IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT COLUMBIA GAS TRANSMISSION CORPORATION

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I. INTRODUCTION

In its cross-appeal, Columbia Transmission demonstrated that the Commissioner's proposed interpretation of R.C. 5727.01(D)—treating Columbia Transmission as a "pipe-line company" whose personal property is assessed at 88% of true value, while treating its competitors as "natural gas companies" and "general businesses" whose property is assessed at 25% of true value—violates the U.S. Constitution in four ways. First, the Commissioner's interpretation renders the two statutory categories "pipeline company" and "natural gas company" so ambiguous as to violate the Due Process Clause. Second, the preferential treatment afforded local distribution companies ("LDCs") at the expense of interstate competitors under the Commissioner's proposed approach violates the Commerce Clause. Third, the proposed tax treatment conflicts with FERC's policies and regulation and is thus preempted. And, fourth, the differential taxing rates lack a rational basis and thus violate equal protection.

Each of these arguments rests on one essential fact—demonstrated irrefutably in the record—that the last thirty years have brought fundamental changes to the natural gas industry. Companies that were formerly in distinct industry segments are now often direct competitors, performing identical functions. The Commissioner's response tacitly concedes that these changes have occurred, but utterly fails to come to grips with their constitutional significance.

For example, as to the Commerce Clause, the changed competitive landscape makes this case very different from Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, the principal case on which the Commissioner relies. The differentially-taxed entities here compete much more directly than those at issue in GMC, meaning the differential taxes here much more clearly implicate (and violate) the Commerce Clause's prohibition against tilting the competitive playing field.

The Commissioner's response to the void-for-vagueness argument fares no better. He blithely asserts that the doctrine "does not apply," because an administrative agency (the Tax Department) has interpreted the statute, thereby removing any confusion. But as this Court has noted, a statute can be too vague precisely <u>because</u> it gives an administrative agency <u>too much leeway</u> in adopting its ultimate interpretation, a point the Commissioner fails to even address.

The Commissioner's response to Columbia Transmission's preemption argument is equally flawed. As Columbia Transmission showed, the proposed interpretation directly undermines FERC's established rates and policies favoring competition. Yet the Commissioner responds only in generalities, avoiding any discussion of the actual debilatory impact the differential rates create. Finally, as to equal protection, the Commissioner acknowledges differential treatment, but argues that because Columbia Transmission is a "utility," it can "as a matter of law" be treated less favorably than "general businesses." The cases he cites, however, do not support that blanket rule, and such a rule makes no sense. A "utility" can be treated differently *when its status as a "utility" is somehow relevant to the law at issue*. But the Commissioner fails to explain why that is the case here, and it is not.

At every turn, the Commissioner ignores the fundamental competitive changes that have transformed this industry. He does so, no doubt, to avoid the constitutional implications those changes portend. But that competition clearly exists, and in light of it, the Commissioner's proposed interpretation transgresses clearly established constitutional boundaries. This Court can, and should, avoid these constitutional shortcomings by enforcing the statute as written.

II. <u>STATEMENT OF FACTS</u>

As its opening brief showed, Columbia Transmission (and other interstate pipeline companies) now directly compete with LDCs in storing and transporting natural gas, and in delivering natural gas to end users. (Col. Br. 31-35).[1] Columbia Transmission also established that it directly competes with transporters of alternative fuels and with non-utility gatherers, both of which are assessed at 25% as "general businesses." (Id. 45-47). The Commissioner responds by advancing "facts" that are either misleading or just plain wrong.

The Commissioner seeks to justify the differential treatment, for example, by referring to certain state regulations that apply to LDCs (T.C. Br. 4), and suggesting that these "unique regulatory burdens" warrant more favorable tax treatment. (T.C. Ans. 36) But the Commissioner fails to even mention, let alone address, the many regulatory burdens that interstate pipelines similarly face:

- They are limited to "just and reasonable" rates, 15 U.S.C. § 717c(a);
- They must file a complete rate schedule with FERC, 15 U.S.C. § 717c(c), and may not change rates without first filing with FERC, 15 U.S.C. § 717c(d);
- They may not grant any customer an undue preference or maintain any unreasonable difference in rates or services, 15 U.S.C. § 717c(b);
- They must obtain a certificate of public convenience and necessity from FERC before engaging in the interstate sale or transportation of gas, or constructing facilities to do so, 15 U.S.C. § 717f(c); and
- They may not abandon facilities or discontinue service without FERC approval, 15 U.S.C. § 717f(b).

In short, the "unique regulatory burdens," (T.C. Br. at 36), aren't all that unique.

The Commissioner's efforts to downplay competition in natural gas transmission are similarly flawed. (T.C. Ans. 26). Columbia Transmission showed, for example, that Ohio LDCs have significant "transmission" property. (Col. Br. 29-30). The Commissioner responds by misstating the record. He claims that LDC East Ohio Gas has "less than 6% of its plant property

1 Col. Br. is the Brief of Appellee/Cross-Appellant Columbia Transmission, T.C. Br. is the Brief of Appellant/Cross-Appellee Tax Commissioner, T.C. Ans. is the Reply/Answer Brief of Appellant/Cross-Appellee.

…listed as 'transmission'" and "over 94% as 'distribution.'" (T.C. Answer 27). But the very document the Commissioner cites lists $ 176,077,144 in transmission plant, $ 994,073,030 in distribution plant, and $1,526,114,430 total plant in service. (Second Supp. 65). As such, distribution plant property constitutes 65% of total property, not 94% as the Commissioner claims, and transmission plant constitutes 12%, not the claimed 6%. (See Second Supp. 65).

Beyond this, the Commissioner offers only gross speculation that LDCs "may" use transmission property only for "distribution purposes" and not to compete with Columbia Transmission. (T.C. Ans. 26). He notes for example, that while three of the LDCs report transmission property, their gross receipts tax returns categorize their revenues (mostly) as "distribution." That is misleading at best—the record shows that neither taxpayers nor Tax Department personnel make any real effort to confirm revenue categorization, (see Supp. 297-99; Tr. IX 136-146), probably because it has no effect on the gross receipts tax owed. See generally R.C. 5727.24, 5727.33; (Supp. 298; Tr. IX 140). So, for example, East Ohio reports all of its transportation revenues as "distribution" in some reports, Tax Commr. Exh. M, but as "transmission" in others, Tax Commr. Exhs. N – S. (Supp. 297; Tr. IX 136-37).

In short, as Professor David Dismukes (an expert witness below) explained, Ohio LDCs' transmission lines directly compete with Columbia Transmission and other interstate pipelines in at least three ways: (1) in linking interstate transmission to local distribution areas; (2) in linking production areas to distribution areas; and (3) in linking distinct distribution areas. (Col. Br. 32). Indeed, Dismukes identified specific locations in Ohio where such competition currently exists. (Id.) The Commissioner has not rebutted that competition, and as described below, it carries constitutional significance for the Commissioner's proposed interpretation.

