

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION,

Appellee/Cross-Appellant,

v.

WILLIAM W. WILKINS, TAX  
COMMISSIONER OF OHIO,

Appellant/Cross-Appellee.

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:  
: Case No. 2006-1443  
:  
:  
: Appeal from BTA  
: Case No. 2003-K-1876  
:  
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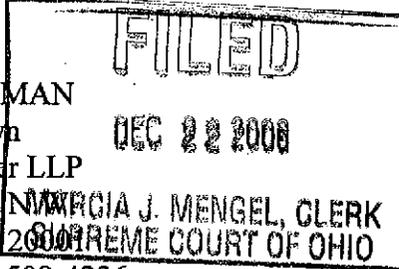
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	:	<b>REPLY BRIEF OF APPELLANT/</b>
Appellant/Cross-Appellee.	:	<b>CROSS-APPELLEE</b>

**Introduction**

In this brief, we reply to Columbia Gas Transmission Corporation's ("Transmission's") response to our initial merit brief in support of our appeal, and we also answer Transmission's initial merit brief on their cross-appeal -- in which Transmission has raised, as a protective matter, various constitutional challenges to the applicable statutes. We first present the "reply" portion of our brief.

**REPLY**

**A. To treat Columbia Gas Transmission as a "natural gas company" for purposes of the reduced personal property tax assessment rate for such companies as enacted in SB 287 would directly contravene the General Assembly's manifest intent in enacting, in that same legislation, a 100%, dollar-for-dollar replacement tax, the "Mcf Tax," levied on "natural gas companies." The Mcf Tax is imposed only on volumes of natural gas delivered to end-users, and not on any transmission service volumes, so that as applied to Transmission the Mcf Tax would replace less than 3.2% of the revenue loss from the property tax rate reduction.**

In our initial brief supporting our appeal, we set forth four independent, but mutually supportive, statutory interpretation grounds for reversal of the BTA's determination. On these bases, we submit that the BTA erroneously held that Transmission's taxable personal property shall be annually assessed at the 25% assessment rate prescribed for "natural gas companies,"

rather than at the 88% rate prescribed for “pipe-line companies.” The BTA, instead, should have determined that Transmission’s use of its property exclusively or primarily for transmission purposes defines it as a “pipe-line company” under the applicable statutory definition sections, R.C. 5727.01(D)(5) and R.C. 5727.02(A). Thus, Transmission should be assessed at the 88% rate for “pipe-line companies.”

Revealingly, Transmission’s 50-page answer/initial merit brief recognizes and attempts to rebut only the first three of those four grounds, which we restate here, as follows:

- (a) The BTA’s statutory interpretation of “natural gas company” contravened the plain meaning of the applicable statutes because the BTA substituted its own novel “incidental business” test in place of the express “primary business” test of R.C. 5727.02(A);
- (b) Even if R.C. 5727.02(A) were to be erroneously interpreted not to provide an express “primary business” test, the Court should apply such standard here in the absence of express statutory language, just as the Court, in the absence of express statutory language, has uniformly applied a “primary” test for purposes of personal property tax, real property tax, sales and use tax, and all other Ohio taxes, whenever a taxpayer uses its property in multiple, tax-distinct ways; and
- (c) In violation of this Court’s controlling public utility tax case law, the BTA’s interpretation wrongly disregarded, and failed to accord proper deference to, the PUCO’s and the Commissioner’s long-standing, shared administrative interpretations of “natural gas company” and “pipe-line company” as those identical terms are used in both sets of statutes.

Transmission’s brief contains only an oblique, passing reference to our fourth statutory interpretation ground (which we detailed in the last three pages of our 23-page initial brief). Transmission’s Br. 22-23. Namely, Transmission’s (and the BTA’s) interpretation of the applicable statutes erroneously ignores that the General Assembly, in the same legislation in which the assessment rate for “natural gas companies” was reduced from 88% to 25% (Am. Sub. S.B. 287 of the 123<sup>rd</sup> General Assembly), also enacted a dollar-for-dollar, annual

replacement tax, called the “natural gas consumption tax,” or “Mcf Tax.” This newly-enacted, off-setting, annual tax is levied under R.C. 5727.811 on “natural gas distribution companies,” i.e., “natural gas companies” and “combined companies” (electric company / natural gas company businesses). See the respective definitions in R.C. 5727.80(K); R.C. 5727.01(D)(4) and R.C. 5727.01(L). The Mcf Tax is imposed solely on the volumes of natural gas that these natural gas distribution companies deliver to end-user consumers. R.C. 5727.811.

Thus, in jointly enacting these companion changes to the public utility tax chapter of the Revised Code, R.C. Chapter 5727, the General Assembly intended SB 287 to be “revenue neutral.” Under that law, “natural gas companies” are annually to be granted a reduction of the personal property tax assessment rate but, at the same time, are subjected to a new annual tax, the Mcf Tax. As a consequence, the natural gas companies’ annual tax savings resulting from the reduced personal property tax assessment rate are recouped by the State through the additional tax payments “natural gas companies” are required to pay under the annual Mcf Tax.

But, in the case of interstate pipeline businesses such as Transmission, the Legislature’s intended “revenue neutrality” would not be achieved. If Transmission were deemed to be a “natural gas company,” Transmission’s liability under the Mcf Tax would be relatively minimal relative to the vast savings of public utility property tax that it would receive by being deemed a “natural gas company.” The Mcf Tax recoupment amount would be minimal because the volumes of natural gas that Transmission delivers to end-user customers are minimal relative to Transmission’s primary business of transmission, i.e., transporting natural gas from sources of production or storage to other than end-user consumers. Transmission’s return on its investment regarding its various pipeline property is overwhelmingly attributable to Transmission’s pipeline transmission services, not distribution (delivery to end-user) services.

In our initial brief we detailed Transmission's failure to present evidence as to any quantification of revenues derived from any such end-user delivery services, as well as the relatively minor nature of Transmission's performance of any end-user delivery services at all. In fact, as we detailed, and Transmission's answer brief tacitly concedes, the only attempted quantification of the actual volumes of gas delivered by Transmission to end-users set forth in the evidentiary record is a one-page summary for calendar year 2002 (well after the 2001 tax year at issue here).

For want of any better evidence, however, we here use Transmission's information on the one-page summary to show just how relatively minimal Transmission's annual Mcf Tax liability would be. The Mcf Tax liability would pale in comparison to the over \$13 million in tax refunds that Transmission would retroactively receive for the 2001 tax year, and each tax year thereafter, under the 25% assessment rate. Specifically, the 2002 annual Mcf volumes shown on the chart attributable to "end-user deliveries" or "direct customer connections in Ohio" total 10,121,579 Mcf's. Supp.1269. Under R.C. 5727.811(C), Transmission could then elect to aggregate that total Mcf volume amount as if it had only one customer, so that application of the volume-discounted tax rates set forth in R.C. 5727.811(A) would yield an effective tax rate of slightly greater than \$.0411/Mcf, i.e., a hundred dollars or so more than \$415,997. Rather than constituting a 100%, dollar-for-dollar offset, such Mcf Tax liability would constitute less than 3.2% of Transmission's personal property tax refund amount.

This tiny, less-than-3.2%, offset is hardly what the General Assembly could have intended. If the General Assembly had intended, as urged by Transmission and erroneously held by the BTA, that, effective for the 2001 tax year, Transmission and other interstate pipeline companies were suddenly to be treated as "natural gas companies" for purposes of the then-

newly reduced personal property tax assessment rate for “natural gas companies,” the General Assembly surely would have enacted a more-encompassing replacement tax to recoup that revenue loss.

Specifically, in addition to levying a tax on the Mcf natural gas distribution companies for their distribution activities (i.e., delivery-to-end-user transportation services), the General Assembly surely would have imposed a tax that would have been measured using the defining activity of interstate pipeline businesses: natural gas transmission. Only in this way could the goal of the Legislature to pass a “revenue neutral” bill have been achieved.

**B. In enacting the assessment rate reduction and Mcf Tax provisions pursuant to SB 287, the General Assembly naturally intended and expected that Transmission and all other interstate pipeline businesses would continue to be considered “pipe-line companies” for all public utility tax and regulatory purposes, just as they had been for nearly a century of previous tax and regulatory administration.**

As Transmission concedes, from the enactment of the public utility personal property tax on “natural gas companies” and “pipe-line companies” in 1911 up to the time of the General Assembly’s enactment of Am. Sub. Sen. Bill No. 287 in 2001, Transmission and all other interstate pipeline companies (“transmission companies”) doing business in Ohio had always filed and paid personal property taxes as “pipe-line companies,” as presently defined in R.C. 5727.01(D)(5), rather than as “natural gas companies” as presently defined in R.C. 5727.01(D)(4). Similarly, as likewise conceded by Transmission, at all times from the contemporaneous enactment of like public utility regulatory statutes in 1911, Transmission and all other interstate pipeline businesses doing business in Ohio had never been treated as “natural gas companies” for PUCO purposes, as presently defined in R.C. 4905.03 (A)(6).

Unlike such PUCO-defined “natural gas companies,” interstate pipeline businesses such as Transmission had (and have) always been exempt from the unique and substantial regulatory

burdens imposed by the PUCO on “natural gas companies” as natural gas “providers-of-last-resort” to the general public. Instead, they were (and are) subject to far different and less-burdensome federal public utility regulation under which they had (and have) no such duties and obligations to assure natural gas supplies to the general public.

Thus, in enacting SB 287, the General Assembly naturally intended and expected that such companies as Transmission would continue to file and pay their public utility taxes levied under R.C. Chapter 5727 as “pipe-line companies.” For both public utility tax and regulatory purposes, at all times during the ninety (90) preceding years, such companies had never considered themselves to be, and were never treated as, “natural gas companies” within the meaning of either R.C. Title 57 or R.C. Title 49.

**C. At all times after the enactment of SB 287, Transmission’s and the other interstate pipelines’ own tax and regulatory course of conduct reflects that they share the same understanding as did the General Assembly when it enacted SB 287: transmission companies are “pipe-line companies,” and not “natural gas companies,” within the meaning of R.C. Chapter 5727 and R.C. Title 49.**

The Mcf Tax is an annual tax for which Transmission and the other interstate pipeline company refund claimants (whose cases are on hold at the BTA pending the outcome of this case) have never filed any Mcf returns or paid any Mcf Tax for any tax years – through 2006. These companies have never considered themselves to be “natural gas companies” for purposes of the Mcf Tax, even though the R.C. 5727.01(D)(4) definition of “natural gas company” applies to both the Mcf Tax and the public utility personal property tax (as well as to the annual public utility excise or “gross receipts” tax).

What is more, throughout the proceedings below at the BTA and at the Tax Commissioner’s appeals division, Transmission and the other interstate pipeline claimants continued to file as “pipe-line companies” for annual public utility property and excise (“gross

receipts”) tax purposes. Similarly, for PUCO purposes, Transmission and these other companies continue not to file as, or be regulated as, “natural gas companies” as defined in R.C. 4905.03(A)(6), and thereby continue to avoid the uniquely burdensome regulations imposed by the PUCO on “natural gas companies.”

In continuing to follow a course of conduct under which they have consistently acted in accordance with the understanding that they are “pipe-line companies,” Transmission and the other interstate pipeline company refund claimants could not have more clearly demonstrated their own lack of conviction regarding the statutory arguments advanced in this litigation by Transmission’s outside counsel.

**D. The BTA’s erroneous interpretation of the definition of “natural gas company” violates well-established principles of statutory interpretation by unjustly and unreasonably failing to harmonize that part of SB 287 imposing the Mcf Tax (as a dollar-for-dollar replacement tax) with the part of SB 287 granting a reduction of assessment rate on the true value of “natural gas company” personal property.**

In interpreting statutes, this Court has always looked to the manifest intent of the General Assembly when enacting a legislative bill – requiring that various related sections of the enacted bill to be read together, and not in isolation. *State ex rel. Myers v. Indus. Comm’n* (1922), 105 Ohio St. 103, paragraph one of the syllabus (“[t]he different sections and part of sections of the same legislative enactment should if possible be so interpreted as to harmonize and give effect to each and all”). *Accord, D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, at ¶20. Despite Transmission’s apparent litigation brief-strategy to pretend that the Mcf Tax does not exist, and was never enacted, SB 287 was carefully written so as to be “revenue neutral.”

If the BTA’s decision is not reversed, it will defeat the manifest legislative intent of the General Assembly. Transmission and the other interstate pipeline company litigants would be the

beneficiaries of massive tax refund windfalls (over \$200 million- worth) wholly unintended by the General Assembly. Moreover, deeming these entities to be “natural gas companies” not only would impermissibly defeat the General Assembly’s legislative will, it would violate the established principle that, if the language of the applicable statutes fairly permits, unjust and unreasonable consequences must be avoided. *City of Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47, paragraph four of the syllabus ; *Accord, Superior Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St.2d 133, 136.

Indeed, when interpreting statutes, this Court has had frequent occasion to emphasize the overriding importance of the General Assembly’s legislative intent. “The paramount consideration in determining the meaning of a statute is legislative intent.” *State v. Jackson* (2004), 102 Ohio St.3d 380, at ¶34; *Accord, Carnes v. Kemp* (2004), 104 Ohio St.3d 629, at ¶16; *Henry v. Cent. Nat’l Bank* (1968), 16 Ohio St.2d 16, paragraphs two and three of the syllabus.

Thus, as applied here, this manifest intent of the General Assembly should, in itself, provide a compelling basis for upholding the Commissioner’s statutory interpretation and reversing the BTA’s. We now proceed, however, to show how the adoption of Transmission’s (and the BTA’s) erroneous statutory interpretation of the applicable statutes would contravene the manifest legislative intent of the General Assembly in yet another highly significant way.

**E. If the BTA's novel "incidental business" test were the correct statutory standard, it could also be used by "natural gas companies" to permit them to "have their cake and eat it too." As natural gas companies, they would claim the 25% assessment rate on their personal property but then, merely by engaging in some incidental transmission activity, would be able to claim status as a "pipe-line company" and thereby escape the Mcf Tax, in contravention of the General Assembly's manifest legislative intent.**

In its decision and order below, the BTA determined that because Transmission demonstrated to the BTA's satisfaction that it engages, to some limited extent, in supplying or distributing of natural gas, the defining activity of a "natural gas company," that it was entitled to the then-newly enacted reduction in the assessment rate applicable to the true value of the personal property of "natural gas companies." *Decision and Order of the BTA* at 21.

