No. 83, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, EXCEPTIONS, AND BRIEF IN SUPPORT THEREOF

[Counsel listed inside front cover]

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FRANK J. PERAGINE
H. PAUL SIMON
THOMAS R. BLUM
JAMES A. BURTON
JEROME K. LIPSICH
SIMON, PERAGINE, SMITH & REDFEARN
43rd Floor, One Shell Square
New Orleans, Louisiana 70139

Attorneys for
Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Tennessee Gas Pipeline Company, a division of Tenneco Inc., Texas Eastern Transmission Corporation and Trunkline Gas Company.

C. MCVEA OLIVER
J. MICHAEL RHYMES
OLIVER & WILSON
Post Office Box 1541
Monroe, Louisiana 71201

STEVEN G. DURIO
202 West Main
P.O. Box 4026-6
Lafayette, Louisiana 70502

Attorneys for
Transcontinental Gas Pipe Line Corporation.

WILLIAM W. BRACKETT
DANIEL F. COLLINS
BRACKETT & COLLINS, P.C.
1899 L Street, N.W.
Suite 501
Washington, D.C. 20036

Attorneys for
Michigan Wisconsin Pipe Line Company.

ARTHUR J. WAECHTER, JR.
HERSCHEL L. ABBOTT, JR.
EDWARD H. BERGIN
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
225 Baronne Street
New Orleans, Louisiana 70112

Attorneys for
Texas Gas Transmission Corporation.

GENE W. LAFITTE
JOHN M. WILSON
DEBORAH BAHN PRICE
LISKOW & LEWIS
50th Floor, One Shell Square
New Orleans, Louisiana 70139

Attorneys for
Florida Gas Transmission Company and Southern Natural Gas Company.

ERNEST L. EDWARDS
GEORGE FRAZIER
MARGARET R. TRIBBLE
DEBORAH F. ZEHNER
LEMLE, KELLEHER, KOHLMEYER & MATTHEWS
1800 First NBC Building
New Orleans, Louisiana 70112

Attorneys for
United Gas Pipe Line Company and Sea Robin Pipeline Company.

BURT W. SPERRY
JAMES H. NAPPER, II
SHOTWELL, BROWN & SPERRY
Post Office Box 1591
Monroe, Louisiana 71201

Attorneys for
Mississippi River Transmission Corporation and Michigan Wisconsin Pipe Line Company.

MELVIN RICHTER
LITTMAN, RICHTER, WRIGHT & TALISMAN, P.C.
1050 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194

Attorney for
Tennessee Gas Pipeline Company, a Division of Tenneco Inc.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

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MOTION FOR LEAVE TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

The pipeline companies, intervenor-applicants in this proceeding,[1] through their undersigned counsel of

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[1] Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline

[footnote continued]

record, respectfully move the Court for leave to file the attached Exceptions to the Report of the Special Master dated September 15, 1980, with Brief in Support. In support of this motion, the pipeline companies show:

1.

On August 28, 1979, the pipeline companies filed a motion for leave to intervene as plaintiffs, asserting that since they are the taxpayers under the First Use Tax, they have significantly protectable interests at issue in the litigation which are not adequately represented by any other party. Plaintiffs did not oppose the intervention; however, Louisiana filed an opposition on September 24, 1979, to which the pipeline companies responded on October 9, 1979.

2.

On September 18, 1979, plaintiffs filed a motion for judgment on the pleadings, asserting that the uncontested facts in the pleadings establish their entitlement to judgment on two of the several grounds raised in the complaint: (1) the First Use Tax is invalid under the Supremacy Clause of the United States Constitution because it is preempted by the Natural Gas Act, the Natural Gas Policy Act of 1978, the Outer Continental Shelf Lands Act and the Coastal Zone Management Act; and (2) the First Use Tax is invalid under the Commerce Clause of the United States Constitution

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Company (a division of Tenneco Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company ("the pipeline companies").

because it constitutes a discriminatory and unapportioned tax on interstate commerce.

3.

On November 5, 1979, the pipeline companies filed their own motion for judgment on the pleadings with accompanying brief, together with a motion for leave to file same, which presented a different perspective on the grounds asserted by plaintiffs in their motion for judgment on the pleadings.

4.

On March 3, 1980, the Court appointed a Special Master. By report dated May 14, 1980, the Master found that "[t]he interests of the pipelines in the outcome of this suit is direct and material," and recommended that the motion of the pipeline companies for leave to intervene be granted.

5.

By report dated September 15, 1980, the Master recommended that the plaintiffs' motion for judgment on the pleadings be denied. Although the report is in terms directed solely to the motion submitted by the plaintiffs, it in effect disposes of the pipeline companies' motion for judgment on the pleadings as well.

6.

Since the Court apparently intends to dispose of the Master's recommendations as to intervention and judgment on the pleadings simultaneously, the pipeline companies clearly should be permitted to submit their own exceptions to the Master's report on the motions for judgment on the pleadings. This will probably be the only opportunity, as a practical matter, for them to present their views to the Court on the questions dealt with in that report. Moreover, consideration of the pipeline companies' arguments will not only promote the interests of justice by allowing the pipeline companies to speak for themselves regarding the resolution of issues which directly and materially affect their interests, but consideration of their different perspective will be of assistance to the Court in passing on the Master's recommendation against disposing of this controversy without an evidentiary hearing.

WHEREFORE, the pipeline companies pray that the attached Exceptions to the Report of the Special Master dated September 15, 1980, with Brief in Support be ordered filed.

GENE W. LAFITTE
FRANK J. PERAGINE
ARTHUR J. WAECHTER, JR.
ERNEST L. EDWARDS
BURT W. SPERRY
MELVIN RICHTER
C. MCVEA OLIVER
DANIEL F. COLLINS
Attorneys

EXCEPTIONS

The pipeline companies except to the Report of the Special Master dated September 15, 1980, in the following respects:

1. The Special Master erred in failing to find that the First Use Tax on its face improperly infringes upon the pervasive regulatory scheme established by the Natural Gas Act and the Natural Gas Policy Act of 1978 in violation of the Supremacy Clause.

2. The Special Master erred in failing to find that the First Use Tax on its face conflicts with the Outer Continental Shelf Lands Act in violation of the Supremacy Clause.

