Number 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

On Report of the Special Master
Dated September 15, 1980,

REPLY OF STATE OF LOUISIANA TO EXCEPTIONS AND SUPPORTING BRIEF OF THE PLAINTIFF STATES

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This Court has afforded the State of Louisiana the opportunity to reply to the exceptions and supporting brief filed by the plaintiff States, with reference to the Special Master's recommendation that the plaintiffs' motion for judgment on the pleadings be denied.

RULES INVOLVED

Supreme Court Rule 9.2

The form of pleadings and motion in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.

Federal Rule of Civil Procedure 12(c)

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The procedural story of the plaintiffs' motion for judgment on the pleadings is a short one.

On September 18, 1979, after the complaint and answer had been filed, the plaintiff States filed a motion for judgment on the pleadings, with supporting brief. On October 22, 1979, the State of Louisiana filed a document combining (1) its motion to dismiss the complaint, and supporting brief, and (2) its brief in opposition to the plaintiffs' motion for judgment on the pleadings.

Shortly thereafter, on November 5, 1979, the seventeen pipeline taxpayers filed in this Court a motion for leave to file their own motion for judgment on the pleadings, with supporting brief. The Special Master did not address these two taxpayer motions and made no recommendations concerning them. Because the taxpayers have not been granted leave to file their motion for judgment on the pleadings, the State of Louisiana has deemed it premature to respond to that motion.

Sometime earlier, on August 28, 1979, the seventeen pipeline companies had filed in this Court a "Motion for Leave to Intervene as Plaintiffs and to File Complaint, Brief in Support of Motion and Complaint of Intervenors." The State of Louisiana promptly filed its opposition to that motion. The matter was subsequently dealt with by the Special Master. In his Report dated May 14, 1980, the Special Master recommended that this intervention motion of the pipeline companies be granted, but made no decision on their motion to file a complaint. The intervention issue is now before this Court on Louisiana's exceptions to the May 14 Report of the Special Master.

It has never been entirely clear whether the pipeline companies, as putative intervenors, seek merely to support the plaintiff States' motion for judgment on the original pleadings, or whether they also seek some sort of judgment on the basis of the complaint in intervention that they have sought to file. This ambivalence became most evident when the pipeline taxpayers, on November 14, 1980, filed a motion in this Court for leave to file exceptions to the Special Master's Report of September 15, 1980, which recommended denial of the plaintiff States' motion for judgment on the original pleadings. This latest motion by the putative intervenor-taxpayers was accompanied by five exceptions and a supporting brief. The taxpayers' motion asserts (at 3) that although the September 15 Report of the Special Master "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." Unanswered is the question whether the pipeline companies' tendered exceptions and arguments are directed primarily or in substantial part to the Special Master's "in effect" denial of the pipeline companies' tendered but unaccepted motion for judgment on their own pleadings.

The position of the United States (and the Federal Energy Regulatory Commission) respecting the pending motion of the plaintiff States has also been procedurally confusing. Early on, in June of 1979, the United States and the Commission filed a brief *amici curiae* in support of the plaintiff States' motion to file their complaint. This Court granted leave to file on June 18, 1979.

Following the filing of the plaintiffs' motion for judgment on the pleadings, the United States and the Commission filed on November 20, 1979, a brief *amici curiae* in support of plaintiffs' motion. The State of Louisiana duly responded to that *amici* brief.

When this Court appointed the Special Master, it referred to him the plaintiffs' pending motion for judgment on the pleadings. Before the Special Master, the United States and the Commission continued to support that motion. But their status as proponents of the motion seemingly changed when the Special Master, in his first Report, recommended that the United States and the Commission be allowed to intervene as parties plaintiffs and to file their complaint in intervention. That recommendation has yet to be accepted by the Court.

When the Special Master filed his second Report on September 15, 1980, recommending denial of the plaintiffs' motion, the United States and the Commission duly filed an "Exception and Brief in Support of Exception," a document now before this Court. The sole exception was to the Report of September 15 insofar as it "recommends that the plaintiffs' motion for judgment on the pleadings be denied."

The Solicitor General has subsequently realized the United States and the Commission are not presently intervening party-plaintiffs to this case so as to entitle them to file such an "Exception" to the September 15 Report. Under date of November 15, 1980, the Solicitor General has asked the Court to ignore the "Exception" and to treat the supporting brief as another submission *amici curiae.*

Out of this procedural history, the State of Louisiana can deduce that the only motion for judgment on the pleadings before this Court at this time is the motion filed by the plaintiff States on September 18, 1979 — which was the motion addressed by the Special Master in his second Report. The State of Louisiana further assumes that the only viable exceptions to the Special Master's recommended denial of that motion are those specified by the plaintiff States. The arguments of the other putative intervenor-plaintiffs are to be viewed as submitted either on requested leave of Court or on an *amici* basis.

ARGUMENT

I.

THE JURISDICTIONAL AND PRUDENTIAL PROBLEMS ABOUNDING IN THE REQUESTED JUDGMENT ON THE PLEADINGS WARRANT DISMISSAL OF THE COMPLAINT

Once again the jurisdictional and prudential problems that plague the plaintiff States' complaint have been dramatically exposed. The efforts of the plaintiff States to secure from this Court a summary-type judgment, inuring to the benefit of private taxpayers, underscore the propriety and advisability of granting the State of Louisiana's motion to dismiss the complaint.

Nowhere are these problems more evident than in the exceptions and briefs filed with reference to the Special Master's recommendation that the plaintiffs' motion for judgment on the pleadings be denied, albeit without prejudice to later renewal. The documents filed by the plaintiff States and the putative intervenor-plaintiffs reveal a remarkable confluence of (a) identical constitutional issues, (b) identical factual statements,[1] and (c) identical supporting arguments. And, under the aegis of the plaintiff States' complaint, these identical considerations are combined in support of all the declaratory, injunctive and tax refund relief that the private pipeline taxpayers could possibly seek or desire.

There can be no mistake about the nature and the import of the judgment on the pleadings that the plaintiff States, the United States (and the Federal Energy Regulatory Commission), and the private pipeline taxpayers so assiduously seek. One need look no further than the final paragraph of the plaintiff States' brief (at 40-41) in support of their exceptions to be reminded that this entire original proceeding, from the complaint to the requested judgment on the pleadings, is directed to three major ends:

(1) A declaratory judgment by this Court that the Louisiana First Use Tax statute is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;

(2) A permanent injunction, to be issued by this Court, "prohibiting the defendant [State of Louisiana] and its agents and employees from collecting the First Use Tax" with respect to such natural gas; and

(3) An order by this Court "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate commerce be refunded *to the taxpayers* together with interest earned thereon." Supporting brief of plaintiff States at 40 (emphasis added).

Such is the nature of the judgment that the plaintiff States

[1]See, e.g., the statement in footnote 3, page 7, of the pipeline companies' brief in support of their profferred exceptions: "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."

would have this Court enter. Such is also the nature of "the plaintiffs' motion for judgment on the pleadings" that the United States and the Federal Energy Regulatory Commission urge "should be granted." Brief of United States and FERC tendered on behalf of exception, at 42. More importantly, such is also the substance and effect of the judgment on the pleadings that the private pipeline taxpayers, as putative intervenor-plaintiffs, would have this Court enter. Apparently satisfied that the judgment sought by the plaintiff States will insure a tax refund and an injunction against further tax collection, the pipeline taxpayers seek to file their own motion for judgment on the pleadings that would have this Court simply hold (a) that Louisiana's First Use Tax is "void on its face" under the Supremacy Clause, and (b) that the tax "is void on its face" under the Commerce Clause.[2]

A. Jurisdictional consequences

From this tripartite melange of coordinated objections to the recommended denial of the plaintiffs' motion for judgment on the pleadings emerge two of the major jurisdictional and prudential considerations suggested in Louisiana's pending motion to dismiss. First, the judgment that this Court is being asked to

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[2]Motion of pipeline companies for leave to file exceptions to the Report of the Special Master, exceptions, and brief in support thereof, at 38-39. This Court has not acted on that motion.

The pipeline companies err (Brief at 38) in referring to the Special Master's recommendation that the "motions" for judgment on the pleadings should be denied. The Special Master addressed only the motion filed by the plaintiff States. He did not address the pipeline companies' earlier motion for judgment on the pleadings, a motion which the companies now seek to renew before this Court. Perhaps this erroneous reference to plural motions having been considered by the Special Master reflects the statement in the pipeline companies' pending motion to file exceptions to the September 15 Report (at 3) that "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." In other words, the pipeline companies seek to file exceptions to something that the Special Master did not do in fact but only "in effect."

render is one tailored by the plaintiffs for the exclusive benefit of the pipeline taxpayers. Despite their claimed injuries as consumers and *parens patriae* for consumer citizens, the plaintiff States seek no remedy or relief in the requested judgment that would directly alleviate their alleged injuries. There is no prayer that this Court order that credits be made on the consumers' gas bills, or that the taxpayers be enjoined from further passing on the cost of the First Use Tax. The entire complaint, including the prayers for relief and the requested judgment thereon, is constructed on the notion that if the private taxpayers are relieved from the burden of the Louisiana tax, and if the private taxpayers are awarded tax refunds, the beneficial consequences will eventually trickle back to the consumers. Presumably, the consumers would then be given certain credits or rebates on their gas bills, and future billings would not reflect the cost of the First Use Tax that the pipeline companies have seen fit to pass on to them.

At the same time, it seems clear that the plaintiff States could obtain precisely the same trickle-down relief from their consumer complaints if the pipeline taxpayers prevail in their pending tax refund suit in Louisiana. There the taxpayers are seeking — as are the plaintiffs in this Court — a declaration of the invalidity of the First Use Tax and a resulting refund of taxes paid. If the taxpayers secure that refund in the Louisiana courts, the consumer interests of the plaintiff States would be fully satisfied, subject only to the appellate review powers of this Court.

Thus the critical thrust of the judgment here sought is an order directing that all revenues collected by Louisiana pursuant to the First Use Tax statute be refunded to the seventeen pipeline taxpayers, who are not formal parties to this proceeding.[3] That fact,

[3]Cf. *South Dakota v. North Carolina*, 192 U.S. 286, 320, 321 (1904), where the Court took note of the constitutional principle that this Court "has no jurisdiction in any case where it cannot render judgment in the legal sense of the term," and further noted "the difficulty of enforcing a judgment for money against a state by reason of its ordinary lack of private property subject to seizure upon execution." See also *Virginia v. West Virginia*, 246 U.S. 565 (1918).

made so evident by the present exceptions and briefs, transforms this proceeding into one outside the pale of this Court's original jurisdiction. The plaintiff States are seeking to invoke and use the original powers of this Court to prosecute the purely personal tax refund claims of the pipeline companies, intending thereby to obtain some indirect and derivative benefits. This Court's original jurisdiction evaporates once it becomes apparent, as is true here, "that the name of the state is being used simply for the prosecution in this court of the claim of the railroad company [or the pipeline companies in this instance], and our original jurisdiction cannot be maintained." *Kansas v. United States*, 204 U.S. 331, 341 (1907). See also *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938); *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277, 289 (1911).

There are still more jurisdictional complications evident from the judgment that the plaintiff States ask this Court to enter. This is something more than a patent attempt by the plaintiffs to volunteer to secure a judgment for the benefit of private taxpayers. It is also a patent attempt by the private taxpayers (a) to use the plaintiff States as surrogates for securing the collection of their tax refunds, and (b) to inject themselves and their personal tax interests into this original proceeding. Not content merely to express their interests and concerns, the pipeline taxpayers have sought to intervene as party plaintiffs, to file their own "complaint in intervention" pursuant to the original jurisdiction of this Court under Article III, to file their own motions for judgment on their pleadings, and to file exceptions to the second Special Master's Report on the theory that he "in effect" denied their first motion for such a judgment.

Never before in this Court's original jurisprudence has there been such candid evidence of an effort by private citizens — the real taxpaying parties in interest — to seek redress in this Court for their tax grievances against a sovereign State. The Eleventh Amendment flatly bars any such suit "commenced or prosecuted against one of the United States by Citizens of another State." See *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North*

Dakota v. Minnesota, 263 U.S. 365 (1923). That result follows whether this proceeding be viewed as one in the name of the intervenor-plaintiffs or one in the name of the plaintiff States as volunteers for those private tax refund claimants. The plaintiff States simply have no standing or faculty to make an imperative demand upon a sister State that it pay the tax refund claims allegedly owed to private citizens. *New Hampshire v. Louisiana, supra.* 108 U.S. at 90-91.[4]

The *New Hampshire* ruling adds yet another dimension to the jurisdictional morass in this case. In speaking of situations where the private citizen has some alternative method of pursuing his claims against a State (as is certainly true here), the Court remarked that its original jurisdiction need not be invoked

> . . . except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. . . . Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant.

Thus the availability of the tax refund procedure in Louisiana, where the taxpayers can fully litigate the constitutionality of the

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[4]The pipeline companies have suggested that Louisiana may have waived its Eleventh Amendment immunity to original suits brought in this Court by private citizens of another state by enacting LA-R.S. 47:1576. It is dubious whether a state can waive its immunity with respect to original actions. But the cited Louisiana statute by its terms constitutes a consent only to the institution of suits in state or federal courts for adjudication of suits to recover taxes paid under protest. See *United Gas Pipe Line Company v. Whitman*, 595 F.2d 323 (5th Cir. 1979). The proposed complaint of the pipeline companies, however, does not seek recovery of the first use taxes paid under protest.

tax in question and their claims for refund, puts the final nail in the jurisdictional coffin of this purported original proceeding.

B. Prudential consequences

The exceptions and briefs relative to the recommended denial of the plaintiffs' motion highlight still another major justification for dismissing the complaint. That justification, prudential in nature, is epitomized by the ruling in *Arizona v. New Mexico,* 425 U.S. 794, 797 (1976), discussed at length in Louisiana's brief (at 22-29) in support of its exceptions to the Special Master's recommendation that the motion to dismiss be denied. In *Arizona* the Court held that exercise of its original jurisdiction should be declined whenever a

> . . . pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. [emphasis in original]

No one disputes the pendency of a forum in Louisiana in which the real parties in interest, the pipeline taxpayers, may pursue their tax refund claims. Nor is there any denial of the fact that this Court has previously determined that this particular Louisiana tax refund procedure is "an adequate remedy to the taxpayer," making it inappropriate for any federal court to intervene in a Louisiana tax controversy. *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 301 (1943).

Indeed, there has yet to be any denial of the fact, which is critical in applying the *Arizona* prudential doctrine, that the Louisiana procedure provides a forum in which "the *issues* tendered here may be litigated." But if there be any lingering doubts on that score, they are dissipated by the demonstration before this Court of the total identity of the issues tendered here by the plaintiff States and the issues being raised and tendered by the pipeline taxpayers in their tax refund suit in Louisiana. Every issue being tendered here will be litigated and resolved in that tax refund suit, as shown by the following comparison of issues tendered here with issues to be litigated in the Louisiana tax refund procedure.[5]

Issues tendered here by various parties	Issues to be litigated in tax refund suit
1. The plaintiffs, the United States and the pipeline companies all assert the invalidity of the Louisiana First Use Tax under the Supremacy Clause. All parties cite and rely upon the Natural Gas Act and the Natural Gas Policy Act of 1978 in this connection, but only the plaintiffs and the pipeline companies include the Outer Continental Shelf Act and the Coastal Zone Management Act in their supremacy claims.	1. The pipeline companies have asserted and are litigating the invalidity of the Louisiana First Use Tax under the Supremacy Clause. The pipeline companies cite and rely upon all four federal statutes used by the plaintiffs in this Court in support of their supremacy claims.
2. The plaintiffs, the United States and the pipeline companies all assert the invalidity of the Louisiana First Use Tax under the Commerce Clause in two respects: (a) unlawful discrimination against interstate commerce; (b) lack of apportionment and risk of multiple taxation.	2. The pipeline companies have asserted and are litigating the invalidity of the Louisiana First Use Tax under the Commerce Clause on precisely the same two grounds tendered by all parties in this Court.

[5]The issues tendered in this Court by the plaintiffs, as well as by the putative intervenors, are evidenced by the complaint filed in this Court by the plaintiff States and by the complaints in intervention that the United States and the pipeline companies seek leave to file. The plethora of exceptions and supporting briefs that the plaintiffs and would-be plaintiffs have filed or sought to file, with reference to the Special Master's recommendation that the motion for judgment on the pleadings be denied, provide the fullest demonstration of the issues being tendered to this Court.

As to the issues being tendered by the pipeline companies in their tax refund suit in Louisiana, see the complaint filed in that case. The complaint is reproduced as an appendix to the Brief of State of Louisiana in Response to Brief for the United States and the Federal Energy Regulatory Commission as

It is significant that, as revealed in the exceptions and briefs now before this Court, the issues being tendered by the plaintiff States are indistinguishable from those being tendered on behalf of the putative intervening taxpayers. The plaintiff States have tendered no separate issues here that will escape litigation in the tax refund suit. And because the consumer interests and concerns expressed here by the plaintiff States are derivative from the pipeline taxpayers' interest and concerns in upsetting the Louisiana First Use Tax, there can be no question as to the adequacy of the taxpayers' representation of those derivative interests in pursuing their tax refund litigation.

In summary, the exceptions and brief filed herein by the plaintiff States nowhere assert or demonstrate that their tendered constitutional issues and their derivative consumer interests cannot or will not be advanced and resolved in the Louisiana litigation. Nor do the aggrieved pipeline taxpayers anywhere assert that the issues being tendered in this Court by the plaintiffs are so different from those the taxpayers are advancing in the tax refund suit that their tax grievances cannot be fully resolved in this original proceeding. Indeed, the only given reason for the taxpayers' campaign to participate fully in this proceeding as intervenor-plaintiffs is not to assert any different issues but to present a "different perspective" on the issues already tendered by the plaintiff States.[6]

This Court need not exercise its original jurisdiction merely to allow private citizens to express a "different perspective" on issues tendered here by surrogate State plaintiffs. The availability and adequacy of the state court forum to resolve all perspectives of the constitutional issues at stake reinforce the applicability of the *Arizona* prudential principle. Nothing said in the present exceptions and briefs casts doubt on such applicability.

Amici Curiae, at A-1 to A-11, filed in this Court (with a gray cover) on December 5, 1979.

[6]See Motion of pipeline companies for leave to file exceptions to the Report of the Special Master, exceptions, and brief in support thereof, at 3, 4, 7 (filed November 14, 1980). But see footnote 2, *supra*.

II.

THE MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED

The plaintiffs' motion for judgment on the pleadings need be addressed only if the Court disagrees with Louisiana's position that dismissal of the complaint is warranted by the jurisdictional, standing and prudential considerations set forth in Louisiana's motion to dismiss.

The Special Master's Report of September 15, 1980, recommends that the motion for judgment on the pleadings "be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings." Second Report of the Special Master, at 38.[7] For a variety of reasons, that recommendation should be accepted by the Court. The proponents of the motion have not met the extremely high burden of demonstrating the utility and propriety of such a summary procedural device in this case. This is, after all, a major piece of constitutional litigation brought in the context of this Court's original jurisdiction.

A. Impropriety of the motion in constitutional litigation

This Court's Rule 9.2 states that, where appropriate, the Federal Rules of Civil Procedure "may be taken as a guide to procedure in original actions in this Court." *Utah v. United States*, 394 U.S. 89, 95 (1969).[8] And since the plaintiffs saw fit to employ the procedural device known as a motion for judgment

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[7]The Special Master does not explain how "further proceedings," presumably evidentiary in nature, could make it any more appropriate or possible, than it now is, to grant a motion for judgment premised solely on the pleadings now on file.

[8]But the Court has warned that procedures governing the exercise of its original jurisdiction "are not invariably governed by common-law precedent or by current rules of civil procedure." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

on the pleadings, the relevant Civil Rule becomes Rule 12(c), which in pertinent part reads:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The plaintiff States' motion for judgment on the pleadings, like its supporting brief, does not cite or mention Civil Rule 12(c) and does not attempt to show compliance with the accepted standards for granting a Rule 12(c) motion. The plaintiffs' pending exceptions and supporting brief, relating to the recommended action on the motion, are equally devoid of any recognition of or reliance on the Rule 12(c) requirements. Nor do plaintiffs claim that it is inappropriate in this original setting to follow the standards of Rule 12(c).

The Rule 12(c) standards can be more easily stated than satisfied.[9] Federal courts, including this Court, have traditionally followed "a fairly restrictive standard in ruling on motions for judgment on the pleadings." 5 C. Wright & A. Miller, *Federal Practice and Procedure*, §1368 at 689 (1969). Thus a motion by a plaintiff for judgment on the pleadings can be granted only where the complaint states a cause of action and where the

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[9]We do not pause to consider whether the plaintiffs' motion was premature under the first clause of Rule 12(c), which makes the motion timely only after the pleadings are closed. In this case, the Special Master has recommended that at least three other groups be allowed to intervene as plaintiffs and to file their own complaints - the State of New Jersey, the United States and FERC, and the seventeen pipeline companies. The defendant, the State of Louisiana, has not had any opportunity to answer those additional complaints. But until answers are filed, are the pleadings "closed" for purposes of Rule 12(c)?

