commissioner "must reconcile his construction of the term 'transmitting telephonic messages' with that of PUCO," AirTouch Paging v. Tracy (1996), 111 Ohio App.3d 202, 209, nothing in the decision itself supports that reading. Instead MCI simply concluded, on the facts of a particular case, that two groups of entities both of which the PUCO treated as telephone companies under a definition identical to the tax definition, both of which used "the same type of equipment," and both of which the PUCO regulated in an identical manner could not, consistent with Equal Protection, be differentially taxed. MCI, 68 Ohio St.3d at 200; see also Southwestern Bell Mobile Systems, Inc. v. Ark. PSC (2001), 73 Ark. App. 222, 227 (noting that MCI, and indeed, Airtouch itself, "would have to be read very broadly" to support the argument that regulatory and assessment authority must be symmetric). In the end, the most that these cases establish is that, as the BTA has put it, "under certain circumstances, it may be appropriate to consider the PUCO's interpretation and application of the latter statutes when determining the effect of the former." Carnegie, 1995 Ohio Tax LEXIS 1357 at *16-18 (considering regulatory treatment, but refusing to find it controlling in tax case).

Even if interpretations of regulatory statutes can sometimes shed light on language in tax provisions, that is not the case here, as the considerations in interpreting the two statutes differ significantly. As an initial matter, in light of the principle that tax statutes must be construed in the taxpayer's favor, the definitions of "natural gas company" and "pipe-line company" in R.C. 5727.01 must be interpreted in favor of Columbia Transmission, even if no similar interpretive principle would guide the similar definitions under R.C. 4905.03.

Further, the Dormant Commerce Clause and the preemptive effect of the Natural Gas Act severely limit the States' ability to regulate a natural gas utility operating interstate. See, e.g., Schneidewind v. ANR Pipeline Co. (1988), 485 U.S. 293, 300-01. Thus, it is federal preemption, not Ohio's statutory definition, that prevents the PUCO's treatment of Columbia Transmission as a "natural gas company." In re Complaint of Steve Bowman (May 19, 1987), PUCO No. 83-1328-GA-CSS, 1987 Ohio PUC LEXIS 1241 at *8-9 (federal preemption precluded PUCO from exercising jurisdiction over Columbia Transmission, even if the company met the definition of a "natural gas company" in R.C. 4905.03).

For purposes of state taxation, in contrast, treating an interstate pipeline as a "natural gas company" subject to the same treatment as state-regulated LDCs poses no preemption concern. In fact, failing to do so raises substantial constitutional issues. Infra 41-44. That is, whether a utility operates locally or interstate is a logical and constitutionally required distinction in drawing regulatory lines. It is, however, an irrelevant and constitutionally prohibited distinction in drawing lines for purposes of state taxation. Thus, the principle calling for avoidance of constitutional doubt pulls the tax definitions and regulatory definitions in opposite directions.

Indeed, the federal preemption issues here make any discussion of how the PUCO treats Columbia Transmission all but meaningless. In fact, because of the broad preemption of state regulation of interstate natural gas transportation, the best description of how the PUCO treats Columbia Transmission is, "it doesn't." The Commissioner makes much of the fact that Columbia Transmission is not on the PUCO's list of "natural gas companies." (T.C. Br. 2). What the Commissioner fails to note is that Columbia Transmission is also not on the PUCO's comparable list of "pipe-line companies," which is limited to intrastate companies. (Supp. 1340).

In any event, even if the PUCO views Columbia Transmission as a "pipe-line company" under R.C. 4905.03 for some limited purpose, this characterization is entitled to no weight in interpreting the taxing statutes as the PUCO has acknowledged that federal preemption forecloses the alternative of treating Columbia Transmission as a "natural gas company." Cf. Carnegie, 1995 Ohio Tax LEXIS 1357 at *17-18 (giving tax and regulatory definitions different interpretations, noting possible preemption issues affecting regulatory interpretation).

(c) Appeal to the Regulatory Definitions Is Inconsistent with the Commissioner's Other Arguments.

The Commissioner's argument that the tax interpretations of "natural gas company" and "pipe-line company" must blindly mimic PUCO interpretations is inconsistent with his argument that a "primary business" test should control, as such a test is not used in the regulatory context See Atwood Resources, Inc. v. Pub. Util. Comm. (1989), 43 Ohio St.3d 96, 101 (holding natural gas producer supplying two consumers was "engaged in the business of supplying natural gas" within R.C. 4905.02, without consideration of whether that was its "primary business"). Indeed, a "primary business" interpretation would be problematic in the regulatory context, allowing entities with some other "primary" business to undertake substantial public-utility-type activity without qualifying as a "public utility" and thus without falling under the PUCO's authority.[9]

Analogy to the regulatory context also undermines the Commissioner's argument that Columbia Transmission cannot meet both the definition of a natural gas company and a pipe-line company. See R.C. 4905.42 ("No company that is both a pipe-line company . . . and a natural gas company ... shall be required to apply to the commission for authority to issue stocks, bonds, [etc.] . . ." (emphasis added)); Panhandle E. Pipe Line Co. v. Pub. Util. Comm. (1978), 56 Ohio St.2d 334, 335-36 (characterizing entity as "both a 'natural gas company' as defined in R.C. 4905.03(A)(6) and a 'pipe-line company' under R.C. 4905.03(A)(7)").

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[9] A "primary business" interpretation is equally ill suited to other Ohio statutes with "engaged in the business" language. See, e.g., R.C. 5743.41 (no person "engaged in the business of trafficking in cigarettes" shall fail to display required license).

3. The Commissioner's Interpretation Is Not Entitled to Deference.

The Commissioner urges deference to the "on-going and settled administrative practices by the taxing and regulatory authorities alike." (T.C. Br. 17). But deference is not appropriate.

As an initial matter, the Commissioner's effort to claim that PUCO's interpretation of regulatory statutes is entitled to deference in a tax appeal has no basis. (T.C. Br. 17). The PUCO does not interpret the tax statutes, and, as discussed above, its interpretation of similar statutory language in the regulatory arena is a completely distinct issue. Likewise, the Commissioner's apparent attempt to argue for deference to FERC's interpretation of federal regulatory statutes, (T.C. Br. 17-18), goes from incorrect to ridiculous—the federal statutes use entirely differently terminology, and relate to entirely different matters than the Ohio tax code.

Nor is the Tax Commissioner's own interpretation entitled to significant weight here. First, Columbia Transmission is within the plain statutory definition of a "natural gas company," leaving no room for deference to the Commissioner's contrary view. See, e.g., Ohio Dental Hygienists Assn. v. Ohio State Dental Bd. (1986), 21 Ohio St.3d 21, 23; R.C. 1.49 (agency construction is a proper consideration when interpreting an "ambiguous" statute). Second, the Commissioner's plea for deference must give way to the principle that tax statutes are interpreted in favor of the taxpayer. See Gulf Oil, 44 Ohio St.2d at 208 (rejecting Commissioner's position and applying principle of strict construction to adopt interpretation favoring taxpayer); cf. State ex rel. Endlich v. Indus. Comm. (1984), 16 Ohio App. 3d 309 (rejecting Industrial Commission interpretation in light of competing principle that the Worker's Compensation Act is to be construed in favor of employees).

The Commissioner's claim that his current interpretation is "settled," (T.C. Br. 17), is misleading and adds nothing. No regulation or other formal decision reflects the distinction between "pipe-line companies" and "natural gas companies" that the Commissioner presses here.

The distinction is, at most, a "matter of practice" entitled to little deference. See Condee v. Lindley (Nov. 30, 1983), BTA No. 81-F-652, 1983 Ohio Tax LEXIS 48 at *13-14, aff'd (1984), 12 Ohio St.3d 90) (deference to Commissioner's interpretation "as a matter of practice" presented "an entirely different problem" than if properly promulgated rule applied); cf. United States v. Mead Corp. (2001), 533 U.S. 218, 221 (administrative ruling without "force of law" entitled only to "respect according to its persuasiveness"). Moreover, until tax year 2001, the distinction between "pipe-line companies" and "natural gas companies" had no personal property tax consequences.

Indeed, deference to this "settled" interpretation is particularly inappropriate given that once S.B. 287 established differing assessment rates, tax officials opined that this difference (combined with their "settled" interpretation) raised serious constitutional concerns. Infra 40. Administrative interpretations that cause constitutional concerns, as this one does, infra 25-26, do not receive deference. See Solid Waste Agency v. United States Army Corps of Engineers (2001), 531 U.S. 159, 172-73.

4. Arguments Regarding the Financial Consequences of Reversal Cannot Justify Depriving Columbia Transmission of a Classification for Which It Qualifies.

The Commissioner and his amicus emphasize the amounts of money at issue in this and similar cases, as if the taxpayer's entitlement to a refund or credit could be offset by the practical inconvenience of giving it. (T.C. Br. 2, 21-23; OSBA Br. 1). But this Court's role, whatever the amount in question, is to apply the law as written. The fact that this case involves significant amounts makes it all the more crucial that the Court fulfill this role, to avoid Columbia Transmission and others being improperly subjected to substantial taxes.

Equally unavailing is the Commissioner's argument that Columbia Transmission must continue to be assessed at 88% because otherwise the General Assembly's intended "replacement tax" revenues will fall short. (T.C. Br. 21-23). Because it was LDCs that sought the tax change enacted in S.B. 287, infra 49-50, the General Assembly may well have focused on LDCs in crafting the replacement tax. But even if the General Assembly did not focus on the possibility that an interstate gas company would meet the statute's definition of a "natural gas company," that does not mean the General Assembly intended to foreclose that result. And it certainly does not trump the actual statutory definition of "natural gas company." "The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact." Foster, 144 Ohio St. 65 at syllabus ¶ 7. The fact that S.B. 287 may not have perfectly achieved revenue neutrality cannot justify failing to give Columbia Transmission the tax treatment to which the statute's terms entitle it.

5. Amicus's Alternative Argument Has Not Been Raised by the Commissioner and Finds No Basis in the Tax Code.

Perhaps recognizing the weakness of the Commissioner's arguments, appellant's amicus raises an alternative argument that this Court should "require separation of the end user portion of [Columbia Transmission's] business from the transportation to distribution companies portion and assess each portion separately." (OSBA Br. 6).

It is enough ground to reject this argument that it is raised by an amicus, has not been raised by the Commissioner, and was not presented to, or considered by, the Board. See, e.g., State ex rel. Hattie v. Goldhardt (1994), 69 Ohio St.3d 123, 125 n. 1; Lakewood v. State Emp. Relations Bd., (1990) 66 Ohio App. 3d 387, 394.

Amicus's suggestion is, in any event, without basis. An initial problem with "separating" Columbia Transmission's property as amicus suggests is that the "end user" portion and "transportation to distribution companies" portion do not correspond with the statutory definitions, which nowhere speak in those terms. Moreover, even apart from this mismatch, amicus's suggested "separation" is neither workable nor legally justified.

Amicus cites General Am. Transp. Corp. v. Limbach (1984), 15 Ohio St.3d 302, which considered whether inventories used in a taxpayer's manufacturing operation were exempt from the personal property tax on general businesses by virtue of the taxpayer's public utility status as an "equipment company." Concluding that the taxpayer's "manufacturing operations are distinct from its equipment leasing operations," this Court subjected the inventories to the personal property tax, since "only the manufacturing operations are involved herein." Id. at 305.

The situation here is quite different. Columbia Transmission does not have "distinct" sets of property, cf. General American at 305, one of which delivers natural gas to end users and the other of which delivers natural gas to LDCs. Instead, Columbia Transmission has a single, integrated system of pipeline and other equipment which serves to transport natural gas both to end users and to intermediaries for further delivery, not to mention serving other functions such as storing natural gas and transporting natural gas to and from storage areas.

In this inherently more complex case, any segmentation of property into differently assessed "portions" must come from the legislature, not from the ad hoc judicial interpretation amicus requests. Indeed, since General Am. Transp, the General Assembly has tailored statutes to segment public utilities' property into different assessment categories in specific situations. For example, current statutes assess an electric company's transmission and distribution property differently than its other property. R.C. 5727.111(A), (E). Moreover, the legislature has defined a category of "combined companies," which act both as electric or rural electric companies and as natural gas or heating companies. R.C. 5727.01(L). In creating this category, the General

Assembly made express, detailed rules for how to attribute property to the companies' differing functions, and for how companies should report that property. R.C. 5727.03.

In effect, amicus urges this Court to expand the "combined company" concept to taxpayers, such as Columbia Transmission, who clearly fall outside that provision's scope. But given that the General Assembly limited that concept to a specific group of taxpayers, it would be improper to judicially engraft a similar treatment onto the tax code for other public utilities. The amicus should direct its request to the General Assembly, not this Court.

PROPOSITION OF LAW NO. 2: Under the Commissioner's interpretation, R.C. 5727.01(D)(4) and (5) fail to adequately define tax classifications subject to different assessment rates, and are void for vagueness on their face and as applied, in violation of Due Process protections of the Ohio and U.S. Constitutions.

The Due Process clauses of both the Ohio and U.S. Constitutions require that laws "provide explicit standards for those who apply them" in order to prevent "arbitrary and discriminatory enforcement." Grayned v. City of Rockford (1972), 408 U.S. 104, 108-09. See also Buckley v. Wilkins, 105 Ohio St.3d 350, 353, 2005-Ohio-2166. The statutory definitions here fail that test because, when a company both transports natural gas and supplies it to consumers, the definitions of "natural gas company" and "pipe-line company" provide no objective basis for deciding between them. Lacking legislative guidance, the Commissioner must simply decide for himself whether to treat a given company as a pipe-line company or a natural gas company. The statute thus "impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis" and opens the door to "arbitrary and discriminatory application." Grayned, 408 U.S. at 108-09. Cf. O'Brien v. Ohio Lottery Comm. (11th Dist. 2005), No. 2004-L-017, 2005 WL 694288, *3-4 (regulation giving lottery director discretion to deny lottery licenses violated due process because it failed to provide "'sufficient standards to prevent arbitrary and discriminatory enforcement'") (quoting State v. Williams, 88 Ohio St.3d 513, 532 2000-Ohio-428).

PROPOSITION OF LAW NO. 3: Where a federally regulated interstate natural gas pipeline company serves the same transportation and storage functions as state-regulated local distribution companies and competes in serving those functions, the Commerce Clause of the U.S. Constitution forbids assessing the interstate pipeline's property at a higher rate than that of competing local distribution companies.

A. The Dormant Commerce Clause Forbids State Taxes That Discriminate Against Or Unduly Burden Interstate Commerce.

The Commerce Clause imposes substantial limits on States' power to regulate or tax interstate commerce. State taxes that discriminate against interstate commerce are strictly forbidden. E.g., Associated Industries v. Lohman (1994), 511 U.S. 641, 646-47. A State tax violates the Commerce Clause when it discriminates against interstate commerce either by providing a direct commercial advantage to local business, Bacchus Imports v. Dias (1984), 468 U.S. 263, 268, or by discriminating on the basis of some "interstate element," Boston Stock Exchange v. State Tax Comm. (1977), 429 U.S. 318, 329, or by distinguishing between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, Camps Newfound/Owatonna v. Town of Harrison (1997), 520 U.S. 564, 576. "Once a state tax is found to discriminate against out-of-state commerce it is typically struck down without further inquiry." Chem. Waste Mgt., Inc. v. Hunt (1992), 504 U.S. 334, 342.

Impermissible discrimination is at times plain on the face of the statute. See, e.g., Oregon Waste Sys., Inc. v. Dept. of Environmental Quality (1994), 511 U.S. 93, 95, 100. However, the Commerce Clause also forbids taxes which, though nondiscriminatory on their face, discriminate against interstate commerce in their practical operation. See, e.g., Hunt v. Wash. State Apple Advertising Comm. (1977), 432 U.S. 333, 350-51; Robbins v. Shelby Cty. Tax. Dist. (1887), 120 U.S. 489. The proper analysis asks whether the challenged statute "will in its practical operation work discrimination against interstate commerce." Dayton Power & Light Co v. Lindley (1979), 58 Ohio St.2d 465, 468 (quotation omitted).

