No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

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

Columbia

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFF'S EXCEPTIONS AND MEMORANDUM RESPONSE

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January 12, 1981

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MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

The pipeline companies, intervenor-applicants in this proceeding*, through their undersigned counsel of record, respectively move the Court for leave to file the

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*Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas

[footnote continued]

attached response to Louisiana's Reply to Plaintiffs' Exceptions with respect to the report of the Special Master dated September 15, 1980.

As support for this motion, the pipeline companies incorporate by reference the grounds set forth in their motion dated November 14, 1980 for leave to file exceptions, and supporting brief, to the same report of the Special Master. By order dated December 15, 1980 the Court granted the requested leave.

Also, as support for this motion, the pipeline companies note that Louisiana has attached to its Reply the lengthy "Proffer of Proof" which it submitted to the Special Master (a document which heretofore was not before the Court). Included in the attached response is the pipeline companies' response to the Proffer, in which it is demonstrated that the assertions in the Proffer do not raise material issues of fact bearing on the issues presented in the plaintiffs' motion for judgment on the pleadings.

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Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company, ("the pipeline companies").

The listing required by the recent amendment of the Court's Rule 28.1 was set out in the Appendix to the Motion of the Pipeline Companies for Leave to File Reply to Louisiana's Exceptions and Memorandum Reply, dated December 5, 1980.

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

MEMORANDUM RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

Despite the length of Louisiana's reply to exceptions filed by the plaintiffs and the intervenor applicants, only a brief response is called for.

Louisiana at the outset reiterates its claim that the plaintiff States are surrogates for the pipeline companies and hence the instant proceeding should be dismissed for jurisdictional and prudential reasons (Reply at 5-13). Louisiana purports to find fresh support for this thesis in

> a remarkable confluence of (a) identical constitutional issues, (b) identical factual statements, and (c) identical supporting arguments (footnote omitted) (Reply at 6).

But, these alleged "identities" do not negate, nor in any way detract from, the differences in interests and perspective between the pipeline companies and plaintiff States. The pipelines' interests stem from the facts, *inter alia*, that the first use tax is by statute imposed upon them, and they are subject to various penalities should they fail to pay the tax. The interests of the plaintiff States, stem from the facts, *inter alia*, that by pass-through, the tax was designed to be, and in fact operates as, a burden upon them and their citizens. In light of these differences in the interests of the plaintiff States and those of the pipeline companies, not only are the plaintiff States not surrogates for the pipeline companies, but the interests of the pipeline companies fully warrant their intervention in this proceeding.

Louisiana also argues that granting judgment on the pleadings without evidentiary hearings is inappropriate when (1) constitutional issues are presented (Reply at 14), and (2) the Court's original jurisdiction is being invoked (Reply at 23). However, neither of these considerations has prevented summary disposition where, as here there is in actuality no genuine dispute as to any material fact. See, *e.g., Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), where, on a motion to dismiss, the Court held that the New York tax on its face resulted in unconstitutional discrimination in violation of the Commerce Clause. Similarly, in original actions the Court has disposed of controversies involving states, including specifically Louisiana, withour any evidentiary hearings. *See e.g., United States v. Louisiana, etc.*, 363 U.S. 7, 84-85 (1960); *United States v. Texas*, 339 U.S. 707, 711-715 (1952).

Moreover, the Supremacy Clause and Commerce Clause issues presented by the motions for judgment are based on facial violations, *i.e.,* (1) that the first use tax *on its face* invades comprehensive federal regulatory schemes in violation of the Supremacy Clause, and (2) that the tax *on its face* results in unconstitutional discrimination and risk of multiple taxation in violation of the Commerce Clause. Consequently, as shown in our Brief Supporting Exceptions, there are no genuine issues of material fact standing in the way of granting the motions for judgment on the pleadings.

The foregoing conclusion is in no way undercut by Louisiana's claim that its answer to the complaint of the plaintiff States purports to deny or put into question virtually every material assertion (Reply at 17). The short answer to that assertion is given at page 39 of the brief of the plaintiff States in support of their motion for judgment on the pleadings (quoted at length at page 17 of Louisiana's instant reply).

Nor is this conclusion impaired by the extensive Proffer of Proof, submitted by Louisiana to the Special Master, in which Louisiana sets out its view of the facts and circumstances on which it claims evidentiary hearings are needed for a determination of the validity of the first use tax.[1]

Review of the various assertions in the "summary" of Louisiana's Proffer (Reply at 28-33) discloses that Louis-

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[1] In view of Louisiana's reproduction of its entire Proffer as an appendix to its instant Reply, we have set out in the Appendix hereto our response to the Proffer. As there shown, the assertions in Louisiana's Proffer reflect either alleged facts which are not relevant to, and do not affect, the issues raised in the motions for judgment on the pleadings, or conclusions of law which have already been conclusively determined contrary to Louisiana's position by authoritative precedents.

iana's factual allegations may readily be treated as true or irrelevant for the purposes of deciding the instant motions. The *foci* of Louisiana's proffer are the assertions that there is a distinction between "raw" and "refined" gas, that processing is necessary to convert "raw" gas into "refined" gas, and that interstate commerce does not commence until after the completion of processing at the tailgate of the processing plant. See Reply at 28-33, 37-38. Contrary to Louisiana's claims that these assertions are factual in nature, as to which evidentiary hearings are required, in actuality they constitute legal conclusions – legal conclusions which have been resolved against Louisiana's position by established precedents.