Professors Wright and Miller have written: "Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and answer, unless a counterclaim, cross-claim, or third-party claim is interposed, in which event the filing of a reply, cross-claim answer, or third-party answer normally will mark the close of the pleadings." 5 C. Wright and A. Miller, *Federal Practice and Procedure*, §1367 at 687 (1969). See also *Dorgan v. International Harvester Co.*, 585 F.2d 1380 (8th Cir. 1978); *Edelman v. Locker*, 6 F.R.D. 272 (E.D.Pa. 1946); *Van Dyke v. Broadhurst*, 28 F.Supp. 737 (D.Pa. 1939), all holding that a motion for judgment on the pleadings is premature where the opposing party has had no opportunity to file an answer.

defendant's answer fails as a matter of law to controvert at least one material allegation.[10] Put differently, the motion

> ... is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice. The motion ... only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.
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> 5 C. Wright and A. Miller, *Federal Practice and Procedure,* §1367 at 685 (1969)

Thus it has become established that, in determining the appropriateness of granting a judgment on the pleadings under Rule 12(c), all reasonable allegations of fact in the non-mover's pleading are assumed to be true, while the contravening allegations in the movant's pleading are deemed false. As was said in *Beal v. Missouri Pacific R.R. Corp.,* 312 U.S. 45, 51 (1941), "[u]pon such a motion denials and allegations of the answer which are well pleaded must be taken as true." See also *Clark v. Allen,* 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States,* 323 U.S. 454, 456-57 (1945); *Postal Telegraph-Cable Co. v. City of Newport,* 247 U.S. 464, 474 (1918). And in the modern era of notice pleading, it becomes particularly appropriate to insist that the defendant's answer, if its assumed truth is to be turned into the basis for an adverse judgment on the merits, must be unequivocal in its admission of all material allegations of fact. Any more lax or imprudent standard for use of this summary procedure would violate "the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his claim or defense." 5 C. Wright and A. Miller, *Federal Practice and Procedure,* §1368 at 690 (1969).

Suffice it to say at this juncture that the plaintiff States have simply not addressed their burden of proving their entitlement to

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[10]See Moore, "Expropriation of the Texas "*Tidelands*" by Judicial Fiat," 3 Baylor L.Rev. 130, 147 (1951).

a judgment under Rule 12(c). They have yet to point to a single material fact alleged in the complaint that the answer of the State of Louisiana admits or fails to deny. Neither this Court nor the Special Master has been advised by the plaintiffs what facts have been alleged *in the complaint* that Louisiana has admitted *in its answer* that are material and decisive in terms of the constitutional issues at stake. All that the plaintiffs have contributed on this point to date is the following statement in their original motion for judgment on the pleadings (at 39-40):

> It is true that the answer of the defendant State of Louisiana contains pro forma denials or contradictions of material allegations of the complaint and that it asserts that "many factual controversies have been raised by the pleadings." Answer ¶ LXX. None of these mock denials, contradictions, or assertions, however, prevents the entry of judgment on the pleadings because it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice ... [citing authorities relative to the use of judicial notice on motions for judgment on the pleadings] .... Thus, although judgment on the pleadings is not appropriate if a material issue of fact exists, federal courts "have been firm in requiring that the issues be genuine and not based on mere pro forma denials or sham or patently false assertions in the pleadings." 5 C. Wright and A. Miller, Federal Practice and Procedure: Civil §1368, at 696 (1969).

Aside from its perjorative nature, the position of the plaintiff States appears to be that a judgment on the pleadings can be had by reference solely to matters outside the pleadings, as to which the defendant has no opportunity to admit or deny in the answer. But judgment pursuant to Rule 12(c), as noted above by Professors Wright and Miller, "can be achieved by *focusing on the content of the pleadings* and any facts of which the court may take judicial notice ... [and] only has utility when all material allegations of fact *are admitted in the pleadings* and only questions of law remain" (emphasis added). See page 16, *supra*.

The plaintiffs' theory of a Rule 12(c) judgment would shift the focus of the search for admissions of material allegations of fact from the pleadings to three outside factors: (a) the facial wording of the statutes involved; (b) facts and other matters of judicial notice or common knowledge; and (c) facts or other matters that have "already [been] found authoritatively by this Court." A defendant intent on denying all material fact allegations that the plaintiff might pluck from the bottomless fount of common knowledge, to say nothing of the bounty of authoritative decisions by this Court, would indeed face a Sisyphean task. It would be a task not unlike that faced by the State of Louisiana in being told by the plaintiff States that it has in effect admitted all conceivable readings of the First Use Tax statute that would render it invalid, all facts of judicial notice and common knowledge that would support a finding of invalidity, and all readings and interpretations of prior precedents that support the plaintiffs' versions of constitutional facts concerning transmission of natural gas.

Not unsurprisingly, use of such an unprincipled and un-limited structuring of a Rule 12(c) motion finds no recorded precedent in federal practice. Rarely can a judgment be entered solely on the basis of undeniable facts of judicial or common knowledge, with or without supporting "authoritative" judicial precedents.[11] But if such situations be possible, major constitutional adjudication is not one of them. Constitutional issues of high public importance should not and dare not be resolved in the cavalier manner suggested by the plaintiff States' motion, or in accordance with what the Special Master described as "a generous application of

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[11]The plaintiff States at no time have indicated or specified the facts as to which judicial notice should be taken in this case. Cf. Rule 201(e) of the Federal Rules of Evidence, entitling the adverse party to an opportunity to be heard, upon timely request, "as to the propriety of taking judicial notice and the tenor of the material noticed."

This Court has warned that the doctrine of judicial notice must not be turned "into a pretext for dispensing with a trial." *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 302 (1937); *Garner v. Louisiana,* 368 U.S. 157, 173 (1961). See also 9 Wigmore on Evidence, §2567 (3d ed. 1940).

judicial notice." Second Report of the Special Master, at 21.

Indeed, it is questionable whether even a properly conceived Rule 12(c) motion, focused primarily on the pleadings, is an appropriate vehicle for assessing issues of great economic importance, particularly those of constitutional dimensions. This Court has recognized that summary-type judgments are seldom proper in cases involving large public concerns.

> Judgments on issues of public moment based on such evidence [affidavits], not subject to probing by judges and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment.
> *Eccles v. Peoples Bank,*
> 333 U.S. 426, 434 (1948)

These sentiments were repeated in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), a case dealing with an attempt by summary judgment motion to secure a determination that the parties were not covered by the Fair Labor Standards Act. In rejecting that attempt and in requiring that a full factual record be developed, the Court observed that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." 334 U.S. at 256-57.[12]

When the "issues of public moment" spring from a State's economic legislation, such as a tax, on what the State conceives to be a local "use" or incident having a significant nexus with its public concerns, two evidentiary principles control, especially in Commerce Clause litigation. First, there is a basic presumption

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[12]The Court also observed in *Kennedy* that, as is true here, the case came to it with a "welter of new contentions and statutory provisions" and with "a score of technical contracts" to be picked through, all without the Court's "full background knowledge of the dealings of the parties." 334 U.S. at 256.

of the "existence of factual conditions" supporting the constitutionality of the state legislation. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). Secondly, the burden of overcoming that presumption rests upon those who would challenge the constitutionality, necessitating proof that there is no state of facts possible that would sustain the legislation. *Id.*[13] See also *Southern Pacific R.R. Co. v. Arizona*, 325 U.S. 761 (1945); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978).

Supremacy Clause assaults on state legislation may also have critical factual predicates to prove or disprove. In determining what is federally supreme to a given state statute, there is "no one crystal clear distinctly marked formula ... [and] [o]ur primary function is to determine whether, *under the circumstances of this particular case*, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added); see also *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963). Such particular circumstances, in other words, may involve something more than merely reading and comparing the words of the federal and state statutes. They may well involve-as they do in this case-an examination of the factual circumstances bearing upon "the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

It would seem, then, that a Rule 12(c) motion is a particularly inappropriate way of determining whether the presumptively valid Louisiana First Use Tax can be invalidated. In its answer, Louisiana has denied every factual allegation in the complaint having any conceivable relation to the claim that the tax is un-

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[13]In the *Borden's Farm Products* case, the Court remanded the case for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law. 293 U.S. at 213.

See generally Note, "The Role of Constitutional Facts in Commerce Clause Litigation," 65 Iowa L.Rev. 1053 (1980).

constitutional. It has denied every conclusory allegation that the statute on its face, as written or applied, is unconstitutional either under the Commerce Clause or the Supremacy Clause. In other words, the State of Louisiana has taken every step possible-in its pleadings and in its briefs-to preserve its right to establish the "existence of factual conditions" underlying the validity of the First Use Tax, and to preserve its right to defend by facts and arguments its presumptively valid tax statute against the factual, legal and constitutional assaults leveled against it.

In that highly controverted state of the pleadings, it becomes inappropriate to assess the presumptive validity or the claimed invalidity of the tax statute from the pleadings alone, even adding a generous amount of judicial notice. A Rule 12(c) motion forces judge and counsel to abandon the adversarial search and development of the facts necessary to constitutional adjudication of modern economic legislation. The motion forces the adjudicator to find the essential constitutional facts, which are rarely alleged or admitted in the current practice of notice pleading, in sources outside the pleadings. The defendant's admissions of material allegations of fact, the procedural heart of a Rule 12(c) motion, must then be said to flow from the undeniable wording of the statutes involved, the undeniable matters of judicial and common knowledge, and the undeniable fact-findings made in earlier precedents in other contexts.

A Rule 12 (c) motion, in short, forces constitutional adjudication to become a exercise in non-adjudicative and non-evidentiary fact finding, at least where the material facts cannot be distilled from the pleadings.[14]

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[14]The very fact that the plaintiffs seek judgment on the alleged facial invalidity of the First Use Tax statute illustrates how remote they are from developing any adjudicative or constitutional facts in this case. They are relying, rather, upon legislative or non-evidentiary facts to prove that the statute violates both the Supremacy Clause and the Commerce Clause. Legislative facts are those that have relevance to legal reasoning and the lawmaking process, whether in the reading of the face of statutes, or in the formulation of legal principles, or in the rendition of rulings from sources of judicial knowledge, or in the enactment of legislation. See Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv.L.Rev. 364, 404-07 (1942); K. Davis, 2 Administrative Law Treatise §§3-8 (1979).

The Special Master tried valiantly to confine his recommendations within the evidentiary straitjacket of the Rule 12(c) motion. He found that "the facts disclosed in the complaint and answer do not, without more, require that the [Louisiana] act be invalidated on the basis of the Supremacy Clause." Second Report of the Special Master, at 21. And with respect to his recommended denial of the Rule 12(c) motion on the Commerce Clause claim, the Special Master relied heavily on the admonition in *Nippert v. Richmond*, 327 U.S. 416, 431 (1946), that state tax statutes are not to be assessed in a vacuum, that the statute's "practical consequences for the doing of interstate business in applications to concrete facts are our concern." Second Report of the Special Master, at 37. The Special Master seemingly implied that there were sufficient disputes over material facts concerning the application of the Louisiana First Use Tax in the Commerce Clause context to warrant denial of the Rule 12(c) motion. Within the limited framework of that rule, the Special Master's conclusions as to factual disputes in the pleadings are eminently correct.

But the Special Master, in recommending denial of the motion, was correct for an even more fundamental reason. A judgment as to the constitutional validity of a complex economic or tax statute, enacted by a sovereign State, should not be entered without a fuller development of facts than a Rule 12(c) motion normally allows. The development and the determination of adjudicative facts, subject to cross-examination, are the stuff of which constitutional adjudication is made.

This Court has quoted with approval a leading commentator's statement that Commerce Clause adjudication, like many other fields of constitutional litigation, depends in large part "upon the thoroughness with which lawyers perform their task in the conduct of constitutional litigation," and that constitutionality "is conditioned upon the facts, and to the lawyers the courts are entitled to look for garnering and presenting the facts." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. at 447 n.25.[15] The problem in this case is that a Rule 12(c) motion for judgment on the pleadings seems designed to inhibit rather than promote the development of facts so essential to constitutional adjudication. That alone mandates acceptance of the Special Master's recommendation that the Rule 12(c) motion be denied.

B. Impropriety of the motion in original actions

There is still another reason why the plaintiffs' motion for judgment on the pleadings should be denied. The inadequacy of a Rule 12(c) motion in promoting the development of facts in constitutional adjudication before any court is evident enough. But the inadequacy and indeed the impropriety of using that kind of a motion to settle constitutional controversies between sovereign States, in the setting of this Court's original jurisidiction, exceed all tolerable limits. Cf. Supreme Court Rule 9.2.

It has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas,* 339 U.S. 707, 715 (1950), and cases cited.

The principles of liberality in fact development in original proceedings have long been applied. Thus in the interstate stream controversy in *Kansas v. Colorado,* 185 U.S. 125, 147 (1902), the Court ruled that it would not "proceed on the mere technical admissions made by the demurrer," but would overrule the demurrer so that the case could go to issue and proof before final decision. Said the Court at 145:

> The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by

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[15]The statement quoted by the Court was that of Professor Dowling, "Interstate Commerce and State Power," 27 Va.L.Rev. 1, 27-28 (1940). See also Note, "The Role of Constitutional Facts in Commerce Clause Litigation," 65 Iowa L.Rev. 1053 (1980).

> demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

And in such boundary dispute cases as *Rhode Island v. Massachusetts*, 14 Peters (39 U.S.) 210, 257 (1840), and *Iowa v. Illinois*, 151 U.S. 238, 242 (1894), the Court also allowed the States great liberality in developing adjudicative facts, eschewing reliance on summary procedures and technical principles of pleadings. See also *United States v. Texas*, 143 U.S. 216 (1891), *United States v. Texas*, 162 U.S. 1 (1896); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Wyoming*, 331 U.S. 440 (1947).

In other types of controversies between States, not involving boundaries or streams, the Court has been equally liberal in allowing full evidentiary development of each State's position. As was said in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914), where one State was alleged to owe a debt to the other:

> As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

It is by now abundantly clear that the instant original proceeding, if it is to go forward to judgment on the ultimate constitutional issues, must be grounded on the full evidentiary hearing that the Special Master has recommended. This original suit is highly unique and important. For the first time in history a sovereign State's tax statute has been called into constitutional question by invoking the delicate and grave original jurisdiction of this Court. All parties are agreed that the constitutional questions thereby raised under the Supremacy Clause and the Commerce Clause are of vast public importance. In such a case, the defendant State of Louisiana is entitled to the benefit of the liberal factual development concept historically accorded by this Court in original proceedings.

Superimposed on any such evidentiary hearing in this proceeding, however, are the almost insuperable problems arising from the absence of any authoritative construction or interpretation of the Louisiana First Use Tax statute by the state courts. Those problems can best be met, of course, by dismissing these original proceedings and allowing the state courts to provide the necessary authoritative gloss in the pending tax refund suits, as urged in Louisiana's motion to dismiss. But if an evidentiary hearing before the Special Master is to be the fate of this case, the State of Louisiana suggests that the Special Master and the parties be given some guidance from this Court as to how these unique problems of statutory construction, interpretation and application are to be developed and resolved.[16]

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[16]The plaintiffs have made preliminary forays into some of the problems of the intent and motivation of the Louisiana legislature in enacting the First Use Tax statute. See brief in support of plaintiff States' exceptions at 8-12, quoting from excerpts of some of the Louisiana legislative hearings; and see appendix to that brief, reproducing a newspaper account of remarks supposedly made to reporters by certain Louisiana state officials.

As to the hazardous value of such purported legislative motivation, see *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) ("Motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful.")

The problem in this case is not quite the same as the Court faced in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which in no event stands as a precedent for dispensing with an evidentiary hearing in original cases involving the interpretation and application of state statutes. In that case, following extensive evidentiary hearings before a Commissioner appointed by the Court (252 U.S. 563), the Court invalidated a West Virginia statute that on its face proscribed all interstate transmission of natural gas produced in West Virginia. The West Virginia statute came before this Court on an emergency motion before the statute came into effect. It needed no authoritative interpretation or construction by state courts, however, because its prohibitory language and intent were considered clear. Yet in explaining and interpreting the statute, the Court made extensive reference to the facts developed at the evidentiary hearings. See 262 U.S. at 586-95.

In contrast, we are dealing here with complex, difficult and often ambiguous language in a state tax statute. The scope and purpose of that language are not totally clear on the face of the Louisiana law. Whereas the Commerce Clause implications of West Virginia's total ban on interstate transmission of gas could be easily and quickly assessed by this Court, thanks to a 2,000 page factual record, the Commerce and Supremacy Clause implications of Louisiana's complex tax statute cannot be assessed even with a factual record until there has been an authoritative construction by the state courts. Only those courts, of course, can provide such a construction.

The ultimate question thus is: In the context of an original proceeding before this Court, how can the necessary authoritative construction of a state tax statute be developed or acquired? What procedures are available, in any evidentiary hearing before the Special Master, for the parties to secure or develop the meaningful interpretation of the Louisiana First Use Tax statute that only the Louisiana state courts can provide?

As explained in Parts III and IV of this brief, the absence of any authoritative construction of the Louisiana statute makes it difficult, if not impossible, for the parties to develop constitutional facts relevant to such construction or to develop constitutional theories and arguments relevant to such construction. All that the State of Louisiana can do at this juncture, therefore, is to suggest (1) the nature and scope of the facts it thinks might be appropriate and necessary in justification of its First Use Tax; and (2) the nature and scope of the constitutional arguments that could be made once some kind of an authoritative construction of the statute has been forthcoming.

III.

AN EVIDENTIARY HEARING MUST PRECEDE DETERMINATION OF THE CONSTITUTIONAL VALIDITY OF THE LOUISIANA FIRST USE TAX

The Special Master is correct in his assessment that the ultimate constitutional issues at stake should be addressed only "on the basis of a complete record." Second Report at 31. Evidentiary hearings, as he states, are necessary to determine if the Louisiana First Use Tax is being interpreted, operated and applied so as to create an irreconcilable conflict with the federal natural gas statutes. Second Report at 21.

And, with reference to the Commerce Clause issues, the Special Master observes that "it would be obviously advantageous to permit the parties to support their divergent positions by evidence relevant to the interpretation and administration of the law, the physical features of the entire process, and the economic impacts on and adjustment by buyers and sellers and consumers." Second Report at 37-38.

At the request of the Special Master, the State of Louisiana submitted a Proffer of Proof of the facts and circumstances it deems essential to its constitutional defense of the First Use Tax. For the convenience of the Court, that Proffer of Proof is reproduced in the appendix to this brief. And for the further convenience of the Court, a summary of that Proffer of Proof is herewith provided.

The statements made in the Proffer and in the summary are not designed to reflect only what is uncontested or conceded. Many are mere allegations, awaiting proof at an evidentiary hearing. But the statements do indicate the massiveness and the complexity of the facts underlying this particular Supremacy Clause and Commerce Clause adjudication. And they indicate anew the wisdom of this Court's precept that, in controversies between States, a "full development of the facts" is most appropriate in resolving "issues of high public importance." *United States v. Texas*, 339 U.S. 707, 715 (1950).

Summary of Constitutional and Statutory Facts to be Submitted by the State of Louisiana

(1) The relevant factual-constitutional underpinnings of the Louisiana First Use Tax begin on the federal enclave known as the Outer Continental Shelf (OCS), lying underwater three miles or more off the Louisiana shoreline. The Federal Government, as owner of the OCS, from time to time executes leases that grant the so-called producers the right to explore for and extract natural resources from the OSC. Offshore wells are drilled into the OCS.

(2) If natural gas is discovered in quantities sufficient to justify commercial production, the producer-lessee enters into a gas purchase contract with a pipeline company.

(3) It is not clear precisely what gas commodity is sold by the producer to the pipeline company at the OCS wellhead. The gas purchase contracts are not in evidence and have not been otherwise revealed to Louisiana. Many of the contracts, particularly those executed prior to the enactment of the Louisiana First Use Tax, may well reveal that the product purchased by the pipeline company at the OCS wellhead is not the "raw gas" extracted through the well but rather the marketable "refined gas." Raw

gas, commonly known as "natural gas" by consumers, is processed or refined only after it has been transported by pipelines from the OCS wellheads to various refining or processing plants within Louisiana. Thus, if the purchase contracts relate only to processed natural gas, delivery of such gas to the pipeline purchasers can occur only at the termination of the processing in the plants located within Louisiana — known as the "tailgate" of the plants. In that event, full payment to the producer-seller for the purchased processed gas depends upon the volume of refined gas metered and delivered at the tailgates, unless otherwise provided in the contracts.