As we detailed in our initial merit brief, the nature of Transmission's business is overwhelmingly that of natural gas "transmission," the defining activity of a "pipe-line company." Thus, the BTA's application of the statutory definitions of "natural gas company" and "pipe-line company" in the present case may be accurately described as an "incidental business" test, as, in fact, we characterize it in our briefing. But this same "incidental business" test that the BTA has devised to define businesses primarily engaged in business as "pipe-line companies" as "natural gas companies" would have the converse application as well.

Namely, under the BTA's "incidental business" test, LDCs (whose primary business is that of "supplying" natural gas), but which may engage in certain kinds of incidental "transportation" or "transmission" activity, would be "pipe-line companies" for purposes of the Mcf Tax, and thereby escape that tax altogether. This is so because under R.C. 5727.811 the Mcf Tax is imposed only on "natural gas companies" and "combined companies" (combined electric company/natural gas company entities). Thus, under the BTA's test, any such incidental

transmission/"pipe-line" business of such primarily-engaged "natural gas companies" would make those companies "pipe-line companies" not subject to the Mcf Tax.

Such instant metamorphoses of these entities from "natural gas companies" to "pipe-line companies" would destroy the Mcf Tax base, in direct contravention of the General Assembly's manifest intent in enacting the Mcf Tax. The revenues derived from the Mcf Tax -- all of which are earmarked for our Ohio school districts and other local governmental units -- would prospectively disappear, and the State would be required to refund previously paid Mcf Tax to any such companies. This would be no small matter.

The collections from the Mcf Tax are substantial. As reflected in the Tax Commissioner's Annual Report to the Governor, the Mcf Tax for the nine months that it was in effect in fiscal year 2002 alone generated \$55,937,596, of which \$39,155,962 was allocated to the "School District Property Tax Replacement Fund," and the remaining \$16,781,634 was allocated to the "Local Government Property Tax Replacement Fund." Appx. 71 of the Commissioner's initial merit brief.

Thus, in this further way, under the "paramount" consideration in interpreting statutes, that of ascertaining the General Assembly's legislative intent, the BTA's adoption of its own novel "incidental business" test should be rejected by this Court. It would destroy the General Assembly's legislative will in enacting the Mcf Tax. Moreover, the BTA's novel test would otherwise violate fundamentals of statutory interpretation, as well, as we discuss under Sections F-H, *infra*.

**F. Adoption the BTA's novel "incidental business" test would require judicial erasure of R.C. 5727.02(A), which provides a "primary business" test to apply when a company is engaged in both the "transportation" activities of a "pipe-line company" and the "supplying" activities of a "natural gas company."**

In applying its "incidental business" test, the BTA overlooked the plain meaning of R.C. 5727.02(A). In fact, the BTA made only a passing reference to that provision, at page 18 of its decision and order, without quoting any of its language or undertaking any analysis of it. Yet, that statute expressly provides for a "primary business" test regarding the very situation presented here. For the 2001 tax year at issue, that statute provided, as follows:

**As used in this chapter, "public utility," "electric company," "natural gas company," "pipe-line company," "water-works 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.**  
(Emphasis added.)

The emphasized language of R.C. 5727.02(A) precisely describes Transmission's very situation: it is not a "natural gas company" for purposes of R.C. Chapter 5727 because it "is engaged in some other primary business to which the supplying of natural gas to others is incidental," namely, its "pipe-line company" business. In its initial merit brief, Transmission raises two erroneous arguments in rebuttal to this "plain meaning" reading of R.C. 5727.02(A). See Transmission's Br.12-13.

First, Transmission wrongly asserts that it would be impermissible for the Court to consider R.C. 5727.02(A) because the Commissioner's BTA brief did not expressly cite that section in support of the "primary business" standard urged therein. In other words, under Transmission's submission, the failure of the Commissioner to expressly cite this statute by brief

would serve to judicially erase it for purposes of this case, as if it did not exist. But, the existence of R.C. 5727.02(A) is a legislative fact, and the BTA surely should have considered its plain meaning in undertaking its statutory interpretation of “natural gas company” and pipe-line company, even without the Commissioner’s citation help.

Moreover, the Commissioner’s timely-filed amended notice of appeal to this Court does raise as error the BTA’s failure to have applied the “primary business” standard of R.C. 5727.02(A), and thus the Commissioner has fully complied with the relevant jurisdictional requirements of R.C. 5717.04. See, numbered paragraph eight of the Commissioner’s amended notice of appeal.

Second, Transmission incorrectly argues that R.C. 5727.02(A) applies only to distinguish “public utility” businesses from non-“public utility” businesses. Transmission’s Br. 12. Under such a misreading, R.C. 5727.02(A) would exclude an entity from the definition of “natural gas company” only when the entity’s “primary business” were a non-“public utility” business one.

In other words, in reading R.C. 5727.02(A), Transmission would have the Court insert the words “of a non-public utility nature” following the words “primary business” so that the pertinent statutory language would read as follows: “\*\*\* ‘natural gas company’ \*\*\* does not include \*\*\* any person that is engaged in some other primary business [of a non-‘public utility’ nature] to which the supplying of \*\*\* natural gas \*\*\* to others is incidental [bracketed language added].” Yet, such insertion of additional language would violate a fundamental standard of statutory construction. Namely, “[t]his court will give effect to the words used in a statute and **will not insert words not used** (emphasis added).” *Parkinson v. Limbach* (1990), 49 Ohio St.3d 143, 144, quoting, *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28.

To support its claim that R.C. 5727.02(A) should apply only when the primary business of an entity is other than a “public utility” one, Transmission erroneously asserts that this conclusion is “obvious” when one considers application of the statutory language of Division (A) to “pipe-line companies.” Specifically, Transmission wrongly concludes that if a “pipe-line company” is engaged incidentally in the business of supplying natural gas, then, under the plain meaning of R.C. 5727.02(A) ascribed to it by the Commissioner, such entity would be excluded from the definition of “pipe-line company,” as well.

What such erroneous assertion ignores is that R.C. 5727.02, when read as a whole, addresses two distinct and separate substantive subjects. Division (A) has meaning and application only to public utility classifications defined in R.C. 5727.01 by “supplying” some basic commodity, be it “heat” (as in the case of “heating companies”), “water” (as in the case of “water-works companies” and “water transportation companies”), “electricity” (as in the case of “electric companies”), or “natural gas” (as in the case of “natural gas companies”). Because “pipe-line companies” are not defined as engaging in any “supplying” activity, Division (A) simply would have no relevance or application to “pipe-line companies,” and, accordingly, should not alter the meaning of that Division as applied to the definition of “natural gas company.”

Conversely, Division (C) of R.C. 5727.02 has direct application to the definition of “pipe-line company,” but has no likely application to any of the other classifications of “public utility” companies listed in the first paragraph of R.C. 5727.02. Under Division (C), the term “public utility” does not include “any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products.” Entities engaged in the oil production, refining, and/or marketing business quite possibly could be primarily engaged in the

oil transportation business – a different, but related, activity expressly encompassed within the R.C. 5727.01(D)(5) of “pipe-line company.” Thus, Division (C) provides meaningful, specific guidance regarding that real-life situation directly and solely applicable to the definition of “pipe-line company.” In other words, when read in its entirety, R.C. 5727.02 addresses two distinct subjects, one applicable to “pipe-line companies,” and the other to the various public utility company classifications defined by some “supplying” activity.

This conclusion is confirmed by a consideration of the original, predecessor version of R.C. 5727.02, namely, Section 5416-1 of the General Code, as enacted pursuant to S.B. 243, 93<sup>rd</sup> General Assembly, 118 Ohio Laws 258 (effective May 1, 1939). That original statutory text included only the subject matter of R.C. 5727.02(C), as follows:

Section 5416-1.

Notwithstanding the definitions set forth in section 5415 and section 5416 of the General Code the terms **“public utility” and “pipe-line company” shall not embrace or include any person or persons, firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, whose primary business in the state of Ohio consists of producing, and/or refining and/or marketing petroleum or its products.** (Emphasis added.)

Then, ten years later, the General Assembly added to this language the content of what is now codified as Division (A) of R.C. 5727.02, pursuant to Am. S.B. 265, 98<sup>th</sup> General Assembly, 123 Ohio Laws 452 (effective July 6, 1949), i.e., it added to the beginning of the section the various classifications of public utility companies defined as engaging in some kind of “supplying” activity, and then followed that language with the “primary business” test now set forth in Division (A).

To summarize this sub-section, R.C. 5727.02(A) expressly provides a “primary business” test directly applicable to the present case. Pursuant to that test, Transmission’s primary business

of transporting natural gas to distribution facilities defines it as a “pipe-line company” within the meaning of R.C. 5727.01(D)(4). Specifically, R.C. 5727.02(A) expressly excludes Transmission from the definition of “natural gas company,” because Transmission’s “supplying” of natural gas to end-users is purely “incidental” to its primary business as a “pipe-line company.”

Unlike ours, Transmission’s interpretation of R.C. 5727.02(A) would require the insertion of additional language not enacted by the General Assembly, in violation of this Court’s established principles of statutory interpretation. Additionally it would entail misapplying the language of Division (A) to “pipe-line companies” such as Transmission, even though that Division plainly would have no relevance or applicability to such entities because pipe-line companies are not defined by any “supplying” activity. Finally, such alternative interpretation would erroneously ignore the import of Division (C) and its direct and specific relevance to the definition of “pipe-line company,” as confirmed from a consideration of the original version of what is now R.C. 5727.02.

But even if R.C. 5727.02(A) were somehow to be judicially erased, the BTA’s devising of its novel “incidental business” test, nonetheless, would be erroneous. The overwhelming primacy of Transmission’s use of its pipeline properties for transmission purposes, not end-user delivery purposes, would define Transmission as a “pipe-line company” in any event. We discuss why in the following sub-section G.

**G. Even if R.C. 5727.02(A) were to be erroneously interpreted not to provide an express “primary business” test, the Court should apply such standard here to the R.C. 5727.01(D)(4) definition of “natural gas company.” In the absence of express statutory language, this Court has uniformly applied a “primary” test for purposes of personal property tax, real property tax, sales and use tax, and all other Ohio taxes, whenever a taxpayer uses its property in multiple, tax-distinct ways.**

**1. This Court has uniformly applied a “primary” test regarding like classification issues.**

In our initial merit brief, we cited a representative sampling of the myriad of this Court’s previous decisions, across the spectrum of Ohio taxation, applying a “primary” test to determine issues of tax classification, whenever the classification issues have involved uses of property in multiple, tax-distinct ways. Namely, we cited, and relied upon, the following five decisions applying a “primary use” test to resolve such classification issues: *Zangerle v. Standard Oil Co. of Ohio* (1945), 144 Ohio St. 506, paragraph four of the syllabus (real property tax vs. personal property tax); *Mead v. Glander* (1950), 153 Ohio St. 539, 543-544 (sales and use tax exemption) ; *A. J. Wiegand v. Bowers* (1960), 171 Ohio St. 78 (same); *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73, 75-76 (same); and, most recently, *Parisi Transportation v. Wilkins* (2005), 102 Ohio St.3d 281, 283, at ¶22 (personal property tax exemption, adopting the “primary use” standard used to determine the tax burdens imposed under the annual motor vehicle licensing tax of R.C. Chapter 4503 in *State ex rel. Tejan v. Lutz* (1954), 31 Ohio N.P. (n.s.) 473, 1934 WL 1918.)

In its brief, Transmission complains that most of the decisions we cite applying a “primary” test assertedly do not support the application of such test here because our cited decisions involve interpretations of exemption statutes, rather than tax-imposition statutes, Trans. Br. 10-11. But these cases are directly applicable for two reasons. First, the classifications used

to impose tax in R.C. 5727.01 are also used, by reference, in several other tax chapters of R.C. Title 57, where they operate as exemptions. For example, entities defined as “public utilities” within the meaning of R.C. Chapter 5727 are exempted from the general personal property tax pursuant to the last paragraph of R.C. 5711.01(B), and from the corporate franchise tax pursuant to R.C. 5733.09(A).

Second, statutes imposing taxes are given the same “strict construction,” so if a “primary” test is appropriate under such “strict” construction for exemptions, that test also applies under the “strict” construction for tax-imposition statutes. Just recently, this Court once again recognized and applied the “strict construction” standard to apply to property tax exemption claims, citing to one of the oldest of its tax decisions: “Laws that exempt property from taxation must receive a strict construction because such laws are in derogation of equal rights.” *First Baptist Church of Milford, Inc. v. Wilkins* (2006), 110 Ohio St.3d 496, at ¶10, quoting *Cincinnati College v. State* (1850), 19 Ohio 110, 115. In other words, the applicable strict construction rules are flip sides of the same coin: statutes imposing taxes are strictly construed against the imposition of the tax, whereas statutes granting exemption from tax are strictly construed against the claim of exemption. Thus the tax exemption cases uniformly applying a “primary” test are directly relevant here.

2. **Assuming that R.C. 5727.02(A) does not apply an express “primary business” test, some modifier would then be required to the R.C. 5727.01(D)(4) definition of “natural gas company.” The question thus would become whether that modifier should be “primarily,” or “incidentally.”**

Next, just as the BTA did in its decision, Transmission attacks the “primary business” test on the erroneous basis that application of such standard would violate the principle that the judiciary should not insert words into the text of statutes, but this, too, is not persuasive. To be sure, as the BTA correctly noted, the judicial insertion of words into a statute is to be avoided, if

possible. *BTA Decision and Order* at 17. But here, this should not be a serious objection because the alternative urged by Transmission, i.e., the BTA-devised “incidental business” test, is equally subject to the same criticism. That is, when an entity is engaged in both transmission and distribution activities, under the BTA’s “incidental business” test, the “incidental” use controls. So, under its test, the BTA inserts the word “incidentally” before the phrase “engaged in the business \*\*\*” rather than inserting the word “primarily,” as the Commissioner has interpreted the R.C. 5727.01(D)(4) definition.