As shown in our Brief on Exceptions at 20-21,[2] it is established (1) that natural gas as it is produced at the wellhead is "natural gas" under the Natural Gas Act regardless of the presence of various impurities and other elements, (2) that such gas (and in particular, the outer continental shelf gas here involved) which moves across state boundaries is in interstate commerce throughout its journey from the wellhead to at least the point of its sale for resale or consumption under the Natural Gas Act as well as under the Commerce Clause generally, and (3) that the processing of the gas in the course of that interstate journey in no way interrupts or affects its continuity. See also Report of the Special Master at 6. With Louisiana's assertions as to raw gas – refined gas dichotomy and the effect of processing thus being unsound and invalid as a matter of law, they plainly do not stand in

[2] See also our response to the Proffer, at 6-9; Brief on Exceptions of the plaintiff States at 22, 29, n. 12; and Brief on Exceptions of the United States at 15-21.

the way of granting judgment on the pleadings without evidentiary hearings.[3]

CONCLUSION

For the foregoing reasons, and those stated in our brief in support of exceptions to the Special Master's instant report, it is respectfully submitted that the Court should

[3]Our response to Louisiana's Proffer (Appendix at 14a-18a) summarizes the undisputed matters establishing the propriety of granting the motions for judgment on the pleadings as a matter of law.

hold that Louisiana's tax is void on its face under both the Supremacy Clause and the Commerce Clause.

Respectfully submitted,

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January 12, 1981

APPENDIX

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In The

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Proceedings Before the Special Master

RESPONSE OF THE PIPELINE COMPANIES TO LOUISIANA'S PROFFER OF PROOF

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RESPONSE OF THE PIPELINE COMPANIES TO LOUISIANA'S PROFFER OF PROOF

As their response to Louisiana's Proffer, the pipeline companies submit the following:

I

EVIDENTIARY HEARINGS ARE NOT NEEDED TO DETERMINE THE ISSUES RAISED BY THE PENDING MOTIONS FOR SUMMARY DISPOSITION

By filing a 116-page Proffer embracing some 154 numbered paragraphs and innumerable subparagraphs, Louisiana seeks to create the impression that the constitutional grounds on which the pending motions for summary disposition are based are grounded on extensive factual considerations. The pipelines strenuously disagree with the factual accuracy of much of Louisiana's assertions and submit that any evidentiary hearing to resolve these disagreements would be extensive and prolonged.[1]

However, and more important for present purposes, the pipeline companies further submit that it is not necessary to undertake any such evidentiary hearing. While the complaints attack the constitutionality of the First Use Tax on numerous grounds, the motions for judgment on the pleadings rely solely on preemption by the Natural Gas Act, the Natural Gas Policy Act, the Outer Continental Shelf Lands Act and the Coastal Zone Management Act under the Supremacy Clause; and the failure to satisfy the apportionment and non-discrimination criteria under the Commerce Clause.[2] If the Court is satisfied that there is no material factual dispute with respect to *any one* of these several grounds urged for summary disposition, then it need consider only whether, as a matter of law, the tax should be struck down on that particular ground.

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[1] The pipeline companies do not regard the Master's instructions as calling for a specific denial or admission of each allegation in the Proffer. However, if the Master desires such a response they would undertake to submit it.

[2] In addition to the issues dealt with in the pending motions for summary disposition, the complaints attack the constitutionality of the First Use Tax under the Impairment of Contracts Clause (Article I, Section 10, Cl. 1), the Equal Protection Clause of the Fourteenth Amendment, and failure to satisfy the requirements under the Commerce Clause that the tax have a substantial "nexus" and that it be "fairly related to services provided" by the taxing state.

Examined in the light of these limited grounds, Louisiana's Proffer fails to demonstrate any need for evidentiary hearings for three basic reasons: First, many of the alleged factual assertions relate to issues beyond the scope of the pending motions; second, other alleged factual assertions are in reality questions of law; and third, still other alleged factual assertions are not only contrived but also refuted as a matter of law by established precedents. On the other hand, as shown below (Part III) the material facts relevant to the grounds invoked in support of the motions are really beyond dispute and therefore there is no need for an evidentiary hearing as a prerequisite to the granting of the motions for summary disposition.[3]

II

THE PROFFER FAILS TO DEMONSTRATE THE EXISTENCE OF FACTUAL DISPUTES MATERIAL TO THE GROUNDS RELIED ON FOR SUMMARY DISPOSITION

In this part, the pipeline companies respond to the principal contentions in Louisiana's Proffer. A response tracking the Proffer according to category headings is set forth as an Appendix hereto.

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[3] Despite the Court's alleged "liberality" in allowing development of factual records in original actions involving "sovereign states" the Court has decided several controversies involving such states, including specifically Louisiana, without any evidentiary hearings. See, *e.g.*, *United States vs Louisiana*, 363 U.S. 84 (1960); *United States vs Texas*, 339 U.S. 707 (1952); *United States vs Louisiana*, 339 U.S. 699 (1952); *United States vs California*, 332 U.S. 19 (1947).