Even where a state law does not affirmatively discriminate against interstate commerce, it will be invalidated if it unduly burdens interstate trade. Pike v. Bruce Church, Inc. (1970), 397 U.S. 137, 142. "Regulation rises to the level of an undue burden if it may seriously interfere with or 'impede substantially' the free flow of commerce between the states." Panhandle E., 56 Ohio St.2d at 339 (citation omitted) (law requiring PUCO approval for interstate pipeline to issue securities unduly burdened interstate commerce).

B. The Tax Structure Here Discriminates Against And Unduly Burdens Interstate Commerce On Its Face And As Applied.

Under the Commissioner's reading of R.C. 5727.01, an interstate pipeline—even one that delivers significant amounts of natural gas directly to Ohio consumers—is treated as a "pipe-line company" assessed at 88% under R.C. 5727.111. While there may also be some "intrastate" companies in this category, as the Commissioner's Final Determination recognized, at least in Ohio, "pipeline companies tend to be interstate businesses." (Second Supp. 2). Cf. Dayton Power & Light Co., 58 Ohio St.2d at 473 (taxing high sulfur coal more favorably than low sulfur coal impermissibly discriminatory where most, but not all, Ohio coal was in favorably taxed category). On the other hand, local distribution companies—which, as the Final Determination noted, "tend to operate in one state only" and be subject to State regulation (Second Supp. 2)—are treated as "natural gas companies" assessed at 25%. Under the Commissioner's reading, then, the statute discriminates against interstate pipelines as compared to LDCs, both on its face and in its effect. Indeed, like a flat tax that imposes a greater rate per mile on interstate than local trucks, see Am. Trucking Assn. v. Scheiner (1987), 483 U.S. 266, 285, Ohio's taxing structure imposes a greater property tax burden per mile on interstate pipelines than on LDC pipelines, rendering it "plainly discriminatory," id. at 285-86. As such, it is subject to "a virtually per se rule of invalidity." Granholm v. Heald (2005), 544 U.S. 460, 476.

There are no relevant differences between interstate pipelines and LDCs that justify the differential rates. To be sure, assessing a Commerce Clause claim of discrimination presumes "a comparison of substantially similar entities." General Motors Corp. v. Tracy (1997), 519 U.S. 278, 298-99. Violation of the Commerce Clause does not, however, require that the entities be in all aspects identical. Nor is it enough if one can hypothesize a "rational basis" for distinguishing them, as would be the case under the Equal Protection Clause. Dayton Power & Light Co., 58 Ohio St.2d at 474-75. Instead, in analyzing discrimination under the Commerce Clause, the focus is on whether there is "actual or prospective competition" between the supposedly favored and disfavored entities. General Motors, 519 U.S. at 299-300.

Here no one can dispute that LDCs and interstate pipelines are "substantially similar" for Commerce Clause purposes. Although the General Motors decision discussed unique features of LDCs, the comparison there was to unregulated natural gas marketers. 519 U.S. at 301. Here, in contrast, the comparison is between interstate, federally-regulated natural gas pipelines and state-regulated local distribution companies. As the remainder of this section will show, these entities are part of the same natural gas distribution network, own the same sorts of property, and compete with one another in various ways. The only real distinction between the two is that one operates interstate and the other operates locally. Under the dormant Commerce Clause, that difference emphatically cannot be used to justify differential treatment.

1. Interstate Pipelines And LDCs Use Similar Transportation Equipment For Similar Purposes.

Both interstate pipelines and LDCs use large amounts of pipe for identical purposes. (Supp. 60, 597; Tr. VII 222-23; Tr. VI 145). They also both use: valves and fittings; meters;

SCADA monitoring systems; odorizers; and filter separators. (Supp. 57-60, 594-96; Tr. VII 209-21; Tr. VI 135-42). In short, "LDCs use the identical equipment that interstate transmission companies use, manufactured in accordance with the same codes." (Supp. 60; Tr. VII 222-23). Thus, the difference in assessment rates cannot be justified by differences in the nature of the property the two companies use.[10]

Reports the companies file with the federal Office of Pipeline Safety further illustrate the similarity of "natural gas company" pipelines and "pipe-line company" pipelines. In these reports, pipelines are divided into "transmission" and "distribution" lines based primarily on the "hoop stress" at which they operate. Section 192.3, Title 49, C.F.R. (Supp. 593; Tr. VI 130). Pipelines classified as "transmission" are generally larger-diameter, higher-pressure pipelines that transport natural gas over longer distances, while "distribution" lines are usually smaller and used for shorter runs. (Supp. 12, 571, 594; Tr. VII 26; Tr. VI 42, 133).

Reports filed with the Office of Pipeline Safety demonstrate that state-regulated local "distribution" companies in fact own substantial amounts of "transmission" line. For example, several Ohio LDCs reported owning "transmission" lines for calendar years 1999 and 2000.[11] Yet, the LDCs' personal property, including transmission lines, was assessed at 25%. (Supp. 710-12; Tr. I 214-24, 240-41; Second Supp. 780-86, 866-67).

Columbia Transmission reports the same sort of "transmission lines" to the Office of Pipeline Safety. (Second Supp. 740-41). Yet its lines—like the rest of Columbia Transmission's

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[10] Illustrating this, National Gas and Oil Cooperative ("NGO") operated during the tax years as an LDC assessed at 25%. (Second Supp. 784). It subsequently spun down certain pipeline and storage assets into a separate FERC-related entity. <u>See</u> <u>NGO Transm., Inc.</u> (2003), 105 FERC P 61,138; (Supp. 431, 441; Tr. III at 20, 59). As a result, these assets changed ownership—and assessment rate—overnight.

[11] Dominion East Ohio, National Gas & Oil Cooperative, Northeast Ohio Natural Gas, Cincinnati Gas & Electric Company, Southeastern Natural Gas, Constitution Gas Transport Co., Inc., and KNG Energy, Inc. (Second Supp. 359, 742-72).

property—are assessed at 88% of true value. (Supp. 1156-58). This is so even though the LDCs' transmission lines "can move gas at the same pressures, [and] the same volumes, that interstate gas pipelines can move the gas at." (Supp. 65; Tr. VII 244).

FERC regulations similarly reflect the functional overlap between Columbia Transmission's personal property and that of LDCs. FERC's Uniform System of Accounts differentiates between "transmission" systems, which transmit gas from a production area "to one or more distribution areas," and "distribution" systems, which are used for "distributing gas within a distribution area." Part 201, Title 18, C.F.R. A "distribution area" is defined as "a metropolitan area or other urban area comprising one or more adjacent or nearby cities, villages or unincorporated areas, including developed areas contiguous to main highways." Id. The "distribution area" is a subjective concept, and is often treated as simply referring to a point where natural gas is transferred from an upstream pipeline company to a downstream LDC. (Supp. 572, 575, 613-14; Tr. VI 45, 58, 212-14).

Even under this location-driven definition, several Ohio LDC's identify a significant portion of their property as "transmission" rather than "distribution." The East Ohio Gas Company, for example, reported over $178 million worth of "transmission" property for tax year 2001—including 1,701 miles of transmission lines. (Supp. 670-71; Tr. I 56-57; Second Supp. 65, 130). And Southeastern Natural Gas Company—another LDC treated as a "natural gas company" and assessed at 25% (Second Supp. 786)—reported $1,008,771 in "transmission" property, and only $382,910 in "distribution" property. (Supp. 717; Tr. I 241; Second Supp. 786). Other Ohio LDCs also reported "transmission property." (Supp. 670-71; Tr. I 54-58; Second Supp. 12, 23, 149).

That LDCs own "transmission" lines is well known to the Department of Taxation. Professor Gary Cornia explained in his 1994 report to the Commission to Study the Ohio Economy and Tax Structure that several Ohio LDCs actually function as "transmission and distribution" utilities. (Second Supp. 154). Moreover, in analyzing the legislation that lowered the assessment rate for natural gas companies but not pipe-line companies, the Administrator of the Public Utility Tax Division expressed constitutional concerns precisely because "pipe line companies will have transmission property assessed at 88% of true value while natural gas companies will have transmission property assessed at 25% of true value." (Supp. 707-08; Tr. I 204-05; Second Supp. 299).

2. Companies Taxed As "Pipe-Line Companies" And Those Taxed As "Natural Gas Companies" Compete In Providing Natural Gas Transportation Services.

Interstate pipelines and LDCs not only own the same types of transportation property, they use that property in direct competition with each other. This occurs in several ways.

First, given the similarities in the equipment used by interstate pipelines and LDCs, whether a particular "leg" of transportation is provided by one rather than the other is largely arbitrary. One pipeline delivery path may involve transportation via interstate pipeline for hundreds of miles within Ohio and transportation by an LDC only for the last few miles. Another pipeline path may involve interstate pipeline property only to the Ohio state line, with all transportation in Ohio accomplished by an LDC. The physical components and function of the property in the two paths may be identical. A company siting a new plant or deciding where to expand its operation, for example, could choose between sites on the first path or the second path. (Supp. 446-47; Tr. III 78-81). But because the Ohio property in the second path is entirely owned by a "natural gas company," it will be assessed at 25%, in contrast with the primarily interstate-pipeline owned property in the first path, which will be assessed at 88%, creating a distinct competitive advantage for the second (more heavily LDC-owned) path. (Supp. 446-48, 675; Tr. III 78-85; Tr. I 74-75).

Nor is such competition purely hypothetical. Columbia Transmission's expert, Dr. David Dismukes, testified that LDC transmission lines in Ohio do compete with Columbia Transmission and other interstate pipelines (1) in linking interstate transmission to local distribution areas; (2) in linking production areas to distribution areas; and (3) in linking distinct distribution areas. (Supp. 443, 449-50; Tr. III 66, 90-95). Indeed, Dr. Dismukes detailed several specific locations in Ohio where such competition exists or could exist.[12]

The tax disadvantage is particularly acute in the context of "direct connects" to interstate pipelines. Because the gas flows directly from the interstate pipeline to the consumer, it suffers the discriminatory tax burden during the entirety of its trip. And, this form of competition is important. During the tax years here, 13 to 15 percent of gas delivered to industrial end users in Ohio was via direct connect. (Supp. 433-34; Tr. III 26-32; Second Supp. 355-56). In the highly competitive market for natural gas service to Ohio power customers (Supp. 436-38; Tr. III 40-48), direct connects constituted more than half of the natural gas delivered in 1999 and more than a third in 2000. (Supp. 438-39; Tr. III 47-52; Second Supp. 357-58).

The record contains several specific examples of competition or potential competition for direct connects. Dr. Dismukes identified numerous Ohio locations which, based on the geographic configuration of various companies' facilities, offer competitive potential for direct connects. (Supp. 476-78; Tr. III 199-208; Second Supp. 674-79). Columbia Transmission

[12] For example, Professor Dismukes highlighted one situation in western Ohio in which a 20-inch LDC line runs parallel to a nearby 24-inch interstate pipeline line. (Supp. 616; Tr. VI 221-23; Second Supp. 354). In another area, in eastern Ohio, a 30-inch LDC line operates near 26-inch interstate pipelines. Id. Exhibits 66 and 67 illustrate other locations presenting competitive opportunities between LDC and interstate pipelines. (Supp. 477-78; Tr. III at 201-04, 206-07; Second Supp. 675-76).

witness Jim Crews testified that Columbia Transmission actively competes for direct connects, and described specific situations in which Columbia Transmission competed directly against LDCs for service to industrial and power customers. (Supp. 69-73; Tr. VII 258-73). Dr. Dismukes explained that as with other delivery paths relying heavily on interstate pipeline property, the attractiveness of a direct connect is diminished by the higher tax costs on interstate pipeline property. (Supp. 439-41, 446-48, 478; Tr. III 52-57, 78-85, 206-07).

Given these various forms of competition, the differing assessment rates create an artificial preference for local ownership of Ohio pipeline facilities that "impede[s] free trade in the national marketplace," and squarely violates the dormant Commerce Clause. See Reeves, Inc. v. Stake (1980), 447 U.S. 429, 437. In Boston Stock Exchange, for example, the Court struck a New York stock transfer tax that had lower rates for transfers done through the New York exchange rather than out-of-state exchanges, finding that the tax "forecloses tax-neutral decisions" and "creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to her sister States." 429 U.S. at 331. The same is true here.

The differing assessment rates for "natural gas companies" and "pipe-line companies" can also skew these entities' construction decisions. Natural gas utilities earn money by building new assets that in turn lead to increased business, and, importantly, increase the costs the utility is entitled to recover under its tariffs. (Supp. 70, 367; Tr. VII 264; Tr. V 102). If Ohio taxes interstate pipeline assets at a higher rate than if an LDC owned the same assets, there is an artificial incentive to have LDCs rather than interstate pipelines undertake new development—regardless of which might otherwise be the best-suited. (Supp. 448; Tr. III 86).

This same skewing occurs with regard to organizational decisions. A taxpayer considering how to structure ownership of pipeline facilities as between an interstate pipeline affiliate and an LDC affiliate will have a tax incentive to place its Ohio assets in the hands of the Ohio LDC affiliate. (Supp. 448; Tr. III 87).

As to existing natural gas utilities with existing corporate structures, the differing assessment rates lead to an arbitrary advantage for organizations that happen to have a larger range of pipeline property in the hands of their in-state, LDC affiliate rather than the interstate pipeline affiliate. Precisely the opposite is the case for the Columbia system. Rather than featuring only "long haul" lines, Columbia Transmission owns a large variety of lines, of various sizes, that spur off and interconnect with other natural gas utilities. (Supp. 522; Tr. VIII 93-94; Second Supp. 871-72). A system involving this configuration is disadvantaged, under the Ohio statutes, because much of the in-state pipeline property is in the hands of the interstate affiliate. (Supp. 446-50; Tr. III 78-93). By contrast, the Dominion system (including interstate pipeline Dominion Transmission and LDC East Ohio Gas Company) places almost all Ohio property in the hands of the LDC. (Second Supp. 873-74). Thus, Dominion System property that serves an operationally similar role to Columbia Transmission's property is assessed at a lower rate.[13] (Supp. 10, 65; Tr. VII 21-23, 244).

The dormant Commerce Clause precludes Ohio from punishing entities that choose to hold their pipelines in an interstate company.

3. Companies Taxed As "Pipe-Line Companies" And Those Taxed As "Natural Gas Companies" Compete In Providing Natural Gas Storage Services.

In Ohio, natural gas storage takes place in underground sandstone formations in former gas production reservoirs. (Supp. 230, 662; Tr. II 221-22; Tr. I 23-24). Equipment such as pipes,

[13] Q: And is there any functional or regulatory reason why a significant portion of Dominion East Ohio's transmission and storage property could not be owned and operated by Dominion Transmission?

A: There is no reason why our facilities could not be owned and operated by Dominion Transmission. (Supp. 15; Tr. VII 43).

valves and fittings, compressors and separators is also involved in providing natural gas storage services. (Supp. 74; Tr. VII 279). Natural gas storage can be provided by a variety of businesses, including interstate pipelines, LDCs, and natural gas "cooperatives." (Supp. 230; Tr. II 222). Indeed, in Ohio, the current natural gas storage fields are owned by one of each such entity. (Second Supp. 493 (listing storage facilities owned by Columbia Transmission, East Ohio Gas Co., and National Gas and Oil Cooperative); Supp. 458; Tr. III 127-28).

