No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR JUDGMENT OF THE PLEADINGS

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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This brief is filed pursuant to Rule 42(4) of this Court's Rules on behalf of the United States and the Federal Energy Regulatory Commission in support of plaintiff's motion for judgment on the pleadings.

JURISDICTION

The motion for leave to file a complaint invoking the original jurisdiction of this Court was granted on June 18, 1979. The jurisdiction of this Court rests on the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

QUESTIONS PRESENTED

1. Whether the Louisiana First Use Tax on Natural Gas is invalid because it conflicts with the exclusive statutory jurisdiction of the Federal Energy Regulatory Commission to regulate the sale and transportation of natural gas in interstate commerce, and the apportionment of costs among producers, processors, and consumers.

2. Whether the Louisiana First Use Tax violates the Commerce Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, clause 3 ("Commerce Clause"), and Article VI, clause 2 ("Supremacy Clause") of the Constitution of the United States are set forth in plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, at page 4.

The First Use Tax on Natural Gas, La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1979), the First Use Tax on Natural Gas—Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), the First Use Tax Trust Fund, La. Rev. Stat. Ann. § 47:1351 (West Supp. 1979), and the Tax Credit to Operators of Electric Generating Plants and Natural Gas Distribution Services, La. Rev. Stat. Ann. § 47:11 (West Supp. 1979), are set forth at pages 1a-20a in the Appendix to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings.

Sections 4, 5, and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d, 717f, and Sections 2(18), 110, 121(b), and 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, 3354, 3368-3369, 3370, 3409-3411 are set forth in the Appendices, *infra*, pages 1a-19a.

THE INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Plaintiff States [1] seek a declaratory judgment that the Louisiana First Use Tax on Natural Gas [2] is unconstitutional and an order permanently restraining the collection of the tax and compelling the refund of all revenues collected plus "all interest earned on such revenues" (Complaint at 6 ¶ II). After the Court

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[1] Plaintiffs are the States of Maryland, Illinois, Indiana, Michigan, New York, Rhode Island, Wisconsin, and the Commonwealth of Massachusetts. Plaintiffs sue "in their proprietary capacities as substantial purchasers of natural gas" subject to the First Use Tax, and in their *parens patriae* capacities on behalf of their citizens who will purchase such gas (Complaint at 6-7 ¶ III). Subsequent to the Court's granting of the plaintiffs' Motion for Leave to File the Complaint, New Jersey filed a motion for leave to intervene, to file a complaint, and a brief in support thereof. Seventeen interstate natural gas pipeline companies have also sought leave to intervene. Finally, a motion for leave to file a brief *amicus curiae* and the brief have been filed on behalf of Associated Gas Distributors.

[2] Act No. 294, 1978 La. Sess. Law Serv. 482 (West), codified as La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1979) (Mot. App. 1a-8a). Hereinafter, the various provisions of the act will be referred to by the section number used in the codification, and the act itself will be referred to as the "First Use Tax" or the "Act".

granted plaintiffs' Motion for Leave to File the Complaint, and directed Louisiana to answer, Louisiana answered the complaint, and moved for appointment of a Special Master. Plaintiffs have now moved for judgment on the pleadings with respect to certain claims presented in the complaint and have filed an answer in opposition to the motion for appointment of a Special Master. In response, Louisiana has filed a motion to dismiss the complaint.

The Act in question imposes a tax on seven cents per thousand cubic feet ("Mcf") by the State of Louisiana on the first "use" of natural gas in Louisiana originating outside of that state that moves in interstate commerce. The principal impact of the tax is on gas produced from federally leased areas on the Outer Continental Shelf ("OCS gas"), and on gas imported from abroad. Because first "use" is defined so broadly as to include even the measurement of gas flowing in interstate commerce, the tax will add at least $225 million per year to the cost of gas used by consumers in approximately 30 states.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States from these leases could be significantly affected. Moreover, under the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce. It is therefore directly concerned with any state tax that may improperly burden or operate inconsistently with those functions.

Finally, the First Use Tax directly conflicts with the authority of the Federal Energy Regulatory Commission. Under the Natural Gas Act, 15 U.S.C. 717-717w,[3] and the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3351 (1978), the Commission is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas. The only proceeding in which a state tax may be challenged in Louisiana is a suit for refund of the amounts paid under protest.[4] Because the First Use Tax falls principally on gas moving in interstate commerce, the Commission has been forced to promulgate regulations that would permit interstate pipelines to pass along in their rates the additional costs resulting from the imposition of the tax to their customers, subject to refund if the tax is ultimately held to be unconsti-

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[3] See page 11, note 20, *infra*.

[4] La. Rev. Stat. Ann. § 47:1576 (West Supp. 1979). Neither injunctive nor declaratory relief restraining the collection of a tax prior to payment is available. Sections 47:1575, 47:1576.

tutional.[5] Thus, the Louisiana tax has imposed substantial administrative and regulatory burdens upon the Commission.

STATEMENT

1. *The Nature of the Louisiana Tax.* The First Use Tax imposes a volume tax of seven cents per thousand cubic feet (subject to certain exclusions), upon the first "use" within Louisiana of any natural gas that is not subject to any severance or production tax levied by Louisiana or any other state or territory of the United States, or is not subject to any import tax or tariff levied by the United States on imports from foreign countries. La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1979) (Mot. App. 4a-5a).[6] The rate of the tax is equivalent to the rate of the Louisiana severance tax on natural gas.[7]

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[5] *State of Louisiana First Use Tax in Pipeline Rate Cases,* Order No. 10, 43 Fed. Reg. 45553 (1978), Order No. 10-A, 43 Fed. Reg. 60438 (1978), Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Company, et al.* v. *Federal Energy Regulatory Commission,* No. 78-3816 (5th Cir.).

[6] The tax does "not apply to natural gas otherwise subject thereto * * * *used* or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within [Louisiana]; [or] to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons. * * * [; or] to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within [Louisiana]." Section 47:1303 A (emphasis added).

[7] See La. Rev. Stat. Ann. § 47:633(9)(a) (West Supp. 1979).

The term "use" is defined broadly as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] 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 [Louisiana]; [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 [Louisiana]." La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979) (Mot. App. 4a).[8] The First Use Tax recites that it is "a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas," (La. Rev. Stat. Ann. § 47:1303 C) (West Supp.

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[8] If any enumerated use "first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter." La. Rev. Stat. Ann. § 47:1303 F (West Supp. 1979) (Mot. App. 6a). The Act provides that if the section reciting that the tax is a cost associated with uses made by the owner in preparation or marketing of the gas is held invalid, the entire Act shall be void. § 4(2), 1978 La. Sess. Law Serv. 486 (Mot. App. 8a). The remaining parts of the Act are severable. Sections 2, 4, 1978 La. Sess. Law. Serv. 485, 486 (Mot. App. 7a, 8a).

[9] La. Rev. Stat. § 47:1302(9) (West Supp. 1979) (Mot. App. 4a) defines "owner" as "the person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in [Louisiana except] any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner."

1979)[9] and not a tax on the natural gas itself.[10] The First Use Tax also expressly abrogates provisions of existing contracts which underlie and form the basis for certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission concerning the apportionment of taxes among sellers, processors, and purchasers of gas. See La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979) (Mot. App. 5a).