(4) The volume of OCS gas delivered at the tailgates in Louisiana, ready for interstate shipment to consumers, constitutes about 95% of the volume of raw gas produced on the OCS. The remaining 5% is removed from the raw gas, at the Louisiana processing plants, in the form of liquefiable hydrocarbons and waste products.

(5) The consideration paid by the pipeline-purchaser for the delivered commodity is at a price approved by the Federal Energy Regulatory Commission (FERC), acting under the terms of the Natural Gas Act, the Natural Gas Policy Act and the applicable regulations thereunder.

(6) The commodity purchased by the pipeline companies is dedicated to interstate commerce by virtue of its origin on the OCS, albeit in globo with other definable commodities. However, until this commodity, i.e., an MCF of gas containing one million BTUs and no corrosives, is deliverable and delivered, the terms of the contract are not met. Not until those delivery terms have been met can the marketing and initial distribution of the purchased commodity commence.

(7) Prior to receipt of the merchantable gas at the tailgate of the processing plant by the pipeline-purchaser, various activities or "uses" occur without which events there would be no delivery of pipeline quality gas useable as a fuel. A review of the historical evolution of the natural gas industry will demonstrate that these activities and uses are necessary steps in the manufacture of the

fuel known as natural gas. These activities have long been pursued by or on behalf of the owners of the natural gas.

(8) Producers cause unprocessed hydrocarbons to rise to the surface of the wellhead of the drilling platforms on the OCS. At this point these natural resources — unprocessed hydrocarbons — are captured and ownership and possession attaches. These unprocessed hydrocarbons are not in a standard marketable condition at this time.

(9) There are approximately 13,500 producing gas wells off the coast of Louisiana.

(10) The producers purport to sell these unprocessed hydrocarbons to pipeline companies, per contracts, where ownership and possession are alleged to attach at the wellheads. Before these unprocessed hydrocarbons are placed in the transmission lines (regulated as common carriers) they are passed through a separator to remove some of the waste products (salt water) brought to the surface with the unprocessed hydrocarbons.

(11) The pipeline companies bring these unprocessed hydrocarbons to the shores of Louisiana by means of underwater pipelines. Approximately 9,650 miles of such underwater pipelines connect these 13,500 wells to the 124 processing plants located in Louisiana. See second Report of the Special Master at 5 n. 7. This massive underwater gathering system crosses the wandering and vulnerable shorelines of Louisiana, causing massive environmental impact.

(12) Channels must be dredged through the fragile barrier islands protecting the sensitive shores of Louisiana to allow this gathering system to reach the processing plants. Upon reaching the coastline of Louisiana additional channels must be dredged through the marshes, swamps and waterbottoms of Louisiana to allow this pipeline gathering system to reach the processing plants.

(13) When the unprocessed hydrocarbons reach the Louisiana coastline it is passed through a gravity separator so as to remove

additional waste products, i.e., water and corrosives. The unprocessed hydrocarbons are then transmitted in the gathering system to a processing plant. At the entrance of the processing plant the unprocessed hydrocarbons are again passed through a separator to remove the remaining waste products. These waste products (water, corrosives and other impurities) cannot be run through the processing plant with the unprocessed hydrocarbons or extensive damage to the plant equipment will occur.

(14) Each of the 124 processing plants in Louisiana occupies approximately 75 acres, with a construction cost of approximately $40,000,000. "[T]he processing of the gas at this central gathering plant is necessary to remove hydrocarbons, hydrogen sulfide and other foreign elements *in order to permit its use as fuel.*"[17] Additionally, unprocessed hydrocarbons are subjected to extensive processing, refinement, treating, dehydration, compression and change in form and content to make the end product economically transportable over long distances under applicable rate structure, and to enable the pipeline owners to receive only that standardized portion of the BTU content of the unprocessed hydrocarbons to which their purchase contract entitles them and the federal rate and regulatory structure requires for delivery to gas consumers.

(15) The unprocessed hydrocarbons from the OCS cannot be transported in its original state to the ultimate consumer at the present price fixed in the rate structure of the pipeline owners by FERC. That is so because the additional weight and corrosive characteristics of the original stream would require that vastly greater costs be either absorbed by the pipeline companies or passed on to the beneficial users to recompense the pipeline companies for the additional BTUs, compression, line maintenance and other costs which would be increased.

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[17]*Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 692 (1954) (dissenting opinion by Justice Clark) (emphasis supplied).

(16) At the Louisiana processing plants the unprocessed hydrocarbons are subjected to changes in temperature, pressure, form, content, value, molecular ratios and potential use. Thereafter, by a series of temperature changes, pressure changes, and the application of other products and chemicals, the constituent chemical makeup and BTU content of the gas are drastically altered from its original form. Propane is removed, butane is taken out and ethane is extracted. The gas is enveloped by a varsol oil solution from which it is again cleansed, refined, pressure changed and warmed to normal temperatures.

> While [processing] and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the [processing] of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts.
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> *Utah Power & Light Co. v. Pfost,* 286 U.S. 165, 179 (1932)

(17) The components thereby removed are distributed to other points both within and without Louisiana for various commercial purposes. The remaining gas, which is then nearly pure methane, consisting at this point of approximately one million BTUs per thousand cubic feet, is delivered to the pipeline owners at the tailgate of the processing plant. There it is metered, paid for and transported interstate for distribution to ultimate consumers. The pipeline purchase contracts provide only for the payment and receipt of gas with a certain BTU content. Gas deviating from that content would be unusable by the ultimate consumers.

(18) The processing incident itself, which occurs solely within Louisiana, can only be performed once. It is not subject to repetitive performance in the several States through which the processed gas passes enroute to its ultimate consumption. Once the water and the impurities have been removed, once the

butane has been extracted and the propane and the ethane taken out, the gas may not again be subjected to those extractable uses. The gas, in other words, has been reduced to the standardized energy product which the consumers of the plaintiff States are equipped to use.

(19) The interstate movement or transportation of this processed fuel, known as natural gas, thus arguably commences at the tailgate of the processing plant. The pipeline company then transports the natural gas to a local distribution system in a sister state. The local distribution company in turn transports the gas, by virtue of retail sales, to the beneficial users of the gas. These processed hydrocarbons (natural gas) are not the same product produced at the wellhead on the OCS. Rather they are a product significantly altered in chemical content and therefore in marketability by the processing and refining "uses" or incidents that take place in Louisiana. In Louisiana's view, for purposes of assessing the validity of the First Use Tax in light of the negative implications of the Commerce Clause, the critical interstate movement commences only when the gas leaves the tailgates of the Louisiana processing plants in its altered or processed condition. The treatment accorded the unprocessed gas while in Louisiana takes place before that interstate movement begins.

(20) For this fuel (natural gas) to be furnished to local consumers in Louisiana, the owner of the natural gas produced from the OCS — an interstate pipeline company — must first obtain a certificate of public convenience and necessity from FERC. Such certificates have routinely been denied by FERC and, as such, approximately 98% of the natural gas placed in interstate commerce at the tailgate of the processing plants in Louisiana is transported out of the State of Louisiana. Although Louisiana consumers are prohibited from acquiring the bulk of the natural gas in question, to the extent that such gas is consumed in Louisiana the purchaser of the gas pays the First Use Tax as passed on to him from the pipeline company-seller.

These are some but by no means all the facts that the State of Louisiana would want to submit at any evidentiary hearing. Only out of that amalgam of facts, supplemented by what the other parties would doubtless want to submit, could Louisiana even begin to construct a meaningful constitutional defense of the First Use Tax statute. Until such facts have been developed, until there has been some authoritative construction of the Louisiana statute, adjudication of the constitutional implications of the statute cannot proceed.

IV.

A JUDGMENT ON THE CONSTITUTIONAL ISSUES IS IN NO EVENT WARRANTED ON THE PRESENT PLEADINGS

For various good and sufficient reasons, the Special Master has declined to reach and consider the ultimate constitutional conclusions sought by the complaint of the plaintiff States. He has recommended that an evidentiary hearing be held before the Supremacy Clause and Commerce Clause claims can be properly resolved.

Nevertheless, the plaintiff States by their exceptions and supporting brief continue to press their constitutional contentions upon this Court as if the pleadings alone make those contentions ripe for final adjudication. The United States and the seventeen pipeline companies eagerly support the plaintiff States in this rush for a summary declaration by this Court that the Louisiana First Use Tax statute is invalid, thus entitling the pipeline companies to a refund of the taxes paid under protest.

The State of Louisiana, supported to a large extent by the second Report of the Special Master, has presented a host of reasons and considerations why this case is simply not ripe or appropriate for immediate, summary and final constitutional adjudication. Not the least of the reasons is the absence of any authoritative delineation of the meaning or scope of the First Use Tax statute by the Louisiana courts. Until that problem is solved, neither the Special Master nor the parties can hope to define the specific provisions of the Louisiana tax statute that the complaint brings into constitutional issue. Nor can they develop or assess the supporting constitutional facts.

Given such an inadequate state of the pleadings and the record, the State of Louisiana still feels obliged to provide this Court some idea of the constitutional arguments that it could or would make when the issues are properly defined and refined. Most of these arguments are diametrically opposed to those set forth in the present exceptions and supporting brief of the plaintiff States. Some of Louisiana's potential contentions are fairly summarized in Part II of the Special Master's Report of September 15, 1980, at 20 - 38. A fuller summary of such contentions is set forth in Parts III and IV of Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae*, at 15 - 36 (filed on December 5, 1979) (gray cover).

The State of Louisiana does not desire to burden the Court with a repetition of all the potential or possible contentions that are contained in the aforementioned brief of December 5th, 1979. What follows is merely an elaboration of those contentions that is necessitated by some of the remarks in the Special Master's Second Report and in the latest briefs of the plaintiff States and other entities that support the motion for judgment on the pleadings. These matters are discussed herein in the same order as in Louisiana's earlier brief.

A. The alleged violations of the Commerce Clause

(1) The "flat prohibition" argument

The latest brief of the Solicitor General, redesignated as an *amici* brief rather than one in support of an Exception, repeats at page 14 the statement in his earlier *amici* brief (at p. 44) that the Commerce Clause "flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed," citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). While the plaintiff States appear to have abandoned this "flat prohibition" argument in their latest brief (see Part II of their brief in support of exceptions), the Special Master also refers to the *Michigan-Wisconsin* decision as "the case which on its facts is closest to this one" and as a case holding that "taking" gas from the outlets of a scrubbing plant "was not a local event separable from the interstate transportation." Second Report of the Special Master, at 36.

It, therefore, bears emphasis here that the *Michigan-Wisconsin* decision is not precedent for holding that, for purposes of state taxation, there can be no local and taxable events separable from the flow of natural gas from wellhead to burners. As carefully noted by the Court in that case, 347 U.S. at 166-67:

> [I]t is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Citations omitted] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.
>
> The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. Hope Natural Gas Co. v. Hall, [274 U.S. 284 (1927)], but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. Utah Power & Light Co. v. Pfost, [286 U.S. 165 (1930)]. The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' "taking" of gas from Phillips' gasoline plant. This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants. The "taking" into appellants' pipeline is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce.

In other words, the Court in *Michigan-Wisconsin* conceived of the interstate flow of natural gas, from the standpoint of immunity from state taxes or controls, as commencing at the point where "production and processing have ceased" and continuing from the outlets or tailgates of the processing plant into the interstate pipelines. In that case, Texas impermissibly sought to tax the "taking" of the processed gas after the processing had ceased and interstate transmission of the processed gas had begun. Likewise, if Louisiana were to impose its First Use Tax at the tailgate of the processing plant, the tax would not survive the *Michigan-Wisconsin* rationale. See also *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921); *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931).

But, as an evidentiary hearing will establish, the taxable incidents of Louisiana's First Use Tax all occur prior to the cessation of processing and before transmission of the processed gas in interstate commerce has begun. Thus the *Michigan-Wisconsin* decision clearly allows the imposition of the First Use Tax in the circumstances of this case. The Commerce Clause does not *per se* prohibit the taxing of the local incidents occurring in Louisiana before processing has been completed.

The *Michigan-Wisconsin* case also illustrates another constitutional concept fundamental to Louisiana's position in this case. There, as in this case, the Court was dealing with the local incidences associated with the interstate transmission of natural gas that can be taxed or regulated by state or local authorities. It was not dealing with the broad reach of federal authority, which may well extend from wellhead to burner. But, in defining the transmission that is immune from state taxes, the Court in *Michigan-Wisconsin* defined the transmission as limited to the transmission of processed gas, a transmission that commences at the tailgate of the processing plant.

For a definition of when this processed gas terminates its interstate journey, again for purposes of state taxation and regulation, one must turn to the Court's earlier decision in *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465, 471 (1931). The

Court there held that "the furnishing of [processed] gas to consumers of Ohio municipalities by means of [local] distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

Thus this Court has conclusively established that it is only the interstate transmission of processed natural gas from processing plant to local distribution plant that is immune from state taxation and regulation. Given an opportunity to prove that its tax is imposed on local events preceding the commencement of such transmission of processed gas, Louisiana will be able to demonstrate that its First Use Tax is not "flatly prohibited" by the Commerce Clause.

(2) The Apportionment and Discrimination Arguments

The repeated attacks on the First Use Tax, in terms of the apportionment and discrimination concepts of the Commerce Clause, warrant further elaboration of the position of the State of Louisiana, again on the assumption that it will be given the chance to develop that position at an evidentiary hearing.

This Court has repeatedly held that state taxes affecting interstate commerce meet the requirements of the Commerce Clause if they: [1] "are applied to activity with a substantial nexus with the State," [2] "are fairly apportioned," [3] "do not discriminate against interstate commerce," and [4] "are fairly related to the services provided by the State." *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978). See also *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977). A state tax cannot be invalidated unless its opponents develop a "factual basis on which to declare the [state] tax unconstitutional as applied." 435 U.S. at 751. Each prong of the four-part test depends upon factual proof of the relevant economic realities. Since the overruling of *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944) in *Complete Auto Transit*

Inc. v. Brady, 430 U.S. 274, 288-89, it is impossible to assess the validity of a state tax solely by examining the language used or not used by the legislative draftsmen. As *Complete Auto Transit* recognized, "[t]here is no economic consequence that follows necessarily from the use of the particular words ... and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." 430 U.S. at 288.

As the Special Master recognized, the plaintiff States here suggest that the First Use Tax violates only the first and fourth of these criteria, thus apparently conceding that the tax is "applied to activity with a substantial nexus with the State" and is "fairly related to the services provided by the State." See Exceptions of the plaintiff States and brief in support of exceptions at page 27. That Louisiana meets these other two requirements is unquestioned. This Court has explained the nexus requirement as necessitating that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *National Bellas Hess v. Illinois*, 386 U.S. 753, 756 (1967); *Miller Brothers Company v. Maryland*, 347 U.S. 340, 344-45 (1954). The nexus here is laid out at length in Louisiana's Proffer. See Proffer of Proof at A—29-36. That the tax is fairly related to services provided by the State is also clear from the Proffer of Proof.[18]

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[18]In his Report the Special Master noted Louisiana's Proffer of Proof that "there are 124 processing plants in Louisiana which process 95% of the outer continental shelf gas. A processing plant typically occupies about seventy-five acres of land and represents a present cost value of $40,000,000. Louisiana Proffer of Proof, A—10." Second Report of the Special Master, at 5 n.7. The Proffer also discusses in detail the types of governmental services Louisiana must provide because of the processing and transportation of natural gas from the Outer Continental Shelf. These include educational facilities, potable water supply, energy services, police and fire protection, health services, transportation facilities, recreational facilities, housing sanitary sewage and solid waste disposal, among others. See Proffer of Proof at A—37-42. The Proffer also documents in tragic detail the environmental consequences of the facilities needed to bring Outer Continental Shelf gas through Louisiana. Proffer of Proof at A—42-48.

The plaintiffs, however, do challenge the tax under the apportionment and discrimination requirements. These, however, cannot be viewed in isolation. The four factors laid out in the *Washington Stevedoring* case are sufficiently interrelated that the degree of compliance with one can affect compliance with the others. For example, the nexus of the tax activity with the taxing state can be so substantial that the activity does not occur anywhere else and thus cannot be taxed again by another state. If so, then there is no apportionment problem because the activity taxed occurs only once. Thus, a factual dispute about one of the factors renders unsuitable a judgment on the pleadings with respect to another of the factors.

To meet Commerce Clause requirements, a state tax must not discriminate against interstate commerce. The Special Master rejected the plaintiffs' contention that the Louisiana First Use Tax discriminated as a matter of law, holding that "it is hard to tell from the pleadings" whether discrimination exists and that the Louisiana tax could be "a 'compensating' tax intended to complement the State severance tax."[19]

In determining whether the Louisiana First Use Tax violates the discrimination prong of the Commerce Clause test, several principles, all enunciated by the Court in prior cases, must be kept in mind.

First, few if any state tax statutes are just alike; prior cases have at best limited usefulness in determining the validity of a tax:

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[19]While recognizing that the First Use Tax would violate the discrimination prong of the commerce clause test if it was "actually a production tax on offshore gas," one commentator also concludes that no violation exists: "Compensating use taxes are valid despite challenges based on discrimination. The Louisiana use tax eliminates some of the economic advantages once enjoyed by interstate concerns. Offshore producers, not liable for a use tax, now pay a use tax. The Louisiana tax, because it equalizes the treatment of intrastate and interstate producers, is valid." Note, "The Effect and Validity of State Taxation of Energy Resources", 58 Wash. U. L. Q. 345, 360-61 (1980).

> [T]he Court has counseled that the result [in interstate commerce challenges to state tax statutes] turns on the unique characteristics of the statute at issue and the particular circumstances in each case.
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> *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)

Second, a state tax statute must be viewed in operation and should not be judged on its face:

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. (Best & Co. v. Maxwell, 311 U.S. 454, 455-56). This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations.
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> *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963)

See also *Nippert v. Richmond*, 327 U.S. 416 (1946); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1941).

Third, a state tax cannot be viewed in isolation from the other taxing statutes enacted by the state. Instead, the overall state taxing scheme must be evaluated in determining whether discrimination truly exists. As this Court held in a case involving the validity of another Louisiana tax statute,

> Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana. If it stood alone, it would be invalid. However, a proper analysis must take "the whole scheme of taxation into account." Galveston, H.&.S.A.R. Co. v. Texas, 210 US 217, 227, 52 L ed 1031, 1037, 28 S Ct 638; Gregg Dyeing Co. v. Query, 286 US 472, 479, 480, 76 L ed 1232, 1237, 1238, 52 S Ct 631, 84 ALR 831.
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> *Halliburton Oil Well Cementing Co. v. Reily*, 373 US 64, 69 (1963)

See also *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

Fourth, precise equality in taxation is unattainable; therefore, approximate equality is sufficient to uphold a statute:

> Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it .... The object should be to place the burden so that it will bear as nearly as possible equally upon all.
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> *Tappan v. Merchants' National Bank*, 86 U.S. 189, 195 (1874).

See also *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716-17 (1972); and *State Railroad Tax Cases*, 92 U.S. 575, 612-13 (1876).

Given these teachings, it is clear that a judgment on the pleadings is impermissible here. As the Special Master concluded, a determination whether there is discrimination against interstate commerce should await a factual hearing.

The plaintiff States, however, argue that a judgment on the pleadings is appropriate and that the Louisiana tax as a matter of law is discriminatory. Surprisingly, they cite this Court's statement in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 n.15 (1977) that "[a] tailored tax, however, accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." Yet, in actuality, they oppose a "careful scrutiny" of the Louisiana tax. Instead of asking for a detailed hearing at which the details of the statute, its operation, and the relationship between it and other Louisiana tax statutes can be explored, they ask for a judgment based on the naked assertions found in the pleadings.

The plaintiff States assert that several types of discrimination warrant a judgment on the pleadings that this tax is unconstitutional:

(1) Initially they argue that the tax discriminates against gas imported from "sister state[s]." Exceptions of the plaintiff States and brief in support of exceptions, at 28. The plaintiff States have never alleged that any gas is in fact imported into Louisiana from other States. The normal movement of such gas is out of Louisiana into other States that have no natural gas. It is certainly unlikely that any of the plaintiff States are shipping

natural gas to Louisiana. Even if there is any gas imported from other States into Louisiana, any First Use Tax liability is offset by a credit based on the severance or production taxes levied by the producing State. Such a severance or production tax is customarily imposed.

(2) The plaintiff States also contend that the tax discriminates against gas imported from outside the United States. As Louisiana's answer makes clear, that gas is not subject to the tax. See Answer LIII - LVI.