Columbia Transmission presented unrefuted evidence that its storage services compete with other storage available in Ohio. The nature and function of natural gas storage does not vary based on who owns the facilities, and at least some storage customers are able to choose between competing providers. (Supp. 14, 75, 711, 230, 457-58, 1264; Tr. VII 40, 281-82; Tr. I 219; Tr. II 222; Tr. III 124-25; Second Supp. 101). When asked whether East Ohio competes with Columbia Transmission in providing storage, East Ohio's Director, Pricing and Regulatory Affairs replied, "absolutely." (Supp. 8; Tr. VII 16).

In tax year 2001, Columbia Transmission reported $366,569,985 in Ohio storage property; East Ohio reported $96,361,398. (Supp. 671-72, 1128, 1133; Second Supp. 63-64) Yet this significant storage property was assessed at different rates for the two companies, providing a distinct competitive advantage to the LDC, (Supp. 459; Tr. III 129-30), and a strong incentive for competitors to place their storage property in the hands of their Ohio LDC affiliate. <u>Supra</u> 34.

4. Companies Taxed As "Pipe-Line Companies" Compete With Those Taxed As "Natural Gas Companies" And General Businesses In Providing Natural Gas Gathering Services.

Another aspect of the competition between LDCs and pipeline companies is in providing gathering service. Gathering involves the initial collection and processing of natural gas from the wellhead. (Supp. 452; Tr. III 101). State-regulated LDCs, federally-regulated pipelines, and independent non-utility gathering companies can all provide this service. (Supp. 452; Tr. III 101). Yet Ohio assesses gathering property owned by "natural gas companies" and general business taxpayers at 25%,[14] while assessing interstate pipelines' gathering property at 88%.

While Columbia Transmission did not own gathering property in Ohio during tax years 2000 and 2001, gathering does remain a potential area of competition between Columbia Transmission and LDCs and nonutilities. Cf. General Motors, 519 U.S. at 300 (evaluating "actual" or "prospective" competition). In fact, Columbia Transmission continues to own gathering property in other states. (Supp. 769; Second Supp. 740-41). And here again, the differential tax rates provide a strong advantage to LDCs over their interstate pipeline competitors. (Supp. 457; Tr. III 121-22).

5. Discrimination Against Interstate Pipelines Results In Discrimination Against Out-Of-State Natural Gas.

Unlike discrimination between out-of-state and in-state widgets or wine, discrimination involving pipelines affects not only the transportation market directly at issue, but also the market for the underlying commodity. As the Supreme Court has explained, "[f]or over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce . . . is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." West Lynn Creamery v. Healy (1994), 512 U.S. 186, 202. By disadvantaging the "instrumentalities" used to bring out-of-state natural gas to Ohio markets, Ohio's tax code disadvantages that out-of-state gas as well, creating "distorting effects on the geography of production." West Lynn, 512 U.S. at 193.

[14] East Ohio Gas and National Gas & Oil Cooperative each reported ownership of "gathering" property and were treated as natural gas companies assessed at 25%. (Second Supp. 742, 749, 782, 784). Similarly, numerous nonutility businesses owned "gathering" property during the tax years and were treated as general businesses assessed at 25%. Infra 46-47.

Ohio produced gas can be delivered to many Ohio consumers without that gas ever entering the facilities of an interstate (or intrastate) "pipe-line." (Supp. 11, 453-56; Tr. VII 27; Tr. III 107-17; Second Supp. 691, 728). Such deliveries avoid the higher per-mile tax burden on Ohio pipeline property. This results in a competitive advantage for Ohio natural gas. (Supp. 68, 456-57; Tr. VII 256; Tr. III 118-22; Supp. 1262).

This local advantage undermines the goal of the Commerce Clause that "every consumer may look to the free competition from every producing area in the Nation . . . ." H.P. Hood & Sons, Inc. v. Du Mond (1949), 336 U.S. 525, 539. It "plac[es] burdens on the flow of commerce across [State] borders that commerce within those borders would not bear." Oklahoma Tax Comm. v. Jefferson Lines, Inc. (1995), 514 U.S. 175, 180.

The effect of this is like that of a protective tariff on goods imported from other States— "[t]he paradigmatic example of a law discriminating against interstate commerce." West Lynn, 512 U.S. at 193. Like a tariff, Ohio's discriminatory assessment rate on property used to bring out-of-state natural gas to market "violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production." Id.

6. Assessing Interstate Pipeline Property At 88% And Natural Gas Property At 25% Disadvantages Out-Of-State Consumers.

The differential tax rate also results in Ohio exporting discriminatory tax burdens to consumers in other states. State tax costs are allocated on a system-wide basis in establishing FERC-approved rates for interstate pipeline services. (Supp. 448, 1261; Tr. III 88). Accordingly, tax costs on Columbia Transmission's Ohio transportation property are passed along to all of its customers, including those outside Ohio. (Supp. 448, 674; Tr. III 87-88; Tr. I 70). For Columbia Transmission's storage property, as well, the burden of the higher assessment rate is in large measure borne out of state. (Supp. 460, 789, 1261; Tr. III 133-34; Second Supp.

789). In contrast, tax costs on Ohio LDCs' property are borne by Ohio consumers. (Supp. 448-49; 1260-61; Tr. III 88-90). Accordingly, assessing pipeline property at a higher rate than LDC property discriminatorily exports Ohio tax costs to out-of-state consumers.

Such efforts violate the Constitution. "Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." Brown-Forman Distillers Corp. v. New York State Liquor Auth. (1986), 476 U.S. 573, 580. For example, in Camps Newfound, 520 U.S. at 568, a Maine statute exempted charitable institutions from real and personal property taxes, but limited the exemption where the institutions were "conducted or operated principally for the benefit of persons who are not residents of Maine." (citation and quotation omitted). The Court held that the tax violated the Commerce Clause, noting that it "penalizes the principally nonresident customers of businesses catering to a primarily interstate market." Id. at 576. This was true even though "the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer." Id. at 580.

Just so here. As in Camps Newfound, the higher assessment rate on interstate pipeline property "functionally serves as an export tariff that targets out-of-state customers by taxing the businesses that principally serve them"—a form of discrimination "at the very core of activities forbidden by the dormant commerce clause." Id. at 580-81.

7. The Impermissible Impact of the Differing Assessment Rates Is Highlighted by Considering the Effect of Duplication of the Rate Differential in Other States.

The inability of Ohio's assessment structure to satisfy the "internal consistency test" highlights its discriminatory nature. That test requires that "a state tax must be of a kind that 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" Am. Trucking Assn., 483 U.S. at 284 (citation omitted). Here, if every state assessed interstate pipeline property at a higher rate than LDC property, the natural gas industry would have a universal incentive to place as much property as possible in the hands of LDC affiliates rather than interstate pipeline affiliates. Supra 33-34. Consumers would have a universal incentive to obtain natural gas via paths that involved less rather than more interstate pipeline property. Supra 36-37. Direct connects would be globally discouraged. Supra 31-32. And the local gas in every state would be more attractive to consumers within the State. Supra 36-37. In short, duplication of the Ohio strategy elsewhere would "'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" Granholm, 544 U.S. at 473 (quoting Dean Milk Co. v. Madison (1951), 340 U.S. 349, 356).

8. Even If Not Viewed As Discriminatory, The 88% Assessment Rate On Interstate Pipeline Property Creates An Undue Burden On Interstate Commerce.

State enactments that are not strictly speaking discriminatory nonetheless violate the Commerce Clause if they "unduly burden" interstate commerce. Supra 26-28. In considering whether a state statute is unduly burdensome, a court must "weigh and assess the state's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one." Bendix Autolite Corp. v. Midwesco Ents., Inc. (1988), 486 U.S. 888, 891.

As the preceding sections show, taxing interstate pipeline property at 88% while taxing property of LDCs at 25% substantially burdens interstate commerce. It does so by impairing interstate pipelines in competing for natural gas transportation, storage, and gathering, supra 31-36; by making it more costly to bring out-of-state gas to market, supra 36-37; and by exporting higher tax costs to out-of-state consumers, supra 37-38. On the other side of the scale, the State's putative interest in assessing interstate pipelines at a higher rate than LDCs is not apparent. While the State has a legitimate interest in raising revenue, that alone cannot justify differential taxation such as that here. See, e.g., New York Rapid Transit Corp. v. New York

(1938), 303 U.S. 573, 587. Accordingly, Ohio's public utility personal property tax is unduly burdensome to interstate commerce even if it is somehow not viewed as actually discriminatory.

9. Tax Department Personnel Recognized the Inequalities Created By Assessing Natural Gas Companies and Pipe-line Companies Differently.

Tellingly, Tax Department personnel recognized that S.B. 287 led to inequalities in the natural gas market. The Administrator of the Public Utility Tax Division when S.B. 287 was considered cautioned that "[s]ome pipeline companies are providing natural gas to end users in Ohio," yet S.B. 287 lowered the assessment rate for "natural gas companies" only. (Second Supp. 291). "This gives natural gas companies an advantage." (Id.). Others in the Tax Department expressed similar concerns. (Second Supp. 265, 279, 286, 293 (memoranda noting "question of equity" in lowering assessment rate for natural gas companies but not pipelines); Second Supp. 270 (memorandum noting concern that pipeline companies, despite serving end users in Ohio, did not have their rate reduced under S.B. 287); Second Supp. 284 (memorandum to the Legislative Director of the Governor's Office, noting that although S.B. 287 was intended to eliminate constitutional concerns, "the Department believes that a whole new round of much stronger suits will be created," and expressing concern that "inequities would be created within the gas industry since gas company property drops to the 25% assessment rate while gas pipeline company property would remain at 88%")).

Just as these Tax Department personnel feared, S.B. 287 has, indeed, led to "inequities" in the natural gas market. As detailed above, the differing assessment rates have not only disadvantaged interstate pipelines, but have also distorted the interstate natural gas market more generally, in clear violation of the Dormant Commerce Clause.

<u>PROPOSITION OF LAW NO. 4:</u> Assessing the personal property of interstate natural gas pipelines at a higher rate than that of local distribution companies and general businesses with which the pipelines compete impairs and is inconsistent with federal regulatory authority and violates the Supremacy Clause of the U.S. Constitution.

That Congress has the power to preempt state law is a "fundamental principle of the Constitution." <u>See</u> <u>Crosby v. Natl. Foreign Trade Council</u> (2000), 530 U.S. 363, 372. Even where no federal enactment expressly preempts state law, Congress may implicitly indicate an intent to occupy a given field to the exclusion of state law. <u>Rice v. Santa Fe Elevator Corp.</u> (1947), 331 U.S. 218, 230. Moreover, state law must yield to federal law if the State law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." <u>Hines v. Davidowitz</u> (1941), 312 U.S. 52, 66-68. State laws can be preempted not only by Congressional enactments, but also by actions of "a federal agency acting within the scope of its congressionally delegated authority." <u>City of New York v. FCC</u> (1988), 486 U.S. 57, 63-64.

In this case, Ohio's differential assessment rates are incompatible with FERC's pervasive regulation of the natural gas industry pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq., as amended by the Natural Gas Policy Act of 1978 ("NGPA"), 92 Stat. 3351, 15 U.S.C. § 3301 et seq, and the Natural Gas Wellhead Decontrol Act of 1989 ("Decontrol Act"), 103 Stat. 157. In the NGA, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." <u>Schneidewind</u>, 485 U.S. at 305. The NGA "was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." <u>Maryland v. Louisiana</u> (1981), 451 U.S. 725, 748. Under FERC's regulatory and tariff scheme, pipelines are, at least theoretically, "entitled to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas." <u>Id.</u>

State taxes that interfere with FERC's ratemaking authority are preempted. In Maryland v. Louisiana, 451 U.S. at 749, Louisiana taxed the "first use" of natural gas and sought to dictate to whom the pipeline taxpayer could allocate the tax costs. The U.S. Supreme Court concluded that the tax thus "interfere[d] with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers." Id. at 749.

Ohio's differential assessment rates have a similar effect. While Ohio's personal property tax would normally be treated as a recoverable cost by FERC, the discriminatory nature of the tax places pipelines at a competitive disadvantage, leading them to discount their FERC-approved rates. (Supp. 475-76, 478-79; Tr. III 196-97, 206-09). As such, Ohio's scheme interferes with federally-regulated pipelines' practical ability to pass their costs along to their customers, as FERC intended and approved. This systematic pressure to discount interferes with FERC's ratemaking and regulatory authority under the NGA just as surely as the first-use tax that the Court struck in Maryland v. Louisiana, 451 U.S. 725.

Ohio's differential assessment also undermines FERC policies favoring free competition. In recent decades, federal policy, as expressed in legislation and in FERC orders, has encouraged competition and the opening of natural gas markets. (Supp. 479; Tr. III 209-10). Both the NGPA and the Decontrol Act sought to deregulate wellhead prices of natural gas and create a competitive market for natural gas production. To do so, Congress urged the Commission to "retain and improve [the] competitive structure [in the natural gas industry] in order to maximize the benefits of decontrol." H.R. Rep. No. 29, 101st Cong., 1st Sess., at 6. In keeping with this, FERC's "primary aim" in adopting Order 636 was "to improve the competitive structure of the natural gas industry." Order No. 636 (1992), 59 FERC P 61,030; (Second Supp. 681-82). See also, e.g., N. Natural Gas Co. (1989), 48 FERC P 61,232, 61,828-29 (footnote omitted) ("Our current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition."). Yet, as Professor Dismukes explained, in assessing Columbia Transmission's personal property at a higher rate than that of competing LDCs, Ohio has placed Columbia Transmission at a competitive disadvantage, undermining FERC's policies of creating open markets. (Supp. 476, 479; Tr. III 197, 209-11). Moreover, by advantaging locally-produced gas, supra 36-37, Ohio's public utility personal property tax interferes with the free wellhead competition Congress sought to foster in the NGPA and Decontrol Act.

The tax structure also interferes with recent FERC efforts to encourage direct connects to interstate pipelines. FERC's prior policy had disfavored arrangements—such as direct connects—that excluded LDCs. See N. Natural Gas Co., 48 FERC P 61,232. But that policy changed with FERC regulatory enactments in the 1980s and 1990s. For example, Order 436 provides the following:

> In order to promote economic efficiency—a necessary factor in providing gas to consumers at the lowest reasonable rates—the rule must provide sufficient competitive incentives to all elements of the market. This means making all market participants, including LDCs, accountable for the success or failure of their market participation . . . ."

(50 F.R. 42,408, 42,469; Second Supp. 689-90). Consistent with this, FERC's current policy is to "allow competition between LDCs and interstate pipelines where there is no indication that the proposed service is the result of any anti-competitive or unduly discriminatory behavior." E.g., Algonquin Gas Transm. Co. (2001), 96 FERC P 61,364, 62,368. This policy "rests on the assumption that market forces operating in fair competition will promote the most efficient allocation of supplies and transportation capacity and the expectation that [LDCs] can and will compete for end-users' business." S. Natural Gas Co. (2000), 93 FERC P 61,162, 61,542. The Commission views competition between interstate pipelines and LDCs as "an integral and necessary component of the Commission's open-access initiatives which have worked to create a

more dynamically competitive gas marketplace." Algonquin, 96 FERC P 61,364, 62,369; see also (Supp. 431; Tr. III 19-20) (expert opinion that FERC has sought to create "open and seamless markets for natural gas services for all types of customers including those that are direct connects").

In conflict with these FERC policies, Ohio's differential assessment rates directly interfere with Columbia Transmission's ability to obtain direct connects. (Supp. 73, 478; Tr. VII 273; Tr. III 206-09). In this way, Ohio's taxing scheme is similar to state attempts to regulate and restrict direct connect arrangements, which have also been held to be preempted. See, e.g., Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co. (C.A.6, 1989), 887 F.2d 1295.

Accordingly, R.C. 5727.01(D)(4) and (5) and R.C. 5727.111(C) and (D), if interpreted to require that interstate pipelines be assessed at 88% while competing LDCs are assessed at 25%, violate the Supremacy Clause on their face and as applied.