A. The Purported Burdens and Adverse Impacts Allegedly Resulting From the Development and Transportation of OCS Gas are Irrelevant

Perhaps the most striking and critical instance of alleged factual assertions which are irrelevant to any issue raised by the motions for summary disposition is the extensive discussion in Louisiana's Proffer (paragraphs 41-52, 63-72, 83-84, 85) purporting to demonstrate that the First Use Tax is justified because it allegedly compensates Louisiana for the burdens and adverse effect of the development and transportation of OCS gas upon the environment and economy of its wetlands.

Northern Natural Gas Co. vs State Corporation Commission of Kansas, 372 U.S. 84, 93 (1963), establishes that such considerations are irrelevant to the determination of preemption under the Natural Gas Act and the Natural Gas Policy Act.

Likewise, these considerations are irrelevant to the determination of preemption under the Outer Continental Shelf Lands Act (OCSLA). As shown in the brief accompanying the pipeline companies' motion for judgment on the pleadings (at pages 43-52), the legislative history of that Act shows that not only did Congress by that Act assert the paramount responsibility of the Federal Government to regulate OCS activity to the exclusion of the states, but Congress did so in the teeth of efforts by the coastal states, notably Texas and Louisiana, to be accorded a right to share in the revenues from, and to impose taxes on, OCS gas production and otherwise provide reimbursement for the environmental and economic damage allegedly resulting from the development and transmission of the OCS gas. And further (brief, at pages 55-61), in enacting the Coastal Zone Management Act (CZMA) and the 1978 amendments to the OCSLA, Congress intended that the coastal energy impact fund established by the CZMA be the exclusive method for compensating the states for the impacts resulting from OCS development.

Louisiana's attempts to invoke these considerations as a basis for justifying the First Use Tax is misdirected. Congress having spoken, these considerations patently cannot be applied to support the First Use Tax and thereby circumvent the intent of Congress in enacting the OCSLA and CZMA.

Finally, these considerations are irrelevant to those facets of the motions for summary disposition which concern the burden on interstate commerce. At most, these considerations would bear on the nexus and benefits criteria for sanctioning state taxes under the Commerce Clause. However, as noted, the motions for summary disposition are not based on either of these criteria; rather, they invoke only the discrimination and apportionment criteria under the Commerce Clause; and on these, the environmental and economic considerations urged by Louisiana are irrelevant.

It is well settled that all four requirements of the Commerce Clause test must be satisfied to avoid invalidation of a state tax, and hence failure to satisfy any one of them is sufficient to call for invalidation, irrespective of the satisfaction *vel non* of the other three. See, e.g., *Complete Auto Transit, Inc. vs Brady*, 430 U.S. 274, 279 (1977); *Department of Revenue of Washington vs Ass'n of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

B. No Evidentiary Hearings is Needed to Establish That the Tax is Upon Gas Moving in Interstate Commerce

As part of its attempt to demonstrate the need for evidentiary hearings, presumably in connection with preemption under the Natural Gas Act and the Natural Gas Policy Act and burden on interstate commerce under the Commerce Clause, Louisiana places heavy stress upon (1) a contention that the interstate commerce does not commence until after the completion of processing, and (2) an asserted distinction between "raw gas" and "refined gas" with only the latter being suitable for distribution and marketing. Neither of these claims calls for evidentiary hearings.

1. The Commencement of Interstate Commerce Is Not Deferred Until After the Completion of Processing

Underlying much of the Proffer is the basic thesis that interstate commerce does not commence until the completion of processing (see paragraphs 3, 33, 53, 76-80, 102, 104) and further, that since at least the first five uses enumerated in the First Use Tax statue are tied into such processing, neither they nor processing itself are in interstate commerce. (See, e.g., paragraphs 2, 3, 33, 53, 74, 78-80.)

This thesis involves patently erroneous conclusions of law. Whether the processing occurs prior to interstate commerce is a question of law and not of fact. There are several decisions, by the Supreme Court and the Courts of Appeals, which make it clear beyond any question that the movement of a natural gas stream in interstate commerce typically begins at the wellhead and is continuous—irrespective of processing—until the gas is consumed or sold for resale. For example, in *California vs Lo-Vaca Gathering Co.,* 379 U.S. 366 (1965) the Supreme Court held (at 369): "The result of our decisions is to make the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption 'in interstate commerce' within the meaning of the [Natural Gas] Act."[4]

Such also are the holdings of the various Courts of Appeals. See, e.g., *Deep South Oil Co. vs F.P.C.,* 247 F.2d 882 (5th Cir. 1957), and related cases;[5] *Saturn Oil and Gas Co. vs F.P.C.,* 250 F.2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 956 (1958); and *Public Service Comm'n of Kentucky vs F.E.R.C.,* 610 F.2d 439 (6th Cir. 1979). For example, the Fifth Circuit in *Deep South* stressed (supra at 887-88):

> . . . petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course, it must, "that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas Gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the

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[4] See also *Phillips Petroleum Co. vs Wisconsin,* 347 U.S. 672 (1954); *Interstate Natural Gas Co. vs F.P.C.,* 331 U.S. 682 (1947); *Illinois Natural Gas Co. vs Central Illinois Public Service Co.,* 314 U.S. 498 (1942).

[5] *Shell Oil Co. vs F.P.C.,* 247 F.2d 900 (5th Cir. 1957), cert. den., 355 U.S. 930 (1958); *Continental Oil Co. vs F.P.C.,* 247 F.2d 904 (5th Cir. 1957); *Humble Oil & Refining Co. vs F.P.C.,* 247 F.2d 903 (5th Cir. 1957), cert. den., 355 U.S. 930 (1958). The Fifth Circuit's holdings in these cases are of particular significance since many of the nation's major gas producing areas are located within that Circuit.

movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . .

2. The Purported Distinction Between "Raw Gas" and "Refined Gas" has Long Been Rejected as Without Substance

As part of its effort to demonstrate the need for evidentiary hearings, with regard to the existence of interstate commerce, Louisiana attempts to distinguish between pre-processing gas as "raw gas" and post-processing gas as "refined gas", with only the latter suitable for distribution and marketing (see, e.g., paragraphs 1-6, 11-23, 27, 29-35, 76-80, 87-89, 92-93). But this distinction is contrived, and contrary to established precedents.

Thus, in the landmark case of *Phillips Petroleum Co. vs Wisconsin*, 347 U.S. 672 (1954), in which the Court held that the jurisdiction of the Federal Power Commission under the Natural Gas Act extended to "the rates charged by a natural-gas producer and gatherer in the sale in interstate commerce of such gas for resale" (347 U.S. at 674), the Court necessarily rejected the notion, now advanced by Louisiana, that a distinction for constitutional and regulatory purposes is to be made between so-called "raw gas" as produced at the well and "natural gas" as it leaves the tailgate of a processing plant.

Shortly after the Supreme Court decision in Phillips, attempts by producers to avoid FPC regulation on the grounds that they sold "casinghead gas," were similarly rejected. See e.g. *Deep South Oil Company, et al.*, 14 FPC 308, 333 (1955), aff'd, *Deep South Oil Company vs F.P.C.*, 247 F.2d 882 (5th Cir. 1957).

There simply is no distinction, either under the Commerce Clause or under the Natural Gas Act, between "raw gas" and "refined gas". Nor is casinghead gas "any the less 'natural' gas because it contains various amounts of other constituents." 247 F.2d at 888. See also *Public Service Comm'n of Kentucky vs F.E.R.C.*, supra; *Gulf Oil Corporation vs F.P.C.*, 128 F. Supp. 446 (D. D.C. 1955), aff'd, 230 F.2d 40 (D.C. Cir. 1956), cert. denied, 351 U.S. 973 (1956).

In *Mobil Oil Corp. vs F.P.C.*, 483 F.2d 1238, 1241 (D.C. Cir. 1973), the Court of Appeals succinctly described natural gas production and transportation to processing plants and made clear that the presence of other hydrocarbons in the gas stream from the wellhead to the extraction plant does not detract from the existence of natural gas *per se* as a separate and distinct product. This highlights the artificiality of Louisiana's claimed raw gas–refined gas distinction and its related allegations as to processing.

In sum, it is well established that "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips". *Deep South Oil Co. vs F.P.C.*, 247 F.2d 882, 888 (5th Cir. 1957).

C. No Evidentiary Hearing is Needed to Establish That the Tax is Not Fairly Apportioned and Discriminatory.

To support its claim that the First Use Tax is fairly apportioned, Louisiana contends (paragraphs 86-93) that the activities defined as uses in the First Use Tax all relate to the processing of "raw gas" and that, since "processing is a one time event" which cannot be repeated in other states, there is no danger of multiple taxation. However, in order for the fair apportionment criterion to be violated, all that is required is that the same type of activity, or activity having the same general relation to the commodity and the taxpayer, exists in other states. See *Michigan Wisconsin Pipe Line Co. vs Calvert*, 347 U.S. 157, 170 (1954).

Moreover, the reasons advanced by Louisiana (paragraph 92), to show that the tax is apportioned are irrelevant. A tax is apportioned only if the method of taxation is reasonably related to a taxpayer's activities, revenues or facilities in the taxing state. The First Use Tax is imposed on the entire volume of gas subject to a "use", and the same rate is used to determine the tax of every taxpayer regardless of the extent of that taxpayer's activities in the state. It is thus unapportioned.

Because it is clear on the face of the statute that the other uses, as defined in the statute, are separate and distinct from processing, and also because of the statute's broad definition of "use", no factual inquiry or evidentiary hearing is necessary to conclude that the same gas on which the tax is levied will be subjected to activities similar to those defined as uses after leaving Louisiana, so that states downsteam from Louisiana may impose similar taxes on the same volume of gas. (See pages 63-67, brief in support of pipeline companies' motion for judgment on the pleadings.)

In the brief in support of their motion for judgment on the pleadings (pages 71-81), the pipeline companies demonstrate three ways in which the First Use Tax discriminates against interstate commerce. Louisiana's Proffer does not even address the first such ground: that the tax discriminates against interstate commerce because it is imposed solely on natural gas originating outside the boundaries of the State of Louisiana. (Id., pages 71-75). Indeed, Louisiana admits (paragraphs 1, 81) that only OSC or federal enclave gas is subject to the First Use Tax.

Accordingly, it is plain that there is no genuine issue of material fact with respect to this first contention.

Similarly, the other arguments advanced by Louisiana addressed to the discrimination issue involve legal considerations only, merely calling for an interpretation of the First Use Tax package, including exemptions for in-state uses, the Severance Tax Credit, and the Tax Credit for Electric and Natural Gas Service. (See pages 76-81 of the pipeline companies' brief in support of motion for judgment on the pleadings.)