The First Use Tax is not levied on gas subject to a production or severance tax imposed by Louisiana or any other state or any import tax imposed by the United States. Almost every state, including Louisiana,[11] has a severance tax. However, the United States does not levy any import taxes upon gas from abroad.[12] As a result, the impact of the First Use Tax is on gas produced from federal enclaves or from the Outer Continental Shelf (to which state severance taxes do not apply)[13] or on gas imported from foreign

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[10] The First Use Tax statute recites that it is not imposed "on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana * * * [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner of the enumerated actions comprising first use within [Louisiana]." La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a).

[11] La. Rev. Stat. Ann. §§ 47:631-47:646 (West 1970).

[12] See 72 Stat. 72, 19 U.S.C. 1202, Schedule 4, Part 10, Item 475.15.

[13] *E.g., Mississippi River Fuel Corp.* v. *Cocreham*, 382 F.2d 929 (5th Cir. 1967), cert. denied, 390 U.S. 1014 (1968);

countries.[14] While the First Use Tax is applicable to gas from all of these three sources, the Louisiana legislature intended that the principal target of the tax would be OCS gas.[15]

What is more, the practical impact falls on gas that passes through the state, since Louisiana allows all electric generating utilities, gas distribution companies, and other persons in Louisiana who purchase natural gas directly from an interstate pipeline a credit against their Louisiana state and local taxes for any increases in the transportation and marketing costs for federal-domain Outer Continental Shelf gas

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accord, *Humble Pipe Line Co.* v. *Waggonner,* 376 U.S. 369 (1964). See also Outer Continental Shelf Lands Act, Section 4(a)(2), Pub. L. No. 83-212, 67 Stat. 462, 43 U.S.C. 1333 (a)(2).

[14] The First Use Tax will fall on gas imported directly into Louisiana, and on gas first imported into another state which flows through Louisiana. Beginning in 1980, liquefied natural gas from Algeria will be imported into the United States through facilities located near Lake Charles, Louisiana. *Trunkline Gas Co., et al.,* Docket No. CP74-138, *et al.,* Opinion No. 796-A (June 30, 1977). In addition an agreement has been reached with the Republic of Mexico for the importation of natural gas from that country. See Washington Post, Sept. 22, 1979, page A1, col. 5. This gas will be imported through existing and proposed facilities at Reynosa, Mexico, near Hidalgo, Texas. *Border Gas, Inc.,* Docket No. CP80-75, Application for Authority pursuant to Section 3 of the Natural Gas Act to Import Natural Gas from Mexico, at 2 (filed November 9, 1979). Initially, that gas will be imported into the United States through facilities owned by Texas Eastern Transmission Corporation. *Id.* at 3-4. A portion of such gas will be transported through Louisiana and will therefore become subject to the First Use Tax.

[15] See *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate,* 1 (Governor

which they purchase.[16] Because Louisiana has characterized the First Use Tax as a cost of transporting and marketing gas (La. Rev. Stat. Ann. § 47:1303 C, E (West Supp. 1979)), this credit allows Louisiana consumers who consume gas subject to the First Use Tax to offset increased rates for natural gas attributable to that tax through reductions in other taxes paid to Louisiana. Indeed, the very purpose of the credit is to ensure that Louisiana consumers do not bear any of the costs associated with the First Use Tax.[17]

2. *The Federal Regulation of Natural Gas.* Two statutes—the Natural Gas Act[18] and the Natural Gas Policy Act of 1978[19]—prescribe the nature and extent of federal regulation of the sale and transportation of natural gas in interstate commerce.

Edwards), 3 (Rep. Tauzin), 13 (Mr. Slaton) (1978); *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives,* 7 (Rep. Tauzin) (Hearing of June 5, 1978); *id.* at 8-9, 16 (Mr. Brooksher), 25-36 (Mr. Woodward) (Hearing of June 6, 1978).

[16] See Act No. 599, Tax Credits to Operators of Electric Generating Plants and Natural Gas Distribution Services, 1978 La. Sess. Law. Serv. 1112, codified as La. Rev. Stat. Ann. § 47:11 (West Supp 1979).

[17] *Hearings on H.B. 768 Before The Committee On Ways and Means of the Louisiana House of Representatives, supra,* at 4 (Colloquy between Representative Tauzin and unidentified speakers), 5 (Colloquy between Representatives Sour and Bagert), 6 (Representative Laborde) (Hearing of June 5, 1978).

[18] 15 U.S.C. 717-717w.

[19] Pub. L. No. 95-621, 92 Stat. 3351.

a. *The Natural Gas Act.* The Natural Gas Act conferred upon the Federal Power Commission the authority to regulate "the transportation of natural gas in interstate commerce [and] the sale [of natural gas] in interstate commerce for resale to consumers." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 524 (1978).[20] Sales for resale by producers are likewise subject to regulation under the Act. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

Section 7 of the Natural Gas Act prohibits any person from selling or transporting natural gas in

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[20] On October 1, 1977, pursuant to the Department of Energy Organization Act ("DOE Act"), Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. (Supp. I) 7101, *et seq.*, and Executive Order No. 12,009, 42 Fed. Reg. 46267 (1977), the Federal Energy Regulatory Commission (DOE Act, Section 401(a), 42 U.S.C. (Supp. I) 7171(a)) succeeded to certain functions of the Federal Power Commission. The successor Commission continues to have the authority to establish rates and charges for the transportation and sale for resale of natural gas in interstate commerce, to issue certificates of public convenience and necessity, and to regulate abandonments of service. DOE Act Section 402(a)(1)(C), (D), 42 U.S.C. (Supp. I) 7172(a)(1)(C), (D). In addition, the Secretary of Energy, pursuant to Sections 402(e) and 642 of the DOE Act, 42 U.S.C. (Supp. I) 7172(e) and 7252, the Secretary of Energy has delegated to the Commission the authority to determine rates and charges, and to issue certificates of public convenience and necessity, for the sale or transportation of natural gas imported into the United States from a foreign country. *Importation and Exportation Of Natural Gas*, 43 Fed. Reg. 47769, 47772 (1978).