PROPOSITION OF LAW NO. 5: Assessing the personal property of interstate natural gas pipelines at 88% while applying a 25% assessment rate to property of local distribution companies and general businesses with which the pipelines compete violates the Equal Protection and Due Process Clauses of the U. S. and Ohio Constitutions.

The differential treatment the Commissioner proposes would also violate the Equal Protection Clause, which is designed to assure that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia (1920), 253 U.S. 412, 415; see also MCI, 68 Ohio St.3d at 199. A classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 527 (quotation omitted). Thus, to satisfy Equal Protection requirements, a challenged tax classification must have a "legitimate purpose," and it must have been "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." W. & S. Life Ins. Co. v. State Bd. of Equalization (1981), 451 U.S. 648, 668. "A taxpayer is denied equal protection when a similarly situated competitor is allowed to grossly undervalue its property for tax purposes, the former is not authorized to assess its property in the same manner, and there is no rational basis for the disparate treatment." GTE N., Inc. v. Zaino, 96 Ohio St.3d 9, 11, 2002-Ohio-2984. Further, the Due Process clause prevents enactments that are "arbitrary and irrational." Usery v. Turner Elkorn Mining Co. (1976), 428 U.S. 1, 15.

Treating Columbia Transmission as a "pipe-line company" assessed at 88% violates both Due Process and Equal Protection. Columbia Transmission competes with and engages in the same functions as taxpayers who are assessed more favorably. These taxpayers include: (1) general business taxpayers who are engaged in the transportation of fuels other than natural gas; (2) general business taxpayers engaged in the gathering of natural gas; (3) local distribution companies who are treated as "natural gas companies" under R.C. 5727.01.[15]

A. Equal Protection And Due Process Are Violated By More Favorable Tax Treatment Of General Business Taxpayers Transporting Alternative Fuels.

Natural gas competes with alternative fuels, including coal and refined petroleum products such as fuel oil and propane. (Supp. 230, 472; Tr. II 222-24; Tr. III 181-82). Ohio industrial and power customers can often choose between natural gas and an alternative fuel. (Supp. 471-72; Tr. III 177-81; Second Supp. 673). For both natural gas and alternative fuels, delivery cost is an important component of the fuel's ultimate cost to a consumer, and personal property tax rates on transportation property affect that cost of delivery. (Supp. 1268). As such, if personal property used in transporting alternative fuels is assessed at a lower rate than that used in transporting natural gas, the differential will create an advantage for the alternative fuels, and for the taxpayers who transport them. (Supp. 472, 1268; Tr. III 181-83).

[15] Columbia Transmission's arguments regarding the first two categories apply equally to Tax Years 2000 and 2001, as the assessment rates for "pipe-line company" property and property of general businesses were 88% and 25% respectively during both years.

That is what happens in Ohio. "Pipe-line companies" transporting natural gas are assessed at 88% under R.C. 5727.111. Yet Ohio taxpayers who transport alternative fuels, including refined petroleum products, are assessed as general business taxpayers, at a 25% rate. This includes a number of companies that transport refined fuels via pipeline, using equipment that is similar to that used by natural gas pipelines. (Supp. 75-76, 463-65; Tr. VII 284-85; Tr. III 148-56; Second Supp. 495, 672).[16]

There is no rational basis—identified or apparent—for the differing assessment rates on natural gas "pipe-lines" on the one hand and transporters of alternative fuels on the other hand. Refined fuel products and natural gas are competing fuels. (Supp. 75, 460; Tr. VII 282-83; Tr. III 135-36; Second Supp. 494). Transporting refined fuels and transporting natural gas involves similar equipment and functions. (Supp. 75-76; Tr. VII 284-85). FERC regulates transportation of refined fuels via pipeline, just as it regulates interstate transportation of natural gas. (Supp. 465; Tr. III 154). Yet property used in transporting natural gas is taxed less favorably than property used in transporting refined fuels, resulting in a competitive advantage to the latter. (Supp. 472; Tr. III 181-83).

Equal Protection prevents the differential treatment of "persons who are in all relevant aspects alike." MCI, 68 Ohio St.3d at 199. Yet, that is precisely what happens here.

B. Equal Protection Is Violated By More Favorable Treatment Of General Business Taxpayers Engaged In Natural Gas Gathering.

As previously noted, supra 35-36, not only do LDCs and interstate pipelines provide gathering services in Ohio, but so do non-utilities. Several nonutility gatherers operated in Ohio

[16] These include Ohio River Pipeline (Supp. 177; Tr. II 11; Second Supp., 336-40, 534); Buckeye Pipeline Company (Supp. 177-78; Tr. II 12-13; Second Supp. 507-10, 520); TE Products Pipeline (Supp. 178, Tr. I 14; Second Supp. 552-69, 860, 863); Inland Corporation (Supp. 179; Tr. II 18-19; Second Supp. 672, 775-77); Marathon Ashland Petroleum, LLC (Supp. 183; Tr. II 34; Second Supp. 672, 787); Sun Pipe Line (Supp. 184; Tr. II 38-39; Second Supp. 617-22, 634-41, 672); TransMontaigne Product Services (Supp. 184; Tr. II 40; Second Supp. 655-58, 667-71, 787); and Wolverine Pipe Line Company (Supp. 185; Tr. II 41-42; Second Supp. 672, 787).

during the tax years.[17] Each of those entities was treated as a general business taxpayer and assessed at 25%, while interstate pipeline gathering property was assessed at 88%. (Supp. 178-79 182-85; Tr. II 15-16, 20-24, 30-31, 35-37, 41; Second Supp. 787).

Here, again, there is no rational basis for this difference in tax treatment. Gathering involves the same functions, and the same equipment, whether provided by an interstate pipeline or an independent gatherer. (Supp. 69; Tr. VII 257). Indeed, many of the assets that independent gatherers now own once belonged to interstate pipelines including Columbia Transmission. (Supp. 769). This "relative undervaluation of comparable property" violates Equal Protection. Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty. (1989), 488 U.S. 336, 346.

C. The Disparity In Natural Gas Company And Pipe-Line Company Assessment Rates Violates Equal Protection.

The evidence highlighted in the Commerce Clause discussion above makes clear that, in various respects, "natural gas companies" and "pipe-line companies" directly compete with one another, and that there is no rational basis for applying dramatically different assessment rates to their property. This treatment violates not only the Dormant Commerce Clause, but also the Due Process and Equal Protection Clauses of the U.S. and Ohio Constitution.

The decision in Boothe Financial Corp. v. Lindley (1983), 6 Ohio St.3d 247, is squarely on point. There, both IBM and Boothe Financial owned computer equipment that they leased to Ohio customers, but the Tax Commissioner employed different methodologies for determining the true value of the two taxpayers' property, resulting in a much lower valuation for IBM's property than Boothe's. This Court held that it violated equal protection to treat differently two taxpayers who leased "essentially identical equipment." Id. at 250.

[17] Those entities included Gatherco, Atlas Pipeline Partners, Bancequity Petroleum, Belden & Blake Corporation, Damascus Gas Company, Energy Search, Inc., North Coast Energy, Ohio Cumberland Gas Company, Resource Energy, Inc., Viking Resources Corporation, and Kingston Oil Corporation. (Second Supp. 360-492, 691-739).

Similarly, in MCI, the Commissioner assessed MCI's equipment at one hundred percent of true value while assessing competitors' property at thirty-one percent. As a result, "two taxpayers within the same class owning or leasing the same type of equipment are treated differently," a situation which this Court concluded "denie[d] MCI equal protection of the laws." MCI, 68 Ohio. St. 3d at 250.

The Department's application of R.C. 5727.01 here fails to heed the teaching of these cases. The same type of property, used for the same purpose, is taxed differently depending on whether a pipe-line company or LDC owns it. Supra 28-31. Consumers pay different rates for natural gas service depending on whether the lines used to deliver their gas are predominantly owned by a pipe-line company or an LDC. Supra 31-34. In-state gas is delivered to consumers with less tax cost per mile than out-of-state gas. Supra 36-37. If this all seems irrational, it is. Because the distinction drawn between pipe-line companies and natural gas companies is arbitrary and lacks a reasoned basis, it is incompatible with due process and equal protection.

Moreover, because the tax classification Ohio employs implicates the constitutionally protected "'right' to engage in interstate trade free from restrictive state regulation," Dennis v. Higgins (1991), 498 U.S. 439, 448, a closer look is required. Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 359 n.3. But applying a heightened standard only makes the unconstitutionality all the more clear.

D. The Legislative Record Reveals The Lack Of Any Rational Basis For Assigning Differing Assessment Rates to "Natural Gas Companies" and "Pipe-Line Companies."

Where legislation is based on an irrational motivation or analysis by the legislature, or the legislature acted irrationally in light of information before it, courts will not speculate as to whether there could have been rational justifications for the legislation other than the ones actually identified. Nordlinger v. Hahn (1992), 505 U.S. 1, 16; Allied Stores, 358 U.S. at 530.

Here, the circumstances in which the differential assessment rates were enacted demonstrate the lack of any rational basis for the distinction between pipe-lines, natural gas companies, and competing general businesses. When the General Assembly was considering S.B. 287, a pending lawsuit argued that the then-88% assessment rate on natural gas companies violated Equal Protection as compared to the 25% assessment rate on general businesses. Columbia Gas of Ohio v. Tracy (Aug. 6, 1999), B.T.A. Case No. 97-K-545, 1999 Ohio Tax LEXIS 1231. By the time S.B. 287 became law, that case was in this Court. Columbia Gas of Ohio, Inc. v. Tracy, Ohio S.Ct. Case No. 99-1633. The sponsors of S.B. 287 were keenly aware of this pending suit, as the Department of Taxation's own contemporaneous analyses of S.B. 287 explain. (Second Supp. 284, 300 (calling bill the "result of litigation")).

As the pleadings in that suit reflect, a central focus was claimed competition between LDCs and general businesses involving direct connects. See Brief of Appellant, Ohio S.Ct. Case No. 99-1633 at 19-20. Legislative testimony also cited claimed discrimination between LDCs and general businesses as a reason the bill was needed. (Second Supp. 347). Clearly, then, the pending suit—and the claimed "equality concerns"—were known to and considered by the legislature. Indeed, the legislation itself states that it was enacted to "provide . . . for equitable taxation of participants in the natural gas markets." (Second Supp. 334).

Despite this focus on equality, the bill resulted in a new disparity in assessment rates between "natural gas companies" and "pipe-line companies." Faced with testimony regarding competition between LDCs and general business taxpayers in "direct connect" situations, legislators equalized the assessment rates of those two players. Unfortunately, the Commissioner has interpreted the statute they drafted as assessing the third (perhaps most critical) player in direct connect situations—the interstate pipeline—at a much higher rate. Thus, despite the legislature's own stated goal of providing "equitable taxation" in the natural gas market, its "solution," under the Commissioner's interpretation, resulted in inequality rather than equality for interstate players, as Tax Department personnel themselves recognized, supra 40. (See Supp. 440-41; Tr. III 56-57 (expert opinion that to create "an equal playing field" for direct connects would require the same tax treatment for not only LDCs and general businesses, but also interstate pipelines)).

Taken together, the record reveals that the legislature addressed short term litigation concerns by creating a new classification scheme that taxing officials themselves viewed as constitutionally problematic. The distinction between "natural gas companies" and "pipe-line companies" that apparently mattered most was that the pending lawsuit (and threat to state revenue) involved the former and not the latter. This sort of short-sighted litigation concern is not a reasoned basis for drawing a legislative distinction between categories of taxpayers.

CONCLUSION

For the foregoing reasons, and based upon the evidence presented in the record, Columbia Transmission requests that the Court affirm the decision of the BTA as to tax year 2001. As to tax year 2000, the constitutional arguments presented in Columbia Transmission's cross-appeal require this Court to reverse the Board's decision and to hold that, for that year as well, Columbia Transmission's personal property must be assessed at 25%.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief of Appellee/Cross-Appellant Columbia Gas Transmission Corporation was delivered by messenger to Barton A. Hubbard Esq. (Counsel of Record), Assistant Attorney General, Cheryl D. Pokorny, Deputy Attorney General, and Janyce C. Katz, Assistant Attorney General, Office of the Attorney General, Taxation Section, Rhodes State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215, attorneys for Appellant/Cross-Appellee Tax Commissioner of Ohio, and mailed by U.S. mail, postage prepaid, to Fred J. Livingston, Taft Stettinius & Hollister LLP, 3500 BP Tower, 200 Public Square, Cleveland, Ohio 44114-2302, attorney for Amicus Curiae The Ohio School Boards Association, on this 22nd day of November, 2006.

One of the Attorneys for
Appellee/Cross-Appellant
Columbia Gas Transmission Corporation

FILED
AUG 07 2006
BOARD OF TAX APPEALS
COLUMBUS, OHIO

IN THE SUPREME COURT OF OHIO

COLUMBIA GAS TRANSMISSION CORPORATION	)	
	)	
Appellee/Cross-Appellant,	)	Case No. 06-1443
	)	
- v. -	)	Appeal from the Ohio Board of Tax Appeals
	)	
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO	)	Board of Tax Appeals Case No. 2003-K-1876
	)	
Appellant/Cross-Appellee.	)	

RECEIVED
AUG 07 2006
OHIO DEPARTMENT OF TAXATION
OFFICE OF THE TAX COMMISSIONER

NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT COLUMBIA GAS TRANSMISSION CORPORATION

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FILED
AUG 07 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

COLUMBIA GAS TRANSMISSION CORPORATION	)	
Appellee/Cross-Appellant,	)	Case No. 06-1443
- v. -	)	Appeal from the Ohio Board of Tax Appeals
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO	)	Board of Tax Appeals Case No. 2003-K-1876
Appellant/Cross-Appellee.	)	

NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT COLUMBIA GAS TRANSMISSION CORPORATION

Columbia Gas Transmission Corporation ("Columbia Transmission") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, and Rule II, Sec. 3(A)(2) of the Rules of Practice, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals ("Board"), journalized in Case No. 2003-K-1876 on July 28, 2006 ("Decision and Order"). The Tax Commissioner of Ohio ("Tax Commissioner") filed his appeal of the Decision and Order on July 31, 2006. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

The Board reversed the Tax Commissioner's final determination, in part, finding that Columbia Transmission satisfied the definition of a "natural gas company" in R.C. 5727.01(D)(4) and that its tangible public utility property should be assessed at the 25% listing rate prescribed for a "natural gas company" in R.C. 5727.111(C) ("Statutory Issue") for Tax Year 2001 and after. In so holding, the Board stated:

> [T]he record demonstrates that [Columbia Transmission] directly supplies natural gas to industrial, power-generating, residential, and farm customers for the purposes delineated in R.C. 5727.01(D)(4). * * * [H]aving now successfully demonstrated that it is indeed a natural gas company as defined

by R.C. 5727.01(D)(4), [Columbia Transmission] is entitled to have its property assessed at the listing rate prescribed for such entities.

Decision and Order at 21.

In his notice of appeal, the Tax Commissioner asserts that the Board's decision is unreasonable and unlawful because the Board refused to add additional requirements to R.C. 5727.01(D)(4) and (D)(5).[1] The Tax Commissioner asserts that a company must be regulated by the Public Utilities Commission of Ohio in order to satisfy the definition of a "natural gas company" in R.C. 5727.01(D)(4). See Tax Commissioner's Notice of Appeal ¶ 4. Further, the Tax Commissioner claims that R.C. 5727.01(D)(4) and (D)(5) impose a "primary use" requirement on the taxable property of a "natural gas company" and a "pipe-line company." See Tax Commissioner's Notice of Appeal ¶ 5. The Tax Commissioner is wrong because the plain language of these statutes do not include either requirement.