Thus, assuming, as we do for our discussion under this sub-section G, that R.C. 5727.02(A) did not exist, and so that there would be no express “primary business” test, some modifier is appropriately applied to resolve the ambiguity in R.C. 5727.01(D)(4). The question then becomes which is more reasonable and fair, and truer to the Legislature’s intent: the modifier “incidentally,” or “primarily”? Under that inquiry, there should be no contest: the Commissioner should prevail hands down, as we detail throughout this brief.

- 3. The General Assembly’s inclusion of the word “primary” in some recent tax statutes should not provide a basis for departing from the “primary” standard uniformly applied whenever the statutory language is silent on the issue, particularly regarding “vintage” definitional statutes like the ones at issue.**

Transmission and the BTA further err by relying on the existence of various tax classifications in which the word “primary” is expressly stated, wrongly asserting that, by implication, where such “primary” language is absent that the General Assembly intends an “incidental” standard to be applied. This contention is faulty for two fundamental reasons.

It is wrong first because few tax classification statutes expressly set forth such “primary” language, and those that do are generally of recent vintage, enacted long after the public utility tax definitions at issue, which are presently codified in R.C. Chapter 5727, but

were originally enacted, in the same basic form, in 1911. Thus, it would be erroneous to impute to the General Assembly in 1911, on the grounds of the absence of express “primary business” language, an asserted intention to apply an “incidental business” test, where the General Assembly’s adoption of such express “primary” language is a relatively new practice.

As one of the examples of a statute which expressly sets forth a “primary use” test, the BTA relies upon the recent amendment to the definition of “personal property,” in R.C. 5701.03. Yet, the BTA’s reliance on this statute would prove far too much.

Specifically, as recently addressed by this Court in *Funtime, Inc. v. Wilkins* (2004), 105 Ohio St.3d 74, pursuant to Sub. S.B. 272, 144 Ohio Laws, Part I, 1528, 119<sup>th</sup> General Assembly, (effective July 20, 1992), the General Assembly amended R.C. 5701.03(B) to define “fixture” and “business fixture,” in part, as property which “primarily benefits the land, or business, respectively.” *BTA Decision and Order* at 18-19. Yet, long before that recent amendment, by judicial decision, this Court had adopted the very same “primary business” test in *Zangerle v. Standard Oil* (1945), *supra* -- one of the cases that we cite for the established principle that the “primary use” test is appropriately applied in the absence of express statutory language.

In other words, the BTA’s citation to the 1992 amendment to R.C. 5701.03 is particularly inapposite to support its own “incidental business” test because, prior to that amendment, this Court, by judicial decision, had applied that same “primary use” test. Even without the express statutory guidance now set forth in R.C. 5701.03(B), the appropriate standard to resolve the issue was to apply a “primary business” use test; the General Assembly simply codified the judicial standard that had already been the established decisional-law standard.

The General Assembly’s recent enactment of “primary” language for various statutory exemption purposes in the sales/use tax law likewise shows that Transmission’s and the BTA’s

citation to tax statutes employing the word “primary” or variations thereof, proves far too much. For example, a myriad of sales/use tax exceptions and exemptions, including most notably, R.C. 5739.01(E) [the sale-for-resale-in-the-same-form exception] and R.C. 5739.02(B)(42)(a)-(f),(h) and (i), (k) - (m) [various other use-based exemptions], do not expressly provide a “primary purpose” or “primary use” test, but several other recent exemptions in the sales/use tax statutes that are conditioned upon the “use” of property or services do expressly include the modifier “primarily.” See, R.C. 5739.02 (B)(14) and (15), (27), (32), (34),(40), (42) (g) and (j), and (44)-(45). It is very much a “hit or miss proposition.” Yet, since *Mead v. Glander* (1950), supra, the “primary use” test is the standard that this Court has always applied to all use-based sales tax exemptions and exceptions, even when the statutory language does not make that standard explicit, whenever multiple uses are involved.

Moreover, as applied to the definition of “natural gas company” in R.C. 5727.01(D)(4), the General Assembly likewise omitted to include any “incidental” language, and has never employed such language in any tax statutes to define an entity, activity or thing to be subject to taxation by reason of its “incidental” nature. Nor has the General Assembly ever exempted an entity, activity, or thing from taxation because of its “incidental” nature. Thus, the adoption here of such an “incidental business” test by judicial decision to define “natural gas company” would be entirely unprecedented and unsupported by any like practice by the General Assembly.

4. **As applied here, the “primary business” test equates to an item-by-item “primary use” test because all of Transmission’s pipeline is primarily or exclusively used in its integrated interstate transmission business, and any use of any portion of its pipeline property for “distribution” purposes is wholly incidental, as confirmed by the total freedom Transmission enjoys from the unique regulatory burdens imposed by the PUCO on PUCO-defined “natural gas companies,” as “providers of last resort.”**

Next, Transmission wrongly disparages the application of a “primary business” test here because, in the cases that we cited, the “primary use” was applied on a transaction-by-transaction, or individual-item-of-property level, whereas here it would be applied to Transmission’s over-all business activities. Transmission is wrong to disparage the “primary business” test on those grounds for three basic reasons. First, and perhaps most obviously, again, the same criticism would equally apply to Transmission’s embrace of the BTA’s “incidental business” test. Second, the classification at issue is defined by the nature of the business, not the use of specific property, so to apply the “primary” test to the activity simply applies the statutory classification in the simplest, most straight-forward way.

But more fundamentally, as applied to the facts of this case, a “primary business” test equates to an item-by-item “primary use” test here. The evidentiary record is replete with evidence that Transmission’s Ohio pipeline property is all part of an integrated, interstate natural gas transmission business. As part of an integrated system, the various pipelines and equipment, as a whole, are necessary to enable Transmission to transport natural gas throughout its interstate transmission areas from points of production and storage to various distribution points. To be sure, some of this same property is also used to provide some, limited end-user delivery services, but such use is non-primary and incidental.

Moreover, all of Transmission's revenues and pipeline property are reported by it for FERC and Ohio taxation purposes as "transmission" revenues and property, and none as "distribution" revenues and property. Transmission made no showing that any items of its pipeline property were used primarily for end-user delivery purposes, rather than to perform or assist its transmission services. Thus, on an item-by-item basis, this integrated transmission property is primarily used for "pipe-line company"/transmission purposes, not "natural gas company"/distribution purposes.

A different question would be presented for resolution to this Court if instead of using only some limited portion of its various pipeline property incidentally for end-user delivery, Transmission had operated two distinct, separate businesses, under which the first used pipeline property primarily for end-user delivery purposes, and the second used pipeline property primarily for "transmission" purposes. But, if this were so, as to such "distribution" business activity, Transmission would be subject to PUCO regulation as a "natural gas company" and would have to comply with the unique burdens imposed by the PUCO on such companies as "providers of last resort."

Under such circumstances, the "distribution" portion of the business would be regulated by the PUCO, not the Federal Energy Regulatory Commission (FERC). This is so, because as we detailed in our initial brief, Congress continues a dual scheme of regulation under which the regulation of "local distribution" activities, i.e., "supplying" natural gas, is reserved to the individual State PUCs. See 15 U.S.C. 717(b).

Significantly, the evidentiary record in this case contains no evidence of any companies the Commissioner taxes as "pipe-line companies" that operate in such dual-business fashion. That is, none of the various transmission companies engaged in Ohio in the business of

transporting natural gas and taxed as such by the Commissioner have filed as “natural gas companies” for any portion of their businesses, and none have identified any separate and distinct “local distribution” operations for PUCO purposes.

In stark contrast, being only incidentally, if at all, engaged in selling natural gas, Transmission and its interstate pipeline business brethren would strenuously object to being required to sell gas, particularly under those rigid “gas-cost” requirements. In fact, under FERC Order No. 636, interstate natural gas pipelines such as Transmission are prohibited from “bundling” their sales of natural gas with the transportation service required to move it. Thus, the non-existence of such dual interstate pipeline/ local distribution businesses in Ohio should hardly be surprising because the regulatory burdens imposed by the General Assembly and the PUCO on such “local distribution” companies are substantial and unique to such businesses. To be sure, such fact pattern would present a different statutory interpretation issue for this Court’s resolution. And in such instance, resolution of that fact pattern might be reasonably amenable to a different tax analysis and result. Such circumstances could perhaps be appropriately resolved by bifurcating the businesses for public utility personal property tax, public utility gross receipts tax, and Mcf Tax purposes. See *General American Trans. Corp. v. Limbach* (1984), 15 Ohio St.3d 302.

To summarize this sub-section G, under application of this Court’s established jurisprudence, even if R.C. 5727.02(A) did not exist, the Commissioner’s “primary business” standard would be the appropriate standard as it would follow this Court’s established decisional law in interpreting similar provisions. The alternative interpretation urged by Transmission and applied by the BTA, under which the BTA devised an unprecedented “incidental business” test, has no support whatsoever in this Court’s tax jurisprudence. In fact, it would drastically depart

from that precedent by elevating a minor, incidental use of Transmission's property as the defining factor for determining application of the tax, in direct contravention of the manifest intent of the General Assembly.

**H. In violation of this Court's controlling public utility tax case law, the BTA's interpretation wrongly disregarded, and failed to accord the required "great deference" to, the PUCO's and the Commissioner's long-standing, shared administrative interpretations of "natural gas company" and "pipe-line company" as those identical terms are used in both sets of statutes.**

**1. The Commissioner's public utility tax treatment of "natural gas companies" and "pipe-line companies" corresponds with the PUCO's regulatory treatment of those entities.**

For PUCO regulatory purposes, entities whose business is "local distribution," i.e., the "supplying" of natural gas to end-users, are required to annual file reports with the PUCO as "natural gas companies" as defined in R.C. 4905.03(A)(6). R.C. 4905.14. As we have emphasized in our briefing, as PUCO-defined "natural gas companies," LDCs are subjected to unique regulatory obligations to which no other entities are subjected: they are "providers of last resort," required to provide access to natural gas supplies to the general public at gas cost.

The PUCO's regulatory treatment of "pipe-line companies" is far different. "Pipe-line companies" whether wholly engaged in intrastate business, or, like Transmission, engaged in interstate business, are not subjected to the unique "provider of last resort" requirements of "natural gas companies." To be sure, by FERC regulation, Transmission, as an interstate pipeline business, is permitted to engage incidentally in limited end-user delivery services, but it is not required to do so. And, when it does do so, FERC Order 636 prohibits it from selling that gas. That is, "bundled" service is prohibited; Transmission is barred from selling the gas that it delivers to end-users. But bundling, of course, is the very essence of a local distribution company – that it has both the obligation and the ability to serve customers with capacity and commodity

that it owns. Interstate pipelines simply cannot perform the functions required of a local distribution company, because they are prohibited from bundling the very services required to perform those functions.

Indeed, because of the location and physical configuration of Transmission's and the other interstate pipeline businesses' property, these entities could not supply natural gas to most members of the general public, including virtually all residential consumers, even if they desired to do so. None of their pipeline property is primarily used for end-user deliver purposes and, accordingly, is uniformly characterized as "transmission" property in their annual FERC reports and Ohio tax returns. T.C. Br. at 10-11 and the citations to the Supp. therein; see also William Peters' testimony at Supp. 1301, page 86 of his deposition (testifying that, to his knowledge, no "pipe-line companies" have reported "distribution property"). Simply put, such transmission companies are not in the "local distribution" business.

As William Peters, the then-administrator of the Commissioner's public utility tax division, testified in the present case, the Commissioner annually obtains from the PUCO a listing of those entities annual reporting with the PUCO as "natural gas companies," and as intrastate "pipe-line companies. Supp. 1338-1340, Ex. C. His staff then uses those PUCO-provided listings to compare it to the annual public utility tax filings with the Tax Commissioner. Supp. 272, Tr. IX 39.

The PUCO's annual report listings show that the PUCO's regulatory treatment of "pipe-line companies" (whether interstate or intrastate) and "natural gas companies" accords 100% with the Commissioner's tax treatment. Neither Transmission, nor any of the other interstate pipeline businesses are listed on the PUCO's listing as "natural gas companies." Similarly, those entities filing as "natural gas companies" for PUCO purposes likewise uniformly file as, and are

treated as, “natural gas companies” for Ohio public utility property tax, gross receipts tax and Mef Tax purposes. Moreover, no entity files for PUCO regulatory purposes or for Ohio tax purposes as a dual pipe-line/natural gas company.

2. **An LDC’s use of “transmission” property may be in order to connect two or more distribution areas or for some other distribution purposes, or for purposes of generating transmission revenues. The mere presence of “transmission” property would not transform an LDC from being a “natural gas company” to a “pipe-line company” for PUCO or Ohio tax purposes**

In its initial merit brief, Transmission identifies a few PUCO-regulated “natural gas companies” or LDCs as reporting “transmission” property,” in addition to “distribution” property, but the presence of such property does not, as Transmission would have it, support the notion that the fundamental differences between “natural gas companies” and “pipe-line companies” have vanished. Rather, LDCs may have “transmission” pipeline (solely in Ohio) for several purposes, including to aid in their distribution activities, for example, by connecting their “distribution” pipeline located in two or more geographically separated Ohio distribution areas.

In the present case, the evidentiary record does not establish for what purposes any PUCO-regulated “natural gas company” (LDC) has used any of its pipeline property as “transmission” property, but substantial distribution-related uses may be reasonably inferred from a review of their annual excise tax (previously called the “gross receipts tax”) reports filed with the Tax Commissioner. We discuss here that tax information as it concerns the LDCs which Transmission’s brief has identified as having reported “transmission property.” See Transmission’s Br. 30, identifying East Ohio Gas Company and Southeastern Natural Gas Company by name and three other LDCs (Constitution Gas, Ohio Gas Company and Ohio Valley Gas) as reporting some “transmission property.”