The Commission also succeeded to the authority of the Interstate Commerce Commission to establish rates and charges for the transportation of oil by pipeline and the valuation of such pipelines. See DOE Act, Section 402(b), 42 U.S.C. (Supp. I) 7172(b).

interstate commerce without first obtaining a certificate of public convenience and necessity from the Commission. See 15 U.S.C. 717f(c). Section 7(e) provides that the "Commission * * * [may] attach to * * * [such] certificate[s] * * * such reasonable terms and conditions as the public convenience and necessity may require" (15 U.S.C. 717f(e)). Finally, Section 7(b) prohibits the termination of certificated service without the prior approval of the Commission. 15 U.S.C. 717f(b); *e.g.*, *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979), slip op. 6-10; *California* v. *Southland Royalty Co.*, *supra.*

Once service has commenced, "sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, mandate the Commission to set just and reasonable rates for the [transportation and] sale of interstate natural gas." *Federal Energy Regulatory Commission* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979). All such rates and contracts affecting such rates must be just and reasonable. Section 4(a), 15 U.S.C. 717c(a). Accordingly, all rates and contracts must be filed with the Commission (Section 4(c), 15 U.S.C. 717c(c)), which may suspend temporarily the operation of, and investigate, newly filed rates and contracts. If the Commission finds that any rate or contract is not just and reasonable, it "shall determine the just and reasonable rate, * * * or contract * * *" (Sections 5(a), 15 U.S.C. 717d(a)).

b. *The Natural Gas Policy Act.* The Natural Gas Policy Act of 1978 (NGPA) modifies the scheme of producer regulation under the Natural Gas Act. It prescribes maximum lawful prices for all natural gas produced in the United States and rules for recovery of those costs in interstate transactions, excludes certain "first sales" of natural gas from the Commission's jurisdiction under the Natural Gas Act. It does not, however, alter the Commission's jurisdiction over the transportation of natural gas in interstate commerce, or any sales for resale subsequent to first sales by interstate pipelines except as provided in Section 601, 92 Stat. 3409-3411. Nor does the NGPA modify the Commission's authority over the transportation of liquid and liquefiable hydrocarbons by pipeline in interstate commerce pursuant to the DOE Act and the Natural Gas Act.

The NGPA specifies maximum lawful prices for all "first sales" [21] of natural gas produced in the United States, whether sold in interstate commerce or intrastate commerce.[22] NGPA Sections 102-109, 92 Stat. 3358-3368. These prices may be adjusted for state severance taxes [23] and for "any costs of compressing, gathering, processing, treating, * * * or transporting such natural gas, * * * borne by the seller and allowed for * * * by the Commission." [24]

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[21] A "first sale" is "any [sale, exchange, or other transfer for value] of any volume of natural gas * * * to any interstate * * * or intrastate pipeline, * * * local distribution company[,] or [user of natural gas,] and [any sale] * * * which precedes or follows any [such] sale * * * and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act." NGPA Section 2(21), 92 Stat. 3355.

[22] These maximum prices may be collected only if contractually authorized. NGPA Section 101(b)(9), 92 Stat. 3358.

[23] NGPA Section 110(a)(1), 92 Stat. 3369.

[24] NGPA Section 110(a)(2), 92 Stat. 3369.

The maximum lawful prices authorized by the NGPA are deemed just and reasonable for purposes of the Natural Gas Act. NGPA Section 601(b)(1)(A), 92 Stat. 3410. Thus, the "Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any [first] sale * * * if such amount is deemed to be just and reasonable under subsection (b)" (Section 601(c)(1), 92 Stat. 3411). Likewise, the Commission may not "deny any interstate pipeline [the right to recover] any amount paid [for] any purchase of natural gas if * * * under subsection (b) * * *, such amount is deemed just and reasonable for purposes of sections 4 and 5 of [the Natural Gas] Act" (Section 601(c)(2)(A), 92 Stat. 3411).

The NGPA also excludes from the Commission's jurisdiction under the Natural Gas Act certain first sales of natural gas in interstate commerce and persons making only such sales. Natural gas not "committed or dedicated to interstate commerce" before the effective date of the NGPA never becomes subject to the Commission's jurisdiction even if sold in a first sale in interstate commerce. NGPA Section 601(a)(1)(A), 92 Stat. 3409.[25] However, gas is "committed or dedicated to interstate commerce" if

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[25] The Commission's jurisdiction under the Natural Gas Act also ceases with respect to first sales of certain classes of natural gas which were committed or dedicated to interstate commerce prior to the effective date of the NGPA. Section 601(a)(1)(B), 92 Stat. 3409.

it "is from the Outer Continental Shelf" or, if it would be required to be sold in interstate commerce (within the meaning of the Natural Gas) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." NGPA Section 2(18)(A), 92 Stat. 3354; H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 71 (1978).

Under Section 311(a) of the NGPA (92 Stat. 3388-3389), the Commission may authorize interstate pipelines to transport natural gas for intrastate pipelines and local distribution companies (Section 311(a)(1), 92 Stat. 3388), and intrastate pipelines to transport natural gas for interstate pipelines and local distribution companies served by interstate pipelines (Section 311(a)(2), 92 Stat. 3389). Such transportation and the persons providing the transportation service are not subject to the Commission's jurisdiction under the Natural Gas Act. NGPA Section 601(a)(2), 92 Stat. 3409-3410. The Commission may also authorize intrastate pipelines to sell natural gas to interstate pipelines or local distribution companies served by interstate pipelines, or to assign the right to purchase natural gas to such persons. NGPA Sections 311(b), 312, 92 Stat. 3389-3391, 3392. These sales and the persons making them are not subject to the Commission's jurisdiction under the Natural Gas Act. NGPA Section 601(a)(1)(C), (D), 92 Stat. 3409.

In sum, the Commission's jurisdiction under the Natural Gas Act over the transportation of natural gas in interstate commerce and sales for resale in interstate commerce other than "first sales" remains undisturbed except as noted above. The Commission continues to determine the terms on, and rates and charges at, which natural gas may be transported in interstate commerce pursuant to the provisions of the Natural Gas Act.[26] The only limitations on this authority are the requirement that the Commission may not deny, or condition a certificate to require gas to be sold at a price other than that permitted under the NGPA, or deny full recovery of amounts paid to purchase such gas if the price paid for such gas is deemed just and reasonable (NGPA Section 601(c), 92 Stat. 3411), and the exclusion of certain sales and transportation arrangements from its jurisdiction under the National Gas Act (NGPA Section 601(a)(1)(C), (D), (2), 92 Stat. 3409-3410).

SUMMARY OF ARGUMENT

I.

The Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution. Although couched in terms of a tax on the "use" of natural gas, the principal impact of the levy is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves or of gas imported from abroad and

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[26] It also continues to prescribe rates and charges for the transportation of liquid and liquefiable hydrocarbons. See page 11, note 20, *supra*, and pages 32-33, note 36, *infra*.

shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

Contrary to the assertion of Louisiana, the decisions of this Court establish that the interstate journey of the gas subject to tax is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. It is therefore clear that the Louisiana tax trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 91-92 (1963).

II.

The Louisiana First Use Tax is also invalid under the Commerce Clause. The Commerce Clause flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). While the Louisiana tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use within Louisiana" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a)), the provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use. Stripped to its essentials, the Louisiana levy is nothing more than an "unapportioned levy on the transportation of the entire volume of gas" *Wash. Rev. Dept.* v. *Stevedoring Ass'n*, 435 U.S. 734, 749 n. 18).

Even if the Louisiana First Use Tax is not simply a transit levy on gas moving in interstate commerce, it is nevertheless invalid because it is not fairly apportioned and because it discriminates against interstate commerce. It is not related to either the value of identifiable activities occurring within the taxing state, the taxpayer's investment in facilities within the state, its gross income from business or the percentage of business conducted within the state, or the length of the facilities or distance traveled within the state.

The Louisiana tax also discriminates against interstate commerce in two distinct ways. First, while Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer. The practical effect of prohibiting the shifting of the First Use Tax, while allowing the shifting of the severance tax, is to impose a tax on Outer Continental Shelf, federal enclave, and imported gas which is greater than the tax imposed on gas produced within Louisiana.