3. The Special Master erred in failing to find that the First Use Tax on its face thwarts the comprehensive federal regulatory scheme established by the Outer Continental Shelf Lands Act and the Coastal Zone Management Act in violation of the Supremacy Clause.

4. The Special Master erred in failing to find that the First Use Tax on its face unlawfully discriminates against interstate commerce in violation of the Commerce Clause.

5. The Special Master erred in failing to find that the First Use Tax on its face exposes the pipeline company taxpayers to the risk of multiple taxation in violation of the Commerce Clause.

Respectfully submitted,

GENE W. LAFITTE
FRANK J. PERAGINE
ARTHUR J. WAECHTER, JR.
ERNEST L. EDWARDS
BURT W. SPERRY
MELVIN RICHTER
C. MCVEA OLIVER
DANIEL F. COLLINS
Attorneys

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BRIEF IN SUPPORT OF EXCEPTIONS

STATEMENT

The Report of the Special Master dated September 15, 1980 ("Report") recommends that the plaintiffs' motion for judgment on the pleadings be denied.[2] Although the pipeline companies have sought leave to file a motion for judgment on the pleadings on their own behalf, the Master expressly declines to address the

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[2]The Report also recommends that Louisiana's motion to dismiss, filed May 29, 1979, be denied. The pipeline companies do not except to this recommendation.

pipeline companies' motion on the ground that his earlier recommendation that their intervention be granted has not yet been acted upon by the Court. Report at 2, n.1.

Nevertheless, the Report has the effect of disposing of the pipeline companies' motion for judgment on the pleadings. Further, the different perspective advanced by the pipeline companies in support of their motion and in these exceptions serves also to establish that judgment on the pleadings should be granted. For both of these reasons, the pipline companies wish to address the errors made by the Master in reccommending that the plaintiffs' motion for judgment on the pleadings be denied.[3]

SUMMARY OF ARGUMENT

I.

In declining to invalidate the First Use Tax summarily under the Supremacy Clause, the Master recognizes that the "provisions of the federal and state laws . . . may be irreconcilable in operation, . . ." However, he goes on to urge, "the interference may be so indirect, so peripheral, so subject to administrative adjustments as to permit the state and federal programs to coexist." Report at 21.

This conclusion, however, is based on an overly narrow view of the Natural Gas Act, the Natural Gas Policy Act and the Supremacy Clause. As shown below, it ignores the Court's repeated reaffirmation that while

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[3] In order to avoid repetition, the pipeline companies adopt the statement of the case set out in the brief in support of exceptions being filed by the plaintiffs.

Congress excluded the local activities of production and gathering and of retail sales from federal natural gas regulation, it intended to provide a pervasive federal regulatory scheme in which the federal interest was dominant with respect to the areas covered, *i.e.*, the interstate transportation and sale of gas for resale. Also, he ignores the well established Supremacy Clause principle that in such circumstances there is no room for any state action, whether it conflicts, interferes with, curtails, or supplements federal regulation in the preempted areas. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

Since, therefore, the mere existence of a potential interference by state action with the areas thus preempted is sufficient for the invalidation of such state action under the Supremacy Clause, the extent or magnitude of such interference, or the possibility of administrative adjustment thereto, is irrelevant. Accordingly, contrary to the Master's recommendation, no further proceedings, evidentiary or otherwise, are needed in order to rule promptly that the First Use Tax is invalid under the Supremacy Clause.

II.

The Master erred in finding that the First Use Tax does not directly conflict with the provision of the Outer Continental Shelf Lands Act which prohibits state taxation of natural resources of the outer continental shelf.

To properly characterize a tax, examination must be made of the particular statute involved. Since the First Use Tax is in substance, if not in form, a severance tax on federal outer continental shelf gas, it is expressly prohibited by the Outer Continental Shelf Lands Act.

III.

The Master erred in failing to find that the First Use Tax thwarts implementation of the Coastal Zone Management Act and the Outer Continental Shelf Lands Act.

The First Use Tax represents yet another attempt by Louisiana to undermine the exclusive authority of the federal government over federal outer continental shelf energy activities. The Coastal Energy Impact Program, established by the 1976 amendments to the Coastal Zone Management Act and as further amended by the Outer Continental Shelf Lands Act in 1978, serves as the sole means of affording compensation to coastal states for outer continental shelf activities. This program conditions receipt of funds by coastal states upon participation in the Coastal Zone Management Act which requires that states adopt a coastal management program which complies with articulated standards designed to promote prudent use of the coastal zone. The First Use Tax not only conflicts with the intent of Congress that the Coastal Energy Impact Program provide the sole source of outer continental shelf derived financial support for coastal states but it also undermines the intent of Congress to preclude states from amassing funds reflecting outer continental shelf activities which are not directly tied to the Coastal Zone Management Act.

IV.

The Master erred in finding that an evidentiary hearing is "desirable" in order to determine whether the First Use Tax discriminates against interstate commerce. Report at 21. Although he apparently believes that the taxing scheme formed by the tax and its companion statutes is discriminatory, Report at 34, he refuses to recommend that the tax be declared unconstitutional because he thinks the State of Louisiana may be able to show, at an evidentiary hearing, that adjustments and allowances can be made between buyers and sellers which might eliminate the discriminatory effect of the tax, Report at 35, or that the "actuality of operation" of the tax may show that it is a compensating tax which complements the state's severance tax under the rationale of *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), Report at 35. The Master erred in both respects.

The Court has never required an interstate business to adjust its prices or make allowances to its customers to rectify a competitive imbalance created by a state tax. The First Use Tax discriminates on its face and so *a fortiori* it must discriminate in its operation. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). No evidentiary hearing is needed for a determination that the taxing scheme in question discriminates because the tax is imposed solely on gas originating outside Louisiana's boundaries; owners of federal outer continental shelf gas who also produce natural resources in Louisiana are relieved of the economic burden of the tax, whereas the pipeline companies are not; and the tax is so designed that its entire economic burden is imposed on consumers in states other than Louisiana.