III. ARGUMENT

A. Unless Interpreted To Treat Columbia Transmission As A "Natural Gas Company," R.C. 5727.01 Is Void For Vagueness.

The Commissioner's bold claim that the void-for-vagueness doctrine does not apply when an administrative agency has interpreted a statute or to statutes that are regulatory rather than criminal, is simply wrong. (T.C. Ans. 32-34). As long as a liberty or property interest is implicated (which it plainly is here), due process protections, including the vagueness doctrine, apply. Indeed, the Commissioner's radical position is incompatible with its own cited cases, which state only that economic regulation is subject to "a less strict vagueness test" than criminal prohibitions—not no vagueness test. Village of Hoffman Estates v. Flipside (1982), 455 U.S. 489, 498; accord Buckley v. Wilkins (2006), 105 Ohio St.3d 350, at ¶19. Under any meaningful vagueness standard, the statute here fails. It attempts to draw a tax-determinative distinction between those companies that "supply" natural gas and those that "transport" natural gas—a distinction that in today's natural gas market is "substantially incomprehensible." Id.

Nor does the Commissioner offer any real answer to O'Brien v. Ohio Lottery Comm. (11^{th} Dist. 2005), No. 2004-L-017, 2005 WL 694288, which struck as impermissibly vague a regulation permitting the lottery director to deny licenses based on the applicant's "financial responsibility and security." The statute there, like here, was a "regulatory measure" "applied and construed by administrative authorities." (T.C. Ans. 32) But that feature, far from helping, actually illustrated the problem. The statute offered no meaningful basis for interpretation, leaving it to the subjective whim of the administrator. See O'Brien at *4. That is equally true here. Under the statute's plain terms, Columbia Transmission qualifies as either a "pipeline company" or a "natural gas company," and the Commissioner's subjective decision as between the two is wholly unconstrained. With no principled basis for distinguishing O'Brien, the Commissioner is left only to "question" the correctness of that decision. (T.C. Ans. 34).

Likewise, the Commissioner's claim that he applied the statutory definitions "in precisely the way PUCO has" does nothing to address the vagueness concerns. (T.C. Ans. 33-34). As Columbia Transmission's initial brief explained, the PUCO's interpretation of its regulatory statute—which is driven by distinct regulatory concerns—does not justify the Commissioner's interpretation of an entirely separate taxation statute. (Col. Br. 17-20). The PUCO's interpretation of its own statutes thus cannot resolve the vagueness in the tax laws here.

B. Assessing Columbia Transmission's Taxable Property At 88% Of Its True Value Violates The Commerce Clause.

Columbia Transmission directly competes with Ohio LDCs and uses identical property for identical purposes in doing so. The differential assessment rates thus tip the competitive playing field in favor of LDCs. Although denying none of this, the Commissioner claims the higher tax burden on interstate pipelines does not violate the Commerce Clause. He is wrong.

1. *GMC v. Tracy* Does Not Support The Commissioner's Position.

The principal case on which the Commissioner relies, Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, ("GMC"), does little, if anything, to support his arguments here. To be sure, in GMC, the Court rejected a dormant Commerce Clause challenge to an Ohio tax statute, but that case is entirely different than the one here.

First, unlike here, the differentially taxed entities in GMC largely did not compete. One entity—unregulated gas marketers—sold only the gas itself, and exclusively to non-residential customers. The other—LDCs—at the time only sold "bundled service," or, in other words, the gas coupled with regulated delivery service. It was this difference in products that raised a "hurdle" to GMC's claims. GMC, 519 U.S. at 297-98. That hurdle is not present here, though, as LDCs have now "unbundled" their product and sell transportation and storage services separately from the gas, meaning they directly compete with interstate pipelines that provide the very same services. (Col. Br. 31-35).[2] And not only do they compete in general, but unlike in GMC where the marketers played absolutely no role in the residential market, here interstate pipelines directly compete with LDCs in several aspects of service to that market:[3] (1) in direct delivery of natural gas to farm tap customers; (2) in "midstream transportation" of natural gas en route to residential customers—say, from Ohio's border to the city gate; and (3) in storage of natural gas for delivery to residential customers. (Col. Br. 31-35).[4]

Second, the taxes at issue in GMC—sales and use taxes—raise very different dormant Commerce Clause problems than the personal property taxes at issue here. Federal statutes such as the Natural Gas Act largely cede to the states the power to tax sales of natural gas, minimizing the role for the dormant Commerce Clause. See, e.g., Panhandle E. Pipe Line Co. v. Pub. Serv. Comm. of Ind. (1947), 332 U.S. 507, 521. See also GMC, 519 U.S. at 292, 310. But that is not true of interstate natural gas transportation, the activity effected here. See Schneidewind v. ANR Pipeline Co. (1988), 485 U.S. 293, 300-01. Indeed, taxing interstate transportation assets poses a

[2] Indeed, this change in the natural gas market makes it likely that GMC would be decided differently today, even on its own facts, as the "bundled service" emphasized in GMC is becoming less and less common. For example, in terms of overall volumes, only 30% of the natural gas transported by LDC Columbia Gas of Ohio now involves "bundled service." (Supp. 569; Tr. VI 33). And LDC East Ohio is seeking to discontinue selling gas at all, and to become exclusively a transportation company. (Col. Br. 12). At the same time, marketers, which at the time of GMC played no role in the residential market, now provide natural gas to a significant percentage of residential customers. (Supp. 576, 10; Tr. VI 61-62, Tr. VII 23).

[3] GMC does not make involvement in the residential market the "threshold inquiry" the Commissioner claims. (T.C. Ans. 35, 36, 38). GMC's attention to the residential market was not "a priori" necessary, 519 U.S. at 304; it resulted from the LDCs' important role in that market, the marketers' lack of any participation there, and how that difference illustrated that the entities provided "different products." Here, the Commissioner's singular focus on the residential market ignores that most of LDC volumes are delivered not to the residential market, but to industrial and commercial customers. Supp. 9, 570, 584; Tr. VI 35, 93, Tr. VII 19.

[4] The existence of this competition in the residential market also triggers another distinction from GMC. There, the court reasoned that imposing lower taxes on LDCs was a justified means of keeping natural gas costs low for residential customers. 519 U.S. at 307-08. But here, taxes on interstate pipelines, just like taxes on LDCs, increase costs to residential customers, meaning the differential cannot be justified on residential customer cost grounds.

unique threat to "the free movement of commerce." Am. Trucking Assns. v. Scheiner (1987), 483 U.S. 266, 284 (striking discriminatory taxes on interstate trucks). And GMC did not speak at all to such taxes—in fact, GMC did not even own any personal property in Ohio.

Third, GMC involved differential treatment of LDCs and unregulated marketers, a vastly different question than differential treatment of LDCs and interstate pipelines. The Court, in deciding that the entities in GMC were not "similarly situated," and thus could be treated differently, expressly relied on the distinction that the marketers were unregulated while the LDCs were heavily regulated. 519 U.S. at 297, 310. But, as noted above, interstate pipelines, just like LDCs, are highly regulated. Supra at 3.

