IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PLAINTIFFS

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ASSOCIATED GAS DISTRIBUTORS
Company Members

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over eleven million customers along the eastern seaboard, or approximately 25 percent of the nation's interstate natural gas customers. More than half the gas purchased by AGD members is produced on the Outer Continental Shelf (OCS) of the United States and moved through Louisiana, thus being subjected to the First Use Tax imposed by that state.

The Federal Energy Regulatory Commission (FERC) has determined that the gas pipeline companies which have direct liability for the tax may recoup their tax payments from their customers, including the gas distributors represented in the AGD group. AGD members will in turn increase their rates to recover this expense from their consumer-customers. Depending on the the level of competitive fuel prices from time to time, the incidence of this tax at the retail market level may result in the loss of gas sales, especially in the highly price-sensitive industrial fuel market.

The First Use Tax is a substantial and unreasonable burden on the interstate transportation of natural gas. While the constitutional validity of the tax is being tested, however, other states may impose similar levies. Multiple taxes comparable to the Louisiana tax would be ruinous to the natural gas industry, including AGD members. A prompt resolution by this Court of the questions here presented is essential to the well-being of the natural gas industry and to the energy policy of this country.

AGD has a substantial and direct interest in this litigation. Its members also have an obligation, as public utilities, to protect their customers against the payment of excessive and unlawful charges. Accordingly, AGD submits the present brief amicus curiae in support of the plaintiffs.

CONSENT OF THE PARTIES

The written consent of the parties has been obtained for the filing of this brief and is attached to the original, signed copy hereof.

ARGUMENT

I. THE LOUISIANA FIRST USE TAX THRUSTS SUBSTANTIAL DIRECT AND INDIRECT ECONOMIC BURDENS ON THE CITIZENS OF A MAJORITY OF THE OTHER STATES

The gravity of the claim brought to this Court by the plaintiff states is readily apparent from the actual economic impact of the Louisiana First Use Tax on millions of citizens in these and other states.

The effect of the Louisiana First Use Tax statute[1] is to impose a seven cent per thousand cubic foot (Mcf) burden on (a) natural gas produced in the OCS and transported through Louisiana and (b) any natural gas imports landed in Louisiana and consumed in other states.[2] The volume of gas to which this tax applies

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[1]The text of the Louisiana First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as La. Rev. Stat. Ann. §§ 47:1301-1307) is reproduced as Exhibit A of Plaintiff's Complaint and its operation is explained beginning at page 7, paragraph V of the Complaint.

[2]Natural gas is scheduled to be imported into the U.S. through Louisiana upon the completion in the early 1980s of a liquefied natural gas terminal now under construction pursuant to a license issued to Trunkline LNG Company by the FERC's predecessor agency, the Federal Power Commission.

amounted, in 1977, to some 3.19 trillion cubic feet, or approximately 30 percent of the total annual volume of natural gas used that year by consumers dependent upon the nation's *interstate* gas supply system. Since this production volume is expected to increase in the future, the tax represents a *minimum* annual burden of about $225 million on the citizens and consumers who depend on gas supplies originating in the offshore Louisiana area.

The 11 interstate pipelines located in Louisiana transport this gas both to their wholesale customers and to direct industrial consumers. Through the many interconnections and pipeline-to-pipeline sales which characterize the interstate natural gas system, natural gas on which this tax is paid reaches an estimated 28 million residential, commercial and industrial customers in 29 states and the District of Columbia. Since both interstate pipeline companies *and* local gas utilities are subject to cost-based rate regulation, these companies are legally entitled to reflect this tax in higher rates to their customers, *i.e.*, the gas-consuming public in their service areas.

The economic or financial burden placed by this tax on individual citizens varies widely from state to state and among the classes of customers. Consumers using gas for space heating in the northeast will naturally pay a larger share of the $225 million than those in Georgia or Florida. Large volume industrial consumers can be expected to pay more of this tax burden than smaller residential and commercial gas users. But the point here is not that this tax alone threatens economic disaster for any particular consumer in any given locality. Rather, it is that the Louisiana First Use Tax is so structured and applied that it effectively and directly attaches to interstate gas in over half of the states and thereby imposes a burden on about 62 percent of the nation's gas customers. The 28 million customers included in this percentage represent a substantially larger, although indeterminate, number of *citizens* affected by the tax; the precise number of affected citizens would depend on the number of affected persons per residential gas customer unit.

Given its scope and size, this tax represents a massive exploitation of these many states and citizens by a single state acting as a self-appointed "toll-keeper" surcharging each unit of gas produced in the federally owned and most prolific of all domestic geological basins. The Louisiana First Use Tax, therefore, represents a major political "coup" on the part of Louisiana, the most direct victims of which are located in the areas supplied with gas derived from the offshore Louisiana area. Louisiana has with this tax dramatically shifted the benefits and burdens flowing to different regions of the nation through the operation of the integrated network of interstate gas transmission and distribution companies.