The Board correctly looked to the express language of R.C. 5727.01(D)(4) and (D)(5) to find that Columbia Transmission is a "natural gas company." Decision and Order at 16. Further, the Board properly refused to add or delete from the express language of those provisions. The Board's Decision and Order complies with the well-established rules of statutory construction set forth by this Court in Bernardini v. Bd. Of Edn. (1979), 58 Ohio St.2d 1, 5, and as quoted by the Board:

> For example, a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation. Crowl v. Deluca (1972), 29 Ohio St.2d 53, 58-59; Slingluff v. Weaver (1902), 66 Ohio St. 621. * * * In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the words used (in a statute), not to delete words used or to insert words not used.' (Emphasis added). Columbus-Suburban Coach Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127; Wheeling Steel

---

[1] These provisions state:

(D) Any person:

* * * *

(4) Is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, . . .

(5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state . . . .

Corp. v. Porterfield (1970), 24 Ohio St.2d 24, 28. (Footnote omitted and emphasis sic.)

Decision and Order at 17. The Board's holding on the Statutory Issue is reasonable and lawful and should be affirmed by this Court.

Before the Board, Columbia Transmission also asserted that the Tax Commissioner's assessment of Columbia Transmission's public utility property at the 88% rate applicable to a "pipe-line company" as defined in R.C. 5727.01(D)(5) violated the:

- Commerce Clause, art. I, § 8, cl. 3 of the United States Constitution;
- Due Process and Equal Protection Clauses of the United States Constitution, amend. XIV, § 1 and Ohio Constitution, art. I, § 2; and
- Supremacy Clause, art. VI, cl. 2 of the United States Constitution. (collectively "Constitutional Challenges")

However, the Board overruled Columbia Transmission's Constitutional Challenges to the Tax Commissioner's final determination based on this Court's holding in MCI Telecommunications Corp. v. Limbach (1994), 68 Ohio St.3d 195. Decision and Order at 11.

Columbia Transmission files its cross-appeal asking the Supreme Court to address Columbia Transmission's Constitutional Challenges for tax years 2000 and 2001. Further, although Columbia Transmission believes that the Board's decision on the Statutory Issue is reasonable and lawful, and is sufficient to require assessment of Columbia Transmission's property at 25% for Tax Year 2001, Columbia Transmission files its cross-appeal to preserve its Constitutional Challenges for tax years 2000 and 2001.

Therefore, Columbia Transmission complains that the Board of Tax Appeals affirmed the Tax Commissioner's final determination which made the following errors:

1. The final determination erred in overruling Columbia Transmission's claim that the Tax Commissioner's assessment, and the final determination affirming it, violate the Commerce Clause, art. I, § 8, cl. 3 of the United States Constitution.

   (a) Under the Commerce Clause, a state may not discriminate against or unduly burden interstate commerce. The Tax Commissioner has assessed the taxable property of Columbia Transmission at a higher percentage of true value than comparable taxable property of other companies, including, but not limited to, local distribution companies and alternate fuel pipelines. This disparate treatment discriminates against interstate commerce, disproportionately burdens the instrumentalities of interstate commerce, influences economic decisionmaking to favor entities operating intrastate, disproportionately burdens out-of-state consumers of natural gas, imposes an undue burden on interstate commerce and impedes the free flow of natural gas in interstate commerce, all in violation of the Commerce Clause.

(b) R.C. 5727.111(D), and the 88% rate established therein, violate the Commerce Clause, both facially and as applied in this case.

2. The final determination erred by overruling Columbia Transmission's claim that by treating Columbia Transmission as a "pipe-line company" under R.C. 5727.01(D)(5) rather than as a "natural gas company" under R.C. 5727.01(D)(4), the Tax Commissioner's assessment and final determination violate the Due Process and Equal Protection Clauses of the United States Constitution amend. XIV and Ohio Constitution art. I, §§ 2, 16.

(a) The statutory categories created by R.C. 5727.01(D)(4) and (D)(5) are vague, ambiguous, and overlapping. Although the Tax Commissioner treated Columbia Transmission as a "pipe-line company," the Board found that Columbia Transmission satisfied the statutory definition of a "natural gas company" in R.C. 5727.01(D)(4).[2] Other companies, although treated as "natural gas companies," satisfy the statutory definition of a "pipe-line company." Similarly situated taxpayers are treated differently under these impermissibly vague statutory classifications.

(b) The statutory categories defined by R.C. 5727.01(D)(4) and R.C. 5727.01(D)(5) are unconstitutionally vague and violate the Due Process and Equal Protection Clauses of the United States Constitution and the Ohio Constitution, both facially and as applied in this case.

3. The final determination erred by overruling Columbia Transmission's claim that in assessing Columbia Transmission's taxable public utility property at 88% of true value, the Tax Commissioner violated the Due Process and Equal Protection Clauses of the United States Constitution amend. XIV and Ohio Constitution art. I, §§ 2, 16.

(a) The Tax Commissioner assessed the taxable public utility property of others similarly situated or in competition with Columbia Transmission at a lesser percentage of true value than was applied to Columbia Transmission's property.

[2] Decision and Order at 21.

(b) R.C. 5727.111(D), and the 88% assessment rate established therein, violate the Due Process and Equal Protection Clauses, both facially and as applied in this case.

4. The final determination erred by overruling Columbia Transmission's claim that the assessment, and the final determination affirming it, impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, art. VI, cl. 2 of the United States Constitution.

(a) R.C. 5727.111(D), and the 88% assessment rate established therein, impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, art. VI, cl. 2 of the United States Constitution, facially and as applied in this case.

Respectfully submitted,

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CORPORATION

CERTIFICATE OF SERVICE

This is to certify that a true copy of this Notice of Cross-Appeal was filed by undersigned counsel with the Board of Tax Appeals, pursuant to R.C. 5717.04, and was delivered by messenger and by CERTIFIED MAIL to counsel of record for the Appellant/Cross-Appellee Tax Commissioner, Barton A. Hubbard, Esq., Assistant Attorney General, Taxation Section, Office of the Attorney General, Rhodes State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215, on this 7th day of August, 2006.

Maryann B. Gall

Maryann B. Gall

COI-1349402v2

OHIO BOARD OF TAX APPEALS

Columbia Gas Transmission Corp.,	)	CASE NO. 2003-K-1876
	)	
Appellant,	)	(PUBLIC UTILITY PERSONAL PROPERTY TAX)
	)	
vs.	)	
	)	DECISION AND ORDER
Thomas M. Zaino, Tax Commissioner of Ohio,	)	
	)	
	)	
Appellee.	)	

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Entered JUL 28 2006

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Through the present appeal, appellant, Columbia Gas Transmission Corporation, challenges a final determination of the Tax Commissioner in which he denied appellant's petitions for reassessment and affirmed public utility property tax assessments as originally issued for tax years 2000 and 2001. We now proceed to consider this matter upon appellant's notice of appeal, the statutory transcript certified by the commissioner, the record of the evidentiary hearing convened before this board, and the post-hearing briefs submitted on behalf of the parties.

Consistent with the requirement imposed upon it by R.C. 5727.08, and within the extended period allowed by R.C. 5727.48, appellant filed its 2000 and 2001 annual reports with the Tax Commissioner. For each of these years, the commissioner issued preliminary assessment certificates setting forth the proposed values of appellant's taxable property to which he then applied an assessment rate of 88% of true value applicable to pipe-line companies. As previously indicated, appellant filed petitions for reassessment for both tax years 2000 and 2001, including among its arguments, that it satisfied the statutory definition of a natural gas company and was therefore entitled to have its property assessed at the 25% rate applicable to such entities beginning with the 2001 tax year, and, further, that the 88% assessment rate applied to its property was in violation of rights guaranteed it by both the United States and Ohio Constitutions.[1]

In his final determination, the commissioner denied each of appellant's arguments and the present appeal ensued, with appellant specifying the following as error:

> "***[2] The Commissioner's final determination is erroneous in its entirety for the following reasons:
>
> "*Specification One*

---

[1] Appellant also asserted that the value of its personal property had been overstated due to the application of the statutory cost-based valuation method set forth in R.C. 5727.11. The commissioner rejected this claim and appellant sought reversal of this determination through its second specification of error. However, during the course of these proceedings, the parties were able to resolve this issue, and, as a result, appellant has withdrawn this specification of error. Accordingly, it is not further addressed herein.

[2] We have omitted the numerical references attributed to the paragraphs set forth in appellant's notice of appeal.

"*** The assessment[s], and the final determination affirming it [them], erroneously classify Columbia Transmission as a 'pipe-line' company under R.C. 5727.01(D)(5), rather than a 'natural gas company' under R.C. 5727.01(D)(4). Columbia Transmission satisfies the definition of a 'natural gas company' in R.C. 5727.01(D)(4) and, accordingly, its taxable public utility property should be assessed at 25% of true value, pursuant to R.C. 5727.111(C)(2), rather than 88% of true value as assessed by the Commissioner.

"*** R.C. 5727.01(D)(4) provides that an entity 'is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within [Ohio] ...[.]' In the final determination, the Commissioner incorrectly found that Columbia Transmission did not supply or distribute gas directly to consumers. In fact, Columbia Transmission did supply and distribute gas directly to consumers, including but not limited to industrial end users, farm tap customers, and local distribution companies that use gas for their own consumption. Cf. Carnegie Natural Gas Co. v. Tracy (Nov. 17, 1995), 1995 WL 691943, Case No. 94-K-526, unreported.

"*** The statutory definition of 'natural gas company' in R.C. 5727.01(D)(4) is vague and ill-specified. Moreover, it overlaps with the definition provided in R.C. 5727.01(D)(5), which specifies that an entity 'is a pipe-line company when engaged in the business of transporting natural gas ... through pipes or tubing ...[.]' Any doubt in construction of these ambiguous provisions must be resolved in favor of Columbia Transmission, Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St.2d 208, paragraphs one and two of the syllabus, which results in treating Columbia Transmission as a 'natural gas company.'

"***

"*Specification Three*

"*** The assessment[s], and the final determination affirming it [them], violate the Commerce Clause, article I, section 8, clause 3 of the United States Constitution.

"*** Under the Commerce Clause, a state may not discriminate against or unduly burden interstate commerce. The Commissioner has assessed the taxable property of Columbia Transmission at a higher percentage of true value than comparable taxable property of other companies, including, but not limited to, local distribution companies. This disparate treatment discriminates against interstate commerce, disproportionately burdens the instrumentalities of interstate commerce, influences economic decisionmaking [sic] to favor entities operating intrastate, disproportionately burdens out-of-state consumers of natural gas, imposes an undue burden on interstate commerce and impedes the free flow of natural gas in interstate commerce, all in violation of the Commerce Clause.

"*** R.C. 5727.111(D), and the 88% rate established therein, violate the Commerce Clause, both facially and as applied in this case.

"*Specification Four*

"*** By treating Columbia Transmission as a 'pipe-line company' under R.C. 5727.01(D)(5) rather than as a 'natural gas company' under R.C. 5727.01(D)(4), the Commissioner's assessment[s] and final determination violate the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions.

"*** The statutory categories created by R.C. 5727.01(D)(4) and (D)(5) are vague, ambiguous, and overlapping. Columbia Transmission, although treated as a 'pipe-line company,' satisfies the statutory definition of a 'natural gas company.' Other companies, although treated as 'natural gas companies,' satisfy the statutory definition of a pipe-line company.' Similarly situated taxpayer are treated differently under these impermissibly vague statutory classifications.

"*** The statutory categories defined by R.C. 5727.01(D)(4) and R.C. 5727.01(D)(5) are unconstitutionally vague and violate the Due Process and Equal Protection Clauses of the United States Constitution and the Ohio Constitution, both facially and as applied in this case.

"*Specification Five*

"*** In determining the true value of Columbia Transmission's taxable public utility property and in assessing Columbia Transmission's taxable public utility property at 88% of true value, the Commissioner violated the Equal Protection and Due Process Clauses of the United States and the Ohio Constitutions.

"*** The Commissioner valued the taxable public utility property of others similarly situated or in competition with Columbia Transmission by using a substantially different methodology resulting in a lower true value than was applied to Columbia Transmission's property.

"*** The Commissioner assessed the taxable public utility property of others similarly situated or in competition with Columbia Transmission at a lesser percentage of true value than was applied to Columbia Transmission's property.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, violate the Due Process and Equal Protection Clauses, both facially and as applied in this case.

"*Specification Six*

"*** The assessment[s], and the final determination affirming it [them], impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution, both facially and as applied in this case."

As was the case before the commissioner, this appeal centers upon the appropriateness of the assessment rate applied to appellant's property for purposes of ad valorem taxation. We first dispense with the constitutional arguments which have been advanced by appellant, responding initially to appellant's request that the board reconsider certain evidentiary rulings made during the course of the hearing convened in this matter. At hearing, appellant sought admission of evidence relating to the General Assembly's consideration and ultimate enactment of Am.Sub.S.B. 287, 148 Ohio Laws, Part V, 11536, 11549-11550 (effective December 21, 2000).[3] Although the examiner declined to admit this evidence, appellant was accorded an opportunity to proffer its evidence and to seek this board's reconsideration.

Through Am.Sub.S.B. 287, the General Assembly amended R.C. 5727.111 so as to reduce the assessment rate prescribed for property owned by natural gas companies, beginning with the 2001 tax year, from 88% to 25%. Citing to Section 17 of Am.Sub.S.B. 287, appellant notes that the changes embodied in this legislation were effected as an emergency measure in order "to provide, at the earliest possible time, for equitable taxation of participants in the natural gas markets." 148 Ohio Laws, Part V, 11620. Appellant asserts that the evidence it sought to have admitted demonstrates not only that the General

[3] The evidence which was not admitted, but which appellant was permitted to proffer, consists of: (1) Ex. 25 - the May 2, 2000 written testimony of Larry L. Long, Executive Director of the County Commissioners' Association of Ohio, presented to the Senate Ways and Means Committee; Ex. 26 - the May 2, 2000 written testimony of Warren G. Russell, Deputy Executive Director of the Ohio School Boards Association, presented to the Senate Ways and Means Committee; Ex. 27 - a DVD from Ohio Government Telecommunications of the testimony before the General Assembly regarding Am.Sub.S.B. 287; and certain portions of testimony provided at this board's hearing by Sam Gerhardstein, appellant's current director of governmental affairs.

Assembly's action was in direct response to then-pending litigation involving the constitutionality of the differing assessment rates applicable to natural gas companies and general business taxpayers,[4] alleged to be in direct competition, but also that the legislature failed to achieve its own goal of "equitable taxation" by not simultaneously reducing the assessment rates for pipe-line companies, a claimed constitutional infirmity of which it and various individuals within the tax department were allegedly aware.

This board has previously expressed its reluctance to accept as evidence documents purportedly reflecting legislative intent. For example, in *Jack Schmidt Lease, Inc. v. Tracy* (July 14, 1995), BTA No. 1994-M-13, unreported, affirmed sub nom. *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74, the appellant sought admission of a letter of a member of the Ohio House of Representatives regarding the legislative intent and purpose of a particular statute. This board concluded that not only did this letter constitute hearsay for which no exception applied,[5] but also that it was "irrelevant because an individual representative has no ability to speak for the legislature." Id. at 4. Continuing, we noted that "[e]ven without considering the layers of hearsay concerns here involved, the subsequent representations of one member of a legislative body, even the sponsor of a bill, are not probative of the intent of the body at the time of enactment of a

[4] The litigation to which appellant refers is *Columbia Gas of Ohio v. Tracy* (Aug. 6, 1999), BTA No. 1997-K-545, unreported, docketed with the Supreme Court of Ohio as case number 99-1633, and subsequently dismissed at the taxpayer's request. See 01/12/2001 Case Announcements, 91 Ohio St.3d 1404.