2. The Tax Differential Disadvantages Columbia Transmission.

In addition to establishing the existence of direct competition, Columbia Transmission presented unrefuted evidence that the tax here provides LDCs a direct competitive advantage. The Commissioner responds that Columbia Transmission did not demonstrate that "such advantage actually occurred solely because of the different tax rates." (T.C. Ans. 41 (emphasis added)). But no such showing is either possible or necessary. Whatever other factors may exist, no one can dispute that higher tax rates contribute to a competitive disadvantage.

The Court has never required a party claiming a dormant Commerce Clause violation to identify a particular consumer whose choice changed as a result of the discriminatory tax. See, e.g., Camps Newfound/ Owatona, Inc. v. Town of Harrison (1997), 520 U.S. 564, 581 n.15 (rejecting state's argument that discriminatory effects of tax were speculative because the record did not "reflect any decision by a potential camper not to attend petitioner's camp as a result of the burden imposed"); Bacchus Imports v. Dias (1984), 468 U.S. 263. Indeed, the dormant Commerce Clause extends even to "prospective competition," i.e., situations where no actual customer has yet even made a choice. See, e.g., GMC, 519 U.S. at 300 (considering "actual or prospective competition"). Moreover, there is no "de minimis" defense to discriminatory taxation under the Commerce Clause. Fulton Corp. v. Faulkner (1996), 516 U.S. 325, 334 n.3.[5]

Here, both the existence of competition and the disadvantage to interstate pipelines are clear. The record is replete with evidence not only of the potential for competition between LDCs and interstate pipelines for transportation and storage service, but also of specific competitive situations during the tax years, including some in which a customer chose LDCs over interstate service. (Col. Br. 32-33, 35). Given this competition, as expert witness David Dismukes testified, "the interstate companies are going to be at a competitive disadvantage relative to the local distribution companies because of the higher assessment rate." (Supp. 479; Tr. III 209); see also (Supp. 68, 447, 675-77; Tr. VII 254-56, Tr. I 74-81, Tr. III 82).

3. The Fact That Some Local Businesses Are Also Disadvantaged Does Not Preclude A Commerce Clause Challenge.

The Commissioner's attempt to overcome this constitutional flaw based on his assertion that intrastate pipeline companies may also have to pay the higher rate fails on both factual and legal grounds. (See T.C. Ans. 37, 39-40). As to the latter, a state cannot excuse discrimination against interstate commerce merely because a law may also disadvantage certain local commerce, such as the intrastate pipelines here. See, e.g., Dean Milk Co. v. City of Madison (1951), 340 U.S. 349, 354 n.4; Am. Modulars Corp. v. Lindley (1978), 54 Ohio St.2d 273, 277; In re CIG Field Servs. Co. (2005), 279 Kan. 857, 873-877 (higher assessment rate on interstate

[5] The Commissioner cites GMC for the proposition that the "hypothetical possibility of favoritism" is inadequate to establish a Commerce Clause violation. (T.C. Ans. 40-41). But GMC was referring to a situation where it was "hypothetical" whether two groups of taxpayers would even be treated differently. See 519 U.S. at 310-11 Here, there is no question that pipelines and LDCs are treated differently by the Commissioner under the statute.

gas gathering than intracounty violated Commerce Clause, even though in-state intercounty gathering systems received same unfavorable treatment as interstate systems).

And, as a factual matter, there is almost no intrastate pipeline property in Ohio, making it difficult to rely on the higher taxation of that property as a justification for the differential here. For the most part, in Ohio the LDCs perform the common functions of intrastate pipelines—such as transportation of natural gas over long distances and natural gas storage. (Supp. 443; Tr. III 65-67). In effect, many Ohio LDCs operate, in part, as "intrastate pipelines," but they are still treated as "natural gas companies" for tax purposes. (Second Supp. 154 (Prof. Gary Cornia's Report to the Comm. to Study the Ohio Economy and Tax Structure explaining that several large Ohio LDCs function in dual role as "transmission and distribution" utilities)). Asserting a lack of discrimination between "interstate pipelines" and "intrastate pipelines" is meaningless when LDCs carry out most intrastate "pipeline" functions in Ohio. [6]

Nor does Exxon Corp. v. Governor of Maryland (1978), 437 U.S. 117, change this. (See T.C. Br. 37-40). Exxon involved a Maryland statute prohibiting petroleum refiners or producers from operating retail service stations. As such, what was forbidden was only a particular kind of vertical integration. Id. at 126. And while the disadvantaged producers and refiners were, as a factual matter, interstate entities, they could have just as easily been intrastate entities. Here, by contrast, the Commissioner relies on the very fact that Columbia Transmission operates interstate and is regulated by FERC rather than PUCO as the basis for imposing the disfavored tax treatment as a "pipeline company." This is not, as in Exxon, mere discrimination against a

[6] The Commissioner's argument is not advanced by his observation that "[c]urrent PUCO records show five purely intrastate pipe-line companies report to the Commission." (T.C. Ans. 39 n.2). This uncited assertion fails to establish that the identified companies were regulated by the PUCO as intrastate pipe-line companies during the tax years. Moreover, the Commissioner does not establish that these companies even transport natural gas, and the record indicates that at least some of them do not. (Exhs. 60c & 60d at 600 (BP Oil carries jet fuel and deicer); Exhs. 60l & 60m at 600 (Ohio Oil Gathering Corp. carries crude oil)).

category that happens to be predominantly interstate, rather the Commissioner seeks to define the category by reference to interstate activities.

4. Discrimination That Favors Shifting Assets To Local Affiliates Is Impermissible.

In its opening brief, Columbia Transmission showed that the preferential assessment rate for LDC-owned property creates an advantage for entities that place their Ohio property in an Ohio-regulated LDC affiliate rather than a federally-regulated affiliate. (Col. Br. 33-34). The Commissioner responds (without citation) that "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." (T.C. Ans. 38).

What he fails to recognize is that favoring ownership of assets by LDC rather than interstate pipeline affiliates is not just discrimination based on how a "business is corporately structured." (T.C. Ans. 38). By advantaging LDC rather than interstate pipeline ownership of Ohio assets, the Ohio scheme constitutes impermissible "discrimination based on the extent of local operations." Lewis v. BT Invest. Mgrs., Inc. (1980), 447 U.S. 27 (striking statute restricting banks with operations "principally conducted outside the state"). See also Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue (1992), 505 U.S. 71, 78 (State cannot "force a taxpayer to conduct its foreign business through a domestic subsidiary to avoid discriminatory taxation," rejecting argument that restriction burdened only a "particular form of corporate organization").

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

Columbia Transmission's opening brief explained that the discrimination here affects not only the transportation market at issue, but the market for the underlying commodity. (Col. Br. 36-37). Functioning like a protective tariff, the higher rates on interstate pipeline property make it more costly, mile-for-mile, to transport out-of-state natural gas to market via interstate pipelines in Ohio than to transport Ohio gas to market via LDC-owned pipelines.