(3) The plaintiff States next contend that the tax discriminates against Outer Continental Shelf gas and in favor of gas on which a severance tax is imposed. This supposed discrimination exists because a separate Louisiana statute grants a credit on a taxpayer's severance taxes to the extent the taxpayer pays the First Use Tax. As the Special Master recognized, the plaintiff States' assertion on this point cannot support a judgment on the pleadings: "[I]nstead of being discriminatory, the 'actuality of operation' may show that the [First Use [T]ax 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)." Second Report of the Special Master, at 35.

An actual determination whether any discrimination exists requires a careful look at Louisiana's whole taxing structure as well as at the actual effects of the First Use Tax. See, e.g., *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-81, (1932); *General American Tank Car Corp v. Day*, 270 U.S. 367, 373 (1926); *Traveler's Insurance Co. v. Connecticut*, 185 U.S. 364, 369-70 (1902). Thus the equality or inequality of taxation cannot be measured at this time. Besides, the plaintiff States blithely and mistakenly cast this controversy into a *Louisiana v. The World* structure. In actuality, Louisiana residents who are the ultimate consumers of Outer Continental Shelf gas subject to the First Use Tax do pay the tax, just as non-Louisianians do. And non-Louisianians who are the ultimate consumers of gas subject to the Louisiana severance tax do pay that tax, just as Louisiana residents do.[20] The plaintiff States' basic contention can be found on pp. 34-35 of their Exceptions to the Special Master's Report:

> *[O]ut-of-state consumers who receive no government services from Louisiana bear the brunt of the tax; people who receive Louisiana's government services pay no tax whatever.*
>
> (emphasis in original)

The import of their arguments is actually much different. What they really are saying is: Louisiana residents should pay for all of the additional government services required because of the transportation and processing of Outer Continental Shelf gas and should incur the loss of land and the harmful and often irreversible effects incurred by virtue of the gas; out-of-state consumers, many from States who steadfastly refuse to allow oil and gas production for fear of the same problems that plague Louisiana, should pay nothing whatsoever to alleviate the burdens suffered by Louisiana solely by virtue of the gas brought in from the Outer Continental Shelf.

The burdens suffered by Louisiana, as described in its Proffer of Proof, are indeed great. Louisiana must provide a wide variety of government services directly as a result of the existence of the facilities for processing and transporting the gas from the Outer Continental Shelf. See n.18, *supra*. Louisiana also will endure severe deleterious environmental effects. The intense channelization associated with Outer Continental Shelf gas marketing has impaired the natural functioning of barrier islands and their associated estuaries, which "form the most dynamic and complex physical/marine life system in the northern hemisphere." Proffer of Proof at A—43. Each year Louisiana loses approximately 16.5 square miles of land in its coastal zone. Proffer of Proof at A—44. And "recent studies of the Louisiana environmental zone indicate that, in general, canals and pipeline

[20]Of course, the ultimate consumers will bear the severance tax or First Use Tax only if the Federal Energy Regulatory Commission chooses to allow the pipeline companies to pass the tax on to them.

trenches have drastically increased rates of deterioration and may contribute to the eventual collapse of the estuarian systems along the Louisiana coast." Proffer of Proof at A—45. Channelization necessary for the transportation of Outer Continental Shelf gas also is causing destruction and loss of wetlands, swamps, and marshes, "creat[ing] an irreversible impact on Louisiana's irreplaceable resources," including fish and oysters. Proffer of Proof at A—45. Gas leaks, spills and blowouts can also cause severe damages. Proffer of Proof at A—47.

Finally, the plaintiff States complain about narrow exemptions such as those for production of sulphur, fertilizer and anhydrous ammonia. Again, the actual effects of these exemptions cannot be judged until a hearing is held at which the operation of the tax can be analyzed and its relationship with the rest of the state's taxing structure can be explored. At this point, it need only be said that this Court has long recognized that the States must be given wide latitude in constructing tax exemptions for certain industries or classes. See, e.g., *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947); *Hicklin v. Coney*, 290 U.S. 169 (1933); *Utah Power & Light Company v. Pfost*, 286 U.S. 165 (1932); *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232 (1889).

B. The alleged violations of the Supremacy Clause

The Special Master correctly summarized that the effect, if any, of the First Use Tax upon the "regulatory power of the FERC" cannot be ascertained upon the face of the pleadings or the statutes.[21] Such a determination can only be made after all the facts have been established. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

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[21] Second Report of the Special Master, at 27, 30.

The plaintiff States assert that Section 1303 C [LSA R.S. 47:1303 C] "touches" the scheme of federal regulation and has a "possibility of being in conflict with the Natural Gas Act." Such peripheral interface between a federal statute and state statute is not violative of the Supremacy Clause. *Hines v. Davidowitz, supra.* The state statute must thwart the "full purpose and objectives" of the federal enactment before the Supremacy Clause comes into operation.

The United States and the Federal Energy Regulatory Commission advocate that "the Louisiana levy interferes with the federal regulation of the transportation and sale of gas in interstate commerce and is therefore invalid under the Supremacy Clause."[22] They further expound that "Section 47:1303 C impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c and 717d)."[23] And, that "§47:1303 C interferes with the Commission's authority to allocate costs between gas consumers and the owners of liquid and liquefiable hydrocarbons which aer [*sic*] carried by interstate pipelines."[24]

(1) Section 1303 C

Section 1303 C of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 293 of 1978, provides:

> In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation [for] marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes

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[22]*Amici* Brief filed November 14, 1980, at 21.

[23]*Amici* Brief filed November 14, 1980, at 22.

[24]*Amici* Brief filed November 14, 1980, at 23.

> from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

The opponents contend that Section 1303 C of the First Use Tax statute is preempted by virtue of its conflict with the exclusive jurisdiction of the Commission. This position is taken in reliance upon alleged facts, i.e., the existence of contracts between the producers of natural gas and the natural gas companies which require the producers to bear all costs (including taxes) associated with the processing of the natural gas produced from locations on the Outer Continental Shelf. These facts are not established by the pleadings. The absence of such essential facts negates any possibility of the rendition of a judgment on the pleadings. In essence their position is that, when the First Use Tax declared unenforceable certain provisions that may be contained in some contracts or agreements authorizing the party liable for the First Use Tax to seek and obtain reimbursement of the tax from any party other than another purchaser, the State of Louisiana adopted a "regulation" conflicting with the exclusive jurisdiction of the Commission. Louisiana contends that is not and cannot be the case.

Section 1303 C provides that the contract agreement provision deemed to be unenforceable is only conclusively so in the event a final definitive judgment is rendered to that effect. There must be a showing that contracts or agreements were in existence containing provisions declared to be "unenforceable" when the Act became effective, for Section 1303 C to have any effect. There has been no allegation or proof that any such contracts were in fact in existence.

If such contracts or agreements actually were in existence, they would be under the jurisdiction of the Commission as contracts forming the basis of certificates authorizing transportation services. The Commission may, pursuant to the procedures set forth in the Natural Gas Act, authorize the deletion of any such reimbursement provisions from contracts which are part of the certificates of public convenience and necessity. 15 U.S.C. §§717c (d) and (e), 717d (a).

Several options are available to those owner-taxpayers having a contractual or agreement right of reimbursement or refund from a party other than the purchaser of the gas. Such options are (1) to seek to enforce the contractual or agreement provisions; (2) to seek a judicial determination that the owner-taxpayer "is entitled to such reimbursement or refund;" or (3) to seek a modification, change or amendment to the contract in conformity with the statute. The first two options would necessitate judicial action while the third option would necessitate Commission authorization.

This third option apparently has been exercised by certain owner-taxpayer natural gas companies, for the Commission has deleted all such reimbursement or refund provisions from those contracts in connection with the certificates of public convenience and necessity.[25] Thus, there exists no actual or potential conflict between the First Use Tax, more particularly Section 1303 C, and the exclusive jurisdiction of the Commission.

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[25]See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

Plaintiffs and the Commission proffer gratuitous and self-serving constructions of the First Use Tax in support of the contention that the Louisiana statute, particularly§1303 C, facially violates the Supremacy Clause interpretation by attempting to allocate among producers, pipelines and consumers the cost of transportation and sale of the affected natural gas.

The Commission's interpretation of the intent of §1303 C is made without any proof of the factual circumstances that gave rise to the language of this section. During legislative deliberation of the scope and application of the tax, interested parties expressed fear that, despite careful attempts to enumerate the uses to which the tax applied, some pipeline-purchasers might maintain that the tax was solely a processing tax. Their fear was that a processing tax might require the producers to bear all taxes and/or costs incurred, thereby entitling the pipeline-purchaser to withhold from the purchase price the cost of the tax it was otherwise liable for as the owner of the gas. By §1303 C the Louisiana legislature, as the evidence will show, sought only to make it clear that the First Use Tax is not a processing tax within the intendment of any such contract language, but rather was to have a much broader application as a cost associated with certain defined "uses" made by the owner of the gas in preparation for the ultimate marketing of the processed gas. The legislature even provided a mechanism by which the parties to such contracts could litigate the applicability and intent of such contract language as it might relate to the First Use Tax, in which instances the State would be a necessary party. The legislature made no attempt and indicated no intention, express or implied, direct or indirect, to allocate costs concerning the transportation and sale of natural gas in interstate commerce.

Throughout the legislative deliberations on the First Use Tax statute, as the evidence will show, it was recognized and acknowledged that the Federal Energy Regulatory Commission has the sole and exclusive right to determine whether the tax upon the enumerated uses constitutes a cost that could properly be passed to the beneficial users of the commodity. Indeed, though not then enacted, the language that ultimately became

§110 of the Natural Gas Policy Act (15 U.S.C. §3320) was referenced not only as proof of the Commission's jurisdiction, but also of the consistency of the levying of such a state tax with congressional intent.

The Commission in fact exercised its jurisdiction without hindrance in Orders 10, 10-A and 10-B.[26] If it now has misgivings about the wisdom of those Orders the original jurisdiction of this Court need not be invoked to resolve these doubts.

The United States and the Commission further assert that Section 1303 C prohibits the Commission from determining "[w]hether the producers or the pipelines' natural gas customers must bear the costs (including any taxes) incurred by the pipelines because of those activities."[27]

The Special Master found that "FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to the consumers if the tax is finally held invalid and mandating the pipelines to seek relief in the Louisiana courts. ... Meanwhile the 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 and liquefiable hydrocarbons transported with or extracted from natural gas. FERC Order to Show Cause in R.M. 78-23."[28]

If the federal agency empowered to administer this federal statute has made no factual or legal finding contrary to the state enactment, then there can be no conflict within the meaning of the Supremacy Clause. No supremacy issue is involved until the federal enactment, as administered, purports to prohibit the enforcement of the state statute.

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[26]See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

[27]*Amici* Brief filed November 14, 1980, at 26.

[28]Second Report of Special Master, at 28.

(2) Applicability of the NGA and NGPA

The Natural Gas Policy Act (§110)[29] reflects congressional anticipation of state enactment of taxes which may have an impact on the price of natural gas to be paid by the ultimate consumer. This Court has held that within the ratemaking authority of the Commission (Federal Power Commission then, and now the Federal Energy Regulatory Commission) taxes may be allowed as a cost of service in adjusting rates pertaining to the transportation and sale of natural gas.

> In our view what the Commission did here did not exceed the powers granted to it by Congress. One of its statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission. ...
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> *FPC v. United Gas Pipe Line Co.*,
> 386 U.S. 237, 243 (1967)

Section 110 (a) (1) of the NGPA (15 U.S.C. §3320 (a) (1)) provides that state severance taxes are to be allowed as an additional cost over the maximum lawful price for the first sale of natural gas. Further, Section 110 (a) (2) of this Act (15 U.S.C. §3320 (a) (2)) provides that the first sale price of natural gas may exceed the maximum lawful price "to the extent necessary to recover ... (2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

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[29] 15 U.S.C. §3320.

The Commission is thereby granted the discretionary authority to determine those costs of service incurred by the natural gas companies which may be passed on through rate charges[30] to the ultimate consumers of natural gas. This discretionary authority does not prohibit state taxation of local incidences, and more particularly, it does not prohibit the application of the First Use Tax to the various local uses of the natural gas within the State of Louisiana.

Each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidences of taxation. Each statutorily enumerated use (LSA-R.S. 47:1302 (8)) was and is occurring consistent with certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.

To determine whether state action "invalidly invade[s] the federal agency's exclusive domain" (*Northern Natural Gas Co. v. State Corp. Comm'n)* under the Natural Gas Act, the standard is "whether state authority can practicably regulate a given area and, if we find that it cannot, then [the Court is] impelled to decide that federal authority governs." *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 19-20 (1961).

This Court has consistently recognized that the "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act and that "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.*, and the cases cited therein, 372 U.S. 84, 90 (1963). "Natural gas" is not in a state suitable for marketing or distribution at the time of its production. Until (1) the central

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[30]The Commission may also deny the pass on of certain cost of services under its ratemaking jurisdiction. *FPC v. United States Gas Pipe Line Co.*, 386 U.S. 237 (1967).

gathering of the original gas stream is accomplished, and (2) the substantial chemical changes and refinement that occur at facilities and properties on shore are completed, and (3) the refined or processed gas reaches the "tailgate" or outlet of the gathering and processing plant for transmission, there can be no marketing or initial distribution thereof.[31]

The First Use Tax is imposed upon the following uses of natural gas in Louisiana: (1) sale; (2) the transportation in the state to the point of delivery at the inlet of any processing plant; (3) the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; (4) transfer of possession or relinquishment of control at a delivery point in the state; (5) processing for the extraction of liquefiable component products or waste materials; (6) use in manufacturing; (7) treatment; and (8) other ascertainable action at a point within the state. LSA-R.S. 47:1302 (8). Louisiana is prepared to show that at least the first five uses enumerated are physical acts or activities necessary in preparing the natural gas "for its first state of distribution," (*Northern Natural Gas Co.*, and the cases cited therein, *id.*), and thus exempt from the federal regulatory scheme under Section 1 (b) of the Natural Gas Act. Since the activities or uses subject to taxation are not within the comprehensive federal regulatory scheme, it cannot be said that the First Use Tax "invalidly invade[s] the federal agency's exclusive domain." *Northern Natural Gas Co. v. State Corp. Comm'n, id.* Louisiana is thus prepared to show that the First Use Tax neither conflicts with nor is preempted by the authority of the Commission.

Furthermore, the First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the tax, nor does the Louisiana tax attempt to regulate in any manner, directly or indirectly, the wholesale price of natural gas transported in interstate commerce.

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[31] *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); and *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

In short, neither the Natural Gas Act, the Natural Gas Policy Act nor any other federal act prohibits state taxation of local incidences which may ultimately or indirectly increase the price paid by the ultimate consumer for the refined natural gas.

(3) Outer Continental Shelf Lands Act.

Plaintiff States argue that the First Use Tax is preempted by the Outer Continental Shelf Lands Act of 1953.[32] Section 4 (a) (2) of the Act (43 U.S.C. §1333 (a) (2) (A)) adopts state laws to the extent they are applicable and not inconsistent with federal laws and then concludes by providing that "[s]tate taxation laws shall not apply to the outer Continental Shelf." A review of the legislative history and the language of the entire section of the statute suggests that Congress intended the law to apply only within the physical limits of the OCS. House Report No. 413, 83rd Cong., 1st Sess. (1953), *reprinted in* [1953] U.S. Code Cong. and Ad. News 2177, 2180, does not use the statutory phrase "shall not apply *to* the Outer Continental Shelf" but rather interprets it to mean "cannot apply *in* these areas."

Despite this clear language that the uses subject to the tax occur solely in the State of Louisiana, the plaintiff States continue their argument that the First Use Tax is, in reality, a tax on severance or production. Not even the United States supports the plaintiff States in this argument. The statute, on its face, does not purport to tax any severance or production of natural gas from the Outer Continental Shelf. And such statutory language cannot be altered or interpreted in terms of questionable economic realities in order to create a conflict between

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[32]At one point in their brief the plaintiff States mention in passing that the First Use Tax also is preempted by and conflicts with the Coastal Zone Management Act, 16 U.S.C. §1451 et seq. (1974). Exceptions of the plaintiff States and brief in support of exceptions, at 6. A noted authority concludes, however, that the Act "does not evince congressional intent to occupy the field of coastal regulation or to circumscribe the preexisting reach of state authority." Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1147 (1976).

federal and state authority. The tax does not reach any uses occurring in the Outer Continental Shelf: thus, the statutes are not in conflict.

Admittedly, Louisiana cannot directly tax the severance of natural gas from the Outer Continental Shelf. That is not the same, however, as saying that Louisiana and other States are prohibited from imposing a tax on local incidents relating to a product originally extracted by private producers with operations occurring in the Outer Continental Shelf.

Nothing in the Outer Continental Shelf Act, moreover, indicates broad preemptive intent, or intent to establish a comprehensive scheme to regulate natural resource development and distribution from the Shelf. The goal of the statute, rather, was to assert American territorial ownership of the Shelf, and to permit the Secretary of the Interior to lease tracts for private natural resource development. Breeden[33] emphasizes that such state legislation as zoning and pollution laws are strictly local matters that are "peripheral concerns" with respect to the intended federal scheme and cites the following passage from the *San Diego Bldg. Trades Council* case, at n. 184:

> [D]ue regard for the presuppositions of our embracing federal systems, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation].
>
> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 at 243 (1959)

State taxation, such as the First Use Tax, that is aimed at compensating a State for environmental damage, governmental costs and other impacts *on state land* is clearly a concern

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[33]R. Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1147 (1976).

"peripheral" to the federal scheme. Therefore, there exists no basis to support plaintiff States' contention of preemption in this regard.

CONCLUSION

For all the foregoing reasons, the Court should accept the Special Master's recommendations that the plaintiffs' motion for a judgment on the pleadings be denied. And for reasons previously set forth in support of Louisiana's Exceptions to the Special Master's Report of September 15th, 1980, the Court should dismiss the complaint filed by the plaintiff States.

All the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 5th day of December, 1980, I served copies of the *Reply of the State of Louisiana to Exceptions and Supporting Brief of the Plaintiff States*, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

PROFFER OF PROOF OF STATE OF LOUISIANA TO THE SPECIAL MASTER

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April 15, 1980

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Pursuant to the Special Master's Order of March 21, 1980, the State of Louisiana submits herewith a *Proffer of Proof* as to what Louisiana can and will prove, as detailed as currently possible, considering the fact that no discovery has as yet been herein had. The facts hereinafter set forth are limited to those known by Louisiana and as ascertained, to date, from the on-going discovery in the state court proceedings. A detailed outline of those proceedings was heretofore submitted in Louisiana's memorandum to the Special Master under date March 29, 1980.

At the preliminary conference with the Master on March 21, 1980, Louisiana was charged with the primary responsibility of setting forth in succinct form the facts upon which it would rely in its defense of the First Use Tax. It was observed that such a request reversed the normal order of proceedings in that it required the defendant, rather than the plaintiff, to set forth the factual basis upon which the constitutional validity of the First Use Tax is to be assessed. More importantly, however, Louisiana is the one party in the best position to know and to develop all the many facts relevant to the disposition of this case. Submission of Louisiana's listing of those facts will permit the Special Master and the various complainants to assess the magnitude of the evidentiary nature of this case and to determine the extent of agreement and disagreement among the parties as to these basic facts.

This Proffer by Louisiana is also designed to disabuse the notion that the facts discoverable from the pleadings alone afford an adequate basis for a summary disposition of this major constitutional adjudication. There are many facts, call them constitutional facts, statutory facts, substantive facts and legal facts, that must be developed above and beyond those asserted in the "barebones" pleadings before the Court. Those facts must be explored in a full evidentiary-type hearing before the constitutional merits of the First Use Tax can be reached, summarily or otherwise. All the following enumerated factual propositions are not self-evident or subject to judicial notice; many of them will be disputed. Some of the propositions can be developed and proved only after there has been an authoritative state court interpretation of Louisiana's First Use Tax statute.

But whatever the controversial nature of the facts, and however difficult it may be to establish some of those facts outside the forum of the state courts, Louisiana submits that the following propositions of fact must be explored and developed if an evidentiary hearing is to be had before the Special Master. The extent and the difficulties that mark this evidentiary exercise serve additionally to underscore the prudential wisdom of this Court in recognizing that it is "structured [primarily] to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971).

In sum, Louisiana proffers and submits the following facts, subject to proof at an evidentiary hearing:

I.

BASIC FACTS

1. In terms of statutory language and economic realities, all the uses upon which Louisiana's First Use Tax is imposed relate exclusively to the local incidents of processing and refining within the State of Louisiana of unrefined or "raw gas" transported into Louisiana from the Outer Continental Shelf (OCS).

2. The processing and the refining of "raw gas" that occur within the State of Louisiana significantly and identifiably create a new and different product, known as refined or "dry gas." The differences between the two products relate to their economic value, their constituent chemical components, their energy contents, their amenability to long distance transportation, and their fitness for consumer consumption.