A review of the revenue information on the Ohio excise tax reports, signed under penalty of perjury, indicates that the “transmission” property of these LDCs was used exclusively or primarily to generate distribution revenues. As to Southeastern Natural Gas, its tax filings with the Commissioner report that *all* of the service revenues it received from July 1, 1999 through December 31, 2000 were from “distribution” activities, and none from “transmission” activities. Specifically, in its annual filings with the Commissioner of its “2000 Annual Statement of Gross Receipts” (BTA BB) and its “Natural Gas Excise Tax Annual Statement” from May 1, 2000 through December 31, 2000 (BTA Ex. CC), it reported \$1,699,529 in “distribution” revenues, and no revenues as “transmission”-related. The same is true for two of the other three LDCs – all of their service revenues are reported for Ohio gross receipts tax/annual excise tax purposes as “distribution”-related, not “transmission”-related. Exs. MM, GG. As for the third, Ohio Valley Gas, the record does not contain any of its annual excise tax returns.

Finally, regarding East Ohio Gas, less than 6% of its plant property by cost is listed as “transmission” property; over 94% as “distribution” property, Second Supp. 65. Moreover, it generally reports all of its service revenues as “distribution”-related, but departed from that characterization in a few of the tax reports in the record. For example, in its 2000 Annual Statement of Gross Receipts, BTA Ex. M (lines 8 and 9) it reported \$116,977,749 as “distribution”-related, and none as “transmission”-related. Likewise, in most of the other subsequent reports all of its revenues are reported as “distribution”-related, e.g., BTA Exs. S-AA, but for a short time, East Ohio Gas reported all of its service revenues as “transmission”-related. E.g., BTA Exs. P-R.

In sum, the evidentiary record reflects that the transmission property of these LDCs is largely, if not exclusively, used to generate distribution service revenues, consistent with the LDCs' primary business' of supplying natural gas to end-users.

3. **This Court has uniformly accorded great weight to the PUCO's administrative interpretation of the identical terms used in the public utility tax law, and will require the Tax Commissioner to apply that same interpretation, if possible. Here, the Commissioner's interpretation accords with the PUCO's. Such shared interpretation prevents the very kind of "have your cake and eat it too" tax/regulatory result that would occur if Transmission were to be a "natural gas company" for Ohio tax purposes, but not for PUCO purposes. The cases cited by Transmission for its assertion that the PUCO's interpretation should be disregarded do not support Transmission's position.**

In support of this proposition, we cited and relied upon *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 19; *Air Touch Paging v. Tracy* (1996), 111 Ohio App.3d 202, 209-210, applying *MCI*, supra, and *Chrysler Corp. v. Tracy* (1995), 73 Ohio St.3d 26, 28. We stand by these citations, and to them add two further of this Court's cases in accord, *Akron Transport Co. v. Glander* (1951), 155 Ohio St. 471, 474; and *GTE N., Inc. v. Zaino* (2002), 96 Ohio St.3d 9.

These two further cases book-end our previous citations, and likewise evidence the special significance given the PUCO's statutory interpretations of the identical terms in the Ohio public utility tax law. Namely, in *Akron Transport*, the Court, while opining that the PUCO's interpretation was not "controlling," nonetheless, reversed the Tax Commissioner's administrative interpretation to the contrary. Thus, the Court found the PUCO's interpretation to be highly relevant. Similarly, in *GTE North* the Court, in upholding the Commissioner, reviewed the related PUCO classifications, finding the PUCO regulatory interpretation to accord with the Commissioner's.

In contrast, Transmission's citation to *Castle Aviation, Inc. v. Wilkins* (2006), 109 Ohio St.3d 290, hardly constitutes opposing authority. In *Castle Aviation*, this Court affirmed the Commissioner's determination that a charter air service was not a "public utility service" within the meaning of the sales and use tax exception for items purchased for use "directly in the rendition of a public utility service." *Castle Aviation*, therefore, involved a far different issue entailing application of this Court's decisions establishing the characteristics of "public utility service"-- in the absence of any express statutory definitions. Namely, at issue was whether the air charter service was subjected to the kind of economic regulation that would qualify it as engaging in a "public utility service." The air charter service was not regulated by the PUCO at all, and no relevant definition in the PUCO applied to such service. Thus, that decision is inapposite, and does not, in any way, call into question the established principles and cases upon which we rely.

**I. Transmission's statutory interpretation that "indirect delivery," i.e., transmission service, constitutes "supplying" of natural gas to consumers was correctly "disregarded" and "questioned" by the BTA below, for it would render the "pipe-line company" classification a sub-set of the "natural gas company" definition, effectively making the separate definition of "pipe-line company" meaningless. Furthermore, it would wildly depart from the Tax Commissioner's and PUCO's shared interpretation of the respective definitions.**

The foregoing sub-section I proposition is basically self-explanatory. The BTA itself thought that Transmission's claim that its transmission activities constituted the "supplying" of natural gas was dubious and rightly so. See the BTA's *Decision and Order* at 21 and f.n.14. Such interpretation of "natural gas company" would truly "swallow up" the entire pipe-line company definition. The 88% assessment rate applicable to "pipe-line companies" would not apply to anyone, rendering it meaningless surplusage. See R.C. 1.47(B)(mandating presumption that "[t]he entire statute is intended to be effective"). Moreover, the case law Transmission cites,

*Atwood Resources, Inc. v. PUCO* (1989), 43 Ohio St.3d 96, and *Commonwealth Natural Resources, Inc. v. Virginia* (Va. 1978), 248 S.E.2d 791, does not support its contention.

First, neither case involves an interstate pipeline like Transmission regulated by federal authorities. In *Commonwealth Natural Resources*, the entity was plainly a purely in-state transmission company; and in *Atwood*, the entity at issue was primarily an in-state natural gas producer that was selling some gas to Ohio consumers. Thus, neither case on its face addresses the situation here, where an entity that is admittedly a federally regulated “pipe-line company” seeks also to qualify as a state-law “natural gas company.”

Second, *Commonwealth Resources* does not implicate the general regulatory classification of the entity at issue. Instead, the case simply decides that a tax on gross receipts is imposed based on the particular transaction generating the receipt, not the overall nature of the taxpayer’s business. By contrast, the present case involves *ad valorem* property tax treatment of pipeline and equipment that is primarily used in transporting gas to LDCs, not delivering it to consumers. Transmission admits its primary purpose is to transport (transmit) gas of LDCs and marketers. It makes no sense to tax such property based on a minor incidental use, rather than the major and primary use.

Indeed, much more appropriately cited as persuasive authority than *Commonwealth Resources* are the FERC regulatory cases applying a “primary purpose” test to determine the character of natural gas facilities as “production and gathering” facilities exempt from FERC regulation, rather than as transportation facilities subject to FERC regulation. *Farmland Industries, Inc.* (1983) 23 FERC ¶51,063; *Amerada Hess Corp.* (1990), 52 FERC ¶61,268. In other words, just as this Court’s settled jurisprudence utilizes a “primary” test when facilities are

used in taxable and exempt ways, so too does the FERC for purposes of determining the scope of its statutory classifications.

Third, the *Atwood* case simply does not stand for the proposition that the mere fact of sale to consumers triggers status as an Ohio “natural gas company.” To the contrary, the PUCO cited *Industrial Gas Co. v. PUCO* (1939), 135 Ohio St. 408, 413 for the proposition that “each case regarding whether a business [is] a public utility [will] stand upon the facts peculiar to it as to the nature of the operations of the business.” The relevant factors are not only the size of the enterprise and whether it deals on a contract basis with purchasers, but the existence of a “threat that the unregulated enterprise presents to the regulated utility and the entire scheme of state regulation.” *In the Matter of the Complaint of Columbia Gas of Ohio, Inc. v. Atwood Resources, Inc.* (Aug. 4, 1987), PUCO No. 86-2175-GA-CSS, unreported [1987 Ohio PUC LEXIS 789], at 11-12, *aff’d*, 43 Ohio St.3d 96. Obviously, Transmission’s direct-connect relationships pose no threat within the entire scheme of regulation, pursuant to which Transmission – unlike *Atwood* – is already comprehensively regulated as an interstate carrier.

#### **ANSWER TO TRANSMISSION’S CROSS-APPEAL**

We incorporate the previous Statement of Case and Facts in our initial merit brief, as well as the factual discussion in the Law and Argument section of that brief, and the facts set forth in the reply portion of this brief. Any further facts relative to the various constitutional challenges raised by Transmission will be referenced directly to the evidentiary record.

## LAW AND ARGUMENT

### PROPOSITION OF LAW NO. I:

**The “void for vagueness” doctrine does not apply to a regulatory or tax measure that has been construed and applied by administrative authorities, who thereby put the public on notice of its obligations under the law.**

Transmission asserts that applying the 88% assessment rate to “pipe-line companies” and not acknowledging them to be Ohio “natural gas companies” entitled to the 25% rate somehow makes the law “void for vagueness on its face and as applied.” Trans. Br. 25-26. At the outset, it is quite remarkable to hear a regulated utility, so long cognizant of whom it reports to and how it is regulated, complain that it somehow cannot tell what regulatory category it belongs to. In the regulatory realm, Transmission is well aware that it is a “pipe-line company” subject to regulation by FERC and not PUCO. Supp. 25, Tr. VII 82:

Nevertheless, Transmission’s argument fails on the state of the law. Before the Court is not a criminal prohibition as is the case in the familiar “void for vagueness” cases. Thus Transmission’s reliance on *Grayned v. City of Rockford* (1972), 408 U.S. 104, which addressed a municipal anti-noise ordinance invoked in the context of a political demonstration, is misplaced. More on point is *Village of Hoffman Estates v. The Flipside* (1982), 455 U.S. 489, where the U.S. Supreme Court rejected a claim of void-for-vagueness in the context of an ordinance licensing and regulating drug paraphernalia. In that context, the High Court stated:

“[T]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the

ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.”

*Hoffman Estates* at 498-99.

That pronouncement applies with great force in this case. For the better part of a century, companies like Transmission have operated within a federally established framework of regulation, pursuant to which they are subjected to federal regulatory authority while LDCs are subject to state regulation. The Ohio definitions of “pipe-line company” and “natural gas company” follow the contours of that general regulatory scheme. The Tax Commissioner’s application of the definitions complies with the well-settled understanding of that scheme.

Transmission’s argument assumes the validity of its statutory contention that it may qualify as both “pipe-line company” and Ohio “natural gas company” under the language of the statutes. Leaping off from that unwarranted assumption, Transmission concludes that the Tax Commissioner “lack[ed] legislative guidance” and that he therefore “must simply decide for himself whether to treat a given company as a pipe-line company or as a natural gas company.” Nothing could be further from the truth. We have already explained that Transmission does not qualify as an Ohio “natural gas company” for PUCO purposes. Because the Tax Commissioner followed PUCO well-settled and eminently reasonable categories, he is not the lonely figure Transmission portrays, left tragically unguided to apply a standard-less statute. Instead, the Commissioner gave effect to the tax statute by looking at how the regulatory framework employing the same concepts is administered by PUCO.

Thus, the definitional statutes easily pass constitutional muster here. *Buckley v. Wilkins* (2006), 105 Ohio St.3d 350. In the words of this Court:

The void-for-vagueness doctrine ‘**does not require scientific precision.**’ \*\*\* The bar is not a high one, and a ‘civil statute that is not concerned with the First Amendment is only unconstitutionally vague if it is ‘**so vague and indefinite as**

really to be no rule [or standard] at all, or if it is ‘substantially incomprehensible.’ [citations, and internal quotations omitted]. (Emphasis added.)

*Buckley*, at ¶19.

Finally, Transmission relies on an Eleventh District pronouncement in *O’Brien v. State Lottery Comm’n*, 2005-Ohio-1412. Regardless of the merits of the *O’Brien* decision (and there is room for legitimate question), it is inapposite here. In that case, the state pulled lottery sales agent licenses based on conduct that was not specifically prohibited, but relying instead upon a regulation that permitted official action based on determination of lack of “financial responsibility,” broadly defined. By contrast, the Commissioner in this case applied statutes with specific content and historically well-settled meanings. It applied those definitions in precisely the way PUCO has and would over a long period of time. Transmission has failed to establish any error in the Tax Commissioner’s application.

## PROPOSITION OF LAW NO. II:

**Where utility regulation continues to protect the interests of the general residential market for natural gas, an entity cannot establish itself as “similarly situated” to LDCs under the Commerce Clause without proving that it is in direct, head-to-head competition for the general residential market. *General Motors Corp. v. Tracy* (1997), 519 U.S. 278, followed.**

1. ***GMC v. Tracy* sets a threshold showing under the Commerce Clause that Transmission plainly has not met.**

In *GMC*, the carmaker contended that it should not pay use tax on natural gas purchases from interstate marketers, because purchases from LDCs would not have been subject to Ohio’s sales and use taxes at all. The distinction between marketer sales and LDC sales, *GMC* argued, discriminated against interstate commerce. In an 8-1 decision, the U.S. Supreme Court rejected this argument.

First, the High Court observed that “any notion of discrimination assumes a comparison of *substantially similar entities* (emphasis added).” *GMC* at 298. Accordingly, “when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.” *Id.* at 299. The essential deficiency of *GMC*’s argument proved to be that, during the time at issue, “marketers did not serve the Ohio LDCs’ core market of small, captive users, typified by residential consumers who want and need the bundled product.” *Id.* at 301. This was so even though the High Court conceded that “[e]liminating the sales tax differential at issue here might well intensify competition between LDCs and marketers for customers in [the industrial] noncaptive market.” *Id.* at 303.

The existence of one arena where the entities competed and one where they did not posed the vexing question of the case. The Court rhetorically queried: “Should we accord controlling

significance to the noncaptive market in which [LDCs and marketers] compete, or to the noncompetitive, captive market in which the local utilities alone operate?” *Id.* The conclusion that LDCs and marketers were not similarly situated was driven primarily by the concern to avoid “imperil[ing] the delivery by regulated LDCs of bundled gas to the noncompetitive market.” *Id.* at 304.

By the same token, Transmission fails the threshold test set by *GMC*: it does not compete head-to-head for the general residential market, as to which LDCs still are subject to the same crucial regulatory obligations as in *GMC*.<sup>1</sup> Accordingly, there can be no Commerce Clause discrimination because Transmission does not compete with LDCs for residential customers and therefore is not similarly situated to the LDCs.