The Commissioner cannot avoid this discriminatory treatment of in-state and out-of-state gas by pointing to the equivalent taxation of interstate and intrastate pipelines. (T.C. Ans. 39). Ohio LDCs can carry gas from Ohio producers to Ohio consumers without the involvement of any interstate or intrastate pipeline—in other words, they can carry Ohio gas to market solely via pipes assessed at 25%. (Supp. 11, 66, 68, 453-57; Tr. III 106-22, Tr. VII 248, 253-54, 26-27). In "practical effect," "those who buy the local product are rewarded in the form of a lower tax rate," while those who purchase out-of-state gas carried into Ohio by interstate pipelines "must suffer the burden of a higher tax rate." Dayton Power & Light (1979), 58 Ohio St.2d 465, 474.

Exxon, on which the Commissioner relies (T.C. Ans. 39), provides no help on this score, as the Court there took care to observe that "no petroleum products are produced or refined in Maryland." 437 U.S. at 123, 125. The court recognized that the analysis would be different "[i]f the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . ." 437 U.S. at 126 n.16. That is precisely the effect of the discriminatory assessment rates here. (S.T. 37; Supp. 68, 450, 456-57; Tr. VII 255-56, Tr. III 94-96, 118-22).

6. The MCF And Gross Receipts Taxes Are Not Relevant.

The Commissioner's suggestion (without authority) that the existence of other taxes, in particular the Mcf and gross receipts taxes, somehow ameliorates the unconstitutional discrimination in the property tax fails for at least four reasons. (T.C. Ans. 41).

First, the U.S. Supreme Court has expressly rejected the notion that courts should "plunge into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events."

Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality (1994), 511 U.S. 93, 105 (quotation omitted) (tax on utilizing Oregon landfills could not be justified by differences in income tax, since they were "entirely different kinds of taxes"). Here, the public utility personal property tax (an ad valorem tax) bears no relationship to the Mcf and gross receipts tax (both of which are transactional taxes). Thus, the personal property tax assessment rates "must stand or fall on their own." Am. Trucking Assn., 483 U.S. at 287, 289 (rejecting effort to save discriminatory tax by reference to distinct components of "multi-tiered scheme of taxes").

Second, the Mcf and gross receipts taxes do not cure the discrimination. The Commissioner claims, for example, that evaluation of the property tax should "take into account the impact on Ohio consumers of the Mcf tax with respect to their purchases of any Ohio produced gas." (T.C. Ans. 41). But the Mcf and gross receipts taxes are transactional taxes that draw no distinction between Ohio and out-of-state gas. A consumer's purchase of Ohio gas transported entirely by an LDC and an equivalent purchase of out-of-state gas transported in Ohio first by interstate pipeline and then LDC will be subject to the same Mcf tax. See generally R.C. 5727.811. That is, Columbia Transmission's deliveries are subject to the Mcf. But the out-of-state gas will also be subject to the higher property tax, leaving it at a disadvantage. (S.T. 37; Supp. 68, 456-57; Tr. VII 254-56, Tr. III 118-22).

Similarly, the Mcf tax does nothing to reduce the property tax's discriminatory impact on the competition for transport service. If a customer can take natural gas delivery from either of two routes: (1) a route that involves several miles of interstate pipeline transmission in Ohio, followed by ultimate delivery by an LDC; or (2) a route that transfers the gas to an LDC at the Ohio line, and thus involves only LDC property within the state, the Mcf tax applies equally to both, but the differential property tax rate strongly incentivizes customers to prefer the latter.

Third, the Commissioner's claim that the Mcf tax was designed to "maintain the LDC revenue base," (T.C. Br. 41), adds nothing. Whether a measure is "revenue neutral" does not speak to its competitive impact on interstate commerce. Here that impact is particularly dramatic in that the Mcf tax is passed through directly to consumers via a line item on the bill, R.C. 4933.33(B), while property tax costs simply become part of the cost of service (which may or may not be fully recoverable). (Supp. 609; Tr. VI 194-97). Thus, trading property tax for Mcf tax, as happened to the LDCs here, shifts risks of non-recovery away from LDCs, providing a significant advantage over interstate pipelines, who are left to bear the risk of whether they can pass along the property tax burden. (Supp. 220; Tr. II 182-84).

Finally, and critically, even if the Mcf tax would otherwise be relevant, any claim that it eliminates the discrimination at issue here is entirely belied by timing: while the lower assessment rate on natural gas company property went into effect with the 2001 tax year (calendar year 2000), the supposedly offsetting Mcf tax only went into effect on July 1, 2001 – after the 2000 and 2001 tax years at issue in this case. See R.C. 5727.811.

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

Columbia Transmission's initial brief explained that Ohio's higher assessment rates on pipeline property disadvantage property whose taxes are borne largely out of state. (Col. Br. 37-38). That brief argued that this treatment, like the differential property tax treatment of charities benefiting out-of-staters in Camps Newfound, violates the Commerce Clause because it "penalizes the principally nonresident customers of businesses catering to a primarily interstate market." Camps Newfound, 520 U.S. at 576.

The Commissioner does not discuss Camps Newfound, instead citing Commonwealth Edison Co. v. Montana (1981), 453 U.S. 609, which upheld a Montana severance tax even though its burden fell primarily on out-of-state consumers. (T.C. Ans. 42). The severance tax was, however, "computed at the same rate regardless of the final destination of the coal." 453 U.S. at 618. Here, Columbia Transmission is not challenging a tax simply because it is borne largely out of state (as in Commonwealth Edison), it is challenging a tax because it is imposed at a higher rate on taxpayers whose customers are primarily out of state. This differential treatment gives "local consumers an advantage over consumers in other States." Brown-Forman Distillers Corp. v. New York State Liquor Auth. (1986), 476 U.S. 573, 580; see also Pennsylvania v. W. Va. (1923), 262 U.S. 553 (law violated Commerce Clause by favoring in-state consumers).

8. The Impermissible Impact Of The Differing Assessment Rates Is Highlighted By Considering The Effect Of Duplication Of The Rate Differential In Other States.

Columbia Transmission's opening brief argued that the inability of Ohio's assessment structure to satisfy the "internal consistency test" highlighted its discriminatory nature. (Col. Br. 38-39). The Commissioner claims that internal consistency is relevant only to fair apportionment, or in considering whether "initially discriminatory state tax structures avoid an overall discriminatory effect." (T.C. Ans. 42). In fact, the Supreme Court has applied an internal consistency analysis in assessing whether taxes are discriminatory. See, e.g., Am. Trucking, 483 U.S. at 284-85; id. at 303 (O'Connor, J., dissenting) (disapproving of the Court's adoption of "an internal consistency rule of general application"). Moreover, the differential assessment rates on LDC and pipeline property do involve "initially discriminatory state tax structures," making internal consistency relevant even under the Commissioner's view.

