IN THE SUPREME COURT OF OHIO
Appeal from the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION CORP.,	)	
	)	
Appellee,	)	
	)	
v.	)	CASE NO. 2006-1443
	)	
THOMAS M. ZAINO [William W. Wilkins],	)	Board of Tax Appeals
TAX COMMISSION OF OHIO,	)	Case No. 2003-K-1876
	)	
Appellant.	)	

BRIEF OF AMICUS CURIAE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, IN SUPPORT OF COLUMBIA GAS TRANSMISSION CORPORATION

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INTRODUCTION AND STATEMENT

The Interstate Natural Gas Association of America ("INGAA") is a national, non-profit trade association composed of interstate natural gas pipeline companies in the United States, as well as comparable pipeline companies in Canada and Mexico. INGAA's United States members, which account for virtually all of the natural gas transported and sold in interstate commerce, are regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717w. INGAA submits this brief in support of the position of Columbia Gas Transmission Corporation to provide the Court with an explanation of the federal policies, embodied in statutes and regulations, governing the natural gas industry.

INGAA defers to the Statement of the Case included in the brief of Appellee/Cross-Appellant, Columbia Gas Transmission Corporation.

ARGUMENT

Proposition of Law: Changes in the federal regulation of the natural gas industry have removed the validity and viability of the Ohio statutory distinctions between "natural gas companies" and "pipe-line companies" because under federal law local distribution companies are encouraged to compete with pipelines to perform transportation, storage and delivery services.

Ohio's tax statute, as applied by the Tax Commissioner, creates distinctions between companies engaged in the natural gas business that are no longer valid or viable in light of changes that have occurred in federal law governing the natural gas industry. R.C. 5727.01(D) contains definitions for a "natural gas company" and a "pipe-line company" that once may have been mutually exclusive categories but now overlap under present day federal statutes and regulations.

Under the statute, the Tax Commissioner has attempted to distinguish between companies engaged in natural gas business subject to regulation by the state and companies engaged in natural gas business subject to regulation by the federal government. Until the late 1970s, this distinction tracked the clear division between the scope of state and federal regulation which in turn matched the differences between the types of companies operating natural gas facilities. With the enactment of the Natural Gas Policy Act in 1978, Congress sought to eliminate the clear division between intrastate and interstate natural gas markets. As a result, today, companies that are primarily regulated by the state can engage in the interstate transportation, storage, and sale of natural gas, that is regulated under federal law by the FERC, in competition with interstate natural gas pipelines. The same facilities can be used for business that is regulated by the Public Utilities Commission of Ohio ("PUCO") and business that is regulated by the FERC – thus, the clear distinctions between companies engaged in intrastate and interstate business that existed at the time R.C. 5727.01(D) was enacted no longer exist.

Moreover federal policy encourages competition in the natural gas industry so that buyers and sellers have many choices, including choices in transportation and storage. As a result, not only can PUCO-regulated natural gas companies use their facilities for FERC-regulated interstate transportation and storage, but federal policy permits interstate pipelines to use their FERC-regulated facilities to directly supply natural gas to consumers. In light of these federal policies, the distinctions between "natural gas companies" and "pipe-line companies" contained in R.C. 5727.01(D)(4) and (5) are no longer valid or viable as mutually exclusive categories to justify applying a higher assessment rate to the property of an interstate pipeline.

A. The Historical Distinctions Used In R.C. 5727.01(D) Between Companies Engaged in Intrastate and Interstate Markets No Longer Apply

The enactment of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301, *et seq.*, in 1978, substantially blurred the bright distinctions between state and federally regulated markets in the natural gas industry. Historically, the natural gas industry was characterized by three distinct segments. Producers produced the gas, and perhaps gathered it from wells through low pressure pipelines to central points, where the gas was sold to interstate natural gas pipelines which then transported the gas to other states where the gas was resold to a local distribution company for distribution and sale to the ultimate consumer. The early Commerce Clause cases of the U.S. Supreme Court had held that the states could regulate natural gas production and gathering, as well as the local distribution and retail sale of the gas, but the states could not regulate the interstate transportation and wholesale sales of natural gas. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 683 (1954) (and cases cited at nn 11 and 12). In 1938 Congress enacted the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"), "to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. at 682-683 (citation omitted).

"The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," so that the FERC, "exercises authority over the rates and facilities of natural gas companies used in this transportation and sale through a variety of powers." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). The line between the jurisdiction of the FERC, under the Natural Gas Act, and the authority left to the states was held to be "sharply and cleanly" drawn by Congress. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 517 (1947). Given these clear divisions between state and federal authority, companies engaged in the natural gas business tended to engage either in state-regulated or federally-regulated activities so that the distinctions drawn between a "natural gas company" and a "pipe-line company" in R.C. 5727.01(D)(4) and (5) had a basis in both the regulatory and business structure of the natural gas industry.