Moreover, as a matter of law, the First Use Tax cannot be considered a compensating tax with respect to Louisiana's severance tax since the activities taxed by, and the situations of the taxpayers under, the two taxes are radically different. A prerequisite for the validity of a compensating tax is the existence of similarly situated taxpayers under the two taxing schemes under consideration. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). This prerequisite is not met by the First Use Tax. Even if the First Use Tax, by itself, could properly be considered as compensating for the severance tax, the taxing scheme formed by the First Use Tax and its companion statutes clearly does not so compensate, because it creates an economic imbalance in favor of Louisiana interests.

V.

The Master erred in finding that an evidentiary hearing is needed to determine whether the First Use Tax exposes the pipeline companies to the risk of multiple taxation. In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), the Court considered a Texas tax imposed on "gathering" gas and measured by the entire volume of gas "taken," with the taxable incident being the pipeline company's taking of the gas from the outlet of a processing plant for immediate interstate transmission. The Court set the tax aside for the reason, *inter alia*, that such "taking" would be repeated in other states, so that the tax created the risk of multiple taxation. No evidentiary hearing is needed to determine that the First Use Tax fits squarely within this holding, because the pipeline companies, in the normal course of their operations, necessarily subject the gas to "uses" (as that term is defined in the tax) in states other than Louisiana, and those states would have the power to impose an identical tax on the same volume of gas taxed in Louisiana.

ARGUMENT

I.

NO EVIDENTIARY HEARING IS NECESSARY FOR THE COURT TO HOLD THAT THE FIRST USE TAX IS PREEMPTED BY THE NATURAL GAS ACT AND THE NATURAL GAS POLICY ACT OF 1978.

A. The Special Master Misconceives The Applicable Standards.

The Master has recommended that an evidentiary hearing is necessary to determine whether the First Use Tax is preempted by the Natuaral Gas Act and the Natural Gas Policy Act of 1978. The Master recognizes that the First Use Tax conflicts with the right of the Federal Energy Regulatory Commission ("the Commission") to regulate the interstate transportation and sale of natural gas, but concludes that evidence might be adduced by Louisiana to show that the Commission's regulation could "be adjusted so that the laws will mesh without conflict." Report at 29.

The Master failed to apply the clear holdings of the Court which have recognized that a state statute may be preempted *even absent an actual conflict* where a federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," or where an act of Congress touches a field "in which the federal interest is so dominant that the federal interest will be assumed to preclude enforcement of state laws of the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Under such circumstances, an actual conflict is not required; rather, it is sufficient that the state law touch upon the area covered by the federal law. Determination of the existence of such a situation is solely a question of law. *Graham v. Richardson*, 403 U.S. 365 (1971).

The pipeline companies contend in their motion for judgment on the pleadings that the First Use Tax invades an area pervasively regulated by the Natural Gas Act and the Natural Gas Policy Act of 1978. *See* Pipeline Companies' Brief in Support of Motion for Judgment on the Pleadings ("Pipeline Companies' Brief") at 22-28. *See also* Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings ("Plaintiffs' Brief") at 14-15; Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae ("Government Brief") at 20-22. The Master apparently accepts this proposition. *See* Report at 27-28. However, he declines to recommend that the First Use Tax is void on this ground without further factual finding of irreconcilable and substantial conflict. In failing so to recommend, the Master patently erred.

In enacting the Natural Gas Act, Congress admittedly did not intend to exclude the states totally from regulating certain limited phases of the natural gas industry, *i.e.*, the local activities of production and gathering at one end of the spectrum, and retail sales to the ultimate consumers at the other. However, the Court has repeatedly recognized that as to those areas of the industry which are subjected to the regulatory jurisdiction of the Commission, Congress intended to "create a comprehensive and effective regulatory scheme" and has "occupied the field" to the exclusion of state regulation. *See, e.g., F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle*

Eastern Pipe Line Company v. Public Service Comm'n of Indiana, 332 U.S. 507, 519-20 (1947); *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 690 (1947); *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943). The Court has also recognized that there is a dominant federal interest in the areas subjected to the Commission's jurisdiction. *See, e.g., Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 692 (1947).

Thus, at the same time that the Natural Gas Act left the matters of production and gathering and of retail sales to the states, it excluded from state action those areas—other than direct sales—which otherwise might be subject to local control but which bore on or affected matters subject to Commission regulation under the pervasive federal scheme. *Natural Gas Pipeline Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955); *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963); *Oklahoma Corp. Comm'n v. F.P.C.*, 415 U.S. 961 (1974), *aff'ing* 362 F.Supp. 522 (W.D. Okla. 1973); *Public Service Comm'n of Kentucky v. F.E.R.C.*, 610 F.2d 439 (6th Cir. 1979).

Such far-reaching preemption protects federal regulation of matters of national concern requiring uniformity of treatment from the danger of being hampered or frustrated by state action furthering local interests. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 632-636 (1972); *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 692 (1947). *Cf. DeCanas v. Bica*, 424 U.S. 351, 359, fn.7 (1976); *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 528-529 (1979) (plurality opinion of Mr. Justice Stevens).

B. No Evidentiary Hearing is Required Since the First Use Tax Facially Encroaches Upon the Exclusive Federal Regulatory Scheme.

Under the above cited precedents, the Natural Gas Act and the Natural Gas Policy Act vest with the Commission the exclusive jurisdiction over the transportation and sale for resale of natural gas in interstate commerce. As shown below, the First Use Tax impermissibly encroaches upon these areas, both by undertaking to require increased rates for the interstate transportation and sale of natural gas and seeking to prescribe how the burden of this tax is to be allocated.

1. The First Use Tax Interferes With The Commission's Administration Of Contracts Subject To Its Jurisdiction.

The First Use Tax directly encroaches upon the Commission's exclusive authority to administer contracts subject to its jurisdiction under the Natural Gas Act. Pipeline Companies' Brief at 28-32. *See also* Plaintiffs' Brief at 23-24; Government Brief at 30-43.[4] The Master found: (1) that the First Use Tax contains "provisions . . . which allot the tax to the cost of preparation (or) marketing of natural gas and outlaw contractual provisions passing the tax back to producers while permitting it to be added to the purchase price of consumers," Report at 27;[5] and (2) that the Commis-

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[4] The First Use Tax would, of course, also encroach upon the Commission's jurisdiction over contracts subject to its jurisdiction under Section 110(a)(2) of the Natural Gas Policy Act of 1978, as shown in the Pipeline Companies' Brief at 32.