3. The interstate transportation of "dry gas" for distribution and use throughout the nation physically commences at the "tailgates" of the 124 processing and refining operations within the State of Louisiana. The First Use Tax is therefore imposed upon local uses or incidents that precede the commencement of any interstate transportation of refined "dry gas" for use by consumers outside Louisiana. Contrariwise, the First Use Tax is not imposed upon the "dry gas" that is delivered into the interstate transmission system at the "tailgates." Nor is the tax in any way imposed on the interstate transmission of "dry gas."

4. The State of Louisiana, by harboring and protecting the 124 local operations necessary to the interstate marketing of refined "dry gas," originating in the OCS as "raw gas," makes substantial contributions to the development of the nation's energy supplies and resources. Approximately ten per cent of the nation's "raw gas" supplies comes from federal OCS lands, and about ninety five per cent of OCS "raw gas" production occurs off Louisiana's shores and hence is processed and refined onshore in Louisiana. More than ninety eight per cent of such gas, refined in Louisiana, is ultimately transported as "dry gas" for use outside Louisiana.

5. The State of Louisiana makes substantial contributions and provides valuable support and protection to the onshore processing, refining and related activities necessary to the transformation of OCS gas from a "raw" to "dry" product. No other State makes such contributions or provides such support and protection as to OCS gas produced offshore from Louisiana.

6. Moreover, Louisiana's response to the nation's energy needs and to the commercial need to process and refine such OCS "raw gas" into a usable product has had costly consequences for the State, its renewable resources, and its people. Louisiana has incurred monumental changes in and injuries to its environment, its shoreline and wetlands, and its socio-economic structure. Many direct and indirect costs of providing state and local governmental services for these processing, refining and supporting operations within the State have increased. The costs of providing these operations with the basic services of government, such as crime prevention, elimination of safety hazards, and provisions for public schools and public highways, have substantially increased.

7. All the foregoing benefits, protections and consequences underlie and justify Louisiana's attempt, by the enactment of the First Use Tax, to secure a fair and reasonable return.

II.

FACTS AS TO PRODUCTION, GATHERING PROCESSING, REFINEMENT, TRANSMISSION, DISTRIBUTION AND CONSUMPTION OF GAS ORIGINATING IN THE OUTER CONTINENTAL SHELF

A. OCS PRODUCTION ACTIVITIES

8. The federal OCS and all the natural gas production activities that occur therein are bounded by and are outside Louisiana's territorial three-mile limit.

9. The southern shoreline of Louisiana and its territorial three-mile limit are in the Gulf of Mexico, northward from the OCS. These southern boundary lines are fluctuating and non-static, varying from time to time dependent upon the then-landward limits of the State as determined by the existence of barrier islands, reefs and other southernmost projections of land mass. These ambulatory lines mark the boundary between the three-mile territorial limits of Louisiana and the OCS waters over which the United States asserts jurisdiction with respect to natural gas production.

10. This vast OCS mineral rich area now contains approximately 13,500 wells and produces 4.1 trillion MCF of gas per year. This raw, unrefined energy is transported from OCS to onshore Louisiana by a vast maze of gathering systems and pipelines of varying sizes up to thirty six inches in diameter and comprising over 9,650 miles.

11. In its raw state, about ninety five per cent of the OCS natural gas is brought through the fragile and changing shoreline and marshes of southern Louisiana to processing plants and refineries in Louisiana. In these Louisiana plants and refineries, the raw gas is subjected to chemical treatment and other operations necessary to make the product marketable, transportable and usable for the purposes of the ultimate consumers in Lousiana and other States.

12. Some of the gas thus produced in the OCS is known as casinghead gas - i.e., gas which results from the production of oil and which is the pressure force that allows this hydrocarbon to be brought to the surface of the earth. Other gas, however, is produced as a separate commodity through a well drilled specifically for that commodity.

13. As initially produced in its *raw state,* none of the OCS gas is of merchantable or "pipeline" quality, for it generally contains oil or other extractable and usable products. Additionally, it is permeated with salt water, sulphur, and other impurities. These must be removed before the product can become a usable energy source. Some of these impurities, particularly salt water, may be partially removed at the wellhead on the derrick floor out in the Gulf of Mexico by using various types of separators or dehydrators. Some of the oil product or distillate can be separated by simple systems and brought onshore to Louisiana through separate facilities for distribution, processing, refinement, and ultimate consumption.

14. The *raw gas* thus derived at the OCS offshore wellhead is brought in its raw state from the producing wells at various pressures, through a maze of pipeline gathering systems to the southern shoreline of Louisiana, across the barrier islands, through the marshes and the wetlands, and into massive facilities constructed on the Louisiana wetlands to refine, process, and manufacture the raw gas into *refined gas* for delivery to pipelines for transportation to the gas consumers.

15. The amount of gas which is produced offshore depends upon the mechanical and geologic capability of the well and subsea reservoir from which the gas is extracted. In some cases the amount produced depends upon the demand of the pipeline companies and their customers.

16. On some occasions, the OCS wells are produced at maximum capability with the excess gas produced during warm seasons stored in subterranean cavities onshore Louisiana. Well pressures or artificial compression systems force the gas through numerous gathering pipelines connected with each other for pur-

poses of transporting the gas from the wellhead to shore. In the processing plants and refineries in Louisiana, hydrocarbons, sulphides, hydrogens, water and other foreign elements are removed in order to standardize the commodity for use as fuel.

17. When the raw gas has been brought from the OCS to a processing plant within the territorial limits of Louisiana, it is treated or processed for the removal of impurities, water, sulphides, carbon dioxide, nitrogen and hydrogen by sophisticated processes. There are 124 processing plants within Louisiana, which process about 95% of the OCS gas.

18. These Louisiana processing plants typically occupy about 75 acres of land, represent a present cost value of $40,000,000 each and handle an average volume of approximately 500,000,000 cubic feet of raw gas per day. Louisiana will show the location of these various processing plants within the State of Louisiana and the gathering pipelines which connect to the inlet side to bring the raw gas into the facility with the outlet side to take the *refined gas* out of it.

B. CONTRACTUAL ARRANGEMENTS

19. The United States, as the owner of the OCS seabed, leases to various producers and explorers the right to explore and produce natural gas from that seabed. Raw gas is then moved from the wellhead or wellbore (represented physically by a platform in the Gulf of Mexico) to the onshore processing plant in Louisiana, subject to various contractual arrangements, and undertakings, between the parties. In some instances, the producer of the gas sells the product to the pipeline at the wellhead. The ownership of the raw gas is transferred at that point. The pipeline then brings the product onshore where it either carries it through the processing system itself or arranges, by agreement, for others to process the raw gas. The producer, who has sold the gas to the pipeline company, reserves the right to retain certain extractable components as full or partial compensation for the cost of processing or refining and in these instances, the pipeline company delivers the product in its raw state to a predesignated

processing plant onshore through its gathering system.

20. In other instances, the producer merely employs the pipeline company at a fixed fee to transport the raw gas, from the wellhead to a predesignated processing plant onshore, either owned by the producer or subject to its control, through a complex series of contractual agreements with other persons.

21. In still other instances, the producer owns not only the well but also all or a share of both the pipeline and processing plant and, therefore, unilaterally controls the processing or treating operation. Then he sells and delivers the refined natural gas directly to the interstate pipeline systems at the tailgate of the plant.

22. All these separate and varied arrangements depend upon conflicting legal and economic considerations primarily relating to capital improvements necessary to gather and transport the raw gas onshore, and then to carry it through the costly processing and refining operation.

23. The usable products which are removed in the processing or refining procedure enjoy a merchantable value beyond the cost of removing them. The removed products include butanes, propanes, and ethanes, which are transported by other pipeline systems into chemical plants for use as feedstock and fuel.

C. NATURAL GAS - AN ENERGY SOURCE

24. Natural gas has value as an energy source and as such it is comparable directly to many other fuels. The same type and measureable quality of energy is provided by fuel oil, coal and nuclear power. The quality of energy or the value of the product as an energy source is uniformly measured by British Thermal Unit content (BTU). A BTU is the amount of energy necessary to raise the temperature in one gram of water one degree centigrade. It is the standard stated computation for an energy source of any kind and the basis for value determination.

25. Natural gas is normally measured in cubic feet. The term "MCF" means one thousand cubic feet and, as the name indicates, it is entirely volumetric. This is the amount of gas which exists in a thousand cubic feet of space at a specified pressure and temperature. Since this measure is volumetric, it does not necessarily relate to the heating content or energy value of the product in question.

26. Some natural gas contains a larger amount of energy (or BTU) than does other natural gas, but the standard of measurement, or energy content, in a thousand cubic feet of natural gas has now become by convention, contract, and uniform acceptance, one million BTUs, i.e., a thousand cubic feet of natural gas (1 MCF) is now customarily required by contract, convention, and economic standardization, to contain one million BTUs of energy. Therefore, one MCF of gas is expected to produce one million BTUs of energy and its price is adjusted accordingly. A poor quality of natural gas containing only 900,000 BTUs suffers a price reduction equal to ten per cent. An MCF of natural gas which contains 1.1 million BTUs enjoys a price increase in a like amount.

27. Much of the gas produced offshore Louisiana comes to the surface with much higher BTU content per MCF than this specified standard amount. These additional BTUs are represented by other products and properties which enjoy significant and separate merchantable value. In the processing and refining operation, these additional products are removed in proportions necessary to reduce the BTU content to the standard of 1,000,000 per MCF. Only after they are removed, along with the impurities and corrosives, does the raw gas produced from the Outer Continental Shelf have a standardized pipeline or consumer quality. This operation is sometimes referred to as "stripping" the gas, which means removing the other energy sources and contaminants from it and leaving the contractual standard of BTU content for transportation into the interstate pipeline system. The physical facilities of local distributors and ultimate consumers are designed and constructed for the measurement

and use of pipeline quality gas and are not capable of efficiently or safely burning various qualities of BTU content without economic loss, serious hazard, and rapid deterioration of facilities. The quality of the product delivered into the interstate pipeline system must be carefully controlled for ultimate safe distribution and use in the homes and industries of the plaintiff states.

28. The value of the products which are removed from the raw gas exceeds the cost of removing them (i.e., the value of the gas itself is enhanced by that amount) or otherwise it would not be feasible economically to engage in the costly processing operation and adjustments would be made in contract price by recomputation based on BTU content. The value thus added through the processing of the gas contributes a substantial portion to the total value of the refined gas product. The transportation cost of the refined gas is significantly reduced, as it costs far less to transport the pipeline quality or refined gas than it does the raw gas. Substantial savings are realized by the ultimate user as well as the pipeline transporters whose lines, compressors, and equipment are spared the weight and corrosive effects.

D. THE PROCESSING OR REFINING OPERATION

29. In the processing plant, the natural gas gathered from far offshore and sometimes commingled with onshore gas flows through a complex system consisting of many miles of various sizes of pipe and is subject to many and varied chemical, pressure and heating treatments.

30. The raw gas is heated and then cooled; it is injected with an oil base product which is subsequently removed; its pressure is raised and it is lowered for various periods of time at various stages in the process. Its BTU content is dramatically altered and its molecular makeup is significantly affected. Sensitive quality controls allow a predetermined amount and quality of product to be removed and thereby adjust the ultimate BTU value of the finished product.

31. After this complex and costly procedure the product which remains is of uniform quality and BTU content (one MMBTU per MCF) and is principally methane of vastly different character from that raw gas which was produced on the Outer Continental Shelf and brought to the inlet of the plant.

32. Economic considerations require that the producers, pipeliners, or processing plant owners seek to remove even "the squeal from the pig itself" in order to get the maximum merchantable product out of the raw gas which is produced offshore. This clearly recognized addition to the value of the product represents a one-time, necessary manufacturing operation which is essential to the use of the product for any purpose.

33. After the usable by-products and corrosives are extracted the refined gas is of "pipeline quality." At the tailgate of the processing plant the refined product is contractually acceptable and the commodity, which is ultimately consumed in the plaintiff States, enters the interstate commerce stream for distribution and consumption. Prior to these operations it is nothing more than raw material to be gathered, treated, prepared, and processed for the various commercial merchantable uses to which it is destined.

34. Natural gas of various owners is carried to the processing plants at the same time and correct accounting procedures must be utilized for ownership and charging purposes.

35. From the tailgate of these processing and refining facilities, the natural gas, in its refined commodity state, is then carried by a complex system of transmission pipelines out of the State of Louisiana and into other parts of the nation to meet the incessant demand for energy.

E. PRICING AND MARKETING

36. For many years, the wellhead price of interstate natural gas was regulated and controlled by federal statutes and various governmental agencies. The Federal Energy Regulatory Commission (FERC) [successor to the Federal Power Commission

(FPC)] is vested with wellhead price regulating authority. Until recently only the sale of gas in the interstate market was subjected to pricing control by federal law. Intrastate gas was subject only to the operation of a free market system.

37. By 1976, due to the impact of artificial prices on interstate gas acquisitions, there was a severe shortage which developed within the interstate system and governmental action was taken to permit the sale of intrastate gas at higher prices to the interstate system. At a time when the interstate system was deficient in gas supplies, there was adequate gas within most intrastate systems to meet the demands of their customers.

38. By subsequent legislation, the federal government imposed wellhead price controls on all gas sales, intrastate as well as interstate. The Natural Gas Policy Act of 1978 (NGPA) brought about price restrictions on all wellhead gas sales. A complex system of pricing mechanisms was provided, with varying prices for gas dependent upon the category of natural gas in question and the date of its discovery. In general, newly discovered natural gas has been furnished a new gas price ceiling while old fields or reservoirs are subject to previous price regulation, and certain classifications of gas are left entirely to the operations of the free market. In all instances, however, gas pricing contemplates adjustment for BTU content at the delivery point.

39. While natural gas prices have escalated in interstate commerce, it remains the most reasonable source for energy on the world market today. The comparably lower prices have attracted new gas customers throughout the nation.

40. Against this background of fundamental energy production and refinement for market, the Louisiana Legislature considered and enacted the First Use Tax. It was designed to insure that necessary operations and uses performed in Louisiana in connection with the preparation of OCS raw gas for marketing bear the same tax burden as borne by the operations and uses performed in Louisiana relative to the marketing of local raw gas.

F. LOUISIANA'S FIRST USE TAX

41. About 30% of Louisiana's revenues are directly derived from oil and gas related activity, principally royalties paid to the State on production from state owned lands and severance taxes paid on gas produced from within Louisiana's territorial limits.

42. Louisiana's severance tax, amounting to seven cents per MCF on all gas produced within the State of Louisiana, is exactly the amount of the First Use Tax. Louisiana's consumers of natural gas will, along with the consumers of all other states, bear their proportionate share of the cost of both the severance tax and the First Use Tax to the extent that they utilize gas as an energy source.

43. Over 98% of the raw OCS gas which is brought onshore Louisiana, processed and placed into the interstate pipeline transmission system, goes outside Louisiana for use and consumption. Of the natural gas produced within the borders of the State of Louisiana, approximately 75% is transported outside Louisiana by the same interstate pipeline system.

44. Louisiana faces declining gas production and markedly reduced reserves. Diminishing revenues from these sources have become a reality of life confronting both governmental and private sources.

45. Louisiana's state debt now exceeds 1.7 billion dollars and she faces additional losses as a result of depleting revenue sources. Louisiana's ambulatory shoreline is receding from erosion, due in part to offshore mineral production and pipeline activities, and thus is contracting the three-mile outward area of state ownership. All this poses imminent loss of state mineral revenues.

46. Louisiana foresees serious problems of satisfying increased demands for public services directly and indirectly related to the impact of gas marketing on a declining tax base, coupled with the payment of 1.7 billion dollars of debt on the same diminishing tax base. The inevitability of additional tax

measures to support these public services and to retire state debt has created a need to supplement depleting mineral revenues with additional justifiable measures from comparable sources.

47. The first well out of sight of land was drilled off the coast of Terrebonne Parish in Louisiana by the Kerr-McGee and Brown & Root joint venture in 1947. Since that time, gas resources in the OCS off the coast of Louisiana have been developed in the interest of national energy needs but at considerable risk to the environment of Louisiana, which includes the greatest wetland area in the United States. OCS activity is still increasing offshore Louisiana while many other States (some among the plaintiffs here represented) continue to resist even the initiation of exploration or production off their borders.

48. Louisiana has contributed to the development of OCS gas resources off its shores by allowing the construction and maintenance of pipeline gathering systems across its barrier islands, its shorelines, its marshes and its wetlands.

49. Louisiana receives no revenues for its support of these OCS activities that even approaches a reasonable compensation for the actual costs and damages incurred by the State.

50. The massive industrial development of the OCS gas resources off the Louisiana coast has occurred without the industry being required to contribute in any way to the operation and maintenance of the government and supporting services provided by Louisiana. Louisiana receives no royalty income from the production of gas in the OCS area. And Louisiana provides an exemption from the state sales tax for all equipment and supplies used and consumed in the production of gas in the OCS. The processing and refining plants in Louisiana enjoy a manufacturer exemption from ad valorem taxation.

51. Unlike most other States, Louisiana is precluded from sharing in federal revenues derived from mineral and forest production on federal lands located within the State. Such sharing by other States is allowed as direct compensation for the impacts they sustain in supporting commercial production on such lands.

52. Louisiana realizes substantial losses from its direct support of the production and preparation for market of the OCS raw gas. It is permitted to use less than two per cent of the OCS gas within the State. At the same time, Louisiana is required by federal law to begin the importation and use of coal produced in other States, taxed there at rates up to 30% by the States and up to 12½% by the federal government.

53. The First Use Tax became effective on April 1, 1979. It imposes a tax on activities occurring within the State at the rate of seven cents per MCF, measured at the tailgate at the conclusion of the refining processes but prior to the delivery of the refined gas to the interstate transmission systems. The tax is not imposed upon the gas itself, either in its raw or its refined stage. Nor is the tax imposed upon the privilege of transporting the gas from those refining operations to the interstate transportation systems. Nor is the tax laid upon the right to engage in the production of this OCS gas offshore, nor upon any activity or operation occurring in the OCS areas.

54. The First Use Tax is imposed upon eight enumerated uses, all of which are a part of or related to the processing and refining activities that occur solely within the State of Louisiana. Such activities are not capable of being duplicated in any other State with respect to raw OCS gas that is gathered, processed and refined in Louisiana.

55. The First Use Tax is imposed upon "the owner of the gas" at the time when the first of any of the eight enumerated uses occurs. By this definition, in 85% of the cases the owner is a natural gas pipeline company, claiming that it acquires title to the gas at the OCS wellhead. In the remaining 15%, the owner is the producer who maintains ownership of the gas throughout the entire gathering and processing stages. Determination of ownership is dependent upon the contractual arrangements among the parties.

56. The seven cents per MCF tax rate imposed by the First Use Tax is identical with the tax rate imposed by Louisiana's severance tax on natural gas produced within the State. Such

territorial gas is gathered, processed, and used in the identical manner as OCS gas.

57. The First Use Tax does not require or even contemplate that the owner of the gas, upon whom the use tax is levied, pass on the cost of the tax to the ultimate consumers. Nor does the First Use Tax require or even contemplate that the owner of the gas seek any approval or authorization from the Federal Energy Regulatory Commission, or any other regulatory body, to pass the tax cost on to the ultimate consumers in the form of higher gas consumption prices.

58. The actions of the gas owners in refusing to absorb the costs of this use tax, as well as their actions in seeking and obtaining the approval of the Federal Energy Regulatory Commission to pass-through the tax costs to the ultimate consumers, are totally voluntary in nature and are in no way dictated or required by the terms or policies of Louisiana's First Use Tax.

59. The Federal Energy Regulatory Commission's orders (Orders 10, 10A and 10B), approving the pass-through of the Louisiana use tax to the ultimate consumers, were issued pursuant to a statutory discretion conferred upon the Commission to permit just such a pass-through to be effectuated. The Commission was not compelled by law to approve the pass-through in this instance.

60. The fact that the owners of OCS-produced gas have succeeded in passing on the incidence of the First Use Tax to ultimate consumers in other States is not evidence of any discrimination against such out-of-state consumers. The incidence of this tax has also been passed on to Louisiana consumers of OCS-produced gas. And both the in-state and out-of-state consumers of natural gas produced within Louisiana, on which a severance tax has been levied in precisely the same amount, are compelled to pay the costs of that severance tax as a result of authorized adjustments in the consumer rate schedules.

61. Thus, for the first time in Louisiana's history, the activities occurring within the State in relation to the gathering,

processing, and refining of OCS-produced gas have been asked to provide Louisiana with reasonable and equitable compensation for having assumed the risks and incurred the impacts, burdens and governmental responsibilities associated with these massive industrial activities.