Louisiana's basic argument on the discrimination issue (paragraphs 36, 60, 94-96), is that the 7 cents per Mcf First Use Tax is the same as the severance tax imposed on Louisiana-produced gas. But as shown in the brief accompanying the pipelines' motion (at pp. 76-78), the purposes for and the activities on which the taxes are imposed are totally different. Accordingly, the taxes are neither equivalent nor complementary, and the First Use Tax cannot be upheld under the "compensating tax" theory used to uphold traditional state use taxes. See *Henneford vs Silas Mason Co.*, 300 U.S. 577 (1937).

Moreover, the severance tax credit enacted contemporaneously with the First Use Tax eliminates the First Use Tax burden on the owners of OCS gas who also produce natural resources in Louisiana.[6] By thus nullifying the First Use Tax liability of mineral producers in Louisiana,

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[6]The three hypotheses, advanced by Louisiana (paragraph 95) in an attempt to show that the Severance Tax Credit does not in fact result in discrimination, do not accurately reflect the operation of the Severance Tax Credit in conjunction with the First Use Tax, and ignore the obvious purpose of the Severance Tax Credit to favor domestic producers of natural resources who also own OCS gas.

the severance tax credit violates the requirement that taxpayers similarly situated be accorded equal tax treatment, a condition precedent for a valid state tax. See, e.g., *Halliburton Oil Well Cementing Co. vs Reily,* 373 U.S. 64 (1963).

III

ALL MATTERS NECESSARY FOR ADJUDICATION OF THE PENDING MOTIONS ARE ESTABLISHED

The pipeline companies submit that all matters necessary for adjudication of the constitutional issues raised by the motions for summary disposition (a) may be judicially noticed by the Court; (b) are established by the relevant statutes at issue;[7] or (c) are established as a matter of law by prior holdings of this Court, and hence there can be no genuine dispute calling for an evidentiary hearing.

The following cannot be disputed and establish that the motions for summary disposition should be granted as a matter of law:

1. The First Use Tax (the tax) is imposed solely on natural gas produced from federal enclaves or beyond the territorial boundaries of Louisiana, and "upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country". La. R.S. 47:1301, § 1303A.

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[7] The relevant statutes, Federal and Louisiana, are printed in the Appendix to the pipeline companies' Motion for Leave to File and Motion for Judgment on the Pleadings with Accompanying Brief (filed November 5, 1979).

2. Natural gas produced from the OCS or onshore federal enclaves is not subject to the imposition of a severance tax or other tax upon the volume of production by any state or territory of the United States, nor is it subject to the imposition of an import tax or tariff by the United States. However, a severance tax is paid on gas produced in Louisiana, La. R.S. 47:631, et seq., and in neighboring states from which gas may be transported through Louisiana. See e.g., Tex. Tax.–Gen. Ann. art. 3.01 (Vernon. 1970); Miss. Code 1942 § § 9417.5-01, et seq.

3. The tax is intended to apply to "the introduction for the first time into the economy of [Louisiana] natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States". La. R.S. 47:1301A.

4. The vast majority of the gas on which the tax is levied is produced from the OCS.

5. The tax applies to gas dedicated to interstate commerce for the moment of its production. See, e.g., *California vs Lo-Vaca Gathering Co.,* 379 U.S. 366 (1965); 15 U.S.C. 3301(18).

6. The First Use Tax and its companion statutes clearly show that the tax is aimed squarely at gas produced from federal domains and destined for ultimate consumption by persons in other states, and is designed so that the economic burden of the tax falls exclusively on the pipeline companies and their customers, primarily those in states other than Louisiana.

7. Such gas, as produced from the federal domains, is purchased by the pipeline companies which transport it into or through the State of Louisiana in various streams in interstate commerce, for sale for resale under rate

schedules or tariffs approved by and on file with the Federal Energy Regulatory Commission (FERC), to gas distributing companies and municipalities, and/or direct sale to other customers, all under certificates of public convenience and necessity issued by FERC.

8. These pipeline companies are "natural gas" companies as defined in the Natural Gas Act and are subject to comprehensive regulation by FERC under that Act and the Natural Gas Policy Act. Such regulation by FERC is exclusive, and it encompasses the purchase of the gas from the various producers, its transportation or exchange, and its sale for resale by the pipeline companies. *Panhandle Eastern Pipe Line Co. vs Pub. Serv. Comm'n of Ind.*, 332 US 507, 516 (1947); *FPC vs Louisiana Power & Light Co.*, 406 US 621, 636 (1972); *Northern Natural Gas Co. vs State Corp. Comm'n. of Kan.*, 372 US 84 (1963).

9. In enacting the OCSLA, Congress asserted the paramount responsibility of the federal government to regulate OCS activities. As part thereof, Congress specifically prohibited the application of State taxation laws to the OCS, and barred the states from claiming an interest in or jurisdiction over "the property and natural resources [of the OCS] or the revenues therefrom." The CZMA is designed, *inter alia*, to provide federal financial assistance to the coastal states to compensate them for impacts resulting from OCS energy activities.

10. The tax is imposed "upon the first occurrence within [Louisiana] of any use" of the gas, with certain exceptions as defined in the statute. La. R.S. 47:1303(a). It is "computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state", such unit being "one thousand cubic feet of natural gas as measured at a pressure base of 15.025

pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit". La. R.S. 47:1303(B).