Finally, the Louisiana First Use Tax discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits designed to ensure that Louisiana consumers are relieved of any First Use Tax liability. The Louisiana tax therefore "falls short of the substantially evenhanded treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 332 (1977).

III.

The resolution of the questions presented does not require the appointment of a Special Master. The decisions of this Court establish as a matter of law that the gas moves in interstate commerce when the enumerated taxable uses occur. Once the interstate movement of the gas is recognized, plaintiffs' claims under the Supremacy and Commerce Clauses can be resolved by testing the Louisiana tax statute under the precedents of this Court. No evidence is required on these constitutional questions.

ARGUMENT

I. THE LOUISIANA FIRST USE TAX CONFLICTS WITH THE FEDERAL REGULATION OF THE SALE AND TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE AND IS THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. Introduction

"[I]t was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States—whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power." *Northern Natural Gas Co.* v. *Kansas Commission,* 372 U.S. 84, 90 (emphasis in original). In passing the Natural Gas Act in 1938 and the Natural Gas Policy Act in 1978, Congress did something more. In the Court's words, "[t]he Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company[,]' *Phillips Petroleum Co.* v. *Wisconsin,* [347 U.S. 672] at 682 * * *" (372 U.S. at 91) (footnote omitted).

The exclusive federal regulation of the sale and transportation of natural gas in interstate commerce preempts all forms of state regulation not expressly authorized by NGPA. Thus, for example, in *Northern Natural Gas Co.* v. *Kansas Commission, supra,* this

Court held that orders of a state commission—requiring an interstate pipeline company to purchase ratably from all wells connecting with its pipeline system in each gas field within the state—were an invalid encroachment upon the exclusive regulatory jurisdiction of the Federal Power Commission. In so holding, the Court observed that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas * * * or for state regulations which would indirectly achieve the same result. These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exlusive domain" (372 U.S. at 91-92).

Judged by this standard, the Louisiana First Use Tax is invalid. Although couched in terms of a tax on the "use" of natural gas, we shall show that the principal impact of the levy is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and federal enclaves or of gas imported from abroad and shipped through Louisiana in interstate commerce. Indeed, the term "use" is defined so broadly as to include any "ascertainable action at a point within [Louisiana]" taken with respect to such gas shipped in interstate commerce. Since Congress has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas, the Louisiana tax is incompatible with the federal regulatory scheme.

Like the plaintiff states, we believe that the invalidity of the Louisiana tax can be demonstrated as a matter of law on the pleadings and that there are no factual questions that require the appointment of a Special Master. Once it is recognized that the impact of the Louisiana tax is on gas produced from fields located on the Outer Continental Shelf, or from fields within federal enclaves, or from abroad and transported across Louisiana, and that such gas moves in interstate commerce, the exclusive federal regulatory jurisdiction over such gas, and the incompatibility of the tax with that exclusive jurisdiction, are established. We therefore now turn to a description of the mechanics of the Louisiana tax and the movement of the natural gas upon which it is imposed.

B. The Gas Subject To The First Use Tax Moves In Interstate Commerce

As we have already explained, the Louisiana First Use Tax applies to three categories of natural gas: OCS gas, federal enclave gas and imported gas. Gas in each of these three categories moves in interstate commerce as that term is defined by the decisions of this Court.

It has long been established that natural "gas which crosses a state line at any stage of its movement from welhead to ultimate consumption[,]" or gas which is commingled with gas so moving, is in interstate commerce during the entire journey. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965).[27] That journey commences at the wellhead (*California* v. *Lo-Vaca, supra; East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 455 (1931)). It ends after the pressure is reduced and the gas is delivered into local distribution systems for ultimate consumption (*Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472-473 (1950); *East Ohio Gas Co.* v. *Tax Commission, supra*, 283 U.S. at 470), or after the gas is delivered to an industrial user for consumption (15 U.S.C. 717(b)), or to a distribution company, or intrastate pipeline, which is subject to state or local regulation, at the border of, or within, a state, and the gas is actually consumed within that state (15 U.S.C. 717(c)). This standard applies to each of the categories of gas involved in this case.

a. *OCS gas.* OCS gas is produced from "field[s] * * * *located outside the borders of any state and any gas taken will have to be transported across state lines for sale* within the United States." *Continental Oil Co.* v. *Federal Power Commission*, 370 F.2d 57, 66

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[27] See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467, 469-472 (1950); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 687-689 (1947); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 503-506 (1942); *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U.S. 465, 470 (1931); *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550, 554 (1926); *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F.2d 525, 527-528 (5th Cir. 1966); *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F.2d 882, 887-889 (5th Cir. 1957), cert. denied, 355 U.S. 930 (1958).

(5th Cir. 1966) (emphasis in original), cert. denied, 388 U.S. 910 (1967). Thus, "the onshore movement of gas produced in the Federal domain offshore Louisiana constitutes interstate commerce within the meaning of the Natural Gas Act * * *." *Chandeleur Pipe Line Co.*, 42 F.P.C. 25 (1969). *See also United Gas Pipe Line Co.*, 30 F.P.C. 560, 563-564 (1963). Furthermore, most of the OCS gas which enters Louisiana is transported through that state for ultimate consumption in other states.[28] This interstate movement is not interrupted by any of the taxable uses described in La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), unless the gas is sold to a local distribution company, intrastate pipeline, or user of gas within Louisiana, for ultimate consumption there.

b. *Federal enclave gas.* Federal enclave gas from Barksdale Air Force Base also moves in interstate commerce. That gas is processed near the field in plants owned by Union Texas Petroleum Company and Arkansas Louisiana Gas Company. The gas is then delivered to Arkansas Louisiana Gas Company, Mississippi River Transmission Corporation, Texas Gas Transmission Company, and United Gas Pipe Line Company. Some of this gas is sold to distribution companies and directly to industrial and other users in Louisiana; the remainder is transported to

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[28] *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives*, 7 (Rep. Tauzin) (Hearing of June 5, 1978); *id.* at 9 (Mr. Brooksher) (Hearing of June 6, 1978); *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 4 (Rep. Tauzin) (1978).

out-of-state consumers. The total volume of gas from Barksdale Air Force Base either moves in interstate commerce or is commingled with such gas. Thus, such federal enclave gas moves in interstate commerce from the time it leaves the wellhead until it is sold for ultimate consumption within Louisiana or other states.

c. *Imported gas.* Gas imported from Mexico will enter the United States through existing connections near Hidalgo, Texas, where it will enter facilities operated by Texas Eastern Transmission Corporation. In these facilities, the imported gas will be commingled with gas produced in Texas, and the commingled stream will be transported into Louisiana, where some of the stream will be sold, and then on to other states where the remainder is sold for ultimate consumption. The movement of this imported gas into and/or through Louisiana is in interstate commerce.

Gas imported from Algeria as liquefied natural gas is carried in special tankers that will dock near Lake Charles, Louisiana. There, the gas will be temporarily stored, vaporized, and delivered to Trunkline Gas Company for transportation through Louisiana for sale and delivery to consumers in Louisiana and other states. *Trunkline LNG Co., et al.*, Opinion No. 796 (Apr. 29, 1977) 2-3. The movement of the liquefied gas to the onshore storage tanks is in interstate, if not foreign, commerce. See *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257, 267 (1927). And the movement of the vaporized gas in Trunkline's interstate pipeline is clearly in interstate commerce.