**2. Since *GMC* disposed of the carmaker’s Commerce Clause challenge based on the competition issue, there is no constitutional significance to the fact that Transmission and LDC’s both have pipeline facilities in this case.**

At great length, Transmission describes similarities between equipment used by LDCs and the pipe-line companies for transmission or delivery. But what this ignores is that only LDC’s, i.e., PUCO-defined “natural gas companies,” serve the residential market in any meaningful way, and only LDCs have the unique regulatory burdens as “provider of last resort” under which they must assure the general public’s access to natural gas supplies at gas cost.

*GMC* defined a threshold inquiry by focusing on the competition for the general residential market. That threshold condition has not been met here. Accordingly, because

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<sup>1</sup> In *GMC*, the competition between marketers and LDCs involved sale of the natural gas commodity. In this case, interstate pipelines no longer generally sell the commodity, and are prohibited from selling it on a bundled basis, i.e., together with the service of transporting it. Accordingly, the point of comparison between LDCs and “pipe-line companies” lies in transportation of gas, not the sale of commodity.

Transmission cannot show genuine competition with LDCs for the residential market, any similarities of equipment are of no avail to its appeal.

- 3. Since gas transportation property of LDCs is used in the conduct of a different primary business, any similarities of the property itself is irrelevant to whether the entities should be regarded as “similarly situated.”**

There is a second reason why Transmission’s discussion of similarities of equipment is a vain endeavor. That is because the equipment is used in the context of different primary businesses. In this regard, the Court should heed not only the U.S. Supreme Court’s general demand in *GMC* that only “substantially similar entities” may be compared; it is equally important to observe the careful scrutiny the High Court has demanded in determining what entities may be compared in a particular case. The best example is *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117, 125-26, where the court rejected the plaintiffs’ suggestion that the inherently interstate business of integrated oil companies be compared with local independent gasoline dealers under the Commerce Clause. Instead, the Court insisted that the proper comparison for a local *independent dealer* was an interstate *independent dealer*, not an interstate, integrated oil company.

Likewise, in this case the proper comparison for Transmission as an interstate *pipe-line company* is not an LDC, but rather an in-state *pipe-line company*. Those entities are treated the same under the statute since the definition of “pipe-line company” encompasses both entities whose pipes or tubing is “wholly” in the state and those whose pipes and tubing are only “partly” in the state. R.C. 5727.01(D)(5). And their primary business remains transmission, not local distribution. Thus, the use of Transmission’s equipment does not equate to an LDC’s use of equipment – even if the individual items have similar characteristics – since they are used in different primary businesses.

4. **A differential tax impact on integrated interstate businesses that have both “pipe-line company”- and LDC- affiliates does not constitute a discrimination against interstate commerce.**

Transmission suggests that the differential assessment percentages lead to disparate impacts on integrated interstate natural gas businesses depending on how the business is corporately structured. Trans. Br. 34. That may be true if, for example, a parent corporation were to shift pipe and tubing from a transmission entity to an LDC and thereby reap the advantage of a lower listing percentage. However, a measure does not discriminate against interstate commerce by imposing disparate impacts on two otherwise identical interstate businesses based merely on their internal corporate organization. Such impacts simply do not implicate the type of protectionist barriers that the Commerce Clause prohibits.

5. **The existence of areas of potential (or even actual) competition between LDCs and Transmission does not change the constitutional analysis under *GMC*.**

At various points, Transmission argues that outside the primary business of transmission it and other pipe-line companies might compete in other areas, for example in gas storage. Yet *GMC* on its face is clear that the existence of areas of potential competition or, as in *GMC* itself, actual current competition with LDCs is not dispositive. Instead, the focus must be on whether head-to-head competition exists for the residential market. Since Transmission has not and cannot prove that area is competitive as between LDCs and pipe-line companies, its claim must fail.

6. **The 88% assessment rate for interstate pipe-line companies creates no protectionist preference for Ohio-produced gas – nor for the Ohio consumers of such gas – because the same assessment percentage applies to intrastate pipe-line companies.**

a. **There is no facial discrimination against interstate commerce.**

Transmission alleges that the 88% assessment rate creates two protectionist preferences that take this case outside the *GMC v. Tracy* holding and violate the Commerce Clause. Trans. Br. 36-38. First, Transmission claims the difference between the taxation of LDCs and pipe-line companies favors purchase of Ohio gas over gas produced outside Ohio. Here the theory is that the consumer's cost of interstate gas is always burdened by some passed-through increment of the higher listing percentage imposed by Ohio on pipe-line companies. Second, Transmission asserts that the tax differential favors Ohio consumers' access to Ohio gas over access by out-of-state consumers – a theory that likewise rests on premise that the cost of all exported Ohio gas to interstate consumers must include an increment of the 88% assessment rate.

Viewed as claims of facial discrimination, both fail for a simple reason. On their face, the Ohio statutes treat “pipe-line companies” the same regardless of whether any particular pipe-line business is interstate or purely intrastate in character.<sup>2</sup> In this regard, it is crucial to take seriously the central tenet of U.S. Supreme Court's decision in *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117: in evaluating a claim of Commerce Clause discrimination, close attention must be paid to which in-state and out-of-state entities are compared – a precursor of *GMC*'s explicit mandate that no discrimination can be found except as between “substantially similar entities.” In *Exxon* the discrimination claim failed because the proper Commerce Clause

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<sup>2</sup> Current PUCO records show five purely intrastate pipe-line companies report to the Commission: BP Oil Pipeline Co., North Coast Gas Transmission LLC, Ohio Intrastate Energy LLC, Ohio Oil Gathering Corp., and Orwell Trumbull Pipeline Co. Since these entities lie within the “pipe-line company” definition along with interstate pipelines, they too are subject to the 88% assessment rate.

analysis lay in comparing in-state independent dealers with interstate independent dealers, *Exxon* at 125-26. In the same way, Transmission's claim in this case fails because the proper comparison here is between *interstate* pipe-line companies and *intrastate* pipe-line companies – not interstate pipe-lines and LDCs. Since the statutes on their face treat both interstate and in-state pipe-line companies the same, the claim of discrimination fails.

**b. Transmission fails to prove a discrimination in practical operation.**

As a fallback, Transmission may argue that even if the statutes are evenhanded on their face, a discrimination “in practical operation” can be shown. See *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St.2d 465, 468 (“the specter of discrimination may arise from the face of the statute or it may appear more subtly in its practical operation”). At this juncture, however, Transmission's argument would run headlong into the holding of *GMC v. Tracy*. As previously noted, in *GMC* General Motors was able to show potential impairment of competition in certain markets open to competition, but to no avail. The state interest in furthering the regulatory objectives with respect to the residential market justified whatever actual discriminatory effect arose in the noncaptive markets – so long as no competition was shown for the general residential market.

Moreover, any attempt to show discriminatory impact faces a steep uphill climb in this case because of two circumstances not present in *Dayton Power & Light*.

First, in this case the Court is confronted not with a tax on transactions in a commodity, as in *DP&L*, but rather an assessment percentage applied to certain in-state property. The tariff-like effect in *DP&L* is manifest; here, the connection between higher assessment percentages and the cost of gas moving in interstate commerce is far more diffuse and attenuated. The U.S. Supreme Court has “never deemed the hypothetical possibility of favoritism to constitute

discrimination that transgresses constitutional commands.” *GMC* at 311, quoting *Associated Industries of Mo. v. Lohman* (1994), 611 U.S. 641, 654. Indeed, “[d]iscrimination, like interstate commerce itself, is a practical conception,” and tribunals are admonished to “deal in this matter, as in others, with substantial distinctions and real injuries.” *Associated Industries* at 654, quoting *Gregg Dyeing Co. v. Query* (1932), 286 U.S. 472, 481. Transmission has presented speculative testimony that the different tax rates could give one company an advantage over another type of company. Supp. 126 (Tr. IV 78-79); Supp. 355, 366, 367- 368, 381 ( Tr. V 55-56, 98-99, 104-106, 157-61); Supp. 73 (Tr. VII 273). However, Transmission presented no evidence that such advantage actually occurred solely because of the different tax rates. Such evidence, if it exists, should have been available, as the hearing in this case occurred 4-5 years after the tax years at issue.

Second, the enactment of a reduced assessment percentage for LDCs was jointly enacted with the passage of a new tax tied to the LDC’s sales – the “Mcf Tax,” enacted in order to maintain the LDC revenue base. Any evaluation of the actual impact of the listing percentage must take into account the impact on Ohio consumers of the Mcf Tax with respect to their purchases of any Ohio produced gas. See S.B. 287, 148 Ohio Laws 11536, 11550 (enacting reduction to an LDC’s assessment percentage), 11560 (enacting “Mcf Tax”). Also relevant is the fact that LDCs (and in-state pipe-line companies) pay a significant gross receipts tax, while the gross receipts tax as to interstate pipe-lines typically involve far smaller payments as a percentage of total revenues because the vast majority of their transactions are exempted interstate transactions. [Compare, e.g., Ex. D, p. 1, line 21 (Supp. 1341) with Ex. PP, p.1, line 26 (Supp. 1377) (comparison showing significantly higher gross receipts liabilities of LDC Columbia Gas of Ohio in contrast to Transmission).]

All these factors defeat a claim of discrimination on this record, where the statutes plainly do not discriminate on their face.

7. **The general allegation that Ohio, through the 88% assessment rate, exports its tax burden to other states fails to state a Commerce Clause claim under *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609.**

In *Commonwealth Edison*, the High Court confronted a claim that, since 90% of coal extracted in Montana was shipped for use in other states, the state's severance tax discriminated against interstate commerce by exporting the burden to out-of-state consumers. The claim had no merit inasmuch as the "tax is computed at the same rate regardless of the final destination of the coal." *Edison* at 618. Likewise, the 88% assessment rate under Ohio law is applied evenhandedly to interstate and in-state pipelines without regard to the source or destination of the natural gas conveyed through their facilities. Under these circumstances, *Commonwealth Edison* forecloses the claim that the tax exports a burden.

8. **The 88% assessment rate does not violate the "internal consistency" test because owning property for use in business is a local activity the state is free to tax so long as such tax is "uniformly assessed" on similarly situated entities – here, the in-state pipe-line companies.**

Transmission contends that if the differential assessment percentages violate the "internal consistency" test, they violate the Commerce Clause; and second, Transmission argues that there is in fact a violation of internal consistency. Trans. Br. 38-39. Transmission is mistaken in both respects.

First, there is no free-floating "internal consistency test" under the Commerce Clause. Instead, the test is applied in limited circumstances to determine whether a tax is fairly apportioned, *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* (1995), 514 U.S. 175, 185, or whether initially discriminatory state tax structures avoid an overall discriminatory effect, *American Trucking Ass'ns v. Scheiner* (1987), 483 U.S. 266, 282-83; *Armco, Inc. v. Hardesty*

(1984), 468 U.S. 638, 644-45 (applying “internal consistency” to test whether compensatory tax defense should be sustained). In this case, Transmission cites no general requirement that property taxes somehow be apportioned; and no initial discriminatory effect has been shown that would trigger the application of the test.

But even if the test were applied, the standard it prescribes is not violated. That is evident from one of the latest pronouncements on the subject, the U.S. Supreme Court’s decision in *American Trucking Ass’ns v. Michigan Public Service Comm’n* (2005), 125 S.Ct. 2419. In *Trucking*, Michigan imposed an annual flat fee to engage in *purely intrastate* deliveries. The interstate truckers argued that, if every state did the same, interstate truckers would be saddled with a multiplicity of state fees for intrastate jobs along with any other fees imposed on interstate transactions. The High Court acknowledged that “if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to ‘top off’ its business by carrying local loads in many (or even all) other States.” Despite “conced[ing]” this point, however, the court found no violation. The burden would be incurred “only because [the interstate trucker] engages in local business in all those States.”

In this case, an *ad valorem* property tax is imposed on the essentially local activity of owning property for use in a business. Under *Trucking*, a company should expect to pay so long as similarly situated “domestic firms” are “uniformly assessed.” As discussed, the in-state pipeline companies are assessed at the same percentage; accordingly, there is no constitutional flaw. *Accord, Commonwealth Edison* at 623-24 (Commerce Clause does not “relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business”); *Jefferson Lines* at 187-88 (“the Commerce Clause does not forbid the actual

assessment of a succession of taxes by different states on distinct events as the same tangible object flows along”).

**9. Where a tax does not discriminate against interstate commerce and where no apportionment claim is raised, there is no issue of “undue burden on interstate commerce.”**

At pages 39-40, Transmission stakes out a fallback position in case the Court finds – as it ought – that Transmission has failed to show a discrimination against interstate commerce: Transmission invokes an “undue burden” test. This contention too runs afoul of the U.S. Supreme Court’s analysis in *GMC*. In footnote 12 of that case, the court noted that “[i]n the realm of taxation, the requirement of apportionment plays a similar role by assuring that interstate activities are not unjustly burdened by multistate taxation,” and holds that “the fact that Ohio exempts local utilities [i.e. LDCs] from its sales and use taxes could not support any claim of undue burden in this nondiscriminatory sense, since the exemption itself does not give rise to conflicting regulation of any transaction or result in malapportionment of any tax.” *GMC* at 299, fn.12. Likewise, the absence of conflicting regulation and malapportionment in this case forecloses an undue burden claim.

**PROPOSITION OF LAW NO. III:**

**Neither the imposition of an 88% assessment rate on pipe-line companies nor the differential percentage imposed on LDC property conflicts with any congressional enactment or regulatory prerogative of the FERC. As a result, there is no violation of the Supremacy Clause.**

In its fourth proposition of law, Transmission attempts to establish violation of the Supremacy Clause. Trans. Br. 41-44. Case law is settled that, to establish pre-emption, there must be express language evidencing Congress’ intent to pre-empt state law. Alternatively, courts may infer pre-emption “where Congress has legislated comprehensively to occupy an entire field of regulation.” *Northwest Central Pipeline Corp. v. State Corporation Commission*

of *Kansas*, 489 U.S. 493, 509 (1988). To attempt to meet this burden, Transmission relies on three incorrect contentions.

First, Transmission contends that the Natural Gas Act occupies the field with respect to wholesale sales and transportation of natural gas in interstate commerce. Notably absent is any discussion of how that affects Ohio's power to impose *ad valorem* property tax. It does not. Contention one is unsupported by statute or case citation and therefore fails.