11. "Use" is defined in the statute as:

> "[1] the 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; or [8] other ascertainable action at a point within the state." La. R.S. 47:1302(8).

12. In sum, as pointed out more fully in the pipeline companies' brief in support of the motions (pages 35-38), the incidence of the tax is upon gas moving in, and constituting an integral part of, interstate commerce into, within or through Louisiana, and neither processing nor any other "use" as defined in the statute interrupts such interstate movement.

13. The transportation of the gas through other states downstream of Louisiana would necessarily subject the owner to taxation for the same or similar activities that could as easily be characterized as "uses" as defined in the Louisiana statute.

14. When the gas is actually used or consumed within Louisiana for certain specified purposes, including "the drilling for or production of oil, natural gas, sulphur", "the manufacture of fertilizer and anhydrous ammonia", and processing for the extraction of liquefiable hydrocarbons, such use is exempted from the reach of the tax. La. R.S. 47:1303A.

15. The tax is payable by the "owner" of the gas, defined in the statute as ". . . the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner." La. R.S. 47:1302(9).

16. The statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle the owner of natural gas subjected to a "use" in Louisiana to recover the amount of taxes paid from any person other than a purchaser of the gas. La. R.S. 47:1303C.

17. As part of the First Use Tax package, the Louisiana legislature enacted (a) the Severance Tax Credit, La. R.S. 47:647 which grants to producers of natural resources in Louisiana who are also First Use taxpayers, a direct tax credit, equal to the amount of First Use Tax paid, against severance taxes owed by that taxpayer to the state; and (b) the Tax Credit for Electric and Natural Gas Service, La. R.S. 47:11, which grants to Louisiana utilities and direct purchasers of natural gas a direct tax credit, against any other Louisiana tax liability, to compensate for increased natural gas costs attributable to the First Use Tax.

The Court need go no further to decide the constitutional issues raised by the motions for summary disposition.

CONCLUSION

As shown in the foregoing response (and as further detailed in the Appendix hereto), Louisiana's massive proffer has not created any material factual dispute that needs to be resolved for the Court to decide the pending motions for summary disposition.

The pipeline companies respectfully submit that there is no need for an evidentiary hearing and that it is entirely appropriate for the Master to proceed to consider the arguments advanced in support of the pending motions for judgment.

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May 6, 1980

APPENDIX

RESPONSE TO PROFFER ACCORDING TO CATEGORY HEADINGS

As is pointed out in the text of the pipeline companies' response, the assertions in Louisiana's Proffer either present facts which are not relevant to, and do not affect, the issues raised in the pending motions for judgment on the pleadings, or the assertions are conclusions of law which have already been conclusively determined by authoritative precedents contrary to the position taken by Louisiana.

To aid the Special Master in analyzing the assertions in the Proffer and ascertaining their effect on his ability to decide the pending motions for summary disposition, the pipeline companies have prepared this additional response according to the category headings of the Proffer.

I. BASIC FACTS (paragraphs 1-7; pages 6-7).

The thrust of these paragraphs is that the tax relates exclusively to the processing and refining within Louisiana of "raw gas" transported from the OCS, and that it is the processed "refined gas" and not the "raw gas" that is in interstate commerce, so that the uses which give rise to the First Use Tax occur prior to the entry of the gas in interstate commerce. As shown at pages 8a-11a of the pipeline companies' response, these assertions involve legal conclusions as to the meaning of the First Use Tax statute and the nature of interstate commerce, and contradict well-established holdings as to the nature of processing and its effect on the movement of the gas subject to processing in interstate commerce.

Other allegations in this section, relating to Louisiana's contributions to the nation's energy supplies and the

*References have been conformed to pagination of Proffer in the Appendix to Louisiana's Reply Brief.

effects of these contributions on the state are irrelevant to the motions for summary disposition as they relate only to the nexus and fair-relation-to-services-provided criteria under the four-pronged test applied by this Court under the Commerce Clause.

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

A. OCS Production Activities (paragraphs 8-18; pages 8-10).

Louisiana's allegations dealing with the location of the OCS and the energy resources located there are irrelevant, except to the extent that they state that all gas subject to the tax originates outside the jurisdiction of Louisiana and that 95% of all OCS gas is subjected to the tax.

The main thrust of the assertions in this section of the proffer, however, is that "raw gas" produced on the OCS and brought into Louisiana must be processed in Louisiana in order to make it marketable. Although the pipeline companies strenuously disagree with the state's description of "raw gas" and its assertions concerning the purpose of, and need for, processing, this disagreement does not create issues of fact which would affect the ability of the Court to address itself to the motions for summary disposition. In making these allegations, Louisiana apparently is attempting to establish that the First Use Tax is imposed before the gas enters interstate commerce. Whether or not processed, the gas is in interstate commerce and subject to FERC regulation immediately upon leaving the wellhead. See text, pages 8a-11a.

B. **Contractual Arrangements** (paragraphs 19-23; pages 10-11).

These allegations attempt to describe various types of contractual arrangements between the producers of natural gas and the pipeline companies which purchase the gas at the wellhead and transport it from the OCS to the ultimate consumers. To the extent that these allegations imply that there is a necessary connection between contracts for the purchase of OCS gas and an alleged need for processing such gas, they merely elaborate on Louisiana's erroneous "raw gas" theory, discussed above under BASIC FACTS and OCS Production Activities.