Apart from its direct and immediate impact on a large number of both states and citizens, the First Use Tax brings with it the potential for considerably greater economic burdens in the form of (a) duplicative taxes by other states, (b) the enactment of retaliatory taxes aimed at Louisiana citizens and (c) indirect economic burdens sustained by citizens of the states on which the burden of this tax will fall.

The likelihood of duplicative or similar taxes being enacted by other states is readily apparent, given the concept of the First Use Tax. Any state through which natural gas is transported to another state is a potential "toll-keeper" state since the events which trigger this tax — compression, metering, storage, transportation, processing, etc., — are routine characteristics of all interstate gas transmission operations. Those citizens located in the northern tier of states are exposed to duplicative taxes by 5 to 10 other states, depending on their particular geographic relationship to Louisiana and the route covered by the interstate pipelines through which gas travels to them. Only those states in which interstate pipelines happen to terminate would be unable to levy a toll of the kind exacted here by Louisiana.

The possibility that one or more states will enact taxes aimed at Louisiana citizens in retaliation for the First Use Tax is, of course, a matter of political speculation.

It is clear, however, that virtually every state is the source of some unique product marketed in other states, including Louisiana. Just as the citizens of the northern states tend to be dependent on Louisiana and other southwestern states for energy supplies, Louisiana citizens depend on other states for steel, coal, automobiles, textiles, lumber, furs, and other basic consumer goods and raw materials. If the First Use Tax can be made a vehicle for surcharging non-Louisiana citizens for natural gas produced adjacent to Louisiana, surely first use taxes can be devised by other states to surcharge Louisiana citizens with respect to other basic commodities.

The indirect or secondary economic effects of the First Use Tax are at least as substantial as the direct effects. Any increase in the price of natural gas may cause industrial gas consumers equipped with other fuel-burning facilities to switch from natural gas to fuel oil or coal as a primary energy source.[3]

The additional demand for fuel oil which will result from increased industrial gas prices will raise fuel prices to all customers. Since both fuel oil and natural gas are primary fuels in the generation of electricity, the First Use Tax will result in undetermined but substantial increases in the cost of electricity sold to citizens in the

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[3]Most AGD members supply industrial consumers under "interruptible" contracts which permit the consumer to decide on a month-by-month basis, according to comparative prices, whether or not to contract for natural gas or fuel oil. In 1977, because of the price spread between gas and fuel oil, 2600 industrial consumers in New England alone terminated use of natural gas. American Gas Association, *Gas Facts* 69 (1978).

29 states where OCS gas subject to this tax is consumed.

The original jurisdiction of this Court was designed to provide a forum for grievances caused by "trade barriers, recrimination [and] intense commercial rivalries" between states. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945). *Accord, Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-600 (1922). The First Use Tax represents a classic example of the interstate tollkeeping which the Constitution prohibits. Taking advantage of its geographic position in relation to the nation's gas deposits, Louisiana has invented an ingenious and efficient mechanism for taxing millions of citizens in a large number of other, energy-dependent states. The prompt exercise of the Court's original jurisdiction in this case is required to review the merits of this tax and thereby limit the economic burden it imposes, directly and indirectly, on millions of gas-consuming citizens.

II. THE PLAINTIFFS ARE ENTITLED TO PRESENT THEIR CLAIM IN THIS COURT

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1976) this Court defined the conditions which make a case appropriate for the exercise of its original jurisdiction:

> [T]he question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it

> necessarily involves the availability of another forum where there is *jurisdiction over the named parties,* where the issues tendered may be litigated, and where appropriate relief may be had.

Id. at 93-94 (emphasis added). The case now before the Court satisfies that test. The "seriousness and dignity" of the instant Complaint is demonstrated in Section I, *supra.*

The named plaintiffs are properly before the Court as consumers of natural gas in their own right. Each plaintiff exercises a proprietary function in purchasing natural gas as fuel for its public buildings, schools, hospitals and other institutions. This proprietary capacity confers on the states a direct interest in the litigation. *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Furthermore, the states are entitled to sue as the representatives of their citizens who are natural gas consumers and who will collectively suffer significant economic injury as a result of the First Use Tax. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251 (1972). As described above, the plaintiff's claims are of significant economic magnitude. They also present important questions regarding the ability of states to shift their revenue burdens to citizens of other states.