These clean historical distinctions came to an end in 1978 when Congress enacted the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301, *et seq.* The sharp divisions between the interstate and intrastate natural gas markets led to price distortions and shortages of natural gas in the interstate markets in the 1970s. To remedy this, Congress adopted the NGPA to eliminate the distorting effects caused by the division between the interstate and intrastate natural gas markets, expanding "federal control, since it granted FERC jurisdiction over the intrastate market for the first time." *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 421 (1986).

B. Post-NGPA Regulation Enables Local Distribution Companies To Provide Some Of The Same Interstate Transportation and Storage Services As Interstate Pipelines

"Congress took a first step toward increasing competition in the natural gas market by enacting the Natural Gas Policy Act of 1978," *General Motors Corp. v. Tracy*, 519 U.S. 278, 283 (1997), which phased out price regulation of the commodity and promoted "gas transportation by interstate and interstate pipelines for third parties." *Id.* (citation omitted). To achieve these purposes, FERC was given authority to permit intrastate pipelines to make sales for resale or to transport natural gas in interstate commerce without subjecting the company to the comprehensive regulation of the FERC under the Natural Gas Act. Pursuant to Section 311 of the NGPA, the FERC could authorize intrastate pipelines to transport or sell gas to interstate pipelines or local distribution companies, transactions that would involve the intrastate pipeline in interstate commerce. 15 U.S.C. §§ 3431(a)(2) & (b). To insulate these companies from the full effect of federal regulation, Section 601(a) of the NGPA removed from the scope of the Natural Gas Act any sales or transportation authorized by the FERC under Section 311. 15 U.S.C. § 3371(a).

Prior to the NGPA, courts had interpreted the scope of the FERC's Natural Gas Act jurisdiction to extend to facilities, that otherwise would be subject only to state regulation, if gas from an interstate stream became commingled in the intrastate facilities. *See, e.g., Louisiana Power & Light Co. v. FPC,* 483 F.2d 623 (5th Cir. 1973) (interstate gas introduced into intrastate pipeline system makes intrastate system subject to NGA jurisdiction); and *Louisiana Public Service v. FPC,* 359 F.2d 525 (5th Cir. 1966) (gas commingled in interstate pipeline is subject to NGA jurisdiction even though it never leaves state of production). In Section 601 of the NGPA, Congress permitted intrastate pipelines to transport interstate gas without the business of the intrastate pipeline becoming subject to the full panoply of federal regulation. Therefore, for the first time, the clean divisions that had existed between intrastate pipelines and interstate pipelines were eroded.

The NGPA specifically excluded from the scope of this new authorization intrastate pipelines and local distribution companies that were exempt from Natural Gas Act jurisdiction under Section 1(c) of the Natural Gas Act (called the Hinshaw exemption). NGPA Section 2(16), 15 U.S.C. § 3301(16) (definition of intrastate pipeline excludes entities covered by NGA Section 1(c) exemption). FERC, however, extended limited jurisdictional certificates to these entities to enable them to engage in the interstate transportation and sales for resale of natural gas on the same terms as intrastate pipelines under NGPA Section 311. The agency reasoned that this was necessary to achieve the Congressional objective of removing artificial restraints on the flow of gas between interstate and intrastate markets. *Certain Transportation, Sales and Assignments by Pipeline Companies not Subject to Commission Jurisdiction under Section 1 (c) of the Natural Gas Act,* 45 F.R. 1872 (January 9, 1980) (Order No. 63).

Subsequently, Congress enacted the Natural Gas Wellhead Decontrol Act, Pub. L. No. 101-60, 103 Stat. 157 (1989), eliminating all natural gas commodity price regulation, in reliance on the existence of open-access transportation through the network of intrastate and interstate pipelines to provide access to the deregulated commodity supplies, and Congress charged the FERC with responsibility to improve the competitive structure of the industry to maximize the benefits of decontrol of the commodity. *United Distribution Companies v. FERC*, 88 F.3d 1105, 1125 (D.C. Cir. 1996). The FERC responded, in its Order No. 636, by revamping its existing open-access transportation regulations that were originally adopted in 1985 in its Order No. 436. In Order No. 636, the FERC required the separation of the sale of the commodity from the provision of transportation service and it adopted other changes to increase the competitive transportation options available for natural gas buyers and sellers. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* 57 F.R. 13267 (April 16, 1992), FERC Stats. & Regs., Regulation Preambles ¶ 30,939 (April 8, 1992) (Order No. 636). These regulations appear in Part 284 of the Commission's regulations, 18 C.F.R. Part 284, and contain the terms and conditions for the interstate transportation and storage of gas by local distribution companies and intrastate pipelines.