[5] That the First Use Tax was intended to be passed onto the ultimate consumer is obvious from the legislative history of the

[footnote continued]

sion has "previously accepted contracts that provided that the processing involved and tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of natural gas," Report at 28. Despite this recognition of a clear conflict between the terms and provisions of contracts "previously accepted" by the Commission and subject to Commission jurisdiction, and the First Use Tax which "outlaw (such) contractual provisions," the Master declined to conclude that the First Use Tax is invalid under the Supremacy Clause.

Instead, he went on to observe that: (1) "FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to consumers if the tax is finally held invalid . . ."; (2) "FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid or liquefiable hydrocarbons transported with or extracted from natural gas"; and (3) "[t]here is an ongoing dispute between the parties as to the legal effect of processing . . . natural gas," which in turn depends upon the physical nature of the process. Report at 28. Rather than relying on past decisions by the courts which have considered the function of processing and its legal effect, *see*, pp. 19-21, *infra*, the Special Master recommends that an evidentiary hearing be held thereon,

statute as well as from its express terms. *See*, Hearings on H.R. 768 Before the Senate Committee on Revenue and Fiscal Affairs of the Louisiana Legislature (1978) at pp. 3-5, 12-13, 25-28 (Rep. Tauzin), 13-16 (Mr. Staton representing Mid Continent Oil and Gas Association), 18-20 (Mr. Garmon representing Exxon Company USA). The Solicitor General furnished copies of the verbatim transcript of these hearings to the Court in November, 1979.

observing that "it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict." Report at 29.

But, since, as the Master recognizes, the "outlaw provisions" of the First Use Tax on their face conflict with the allocation provisions of the contracts approved by the Commission in the exercise of its authority under the Natural Gas Act, the Master's further observations are inapposite. Where, as here, the federal scheme of regulation of natural gas in interstate commerce has been shown to be pervasive, the states are precluded from regulating in the same area. Indeed, the only relevant inquiry is whether the state has infringed upon an area of federal law, and not whether, despite such infringement, the federal agency's "orders can be adjusted so that the laws will mesh without conflict." The Master's specific recognition that the First Use Tax infringes upon the Commission's administration of contracts subject to its jurisdiction inevitably calls for the conclusion that the First Use Tax is invalid under the Supremacy Clause and no evidentiary hearing is required.

2. The First Use Tax Infringes on the Commission's Ratemaking Responsibility.

The pipeline companies also contend that the First Use Tax indirectly, if not directly, infringes upon the exclusive domain of federal regulation by undertaking to require increased rates for the interstate transportation and sale of natural gas. Pipeline Companies' Brief at 32-42. *See also* Plaintiffs' Brief at 18-23. The Master conceded that this contention may be correct, but he declines to recommend that the tax be declared invalid on this ground without an evidentiary hearing, stating that "a decision is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed." Report at 27.[6]

Again, the Master has applied the wrong standard for preemption in this case. The question in situations involving preemption under a pervasive federal regulatory scheme such as the Natural Gas Act is not the *extent* to which a state staute or regulation effects or infringes upon the federal scheme. Rather, the critical question relates to the existence *vel non* of *any* effect or infringement; once such effect or infringment is shown to exist, the offending state action must be set aside. *See, e.g., Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963); *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). *See also Backus v. Panhandle Eastern Pipe Line Co.*, 558 F.2d 1373, 1375-76 (10th Cir. 1977), where the court invalidated an Oklahoma statute that required an interstate pipeline to furnish gas to customers occupying land crossed by the pipeline even though the record contained no evidence as to the amount of gas which was or might be used by those customers, the court stating:

> A finding of substantial interference with interstate commerce is unnecessary to a determination of this case.

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[6]The Master further stated:

> The issue eventually to be resolved is whether the First Use Tax is just one of the many factors affecting the price, some of which are beyond FERC control, or whether it is a substantial hindrance to the Commission's powers. *Id.*

Since, as the Master recognized, the First Use Tax infringes upon the Commission's ratemaking responsibilities under the Natural Gas Act and since the areas entrusted to the Commission's responsibility are exclusive, it follows that no evidentiary hearing is needed to establish that this attempt on the part of Louisiana to foster its local interests at the expense of the customers in the remainder of the nation violates the Supremacy Clause.

C. The Validity Vel Non Of The State's Action Absent The Federal Regulatory Scheme Is Irrelevant.

The Master's recommendation of evidentiary hearings apparently is based, *inter alia*, on the simplistic conclusion that the First Use Tax is within the sphere of permissible state regulation because it is a tax. But the critical inquiry is not whether the legislation constitutes an exercise of the state's admitted power to tax, but whether the legislation infringes upon the exclusive domain of the Commission to regulate the interstate transportation and sale for resale of natural gas. In *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963), the Court invalidated a ratable take order of the Kansas Commission, despite the fact that the order was issued pursuant to the state's admitted conservation powers. What was said there is equally applicable here:

> [T]he problem of this case is not as to the existence or even the scope of a State's power to conserve natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the

federal regulatory scheme. 372 U.S. at 93. *See also Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

The Court further recognized that even an indirect infringement will result in preemption. *Id.* at 91.

Thus, it is no answer to our contentions here that states may impose severance taxes on local production. As noted, see pp. 13-14, *supra*, production is an area reserved for state regulation, so that a tax on production typically would not infringe upon the federal regulatory scheme. The First Use Tax, however, does infringe upon the federal scheme since it involves an area reserved exclusively for *federal* regulation—the interstate transportation and sale for resale of natural gas.

Similarly, the First Use Tax is invalid even if some of the "uses" taxed by Louisiana might be regarded as separate local incidents, since the statute in either case directly *or indirectly* infringes upon the Commission's sphere of exclusive jurisdiction. Moreover, even though it is irrelevant whether the "uses" taxes are separate local incidents, it should be noted that the transportation onshore of natural gas produced from the federal outer continental shelf is *by definition* in interstate commerce. 15 U.S.C. § 3301(18). *See also Continental Oil Co. v. F.P.C.*, 370 F.2d 57, 66 (5th Cir. 1966).