C. The Taxable "Uses" Enumerated In The Louisiana Statute Do Not Interrupt The Journey Of The Gas In Interstate Commerce

Louisiana does not dispute the fact that each of the three categories of gas to which the First Use Tax applies—OCS gas, federal enclave gas, and imported gas,—moves in interstate commerce. It contends, however, that extensive processing and treatment of the gas occurs in Louisiana and that these activities interrupt the journey of the gas in interstate commerce and thereby justify imposition of the tax (see Motion to Dismiss, 22-26; Answer at 11, ¶ XXXV; 13, ¶ XL).

But the decisions of this Court establish that the interstate journey of OCS, federal enclave, and imported natural gas is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana tax statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. We turn now to a discussion of each of the taxable "uses" enumerated in the Louisiana First Use Tax Statute.

1. The "sale" or "transfer of possession or relinquishment of control at a delivery point [within Louisiana]" (La. Rev. Stat. Ann. § 47:1302(8)

(West Supp. 1979)) does not necessarily interrupt the interstate movement of gas subject to the First Use Tax. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U.S. 550, 554 (1926).

In transactions involving gas that is sold and/or delivered to another pipeline, which transports the gas, or commingles it with gas transported, out of Louisiana, or sells and/or delivers the gas to a third pipeline, which transports the gas out of Louisiana, "the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to its intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504.[29]

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[29] On the other hand, if the gas is sold and delivered to an intrastate pipeline, or distribution company at the border of, or within, Louisiana, and is actually consumed within that state, it ceases to be in interstate commerce once that delivery is made. 15 U.S.C. 717(c); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *Federal Power Commission* v. *East Ohio Gas Co., supra,* 338 U.S. at 472-473. The same is true if gas is sold and delivered to an industrial or other user within Louisiana. 15 U.S.C. 717(b); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U.S. 507 (1947).

Gas which is subject to the First Use Tax and which is "use[d] in manufacturing" in Louisiana (§ 47:1302(8)) has ceased to be in interstate commerce with its delivery to the manufacturer, or the local distribution company or intrastate pipeline which serves that manufacturer.

2. The "transportation in [Louisiana] to the point of delivery at the inlet of any processing plant" or "the transportation in [Louisiana] of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility" (La. Rev. Stat. Ann. § 47:1302(8)) by an interstate pipeline does not interrupt the interstate movement of the gas. To the contrary, such transportation is an inseparable segment of the interstate movement of the gas from the wellhead to the ultimate consumers located in Louisiana and in other states. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163 (1954); *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968).

3. The delivery of gas to the operator of a treating and/or processing plant, treatment of the gas for removal of impurities and/or waste products, and processing to extract liquid and liquefiable hydrocarbons (see § 47:1302(8)) do not interrupt the interstate movement. Instead, as this Court has observed, the "[t]he entire movement of the gas, from the producing wells through the [processing plants] and into the [interstate] pipeline[s] to consumers outside [Louisiana] is a steady and continuous flow." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163 (1954); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 685 n.7 (1947). Thus, "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips * * *." *Deep South Oil Co.* v. *Federal Power Commission*, *supra*, 247 F.2d at 888.

4. The storage of gas within Louisiana by an interstate pipeline, which may constitute "other ascertainable action at a point within the state" (§ 47:1302(8)) does not interrupt the interstate movement if it is a temporary incident of such movement. Cf. *Board of Trade of City of Chicago* v. *Olsen*, 262 U.S. 1, 33-34 (1923).[30] This gas has moved in interstate commerce prior to storage and will so move upon withdrawal from storage in the manner previously authorized by the Commission until such time as the Commission, by an amendment to the certificate authorizing operation of the storage facility, authorizes a different movement. The seasonal storage of such gas does not break the interstate journey because the gas is stored to facilitate its movement to the ultimate consumers, whether in Louisiana or in other states, during the winter heating season when the demand for gas is the greatest.[31] *Cf. Champlin Realty Co.* v. *Brattleboro*, 260 U.S. 366, 376-377 (1922).

The temporary storage of liquefied natural gas to permit it to be reconverted by vaporization to its normal gaseous state is likewise a segment in the movement of the gas from foreign producers to consumers in the United States.[32] Such storage does not

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[30] Storage of gas subject to the First Use Tax by an intrastate pipeline, local distribution company, or industrial or other consumer of gas within Louisiana presents a different legal issue. Such gas has ceased to be in interstate commerce by reason of the sale of such gas to those persons.

[31] See Federal Power Commission *National Gas Survey*, Vol. I, at 39-40, 44-46, 47 (1975).

[32] *National Gas Survey*, *supra*, Vol. II, at 406.

break the interstate movement because it is equivalent to storage in transit. See *Board of Trade of City of Chicago* v. *Olsen*, 262 U.S. 1, 33-34 (1923); cf. *Atlantic Coast R.R.* v. *Standard Oil Co.*, *supra*, 275 U.S. at 267-270. Nor does the vaporization of the liquefied natural gas break the interstate journey because "mere changes in the method of transportation do not affect the continuity of the transit." *Minnesota* v. *Blasius*, 290 U.S. 1, 10 (1933).

D. The Louisiana Tax Interferes With The Federal Regulation Of The Transportation And Sale Of Natural Gas In Interstate Commerce

Once it is recognized that the First Use Tax is imposed upon OCS, federal enclave, and imported natural gas, and that each of these categories of gas move in interstate commerce, it is readily seen 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.[33]

We focus first on Section 47:1303 C as it interferes with the Commission's regulation of the transportation and sale of natural gas in interstate com-

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[33] "Although [these claims are] basically constitutional in nature, deriving [their] force from the operation of the Supremacy Clause, Art. VI, cl. 2, they are treated as 'statutory' for purposes * * * of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 271-272 & n. 6 (1977); *Hagans* v. *Lavine*, 415 U.S. 528, 549 (1974).

merce. By the terms of the First Use Tax Act, § 4(2), 1978 La. Sess. Law. Serv. 486, if that provision is unconstitutional, the entire statute becomes void.[34] Thus, if the Court holds Section 47:1303 C invalid under the Supremacy Clause, it need not reach any of plaintiffs' other claims.[35]

Section 47:1303 C declares the First Use Tax to be "a cost associated with uses made by the owner in preparation of [sic] marketing of the natural gas[,]." It abrogates "agreement[s] or contract[s] 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 other party in interest, other than a purchaser of such natural gas * * * 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 * * * any other grounds for reimbursement or refund * * *." Louisiana's answer

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[34] See *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate,* 4, 13, 28 (Representative Tauzin) (1978).