[5] On appeal, the court determined that the document in question was inadmissible under either Evid.R. 803(8) or 1005.

bill. *Financial Indemnity Co. v. Cargile* (1972)[,] 32 Ohio Misc. 103.[6] Therefore, even if hearsay was not a concern, Representative Johnson's statements concerning the purposes of the bill would not be probative of intent." Id. at 5. See, also, *Glick v. Sokol*, 149 Ohio App.3d 344, 346, 2002-Ohio-4731 ("We note that Ohio has no official legislative history and, consequently, sponsor testimony is of limited value to our analysis. See *State v. Dickinson* (1971), 28 Ohio St.2d 65, 67 ***."); *Vukovich v. City of Youngstown* (Sept. 25, 1990), Mahoning App. No. 88 C.A. 198, unreported, jurisdictional motion overruled (1991), 58 Ohio St. 3d 703; *Cleveland Elec. Illum. Co. v. Cleveland* (Apr. 21, 1977), Cuyahoga App. No. 35999, unreported. Cf. *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, paragraph 7 of the syllabus ("Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.").

Through its proffer, appellant attempts to prove the intent of the General Assembly when it reduced the assessment rate for natural gas companies in order to support its arguments in this case challenging the constitutionality of the assessment rate left unchanged for pipe-line companies. After considering the parties' arguments, we are not

[6] In *Financial Indemnity*, the court commented: "We are here involved with a question of the intent of the Legislature. Plaintiff has submitted the affidavit of a former member of the Ohio General Assembly who sponsored the bill which became the act enacting the sections of the code with which we are here concerned. This affidavit seeks to interpret the intent of the Legislature. We believe that the meaning of the act must be determined from the words of the statute itself. The court cannot consider what an individual legislator, even the author of the bill, states he understood them to mean." Id. at 106.

persuaded that we should deviate from the rationale expressed by this board in *Jack Schmidt Lease.* The statute in question, which provides for the assessment of pipe-line company property at 88%, as opposed to the 25% assessment rate for other entities, is unambiguous and requires no further explanation. Instead, a determination regarding the constitutionality of the statute and its application can be made through a review of the express language set forth in the statute and the facts presented by the parties. Even assuming, arguendo, such evidence is admissible, appellant is not prejudiced by our ruling at this stage of the proceedings as this board is without jurisdiction to consider its constitutional claims. Rather, an appellate court with such authority may overturn this ruling and directly consider appellant's proffered evidence in the context of the arguments which have been advanced. Accordingly, appellant's motion for reconsideration is hereby overruled.

With respect to the merits of appellant's constitutional challenges, we acknowledge once again the lack of our ability to ultimately resolve such claims. See, e.g., *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported. Instead, as pointed out by the Supreme Court in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, such authority is reserved to Ohio's courts[7]:

---

[7] Section 1, Article IV, of the Ohio Constitution provides that "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Further, the Supreme Court of Ohio has expressly acknowledged that "[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have firmly been established as an essential feature of the Ohio system of separation of powers. See, e.g., *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 62, *** ('interpretation of the state and federal Constitutions is a role

"The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

"In *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, *** paragraph three of the syllabus, we held:

"'The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, *** construed.)'

"We explained the process, 35 Ohio St.3d at 232 ***:

"'When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"'To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.'

Footnote contd. ———

exclusive to the judicial branch')." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462. (Parallel citations omitted.)

> "Under *Cleveland Gear*, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197-198. (Parallel citations omitted.)

See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229.

The parties were accorded an opportunity to offer evidence in support of their respective positions relating to appellant's constitutional arguments. Given this board's inability to decide such issues, appellant's arguments must be overruled at this administrative level of proceedings.

This board does, however, have the authority to address appellant's argument that it satisfies the statutory definition of a natural gas company and is therefore entitled to have its property assessed at a more favorable rate than that applied to pipe-line companies, the classification currently applied to it by the Tax Commissioner. Beginning with tax year 2001, the General Assembly amended R.C. 5727.111 so as to establish, for the first time, different assessment rates for the property of public utilities classified as natural gas companies and pipe-line companies, 25% and 88%, respectively. See R.C. 5727.111(C) and (D). For purposes of determining which assessment rate applies, we must look to R.C. 5727.01(D), which defines both a natural gas company and a pipe-line company, providing in relevant part:

> "Any person:

"***

"(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;[8]

"(5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state[.]"

Appellant argues that the preceding definitions are not mutually exclusive and that it qualifies as both a natural gas company and a pipe-line company. Acknowledging that this overlap in definitions has existed for some time, it was not until natural gas companies were accorded more favorable tax treatment that appellant was motivated to seek reclassification for tax purposes from a pipe-line company to a natural gas company.

Rejecting appellant's contentions, the commissioner commented in his final determination as follows:

"The petitioner objects to the statutory requirement in R.C. 5727.111 that the taxable property of a 'pipe-line company' be assessed at an 88% listing percentage, rather than at the 25% listing percentage prescribed by the statute for all taxable property of a 'natural gas company.' The petitioner contends that it is a 'natural gas company' under R.C. 5727.01(D)(4) and should be assessed as a natural gas company rather than a pipeline company.[9] In furtherance of this argument, the petitioner has submitted a chart reflecting the number of customers by county that are connected to its pipeline. The

[8] Effective June 26, 2001, the definition of a natural gas company set forth in R.C. 5727.01(D)(4) was modified to provide that a person is a natural gas company when it is "engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, excluding a person that is a governmental aggregator or retail natural gas supplier as defined in section 4929.01 of the Revised Code[.]" 149 Ohio Laws, Part II, 3857, 3896.

[9] The record contains varying references to both "pipeline" and "pipe-line" companies. While both are intended to refer to the same type of entity, we will utilize the latter as it is consistent with R.C. 5727.01(D)(5).

total exceeds 31,900 customers, but based on the evidence, the majority are 'farm tap customers' granted the right to tap into the pipeline at the time of construction. Based on the evidence, this contention is not well taken. The above description that the petitioner gives of its operations is the description of a pipeline company and not of a natural gas company. R.C. 5727.01(D)(4) states that a natural gas company supplies or distributes 'natural gas for lighting, power, or heating purposes to consumers within this state ...[.]' The petitioner is not supplying or distributing gas directly to consumers, but rather transporting natural gas through a network from Kentucky into the Midwest and then on to the Eastern Seaboard via pipelines. The transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, the petitioner is properly classified as a pipeline company under R.C. 5727.01(D)(5). ***

"***

"Further, the petitioner does not fit the profile of a typical natural gas company. Most natural gas companies tend to operate in one state only, while pipeline companies tend to be interstate businesses. The Public Utilities Commission of Ohio (PUCO) regulates natural gas companies that operate within Ohio. As part of the regulation of a natural gas company, a service territory is designated. The PUCO has not designated a service territory for the petitioner since it does not recognize the petitioner as a natural gas company. FERC (the Federal Energy Regulatory Commission) publishes a listing of companies that it considers natural gas pipeline companies. The petitioner is included on the FERC list of natural gas pipeline companies. Thus, PUCO does not consider the petitioner a natural gas company, and FERC considers it a natural gas pipeline company." S.T. at 1-2.

Before this board appellant presented evidence demonstrating that a significant portion of its business involves transporting natural gas through an interstate network of pipelines and operating natural gas storage facilities inside and outside Ohio.

With regard to its transportation services, appellant has pipeline in ten states, approximately 4,000 miles of which are located in Ohio, receiving natural gas at various interconnection points along its pipeline network. In providing transportation services, appellant is subject to regulation by the Federal Energy Regulatory Commission ("FERC") as a "natural-gas company" under the Natural Gas Act. Section 717, Title 15, U.S. Code.[10]

All of the natural gas transported by appellant is owned by its customers and moved by appellant between points on its network designated by its customers. In providing these transportation services, appellant's customers include: "local distribution companies" ("LDCs"), which typically deliver natural gas directly to residential and commercial end-use consumers; large industrial and electric generating companies, e.g., First Energy, Pacific Gas & Electric, U.S. Gypsum, which, instead of receiving gas from an LDC, acquire it through a direct connection to appellant's pipelines; and natural gas marketers, which purchase gas from producers and sell it to end-users, but which are not subject to regulation as a utility. In addition, appellant has groups of residential and "farm tap" customers, totaling almost 32,000, who acquire direct access to appellant's pipeline system, the latter emanating typically from construction or right-of-way agreements. In addition to its natural gas transportation services, appellant also provides natural gas

[10] Section 717(b), Title 15, U.S. Code, states: "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

storage services whereby appellant injects its customers' natural gas into underground wells for later withdrawal in response to seasonal demands or market variations.

Based upon the foregoing activities, appellant insists it qualifies as a natural gas company since it "suppl[ies] natural gas for lighting, power, or heating purposes to consumers within this state." R.C. 5727.01(D)(4). Appellant contends that not only do the thousands of customers it serves through direct connections to its pipeline satisfy the preceding definition, but, it also argues that the statute does not limit its terms to a final transfer of natural gas to end users. Since appellant supplies gas to LDCs and natural gas marketers which, in turn, deliver it to Ohio end-use consumers, also serves as a basis upon which it satisfies the above-quoted definition of a natural gas company.

Although the commissioner acknowledges limited instances where appellant's customers have direct connections to its pipeline network, he insists that appellant is primarily engaged in the interstate transmission of natural gas. Maintaining that appellant is appropriately treated as a pipe-line company pursuant to R.C. 5727.01(D)(5), the commissioner emphasizes the differing regulatory treatment between pipe-line and natural gas companies. Considered a transporter of natural gas in interstate commerce, appellant is subject to regulation by the FERC rather than the Public Utilities Commission of Ohio ("PUCO"). Unlike appellant, entities treated as natural gas companies by the PUCO are subject to various public service obligations, including requirements to serve all members of the public and ensure access to natural gas, abide by approved rates, adhere to specific procedures prior to terminating service, and comply with specific reporting requirements regarding business conduct.[11]

In order to resolve whether appellant constitutes a natural gas or pipe-line company under R.C. 5727.01(D)(4) or (5), this board must determine the extent to which it is appropriate to look beyond the language set forth within the statute. Appellant argues that we need look no further than the definitions themselves, while the commissioner maintains that these definitions should be construed or interpreted in light of appellant's historical treatment as a pipe-line company, the primary nature of its business, and the differing regulatory treatment accorded natural gas and pipe-line companies. Upon consideration of the parties' arguments, we agree with appellant that the conditions clearly set forth within R.C. 5727.01(D) render it unnecessary to look to factors beyond those expressly delineated within the statute.

Making general references to the "profile of a typical natural gas company," the commissioner suggests that appellant's historical treatment as a pipe-line company have some bearing upon whether it is considered a natural gas company or a pipe-line company, questioning appellant's contention that it can qualify as both under the definitions prescribed by the legislature. The evidence before this board demonstrates that regulatory changes and increased competitive forces have significantly altered the natural gas industry during the last three decades, blurring former distinctions which may have existed between interstate pipeline companies and LDCs. The failure of the legislature to take into

[11] Although regulated by the FERC rather than the PUCO, appellant asserts that it is subject to similar

consideration these developments, however, does not warrant this board's adding to or deleting from the express language of R.C. 5727.01(D)(4) and (5). As noted in *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1:

> "When this court has been called upon to give effect to an Act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous. For example, a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation. *Crowl* v. *Deluca* (1972), 29 Ohio St. 2d 53, 58-59; *Slingluff* v. *Weaver* (1902), 66 Ohio St. 621. *** In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*' (Emphasis added.) *Columbus-Suburban Coach Lines* v. *Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127; *Wheeling Steel Corp.* v. *Porterfield* (1970), 24 Ohio St.2d 24, 28. Furthermore, whether an act is wise or unwise is a question for the General Assembly and not this court. *Olin Mathieson Chemical Corp.* v. *Ontario Store* (1967), 9 Ohio St. 2d 67, 70." Id. at 6. (Footnote omitted and emphasis sic.)

Neither R.C. 5727.01(D)(4) nor (5) imposes a "primary business" test as an element in determining under which definition an entity should be classified for tax purposes. Clearly, the General Assembly is capable of setting forth such parameters in the tax area, having done so in several other instances where there exists the possibility that an organization may be engaged in multiple activities or, of a comparable nature, property may be devoted to multiple uses. See, e.g., R.C. 5701.02(C) and 5701.03(B) (defining "fixture" and "business fixture" as tangible personal property permanently attached or affixed to land, building, structure, or improvement, which "primarily benefits" the land or the

Footnote contd. ——
regulatory requirements under the Natural Gas Act.

business, respectively); R.C. 5709.07(A)(3) (exempting from real property tax land "used primarily for church retreats or church camping"); R.C. 5709.20 (defining various pollution control and energy-related facilities by making reference to their "primary purpose"); R.C. 5709.55 (exempting from personal property tax property used or held by a holder of a liquor permit whose "primary business" is the production of wine); R.C. 5725.01(B)(1) (defining a "dealer in intangibles" as one engaged in a business which "consists primarily of lending money" or other listed activities); R.C. 5727.01(D) (defining a person as a "telephone company" when "primarily engaged" in providing local exchange telephone service); R.C. 5727.02 (differentiating between "primary" and "incidental" business activities of various public utilities referenced within R.C. Chapter 5727.); R.C. 5733.09(D)(1) (defining a "commercial printer" for purposes of corporate franchise tax obligations as a person "primarily engaged in the business of commercial printing").[12]

We are also not persuaded that appellant's regulation by the FERC rather than by the PUCO dictates its classification for purposes of taxation. In *Carnegie Natural Gas Co. v. Tracy* (Nov. 17, 1995), BTA No. 194-K-526, unreported, this board concluded that the taxpayer was entitled to a refund of corporate franchise tax it had paid because it met

[12] There have been instances in which the Supreme Court has developed its own "primacy," or "true object," test where none was expressly imposed by statute. See, e.g., *Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St.3d 134 (construing *Accountant's Computer Serv. v. Kosydar* (1973), 35 Ohio St.2d 120, and concluding that in order to determine whether a "mixed transaction" involving the rendition of a personal service and the transfer of tangible personal property was subject to sales/use tax, it was necessary to ascertain whether the services rendered were a consequential or inconsequential aspect of the transaction). However, where terms and conditions are clearly set forth by statute, the court has been reluctant to amplify such terms and conditions. See, e.g., *SCM Chemicals, Inc. v. Zaino*, 106 Ohio St.3d 43, 2005-Ohio-3676; *Elkem Metals Co., L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683; *Bernardini*, supra.

the definition of a natural gas company set forth in R.C. 5727.01 and was therefore exempt from such tax.[13] Rejecting arguments similar to those advanced in this appeal, i.e., that the applicable taxing statutes be construed so as to take into consideration whether the taxpayer was regulated by the PUCO, this board held:

> "In considering the Tax Commissioner's final determination in which he relied extensively upon the absence of appellant's regulation by the PUCO, we refer to the admonition found in a portion of the court's syllabus in *State, ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65:
>
> "'7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.)
>
> "'8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.'
>
> "See, also, *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 27-28 (holding 'neither the Board of Tax Appeals, nor this court, may legislate to add a requirement to a statute enacted by the General Assembly.')[.]
>
> "Given the similarity between the definitions set forth at 5727.01(E)(4) and (5) and those found in R.C. 4905.03(A)(6) and (7), under certain circumstances, it may be appropriate to consider the PUCO's interpretation and application of the latter statutes when determining the effect of the former. See *Akron Transp. Co. v. Glander* (1951), 155 Ohio St. 471; *Chrysler* [*Corp. v. Tracy* (Jan. 21, 1994), BTA No. 1991-K-1523, unreported, affirmed (1995), 73 Ohio St.3d 26].

[13] In *Carnegie Natural Gas*, supra, the definitions of natural gas and pipe-line companies were set forth in former R.C. 5739.01(E)(4) and (5).