Furthermore, courts have repeatedly held that the movement of natural gas across state boundaries (without regard to the federal outer continental shelf) is in interstate commerce throughout its journey "from the wellhead to the consumer's burner tip," and hence that the Commission's sphere of regulation extends to natural gas as it is produced at the wellhead irrespective of other hydrocarbons, components or impurities with which it may be mixed as it comes out of the ground. *Deep South Oil Co. v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957) and related cases.[7] *See also United Gas Improv. Co. v. Continental Oil Co.*, 381 U.S. 392, 402 (1965); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Saturn Oil & Gas Co. v. F.P.C.*, 250 F.2d 61 (10th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).

As the Sixth Circuit recently stated in upholding the Commission's assertion of jurisdiction over sales made from field gathering lines:

> The unprocessed hydrocarbons, of course, are not precisely the same product that reaches Pennsylvania and West Virginia consumers through the high pressure transmission lines of the Kentucky West Virginia Company. Yet the difference in the nature of the gas is not significant in determining the applicability of federal regulation. The ultimate sale in other states of a substantial part of the producer's natural gas output invokes federal jurisdiction over the entire volume of production . . . the natural gas here at issue begins its journey in interstate commerce at the wellhead. *Public Service Comm'n of Kentucky v. F.E.R.C.*, 610 F.2d 439, 444 (1979). (Citations omitted).

[7] *Shell Oil & Gas Co. v. F.P.C.*, 247 F.2d 900 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958); *Continental Oil Co. v. F.P.C.*, 247 F.2d 904 (5th Cir. 1957); *Humble Oil & Refining Co. v. F.P.C.*, 247 F.2d 903 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).

II.

AS A MATTER OF LAW THE FIRST USE TAX IS PREEMPTED BY THE OUTER CONTINENTAL SHELF LANDS ACT.

The Master correctly determined that resolution of the conflict between the First Use Tax and the Outer Continental Shelf Lands Act ("OCSLA") does not require an evidentiary hearing. However, the Master erred in failing to find that the First Use Tax is in direct conflict with and thus preempted by the provision of the OCSLA which expressly prohibits state taxation of the natural resources of the federal outer continental shelf. 43 U.S.C. § 1333(a)(2)(A) and (a)(3). That a conflict exists between the OCSLA and the First Use Tax is amply demonstrated by the Pipeline Companies' Brief at 42-54.

The Master erroneously relies on *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me. 1973), *appeal dismissed*, 414 U.S. 1035 (1973), to support his suggestion that the First Use Tax is not a tax on natural gas, but rather is a tax on "uses" performed within Louisiana. Report at 30. But in *Portland Pipe Line*, the court held that the license fee there involved was imposed on the activity of offloading oil, rather than upon the oil itself, finding it significant that over the long run, the fee was *not* related to volume but only to the hazard of overwater oil transportation. 307 A.2d at 34. Thus, while the license fee was measured by the volume of oil transferred over water during the licensing period, the fee was to be used *exclusively* for the creation and maintenance of a coastal protection fund, and the fund was limited to four million dollars, with the fee to be reduced once the four million dollar limit was reached, to a level sufficient to maintain the fund.

In contrast, not only is there no limit upon the amount collected under the First Use Tax, but the use of funds collected is not restricted to repair the damage allegedly done by the pipelines' federal outer continental shelf activities. Rather, the First Use Tax is imposed, without restriction in time or magnitude of the revenues, on the total volumes of outer continental shelf gas moving in interstate commerce within Louisiana. Looking beyond form to substance, it is clear that the First Use Tax is Louisiana's attempt to impose a severance tax on federal outer continental shelf gas, and as such, it is expressly prohibited by the OCSLA. *Cf. Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910); *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U.S. 341 (1905); *Citroen Cars Corp. v. New York Dep't of Finance*, 332 N.Y.S.2d 882-87, 283 N.E.2d 758, 761 (1971).

Moreover, unlike *Portland Pipe Line*, there is a question of federal supremacy here and hence, the state's right to protect its own interests—the holding in *Portland Pipe Line* further cited by the Master (Report at 30)—is irrelevant in light of the established principle that such state rights must give way to pervasive federal regulatory schemes. *See, e.g., Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 93-94 (1963).

III.

AS A MATTER OF LAW THE FIRST USE TAX IS PREEMPTED BY THE OUTER CONTINENTAL SHELF LANDS ACT AND THE COASTAL ZONE MANAGEMENT ACT.

The OCSLA and the Coastal Zone Management Act ("CZMA") set out a comprehensive legislative program which seeks to assure prudent management of the nation's coastal zone while encouraging offshore energy exploration and production. The pipeline companies have shown that the First Use Tax impinges on that program. *See* Pipeline Companies' Brief at 56. The Master correctly identified the CZMA as one of the statutes involved in the motions for judgment on the pleadings, but he failed to address or resolve the interference of the First Use Tax with the OCSLA-CZMA programs.

The statutory language and the legislative history of the OCSLA and CZMA reveal the comprehensive manner in which Congress sought to balance and promote the competing interests of energy self-sufficiency and effective management of the coastal zone. 43 U.S.C. § 1332(4) and 16 U.S.C. § 1451(g)(j), as amended by Pub. L. 96-464, § 2(2) (October 17, 1980). Congress declared after the Arab oil embargo of 1973 that energy self-sufficiency was of paramount importance. It was acknowledged, however, that the goal of accelerating outer continental shelf energy activities could have an adverse effect on the coastal management efforts, which had been promoted by the CZMA. Accordingly, in 1976 Congress sought to revise the CZMA so as to foster energy production while protecting coastal management efforts.

Through the hearings on the amendments to the CZMA in 1976 and the OCSLA in 1978, representatives of the State of Louisiana as well as other coastal states advocated that they be authorized to share in outer continental shelf revenues. They repeatedly urged that Congress amend the OCSLA so as to provide concurrent jurisdiction over resources development beyond the 3-mile limit. *See* Pipeline Companies' Brief at 58. Louisiana sought congressional approval either to tax the resources severed from the outer continental shelf or to share in revenue therefrom as compensation for the impacts of outer continental shelf activities.[8] Nevertheless, Congress expressly rejected this approach.[9] Congress not only continued to adhere to the jurisdictional division of proprietary interests articulated in this Submerged Lands Act,[10] but also prohibited any state participation in outer continental shelf revenue-sharing. It was recognized that unfettered revenue-sharing with little or no reference to prudent planning and management of the coastal zone would have devastated the intent of the CZMA of 1972.[11] Therefore, as an alternative to revenue-sharing with the coastal states, Congress amended the CZMA in 1976 so

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[8] Outer Continental Shelf Oil & Gas Developments: Hearings before Subcommittee on Minerals, Materials and Fuel (May 10, 1976) 94th Cong. at 675-683 (Statement of William Guste, Att. Gen. of La.)