[35] Contrary to Louisiana's denial (Answer at 17-18 ¶ XLVIII), Section 47:1303 C is a regulation of the transportation and sale of natural gas in interstate and foreign commerce. To " 'regulate' is to lay down the rule by which a thing shall be done." *Federal Power Commission* v. *Corporation Commission of Oklahoma,* 362 F.Supp. 522, 532 (W.D. Okla. 1973) (three judge court), aff'd per curiam, 415 U.S. 961 (1974). As it prescribes "the rule by which natural gas produced [outside of Louisiana's taxing jurisdiction] may move from [Louisiana] to other states[,] [§ 47:1303 C] constitute[s], therefore, a regulation * * * " (362 F. Supp. at 533).

states that "the sole purpose, intent, and application of [47:1303 C is] to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers." Answer at 21 ¶ LX. It is therefore plain that Section 47:1303 C seeks to regulate the apportionment of costs among producers, processors, and pipelines, and therefore interferes with the Commission's jurisdiction.

1. 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, 717d). Insofar as it characterizes the First Use Tax as a cost associated with uses of the gas by the interstate pipeline owner and abrogates contractual provisions which would require persons other than gas consumers to bear the tax, Section 47:1303 C interferes with the Commission's authority to allocate costs between gas consumers and the owners of liquid and liquefied hydrocarbons which are carried by interstate pipelines.

Because many natural gas pipelines transport extractable hydrocarbons as well as natural gas (see page 37 & note 39, *infra*), the Commission must determine which costs should be borne by natural gas consumers and which should be borne by the owners of the extractable hydrocarbons.[36] The First Use Tax,

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[36] *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1241-1243, 1247, 1249 (D.C. Cir. 1973); *City of Detroit* v. *FPC*, 230 F.2d 810, 819-821 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956); *Cities Service Gas Co.* v. *FPC*, 155 F.2d 694, 703 (10th Cir.),

like other taxes and costs, is an element of the pipelines' costs of service. *Federal Power Commission* v.

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cert. denied, 329 U.S. 773 (1946); *Hope Natural Gas Co.* v. *FPC,* 134 F.2d 287, 307-308 (4th Cir. 1943), rev'd on other grounds, 320 U.S. 591 (1944); *Panhandle Eastern Pipe Line Co.* v. *FPC,* 324 U.S. 635, 641-642 (1945); *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 588-590 (1945); see cases cited at page 38, note 41, *infra.*

When these cases were decided, the Commission could not directly prescribe rates for the transportation of liquid hydrocarbons; it could only assign costs to that service and preclude the recovery of such costs in rates charged natural gas consumers. *Mobil Oil Corp.* v. *FPC, supra,* 483 F.2d at 1246-1249. Arguably, the Commission could regulate the terms on, and rates at, which liquefiable hydrocarbons—those hydrocarbons produced with natural gas existing in a gaseous state when produced and transported that may be extracted from the gas stream by processing, liquefied, and treated as liquids (*id.* at 1241)—are transported in interstate commerce pursuant to the Natural Gas Act (*id.* at 1242, 1246, 1249). The Commission's authority to regulate the transportation of liquid, and perhaps liquefiable, hydrocarbons by interstate natural gas pipelines (cf. *id.* at 1242-1243), was established when the DOE Act vested the Commission with jurisdiction to set rates for the transportation of oil by common-carrier pipeline (DOE Act, Section 402(b), 42 U.S.C. (Supp. I) 7172(b)), including any "petroleum by-products, derivates or petrochemicals." H. Rep. No. 95-539, 95th Cong., 1st Sess. 69 (1977). Thus, the Commission may now prescribe directly the rates for the transportation of liquid and liquefiable hydrocarbons by natural gas pipelines providing common carriage for such products. Accordingly, since any natural gas pipeline operating on the Outer Continental Shelf, which carries liquid and liquefiable hydrocarbons for producers, must operate as a common carrier (43 U.S.C. 1334(c)), the Commission may now prescribe directly the rates for the transportation by pipeline of liquid hydrocarbons as well as for the liquefiable hydrocarbons and natural gas carried by such pipelines.

United Gas Pipe Line Co., 386 U.S. 243 (1967). It is for the Commission and the Commission alone to determine whether this cost should be borne by gas consumers or others. *Id.* at 243-246.

The Commission has therefore consistently held that a pipeline's natural gas customers do not receive any benefits from the pipeline's transportation of liquid and liquefiable hydrocarbons for the owners, and that the costs associated with the transportation and delivery of those products at the inlet of a processing plant must be borne by the producers, who benefit from such activities, and not by natural gas consumers. See page 38, note 41, *infra*. The Commission has also held that costs associated with the processing of natural gas to extract the liquid and liquefiable hydrocarbons must be borne by the owners of those products, and not by the natural gas consumers.[37]

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[37] Natural gas is processed to extract liquid and liquefiable hydrocarbons because those products are considered more valuable than the processed gas. *E.g., Deep South Oil Co. of Texas* v. *Federal Power Commission, supra*, 247 F.2d at 888; *National Rates for Natural Gas*, 54 F.P.C. 3090, 3096-3102 (1975), reh. denied, 15 P.U.R. 4th 1, 12-13 (1976), aff'd in part and rev'd in part on other grounds, *sub nom. Tenneco Oil Co.* v. *Federal Energy Regulatory Commission*, 571 F.2d 834, 844-845 (5th Cir. 1978). The removal of these hydrocarbon products does not benefit gas consumers because it reduces both the volume, and heat content, of the processed gas. *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968), aff'd, 428 F.2d 407 (5th Cir.), cert. denied 400 U.S. 950 (1970); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1158, 1163-1165 (1962), aff'd *sub nom. Mid-*

The First Use Tax is such a cost. It is imposed on activities which, in most cases, occur solely because the pipeline transports and delivers the gas stream to a processing plant so that the producers may separate and extract the liquid and liquefiable hydrocarbons contained in that stream. Thus, "the trans-

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American Pipe line Co. v. *FPC,* 330 F.2d 226, D.C. Cir. 1964).

Although the methodologies have differed, the Commission has applied the policy of requiring the owner of hydrocarbons to bear the cost of their extraction in establishing rates for producers as well as for pipelines. In establishing producer rates, the Commission has either credited revenues from the sale of the extracted hydrocarbons against costs, or allocated costs between the processed gas and the extracted hydrocarbons on the basis of economic and physical characteristics of the two products. *National Rates For Natural Gas,* Docket No. RM75-14, Opinion No. 770, 15 P.U.R. 4th 21, 49-50 (1976), reh. denied, Opinion No. 770-A, 17 P.U.R. 4th 317, 346-347 (1976), aff'd *sub nom. American Public Gas Association* v. *FPC,* 567 F.2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *National Rates for Natural Gas,* 54 F.P.C. 3090, 3096-3102 (1975), reh. denied, Opinion No. 749-C, 15 P.U.R. 4th 1, 12-14 (1976). In establishing rates for those pipelines which own the extracted hydrocarbons as well as the processed gas, the Commission has credited the revenues from the sales of the liquids against the pipeline's cost of service. *Kansas-Nebraska Natural Gas Company, Inc.,* 53 F.P.C. 1691, 1702-1703 (1975), reh. denied, 54 F.P.C. 923 (1975); *Panhandle Eastern Pipe Line Co.,* 25 F.P.C. 787, 797-798 (1961), remanded *sub nom. Panhandle Eastern Pipe Line Co.* v. *FPC,* 305 F.2d 763, 767-768 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963), aff'd on remand, 32 F.P.C. 636 (1964), aff'd per curiam, 348 F.2d 340 (D.C. Cir.), cert. denied, 382 U.S. 944 (1965); *Northern Natural Gas Co.,* 28 F.P.C. 1155, 1163-1165; *Tennessee Gas Transmission Co.,* 18 F.P.C. 428, 435 (1957); *id.* at 474-479 (Initial Decision).

portation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility[,] * * * processing for the extraction of liquefiable component products or waste materials[,] * * * [and] treatment"[38] occur solely because the gas is delivered to a producer-owned processing plant. Moreover, the pipeline must "transfer * * * possession or relinquish[] control at a delivery point in [Louisiana]" (*ibid.*) at the inlet of the processing plant to enable the producers to process the gas. Since such activities benefit only the producers, the Commission must determine whether the producers or the pipelines' natural gas customers must bear the costs (including any taxes) incurred by the pipelines because of these activities.