C. **Natural Gas—An Energy Source** (paragraphs 24-28; pages 11-13).

The allegations in paragraphs 24-25, dealing with the nature and measurement of natural gas, are accurate. Again, however, the main thrust of this section relates to Louisiana's erroneous legal assertions concerning the purported need to process the "raw gas" in order to make it marketable. See discussion under BASIC FACTS and OCS Production Activities, supra.

D. **The Processing or Refining Operation** (paragraphs 29-35; pages 13-14).

The allegations in this section attempt to describe and characterize the operations to which natural gas is subjected during processing. They may be relevant to the "nexus" or "fairly related" considerations (which are not presented in the motions for judgment on the pleadings), but for the reasons stated above, do not affect the propriety of granting the pending motions for summary disposition.

E. **Pricing and Marketing** (paragraphs 36-40; pages 14-15).

These allegations deal with the effect of federal regulation on natural gas pricing and marketing, and as such, advance legal conclusions which do not create any issue of fact. It is interesting to not the admission (paragraph 36) that FERC "is vested with wellhead price regulating authority", with its implicit recognition that the gas at issue moves in interstate commerce from the moment of its production.

F. **Louisiana's First Use Tax** (paragraphs 41-62; pages 16-20).

To the extent that the paragraphs in this section deal with the operation and effect of the First Use Tax, they are argumentative and postulate erroneous legal conclusions. The bulk of this material represents Louisiana's attempt to justify the enactment of the First Use Tax. This is irrelevant to the motions for judgment on the pleadings. Regardless of a state's reason for enacting a tax or other statute, that statute must fall if it conflicts with a federal statute or regulatory scheme in violation of the Supremacy Clause [*Northern Natural Gas Co. vs State Corporation Comm'n of Kansas*, 372 U.S. 84 (1963); *Ray vs Atlantic Richfield Company*, 435 U.S. 151 (1978)]; or violates the Commerce Clause by discriminating against interstate commerce or creating the risk of multiple taxation [*City of Philadelphia vs New Jersey*, 437 U.S. 617 (1978); *Boston Stock Exchange vs State Tax Comm'n.*, 429 U.S. 318 (1977); *Gwin, White & Prince, Inc. vs Henneford*, 305 U.S. 434 (1939)]. These are the issues raised in the motions for judgment on the pleadings, and none of the allegations in this section creates factual disputes with respect to any of them.

G. **Environmental and Economic Conditions** (paragraphs 63-72; pages 20-23).

These allegations relate solely to whether the tax imposed is fairly related under that facet of the Commerce Clause test. The alleged costs and burdens imposed on the State of Louisiana by the taxed activities are irrelevant to the issues raised by the pending motions for summary disposition. See text, pages 6a-7a.

III. STATUTORY FACTS AND QUESTIONS (paragraphs 73-75; pages 24-26).

The majority of the so-called "statutory facts", set forth in paragraph 73 (subparts "j" through "y"), pose legal questions, not factual ones. Subparts "a" through "i" are irrelevant, because it is established by the pleadings that the pipeline companies pay the First Use Tax on one or another of the "uses". Subpart "z", relating to possible differences in the transmission of "raw gas" as opposed to processed "refined gas", is likewise irrelevant because it is established law that the gas is in interstate commerce whether it is "raw" or "refined". See discussion at pp. A-1—A-3, supra.

IV. FACTS SHOWING COMMERCE CLAUSE INAPPLICABLE (paragraphs 76-80; pages 27-28).

The thrust of these paragraphs is that the gas is not in interstate commerce at the time it is subjected to any of the "uses" enumerated in the First Use Tax, because these uses occur prior to processing in Louisiana. These assertions are erroneous legal conclusions, contrary to prior decisions of the federal courts. See text, pages 8a-11a.

V. FACTS SHOWING COMPLIANCE WITH COMMERCE CLAUSE REQUIREMENTS

A. **Substantial Nexus** (paragraphs 83-84; pages 28-36).

Although the pipeline companies strenuously disagree with the assertions advanced in this section, such disagreement does not raise an issue of fact affecting adjudication of the pending motions for summary disposition, because these assertions address the nexus requirement of the Commerce Clause test, not raised in the pending motions.

B. **Relation of Tax to Services Provided** (paragraph 85; pages 37-48).

Again, while the pipeline companies strenuously disagree with the assertions made in this section, this dispute relates to Commerce Clause considerations not presented by the motions for summary disposition.

C. **Apportionment** (paragraphs 86-93; pages 48-50).

The failure of this section to create a material fact issue is discussed at pages 11a-12a of the text of the pipeline companies' response. With the perspective of this discussion in mind, a brief response to the individual allegations respecting the fair apportionment criterion may be appropriate:

Paragraph 86: This paragraph merely contains conclusory agruments; it sets forth no facts.

Paragraphs 87-88: These paragraphs are irrelevant because it is not necessary that the identical "use" to which the gas is subjected in Louisiana be repeated in other states to create the risk of multiple taxation. (See text, pp. 11a-12a). Moreover, they do not accurately describe the function of processing and its effect on the total gas stream. See discussion at pages A-1—A-3, supra.

Paragraph 89: The response to the first sentence of this paragraph is identical to the response to paragraphs 87 and 88. As to the second sentence of this paragraph, these allegations relate solely to the "fairly related" criterion of the Commerce Clause test, which is not presented in the pending motions for summary disposition.