[9] Congress rejected H.R. 3981 in 1976 which would have directed 10% of federal revenues to the Coastal Energy Impact Program. *See* H.R. Rep. 94-878, 94th Cong. 78 (1976). *See also* H.R. Rep. 95-590, 95th Cong. 2nd Sess. 195, *reprinted in* (1978) U.S. Code Cong. & Ad. News 1600-1601.

[10] H.R. Rep. No. 96-1012, 96th Cong. 2nd Sess. 26-27 (1980).

[11] H.R. Rep. 95-590, 95th Cong. 2nd Sess. 196, *reprinted in* (1978) U.S. Code Cong. & Ad. News 1601.

as to establish the Coastal Energy Impact Program ("CEIP").[12]

The CEIP was created to recompense coastal states for impacts associated with outer continental shelf energy development and production. This program compensates coastal states for the costs of public facilities and public services[13] and for the prevention, reduction, or amelioration of any unavoidable loss of valuable environmental or recreational resources resulting from coastal energy activities. 16 U.S.C. § 1456a (b)(5)(C). *See* Pipeline Companies' Brief at 57 and 58 for a description of the broad compensation provided to eligible states impacted by coastal energy activities. The compensatory nature of the CEIP is demonstrated by the manner in which CEIP compensation is computed. Eligiblity for CEIP grants is premised on a formula which computes, as one of its three elements, the volume of outer continental shelf gas first landed in the state–the same basis for calculating the First Use Tax. The CEIP, however, more accurately reflects outer continental shelf impacts since it includes in the formula the volume of both outer continental shelf oil and gas coming ashore. The other two elements of the CEIP are the volume of oil and gas produced adjacent to the state and the outer continental shelf acreage

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[12]The Office of Coastal Zone Management recently completed an evaluation of the CEIP. In the text, it was noted that the formula grant aid (CEIP formula) was intended by Congress to provide "equity" or compensation in lieu of taxes to coastal states. *See* 11 Coastal Zone Management 1 (October 22, 1980).

[13]The term "public facilities and public services" is defined in 16 U.S.C. §1453(15), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, § 4(1).

newly leased by the federal government adjacent to the coastal state. 16 U.S.C. § § 1456a(b)(2)(A), (B) & (C). Thus, states are compensated in direct proportion to adjacent federal offshore outer continental shelf activities; however, they are ineligible for this compensation if they do not comply with the mandates of the CZMA.[14]

Just this year, Congress reaffirmed its intent that states strictly adhere to federal coastal management objectives in order to receive compensation for outer continental shelf impacts.[15] Congress clarified that CZMA criteria must be contained in a state's coastal management plan if that state is to be eligible to receive CEIP funds.[16] 16 U.S.C. § 1452(2), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, § 3. Absolute adherence to the CZMA objectives is so essential that now even federal agencies must identify all activities which may be inconsistent

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[14]Congress recently reaffirmed that eligibility for outer continental shelf impact funds is inseparable from participation in the federal coastal zone management program. To put to rest the controversy which had arisen between Georgia and the Office of Coastal Zone Management as to whether Georgia's withdrawal from the CZMA program rendered it ineligible to receive coastal energy impact assistance, Congress directed that after notice, program monies and CEIP funds be withdrawn from states which failed to adhere to an approved program or deviated from the terms of the program grant. Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464 § 9 (October 17, 1980).

[15]Since the September 15 report of the Special Master, the CZMA has been amended. *See* Pub. L. 96-464, the Coastal Zone Management Improvement Act of 1980 (October 17, 1980).

[16]The purpose of this clarification was to foster uniformity in state management programs. 126 Cong. Rec. H10109 (Daily ed. Sept. 30, 1980) (Remarks of Rep. Studds).

with coastal management objectives and take steps to resolve these conflicts. 16 U.S.C. §§ 1452(4) and 1452(c), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464 §§ 3 & 10(3) (October 17, 1980). To assure continued adherence to CZMA objectives, the Secretary of Commerce is directed to report to Congress annually regarding any federal actions or state management plans which may be inconsistent with coastal management objectives. 16 U.S.C. §§ 1458 and 1462, as amended by the Coastal Zone Management Improvement Act of 1980 §§ 9 & 10, Pub. L. 96-464 (October 17, 1980).

The First Use Tax obviously undermines the intent of the CZMA and the OCSLA. Clearly, coastal states are provided CEIP funds in lieu of their participation in outer continental shelf revenue-sharing. To assure continued viability of CZMA objectives, states are only eligible for CEIP funds if they participate in CZMA.[17] If Louisiana is allowed to continue to amass large sums based on the amount of outer continental shelf gas first landed in the state in furtherance of its own interests, the First Use Tax will not only duplicate the compensation already provided in the CZMA, but it will also stand "as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The First Use Tax is clearly repugnant to the OCSLA-CZMA scheme since it provides compensation to Louisiana in derogation of manifest congressional intent thst

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[17]Although participation by a state in the CZMA program is voluntary, states may not receive CEIP funds without an approved coastal management program. Louisiana has chosen to be governed by the CZMA and to be subject to both the benefits and the responsibilities intrinsic to that act. 45 Fed. Reg. 64615 (September 30, 1980).

CZMA impact funds provide the exclusive compensation for outer continental shelf impacts. Additionally, it frustrates the intent of Congress that expenditures of funds derived from outer continental shelf impacts be absolutely tied to CZMA participation.

The State of Louisiana agreed in its response to the brief filed on behalf of the pipeline companies that Congress addressed adverse outer continental shelf impacts on coastal states through creation of the CEIP. *See* Louisiana Brief at 15. Louisiana, however, complained that the program was underfunded. This claim, if credible, is for Congress alone to resolve.

IV.