However, neither R.C. 5733.09 [n]or R.C. 5727.01 condition the status of a company as a public utility for purposes of exempting it from the imposition of franchise tax upon its regulation by the PUCO. Additionally, appellant has suggested that the PUCO may actually be preempted from such regulation by virtue of the Natural Gas Act. See 15 U.S.C. section 717, et seq.; Brief of Appellant at 9 (collecting case[s]). Accordingly, we proceed to determine whether appellant qualifies as a natural gas company, or in the alternative, a pipe-line company as expressly defined by R.C. 5727.01(E)." Id. at 14-16.

Cf. *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, 311 ("The definitions of a 'public utility' set forth in R.C. 4905.02, 4905.03 and 5727.01 are not exclusive since those definitions are relevant solely to the statutory chapters in which they are located. *Vernon v. Warner Amex Cable Communications, Inc.* (1986), 25 Ohio St.3d 117, 119 ***."); *Continental Cablevision of Ohio, Inc. v. Tracy* (July 10, 1998), BTA Nos. 1996-K-6, et al., unreported, at 38, fn. 12.

Had it been the intent of the General Assembly to define a natural gas company or a pipe-line company on the basis of whether it is regulated by the FERC or the PUCO, it could easily have included such analysis as a determining factor. It chose not to do so and this board will not amplify the terms of R.C. 5727.01(D) to now achieve such a result. *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, ¶29, 2005-Ohio-2423 ("For that reason, it does seem plausible, perhaps even probable, that the General Assembly did intend the notice provision not to apply when the board conducts investigatory inspections. However, the strongest indication of the General Assembly's intent is the language it uses in a statute. ***"); *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266 ("The first rule of statutory construction is that a statute which is clear is to be applied, not construed. 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.' *** Our obligation is to apply the statute as written. ***").

Even disregarding appellant's contention that its delivery of natural gas to LDCs and natural gas marketers qualifies it as a natural gas company,[14] the record demonstrates that it directly supplies natural gas to industrial, power-generating, residential, and farm customers for the purposes delineated in R.C. 5727.01(D)(4). While it may indeed also satisfy the definitional elements of a pipe-line company, its election to not previously challenge its treatment is reasonable given the prior similarities in their treatment for tax purposes. However, having now successfully demonstrated that it is indeed a natural gas company as defined by R.C. 5727.01(D)(4), appellant is entitled to have its property assessed at the listing rate prescribed for such entities.

Consistent with the preceding discussion, and to the extent within this board's jurisdiction, appellant's first specification of error is well taken and is sustained. The remainder of appellant's specifications are beyond this board's jurisdiction and must

[14] We question whether the distribution of natural gas to LDCs and natural gas marketers, which themselves do not consume such gas for their own lighting, power, or heating purposes, would qualify appellant as a natural gas company under R.C. 5727.01(D)(4). See *Chrysler Corp. v. Tracy* (1995), 73 Ohio St.3d 26. However, given the other entities to which appellant supplies natural gas for these purposes, we need not make such determination.

therefore be overruled. Accordingly, it is the order of this board that the Tax Commissioner's final determination, consistent with foregoing discussion, is hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

Julia M. Snow, Board Secretary

FILED
JUL 31 2006
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COLUMBUS, OHIO

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION CORP., Appellee,	:	Case No. 06-1443
v.	:	
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO, Appellant.	:	Appeal from BTA Case No. 2003-K-1876

NOTICE OF APPEAL

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Appellant, William W. Wilkins, having succeeded to the office of Thomas M. Zaino, Tax Commissioner of Ohio, hereby gives notice of his appeal as of right to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals ("BTA") dated July 28, 2006, in BTA Case No. 2003-K-1876, entered on the journal of the proceedings on July 28, 2006. This appeal is filed in accordance with Section 5717.04, Ohio Revised Code, and Section 3(A)(1), S. Ct. Prac. R. II. A true copy of the Decision and Order of the BTA from which appeal is sought is attached hereto and incorporated herein by reference. This notice of appeal is being filed within thirty days of the entry of the attached BTA decision and order as required by statute and rule.

The appellant Tax Commissioner complains of the following errors in the Decision and Order of the BTA:

(1) The BTA erred, as a matter of fact and law, in holding that, beginning with the 2001 tax year (the second of the two tax years at issue), the taxpayer's taxable

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The appellant Tax Commissioner complains of the following errors in the Decision and Order of the BTA:

(1) The BTA erred, as a matter of fact and law, in holding that, beginning with the 2001 tax year (the second of the two tax years at issue), the taxpayer's taxable

property, in whole and in part, shall be assessed at an assessment rate of 25% of the true value of the taxable property, in accordance with the statutorily-prescribed rates for "natural gas companies," set forth in R.C. 5727.111 (C)(2), rather than at an assessment rate of 88% of true value, in accordance with the statutorily-prescribed rates for "pipeline companies," as set forth in R.C. 5727.111 (D).

(2) The BTA erred, as a matter of fact and law, in reversing the holdings and findings of the Commissioner that the taxpayer's taxable property, in whole and in part, shall be assessed at an assessment rate of 88% of its true value, in accordance with the statutorily-prescribed assessment rate for pipeline companies set forth in R.C. 5727.111(D).

(3) The BTA erred, as a matter of fact and law, in failing to follow the Tax Commissioner's several decades-long administrative interpretation and application of the Ohio public utility property tax definitions of "pipeline companies" and "natural gas companies," as set forth in R.C. 5727.01 (D)(4), and (D)(5), respectively, under which the taxpayer has always been required to report, and – until the tax years at issue – has always reported, as a "pipeline company." Such long-standing administrative practice and interpretation of the applicable statutory definitions by the Tax Commissioner, as the governmental agency charged with administering the tax, was properly entitled to be, and should have been, accorded great deference by the BTA.

(4) Because the taxpayer is not a "natural gas company" for purposes of any filings or compliance with the statutes, regulations and directives of the

Public Utilities Commission of Ohio (PUCO), and, further, that for purposes of its filings and compliance with the statutes, regulations and directives of the Federal Energy Regulatory Commission (FERC), the taxpayer reports and complies as an interstate natural gas **pipeline** company, the BTA erred, as a matter of fact and law, in holding that the taxpayer's taxable property shall be assessed at a 25% assessment rate on the true value of its taxable property as a "natural gas company," rather than at the 88% assessment rate on the true value of its taxable property as a "pipeline company."

(5) The BTA erred as a matter of fact and law in holding that the taxpayer's taxable property shall be assessed at an assessment rate of 25% of true value, rather than at 88% of true value, when the exclusive or "primary use" of its taxable property, is for "transporting natural gas, oil or coal or its derivatives through pipes or tubing, either wholly or partially in this state" within the meaning of the statutory definition of "pipeline company" in R.C. 5727.01(D)(5), rather than for "supplying or distributing natural gas for lighting, power or heating purposes to consumers within this state ***" within the meaning of the definition of "natural gas company" set forth in R.C. 5727.01 (D)(4).

(6) The BTA erred as a matter of fact and law in determining that any portion of the taxpayer's taxable property constituted "natural gas company" property, rather than "pipeline company" property, for purposes of application of the statutory assessment rates set forth in R.C. 5727.111.

(7) The BTA erred as a matter of fact and law in apparently holding that any use (even a comparatively incidental one) of any portion of the taxpayer's taxable

property to "distribute or supply" natural gas to consumers (end-user customers), rather than to transport natural gas, oil or coal or its derivatives, somehow requires the Commissioner to assess the taxpayer at an assessment rate of 25% of true value rather than at 88% of true value -- for all of its taxable property.

If the Court would allow the BTA's unreasonable, unlawful and erroneous interpretation of the public utility statutes to be affirmed, it is doubtful whether any taxpayer would be subject to the 88%-of-true-value assessment rate statutorily prescribed for "pipeline companies" set forth in R.C. 5727.111 (D). Suddenly, after almost 100 years of existence, the statutory definition of "pipeline company" would be rendered meaningless surplusage.

Respectfully submitted,

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In The Supreme Court of Ohio

Case Information Statement

Case Name: Columbia Gas Transmission Corp.

Case No.: _____

I. Has this case previously been decided or remanded by this Court? Yes ☐ No ☒

If so, please provide the Case Name: _____

Case No.: _____

Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes ☐ No ☒

If so, please provide the Case Name and Citation:_____

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes ☒ No ☐

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____, Section _____ **Ohio Revised Code:** R.C. 5727.01 and 5727.111

Ohio Constitution: Article _____, Section _____ **Court Rule:** _____

United States Code: Title _____, Section _____ **Ohio Admin. Code:** O.A.C _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

1) Public Utility Property Tax

2)._____

3) _____

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes ☐ No ☒

If so, please identify the Case Name: ______

Case No.: ______

Court where Currently Pending: _____

Issue: _____

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Signature of appellant or counsel

Counsel for: Tax Commissioner

FILED
AUG 16 2006
BOARD OF TAX APPEALS
COLUMBUS, OHIO

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION CORP.,	:	
Appellee/Cross-Appellant,	:	Case No. 06-1443
v.	:	
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO,	:	Appeal from BTA Case No. 2003-K-1876
Appellant/Cross-Appellee.	:	

AMENDED NOTICE OF APPEAL OF APPELLANT/CROSS-APPELLEE TAX COMMISSIONER OF OHIO

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ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION CORP.,	:	
	:	
Appellee/Cross-Appellant,	:	
	:	Case No. 06-1443
v.	:	
	:	Appeal from BTA Case
THOMAS M. ZAINO, TAX COMMISSIONER OF OHIO,	:	No. 2003-K-1876
	:	
	:	
Appellant/Cross-Appellee.	:	

AMENDED NOTICE OF APPEAL

Appellant, William W. Wilkins, having succeeded to the office of Thomas M. Zaino, Tax Commissioner of Ohio, hereby gives notice of his amended notice of appeal. This amended notice of appeal shall supersede his previous appeal filed with this Court on August 1, 2006. As was equally true of his originally-filed notice of appeal, this amended notice of appeal is an appeal as of right to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals ("BTA") dated July 28, 2006, in BTA Case No. 2003-K-1876, entered on the journal of the proceedings on July 28, 2006. It is filed in accordance with Section 5717.04, Ohio Revised Code, and Section 3(A)(1), S. Ct. Prac. R. II. A true copy of the Decision and Order of the BTA from which appeal is sought is attached hereto and incorporated herein by reference. This amended notice of appeal is being filed within thirty days of the entry of the attached BTA decision and order as required by statute and rule.

When R.C. 5727.02 is read in *pari materia* with the definitions of "natural gas company" and "pipe-line company" set forth in R.C. 5727.01, it becomes apparent that the taxpayer is a "pipe-line company," and not a "natural gas company," for public utility personal property tax purposes. Thus, we amplify our previous specifications of errors in order to expressly set forth for the Court a dispositive statutory basis in our favor: the "**primary business**" standard of R.C. 5727.02.

In addition to the various grounds set forth in our originally-filed notice of appeal, the taxpayer is a pipe-line company, and not a natural gas company, because the taxpayer is, and was at all times pertinent hereto, exclusively or primarily engaged in the pipe-line business of transporting natural gas through pipes within this state. Any engagement by the taxpayer in the activity of "supplying natural gas to consumers" (referring to the R.C. 5727.01(D)(4) definition of "natural gas company") is, and always has been, purely incidental to that primary pipe-line business. To the extent, if any, to which its various property is used in delivering natural gas to end-user customers (consumers), such business use of the property is incidental to the primary business use of the property in "pipe-line" activities, i.e., to transport natural gas through pipes to other than end-user customers.

In other words, contrary to the taxpayer's and the BTA's supposition, a primary use/primary business test is an **express** statutory standard pursuant to R.C. 5727.02 and is directly applicable to this case. Thus, we rely on this express statutory standard, as well as on this Court's jurisprudence that has similarly judicially blessed primary use/primary business standards, even in the absence of such explicit statutory guidance.

Accordingly, we reiterate (with various revisions) the seven previous specifications of error in our originally-filed notice of appeal, and then add an additional specification of error (numbered paragraph 8) relating to the "primary business" standard expressly set forth in R.C. 5727.02, as follows:

(1) The BTA erred, as a matter of fact and law, in holding that, beginning with the 2001 tax year (the second of the two tax years at issue), the taxpayer's taxable property, in whole and in part, shall be assessed at an assessment rate of 25% of the true value of the taxable property, in accordance with the statutorily-prescribed rate for "natural gas companies," set forth in former R.C. 5727.111 (C)(2), rather than at an assessment rate of 88% of true value, in accordance with the statutorily-prescribed rate for "pipe-line companies," as set forth in R.C. 5727.111 (D).

(2) The BTA erred, as a matter of fact and law, in reversing the holdings and findings of the Commissioner that the taxpayer's taxable property, in whole and in part, shall be assessed at an assessment rate of 88% of its true value, in accordance with the statutorily-prescribed assessment rate for pipe-line companies set forth in R.C. 5727.111(D).

(3) The BTA erred, as a matter of fact and law, in failing to follow the Tax Commissioner's several decades-long administrative interpretation and application of the Ohio public utility property tax definitions of "pipe-line companies" and "natural gas companies," as set forth in R.C. 5727.01 (D)(4), and (D)(5), respectively, under which the taxpayer has always been required to report, and has always reported, as a "pipe-line company." Such long-standing administrative practice and interpretation of the applicable statutory definitions by the Tax Commissioner, as the governmental agency charged with administering the tax, was properly entitled to be, and should have been, accorded great deference by the BTA. Indeed, the Commissioner's uniform interpretation and

application of the law accords with the Public Utilities Commission of Ohio's (PUCO's) same uniform interpretation and application of the identical definitions of those terms. Thus, the BTA likewise erred by failing to accord due deference to the PUCO's uniform interpretation and application of these definitions as well.

(4) Because the taxpayer is not now being treated, and has **never** been treated, by the Public Utilities Commission of Ohio (PUCO) as a "natural gas company" as defined in R.C. 4905.03(A)(6) for purposes of any filings or compliance with the statutes, regulations and directives of the PUCO, and, further, that for purposes of its filings and compliance with the statutes, regulations and directives of the Federal Energy Regulatory Commission (FERC), the taxpayer has always lawfully reported and complied as an interstate natural gas **pipe-line** company, the BTA erred, as a matter of fact and law, in holding that the taxpayer's taxable property shall be assessed at a 25% assessment rate on the true value of its taxable property as a "natural gas company," rather than at the 88% assessment rate on the true value of its taxable property as a "pipe-line company." The BTA's error is particularly apparent given that the definitions of "natural gas company" and "pipe-line company" for public utility regulatory purposes set forth in R.C. 4905.03(A) have always been identical to the definitions of those terms for public utility tax purposes in R.C. 5727.01(D).

(5) The BTA erred as a matter of fact and law in holding that the taxpayer's taxable property shall be assessed at an assessment rate of 25% of true value, rather than at 88% of true value, when the exclusive or primary business use of its taxable property, is for "transporting natural gas, oil or coal or its derivatives through

pipes or tubing, either wholly or partially in this state" within the meaning of the statutory definition of "pipe-line company" in R.C. 5727.01(D)(5), rather than for "supplying or distributing natural gas for lighting, power or heating purposes to consumers within this state ***" within the meaning of the definition of "natural gas company" set forth in R.C. 5727.01 (D)(4).

(6) The BTA erred as a matter of fact and law in determining that any portion of the taxpayer's taxable property constituted "natural gas company" property, rather than "pipe-line company" property, for purposes of application of the statutory assessment rates set forth in R.C. 5727.111.