Section 47:1303 C, however, seeks to preclude the Commission from classifying the First Use Tax as a cost associated with the extraction of hydrocarbons and requiring that it be recovered from those products. It does this by abrogating contracts which require the owners of the extracted hydrocarbons to reimburse the transporting interstate pipelines for costs allocated to transportation and processing of those products. This abrogation prohibits the interstate pipeline from obtaining reimbursement from the owner of the extracted hydrocarbons and requires the interstate pipeline to seek reimbursement, if at all, from subsequent purchasers of the processed gas. The practical effect of this provision is to shift the incidence of significant costs incurred primarily for the benefit of the owners of the extracted hydrocar-

[38] La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979).

bons to the ulimate consumer of the processed gas without the prior approval of the Commission.

2. Section 47:1303 C also interfers with the Commission's authority to control the terms on which natural gas is transported in interstate commerce through the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f). Interstate pipelines transport liquid and liquefiable hydrocarbons for the producers as well as natural gas onshore to a processing plant where the former are extracted by the producer and the residue gas returned to the pipeline.[39] Many contracts for this transportation service require the owner of the extractable hydrocarbons to reimburse the pipeline for all costs (including any taxes) incurred by, or levied against, the pipeline as a result of this transportation or the processing of the gas to extract the hydrocarbon products. Thus, the contracts require the producers to bear all costs asso-

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[39] *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968); *Tennessee Gas Pipeline Co., et al.*, 38 F.P.C. 691, 725, 737 (1967) (Initial Decision); *Continental Oil Co., et al.*, 27 F.P.C. 96, 149-150 (1962) (Initial Decision); *Hearings on H.R. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 14 (Mr. Slaton) (1978); *Hearings on H.R. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives*, 9 (Mr. Brooksher) (Hearing of June 6, 1978).

In some cases, the producer transports the gas onshore for processing. *E.g.*, *Gulf Oil Corporation*, Docket No. CI77-635 (July 29, 1977), petition for review pending, *Gulf Oil Corporation* v. *Federal Energy Regulatory Commission*, No. 77-2137 (D.C. Cir.); *Sabine Pipe Line Company and Texaco Inc.*, Docket Nos. CP77-304 and CI74-537 (July 7, 14, & 26, 1977).

ciated with transporting and extracting the liquid and liquefiable hydrocarbons.[40]

These contracts form the basis of the certificates authorizing these transportation services. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 387 (1959). In issuing certificates for such transportation, the Commission has, at a minimum, required that costs be allocated to that service.[41] Furthermore, the Commission must approve any amendment to these contracts. The parties must give notice of any proposed changes in these contracts to the Commission (15 U.S.C. 717c(d)), which may suspend temporarily the operation of the amended contracts (15 U.S.C. 717c(e)) and deter-

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[40] *E.g., Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate,* 5 (Representative Tauzin), 14 (Mr. Slaton), 19 (Mr. Garner) (1978); *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives,* 9, 16 (Mr. Brooksher) (Hearing of June 6, 1978).

[41] *Union Oil Company of California, et al.,* Docket No. CI77-828, *et al.,* order at 7, 10-11 (Apr. 12, 1978); *Canadian Superior Oil (U.S.) Ltd., et al.,* Docket No. CI77-802 (Mar. 28, 1978); *High Island Offshore System,* Docket Nos. CP75-104, *et al.,* order at 10, 16-17, 18 (June 4, 1976); *Tennessee Gas Pipeline Co., et al.,* 38 F.P.C. 691, 698 (1967); *Northern Natural Gas Co.,* 28 F.P.C. 1155, 1163-1165 (1962), aff'd *sub nom. Mid-America Pipeline Co.* v. *FPC,* 330 F.2d 226 (D.C. Cir. 1964); *Continental Oil Co., et al.,* 27 F.P.C. 96, 107-108 (1962); *Texas Eastern Transmission Corporation,* 11 F.P.C. 435, 447 (1952). *See also Pipeline Costs Allocable To The Transportation Of Liquids, Liquefiable Hydrocarbons, etc., For Others,* 47 F.P.C. 208 (1972), rev'd on other grounds *sub nom. Mobil Oil Corp.* v. *FPC,* 483 F.2d 1238 (D.C. Cir. 1973).

mine the terms of the amended contracts (15 U.S.C. 717d(a)). This procedure is within the exclusive jurisdiction of the Commission and may not be circumvented by states seeking to exercise control over such matters. *Northern Natural Gas Co.* v. *Kansas Commission,* 372 U.S. 84, 96-98 (1963); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U.S. 498, 506-509 (1942); *cf. United Gas Pipe Line Co.* v. *McCombs,* No. 78-17 (June 18, 1979). Thus, only the Commission may authorize deletion of the reimbursement provisions from contracts which are part of the certificates.

Section 47:1303 C, however, abrogates those provisions. It requires that the owner of the gas (rather than the owner of the extractable hydrocarbons) bear the cost of the tax. In doing so, it modifies certificates issued by the Commission and thereby invades the exclusive jurisdiction of the Commission.

3. Finally, Section 47:1303 C interferes with the regulation prescribed by the Natural Gas Policy Act in two distinct ways. First, it interferes with the Commission's authority under Section 110(a)(2), to determine whether, when a producer transports and processes OCS and federal enclave gas prior to selling it in a first sale, he should be allowed to increase the maximum lawful prices for such first sales to recover the First Use Tax from purchasers of the gas or whether he must recover the First Use Tax from other persons. Second, the Louisiana tax statute attempts to regulate aspects of first sales of "high-cost natural gas" produced on the OCS which Congress has directed are to be free of federal as well as state regulation.

a. Under Section 110(a)(2) of the NGPA, a person making a "first sale" of natural gas may increase the maximum lawful price for such first sale to recover costs incurred in "compressing, gathering, processing, treating, * * * or transporting * * * natural gas, or other similar costs," only if the Commission first authorizes such recovery. See H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 91 (1978).