Paragraph 90: The allegations of this paragraph also relate solely to the "fairly related" requirement and are irrelevant to the motions for summary disposition.

Paragraph 91: This paragraph postulates an erroneous legal conclusion.

Paragraph 92: This paragraph attempts to show that the First Use Tax is apportioned. However, a reading of the statute itself discloses that it is not apportioned, since the tax is imposed on the entire volume of gas, at the same rate for each taxpayer, without regard to the taxpayer's activities, income or facilities in Louisiana or other states. See text, pages 11a-12a.

Paragraph 93: This paragraph, again asserting that the activities taxes under the First Use Tax occur prior to the entry of gas in interstate commerce, runs afoul of long-established holdings of the federal courts and does not create an issue of fact.

D. **Discrimination Against Interstate Commerce** (paragraphs 94-100; pages 50-52).

This section is discussed at pages 12a-13a of the text of the response. As shown below, only questions of law, not issues of fact, are involved.

Paragraph 94: In this paragraph, the state attempts to show that the First Use Tax and the Severance Tax are equivalent taxes, so that the First Use Tax removes a competitive disadvantage presently imposed on Louisiana domestic gas subject to the Severance Tax. This involves a legal proposition and is plainly incorrect (see pages 71-75 of the pipeline companies' brief in support of their motion for judgment on the pleadings).

Paragraph 95: This paragraph advances an incorrect legal proposition. The hypothetical situations mentioned in this paragraph may be resolved by reference to the First Use Tax Statute and the Severance Tax Credit Statute. No factual development is needed.

Paragraph 96: This paragraph plainly involves an erroneous legal conclusion.

Paragraph 97: The first sentence of this paragraph actually addresses the "fairly related to costs and benefits" issue, which is not involved in the pending motions for summary disposition. It is therefore irrelevant. The second sentence reiterates the erroneous legal arguments advanced in paragraph 94.

Paragraph 98: These allegations relate to the fair apportionment or multiple taxation issue, which is treated above. It is irrelevant to the discrimination issue.

Paragraphs 99 and 100: These paragraphs plainly involve incorrect legal conclusions. The public policy arguments advanced in paragraph 100 are irrelevant to the issues presented in the motions. See discussion at pp. A-4—A-5, supra.

VI. FACTS RELATIVE TO SUPREMACY CLAUSE ARGUMENTS

A. **The Alleged Attempt to Regulate Gas Dedicated to Interstate Commerce.** (paragraphs 102-109; pages 52-53).

The allegations of this section undertake to describe the regulatory authority of FERC as perceived by Louisiana and as such, they involve purely legal conclusions.

B. **The Alleged Repugnancy to Comprehensive Scheme of Federal Regulation.** (paragraphs 110-116; pages 54-55).

In this section, Louisiana blandly asserts that no comprehensive federal regulatory scheme exists which is disrupted or violated by the First Use Tax. The determination of whether such a scheme exists clearly involves a conclusion of law, not fact. Elsewhere in this section, Louisiana repeats its erroneous legal assertions, discussed above and in the text, that the transportation of "raw gas" is not in interstate commerce when subjected to a first use.

C. **The Alleged Contract Nullification** (paragraphs 117-123; pages 55-57).

While the assertions in these paragraphs bear on the pipeline companies' claim that the section of the First Use Tax quoted in paragraph 117 (R.S. 47:1303C) interferes with the regulatory powers vested in FERC, determination of that interference is a legal, not factual, question. The public purpose arguments advanced in paragraphs 119-121 are of course irrelevant to determinations under Supremacy Clause. (See pages A-4—A-5, supra.

D. **The Outer Continental Shelf Lands Act Allegations** (paragraphs 124-131; pages 58-59).

The allegations in this section are purely legal and are dealt with at pages 42-61 of the brief in support of the pipeline companies' motion for judgment on the pleadings. Significantly, the Proffer does not address the pipeline companies' argument that the First Use Tax is not only prohibited by the language and legislative history of the OCSLA, but also by the comprehensive scheme for reimbursement of coastal states for OCS-related impacts represented by the CZMA and the 1978 amendments to the OCSLA. (See pages 55-61, pipeline companies' brief in support of motions).

It should be noted that in paragraph 94 of the Proffer Louisiana admits that the First Use Tax is a tax on OCS gas or the production thereof, designed to place the same burden on such gas as the State places on gas produced within its boundaries, thus directly violating the OCSLA.

VII. FACTS RELATIVE TO EQUAL PROTECTION ARGUMENTS (paragraphs 132-145; pages 59-61).

The allegations in this section are irrelevant to the pending motions, which are in no way based on a claim that the First Use Tax violates the Equal Protection Clause of the Fourteenth Amendment. In any case, they involve merely legal conclusions, not factual issues.

VIII. FACTS RELATIVE TO IMPORT/EXPORT CLAUSE ARGUMENTS (paragraphs 146-149; page 62).

The pending motions for summary disposition are not based on a claim that the First Use Tax violates the Import/Export clause and these allegations are accordingly irrelevant.

IX. FACTS RELATIVE TO JURISDICTIONAL, STANDING AND PRUDENTIAL CONSIDERATIONS (paragraphs 150-154; pages 62-63).

All of the allegations in this section advance legal arguments, not factual disputes, and in any event are not germane to the pending motions.