(7) The BTA erred as a matter of fact and law in apparently holding that any use (even a comparatively incidental one) of any portion of the taxpayer's taxable property to "distribute or supply" natural gas to consumers (end-user customers), rather than to transport natural gas, oil or coal or its derivatives, somehow requires the Commissioner to assess the taxpayer at an assessment rate of 25% of true value rather than at 88% of true value -- for all of its taxable property. If the Court would allow the BTA's unreasonable, unlawful and erroneous interpretation of the public utility tax statutes to be affirmed, it is doubtful whether any taxpayer would be subject to the 88%-of-true-value assessment rate statutorily prescribed for "pipeline companies" set forth in R.C. 5727.111 (D). Suddenly, after almost 100 years of existence, the statutory definition of "pipe-line company" would be rendered meaningless surplusage. Through the simple expedient of contracting to deliver natural gas to even just one end-user customer,

a pipe-line company would "presto chango" magically be transformed into a "natural gas company" for purposes of public utility property taxation.

(8) Because the taxpayer's "primary business" within the meaning of R.C. 5727.02(A) is that of a "pipe-line company" as defined in R.C. 5727.01(D)(5), and any activity that the taxpayer engages in which constitutes the "supplying of natural gas to consumers" in this state is purely incidental to such primary pipe-line business, the BTA erred, as a matter of fact and law, in holding that the taxpayer is a "natural gas company" for purposes of applying the statutory assessment rate percentages prescribed in R.C. 5727.111. The BTA should have read the R.C 5727.01(D)(4)and (D)(5) definitions of "natural gas company" and "pipe-line company" in *pari materia* with the "primary business" test of R.C. 5727.02(A) to hold that the taxpayer is a pipe-line company whose property is subject to an 88% assessment rate percentage as prescribed under R.C. 5727.111(D).

Respectfully submitted,

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In The Supreme Court of Ohio

Case Information Statement

Case Name:	Case No.:
Columbia Gas Transmission	06-1443

I. Has this case previously been decided or remanded by this Court? Yes ☐ No ☒

If so, please provide the Case Name: _____

Case No.: _____

Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes ☒ No ☐

If so, please provide the Case Name and Citation: General Motors v. Tracy (1997), 519 U.S. 278

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes ☒ No ☐

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____, Section _____ **Ohio Revised Code**: R.C. 5727.01 AND .02

Ohio Constitution: Article _____, Section _____ **Court Rule**: _____

United States Code: Title _____, Section _____ **Ohio Admin. Code**: O.A.C _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

1) Public Utility Property Tax

2) _____

3) _____

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes ☐ No ☒

If so, please identify the Case Name: ______

Case No.: ______

Court where Currently Pending: _____

Issue: _____

Contact information for appellant or counsel:

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City State Zip Code

Signature of appellant or counsel

Counsel for: Tax Commissioner

4905.03 Definitions

As used in this chapter:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(1) A telegraph company, when engaged in the business of transmitting telegraphic messages to, from, through, or in this state;

(2) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier;

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

(4) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state;

(5) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artifical [*sic*] gas as is manufactured by such producer as a by-product of some other process in which such producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission.

(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission. The commission may, upon application made to it, relieve any producer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, so long as such producer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to consumers.

(7) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state;

(8) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(9) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(10) A messenger company, when engaged in the business of supplying messengers for any purpose;

(11) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether such railway is termed street, inclined-plane, elevated, or underground railway;

(12) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(13) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights of way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code;

(14) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(B) "Motor-propelled vehicle" means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

Nothing in this section shall be construed to mean that an electric light company operated not for profit, owned and operated exclusively by and solely for its customers, or owned or operated by a municipal corporation, is subject to sections 4905.66, 4905.67, 4905.68, and 4905.69 of the Revised Code.

(1988 S 337, eff. 3-29-88; 1980 H 21; 1975 H 579; 130 v H 1; 129 v 501; 1953 H 1; GC 614-2)

§ 5727.01 Definitions.

As used in this chapter:

(A) "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, railroad company, or combined company.

(B) "Gross receipts" means the entire receipts for business done by any person from operations† as a public utility, or incidental thereto, or in connection therewith, including any receipts received under Chapter 4928. of the Revised Code. The gross receipts for business done by an incorporated company engaged in operation as a public utility includes the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation as a public utility or from any other business.

(C) "Rural electric company" means any nonprofit corporation, organization, association, or cooperative engaged in the business of supplying electricity to its members or persons owning an interest therein in an area the major portion of which is rural.

(D) Any person:

(1) Is a telegraph company when engaged in the business of transmitting telegraphic messages to, from, through, or in this state;

(2) Is a telephone company when primarily engaged in the business of providing local exchange telephone service, excluding cellular radio service, in this state;

(3) Is an electric company when engaged in the business of generating, transmitting, or distributing electricity within this state for use by others, but excludes a rural electric company;

(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;

(5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state;

(6) Is a water-works company when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(7) Is a water transportation company when engaged in the transportation of passengers or property, by boat or other watercraft, over any waterway, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state;

(8) Is a heating company when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating purposes;

(9) Is a railroad company when engaged in the business of owning or operating a railroad either wholly or partially within this state on rights-of-way acquired and held exclusively by such company, or otherwise, and includes a passenger, street, suburban, or interurban railroad company.

As used in division (D)(2) of this section, "local exchange telephone service" means making available or furnishing access and a dial tone to all persons within a local calling area for use in originating and receiving voice grade communications over a switched network operated by the provider of the service within the area and for gaining access to other telecommunication services.

(E) "Taxable property" means the property required by section 5727.06 of the Revised Code to be assessed by the tax commissioner, but does not include either of the following:

(1) An item of tangible personal property that for the period subsequent to the effective date of an air, water, or noise pollution control certificate and continuing so long as the certificate is in force, has been certified as part of the pollution control facility with respect to which the certificate has been issued;

(2) An item of tangible personal property that during the construction of a plant or facility and until the item is first capable of operation, whether actually used in operation or not, is incorporated in or being held exclusively for incorporation in that plant or facility.

(F) "Taxing district" means a municipal corporation of†† township, or part thereof, in which the aggregate rate of taxation is uniform.

(G) "Telecommunications service" has the same meaning as in division (AA) of section 5739.01 of the Revised Code.

(H) "Interexchange telecommunications company" means a person that is engaged in the business of transmitting telephonic messages to, from, through, or in this state, but that is not a telephone company.

(I) "Sale and leaseback transaction" means a transaction in which a public utility or interexchange telecommunications company sells any tangible personal property to a person other than a public utility or interexchange telecommunications company and leases that property back from the buyer.

(J) "Production equipment" means all taxable steam, nuclear, hydraulic, and other production plant equipment used to generate electricity. For tax years prior to 2001, "production equipment" includes taxable station equipment that is located at a production plant.

(K) "Tax year" means the year for which property or gross receipts are subject to assessment under this chapter. This division does not limit the tax commissioner's ability to assess and value property or gross receipts outside the tax year.

(L) "Combined company" means any person engaged in the activity of an electric company or rural electric company that is also engaged in the activity of a heating company or a natural gas company, or any combination thereof.

HISTORY: GC §§ 5415-5418, 5321; 102 v 224, §§ 39-42; 115 v 162; 116 v 190; 116 v PtII, 308; 119 v 165; 124 v 166; Bureau of Code Revision, 10-1-53; 125 v 903(1049); 138 v H 145 (Eff 12-31-79); 139 v H 201 (Eff 12-31-82); 142 v H 171 (Eff 7-1-87); 143 v S 156 (Eff 12-31-89); 144 v H 904 (Eff 12-22-92); 148 v H 283 (Eff 9-29-99); 148 v S 3 (Eff 7-6-99; 10-5-99†††); 148 v H 640. Eff 6-15-2000.

§ 5727.02 Persons excepted.

As used in this chapter, "public utility," "electric company," "natural gas company," "pipe-line company," "water-works company," "water transportation company" or "heating company" does not include any of the following:

(A) Any person that is engaged in some other primary business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental. As used in this division, "supplying of electricity" means generating, transmitting, or distributing electricity;

(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise;

(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products.

HISTORY: GC § 5416-1; 115 v 258; 123 v 452; 124 v 460; Bureau of Code Revision, 10-1-53; 143 v S 156 (Eff 12-31-89); 148 v S 3. Eff 7-6-99; 10-5-99.

§ 5727.03 Combined company to file separate report for each listed activity.

(A) A combined company shall file a separate report under section 5727.08 of the Revised Code for each listed activity of a combined company. The tax commissioner shall separately value, apportion, and assess the company's property. Divisions (B)(1), (2), and (3) of this section shall be used to determine the taxable property that cannot be directly attributed to providing one of the listed activities of a combined company.

(B)(1) The taxable property to attribute to an electric company or a rural electric company activity shall be the taxable cost of the property that cannot be directly attributed to a listed activity of a combined company multiplied by a numerator that is the taxable cost of property that can be directly attributed to the activity of an electric company or a rural electric company and a denominator that is the sum of the taxable cost that can be directly attributed to all the listed activities of a combined company.

(2) The taxable property to attribute to a heating company activity shall be the taxable cost of the property that cannot be directly attributed to a listed activity of a combined company multiplied by a numerator that is the taxable cost of property that can be directly attributed to the activity of a heating company and a denominator that is the sum of the taxable cost that can be directly attributed to all listed activities of a combined company.

(3) The taxable property to attribute to a natural gas company activity shall be the taxable cost of the property that cannot be directly attributed to a listed activity of a combined company multiplied by a numerator that is the taxable cost of property that can be directly attributed to the activity of a natural gas company and a denominator that is the sum of the taxable cost that can be directly attributed to all the listed activities of a combined company.

(C) A combined company shall file a separate report under section 5727.31 of the Revised Code for each public utility activity subject to the excise tax imposed by section 5727.30 of the Revised Code. The tax commissioner shall exclude from the assessment issued by the tax commissioner on or before the first Monday in November 2002, and thereafter, the taxable gross receipts directly attributable to the activity of an electric company or a rural electric company. In addition, the tax commissioner shall exclude the portion of taxable gross receipts that cannot be attributed to a listed combined company activity or another public utility activity subject to the excise tax imposed by section 5727.30 of the Revised Code by multiplying those taxable gross receipts by a numerator that is the taxable gross receipts that can be directly attributed to an electric company or a rural electric company activity, and a denominator that is the sum of the taxable gross receipts that can be directly attributed to a listed combined company activity or another public utility activity subject to the excise tax imposed by section 5727.30 of the Revised Code.

(D) A combined company subject to the excise tax imposed by section 5727.24 of the Revised Code shall file a return under section 5727.25 of the Revised Code. The excise tax imposed by section 5727.24 of the Revised Code shall be levied only on the following gross receipts of a combined company:

(1) The taxable gross receipts directly attributed to the activity of a natural gas company;

(2) The portion of taxable gross receipts that cannot be directly attributed to a listed combined company activity or another public utility activity subject to the excise tax imposed by section 5727.30 of the Revised Code, by multiplying those taxable gross receipts by a numerator that is the taxable gross receipts that can be directly attributed to a natural gas company activity, and a denominator that is the sum of the taxable gross receipts that can be directly attributed to a listed combined company activity or another public utility activity subject to the excise tax imposed by section 5727.30 of the Revised Code.

HISTORY: 148 v S 3 (Eff 7-6-99; 10-5-99)†; 148 v H 640. Eff 6-15-2000.

R.C. 5727.111 as effective 12/21/2000

[§ 5727.11.1] § 5727.111 Assessment at percentages of true value.

The taxable property of each public utility, except a railroad company, and of each interexchange telecommunications company shall be assessed at the following percentages of true value:

(A)(1) Except as provided in division (A)(2) of this section, fifty per cent in the case of a rural electric company;

(2) For tax year 2001 and thereafter, fifty per cent in the case of the taxable transmission and distribution property of a rural electric company, and twenty-five per cent for all its other taxable property;

(B) In the case of a telephone or telegraph company, twenty-five per cent for taxable property first subject to taxation in this state for tax year 1995 or thereafter, and eighty-eight per cent for all other taxable property;

(C)(1) Except as provided in division (C)(2) of this section, eighty-eight per cent in the case of a natural gas company;

(2) For tax year 2001 and thereafter, twenty-five per cent in the case of a natural gas company.

(D) Eighty-eight per cent in the case of a pipe-line, water-works, or heating company;

(E)(1) Except as provided in division (E)(2) or (3) of this section, one hundred per cent in the case of the taxable production equipment of an electric company and eighty-eight per cent for all its other taxable property;

(2) For tax year 2001 and thereafter, eighty-eight per cent in the case of the taxable transmission and distribution property of an electric company, and twenty-five per cent for all its other taxable property;

(3) Property listed and assessed under divisions (B)(1) and (2) of section 5711.22 of the Revised Code and leased to an electric company shall continue to be assessed at one hundred per cent for production equipment and eighty-eight per cent for all such other taxable property until January 1, 2002.

(F) Twenty-five per cent in the case of an interexchange telecommunications company;

(G) Twenty-five per cent in the case of a water transportation company.

HISTORY: 143 v S 156 (Eff 12-31-89); 143 v S 257 (Eff 9-26-90); 145 v H 715 (Eff 7-22-94); 146 v H 117 (Eff 9-29-95); 147 v H 215 (Eff 6-30-97); 148 v H 283 (Eff 9-29-99); 148 v S 3 (Eff 7-6-99; 10-5-99†); 148 v H 640 (Eff 6-15-2000); 148 v S 287. Eff 12-21-2000.

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R.C. 5727.111 as effective 6/26/2003

[§ 5727.11.1] § 5727.111 Assessment at percentages of true value.

The taxable property of each public utility, except a railroad company, and of each interexchange telecommunications company shall be assessed at the following percentages of true value:

(A)(1) Except as provided in division (A)(2) of this section, fifty per cent in the case of a rural electric company;

(2) For tax year 2001 and thereafter, fifty per cent in the case of the taxable transmission and distribution property of a rural electric company, and twenty-five per cent for all its other taxable property;

(B) In the case of a telephone or telegraph company, twenty-five per cent for taxable property *first subject to taxation in this state for tax year 1995 or thereafter,* and the following for all other taxable property:

(1) For tax years prior to 2005, eighty-eight per cent;

(2) For tax year 2005, sixty-seven per cent;

(3) For tax year 2006, forty-six per cent;

(4) For tax year 2007 and thereafter, twenty-five per cent.

(C) Twenty-five per cent in the case of a natural gas company.

(D) Eighty-eight per cent in the case of a pipe-line, water-works, or heating company;

(E)(1) Except as provided in division (E)(2) or (3) of this section, one hundred per cent in the case of the taxable production equipment of an electric company and eighty-eight per cent for all its other taxable property;

(2) For tax year 2001 and thereafter, eighty-eight per cent in the case of the taxable transmission and distribution property of an electric company, and twenty-five per cent for all its other taxable property;

(3) Property listed and assessed under divisions (B)(1) and (2) of section 5711.22 of the Revised Code and leased to an electric company shall continue to be assessed at one hundred per cent for production equipment and eighty-eight per cent for all such other taxable property until January 1, 2002.

(F) Twenty-five per cent in the case of an interexchange telecommunications company;

(G) Twenty-five per cent in the case of a water transportation company.

HISTORY: 143 v S 156 (Eff 12-31-89); 143 v S 257 (Eff 9-26-90); 145 v H 715 (Eff 7-22-94); 146 v H 117 (Eff 9-29-95); 147 v H 215 (Eff 6-30-97); 148 v H 283 (Eff 9-29-99); 148 v S 3 (Eff 7-6-99; 10-5-99)†; 148 v H 640 (Eff 6-15-2000); 148 v S 287 (Eff 12-21-2000); 150 v H 95. Eff 6-26-2003.

Ohio Constitution. Art. I, § 2

§ 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Commerce Clause, U.S. Const. art. I, § 8, cl. 3

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Supremacy Clause, U.S. Const. art. VI, cl. 2

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Equal Protection and Due Process, U.S. Const. art. XIV

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.