The Commissioner next argues that even if it applies, the internal consistency test is satisfied. But Am. Trucking Assns. v. Michigan Pub. Serv. Comm. (2005), 545 U.S. 429, on which the Commissioner relies, is inapt. The flat tax on motor carriers there applied uniformly to all firms, unlike the discriminatory rates here. Moreover, the tax applied only to carriers that undertook "point-to-point hauls between Michigan cities," id. at 2422, while the higher assessment rate here has no comparable limitation to property used in "local hauls."

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

Citing footnote 12 of GMC, the Commissioner sidesteps Columbia Transmission's undue burden argument by urging that, for taxes, the undue burden inquiry adds nothing to the apportionment test. (T.C. Ans. 44). But, as no party in GMC claimed an "undue burden," footnote 12 is plainly dicta. See, e.g., Yamaha Motor Corp. v. Jim's Motorcycle, Inc. (4th Cir. 2005), 401 F.3d 560, 572. Moreover, footnote 12 itself explained that there is "no clear line" between analysis of discrimination and undue burden. 519 U.S. at 300, n.12. See also CIG Field Servs., 279 Kan. at 875 (even if higher assessment rate on interstate gathering property was not discriminatory, it would constitute an undue burden). Ultimately, the Commissioner's side-step fails, but he offers no argument as to why the tax here is not an undue burden.

C. Assessing Interstate Pipeline Property At A Higher Rate Than That Of LDCs And General Businesses Violates The Supremacy Clause.

Columbia Transmission's opening brief explained that Ohio's differential assessment rates on natural gas company and pipe-line property interfere both with FERC's ratemaking authority and with FERC policies favoring free competition. (Col. Br. 41-44). In his brief, the Commissioner concedes that if Ohio's differential assessment percentages "interfere[] with a federally regulated pipeline's practical ability to pass their costs along to their customers, as FERC intended and approved," "it would indeed violate federal supremacy." (T.C. Ans. 45). And he also admits that the Supreme Court's decision in Maryland v. Louisiana (1981), 451 U.S. 725, squarely condemned state taxes that interfere with FERC's authority over how a tax's cost is allocated to customers. (Id.). Having conceded these key points, the Commissioner is left to contend that nothing in the tax 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." (Id.). But even then, the Commissioner does not contest that the disparate tax rates produce a competitive pressure that, as a factual matter, does limit pipelines' ability to pass along their property tax costs. (See Col. Br. 42); (Supp. 220, 473-76, 664; Tr. I 30-31, Tr. II 182-84, Tr. III 186-97).

The Commissioner's view, then, must be that interference with FERC-established rates matters only if it is done forthrightly (as in Maryland), not if it indirectly (or unintentionally) results from a state enactment (as here). But that is not the law. The only question is whether the state enactment "stands as an obstacle to" FERC's authority, Hines v. Davidowitz (1941), 312 U.S. 52, 67, not whether it was intended to.

The Commissioner similarly fails to provide any meaningful response to Columbia Transmission's argument that the differential assessment rates interfere with federal policies favoring free competition in the natural gas market—policies embodied in several cited statutes and FERC orders. (Col. Br. 42-44). He fails to even discuss these statutes and orders, instead mystifyingly asserting that "Transmission is not able to point to any language enacted by Congress that prohibits state tax differentials of this sort." (T.C. Ans. 46). Of course not—had Congress enacted "language that prohibits" the tax structure here, that would give rise to express preemption. The argument here is conflict preemption, which prevents any tax scheme that frustrates the pro-competition purposes of the federal statutes and orders.

The Commissioner's citation to Dept. of Revenue v. ACF Indus., Inc. (1994), 510 U.S. 332, is equally off-point. The Court there considered a federal statute that expressly forbade certain state taxes, and in light of federalism principles, hesitated to broadly interpret that provision. Here, the federal statutes are not an attempt to control state taxation—"a field which the States have traditionally occupied," Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218,

230. Instead, the identified statutes and orders involve the intrinsically federal issue of interstate natural gas transportation. Interpreting the purposes of those enactments and orders, and whether they are frustrated by the state tax at issue, thus involves far different considerations than in ACF. Cf. United States v. Locke (2000), 529 U.S. 89, 108 (no presumption against pre-emption where state enactment implicates area of traditionally federal concern).

D. Assessing Columbia Transmission's Property At 88% Of True Value Violates Equal Protection And Due Process.

Columbia Transmission identified three categories of taxpayers with which it competes, but which are taxed more favorably: (1) general business taxpayers that transport fuels other than natural gas; (2) general business taxpayers engaged in natural gas gathering; (3) LDCs treated as "natural gas companies" under R.C. 5727.01. (Col. Br. 45). The Commissioner does not deny that these taxpayers compete with Columbia Transmission or that they are taxed more favorably, yet he claims that there is no Equal Protection violation. His arguments are unpersuasive.

The Commissioner posits that Columbia Transmission, as "a federally regulated public utility" is not similarly situated to "any general business involving natural gas" "as a matter of law." (T.C. Ans. 48). To be sure, New York Rapid Transit Corp. v. City of New York (1938), 303 U.S. 573, 579-80, which the Commissioner cites, upheld an excise tax applied to utilities but not others. But New York and similar cases rest on identifiable differences between utilities and non-utilities as relevant to the tax at issue, they do not articulate a blanket rule that any tax distinction drawn between utilities and nonutilities is automatically rational. And even such a blanket rule would not help the Commissioner, as he has not made that categorical distinction, but has instead disadvantaged only a particular group of utilities—pipe-line companies.

In any event, fundamental changes in the utility industry have wholly undermined the key justifications for tolerating a greater tax burden for public utilities. Central premises for higher taxes on utilities have been their "relative freedom from competition; New York, 303 U.S. at 579; see also Burton v. Greater Portsmouth Growth Corp. (1966), 7 Ohio St.2d 34, 37-38; and their ability to pass along tax costs to their customers, see AT&T Info. Sys., Inc. v. City of New York (1988), 527 N.Y.S. 2d 10, 14. But as the record here shows, in today's natural gas market, Columbia Transmission is neither free from competition nor uniformly able to pass tax costs to its customers. (Supp. 220, 473-76, 664; Tr. I 30-31, Tr. II 182-84, 193-95, Tr. III 186-97).

Regarding competition for "gathering," (Col. Br.46-47), there is no suggestion of how Columbia Transmission's utility status provides it any advantage. Equal protection prevents different treatment of "persons who are in all relevant aspects alike." MCI Telecomm Corp. v. Limbach, 68 Ohio St.3d 195, 199, 1994-Ohio 489. Simply reciting that independent gatherers are not utilities while Columbia Transmission is sheds no light on why that is a relevant distinction as to competition for natural gas gathering.

The Commissioner's appeal to Columbia Transmission's utility status is of even less force in justifying its unfavorable treatment as compared to alternate fuel pipelines, which themselves have many of the same "utility" characteristics as natural gas pipelines. As Columbia Transmission's initial brief pointed out, pipelines carrying refined products are, like Columbia Transmission, regulated by FERC and must offer "just and reasonable" rates. (Col. Br. 46); see generally 18 C.F.R. Chapter I, Subchapter P. Nonetheless, many of these companies are taxed as "general businesses." (Col. Br. 46) (listing companies).