62. The purpose of the First Use Tax is to prevent the waste of Louisiana's natural resources and to equalize competition between Louisiana's territorial gas marketers who pay the severance tax and the offshore marketers who otherwise pay no tax at all. The tax requires this major industry to pay its own way and to contribute to local and state governmental costs in the proportion, and in a fair relationship, to the services which are provided and to the risks and hazards which are incurred. A portion of the tax proceeds are specifically designated for the restoration and preservation of Louisiana's eroding state shoreline and the maintenance and upkeep of its marsh and wetland area. Exposures and impacts to the State's waterbottoms, barrier islands and coastal areas are almost inestimable and the First Use Tax will allow Louisiana, for the first time, to adopt broadbased protective measures and safeguard systems to insure the restoration and perpetuation of these and other valuable resources.

G. ENVIRONMENTAL AND ECONOMIC CONSIDERATIONS

63. The environmental area in question, so far as Louisiana is concerned, extends from the Gulf of Mexico on the south to the higher ground some twenty to forty miles north and inland, approximately bounded by the Thirtieth Parallel on the North. The OCS gas enters the shoreline of Louisiana from numerous locations in pipelines typically ranging from twelve to thirty six inches in diameter. These lines are installed by various methods, all involving the digging of canals and ditches with the necessary berm, spoil bank and destruction of the natural environmental makeup, together with backfill, dissection, machinery, equipment and deterioration of immediate areas. Surveying and

alignments are established and marked, with the aid of marsh buggies having wide tracks which cause a significant impact upon the marshland.

64. The entire coastal area of Louisiana is characterized by a wetland area of bayous, swamps, ponds, standing waters, and marshlands. Along the coasts, tides and wave action have produced little vegetation or peat formation and support with only pioneer species of plantlife and shore birds. Behind this protective sea rim are vast areas of salt marsh with frequent inundations of salt water resulting from natural storm tides maintaining customary and essential salinities. The vegetation here is broken down and flushed by tides and the saline balance of these areas is maintained as a vital aspect in the maturing of enormous values in fish, shellfish, fur bearers, and other dependent species.

65. Further inland where the pressures of fresh water flow compensate for tidal pressures, a mixing zone occurs and in these brackish marshes are found the most productive estuaries in the world for a myriad of species of fish and commercial marshland products. It is in these moderately saline marshes that the greatest danger of destruction from salt water intrusion through industrial activities exists. Upsetting the delicate balance between fresh water flushing and salt water inundation has devastated significant portions of this area and will totally destroy this area in the immediate future unless corrective measures are funded and taken.

66. Still further inland, areas normally protected from salt water produce a different type of fresh water marsh where plant species and different abundant water life habitation is found. Coastal Louisiana has a wide range of environmental characteristics important to all forms of terrestrial and marine life. High productivity of fur, waterfowl, oysters, fish, and shrimp indicate something about the magnitude of the importance of these various products to man. About 4,000,000 acres are involved in the various types of marsh vegetation.

67. In 1977 commercial fish and shellfish landings in Louisiana coastal and inland waters amounted to 920,000,000

pounds with a value in excess of $138,000,000. Fur-bearing animals, such as muskrat, mink, and nutria, produced a fur value of twelve and one-half million dollars in the 1976-77 season. Agricultural products sold and consumed in the marshland areas represented a total economic input of over $335,000,000. These and other renewable resources are directly dependent for their existence upon the maintenance of this remarkable coastal environment. Fresh and salt water imbalances and intense-user activities are among the major problems facing coastal Louisiana. This estuarine system produces about twenty eight per cent of the nation's total commercial fish harvest and must be protected and safeguarded.

68. In 1974 substantially all the 124,000 employees directly involved in OCS gas production and marketing were residents of Louisiana. With the addition of families and related household members, this human count exceeded 390,000 people. At that time, more than six years ago, the uncompensated cost to the State of Louisiana exceeded $183,000,000 per year and $84,000,000 at the parish and municipal government levels. On a per-capita cost of governmental services, it has been estimated that Louisiana annually expends $267,000,000 to provide the benefits of government and public services to the persons attracted to this State by the OCS-related energy industry. Some personal taxes are collected from these individuals but the cost of services far outweighs such minimal revenue sources.

69. Huge sums are paid by the natural gas industry to the Federal Government in the form of bonuses and royalties for offshore operations. There is no direct sharing of these amounts with the State of Louisiana for the services, facilities, and benefits provided. In 1978, more than $627,000,000 in royalties were paid to the Federal Government by onshore-based firms operating beyond the imaginary three-mile boundary offshore Louisiana for natural gas production only.

70. There are certain positive aspects associated with the development of the natural resources offshore Louisiana. These result from employment opportunities, both directly and in-

directly, and the encouragement of development of supporting and complementary businesses resulting in a better economic climate. On the other hand, this has created massive problems which the population center of Morgan City, Louisiana now typifies. This once quiet coastal fishing village initially celebrated the fact that the first oil well out of sight of land was drilled off its shore. The town is now a collection of fastfood franchises, mobile homes, motels, and bunkhouse type hotels where workers gather to drink beer and watch a communal television set. Adequate housing is scarce. Huge piles of rusting steel scraps litter the road for miles and the landscape is an industrial wasteland.

71. State and local governmental units in Louisiana are not able to secure adequate revenues through taxes from firms engaged in OCS gas activity, although these firms have a direct and indirect impact on services required. These impacts bear not only on port facilities, schools, medical facilities, and environmental management services, but on the entire range of governmental activity. The production of mineral resources from the OCS generates social costs regardless of where the area is, whether offshore Louisiana, California or Massachusetts. The magnitude of the onshore impact of OCS activities will vary depending upon how the tax structure for the region is set up and the relative importance of OCS activity to other economic development.

72. In 1970 only some 300 gas wells were situated within the state territorial waters offshore Louisiana, while 1300 were situated in the federal OCS. Since that time, the numbers have changed dramatically. During the decade of the Seventies, 12,276 wells have been drilled in the federal OCS, while drilling in state waters declined proportionately. Of the offshore production in the Gulf of Mexico, south of Louisiana, about 90% is in the OCS and only about 10% is from Louisiana controlled waterbottom. In 1971 Louisiana was losing over $183,000,000 per annum tax revenues and in 1979 this amount has more than doubled.

III.

STATUTORY FACTS AND QUESTIONS

73. Since the constitutionality of the Louisiana First Use Tax depends in large part upon the particular facts and circumstances to which the statute is applied, the following factual inquiries must be made and evidence must be supplied with respect to each inquiry:

a. As respects each taxpayer, which of the eight enumerated uses first occurs in Louisiana and in what order do subsequent uses, if any, follow?

b. Has the first enumerated use, to-wit: *sale*, been performed and has the tax been assessed on that basis as to any taxpayer?

c. Has the second enumerated use, to-wit: *transportation in the State to the point of delivery at the inlet of any processing plant*, been performed and has the tax been assessed on that basis as to any taxpayer?

d. Has the third enumerated use, to-wit: *the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility*, been performed and has the tax been assessed on that basis as to any taxpayer?

e. Has the fourth enumerated use, to-wit: *the transfer of possession or relinquishment of control at a delivery point in the State*, been performed and has the tax been assessed on that basis as to any taxpayer?

f. Has the fifth enumerated use, to-wit: *processing for the extraction of liquefiable component products or waste materials*, been performed and has the tax been assessed on that basis as to any taxpayer?

g. Has the sixth enumerated use, to-wit: *use in manufacturing*, been performed and has the tax been assessed on that basis as to any taxpayer?

h. Has the seventh enumerated use, to-wit: *treatment*, been performed and has the tax been assessed on that basis as to any taxpayer?

i. Has the eighth enumerated use, to-wit: *other ascertainable action at a point within the State,* been performed and has the tax been assessed on that basis as to any taxpayer?

j. Should the first enumerated use not occur in Louisiana may the second or subsequently enumerated uses occurring in Louisiana be the subject of the imposition of the tax?

k. Is the public policy of the State in support of the statutory provision declaring certain contractual provisions unenforceable consistent with the factual basis supporting the announced public policy?

l. Is there sufficient justification or State interest to support the granting of an exemption from the tax to certain uses of natural gas within the State?

m. Does the severance tax credit statute amend the First Use Tax statute?

n. Does the tax credit for electric and natural gas service statute amend the First Use Tax statute?

o. Does the application of the severance tax credit statute create a discriminatory first use tax?

p. Does the application of the tax credit for electric and natural gas service create a discriminatory first use tax?

q. Who is entitled to claim a tax credit under the tax credit for electric and natural gas service?

r. Does the granting of a gas severance tax credit subject the owner of the then untaxed domestically produced gas to a first use tax liability when the gas undergoes any of the enumerated uses in the statute upon which the first use tax is imposed?

s. What incidents qualify to support a claim for a tax credit under the tax credit statute for electric and natural gas service?

t. What contractual language will suffice to trigger application of Section 4 of Act 294 of 1978?

u. What effect, if any, do the rules promulgated by the Louisiana Department of Revenue to implement the tax have on the constitutional applications of the tax?

v. What effect does the declaration of severability in Section 2 of Act 294 have upon the severability of Section 4 of said act?

w. Do the provisions of Section 1303 (C) of Title 47 of the Louisiana Revised Statutes prohibit the contractual shifting of tax liability by contracts entered into on and after the effective date of Act 294?

x. Which one, if any, of the enumerated uses can be considered a cost or expense attributable to processing under the terms of Section 4 of Act 294?

y. Does Article VII, Section 4, Sub-section B of the Louisiana Constitution of 1974 prohibit the imposition of the First Use Tax on uses of gas produced within the State upon which no severance tax is imposed?

z. What are the essential components of transportation of raw gas to a processing plant which distinguish it from transmission of refined gas to markets for use?

74. All the eight enumerated uses permit the tax to be assessed in any particular case only upon an activity or use that is an ingredient of or related to the gathering, processing and refining of OCS raw gas within Louisiana before the refined gas is delivered to interstate transmission systems. Absent such processing in Louisiana, none of the other enumerated uses would necessarily permit the imposition of the First Use Tax on any taxpayer. And, Louisiana has in fact imposed no use tax on any enumerated usage by a taxpayer save where OCS raw gas has been gathered, processed and refined solely within the State.

75. The Louisiana Supreme Court has had no opportunity, as yet, to make any definitive interpretation of the First Use Tax statute or to determine the propriety of the application of the First Use Tax to uses that have so far been made.

IV.

FACTS SHOWING COMMERCE CLAUSE INAPPLICABLE

76. The movement of refined natural gas in interstate commerce commences at the tailgate or outlet of the gathering and processing plant where the natural gas company accepts delivery for transmission to the ultimate consumers.

77. The "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act for "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stage of distribution." "Raw gas" is not in a state suitable for marketing or distribution at the time of its production at the wellhead on the offshore platform. The commodity purchased at the wellhead by natural gas companies is dedicated to interstate commerce by virtue of its origin in the Outer Continental Shelf and contains other definable commodities and corrosives. Until the commodity purchased (i.e. an MCF of gas containing one million BTUs and no corrosives) is deliverable and delivered, the terms of the contract are not met and the marketing and initial distribution of the natural gas has not commenced.

78. Of the eight enumerated uses of natural gas within Louisiana which are subject to imposition of the First Use Tax, the first five uses enumerated are physical acts or activities necessary in preparing the raw natural gas "for its first stage of distribution." Until the first five uses enumerated are performed upon the raw natural gas, the natural gas companies do not take delivery of the actual commodity purchased. The natural gas companies take delivery of the commodity purchased from the producer at the "tailgate" of the gathering and processing plant located in Louisiana. The first five uses enumerated are exempt from federal regulation as part and parcel of the gathering system.

79. Until (1) the central gathering of the raw gas stream is accomplished, and (2) the substantial physical activities and processing onshore are completed, and (3) the refined commodity reaches the "tailgate" or outlet of the gathering and processing plant for delivery to and transmission by a natural gas pipeline company, there can be no marketing or initial distribution for consumption of the actual commodity purchased because such refined commodity does not exist until then.

80. The taxable incidences all occur while the raw natural gas is in the unregulated gathering system and prior to the point where the refined natural gas enters the market for transmission in interstate commerce.

V.

FACTS SHOWING COMPLIANCE WITH COMMERCE CLAUSE REQUIREMENTS

81. The Louisiana First Use Tax is imposed solely upon local activities that precede the introduction of refined OCS gas into the interstate stream or transmission of that product. But even if, as the complainants assert, the stream of interstate commerce be defined as extending from the OCS wellhead to the consumer's burners, facts are available to demonstrate that the imposition of the First Use Tax is fully consistent with the constitutional principle that interstate commerce must bear its fair share of direct state taxes.

82. Under appropriate factual conditions, interstate commerce may be directly taxed by a State so that the industry pays its fair share for benefits received. The factual criteria for a constitutional imposition of a direct tax on interstate business are: (1) the tax must be applied to an activity with a substantial nexus to the taxing State; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided and to the benefits received. All those criteria have been met by Louisiana.

A. SUBSTANTIAL NEXUS

83. In order to assess the sufficiency of nexus between the activity upon which is imposed Louisiana's First Use Tax and the State, it is necessary to recognize the "uses" taxed by Louisiana. The First Use Tax is imposed on the following enumerated uses:

a. the sale;

b. the transportation in the State to the point of delivery at the inlet of any processing plant;

c. the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility;

d. transfer of possession or relinquishment of control at a delivery point in the State;

e. processing for the extraction of liquefiable component products or waste materials;

f. use in manufacturing;

g. treatment; or

h. other ascertainable action at a point within the State.

84. Facts which must be discerned with respect to the nexus of these uses include but are not limited to the following:

a. Outer Continental Shelf (OCS) activity off of the coast of Louisiana composes the most productive, sophisticated, and complex natural gas network in the northern hemisphere. The Federal OCS in the Gulf of Mexico contains approximately 366 fields. Of these, 232 primarily produce gas, at production depths from 1,000 feet to 25,000 feet, with the majority of production occurring between 8,000 and 12,000 feet. As of the end of 1978, 37.6 trillion cubic feet of new gas had been produced from these Federal OCS lands. Since the inception of the OCS Leasing Program, there have been approximately 2,000 fixed structures erected in OCS waters offshore Louisiana from which approximately 13,576 exploratory holes have been drilled.

b. As of 1977 the area contained approximately 9,650 statute miles of gathering pipelines from production units in the OCS to the 124 gas processing plants within the boundaries of the State of Louisiana. Production and gathering from this area represented approximately 97 percent of the total U.S. offshore production under both Federal and State leases in 1977.

c. In connection with OCS natural gas operations, one or more onshore operations bases are established to support gas activities in a given offshore region. The actual number of operation bases in a given area will depend on several factors: the number and distribution of lease holdings, the number of companies with holdings, the amount of dependent activity and the distance from the onshore base to the leased tracts. In the Gulf of Mexico off of the Louisiana coast the first offshore well was drilled in 1947. In the 33 years since that date, operational bases and related facilities associated with natural gas production have been strategically located in virtually every accessible area along the 1,200 miles of Louisiana's coastline. Of the 124 gas processing plants in Louisiana, 80 plants are located within Louisiana's fragile coastal marshlands. As a general rule, an operations base includes helicopter pads, warehouse base, offices, staging area and dockage, and associated facilities requiring approximately 50 acres of land. Locational requirements include an inland water dock site with ocean access accommodating drafts to 15 feet in a planned or existing industrial area and necessary infrastructure (water, utilities, highway access, etc.) must be available.

d. Operations bases and services established to support exploration activities normally continue serving offshore operations in development drilling. The operation bases themselves, and many of the service companies, will also support the production phase. Through the first six years of these operations, in excess of 600 persons will be employed by companies holding those OCS leases or providing services associated therewith for each lease in the OCS off of the Louisiana coast. In the next five years additional lease sales occurring in the OCS waters off of Louisiana's coast are expected.

e. Gas processing plants are tied to the productive life of a field (or fields, if more than a single field is connected by pipeline to the facility). To achieve maximum efficiency, processing facilities require a site near the area of production. The most important locational factors in siting a gas processing plant are proximity to the source of production and to the distribution system. Sites selected for these facilities have historically been in the proximity of the landing site of OCS gas gathering pipelines and, as a consequence, 95 percent of all new gas processing plants for Gulf of Mexico OCS gas production are located within Louisiana. A gas processing plant with a capacity of 300 mmcf/day requires between 20 and 75 acres for the site. Future OCS production will cause an expansion of existing facilities in addition to possible construction of new plants, depending upon the magnitude of future discoveries.

f. In excess of 9,000 miles of gathering pipelines have been laid through coastal Louisiana and the associated OCS lands as a result of OCS operations. In order to bring these gathering lines onshore to gas processing and storage facilities, it is necessary that canals be dredged through the delicate Louisiana wetlands and marshes, resulting in significant annual losses to the Louisiana environment and ecosystem.

1. Dredging for channel construction associated with the pipe laying activities affects the Louisiana coastal environment in a number of ways:

(a) by removal of marsh and barrier land surfaces to water bodies;

(b) by disturbance of waterbottom habitats;

(c) by removal of waterbottom materials, both benthic and sessile organisms are affected;

(d) by creation of deep water areas that may either expose or collect toxic materials;

(e) by release of low density sediments, dissolved or absorbed chemicals or toxics and nutrients;

(f) by increasing intrusion of saline waters into previously fresher water areas;

(g) by exposing new bank surfaces to erosion, thus accelerating land loss;

(h) by changing water circulation patterns between salt, brackish, and freshwater marsh areas;

(i) by affecting terrestrial and aquatic habitats through spoil disposal activities;

(j) by alteration of natural drainage processes;

(k) by destroying fauna nesting areas;

(l) by creating a transient turbidity that temporarily affects both sessile and nekton organisms;

(m) by burial of sessile organisms through sediment accumulation.

2. Spoil disposal associated with channelization for gathering lines will affect the environment in a number of ways including:

(a) by spoil bank interference with circulation in the marsh areas;

(b) by redistribution of nutrients, pathogens, and toxic chemicals contained in spoils;

(c) by covering plants, eggs, larvae, and larger organisms and in general by covering high bio-mass substrates with low bio-mass spoils;

(d) by interfering with the physiological processes of aquatic organisms through suspended sediments;

(e) by reducing photosynthesis through turbidity increases;

(f) by compounding eutrophication.

g. Each enumerated use subject to Louisiana's First Use Tax Act has a clear nexus to the State of Louisiana, as follows:

(1) *The sale of natural gas:* The sale of a substantial portion of raw gas produced in the Federal OCS off of Louisiana's coast occurs subsequent to the entry of the gas within Louisiana's boundaries. Such sales may occur at the point of delivery at a processing plant or storage facility, during a time period associated with processing or storage, or at any other points of delivery designated by parties to the sale. All sales of this nature occur within the boundaries of the State of Louisiana.

(2) *The transportation in the State to the point of delivery at the inlet of any processing plant; the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility:* In excess of 90 per cent of all gas produced on Federal OCS lands off of the Louisiana coast is transported by pipeline gathering systems to processing plants or storage facilities located in Louisiana. Such gathering lines traverse the boundaries of the State of Louisiana and stop within Louisiana's territorial limits.

(3) *Transfer of possession or relinquishment of control at a delivery point in the State:* The majority of all gas entering the State of Louisiana from Federal OCS lands involves a transfer of possession or relinquishment of control by the owner at a delivery point within the boundaries of the State of Louisiana.

(4) *Processing for the extraction of liquefiable component products or waste materials:* Gas produced from Federal OCS lands and transported into the State of Louisiana is processed and transformed into pipeline quality refined gas at facilities located within the boundaries of the State of Louisiana. One hundred twenty-four gas processing plants are located within the boundaries of Louisiana, and plant owners have contracted to perform essential functions to make the gas marketable. All raw natural gas received at processing plants in Louisiana contains extractable liquefiable hydrocarbons and corrosives in suspension which make the raw natural gas unfit for long distance transportation and unusable for general public consumption. These liquefiable hydrocarbons and corrosives include: propane, isobutane, normal butane, isopentane, normal pentane, ethane, hexane, water, sulphur, carbon dioxide, and nitrogen.

(5) While each gas processing plant in the State of Louisiana may vary in the types of operations and procedures used at the plant, the following materials generally describe the type of operations which occur upon receipt of raw natural gas by a processing plant in Louisiana. In some instances, water may be partially separated from the raw gas at the well head or

removed at a dehydration plant or separator onshore prior to processing. At the processing plant the raw gas enters an inlet separator which removes any condensate from the raw stream. As there are still extractable hydrocarbons remaining, the gas flowing out of the separator is sent to absorption towers where additional liquids are absorbed out. When the gas enters the absorption tower, it flows against absorption oil. The gas generally enters in at the bottom of the tower and out at the top. As the gas moves up the tower, oil is pumped against the flow of the stream of gas and the oil absorbs liquefiable hydrocarbons out of the raw gas stream. All of the liquefiable hydrocarbons are extracted in the absorbor, and they are then contained in the absorption oil. From the absorbor the oil goes to a still where heat is applied and the pressure controlled so that the hydrocarbons will take the form of the liquid, be boiled-off, and leave the oil for recirculation. The boiling-off of liquids by heat and pressure is called fractionation and an additional fractionation process separates the various absorbed hydrocarbons (propane, butane, etc). The natural gas remaining after absorption is generally called residue gas and the residue gas may, as necessary, be sent from the absorption towers through a dehydration unit where water and other undesirable elements remaining in the gas are separated out. The remaining dry gas product is then delivered at the tailgate of the plant to the pipeline company or other purchaser as "pipeline quality" gas ready for transmission and consumption.