A. The Plaintiff States Have No Forum Other Than This Court In Which To Present Their Claim.

Although two cases challenging the First Use Tax are presently pending in the state and federal courts in Louisiana, neither affords the plaintiffs a practicable litigation alternative. In *Edwards* v. *Transcontinental Gas Pipeline Corp.,* No. 216867 (19th Judicial District Court, La., filed September 22, 1978), the Governor and other Louisiana officials have filed an action for a declaratory judgment that the tax does not violate the United States Constitution, naming as defendants twenty-three pipeline companies which transport OCS gas through Louisiana. This action apparently will result in a nonappealable advisory opinion, since the pipelines are barred by state law from having collection of the tax restrained.[4]

Furthermore, there is a strong basis for concluding that the plaintiff and other gas consuming states, and *not* the interstate gas pipelines, are the real parties in interest in the *Edwards* case. As shown in Section I, the routine application of the gas rate-making/cost recovery system makes the interstate pipeline companies mere conduits for the collection of this tax. Each dollar of tax owned to Louisiana is automatically reflected in

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[4]La. Rev. Stat. Ann. §47:1575 (West) provides: "No court of this state shall issue any process whatsoever to restrain the collection of any tax, penalty, interest, or other charge imposed in this Sub-title."

pipeline rates and collected prior to payment to the tax collector. As *wholesalers* of a commodity in short supply, the interstate pipelines are virtually immune to any sales losses occasioned by the choice of fuel oil over natural gas made by industrial users in the *retail* marketplace. Gas volumes not sold in one region or state can, in today's circumstances, be delivered for resale in another region where retail competitive forces are favorable to gas. Whether the tax is finally invalidated or upheld is not a matter of real economic moment to the interstate pipelines.

Under these circumstances, it is imperative that this Court's original jurisdiction be exercised. The rejection of plaintiffs' motion would place the many millions of citizens on whom this tax ultimately rests under the protection of pipeline companies with little or no stake in the outcome of the litigation and no direct accountability to or contact with either these state governments or their citizens.

The second case presently pending in Louisiana, *FERC* v. *McNamara,* Civ. Action No. 78-384 (M.D. La., filed September 29, 1978), is a challenge by FERC to the constitutionality of the First Use Tax under the supremacy and commerce clauses of the Constitution. That case has been stayed pending a decision in the *Edwards* case, and therefore provides no immediate avenue of relief. The plaintiff states have no alternative to the instant action to achieve a reasonably prompt and final adjudication of the validity of the First Use Tax.[5] Only assumption of jurisdiction by this Court will avoid the economic havoc of multiple unconstitutional taxes on the transportation of natural gas in interstate commerce.

B. The Decision In *Arizona* v. *New Mexico* Is Not A Basis For Denial Of The Plaintiff's Motion In This Case.

The facts in *Arizona* v. *New Mexico,* 425 U.S. 798 (1976) differ significantly from those in the instant case, and that decision does not provide a basis for denial of the plaintiffs' motion. The state of Arizona sued New Mexico, contending that New Mexico's tax on the generation of electricity violated, among others, the supremacy and commerce clauses of the Constitution. Pending at the time the *Arizona* v. *New Mexico* suit was filed was a federal district court action in which the Salt River Project Agricultural Improvement and Power District was a named plaintiff. The Salt River Project was a political subdivision of the Arizona state government and its representation of the state in the pending suit was a factor which the Court considered in denying Arizona's bill of complaint. 425 U.S. at 797-98. None of the plaintiffs in the instant action is a party in either of the presently pending actions in Louisiana.

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[5]*See Ohio* v. *Kentucky,* 410 U.S. 642, 644 (1973) ("Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.")

A second important distinction between the present case and *Arizona* v. *New Mexico* is that collection of the challenged tax in the latter case was enjoined pending litigation of its constitutionality. In the instant case, liability for the tax is presently accruing. The plaintiffs are barred by the Anti-Injunction Act, 28 U.S.C. § 1341 (1976), from having the defendant enjoined from collection of the tax. Louisiana has established an escrow account to assure the refunding of the tax with 6 percent interest in the event it is found unconstitutional. The inadequacy of the refund remedy as a basis for protection of gas consumers has long been recognized by this court. *FPC* v. *Tennessee Gas Transmission Co.,*371 U.S. 145 (1962).

In his concurring opinion in *Arizona* v. *New Mexico,* Justice Stevens rested his agreement with the majority on Arizona's failure to allege that it would suffer any harm as a result of the tax and stated:

> Except to the extent that they apply to Arizona's attempt to litigate on behalf of an entity which has access to another forum, I do not believe the comments which the Court has previously made about its nonexclusive original jurisdiction adequately support an order denying a State leave to file a complaint against another State.

425 U.S. at 798. The plaintiffs have demonstrated that they have no remedy other than in this Court and that

they present serious economic and legal claims on their own behalf and in their own right. As shown above, plaintiffs are the real parties in interest. The Court is obligated under the Constitution and the applicable statutory law to assume jurisdiction in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the plaintiff's Motion for Leave to File Complaint.

Respectfully submitted,

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May 25, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 25th Day of May, 1979, copies of the foregoing Brief of Amicus Curiae On Behalf of Associated Gas Distributors in Support of Plaintiffs were mailed, postage prepaid, to counsel for all parties of record.

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