As a result of these statutory and regulatory changes, since the early 1980s it has been possible for local distribution companies and intrastate pipelines, otherwise subject to regulation by the states, to use their facilities for the interstate transportation, storage, and sale for resale of natural gas that is subject to regulation by the FERC. The FERC regulates only the terms of the interstate transportation, storage,[1] and wholesale sales, and not the purely intrastate business of these local distribution and intrastate pipeline companies. *See* 18 C.F.R. Subparts C & D; 18 C.F.R. §§ 284.224 & 284.227. In fact, the FERC allows these companies to elect to use their state-established rates for any interstate transportation they perform. 18 C.F.R. § 284.224(e)(2); *see, e.g., Cincinnati Gas & Electric Co.*, 88 FERC ¶ 61,104 (1999) (local distribution company's use of currently effective State of Ohio-approved rate approved to apply to interstate transportation).

Cincinnati Gas & Electric Company is an example of an Ohio local distribution company that would satisfy the R.C. 5727.01(D)(4) definition of "natural gas company" but also has been authorized by FERC to transport gas as an intrastate pipeline, *Cincinnati Gas & Electric Co.*, 31 FERC ¶ 62,384 (1985), and has rates and a form of tariff on file with FERC. As part of this authorization FERC requires the local distribution company to undergo a FERC rate reevaluation every three years to determine whether its state-approved rates continue to be appropriate for the interstate transportation it performs. *See, Consumers Energy Co.*, 88 FERC ¶ 61,084 (1999). This periodic rate review results in a mini-rate case for local distribution companies performing interstate transportation and storage services.

The interstate transportation and storage provided by local distribution companies and intrastate pipelines under these regulations competes with the transportation and storage services provided by interstate pipeline companies. Indeed, the purpose of the statutory and regulatory changes in federal law was to enable the free flow of natural gas through facilities that had

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1 Storage is regulated under the FERC's transportation jurisdiction. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, n.1 (1988) (citations omitted); *see also*, 18 C.F.R. ¶ 284.1(a) ("Transportation includes storage, exchange, backhaul, displacement, or other methods of transportation.").

previously been restricted to use either for the intrastate or for the interstate market. Therefore, in light of these federal laws, a local distribution company can qualify as a "pipe-line company" under the definition in R.C. 5727.01(D)(5) because it would be "engaged in the business of transporting natural gas ...through pipes ...." The fact that the local distribution company is primarily regulated by the PUCO is not mutually exclusive with the local distribution company also engaging in the business of transporting gas or providing storage service in competition with pipelines.

C. FERC Policy Enables Both Interstate Pipelines And Local Distribution Companies To Directly Supply Gas To Consumers

Under R.C. 5727.01(D)(4) the distinguishing characteristic of a "natural gas company" is that it engages in the business of supplying natural gas to consumers, yet both interstate pipelines and local distribution companies engage in this business. At one time, FERC had a policy preference for local distribution companies to directly supply gas to end users. That policy preference was abandoned by the FERC in the 1980s, in favor of a policy to advance competition in the industry by permitting consumers to obtain direct access to natural gas supplies even if that meant by-passing the local distribution company to connect directly to an interstate pipeline. *See Northern Natural Gas Co.*, 48 FERC ¶ 61,232 (1989) (explaining policy evolution); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992) (discussing and approving by-pass policy); and *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 122-123 (D.C. Cir. 1989) (discussing and approving policy change). In approving this by-pass policy, that permits competition between local distribution companies and interstate pipelines, at least one court has recognized the similarities between the service to be provided by the interstate pipeline in delivering gas directly to the end-user and the local distribution of gas provided by a local distribution company. *Cascade Natural Gas Corp. v. FERC*, 955 F.2d at 1421.

R.C. 5727.01(D)(4) uses the term "supplying" natural gas to consumers, a word that normally encompasses the delivery of an item but not necessarily the sale of the item. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (affirming holding that direct sales by marketers do not qualify marketer as a "natural gas company" under R.C. 5727.01(D)(4)). Since FERC policy permits consumers to connect directly to an interstate pipeline so that the interstate pipeline supplies to the consumer natural gas that has been purchased by that consumer elsewhere, an interstate pipeline can meet the statutory definition of a "natural gas company."

In sum, changes in federal law have caused the Ohio statutory definitions of "natural gas company" and "pipe-line company" to become overlapping categories. This overlap was of little consequence prior to the change in the applicable assessment rate for the two categories. Because of the changes in federal law, which enable and even encourage local distribution companies to compete with interstate pipelines, the use of these overlapping categories to differentiate the assessment rates for businesses that can provide the same services is no longer tenable. An interstate pipeline company can qualify under the statutory definition of a "natural gas company" and, therefore, is entitled to the same assessment rate as the local distribution companies.

CONCLUSION

For the reasons set forth above, and in the brief of Appellee/Cross-Appellant Columbia Gas Transmission Corporation, the definitions in R.C. 5727.01(D) create overlapping categories, which entitles Columbia Gas Transmission Corporation to the more favorable "natural gas company" classification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief of Amicus Curiae Interstate Natural Gas Association of America, 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 the 22nd day of November, 2006.

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