NO EVIDENTIARY HEARING IS NECESSARY FOR THE COURT TO HOLD THAT THE FIRST USE TAX UNLAWFULLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The pipeline companies have advanced three distinct arguments in support of their contention that no evidentiary hearing is necessary to hold that the First Use Tax discriminates against interstate commerce. *See* Pipeline Companies' Brief at 71-81. *See also* Plaintiffs' Brief at 31-34.

The Master apparently agrees that the First Use Tax is discriminatory. After discussing the interplay between the First Use Tax and the Severance Tax Credit, La. R.S. 47:647, he concluded that the taxing scheme "obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana." Report at 34. Similarly, he found that, as a result of the tax credit to Louisiana utilities and direct consumers of gas subject to the First Use Tax, La. R.S. 47:11, "Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in the whole or in part from the incidence of the tax which is passed on to consumers out of the state." *Id.* at 34. Nonetheless, the Master concluded that "it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing." *Id.* at 21. It is submitted that the Master's conclusion is premised on two errors.

The Master first erred in concluding that a hearing is needed to determine "what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other." *Id.* at 35. This misconstrues the law. The Court has never required an interstate business to adjust its prices or make allowances to its customers to rectify the competitive imbalance created by a state tax.

The Court has instead inquired whether the taxing scheme under consideration will operate, by its very terms, to discriminate against interstate commerce. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (rendered on appeal of judgment granting motion to dismiss). If such facial discrimination is found, no further inquiry is needed because *a fortiori* the tax must discriminate in operation.

The Master found that the tax discriminates on its face. That should have ended the inquiry. Instead, he recommends that a hearing be held to determine whether this facially unconstitutional statute can be saved by the actuality of its operations. No statute found to be facially discriminatory has heretofore been saved from invalidity by a consideration of its practical operations.

Clearly, no evidentiary hearing is required for the following determinations:

First, the tax discriminates against interstate commerce because it is imposed solely on gas originating outside Louisiana's boundaries. It thus discriminates in favor of the owners of gas produced within its borders, even though such gas is subject to the same activities defined in the statute as "uses."[18] *Philadelphia v. New Jersey*, 437 U.S. 617, 626-627 (1979). *See* Pipeline Companies' Brief at 71-75. *See also* Plaintiffs' Brief at 32-34.

Second, the First Use Tax, in conjunction with the Severance Tax Credit, discriminates against interstate commerce because the credit effectively eliminates the economic burden of the tax on owners of outer continental shelf gas who also produce natural resources in Louisiana, thereby discriminating against the pipelines which do not engage in such production. *See* Pipeline Companies' Brief at 76-78. *See also* Plaintiffs' Brief at 34.

Third, the First Use Tax in conjunction with the tax credit for in-state electric and natural gas utility service and various exemptions for in-state uses of gas otherwise subject to the tax, La. R.S. 47:1303(a), discriminates against interstate commerce by imposing the entire economic burden of the tax on consumers in other states. *See* Pipeline Companies' Brief at 78-81;

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[18] For example, gas produced two miles offshore, in Louisiana waters, is not subject to the tax, while gas produced four miles offshore, from the federal outer continental shelf, is subject to the tax, notwithstanding that the gas in each case is brought onshore, is subjected to the same activities and imposes exactly the same alleged burdens on the State of Louisiana.

See also Plaintiffs' Brief at 34. As a result, local gas consuming industries will enjoy a competitive advantage over such industries located in other states.[19] *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 456-457 (1940); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 334 n.13 (1977).

The Master also erred in concluding that an evidentiary hearing is needed because "the 'actuality of operation' may show that the tax is a 'compensating' tax intended to complement the state severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)." Report at 35. However, no such evidentiary hearing is needed. As is obvious from an examination of the respective statutes, the First Use Tax cannot "complement" the state severance tax as a matter of law.

The traditional use tax complements a sales tax by insuring that the same activities, purchases at retail, will be subject to an equal tax burden regardless where the purchase is made, thereby placing the same in-state and out-of-state activities on an equal competitive footing. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937); *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 347-348 (1944).

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[19]For example, Company A, located in Louisiana, manufactures a product in competition with Company B, located in another state. Both companies annually consume 10,000,000 mcf of natural gas produced from the outer continental shelf in their operations. Because of the First Use Tax, Company B will have increased expenses of $700,000, but Company A will suffer no increase in expenses by virtue of the First Use Tax. The competitive disadvantage suffered by Company B, solely because of the Louisiana tax, is obvious.

By contrast, the First Use Tax cannot be considered a "compensating" tax with respect to the state severance tax, since the activities taxed by, and the situations of the taxpayers under, the two taxes are radically different.[20] Under Louisiana's theory, the First Use Tax is imposed on federal outer continental shelf gas when it is first subjected to one of the activities defined as "uses" in the statute; whereas the severance tax is imposed on Louisiana gas as a result of the severing of such gas from the soil or water-bottoms within the state.

Moreover, the severance tax is "an excise tax upon the privilege of severing resources" from within Louisiana's borders, and is premised upon the State's "inherent power . . . to regulate the severance of its natural resources." *State v. Standard Oil Co. of Louisiana*, 178 So. 601, 610, 626 (La. 1938). The first Use Tax, on the other hand, is imposed to compensate Louisiana for the alleged costs incurred by the state in providing services and support to the outer continental shelf gas pipeline industry and the alleged environmental damage caused to the state coastal areas by such industry. La. R.S. 47:1301C.

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court articulated the test for the validity of a use or compensating tax:

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[20]If the First Use Tax were a true compensating tax with respect to the severance tax, and as such, a tax on the privilege of severing resources from the outer continental shelf, it would be the sort of tax expressly prohibited by the OCSLA. *See* pp. 22-23, *supra*.

> Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. 373 U.S. at 70.

Under *Halliburton*, a prerequisite for the validity of a compensating tax is the existence of similarly situated taxpayers under each taxing scheme.[21] In the instant case, there is no similarity whatever between the taxpayers under the First Use Tax and the severance tax, and the two taxes cannot be complementary. Just as the Court in *Halliburton* found it impermissible to justify the imposition of a use tax by comparing the activities of a manufacturer-user to those of a user purchasing at retail, 373 U.S. at 71-72, Louisiana cannot legally justify the imposition of the First Use Tax by comparing the activities of the pipeline companies in transporting federal outer continental shelf gas to the production activities of in-state producers of gas and other minerals.[22]

Even if the First Use Tax could properly be considered as compensating for the severance tax, it is clear that the taxing scheme represented by the First Use Tax and its companion statutes does not so

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[21]Of course, *Halliburton* also requires equal treatment of similarly situated taxpayers. Since the taxpayers are not similarly situated in the present case, it is not necessary to consider whether they have been given equal treatment.