Second, Transmission contends that Ohio's differential assessment percentages somehow "interfere[ ] with a federally regulated pipeline's practical ability to pass their costs along to their customers, as FERC intended and approved." If that were so, it would indeed violate federal supremacy, see *Maryland v. Louisiana* (1981), 451 U.S. 725, 733-34, 747-48.

Unlike in this case, in *Maryland*, Louisiana imposed on natural gas a first-use tax that suffered from a number of constitutional deficiencies. The state provisions most applicable to this case declared that: (i) the "tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas," and (ii) required that the tax cost be passed on to the ultimate consumers; any allocation of the tax costs to any party except the ultimate consumer was "against public policy and unenforceable to that extent." *Maryland* at 734. Quite understandably, these provisions were found to interfere with FERC's prerogative to "regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers." *Id.* at 749.

By contrast, no language in the tax statutes at issue here purports to control the pipe-line company's power to determine whether to pass on its *ad valorem* property tax expenses and to whom. In fact, Transmission's own witness testified that state taxes are considered by FERC and included in the costs used to establish the rates. Supp. 126-127, 220, 447. Far from

interfering with FERC's authority, the tax Ohio imposes falls within the costs considered by FERC in establishing its natural gas rates and therefore is permissible. Thus, it does not violate the Supremacy Clause.

Third, Transmission argues that differential assessment percentages interfere with a federal policy to promote competition among gas entities. Once again, Transmission is not able to point to any language enacted by Congress that prohibits state tax differentials of this sort. Nor do they cite any cases where the courts have found that regulatory "field preemption" displaces state taxing power in this way. Accordingly, the bare contention of a potential policy conflict fails to state a claim of preemption.

Particularly illuminating in this regard is the holding of *Dep't of Revenue v. ACF Industries, Inc.* (1994), 510 U.S. 332. In that case, in a familiar piece of legislation called the "4R Act", Congress *did* enact explicit language to prohibit differential tax rates that disadvantage rail transportation property. Rail car lessees complained that the state had exempted altogether certain classes of business personal property. The lessees claimed the exemptions violated the antidiscrimination law, since their rail car property was taxed. In addressing whether the antidiscrimination provisions prohibited exemptions of non-rail property, the court concluded that Congress did not intend to prohibit states from exempting other business property. In support of its reading, the court stated:

"Principles of federalism compel our view. [The federal law] sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope."

*ACF Industries* at 345.

Likewise in this case – where Congress has not explicitly pre-empted anything – no displacement of the state's fundamental power to tax can be inferred.

## PROPOSITION OF LAW NO. IV:

**Where a taxpayer fails to show that other entities are in all relevant respects like itself, and additionally fails to negate every conceivable rational basis for distinguishing it from other entities, the taxpayer fails to state an equal protection/due process claim.**

Transmission struggles mightily to discover an equal protection claim. Trans. Br. 44-50. It fails utterly. First, it fails to show itself to be sufficiently similar to general business entities to justify imposing a constitutional requirement of equal treatment. Second, as to entities with whom it can claim to be similarly situated, it fails to negate every conceivable rational basis for the distinction.

**1. Nonutility general businesses may be treated differently from regulated utility businesses.**

The starting point for any equal protection claim is to determine whether the entities the claimant seeks to compare are in fact similarly situated. That is so because persons who are differently situated can be treated differently, without such differential treatment invoking equal protection review. See *Vacco v. Quill* (1997), 521 U.S. 793, 799 (noting that equal protection “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly”), citing *Plyler v. Doe* (1982), 457 U.S. 202, 216 (“The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”); *GTE North, Inc. v. Zaino* (2002), 96 Ohio St.3d 9, 11, 2002-Ohio-2984 ¶39 (same).

Indeed, the case law applying equal protection to tax distinctions “simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.” *MCI Telecommunications, Inc. v. Limbach* (1994), 68 Ohio St.3d 195, 199; *F.S. Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415.

When Transmission, a federally regulated public utility, attempts to compare itself to any general business involving natural gas<sup>3</sup> that is subject to Ohio's general personal property tax, this doctrine bars that claim as a matter of law. That is so, because the U.S. Supreme Court has long since pronounced that regulated utilities are simply not similarly situated to general businesses. *New York Rapid Transit Corp. v. City of New York* (1938), 303 U.S. 573, 579 (“carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses” and as a result “these public service organization have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions”); *Atlantic Coastline R. Co. v. Doughton* (1923), 262 U.S. 413, 423-24.

In this regard it is worth noting two things. First, no general business can engage in Transmission's primary business of interstate transmission without being regulated by the FERC. Second, as often noted previously, all transmission companies, in-state and interstate, are treated the same.

**2. Neither potential nor actual competition between them establishes that entities are similarly situated.**

Transmission appears to be suggesting that the mere fact of *some* competition triggers equal protection scrutiny, but that is wrong. *GTE North* explicitly held that “the fact that one business competes with another does not, of itself, mean that the two companies are similarly situated for purposes of equal protection,” 96 Ohio St.3d at 15, 2002-Ohio-2984 ¶39. Accord, *Union Bank & Trust Co. v. Phelps* (1933), 288 U.S. 181, 186. An entity “primarily engaged” in

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<sup>3</sup> Of course differential treatment only promises to become more differential as Ohio phases out the general personal property tax while the utility property tax remains.

one business is not similarly situated to an entity primarily engaged in another, with whom it tangentially competes. *Phelps*, 288 U.S. at 186; *GTE North* at ¶32 .

**3. As to entities similarly situated, the claimant must negate every conceivable rational basis.**

Even assuming Transmission can compare itself to certain competitors during the relevant time period for purposes of equal protection, its challenge must fail. That is so, because Transmission's burden here is to "negate every conceivable basis which might support" differentiating between pipe-line companies and other service providers. *GTE North*, 96 Ohio St.3d 9, 2002-Ohio-2984, ¶21. Accord, *Park Corp. v. City of Brook Park* (2004), 102 Ohio St.3d 166, 2004-Ohio-2237, ¶20 ("In most cases, courts give a large degree of deference to legislatures when reviewing a statute on an equal protection basis."); see also *Regan v. Taxation with Representation of Washington* (1983), 461 U.S. 540, 547 ("[L]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *Nordlinger v. Hahn* (1992), 505 U.S. 1, 11-12.<sup>4</sup>

Transmission has not accomplished the task. In particular, Transmission compares itself to LDCs. But the ultimate and inescapable service obligations of LDCs to consumers – especially the human needs of residential consumers – plainly furnish a rational basis for treating them differently, and more favorably, [Supp. 125-126, Tr. IV 75-77; Supp. 16-17, Tr.VII 48-51].

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<sup>4</sup> In support of its equal protection argument, Transmission cites *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County* (1989), 488 U.S. 336. Because the Tax Commissioner views the statutes as creating the distinction between pipe-line companies and Ohio "natural gas companies" that he applied here, the Commissioner regards *MCI* and *Allegheny Pittsburgh* as inapposite. Both those cases involved administrative practices – in the case of *Allegheny Pittsburgh* administrative negligence – which violated the statutes rather than fulfilled the purpose of the statutes. Where as here the statutes themselves mandate the administrative action that has been challenged, greater deference is owed since the legislature itself made the choices. *Nordlinger* itself articulates the distinction, at 15-16.

Accord, *GMC* at 311-12.

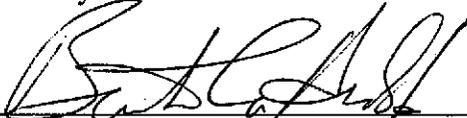
### CONCLUSION

The BTA's devising of its own startling "incidental business" test should be rejected as contrary to the plain meaning of the relevant statutes, in contravention of the manifest intent of the General Assembly, and in disregard of the PUCO's and Commissioner's long-standing, shared administrative interpretations of the identical definitional terms in the public utility regulatory and tax statutes. Similarly, Transmission's "kitchen sink" constitutional challenges on "void for vagueness," Commerce Clause, Equal Protection, Due Process, and Supremacy Clause preemption grounds are baseless.

None of Transmission's claims should call into question the validity of the Tax Commissioner's and PUCO's well-settled interpretations of the statutory definitions at issue. For these reasons, the Commissioner's determination that Transmission is a "pipe-line company" under R.C. 5727.01(D)(4) and R.C. 5727.02(A) should be upheld.

Respectfully submitted,

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THE STATE OF OHIO  
**LEGISLATIVE ACTS**

PASSED  
(EXCEPTING APPROPRIATION ACTS)

AND

**JOINT RESOLUTIONS**

ADOPTED

BY THE  
NINETY-THIRD GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO,  
JANUARY 2, 1939, TO JUNE 14, 1939,  
(Both Inclusive)

ALSO THE TIMES FOR HOLDING THE COURTS OF APPEALS  
AND THE COURTS OF COMMON PLEAS IN OHIO  
FOR THE YEARS 1939 AND 1940.

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VOLUME CXVIII

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THE F. J. HEER PRINTING CO.  
Columbus, Ohio  
1940  
Bound at the State Bindery.

(Senate Bill No. 248)

## AN ACT

To enact section 5416-1 of the General Code, relative to the business of producing and/or refining and/or marketing petroleum or its products.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That section 5416-1 of the General Code be enacted to read as follows:

**Producing and marketing petroleum, etc.**

Sec. 5416-1. Notwithstanding the definitions set forth in section 5415 and section 5416 of the General Code the terms "public utility" and "pipe line company" shall not embrace or include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, whose primary business in the state of Ohio consists of producing, and/or refining, and/or marketing petroleum or its products.

WILLIAM M. McCULLOCH,  
*Speaker of the House of Representatives.*

PAUL M. HERBERT,  
*President of the Senate.*

Passed April 18, 1939.

Approved April 28, 1939.

JOHN W. BRICKER,  
*Governor.*

The sectional number in this act is in conformity to the General Code.

THOMAS J. HERBERT,  
*Attorney General.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the 1st day of May, A. D. 1939.

EARL GRIFFITH,  
*Secretary of State.*

File No. 73.

THE STATE OF OHIO

**LEGISLATIVE ACTS**

**PASSED**

(EXCEPTING APPROPRIATION ACTS)

AND

**JOINT RESOLUTIONS**

ADOPTED

By THE

NINETY-EIGHTH GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO

January 3, 1949, to July 29, 1949, Inclusive

ALSO THE TIMES FOR HOLDING THE COURTS OF APPEALS  
AND THE COURTS OF COMMON PLEAS IN OHIO  
FOR THE YEARS 1949 AND 1950

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VOLUME CXXIII

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**ATTORNEY GENERAL  
OF OHIO**

  
F. J. Heer Printing Company  
Columbus, Ohio  
1950  
Bound at the State Bindery

(Amended Senate Bill No. 265)

## AN ACT

To amend section 5416-1 of the General Code relative to the definition of "public utility", "electric light company", "gas company", "natural gas company", "pipe line company", "water works company", "heating company" and "cooling company".

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That section 5416-1 of the General Code be amended to read as follows:

**Limitation on definitions in General Code Section 5416.**

Sec. 5416-1. Notwithstanding the definitions set forth in section 5415 and section 5416 of the General Code the terms "public utility", \*\*\* "electric light company", "gas company", "natural gas company", "pipe line company", "water works company", "heating company", or "cooling company" shall not embrace or include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, *who is engaged in some other primary business to which the supplying of electricity, power, heat, artificial gas, natural gas, water, steam and/or air to others is incidental, or who supplies electricity, power, heat, gas, water, steam and/or air to his or its tenants, whether for a separate charge or otherwise, or whose primary business in the state of Ohio consists of producing, and/or refining, and/or marketing petroleum or its products.*

**Repeal.**

SECTION 2. That existing section 5416-1 of the General Code is hereby repealed.

JOHN F. CANTWELL,  
*Speaker of the House of Representatives.*

GEORGE D. NYE,  
*President of the Senate.*

Passed June 23, 1949.

Approved July 5, 1949.

FRANK J. LAUSCHE,  
*Governor.*

The sectional number herein is in conformity to the General Code.  
WILLARD D. CAMPBELL,  
*Director of Code Revision.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the 6th day of July, A. D. 1949.

File No. 117.

CHARLES F. SWEENEY,  
*Secretary of State.*

UNITED STATES CODE ANNOTATED  
TITLE 15. COMMERCE AND TRADE  
CHAPTER 15B--NATURAL GAS  
§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

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, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, 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.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is--

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

§ 5701.03. "Personal property" and "business fixture" defined

As used in Title LVII [57] of the Revised Code:

(A) "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. "Personal property" also includes every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere. "Personal property" does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, electricity, or, for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the electricity, patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale.

(B) "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.

§ 5711.01. Definitions

As used in this chapter:

(A) "Taxable property" includes all the kinds of property mentioned in division (B) of section 5709.01 and section 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent the taxpayer may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from the taxpayer's credits. "Taxable property" does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, surrender values under policies of insurance, or any tangible personal property acquired from a public utility or interexchange telecommunications company as defined in section 5727.01 of the Revised Code and leased back to the public utility or interexchange telecommunications company pursuant to a sale and leaseback transaction as defined in division (I) of section 5727.01 of the Revised Code. For tax year 2007 and thereafter, "taxable property" of a telephone, telegraph, or interexchange telecommunications company, as defined in section 5727.01 of the Revised Code, includes property subject to such a sale and leaseback transaction.

For tax year 2007 and thereafter, taxable property leased to a telephone, telegraph, or interexchange telecommunications company, as defined in section 5727.01 of the Revised Code, shall be listed and assessed by the owner of the property at the percentage of true value in money required under division (H) of section 5711.22 of the Revised Code.

(B) "Taxpayer" means any owner of taxable property, including property exempt under division (C) of section 5709.01 of the Revised Code, and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.36 of the Revised Code, to make a return for or on behalf of another. For tax year 2007 and thereafter, "taxpayer" includes telephone companies, telegraph companies, and interexchange telecommunications company as defined in section 5727.01 of the Revised Code. The tax commissioner may by rule define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such rule shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state;

(4) Unincorporated mutual funds.

Taxpayer excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII [57] of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or public utilities, except to the extent they may be required by sections 5711.01 to 5711.36 of the Revised Code, to make returns as fiduciaries, or by section 5725.26 of the Revised Code, to make returns of property leased, or held for the purpose of leasing, to others if the owner or lessor of the property acquired it for the sole purpose of leasing it to others or to the extent that property is taxable under section 5725.25 of the Revised Code.