Ultimately, the Commissioner's position is entirely circular: it is appropriate to treat refined product and natural gas pipelines differently because the Ohio tax laws call one, but not the other, a "utility." The Commissioner thus does not point to any operational difference in the entities, but only to differences in their current tax treatment. But "the Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes." Williams v. Vermont (1985), 472 U.S. 14, 27. The proper question is why it is rational to create those categories in the first instance—and on that, the Commissioner has nothing to say.

Certainly it is no answer to say that equal protection is not implicated merely because the entities are not "primarily engaged" in the same business. (T.C. Ans. 48-49). In Boothe Fin. Corp. v. Lindley (1983), 6 Ohio St.3d 247, 250, for example, this Court had no problem finding an equal protection violation notwithstanding that the two companies—Boothe and IBM—clearly were not "primarily engaged" in the same business. It was enough that the two entities were similarly situated as to the particular aspect of their businesses that was at issue—there the leasing of computer equipment. That test is clearly met here. Tellingly, the Commissioner does not respond to this Boothe argument, (see Col. Br. 48), failing to so much as cite the case.[7]

Finally, the Commissioner claims that LDCs' service obligations provide "a rational basis for treating them differently, and more favorably." (T.C. Ans. 49). But as discussed in the Commerce Clause context, while LDCs' service obligations may justify treating them differently from unregulated marketers, as in GMC, the comparison to federally regulated pipelines with service obligations of their own, see supra at 6-8, is quite different.

IV. CONCLUSION

The Court should affirm the decision of the BTA as to tax year 2001. As to tax year 2000, the Court should reverse the Board's decision and hold that, for that year as well, Columbia Transmission's personal property must be assessed at 25%.

[7] The Commissioner's response to MCI is equally unhelpful, consisting of a footnote dismissing the case on the ground that it involved "administrative practices . . . which violated the statutes." (T.C. Ans. 49). But MCI did not hold that the Commissioner had violated the applicable statutes in assessing taxpayer MCI, it held that the assessment "denied MCI equal protection." 68 Ohio St.3d at 201. In any event, whether a distinction is drawn administratively or legislatively, there must be a rational basis for the distinction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Reply Brief of Appellee/Cross-Appellant Columbia Gas Transmission Corporation was delivered by messenger to Barton A. Hubbard Esq. (Counsel of Record), Assistant Attorney General, Cheryl D. Pokorny, Deputy Attorney General, and Janyce C. Katz, Assistant Attorney General, Office of the Attorney General, Taxation Section, Rhodes State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43215, attorneys for Appellant/Cross-Appellee Tax Commissioner of Ohio, and mailed by U.S. mail, postage prepaid, to Fred J. Livingston, Taft Stettinius & Hollister LLP, 3500 BP Tower, 200 Public Square, Cleveland, Ohio 44114-2302, attorney for Amicus Curiae The Ohio School Boards Association, and Andrea Wolfman, Thelen Reid & Priest LLP, 701 8th St., NW, Suite 800, Washington, DC 20001, attorney for Amicus Curiae Interstate Natural Gas Association of America, on this 30th day of January, 2007.

Maryann B. Gall

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

15 U.S.C.A. § **717c**

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 15B--NATURAL GAS
§ **717c.** Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

CREDIT(S)

(June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.)

Westlaw.

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 15B. Natural Gas (Refs & Annos)

→§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

CREDIT(S)

(June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459; Nov. 9, 1978, Pub.L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1942 Acts. House Committee Report No. 1290, see 1942 U.S. Code Cong. Service, p. 187.

1947 Acts. House Report No. 695, see 1947 U.S. Code Cong. Service, p. 1477.

1978 Acts. Senate Report No. 95-141 and House Report No. 95-543, see 1978 U.S. Code Cong. and Adm. News, p. 7660.

1988 Acts. Senate Report No. 100-486, see 1988 U.S. Code Cong. and Adm. News, p. 2692.

Amendments

1988 Amendments. Subsec. (f). Pub.L. 100-474 designated existing provision as par. (1) and added par. (2).

1978 Amendments. Subsec. (c). Pub.L. 95-617, § 608(a), (b) (1), designated existing first paragraph as par. (1) (A) and existing second paragraph as par. (1) (B) and added par. (2).

Subsec. (e). Pub.L. 95-617, § 608(b) (2), substituted "subsection (c) (1)" for "subsection (c)".

1947 Amendments. Subsec. (h). Act July 25, 1947 added subsec. (h).

1942 Amendments. Subsecs. (c) to (g). Act Feb. 7, 1942 added subsecs. (c) to (g). Former subsec. (c), which related to duplication of facilities, enlargement of existing facilities and certificates of convenience and necessity, was repealed by Act Feb. 7, 1942.

Effective and Applicability Provisions

1988 Acts. Section 3 of Pub.L. 100-474 provided that: "The provisions of this Act [amending this section and enacting a provision set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988]."

Transfer of Functions

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of such Commission with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 9, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

The enforcement functions of the Secretary of Energy or other appropriate official or entity in the Department of Energy, and such enforcement functions of the Commission, Commissioners, or other appropriate officer or entity in the Federal Energy Regulatory Commission related to compliance with the certificates of public convenience and necessity issued under this section as they relate to pre-construction, construction, and initial operation of an approved transportation system for the transport of Canadian natural gas and Alaskan natural gas as such terms are defined in the Alaskan Natural Gas Transportation Act of 1976, section 719 et seq. of this title, were transferred to the Federal Inspector for the Alaska Natural Gas Transportation System, effective July 1, 1979, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, pursuant to sections 102(d) and 203(a) of 1979 Reorg. Plan No. 1, June 12, 1979, 44 F.R. 33664, 33666, 93 Stat. 1373, set out in the Appendix to Title 5, Government Organization and Employees.

The functions of the Federal Power Commission and of the members, officers, and components thereof were transferred to, and vested in, either the Secretary of Energy or, with regard to certain specific and enumerated functions relating to hydroelectric licenses and permits, electricity rates and charges, natural gas rates and charges, certificates of public convenience and necessity for natural gas, natural gas curtailments, and mergers and securities acquisitions under the Federal Power Act and the Natural Gas Act, to the Federal Energy Regulatory Commission within the Department of Energy, as part of the creation of the Department of Energy by Pub.L. 95-91, Aug. 4, 1977, 91 Stat. 565. See sections 7151, 7172 and 7293 of Title 42, The Public Health and Welfare.

15 U.S.C.A. § **717f**, 15 USCA § **717f**

Current through P.L. 109-481 (excluding P.L. 109-415, 109-417, 109-432, 109-435, 109-461, 109-469, 109-479) approved 01-12-07.

END OF DOCUMENT

Westlaw.