[22]The true similarity of situation for severance tax purposes is that existing between producers of outer continental shelf gas and producers of Louisiana gas. However, by the terms of the statute itself, the piplines are prohibited from obtaining reimbursement of their tax payments from the federal outer continental shelf gas producers from whom they buy their gas. La. R.S. 47:1303C.

compensate. A tax compensates for another tax when it eliminates a competitive imbalance which would otherwise exist. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). This is the supposed reason why the First Use Tax is not imposed on Louisiana-produced gas. However, the Severance Tax Credit and the various credits and exemptions for in-state consumers are not addressed to a supposed need for equalization; rather, they create a prohibited economic imbalance.

The Severance Tax Credit effectively relieves producers of Louisiana natural resources, which also own federal outer continental shelf gas subject to the First Use Tax, of the economic consequences of their First Use Tax obligation. It therefore creates an economic advantage in favor of one class of outer continental shelf gas owners (the producers), to the disadvantage of another class of outer continental shelf gas owners (the pipeline companies). Similarly, the various credits and exemptions for in-state consumers create an economic advantage for Louisiana residents and industries, by effectively shielding them from the impact of the tax.

In the final analysis, the taxing scheme formed by the First Use Tax and its companion statutes represents Louisiana's attempt to use its favored position as a coastal state to obtain revenues exclusively from the citizens of other states. Louisiana clearly is prohibited from thus "project[ing] the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940). Moreover, this is precisely the kind of tax which invites retaliatory taxation by other states and which the Commerce Clause was designed to prevent. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318

(1977); *Austin v. New Hampshire*, 420, U.S. 656, 662 (1975).

V.

NO EVIDENTIARY HEARING IS NEEDED TO HOLD THAT THE FIRST USE TAX CREATES THE RISK OF MULTIPLE TAXATION.

The Master rejects the claim that the First Use Tax exposes the pipeline companies to the burden of multiple taxation and therefore violates the Commerce Clause. Report at 35-37. He recognizes that "the tax is on the total amount of natural gas within the State and subject to use there," but nevertheless asserts:

> Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved. *Id.* at 35, 36.

In so urging, the Master ignores the First Use Tax's "beggared" nature of definition of "use." *Cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 161 (1954). Unlike severance and use taxes where the taxable event can occur only once, so that taxing the total amount of the commodity does not create a risk of multiple taxation, there is no such limitation upon the occurrence of non-consumptive "uses" as defined in the First Use Tax. To the contrary, the gas subject to the tax unavoidably is subjected to "uses" as defined in the statute in one or more of the several states which it traverses during its interstate journey beyond Louisiana to the ultimate consumers. *See* Pipeline Companies' Brief at 64-65.[23]

Accordingly, the First Use tax fits squarely within the holding of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). In that case, Texas had imposed a tax on "gathering" gas measured by the entire volume of gas "taken," and the taxable incident was the pipeline company's taking of the gas from the outlet of a processing plant in Texas for immediate interstate transmission. The Court set the tax aside as impermissible under the Commerce Clause for the reason, *inter alia*, that it would permit a multiple burden upon interstate commerce:

> for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. 347 U.S. at 170.[24]

Since, as just indicated, the pipeline companies, in the normal course of their operations, subject the gas to "uses" in states other than Louisiana, no evidentiary hearing is necessary to justify the conclusion that under *Calvert*, the tax exposes the pipeline companies to the risk of multiple taxation.

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[23]In addition to transporting gas in interstate commerce, the pipeline companies typically sell it to distribution companies to which they transfer possession and/or relinquish control at the point of delivery. These activities embody a number of "uses" as defined in the statute.

[24]The Court has expressly reaffirmed this facet of *Calvert* in *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 749 n.18 (1978).

The Master discusses, but misconstrues *Calvert.* After noting that most of the activities defined as "uses" in the statute are "too intimately connected with interstate commerce to survive," Report at 36, the Master declines to recommend that the tax be declared unconstitutional because he believes that there is a "dispute" between the parties concerning the legal significance of processing which requires an evidentiary hearing to resolve. *Id.* at 37.

However, no evidentiary hearing is needed because, as a matter of law, processing is merely another aspect of the transportation of the gas from the wellhead to the burner tip and does not interrupt the continuous flow of the gas. *Deep South Oil Co. v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957). *See also* pp. 21-22, *supra.*

CONCLUSION

For the foregoing reasons the Court should reject the recommendation of the Special Master that the motions for judgment on the pleadings should be denied. Instead, the Court should hold (1) that Louisiana's First Use Tax is void on its face under the Supremacy Clause for infringement upon the pervasive federal regulatory schemes provided by Congress in the Natural Gas Act, the Natural Gas Policy Act, the Outer Continental Shelf Lands Act, and the Coastal Zone Management Act, and (2) that the tax is void on its face under the Commerce

Clause because it unlawfully discriminates against interstate commerce in favor of local interests and improperly exposes the pipeline company taxpayers to the risk of multiple taxation.

Respectfully submitted,

FRANK J. PERAGINE
H. PAUL SIMON
THOMAS R. BLUM
JAMES A. BURTON
JEROME K. LIPSICH

Attorneys

C. MCVEA OLIVER
J. MICHAEL RHYMES
STEVEN G. DURIO

Attorneys

WILLIAM W. BRACKETT
DANIEL F. COLLINS

Attorneys

ARTHUR J. WEACHTER, JR.
HERSCHEL L. ABBOTT, JR.
EDWARD H. BERGIN

Attorneys

GENE W. LAFITTE
JOHN M. WILSON
DEBORAH BAHN PRICE

Attorneys

ERNEST L. EDWARDS
GEORGE FRAZIER
MARGARET R. TRIBBLE
DEBORAH F. ZEHNER

Attorneys

BURT W. SPERRY
JAMES H. NAPPER, II

Attorneys

MELVIN RICHTER

Attorney

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