(C) "Return" means the taxpayer's annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but does not include trustees unless the sense so requires.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or holding or selling real property or investments for the purpose of realizing income or profit which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

(K) "Unincorporated mutual fund" means any partnership, each partner of which is a corporation, engaged solely in the business of investing and reinvesting funds in investments, or holding or selling investments for the purpose of realizing income or profit which is distributed to its partners and which is subject to Chapter 1707. of the

**Revised Code. An unincorporated mutual fund does not include any dealer in intangibles as defined in section 5725.01 of the Revised Code.**

**§ 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification**

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and

the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

§ 5733.09. Exempted companies

(A) (1) Except as provided in divisions (A)(2) and (3) of this section, an incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and required by law to file reports with the tax commissioner and to pay an excise tax upon its gross receipts, and insurance, fraternal, beneficial, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance and dealers in intangibles, the shares of which are, or the capital or ownership in capital employed by such dealer is, subject to the taxes imposed by section 5707.03 of the Revised Code, shall not be subject to this chapter, except for sections 5733.031 [5733.03.1], 5733.042 [5733.04.2], 5733.05, 5733.052 [5733.05.2], 5733.053 [5733.05.3], 5733.069, 5733.0611, 5733.40, 5733.41, and sections 5747.40 to 5747.453 [5747.45.3] of the Revised Code. However, for reports required to be filed under section 5725.14 of the Revised Code in 2003 and thereafter, nothing in this section shall be construed to exempt the property of any dealer in intangibles under section 5725.13 of the Revised Code from the tax imposed under section 5707.03 of the Revised Code.

(2) An electric company subject to the filing requirements of section 5727.08 of the Revised Code or otherwise having nexus with or in this state under the Constitution of the United States, or any other corporation having any gross receipts directly attributable to providing public utility service as an electric company or having any property directly attributable to providing public utility service as an electric company, is subject to this chapter.

(3) A telephone company that no longer pays an excise tax under section 5727.30 of the Revised Code on its gross receipts billed after June 30, 2004, is first subject to taxation under this chapter for tax year 2005. For that tax year, a telephone company with a taxable year ending in 2004 shall compute the tax imposed under this chapter, and shall compute the net operating loss carry forward for tax year 2005, by multiplying the tax owed under this chapter, net of all nonrefundable credits, or the loss for the taxable year, by fifty per cent.

(B) A corporation that has made an election under subchapter S, chapter one, subtitle A, of the Internal Revenue Code for its taxable year under such code is exempt from the tax imposed by section 5733.06 of the Revised Code that is based on that taxable year.

A corporation that makes such an election shall file a notice of such election with the tax commissioner between the first day of January and the thirty-first day of March of each tax year that the election is in effect.

(C) An entity defined to be a "real estate investment trust" by section 856 of the Internal Revenue Code, a "regulated investment company" by section 851 of the Internal Revenue Code, or a "real estate mortgage investment conduit" by section 860D of the Internal Revenue Code, is exempt from taxation for a tax year as a corporation under this chapter

and is exempt from taxation for a return year as a dealer in intangibles under Chapter 5725. of the Revised Code if it provides the report required by this division. By the last day of March of the tax or return year the entity shall submit to the tax commissioner the name of the entity with a list of the names, addresses, and social security or federal identification numbers of all investors, shareholders, and other similar investors who owned any interest or invested in the entity during the preceding calendar year. The commissioner may extend the date by which the report must be submitted for reasonable cause shown by the entity. The commissioner may prescribe the form of the report required for exemption under this division.

(D) (1) As used in this division:

(a) "Commercial printer" means a person primarily engaged in the business of commercial printing. However, "commercial printer" does not include a person primarily engaged in the business of providing duplicating services using photocopy machines or other xerographic processes.

(b) "Commercial printing" means printing by one or more common processes such as letterpress, lithography, gravure, screen, or digital imaging, and includes related activities such as binding, platemaking, prepress operation, cartographic composition, and typesetting.

(c) "Contract for printing" means an oral or written agreement for the purchase of printed materials produced by a commercial printer.

(d) "Intangible property located at the premises of a commercial printer" means intangible property of any kind owned or licensed by a customer of the commercial printer and furnished to the commercial printer for use in commercial printing.

(e) "Printed material" means any tangible personal property produced or processed by a commercial printer pursuant to a contract for printing.

(f) "Related member" has the same meaning as in section 5733.042 [5733.04.2] of the Revised Code without regard to division (B) of that section.

(2) Except as provided in divisions (D)(3) and (4) of this section, a corporation not otherwise subject to the tax imposed by section 5733.06 of the Revised Code for a tax year does not become subject to that tax for the tax year solely by reason of any one or more of the following occurring in this state during the taxable year that ends immediately prior to the tax year:

(a) Ownership by the corporation or a related member of the corporation of tangible personal property or intangible property located during all or any portion of the taxable year or on the first day of the tax year at the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing with respect to such property or the premises of a commercial printer's related member with

which the corporation or the corporation's related member has a contract for printing with respect to such property;

(b) Sales by the corporation or a related member of the corporation of property produced at and shipped or distributed from the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing with respect to such property or the premises of a commercial printer's related member with which the corporation or the corporation's related member has a contract for printing with respect to such property;

(c) Activities of employees, officers, agents, or contractors of the corporation or a related member of the corporation on the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing or the premises of a commercial printer's related member with which the corporation or the corporation's related member has a contract for printing, where the activities are directly and solely related to quality control, distribution, or printing services, or any combination thereof, performed by or at the direction of the commercial printer or the commercial printer's related member.

(3) The exemption under this division does not apply for a taxable year to any corporation having on the first day of January of the tax year or at any time during the taxable year ending immediately preceding the first day of January of the tax year a related member which, on the first day of January of the tax year or during any portion of such taxable year of the corporation, has nexus in or with this state under the Constitution of the United States or holds a certificate of compliance with the laws of this state authorizing it to do business in this state.

(4) With respect to allowing the exemption under this division, the tax commissioner shall be guided by the doctrines of "economic reality," "sham transaction," "step transaction," and "substance over form." A corporation shall bear the burden of establishing by a preponderance of the evidence that any transaction giving rise to an exemption claimed under this division did not have as a principal purpose the avoidance of any portion of the tax imposed by section 5733.06 of the Revised Code.

Application of the doctrines listed in division (D)(4) of this section is not limited to this division.

§ 5739.01. Definitions

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

(c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;

(d) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry cleaning services are or are to be provided;

(e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An affiliated group means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's

common stock with voting rights.

(f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;

(g) Landscaping and lawn care service is or is to be provided;

(h) Private investigation and security service is or is to be provided;

(i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;

(j) Building maintenance and janitorial service is or is to be provided;

(k) Employment service is or is to be provided;

(l) Employment placement service is or is to be provided;

(m) Exterminating service is or is to be provided;

(n) Physical fitness facility service is or is to be provided;

(o) Recreation and sports club service is or is to be provided.

(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;

(q) On and after August 1, 2003, personal care service is or is to be provided to an individual. As used in this division, "personal care service" includes skin care, the application of cosmetics, manicuring, pedicuring, hair removal, tattooing, body piercing, tanning, massage, and other similar services. "Personal care service" does not include a service provided by or on the order of a licensed physician or licensed chiropractor, or the cutting, coloring, or styling of an individual's hair.

(r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined in section 5735.01 of the Revised Code, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under 49 U.S.C. 41102;

(s) On and after August 1, 2003, motor vehicle towing service is or is to be provided. As used in this division, "motor vehicle towing service" means the towing or conveyance of a wrecked, disabled, or illegally parked motor vehicle.

(t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal service" means the removal of snow by any mechanized means, but does not include the providing of such service by a person that has less than five thousand dollars in sales of such service during the calendar year.

(4) All transactions by which printed, imprinted, overprinted, lithographic,

multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used directly in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, if the corporation is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of such films for exhibition purposes is not a sale.

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business.

Except as provided in this section, "sale" and "selling" do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) "Vendor" means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(D) (1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4) (a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exemption under division (B)(42)(f) of section 5739.02 of the Revised Code for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

(E) "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H) (1) (a) "Price," except as provided in divisions (H)(2) and (3) of this section, means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(i) The vendor's cost of the property sold;

(ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;

(iii) Charges by the vendor for any services necessary to complete the sale;

(iv) On and after August 1, 2003, delivery charges. As used in this division, "delivery charges" means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.

(v) Installation charges;

(vi) Credit for any trade-in.

(b) "Price" includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:

(i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;

(ii) The consumer identifies the consumer's self to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.

(iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.

(c) "Price" does not include any of the following:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 [1547.54.3] of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same

meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in this division, "watercraft" includes an outdrive unit attached to the watercraft.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 [5739.12.1] of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether the rooms are in one or several structures.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed, regardless of whether the vendor is a delivery vendor.

(P) "Used directly in the rendition of a public utility service" means that property that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal

property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) "Assembly" and "assembling" mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(T) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county that is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority that includes territory in more than one county must include all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(V) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county that is a transit authority, the board of county commissioners.

(W) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) "Providing a service" means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y) (1) (a) "Automatic data processing" means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and

operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA) (1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added. "Telecommunications service" does not include any of the following:

(a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a consumer where the consumer's primary purpose for the underlying transaction is the processed data or information;

(b) Installation or maintenance of wiring or equipment on a customer's premises;

(c) Tangible personal property;

(d) Advertising, including directory advertising;

(e) Billing and collection services provided to third parties;

(f) Internet access service;

(g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as defined in 47 U.S.C. 522(6), and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 C.F.R. 20.3;

(h) Ancillary service;

(i) Digital products delivered electronically, including software, music, video, reading materials, or ring tones.

(2) "Ancillary service" means a service that is associated with or incidental to the provision of telecommunications service, including conference bridging service, detailed telecommunications billing service, directory assistance, vertical service, and voice mail service. As used in this division:

(a) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call, including providing a telephone number. "Conference bridging service" does not include telecommunications services used to reach the conference bridge.

(b) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(c) "Directory assistance" means an ancillary service of providing telephone number or address information.

(d) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and manage multiple calls and call connections, including conference bridging service.

(e) "Voice mail service" means an ancillary service that enables the customer to store, send, or receive recorded messages. "Voice mail service" does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(3) "900 service" means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service, and which is typically marketed under the name "900" service and any subsequent numbers designated by the federal communications commission. "900 service" does not include the charge for collection services provided by the seller of the telecommunications service to the subscriber, or services or products sold by the subscriber to the subscriber's customer.

(4) "Prepaid calling service" means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units of dollars of which the number declines with use in a known amount.

(5) "Prepaid wireless calling service" means a telecommunications service that provides the right to utilize mobile telecommunications service as well as other non-telecommunications services, including the download of digital products delivered electronically, and content and ancillary services, that must be paid for in advance and that is sold in predetermined units of dollars of which the number declines with use in a known amount.

(6) "Value-added non-voice data service" means a telecommunications service in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.

(7) "Coin-operated telephone service" means a telecommunications service paid for by inserting money into a telephone accepting direct deposits of money to operate.

(8) "Customer" has the same meaning as in section 5739.034 [5739.03.4] of the Revised Code.

(BB) "Laundry and dry cleaning services" means removing soil or dirt from towels, linens, articles of clothing, or other fabric items that belong to others and supplying towels, linens, articles of clothing, or other fabric items. "Laundry and dry cleaning services" does not include the provision of self-service facilities for use by consumers to remove soil or dirt from towels, linens, articles of clothing, or other fabric items.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new

or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 [5739.01.1] of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or

gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food or food production, and includes but is not limited to cattle, sheep, goats, swine, and poultry. "Livestock" does not include invertebrates, fish, amphibians, reptiles, horses, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as in section 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

(UU) (1) "Lease" or "rental" means any transfer of the possession or control of tangible personal property for a fixed or indefinite term, for consideration. "Lease" or "rental" includes future options to purchase or extend, and agreements described in 26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon the sale or disposition of the property. "Lease" or "rental" does not include:

(a) A transfer of possession or control of tangible personal property under a security agreement or a deferred payment plan that requires the transfer of title upon completion of the required payments;

(b) A transfer of possession or control of tangible personal property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one per cent of the total required payments;

(c) Providing tangible personal property along with an operator for a fixed or indefinite period of time, if the operator is necessary for the property to perform as designed. For purposes of this division, the operator must do more than maintain, inspect, or set-up the tangible personal property.

(2) "Lease" and "rental," as defined in division (UU) of this section, shall not apply to leases or rentals that exist before June 26, 2003.

(3) "Lease" and "rental" have the same meaning as in division (UU)(1) of this section regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, Title XIII of the Revised Code, or other federal, state, or local laws.

(VV) "Mobile telecommunications service" has the same meaning as in the "Mobile Telecommunications Sourcing Act," Pub. L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, on and after August 1, 2003, includes related fees and ancillary services, including universal service fees, detailed billing service, directory assistance, service initiation, voice mail service, and vertical services, such as caller ID and three-way calling.

(WW) "Certified service provider" has the same meaning as in section 5740.01 of the Revised Code.

(XX) "Satellite broadcasting service" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

(YY) "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to

the senses. For purposes of this chapter and Chapter 5741. of the Revised Code, "tangible personal property" includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

(ZZ) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the consumer or at the direction of the consumer when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the consumer to the direct mail vendor for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.

(AAA) "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(CCC) "Delivered electronically" means delivery of computer software from the seller to the purchaser by means other than tangible storage media.

(DDD) "Prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(EEE) (1) "Food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

(2) As used in division (EEE)(1) of this section:

(a) "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

(b) "Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food for use as a sole item of a meal or of

the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

- (i) A vitamin;
- (ii) A mineral;
- (iii) An herb or other botanical;
- (iv) An amino acid;
- (v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;
- (vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

(c) "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

(d) "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

(FFF) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

(GGG) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue a prescription.

(HHH) "Durable medical equipment" means equipment, including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. "Durable medical equipment" does not include mobility enhancing equipment.