R.C. § 4933.33

Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
Chapter 4933. Companies--Gas; Electric; Water; Others (Refs & Annos)
Miscellaneous Provisions

→4933.33 Statement to customers concerning taxes and assessments included in bills

(A) Annually, each electric distribution company, as defined in section 5727.80 of the Revised Code, shall state on each customer bill, or shall distribute to each of its customers, the following statement:

"Under state law, the amount you are being billed includes:

(1) Kilowatt-hour taxes that have been in effect since 2001 and are currently at $ __________ (The current dollar figure of the kilowatt-hour taxes levied by section 5727.81 of the Revised Code shall be placed in the blank); and

(2) Assessments to assist in the support of the operations of the PUCO and the office of the consumers' counsel that have been in effect since 1912 and 1977, respectively."

(B) Annually, each natural gas distribution company, as defined in section 5727.80 of the Revised Code, shall state on each customer bill, or shall distribute to each of its customers, the following statement:

"Under state law, the amount you are being billed includes:

(1) Natural gas distribution taxes that have been in effect since 2001 and are currently at $ __________ (The current dollar figure of the natural gas distribution excise taxes levied by section 5727.811 of the Revised Code shall be placed in the blank); and

(2) Assessments to assist in the support of the operations of the PUCO and the office of the consumers' counsel that have been in effect since 1912 and 1977, respectively."

(C) The notice required under division (A) or (B) of this section does not apply to an electric distribution company or a natural gas distribution company that is not subject to assessments to support the operations of the PUCO or the office of the consumers' counsel.

(D) Nothing in this section shall be construed to mean that an electric distribution company or a natural gas distribution company subject to this section may not cause such appearance or distribute such statement on a more frequent basis.

(2000 S 287, eff. 12-21-00; 1999 S 3, eff. 10-5-99; 1982 S 378, eff. 1- 11-83; 1980 H 21)

UNCODIFIED LAW

2000 S 287, § 3, eff. 12-21-00, amended 1999 S 3, § 4, to read:

Sections 4933.33, 5727.30, and 5727.32 of the Revised Code, as amended by Am. Sub. S.B. 3 of the 123rd General Assembly, shall first apply to the excise tax assessed by the Tax Commissioner for tax year 2002.

R.C. § 4933.33

CROSS REFERENCES

Assessment for expenses of consumers' counsel, 4911.18

Electric or natural gas distribution companies, excise tax, furnishing of statement to customers, 5727.94

OHIO ADMINISTRATIVE CODE REFERENCES

Consumers' counsel governing board, OAC 4901:4

LIBRARY REFERENCES

Electricity k11.4.
Westlaw Topic No. 145.
C.J.S. Electricity § 29 et seq.
Baldwin's Ohio Legislative Service Annotated, 1999 S 3--LSC Analysis, p 7/L-677

R.C. § 4933.33, OH ST § 4933.33

Current through 2006 File 150 of the 126th GA (2005-2006),
apv. by 12/26/06, and filed with the Secretary of State by 12/27/2006.

END OF DOCUMENT

§ 5727.01 Definitions.

As used in this chapter:

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

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

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

(D) Any person:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY: GC §§ 5415-5416, 5381; 108 v 224, §§ 39-42; 115 v 188; 116 v 199; 118 v PtII, 30; 119 v 185; 124 v 160; Bureau of Code Revision, 10-1-53; 125 v 903(1049); 138 v H 145 (Eff 12-31-79); 139 v H 201 (Eff 12-31-80); 142 v H 171 (Eff 7-1-87); 143 v S 156 (Eff 12-31-89); 144 v H 904 (Eff 12-22-92); 146 v H 283 (Eff 9-29-97); 148 v S 3 (Eff 7-6-99, 10-5-99††); 148 v H 640. Eff 9-15-2000.

C

Baldwin's Ohio Revised Code Annotated Currentness
Title LVII. Taxation
Chapter 5727. Public Utilities (Refs & Annos)
Natural Gas Companies and Combined Electric and Gas Companies

→5727.24 Levy of excise tax

For the purpose of providing revenue to meet the needs of the state, on and after May 1, 2000, an excise tax is hereby levied on the gross receipts of a natural gas company and on the gross receipts of a combined company from operating as a natural gas company. The tax shall be computed by multiplying the taxable gross receipts as determined under section 5727.33 of the Revised Code by four and three-fourths per cent. A combined company shall be subject to this tax on any gross receipts derived from operating as a natural gas company, as determined under division (D) of section 5727.03 of the Revised Code, and, if applicable, shall be subject to the tax imposed by section 5727.30 of the Revised Code for all other gross receipts.

(2000 H 640, eff. 6-15-00; 1999 H 283, eff. 9-29-99)

UNCODIFIED LAW

2000 S 287, § 5: See Uncodified Law under 5727.31.

1999 H 283, § 175, eff. 6-30-99, reads:

Any natural gas company that, as of July 1, 1999, has over three hundred thousand open access residential customers shall pay $10,300,000 on June 30, 2001, as an advance payment of the tax imposed by section 5727.24 of the Revised Code, as enacted by this act, for the quarter ending June 30, 2001. This payment is an advance payment of the tax that is due within 45 days after the last day of June as required by division (A) of section 5727.25 of the Revised Code, as enacted by this act. The $10,300,000 payment shall be refundable to a natural gas company as a credit in accordance with division (B) or (C) of section 5727.29 of the Revised Code.

1999 H 283, § 176: See Uncodified Law under 5727.01.

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 5727.24 repealed by 1989 S 156, eff. 12-31-89; 1983 H 291; 1979 H 145; 130 v H 413; 126 v 880; 1953 H 1; GC 5462.

Pre-1953 H 1 Amendments: 124 v S 295; 102 v 242, § 73; 101 v 407, § 40; 101 v 399; 92 v 89, § 2; 91 v 409, § 2

CROSS REFERENCES

Domestic and foreign corporations, when deemed organized, 5733.16

Highway obligations bond retirement fund, transfer of tax revenues to, 5528.36

R.C. § 5727.24

Municipal income tax exemption, 718.01

Public improvements bond retirement fund, transfer of tax revenues to, 129.73

Tax credit certificates, 122.152

LIBRARY REFERENCES

Taxation ⟹117, 143-159.
Westlaw Topic No. 371.
C.J.S. Taxation § 134, 159, 161, 170-174, 176-177, 181-183, 185, 261.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Taxation § 249, Taxable and Exempt Income.

OH Jur. 3d Taxation § 837, General Excise Tax--Taxable Base.

Treatises and Practice Aids

Gotherman, Babbit and Lang, Baldwin's Ohio Practice, Local Government Law-- Municipal, § 12:13, Exempt Income.

R.C. § 5727.24, OH ST § 5727.24

Current through 2006 File 150 of the 126th GA (2005-2006), apv. by 12/26/06, and filed with the Secretary of State by 12/27/2006.