The above described processing is absolutely mandatory to convert raw natural gas into a marketable commodity.

(6) *Use in manufacturing; treatment; or other ascertainable action at a point within the State:* Research indicates that some raw natural gas brought into Louisiana from the OCS is treated and used directly in various petrochemical feedstock applications within Louisiana.

h. There is a substantial value added in Louisiana as a result of the uses to which the gas is put in the State. This value added is distinct and comparable to value added to other commodities of commerce from manufacturing and marketing activities associated therewith. This value added is only due to the uses and activities related to raw gas which occur in Louisiana prior to its refinement and delivery to its owners for transmission and consumption.

i. The operation of natural gas activities stemming from OCS production creates costs and benefits to the State of Louisiana which form a nexus between the State and the uses enumerated in Louisiana's First Use Tax. The costs and benefits to the State come from three sources:

(1) The onshore activity related to the discovery, development, and production of natural gas wells;

(2) The onshore activity related to the gathering, storage, and processing of the output from these wells; and

(3) The induced economic activity generated by the supply of input to OCS related activity and by the supply of raw natural gas which is the output of that activity.

j. The inputs which are used in OCS related activity and the subsequent activities induced by it are labor, capital, and land.

(1) Labor receives increased income due to increased levels of economic activity. Some of this labor was previously unemployed and some migrated into the State due to this activity.

(2) Capital inputs come from two sources: public and private. Private capital receives income due to higher economic activity, although some of this increased income is received by out-of-state owners. Public capital includes the schools, roads, sewage facilities, etc., necessary to maintain public services at acceptable levels in the face of the increased economic activity.

(3) Land inputs also come from private and public sources. Private land-owners, both in-state and out-of state, receive increased income from the increased economic activity. Public land, or, more generally, publicly owned resources, such as waterbottoms, barrier islands, reefs, and sensitive shoreline are used in the resulting natural gas activity.

k. Increases in local and regional population and business activity (caused by OCS operations) cause corresponding increases in a demand for public and private services and facilities such as education, potable water supply, energy services, police and fire protection, transportation, recreation, sanitary sewage and solid waste disposal and housing. Such population and business activity fluctuations cause deficiencies in service levels and adversely effect the quality of life and even the physical well-being of the population at times. The severity of these deficiencies are directly proportional to the total increase in demand and the length of time over which the increase occurs, and inversely proportional to the capacity of existing service systems and facilities to provide for increased demands without lowering designed service standards to the point where quality of service is considered unacceptable by the public. The increase of demand for public services calls for expenditures in excess of current revenues, requiring increases in taxes or other public revenue producing measures.

l. The Louisiana coastline is a high hazard area particularly with respect to hurricanes and storm surges. From its inception and continuing to date, the activities associated with OCS gas marketing operations have significantly increased populations in Louisiana's coastal areas. As a result, the State has been required to furnish substantial protections for the inhabitants of the coastal area from natural disasters. Extensive and increasingly costly highways and transportation related facilities have been required to ensure egress and access to the coastal areas. These transportational links serve to perform necessary functions for support of facilities located in the coastal zone and to provide emergency egress in the case of a man-made or natural disaster. The construction of needed highways and bridges, which can be directly correlated to onshore support of OCS gas activities has, alone, created substantial financial burdens for the State. Viewed in connection with all other public services required from the State of Louisiana for onshore support of OCS gas activities the costs to the State far exceed revenues generated.

B. RELATION OF TAX TO SERVICES PROVIDED

85. The second criteria is that there be a factual determination as to whether or not a substantial relationship exists between the tax and services provided by the State with respect to activities associated with the taxed uses. In order to adequately assess the relationship between Louisiana's First Use Tax and services provided for the benefit of the owners of the raw natural gas, it is necessary to evaluate the provided services.

a. Since the inception of offshore drilling in 1947 the State has experienced significant and onerous burdens for which comparatively little, if any, compensation has been received.

b. The effects experienced from onshore support of OCS related activities are cumulative and synergistic in nature, progressively increasing and expanding as OCS activities correspondingly increase and expand. There is an irrevocable interrelationship between labor, capital and land requirements, which both specifically and collectively create tangible hardships on the State of Louisiana.

c. The following materials briefly summarize the services provided by the State of Louisiana which are directly related to onshore impacts of OCS natural gas marketing activities. These hardships have been cumulatively impacting the State of Louisiana for over thirty years and progressively increase as OCS activity expands.

(1) Since the inception of OCS gas operations, population trends in Louisiana have shown an ever-increasing coastal population growth specifically related thereto. In the midst of irreplaceable marshes and wetlands have grown substantial population centers whose very existence is irrevocably tied to OCS gas operations. These once remote wilderness areas rapidly evolved into the hub of service and support activities for OCS operations. Thousands of laborers and their families, together with skilled workers and professionals, were infused into a coastal area whose public facilities were wholly inadequate to meet the demands of an ever-increasing population. Operation of a typical exploratory drilling rig requires about 110

workers, and each such rig can drill from four to six wells per year. The exploratory phase requires the largest number of transient employees because of the skills needed and the temporary nature of the work. Notwithstanding the transient status of employees, the State is still required to provide substantial services for these employees. Development rigs have similar requirements with crews of about 65 workers per rig as typical. Employment needed for the production phases will steadily rise in direct relation to the number of productive wells and platforms brought into service, peaking near the end of the development phase.

(2) Concurrent with the offshore operations are pipe laying operations conducted on the OCS and in State waters and wetlands. A pipe laying barge employs about 170 workers, about one third of which are unskilled and will be recruited locally, if available. Like workers on drilling rigs, most of the skilled pipe laying workers migrate with the vessel from job to job.

(3) A significant number of workers are employed in construction and expansion of raw gas processing facilities, onshore and overland transportation facilities, and onshore supply facilities directly associated with the marketing operations. A large number of support services directly related to OCS gas operations require not only a significant employee population, but, additionally, building space or sites, highway access, and in many cases inland water dock sites with ocean access. These support services include shop building facilities, platform and rig construction facilities, drilling mud suppliers, cement and structural material suppliers and manufacturers, logging and perforating services, wellhead equipment services and personnel, downhold equipment and personnel, diving services, tool sale and rental tool companies, and a full spectrum of pipeline, processing plant, and rig related industries which supply equipment, personnel, crewboat service, helicopters, catering and waste disposal.

(4) Increases in local and regional population and business activity cause corresponding increases in the

demand for public and private community services and facilities. The services include:

(a) education: during the initial phases of OCS operations, the Louisiana coastal communities had no educational facilities or only the most limited facilities as were required to meet previous populations. The substantial and rapid shift of population centers to the Louisiana coast has created a demand for new and/or expanded educational facilities including: physical structures, land area and publicly salaried personnel. Financial outlays for education have significantly exceeded available revenues and have substantially contributed to the State's bonded indebtedness.

(b) potable water supply: despite a surrounding area which contains some of the most valuable water resources in the nation, the availability of water safe for public use and consumption is limited. Extensive networks of piping, wells, and water purification and treatment facilities are mandatory. These facilities must be expanded and modernized as demands increase with population infusion.

(c) energy services: due to the wilderness nature of the coast, prior to the initiation of OCS-related activities, energy services were completely unavailable in many areas of coastal Louisiana. The provision of these services has been accomplished through a combination of publicly and privately financed facilities which, as with each other facility, must be constantly expanded and modernized to meet ever-increasing needs.

(d) police and fire protection: increased police and fire protection is an integral part of population growth. Police and enforcement authorities must be provided and funded in sufficient numbers to provide services to residents and transients alike. As a consequence, a significant portion of the services provided afford protection for individuals who infuse little revenue into the State's economy. Included in these services may often be the requirement for sophisticated and expensive equipment to control both onshore and water-borne activites.

(e) health services: a broad spectrum of health services is associated with population growth incident to OCS gas activities and their onshore related activities. In addition to the establishment of obvious services such as hospitals, clinics, ambulance and emergency service, there is a mandate that State funded health care be provided for those individuals who are not financially capable of affording necessary health care. As with police protection, the use of health care services is not limited to residents and a significant portion of the services provided are utilized by transients who infuse little money into the State's economy.

(f) transportation: the vast majority of activities and operations involved in OCS gas development and production are located in coastal areas which are subject to natural disasters such as storm surges and hurricanes. It is necessary that road and highway facilities be provided to allow the transportation of necessary goods and supplies to OCS related activities. It is additionally necessary that these roadways be capable of allowing emergency evacuation during the time a natural disaster would approach the coast. Construction of highways in coastal marshes and wetlands is among the most expensive roadway construction in the world the cost of which must be borne by the State of Louisiana. Highways must often be elevated, and require the construction of bridges or locks to transgress navigable waterways.

In addition to construction of roadways, transportational facilities must be provided by way of buses or other common carriers to allow travel by individuals who lack their own mode of transportation.

(g) recreation: as part of the overall scheme of public services provided to the citizens of the

State, the State provides recreational areas including: boat ramps, parks, golf courses, public swimming facilities, zoos, and man-made impoundments and reservoirs.

(h) housing: possibly the greatest shortage in all available services is that of housing. The coastal Louisiana area is not topographically situated for rapid housing development. The Louisiana marshes, swamps, and wetlands inhibit construction. To allow development the swamp or wetland area must be completely destroyed and sufficient community roadways must be constructed to service a new development.

(i) sanitary sewage and solid waste disposal: in connection with housing expansion, and, similarly, in industrial or commercial sites, extensive sanitary sewage facilities must be provided. Associated with these facilities are the necessary treatment sites and solid waste disposal sites. Additionally, sanitary land fills and refuse sites must be provided which increase loss of wetlands area and burden the financial structure of the State. Further, federal law prohibits waste disposal from the OCS platforms and this refuse must be returned to shore for proper disposal.

(5) As the demands for the above enumerated services increase, the demands on public capital increase. The demands for public capital resulting from OCS natural gas activity have two sources: population demand on public capital, and facility demand on public capital. These public capital costs consist of annual capital operating cost and annual interest costs on public debt. Annual cost must be absorbed by the State and local governments as expenditures are made. Debt costs will continue after the OCS activity declines, imposing a fiscal burden on the remaining population which must be borne notwithstanding the absence of income from OCS related activities. In addition, to the extent that the activity results in the shift of population within the State, previous capital used must be paid for by remaining residents in the face of

a declining tax base; and new capital must be created at the destination locations of the population shifts. In this sense, there is a double capital cost imposed on citizens of the State of Louisiana.

(6) The facility demand on public capital is directly tied to the unusual public capital necessity for primary and secondary OCS natural gas activities. These include highways, sewage treatment, and other services which have greater demands placed on public facilities than would be experienced through other forms of business activities.

(7) A particular cost to the State is the construction, maintenance, and supervision of port and port facilities related to OCS gas marketing activities. An integral part of this service includes the creation and maintenance of channels and includes the requirement for services of enforcement authorities to oversee port operations. Since natural gas operations on the OCS are supported almost entirely by water borne commerce, the port facilities provided must be regularly expanded to meet ever increasing needs of the industry.

(8) The third aspect of costs to the State is that related to land. The uses and loss of land attributable to OCS gas operations and related onshore activities are inextricably intertwined with environmental impacts flowing from OCS gas marketing activities. Louisiana's environmental setting and ecological stability is directly and indirectly adversely affected by activities associated with gas operations and related activities. This effect is demonstrated by the following facts:

(a) Barrier islands, reefs and shores: Louisiana's barrier islands, associated marshlands, reefs, water bottoms, and shores are one of the most significant and dynamic coastal features in the United States. Over 2,500 barrier islands buffer Louisiana's near sea-level coast from storm surges and protect the marshland - estuarine intertidal zone from direct impact from the Gulf of Mexico. Within the intertidal zone the shallow waters and marshlands form highly productive environments for numerous flora and fauna species. Included within the estuarine areas is the most productive fisheries zone in the United States. Without the barrier islands, the productive habitats and estuarine areas would not develop. Barrier island changes, whether natural or man-made, affect the viability, survival and robustness of dependent life systems.

(b) Louisiana's barrier islands differ in origin and characteristics from those along the Atlantic coast and other portions of the Gulf coast in that they are directly related to Mississippi River deltaic sequences and processes. The islands are far removed both vertically and horizontally from mainland rock sediment sources and are set in an area that is undergoing regional and local subsidence. In addition, eustatic sea level changes have occurred at irregular intervals for the last several decades raising the water table and, subsequently, lowering available above-sea-level land masses on the barrier islands. Source and quantity of sand available for reworking into beaches and barrier islands are limited. Sediment supply in the lower regions of the Mississippi River is restricted to fine grained material. While the fine grained material enhances the viability and robustness of marine life, these riverine deposits are sensitive and vulnerable to man-made changes. Man-made channels through or adjacent to barrier islands for the purpose of pipelines or navigation channels have, and continue to, cause extensive damage to the State's barrier islands. As a result, the delicate estuarine areas protected by these barrier islands are endangered and, absent extensive restorative measures on the barrier islands, face eventual destruction.

(c) The barrier islands and their associated intertidal marshland - estuarine environments form the most dynamic and complex physical/marine life system in the northern hemisphere. Hydrography is among the most important of parameters in determining the viability of marine life systems. Numerous inlets and associated bars, spits and shoals form discrete niches for the propagation of marine life. Tidal channels that drain and flood the estuaries and marshlands form the arteries of nutrient transport and water mixing mandatory for continued marine species growth. Under natural conditions, the natural functioning of barrier islands and their associated estuaries can evolve in unison and change through time without significant deterioration of marine life populations. However, the intensive channelization associated with OCS gas marketing has created an imbalance in this sensitive system and threatens destruction of the entire system.

(d) Land loss associated with man-made channelization is not limited to the original parameters of the channel. Natural forces and wave wash from water borne craft accelerate erodive forces on channel banks to widen a canal at a rate which may equal or exceed 1-1/4 feet per month. In that a significant number of these channels were dredged with the earliest beginnings of the OCS gas industry over thirty years ago, the cumulative impact of erodive forces on Louisiana's barrier islands and coastal marshes have been enormous.

(e) Detailed inventories of land loss and erosion related to channelization have indicated that land is being lost in the Louisiana coastal zone at the rate of 16.5 square miles per year. Similar studies have shown the total rate of wetland loss alone attributable to channelization for brackish marsh across the State is 3,320 acres per year; 1,704 acres per year for saline marsh; 1,212 acres per year for fresh marsh; and 541 acres per year for swamp forest.

(f) The land loss associated with channelization attributable to OCS gas marketing operations is but one phase in the progressive destruction of Louisiana's delicate ecosystem. The productivity of a given estuary system is directly proportional to the configuration of its component environmental parts and the kind and intensity of processes operating the system. Estuaries in coastal Louisiana owe their high productivity to the large areas of marshes and swamps fringing open water bodies; to the highly irregular shorelines providing thousands of miles of land-water contact and broad brackish water zones; and to protections afforded from Gulf waters by barrier islands. Under natural conditions the productivity of the entire estuarian zone will remain high. However, recent studies of the Louisiana environmental zone indicate that, in general, canals and pipeline trenches have drastically increased rates of deterioration and may contribute to the eventual collapse of the estuarian systems along the Louisiana coast. Without intensive and expedient restorative measures on Louisiana's coast, this probability of estuarian collapse will become an eventuality.

(g) Interrelated with land loss from channelization is the destruction and loss of wetlands, swamps, and marshes from increased urban and industrial expansion. These activities in Louisiana's coastal areas have necessitated the filling of thousands of wetland and marsh acres for the construction of housing, industrial sites, and commercial sites. This filling process has created an irreversible impact on Louisiana's irreplaceable resources. Natural tidal marshes have been evaluated in monetary terms. By-production (fisheries, etc.) on a per acre basis yield a value of $100+ per year. More intensive uses such as oyster aquaculture, which preserve many of the natural functions of the marsh -estuarine ecosystem, have a potential up to $1,000 per acre per year. The potential for waste assimilation is much higher; about $2,500 per acre per year for tertiary treatment. Summation of the noncompeting uses approaches an ecological life-support value of about $4,000 per acre per year, based on the gross primary productivity (in energy terms) of the natural marsh, using a conversion ratio from energy to dollars based on the ratio of Gross National Product to National Energy Consumption. When these annual social values of $2,500 to $4,000 are income capitalized the estimated total social values are substantial for any given acre. The loss of this acreage from OCS gas related onshore activities must be borne by the State.

(h) Vegetation community changes measured over a ten year period, 1968 to 1978, indicate salt water incursion trends in Louisiana coastal marshes. These trends show conversion of 240 square miles of brackish marsh communities to saline communities; 352 square miles of intermediate to brackish marsh; 282 square miles of fresh to intermediate marsh; and 29 square miles of fresh to brackish marsh. Each of these changes is accelerated as a result of gas pipeline activities and lowers productivity of the affected areas.

(9) Additional costs to the State of Louisiana related to pipeline activities can be ascertained by calculation of lost revenues to the State resulting therefrom. Diminution of fisheries and wildlife resources is directly attributed to channelization. Additional losses can be found in other operational features of raw gas transport and marketing activities and these detrimental impacts include:

(a) The physical presence of platforms affect both commercial fishing and navigation. Platforms adversely affect commercial fishing by removing open waters and sea floor from use by purse seiners and trawler nets foul. The flotsam and jetsam from OCS operation also generate adverse impacts on commercial fishing similar to those caused by platforms. Platforms also interfere with coastal shipping traffic and increase the possibility of collisions between ships and between ships and platforms. Between 1974 and 1977, fifteen vessels collided with structures in the Gulf of Mexico and such collisions create the imminent peril of significant oil and gas spills.

(b) For the period 1956 to 1973 there were 38 gas leaks associated with well blowouts during OCS operations in the Gulf of Mexico. Eleven of these incidents in the Gulf involved fires and five were associated with oil or condensate spills. The duration of these blowouts ranged from two hours to over seven months.

(c) Spills are recognized as the most common cause of environmental pollution associated with offshore mineral activities. All phases of petroleum development, from exploration to production, have the potential for causing or contributing to spills. Thirty major spill incidents (238 barrels or more spilled) occurred in the OCS area of the Gulf of Mexico between 1964 and 1978. From these 30 incidents, 347,195 barrels of oil were spilled. Damages resulting from these spills range from negligible to significant destruction of coastal marine life affected by the spills.

(d) Blowouts: Wells have blown out of control during drilling operations, completion and production. Statistics indicate that an average of one blowout occurs for every 245 wells drilled, spilling approximately 1,294 barrels each occurence.

(e) OCS mineral exploitation activities introduce various stresses to coastal fishery organisms. Basically, two types of effects can be expected to occur: lethal and sub-lethal effects. Lethal effects are those which cause immediate mortality. Lethal effects can be caused by toxicants or from smothering and suffocation. Sublethal effects are those which do not cause immediate mortality, although death may follow at some later date. These effects may be acute, that is, a single sudden stress or chronic stresses recurring frequently over extended time periods. The manifestation of impacts on fishery resources is alteration in stock abundance and species composition. The cause of the above effects can take two pathways: primary effects and secondary effects. Primary effects are those which affect those organisms comprising the

> fishery directly, without intermediate steps. Secondary effects are those which impact other components of the ecosystem or interfere with ecological relationships, the end result of which is an altered fishery stock. Examples of secondary effects are habitat alterations, destruction or critical components of trophic structure, bioaccumulation, bioconcentration and biomagnification. Typically, the impacts of secondary effects surface at some later time. The fisheries of the Gulf of Mexico are dominated by estuarine-associated species, and estuaries and coastal areas are more sensitive to spills and related perturbations than the open ocean.

C. APPORTIONMENT

86. A third criteria set forth for determining the constitutionality of a tax under the Commerce Clause is that the tax be fairly apportioned. There is no danger of multiple taxation because Louisiana taxes only activities carried on within the State. The First Use Tax does not undertake to tax activities carried on outside of the borders of Louisiana. The tax imposed by the State is not out of proportion to what the taxpayers are doing in the State and to costs and burdens imposed on the State.