(III) "Mobility enhancing equipment" means equipment, including repair and replacement parts for such equipment, that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. "Mobility enhancing equipment" does not include durable medical equipment.

(JJJ) "Prosthetic device" means a replacement, corrective, or supportive device,

including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body. As used in this division, "prosthetic device" does not include corrective eyeglasses, contact lenses, or dental prosthesis.

(KKK) (1) "Fractional aircraft ownership program" means a program in which persons within an affiliated group sell and manage fractional ownership program aircraft, provided that at least one hundred airworthy aircraft are operated in the program and the program meets all of the following criteria:

(a) Management services are provided by at least one program manager within an affiliated group on behalf of the fractional owners.

(b) Each program aircraft is owned or possessed by at least one fractional owner.

(c) Each fractional owner owns or possesses at least a one-sixteenth interest in at least one fixed-wing program aircraft.

(d) A dry-lease aircraft interchange arrangement is in effect among all of the fractional owners.

(e) Multi-year program agreements are in effect regarding the fractional ownership, management services, and dry-lease aircraft interchange arrangement aspects of the program.

(2) As used in division (KKK)(1) of this section:

(a) "Affiliated group" has the same meaning as in division (B)(3)(e) of this section.

(b) "Fractional owner" means a person that owns or possesses at least a one-sixteenth interest in a program aircraft and has entered into the agreements described in division (KKK)(1)(e) of this section.

(c) "Fractional ownership program aircraft" or "program aircraft" means a turbojet aircraft that is owned or possessed by a fractional owner and that has been included in a dry-lease aircraft interchange arrangement and agreement under divisions (KKK)(1)(d) and (e) of this section, or an aircraft a program manager owns or possesses primarily for use in a fractional aircraft ownership program.

(d) "Management services" means administrative and aviation support services furnished under a fractional aircraft ownership program in accordance with a management services agreement under division (KKK)(1)(e) of this section, and offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of safety guidelines; the coordination of the scheduling of the program aircraft and crews; program aircraft maintenance; program aircraft insurance; crew training for crews employed, furnished, or contracted by the program manager or the fractional owner; the satisfaction of record-keeping requirements; and the development and use of an operations manual and a maintenance manual for the fractional aircraft ownership program.

(e) "Program manager" means the person that offers management services to fractional owners pursuant to a management services agreement under division (KKK)(1)(e) of this section.

§ 5739.02. Levy of sales tax; purpose; rate; exemptions

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A) (1) The tax shall be collected as provided in section 5739.025 [5739.02.5] of the Revised Code, provided that on and after July 1, 2003, and on or before June 30, 2005, the rate of tax shall be six per cent. On and after July 1, 2005, the rate of the tax shall be five and one-half per cent. The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

(2) In the case of the lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer to carry a load of not more than one ton, watercraft, outboard motor, or aircraft, or of any tangible personal property, other than motor vehicles designed by the manufacturer to carry a load of more than one ton, to be used by the lessee or renter primarily for business purposes, the tax shall be collected by the vendor at the time the lease or rental is consummated and shall be calculated by the vendor on the basis of the total amount to be paid by the lessee or renter under the lease agreement. If the total amount of the consideration for the lease or rental includes amounts that are not calculated at the time the lease or rental is executed, the tax shall be calculated and collected by the vendor at the time such amounts are billed to the lessee or renter. In the case of an open-end lease or rental, the tax shall be calculated by the vendor on the basis of the total amount to be paid during the initial fixed term of the lease or rental, and for each subsequent renewal period as it comes due. As used in this division, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code, and "watercraft" includes an outdrive unit attached to the watercraft.

A lease with a renewal clause and a termination penalty or similar provision that applies if the renewal clause is not exercised is presumed to be a sham transaction. In such a case, the tax shall be calculated and paid on the basis of the entire length of the lease period, including any renewal periods, until the termination penalty or similar provision no longer applies. The taxpayer shall bear the burden, by a preponderance of the evidence, that the transaction or series of transactions is not a sham transaction.

(3) Except as provided in division (A)(2) of this section, in the case of a sale, the price of which consists in whole or in part of the lease or rental of tangible personal property, the tax shall be measured by the installments of that lease or rental.

(4) In the case of a sale of a physical fitness facility service or recreation and sports club service, the price of which consists in whole or in part of a membership for the receipt of the benefit of the service, the tax applicable to the sale shall be

measured by the installments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state or any of its political subdivisions, or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions;

(2) Sales of food for human consumption off the premises where sold;

(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

(4) Sales of newspapers and of magazine subscriptions and sales or transfers of magazines distributed as controlled circulation publications;

(5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;

(6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under division (A) of section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;

(7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telegraph company, all terms as defined in section 5727.01 of the Revised Code, and sales of electricity delivered through wires;

(8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;

(9) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, or nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization, except that sales made by separate student clubs and other groups of students of a

primary or secondary school, and sales made by a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school, shall not be considered to be sales of such school, and sales by each such club, group, association, or organization shall be counted separately for purposes of the six-day limitation. This division does not apply to sales by a noncommercial educational radio or television broadcasting station.

(10) Sales not within the taxing power of this state under the Constitution of the United States;

(11) Except for transactions that are sales under division (B)(3)(r) of section 5739.01 of the Revised Code, the transportation of persons or property, unless the transportation is by a private investigation and security service;

(12) Sales of tangible personal property or services to churches, to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under section 140.08 of the Revised Code; and sales to organizations described in division (D) of section 5709.12 of the Revised Code.

"Charitable purposes" means the relief of poverty; the improvement of health through the alleviation of illness, disease, or injury; the operation of an organization exclusively for the provision of professional, laundry, printing, and purchasing services to hospitals or charitable institutions; the operation of a home for the aged, as defined in section 5701.13 of the Revised Code; the operation of a radio or television broadcasting station that is licensed by the federal communications commission as a noncommercial educational radio or television station; the operation of a nonprofit animal adoption service or a county humane society; the promotion of education by an institution of learning that maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum; the operation of a parent-teacher association, booster group, or similar organization primarily engaged in the promotion and support of the curricular or extracurricular activities of a primary or secondary school; the operation of a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein; the production of performances in music, dramatics, and the arts; or the promotion of education by an organization engaged in carrying on research in, or the dissemination of, scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business, or sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of section 5709.12 of the Revised Code.

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with

the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building materials and services sold to a construction contractor for incorporation into a building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 [307.69.6] of the Revised Code; and building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;

(14) Sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock;

(15) Sales to persons primarily engaged in any of the activities mentioned in division (B)(42)(a) or (g) of this section, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail. "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles or bulk tanks, trailers, or similar devices attached to motor vehicles. "Packaging" means placing in a package. Division (B)(15) of this section does not apply to persons engaged in highway transportation for hire.

(16) Sales of food to persons using food stamp benefits to purchase the food. As used in this division, "food" has the same meaning as in the "Food Stamp Act of 1977," 91 Stat. 958, 7 U.S.C. 2012, as amended, and federal regulations adopted pursuant to that act.

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption directly in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption directly in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or

material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for such use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture, except where such property is incorporated into real property;

(18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes, or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities;

(19) Sales of prosthetic devices

, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when such devices or equipment are for use by a human being.

(20) Sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services, including trauma care and emergency medical services, for political subdivisions of the state;

(21) Sales of tangible personal property manufactured in this state, if sold by the manufacturer in this state to a retailer for use in the retail business of the retailer outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser;

(22) Sales of services provided by the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities, or by governmental entities of the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities;

(23) Sales of motor vehicles to nonresidents of this state upon the presentation of an affidavit executed in this state by the nonresident purchaser affirming that the purchaser is a nonresident of this state, that possession of the motor vehicle is taken in this state for the sole purpose of immediately removing it from this state, that the motor vehicle will be permanently titled and registered in another state, and that the motor vehicle will not be used in this state;

(24) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting, and classifying by size; packages, including material and parts for packages, and machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor vehicles licensed to operate on public highways, used in intraplant or interplant transfers or shipment of eggs in the process of preparation for sale, when the plant or plants within or

between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein.

(25) (a) Sales of water to a consumer for residential use, except the sale of bottled water, distilled water, mineral water, carbonated water, or ice;

(b) Sales of water by a nonprofit corporation engaged exclusively in the treatment, distribution, and sale of water to consumers, if such water is delivered to consumers through pipes or tubing.

(26) Fees charged for inspection or reinspection of motor vehicles under section 3704.14 of the Revised Code;

(27) Sales to persons licensed to conduct a food service operation pursuant to section 3717.43 of the Revised Code, of tangible personal property primarily used directly for the following:

(a) To prepare food for human consumption for sale;

(b) To preserve food that has been or will be prepared for human consumption for sale by the food service operator, not including tangible personal property used to display food for selection by the consumer;

(c) To clean tangible personal property used to prepare or serve food for human consumption for sale.

(28) Sales of animals by nonprofit animal adoption services or county humane societies;

(29) Sales of services to a corporation described in division (A) of section 5709.72 of the Revised Code, and sales of tangible personal property that qualifies for exemption from taxation under section 5709.72 of the Revised Code;

(30) Sales and installation of agricultural land tile, as defined in division (B)(5)(a) of section 5739.01 of the Revised Code;

(31) Sales and erection or installation of portable grain bins, as defined in division (B)(5)(b) of section 5739.01 of the Revised Code;

(32) The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire, except for packages and packaging used for the transportation of tangible personal property;

(33) Sales to the state headquarters of any veterans' organization in this state that is either incorporated and issued a charter by the congress of the United States or is recognized by the United States veterans administration, for use by the headquarters;

(34) Sales to a telecommunications service vendor, mobile telecommunications

service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium, including, but not limited to, poles, wires, cables, switching equipment, computers, and record storage devices and media, and component parts for the tangible personal property. The exemption provided in this division shall be in lieu of all other exemptions under division (B)(42)(a) of this section to which the vendor may otherwise be entitled, based upon the use of the thing purchased in providing the telecommunications, mobile telecommunications, or satellite broadcasting service.

(35) (a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.

(b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(35)(a) of this section; and of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.

(c) Sales of automatic food vending machines that preserve food with a shelf life of forty-five days or less by refrigeration and dispense it to the consumer.

For purposes of division (B)(35) of this section, "direct marketing" means the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier.

(36) Sales to a person engaged in the business of horticulture or producing livestock of materials to be incorporated into a horticulture structure or livestock structure;

(37) Sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to an individual who is licensed or certified to teach in an elementary or a secondary school in this state for use by that individual in preparation for teaching elementary or secondary school students;

(38) Sales to a professional racing team of any of the following:

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

(c) Items of property that are attached to or incorporated in motor racing vehicles, including engines, chassis, and all other components of the vehicles, and all spare, replacement, and rebuilt parts or components of the vehicles; except not including tires, consumable fluids, paint, and accessories consisting of

instrumentation sensors and related items added to the vehicle to collect and transmit data by means of telemetry and other forms of communication.

(39) Sales of used manufactured homes and used mobile homes, as defined in section 5739.0210 [5739.02.10] of the Revised Code, made on or after January 1, 2000;

(40) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exemptions in division (B)(42)(a) of this section to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

(41) Sales to a person providing services under division (B)(3)(s) of section 5739.01 of the Revised Code of tangible personal property and services used directly and primarily in providing taxable services under that section.

(42) Sales where the purpose of the purchaser is to do any of the following:

(a) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume the thing transferred directly in producing tangible personal property for sale by mining, including, without limitation, the extraction from the earth of all substances that are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, or directly in the rendition of a public utility service, except that the sales tax levied by this section shall be collected upon all meals, drinks, and food for human consumption sold when transporting persons. Persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

(b) To hold the thing transferred as security for the performance of an obligation of the vendor;

(c) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;

(d) To use or consume the thing directly in commercial fishing;

(e) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed

as controlled circulation publications;

(f) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;

(g) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;

(h) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as described in division (B)(7) of section 5739.01 of the Revised Code, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would not be subject to the tax imposed by this section;

(i) To use the thing transferred as qualified research and development equipment;

(j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, "affiliated group" has the same meaning as in division (B)(3)(e) of section 5739.01 of the Revised Code and "direct marketing" has the same meaning as in division (B)(35) of this section.

(k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;

(l) To use or consume the thing transferred in the production of a newspaper for distribution to the public;

(m) To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service.

As used in division (B)(42) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of section 5739.01 of the Revised Code.

(43) Sales conducted through a coin operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction.

(44) Sales of replacement and modification parts for engines, airframes, instruments, and interiors in, and paint for, aircraft used primarily in a fractional aircraft ownership program, and sales of services for the repair, modification, and maintenance of such aircraft, and machinery, equipment, and supplies primarily used to provide those services.

(45) Sales of telecommunications service that is used directly and primarily to perform the functions of a call center. As used in this division, "call center" means any physical location where telephone calls are placed or received in high volume for the purpose of making sales, marketing, customer service, technical support, or other specialized business activity, and that employs at least fifty individuals that engage in call center activities on a full-time basis, or sufficient individuals to fill fifty full-time equivalent positions.

(46) Sales by a telecommunications service vendor of 900 service to a subscriber. This division does not apply to information services, as defined in division (FF) of section 5739.01 of the Revised Code.

(47) Sales of value-added non-voice data service. This division does not apply to any similar service that is not otherwise a telecommunications service.

(C) For the purpose of the proper administration of this chapter, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

(E) The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional sales tax pursuant to section 5739.021 [5739.02.1] or 5739.026 [5739.02.6] of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 [5739.02.3] of the Revised Code. Except for the discount authorized under section 5739.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 [5703.05.5] of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of the tax levied by this section or section 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Appellant/Cross-Appellee was sent by regular U.S. mail to Maryann B. Gall, Mary Beth Young, Phyllis J. Shambaugh, and Kasey T. Ingram, Jones Day, P. O. Box 165017, Columbus, Ohio 43216-5017, attorneys for Appellee-Cross-Appellant Columbia Gas Transmission Corporation, Andrea Wolfman, Thelen Reid Brown Raysman & Steiner LLP, 701 Eighth Street, N.W., Washington, DC 20001, Attorney for Amicus Curiae, Interstate Natural Gas Association of America, and Fred J. Livingstone, 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 22<sup>nd</sup> day of December, 2006.



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