END OF DOCUMENT

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5727. PUBLIC UTILITIES
GROSS RECEIPTS AND EARNINGS

5727.33 DETERMINATION OF GROSS RECEIPTS; EXCLUSIONS

<Note: See also following version of this section, and Publisher's Note below.>

(A) For the purpose of computing the public utility excise tax, the tax commissioner shall ascertain and determine the entire gross receipts actually received from all sources, excluding the receipts described in divisions (B), (C), and (D) of this section, of each natural gas, pipe-line, water-works, heating, and water transportation company for business done within this state for the year ending on the thirtieth day of April, and of each telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June.

(B) In ascertaining and determining the gross receipts of each of the companies named in this section, the commissioner shall exclude all of the following:

(1) All receipts derived wholly from interstate business;

(2) All receipts derived wholly from business done for or with the federal government;

(3) All receipts from the sale of merchandise;

(4) All receipts from sales to other public utilities, except railroad, telegraph, and telephone companies, for resale, provided the other public utility is required to file a statement pursuant to section 5727.31 of the Revised Code.

(C) In ascertaining and determining the gross receipts of a telephone company, the commissioner shall exclude all of the following:

(1) Receipts of amounts billed on behalf of other entities;

(2) Receipts from sales to other telephone companies for resale, as defined in division (G) of section 5727.32 of the Revised Code;

(3) Receipts from incoming or outgoing wide area transmission service or wide area transmission type service, including eight hundred or eight-hundred-type service;

R.C. § **5727.33**

(4) Receipts from private communications service as described in division (AA)(2) of section 5739.01 of the Revised Code;

(5) Receipts from sales to providers of telecommunications service for resale, as defined in division (G) of section 5727.32 of the Revised Code.

(D) In ascertaining and determining the gross receipts of a natural gas company, the commissioner shall exclude receipts of amounts billed on behalf of other entities. Transportation and billing and collection fees charged to other entities shall be included in the gross receipts of a natural gas company.

The amount ascertained by the commissioner under this section, less a deduction of twenty-five thousand dollars, shall be the gross receipts of such companies for business done within this state for that year.

CREDIT(S)

(1999 S 3, eff. 10-5-99; 1996 H 476, eff. 9-17-96; 1992 H 904, eff. 12-22- 92; 1991 H 276, H 298; 1989 S 156; 1988 H 721; 1987 H 171)

<Note: See also following version of this section, and Publisher's Note below.>

R.C. § **5727.33**

OH ST § **5727.33**

END OF DOCUMENT

R.C. § **5727.811**

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5727. PUBLIC UTILITIES
ELECTRIC OR NATURAL GAS DISTRIBUTION COMPANIES

5727.811 EXCISE TAX ON NATURAL GAS DISTRIBUTION COMPANIES

(A) For the purpose of raising revenue for public education and state and local government operations, an excise tax is hereby levied on every natural gas distribution company for all natural gas volumes billed by, or on behalf of, the company on and after July 1, 2001. Except as provided in divisions (C) or (D) of this section, the tax shall be levied at the following rates per MCF of natural gas distributed by the company through a meter of an end user in this state:

MCF DISTRIBUTED TO AN END USER	RATE PER MCF
For the first 100 MCF per month	$.1593
For the next 101 to 200 MCF per month	$.0877
For 2001 and above MCF per month	$.0411

If no meter is used to measure the MCF of natural gas distributed by the company, the rates shall apply to the estimated MCF of natural gas distributed to an unmetered location in this state.

(B) A natural gas distribution company shall base the tax on the MCF of natural gas distributed to an end user through the meter of the end user in this state that is estimated to be consumed by the end user as reflected on the end user's customer statement from the natural gas distribution company. The natural gas distribution company shall pay the tax levied by this section to the treasurer of state in accordance with section 5727.82 of the Revised Code.

(C) A natural gas distribution company with fifty thousand customers or less may elect to apply the rates specified in division (A) of this section to the aggregate of the natural gas distributed by the company through the meter of all its customers in this state, and upon such election, this method shall be used to determine the amount of tax to be paid by such company.

(D) A natural gas distribution company shall pay the tax imposed by this section at the rate of $.02 per MCF of natural gas distributed by the company through the meter of a flex customer. The natural gas distribution company correspondingly shall reduce the per MCF rate that it charges the flex customer for natural gas distribution services by $.02 per MCF of natural gas distributed to the flex customer.

(E) Except as provided in division (F) of this section, each natural gas distribution company shall pay the tax imposed by this section in all of the following circumstances:

(1) The natural gas is distributed by the company through a meter of an end user in this state;

(2) The natural gas distribution company is distributing natural gas through a meter located in another state, but the natural gas is consumed in this state in the manner prescribed by the tax commissioner;

(3) The natural gas distribution company is distributing natural gas in this state without the use of a meter, but the natural gas is consumed in this state as estimated and in the manner prescribed by the tax commissioner.

(F) The tax levied by this section does not apply to the distribution of natural gas to the federal government, or natural gas produced by an end user in this state that is consumed by that end user or its affiliates and is not distributed through the facilities of a natural gas company.

CREDIT(S)

(2000 S 287, eff. 12-21-00)

UNCODIFIED LAW

2000 S 287, § 10, eff. 12-21-00, reads:

The excise tax imposed by section **5727.811** of the Revised Code shall first apply to natural gas distributed on and after July 1, 2001. Before that date, a natural gas distribution company shall register with the Tax Commissioner in accordance with section 5727.93 of the Revised Code, as amended by this act.

2000 S 287, § 11, eff. 12-21-00, reads:

(A) Not later than 90 days after the effective date of this act, each natural gas distribution company in this state having more than 50,000 customers, and each natural gas distribution company in this state with 50,000 customers or less that does not make an election under division (C) of section **5727.811** of the Revised Code, as enacted by this act, shall file with the Public Utilities Commission revised schedules that do both of the following:

(1) For all customers, reduce natural gas MCF rates, effective April 1, 2001, in an amount equal to the amount included in rates in each company's last base rate case for the differential resulting from the reduction in the personal property tax assessment rate to 25% of true value as provided by section 5727.111 of the Revised Code, as amended by this act;

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(2) Establish a rider that provides for the collection, beginning July 1, 2001, of the excise tax imposed by section **5727.811** of the Revised Code, as enacted by this act. The Commission shall approve a revised schedule filed under this section within 60 days after it is filed.

(B) To the extent possible, the rate reduction provided by division (A)(1) of this section and the tax rider provided by division (A)(2) of this section shall be designed to avoid revenue responsibility shifts among the natural gas distribution company's customer rate schedules or between the natural gas distribution company's commodity sales service and distribution service.

CROSS REFERENCES

Statement on customer bills, 4933.33

Tax refund fund, 5703.052

R.C. § **5727.811**

OH ST § **5727.811**

END OF DOCUMENT

Ohio Constitution. Art. I, § 2

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

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

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

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

To borrow Money on the Credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

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

To constitute Tribunals inferior to the supreme Court;

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

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

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

To provide and maintain a Navy;

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

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

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

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

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

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

ARTICLE VI

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

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

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

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

Amendment XIV

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