87. The raw gas transported into the State of Louisiana from Federal OCS gas operations is *not* the same product which is piped from Louisiana gas processing plants to consumers out of State. Raw natural gas is a composite of hydrocarbons, corrosives, and inert ingredients including methane, propane, isobutane, normal butane, isopentane, normal pentane, ethane, hexane, water, sulphur, carbon dioxide, and nitrogen.

88. The raw gas has a BTU content that is neither desirable nor contracted for by the purchasers for distribution and public consumption. It is mandatory that BTU content of raw gas be adjusted to the standard marketable BTU level. Once the raw gas has been processed and refined, the gas delivered at the plant's tailgate is of proper BTU content and dryness, capable of economical long distance transportation to markets. The BTUs

are adjusted and the gas is dried to make it marketable and fit for transportation only once. No further activity of the nature taxed in Louisiana is required or necessary once the refined gas is delivered to the owners in Louisiana.

89. One hundred percent of the processing and refinement of raw natural gas piped onshore into Louisiana from Federal OCS lands occurs in Louisiana. It is impossible to sell, transport, process, or utilize raw natural gas after it has completed the uses taxed in Louisiana because the gas no longer exists in its original raw state. Similarly, the costs and burdens imposed on the State of Louisiana associated with onshore support activities related to marketing of raw natural gas through the processing phase are experienced only in Louisiana and cannot be imposed by any other State.

90. Costs to the State have historically, are presently, and will in the future exceed benefits received by the State. As each annual cost figure manifests itself, the cumulative disparity between costs and benefits is accentuated, particularly with respect to the irretrievable commitment of natural resources and the depleting character of the commodity.

91. The apportionment formula for calculation of proportional amounts of activity done within the State to the amount of tax collected is not nor need be mathematically exact.

92. Louisiana's First Use Tax is fairly apportioned to uses occurring in Louisiana, which cannot occur in another State. This includes:

a. the sale of raw natural gas prior to processing in Louisiana which cannot occur in another State;

b. the transportation in Louisiana to the point of delivery at the inlet of any processing plant in Louisiana which cannot occur in another State;

c. removal of component products or waste materials which cannot occur in another State once it has been done in Louisiana; and

d. transfer of possession or relinquishment of control of the gas by the owner does not occur again until the gas is resold to local distributors or end-users.

93. The First Use Tax is levied solely on the local gathering system activities occurring exclusively and but once in Louisiana, all of which activities are a part of the processing, refining, marketing and transformation of raw gas into refined gas. The local taxable incidents are not integral parts of the flow of commerce, i.e., the transmission of refined gas from the tailgate of a processing plant to the ultimate consumer. The tax is not one which in form or substance can be repeated by other States. All events upon which the tax is conditioned occur in Louisiana and not elsewhere.

D. DISCRIMINATION AGAINST INTERSTATE COMMERCE

94. The last criteria is that the state tax be nondiscriminatory. An economic advantage existed in favor of marketing gas produced from the OCS prior to the imposition of the First Use Tax and against marketing of gas produced within the boundaries of Louisiana. A severance tax is imposed on Louisiana produced gas at the rate of seven cents per one thousand cubic feet, the same tax rate imposed upon owners of natural gas affected by the First Use Tax. No commercial advantage is granted to local business; owners, whether local or out of State, of natural gas are liable for the First Use Tax when a local taxable incident first occurs with respect to the natural gas; and owners, whether local or out of State, of natural gas produced in Louisiana are liable for the equivalent State severance tax. The tax rate is the same; equivalent taxation exists on domestic gas owners as is now imposed on owners of OCS gas.

95. Owners of natural gas who pay the First Use Tax do not pay a higher tax than those owners who pay the Louisiana severance tax. Owner A has 1000 MCF of OCS gas; Owner B has 1000 MCF of OCS gas and 1000 MCF of gas subject to the Louisiana gas severance tax; and Owner C has 1000 MCF of gas subject to the Louisiana severance tax. Owner A owes $70 of first use

tax; Owner B owes $70 of first use tax and $70 in severance tax; Owner B pays the first use tax and may claim a severance tax credit against a gas severance tax liability, but then he owes an additional and equivalent amount of taxes because the then untaxed domestic gas is subjected to a local use taxable under the First Use Tax; Owner C owes $70 in severance taxes. All three Owners have the same tax liability owed upon the use of the same volume of natural gas.

96. The First Use Tax does not tax uses of the gas or the business operations of the owners of natural gas performed or occurring in any other State. The First Use Tax falls uniformly on all taxpayers liable for the tax.

97. Without the First Use Tax, raw natural gas produced from the OCS and transported by gathering systems across Louisiana shorelines and barrier islands to processing plants located in Louisiana is ultimately converted from raw gas into a marketable commodity with an increased value and delivered to interstate transmission systems for resale and use without the owner bearing its fair share of the State costs incurred incident to affording services, protection, and repairing damage caused by onshore activities and impacts associated with essential marketing operations. The discrimination or disadvantage that has long been borne by owners and marketers of gas produced within the territorial boundaries of Louisiana is removed by taxing owners of gas which is similarly used in Louisiana, but who, prior to the First Use Tax, provided no direct compensation for the substantial benefits received.

98. The First Use Tax does not subject the owners liable for said tax to the burden of "multiple taxation." The "uses" once performed in Louisiana are not performed in another jurisdiction on the same gas.

99. The owner of gas who owes the First Use Tax may not, as a matter of public policy, contractually shift the tax to a party who receives no benefits of ownership or use of the refined gas. Purchasers of gas subject to Louisiana's severance tax may not contractually shift the tax back to the producer except to the ex-

tent of production retained by such producer. Taxpayers owing the First Use Tax and taxpayers owing a severance tax are treated equally as respects the burden of the tax.

100. Natural gas use which is exempt from the tax when applied in Louisiana to the drilling for or production of oil, natural gas and sulphur, to the processing of natural gas, or to the manufacture of fertilizer and anhydrous ammonia are deemed to be uses of significant state and national concern which fully merit the exempt status granted.

VI.

FACTS RELATIVE TO SUPREMACY CLAUSE ARGUMENTS

101. A variety of facts must be explored and developed in connection with the complainants' allegations that Louisiana's First Use Tax is unconstitutional as violative of the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

A. THE ALLEGED ATTEMPT TO REGULATE GAS DEDICATED TO INTERSTATE COMMERCE

102. The First Use Tax is not imposed "on gas" but is imposed upon local activities or uses allowed or permitted by the owners thereof to be performed within the territorial limits of the State of Louisiana. The raw gas, the use of which is subject to the tax, is not moving in interstate commerce at the time the taxable incidences — uses within Louisiana — occur.

103. The regulatory authority of FERC over natural gas companies is imposed by federal statute which includes rate-making jurisdiction. The authority of FERC under its rate-making jurisdiction does not prohibit state taxation. Section 110(a) of the Natural Gas Policy Act of 1978 specifically recognizes and authorizes State taxation of natural gas as well as the related activities appertaining to the refining and marketing of natural gas.

104. The First Use Tax is not a tax on gas dedicated to interstate commerce but rather upon the uses of the gas within Louisiana. These uses may be considered a cost of the service in preparing the raw natural gas as a marketable commodity which is ultimately consumed in plaintiff states.

105. Only the Commission may authorize a cost of service to be passed on to consumers (Section 4 and 5 of the Natural Gas Act and Section 110(a)(2) of the Natural Gas Policy Act). The First Use Tax does not require any person other than the owner of the gas subject to the tax to bear the burden of the entire tax.

106. Pursuant to application of the natural gas companies, FERC has published Orders 10, 10A and 10B allowing the direct pass-through of the First Use Tax to the ultimate consumers. This pass-through order does not affect the rate-making jurisdiction of FERC. The Orders were an exercise of the discretionary authority of the Commission upon application by the actual taxpayers.

107. The First Use Tax is imposed upon activities not under the rate-making jurisdiction of FERC and does not regulate gas dedicated to interstate commerce. The taxation of activities occurring within the State of Louisiana is not a regulation of the gas being put to a use in Louisiana.

108. The average residential consumer's maximum additional costs due to the pass-through of the First Use Tax, in the unlikely event that his entire gas supply consumed is derived only from the OCS, will be approximately eighty four cents per year. These figures conform to the concept of keeping the price of natural gas to the consumer at the lowest reasonable level.

109. Approximately ten per cent of the nation's gas supply comes from the Outer Continental Shelf and forms a part of the system-wide gas supply of a given pipeline, from which the rates and charges allowed by FERC are computed for that pipeline.

B. THE ALLEGED REPUGNANCY TO COMPREHENSIVE SCHEME OF FEDERAL REGULATION

110. Complainants allege that there exists a comprehensive federal regulatory scheme structured around the Natural Gas Act, Natural Gas Policy Act, Outer Continental Shelf Lands Act and Coastal Zone Management Act.

111. No federal regulatory scheme exists which prohibits State taxation of natural gas or the uses of natural gas. To the contrary, the cited statutory authorities specifically recognize and authorize State severance taxes as well as other State taxes and assessments relating to the cost of having a marketable gas available for consumption.

112. Federal regulation does not purport to regulate the processing of raw natural gas but, rather, mandates and approves the processing of this raw natural gas brought into Louisiana from the Outer Continental Shelf. The transportion of raw gas to the inlet of a processing plant is, likewise, not regulated.

113. The taxable incidents are solely local, occur one time only, and are necessary to the effectuation of the contracts of sale that are approved by the federal regulatory authorities. No regulatory authority cited by complainants prohibits Louisiana from taxing local activities occurring but once and then only within the territorial boundaries of the State of Louisiana.

114. Each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidents of taxation.

115. Each statutorily enumerated use was and is occurring consistently with certificates of public convenience and necessity issued by FERC under Section 7 of the Natural Gas Act. Each of the enumerated uses is essential in preparing the gas brought into Louisiana from the Outer Continental Shelf for the "first stages of distribution."

116. The First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the First Use Tax. The economic desires of the natural gas companies induce them to apply to FERC for assistance.

C. THE ALLEGED CONTRACT NULLIFICATION

(Contract Clause [Article I, Section 10, Clause 1] U. S. Constitution)

117. Subsection C of Section 1303 of Title 47 of the Louisiana Revised Statutes provides:

> "C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation of processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest."

118. To enable complainants to prevail in their arguments, there must be a showing that contracts are and were in existence which allow the owners of natural gas liable for the First Use Tax to claim a reimbursement or refund of such taxes from any

other party in interest, other than a purchaser of such natural gas. No such valid contracts were in existence upon the effective date of the tax.

119. Even if it could be established that such contracts are in existence, the First Use Tax is a proper and legal exercise of the police and taxing powers of the State. The exercise of the police power of the State, as reasonable and appropriate, justifies the abrogation of any such contracts.

120. The public purpose supporting the exercise of Louisiana's police power is as follows:

a. The conservation of natural resources is of vital concern to the present and future welfare of Louisiana and the nation, and it is the policy of the State of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources.

b. The imposition of a tax upon the severance of these natural resources from the soil and water of the State fails to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the State equally and uniformly taxes the introduction for the first time into the economy of the State natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

c. The waterbottoms, barrier islands, and coastal areas within this State are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation.

d. Existing laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the State's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the State levies an equitable tax thereon.

e. The First Use Tax is to require the exaction of fair and reasonable compensation to the citizens of Louisiana for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into and used in the state, and to provide some measure of reimbursement to the citizens for damages to the State's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

121. The public policy to prohibit the contractual shifting of the tax liability establishes several alternatives for the taxpayer:

a. The owner may decide to absorb the tax;

b. the owner may apply to the Federal Energy Regulatory Commission for a rate increase; or

c. the owner may apply to the Federal Energy Regulatory Commission to authorize the pass on of the tax to all subsequent purchasers, as a cost related to the marketer, of the gas, in excess of its approved rate structure.

122. The Federal Energy Regulatory Commission exercised its discretion and promulgated Orders 10, 10A and 10B, which allow the owners of natural gas liable for the First Use Tax to directly pass-through that liability to the ultimate consumers. This pass-through order does not affect the rate-making jurisdiction of FERC and is specifically authorized by federal law.

123. FERC Orders 10, 10A and 10B modify each and every contract previously approved by FERC under Sections 4, 5, and 7 of the NGA to delete the right of the owner to seek reimbursement or refund from any other party at interest other than a purchaser of the natural gas. These contract modifications or alterations are pursuant to federal law and became effective prior to the imposition of the First Use Tax.

D. THE OUTER CONTINENTAL SHELF LANDS ACT ALLEGATIONS

124. The OCSLA applies to that portion of the Outer Continental Shelf lying beyond the three-mile seaward boundary of Louisiana.

125. Each taxable incident for the First Use Tax is local in nature and occurs within the territorial boundary of the State of Louisiana.

126. No severance tax is levied upon raw natural gas produced from the Outer Continental Shelf and Louisiana collects no severance tax on raw gas produced in the Outer Continental Shelf.

127. The First Use Tax is not a tax on raw natural gas produced in the Outer Continental Shelf but, rather, the volume of gas used in Louisiana is the means of measurement for determining the dollar amount of liability to be assessed the owner of the raw natural gas who allows his gas to be put to a taxable use in Louisiana.

128. Raw natural gas, once severed from the Outer Continental Shelf, is no longer a portion of the Outer Continental Shelf but rather a commodity which comes into Louisiana by means of pipelines, which pipelines have damaged Louisiana's barrier islands, coastal waters and wetlands and exacerbates the loss of Louisiana acreage. Once this commodity leaves the Outer Continental Shelf (i.e., crosses Louisiana's boundary) it is no longer a portion of the Outer Continental Shelf subject to the provisions of the OCSLA.

129. State taxation laws levied directly on gas produced on the Outer Continental Shelf by any interior State — taxes on local distribution companies, sales taxes, use taxes, gross receipts taxes, etc. — are not and have not been considered as taxation laws applying to the Outer Continental Shelf in violation of the OCSLA.

130. The United States enters into leases of OCS tracts by means of public competitive bids. The amount of revenues received is dependent upon the bid per acreage and any bonuses and royalties to be received by the United States. The amount bid is not dependent upon the existence or non-existence of factors that may affect the ultimate price to be paid by consumers, but rather by the geology and economics; i.e., the speculation on size and location of reservoirs and the ability to realize a profitable return upon the capital investments necessary to produce the minerals.

131. The tax liability of OCS lessees, like all other businesses, is passed on to the ultimate end product consumer.

VII.

FACTS RELATIVE TO EQUAL PROTECTION ARGUMENTS

132. Complainants allege that the First Use Tax promotes various kinds of unequal treatment in violation of the 14th Amendment to the United States Constitution. The complainants have yet to demonstrate the factual validity of that allegation.

133. *All* owners of raw natural gas, as defined by the First Use Tax, wherein an identifiable first use of the gas occurs within the boundaries of Louisiana are liable for the payment of the First Use Tax. There are no exceptions.

134. The Severance Tax Credit Statute (R. S. 47:647) is available to any taxpayer paying the First Use Tax who also has a Louisiana severance tax liability. Owners of gas residing in any state other than Louisiana who have a severance tax liability on gas produced within the State and who have a First Use Tax liability as a result of allowing gas produced from the Outer Continental Shelf to be put to a taxable first use in Louisiana, has the right and privilege of claiming a credit against the severance tax owed if he has paid the First Use Tax.

135. Prior to the imposition of the First Use Tax, gas produced in Louisiana was subject to a severance tax at the rate of seven cents per MCF. After the imposition of the First Use Tax gas produced in Louisiana is still subject to a severance tax at the rate of seven cents per MCF.

136. Prior to the imposition of the First Use Tax, gas produced from the Outer Continental Shelf was not subject to Louisiana's severance tax or any other tax. Subsequent to the imposition of the First Use Tax gas produced from the Outer Continental Shelf is still free of Louisiana's severance tax and all other severance taxes.

137. Consumers using gas produced in Louisiana paid the Louisiana severance tax through the rate-making jurisdiction of FERC prior to the imposition of First Use Tax and pay this same tax since the imposition of First Use Tax. Consumers using gas produced from the Outer Continental Shelf did not pay a severance tax prior to the imposition of the First Use Tax and do not pay any severance tax as a result of the imposition of the First Use Tax.

138. Prior to the imposition of the First Use Tax, there existed a disparity and discrimination against gas produced in Louisiana and in favor of gas produced from the Outer Continental Shelf.

139. Consumers in Louisiana, as well as those outside of Louisiana, purchasing Louisiana gas were discriminated against because gas produced in the Outer Continental Shelf was not subject to any tax.

140. Prior to the imposition of the First Use Tax the uses statutorily defined as local taxable incidences were occurring to gas produced in Louisiana and produced from the Outer Continental Shelf. Subsequent to the imposition of the First Use Tax these uses still occur to gas produced in Louisiana and gas produced from the Outer Continental Shelf.

141. The First Use Tax rate is seven cents per MCF, which is equivalent to the Louisiana severance tax, and consumers using

gas produced from the Outer Continental Shelf now ultimately pay the same price for gas that is produced in Louisiana. Whether consumers reside in Louisiana or in a sister state they now pay the same price for natural gas consumed regardless of the location of the production of the gas.

142. The Tax Credit for Electric and Natural Gas Service (R.S. 47:11) is available to every appropriate entity owing any tax or combination of taxes, other than severance taxes, to the State of Louisiana upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply.

143. This particular tax credit does not relieve the customers — end users for residential, commercial or industrial purposes — of paying the First Use Tax as passed on to them by the local distribution systems.

144. Any qualified entity owing taxes to the State of Louisiana may claim the credit. This is true for non-residents, as well as residents of Louisiana, if they owe taxes to the State of Louisiana.

145. This tax credit is not to relieve Louisiana entities from paying the First Use Tax but rather grants them a tax credit as a result of any increased transportation and marketing costs of natural gas delivered from the federal domain of Outer Continental Shelf. The need and necessity of such credit is readily shown to be because of the dependency of these entities on Outer Continental Shelf gas and a means of helping these companies maintain available public services.

VIII.

FACTS RELATIVE TO IMPORT/EXPORT CLAUSE ARGUMENTS

146. Complainants allege the First Use Tax violates the import/export clause of the United States Constitution, Article I, Section 2, Clause 10. That allegation has yet to be supported by factual proof.

147. The First Use Tax is not imposed upon natural gas imported into the United States or natural gas exported from the United States. Natural gas produced from the Outer Continental Shelf and transported into Louisiana is not gas imported from a foreign country nor an import within the meaning and ambit of Article I, Section 2, Clause 10, of the United States Constitution.

148. Raw natural gas, on which no severance or production tax is paid or due, transported into Louisiana, comes from the subsoil and seabed of the continental shelf contiguous to the coast of the United States and the first use thereof in Louisiana subjects the owner of the raw natural gas to the First Use Tax liability. Said raw natural gas is not an import and is not subject to the levy of a federal import tax.

149. Mexican gas that may come into Louisiana is an import subject to the levy of a federal import tax and the first use of such gas in Louisiana is not subject to the First Use Tax. The same applies to Canadian gas or any other gas produced outside the territorial bounds of the United States and not from the subsoil and seabed of the continental shelf contiguous to the coast of the United States under the jurisdiction and control of the United States government.

IX.

FACTS RELATIVE TO JURISDICTIONAL, STANDING AND PRUDENTIAL CONSIDERATIONS

150. The facts alleged in the complaint filed by the plaintiff

States do not state a cause of action within the original jurisdiction of this Court.

151. The plaintiff States lack standing to invoke this Court's original jurisdiction since the facts alleged in the complaint demonstrate that they are representing and asserting only the interests of the private parties who are subject to the imposition of Louisiana's First Use Tax. The facts alleged in the complaint further demonstrate that the interest asserted by the plaintiff States, for themselves as gas consumers and as *parens patriae* for all gas consumers in their respective jurisdictions, is at most an indirect one.

152. The plaintiff States do not have any direct interest in the subject matter of this original action, and they have suffered no direct injury in fact, caused by the State of Louisiana.

153. Louisiana's First Use Tax is not imposed upon out-of-state consumers or upon any refined OCS gas that they may consume. Louisiana is in no way responsible for the action of the taxpayers in securing FERC's authorization for passing on the cost of the use tax to the ultimate consumers of refined OCS gas.

154. The interstate pipeline companies, upon whom the Louisiana use tax is imposed, are fully capable of defending their own direct interests and in asserting all the constitutional objections to the Louisiana use tax which the various complainants seek to raise before this Court. Those interstate pipeline companies have in fact instituted appropriate tax refund proceedings in the Louisiana state courts, wherein they have amply asserted their direct interests and wherein they can obtain a speedy resolution of those constitutional objections. Any such resolution by the Louisiana courts is of course subject to review by this Court in exercise of its appellate jurisdiction.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 15th day of April, 1980, I served copies of the foregoing *Proffer of Proof of State of Louisiana to the Special Master* by mailing copies thereof in duly addressed envelopes, with postage prepaid, to:

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