Where a producer transports and processes OCS and federal enclave gas prior to selling it in a first sale, he incurs the First Use Tax because he is the owner of the gas when the taxable uses occur (see La. Rev. Stat. Ann. § 47:1302(9) (West Supp. 1979) (Mot. App. 4a)) and performs the taxable uses, namely the transportation of unprocessed gas to the inlet of a processing plant and the processing and treatment of the gas to extract liquid and liquefiable hydrocarbons and waste materials (see § 47:1302(8)), and because First Use Tax is "deemed a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas" (§ 47:1303 C) (Mot. App. 5a)). In those cases, the First Use Tax is subject to recovery through an increase in maximum lawful prices pursuant to Section 110(a)(2) of the NGPA because it is a cost "of compressing, gathering, processing, treating, * * * or transporting such natural gas * * * borne by the seller * * *." Thus, the maximum lawful prices for first sales of such natural gas subject to the First Use Tax may be increased to recoup that tax only if first authorized by the Commission.

Section 47:1303 C, however, interferes with the exercise of that authority. As previously noted, it abrogates provisions of contracts and agreements which permit the producer-owner of the gas to such reimbursement for the tax from persons other than subsequent purchasers of the processed natural gas. By requiring that the tax be passed along, if at all, only to natural gas customers, Section 47:1303 C conflicts with the provisions of Section 110(a)(2) of the NGPA which authorize the Commission to determine whether the maximum lawful prices prescribed in the NGPA should be increased to permit recovery of the First Use Tax, or whether the producer must look to persons other than natural gas consumers to reimburse him for the tax.

b. Moreover, Section 47:1303 C attempts to regulate the apportionment of costs in certain "first sales" of natural gas which Congress has directed are to be free of federal and state regulation. Section 121(b) of the Natural Gas Policy Act generally provides that the price ceilings prescribed in the Act for first sales of "high cost natural gas" [42] shall cease to apply to such first sales. This provision became effective upon the implementation of the incremental pricing provisions of the Act on November 1, 1979.[43]

Such first sales of natural gas in interstate commerce are now free of federal regulation. In addition,

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[42] Section 107, 92 Stat. 3366-3367.

[43] *Regulations Implementing the Incremental Pricing Provisions of the Natural Gas Policy Act of 1978*, Order No. 49, 44 Fed. Reg. 57726. (1979).

to the extent that "high-cost natural gas" is produced on the OCS, it is also free from any state regulation under Section 602(a) of the NGPA (92 Stat. 3411), which authorizes the states to prescribe maximum lawful prices for first sales of natural gas "produced in such State" that are lower than the maximum lawful prices prescribed in the NGPA. Because the OCS "*is located outside the borders of any state*" (*Continental Oil Co.* v. *Federal Power Commission*, *supra*, 370 F.2d at 67), Louisiana may not regulate sales of "high-cost natural gas" from that area since such gas is not produced in Louisiana.

In the absence of congressional authorization to do so, the states have no constitutional power to regulate the price of wholesales of natural gas in interstate commerce (*Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *cf. Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) or to establish the terms on which such gas could be transported in interstate commerce. Cf. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (states may not require gas companies serving both interstate and intrastate consumers to serve intrastate consumers prior to serving interstate consumers). Accordingly, since Section 47:1303 C seeks to regulate the apportionment of costs between the seller and buyer of "high-cost natural gas," which is produced from the OCS, it seeks to regulate transactions which this Court has held that the states may not regulate and which Congress has required to be free of federal as well as state regulation.

In light of the foregoing, it is clear that Section 47:1303 C trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Comm'n*, *supra*, 372 U.S. at 91-92. By providing that the First Use Tax can only be passed on only to natural gas consumers, Section 47:1303 C, "seriously impair[s] the [Commission's] authority to regulate the intricate relationship between the [pipeline] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states" (372 U.S. at 92). Since regulation of "[t]his relationship is a matter with respect to which Congress has given the [Commission] paramount and exclusive authority[,]" Section 47:1303 C should be "declared a nullity in order to assure the effectuation of the [regulatory scheme] ordained by Congress" (372 U.S. at 92).

II. THE LOUISIANA FIRST USE TAX IS INVALID UNDER THE COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the Constitution provides that: "Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As the Court observed in *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." It is settled by the decisions of this Court that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). See also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977).

The Commerce Clause flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 n. 11 (1976). Moreover, to the extent the goods come to rest and the tax can be said to reach a local activity, it is valid only where it is applied to activities having a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. See, *e.g.*, *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The Louisiana First Use Tax contravenes the Commerce Clause in both respects.

A. The First Use Tax is imposed upon gas that is in transit through Louisiana in interstate commerce. While the tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use within [Louisiana]" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a), provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use.[44]

As we have pointed out (pages 6-7, *supra*, "[t]he tax imposed * * * shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within [Louisiana]" and the term "unit" is defined as "one thousand cubic feet of natural gas" measured at a specified pressure and temperature (La. Rev. Stat. Ann. § 47:1303 B (West Supp. 1979) (Mot. App. 5a)). But such a levy is no different than a tax imposed "at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered" at the outlet of a processing plant that this Court struck down in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, 347 U.S. 161. There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. Like Louisiana, the State identified, as a local incident, the transfer of gas from the refinery to the pipeline. The Court held the tax to be unconstitutional under the

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[44] "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted" *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930). See also *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955); *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280 (1932).

Commerce Clause because it was an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or the percentage of the taxpayer's business that was attributable to Texas. In these circumstances, the Court ruled that the Texas tax could not survive attack under the Commerce Clause.

In our view, *Michigan-Wisconsin Pipe Line Co.* controls the Commerce Clause aspects of this case. Stripped to its essentials, the Louisiana tax is simply a transit fee on the privilege of moving gas through the state. It is unrelated to the actual consumption of the gas within the state. Indeed, to the extent that gas subject to tax comes to rest and is consumed within the state, there are credits that are available to offset other Louisiana taxes payable by the users. Nor does the tax bear any reasonable relationship to the transporter's business within Louisiana. It is nothing more than an "unapportioned levy on the transportation of the entire volume of gas" (*Wash. Rev. Dept.* v. *Stevedoring Ass'n*, *supra*, 435 U.S. at 749 n. 18) and therefore invalid under the Commerce Clause.

B. Even if the Louisiana First Use Tax is not simply a transit levy on gas moving in interstate commerce, it is nevertheless invalid because it is not fairly apportioned and because it discriminates against interstate commerce.

1. A tax on interstate activities is properly apportioned if it is related to the value of identifiable

activities occurring within the taxing state (*Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 746-747), the taxpayer's investment in facilities within the state (*Colonial Pipeline Co.* v. *Triagle,* 421 U.S. 100, 107 n. 5 (1975); *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 81-82 nn. 1 & 2, 93 (1948) (Opinion of Reed, J.)), gross income from business conducted within the state (*Washington Rev. Dept.* v. *Stevedoring Assn, supra,* 435 U.S. at 737-738 and n. 4, 750; *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 275), the percentage of the taxpayer's business in the state (*Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 749 n. 18; *Case of the State Freight Tax,* 82 U.S. (15 Wall.) 232, 273, 278 (1872), or the length of the facilities or distance traveled within the state (*Norfolk & W.R. Co.* v. *Tax Comm'n,* 390 U.S. 317, 323-325 (1968)).

The First Use Tax is not related to any of these factors. Rather, it is imposed on the entire volume of OCS, federal enclave, and imported gas entering the state, except such gas as is consumed in certain uses within Louisiana. La. Rev. Stat. Ann. §§ 47:1303 A, B (West Supp. 1979) (Mot. App. 4a-5a). The tax "is the same whether the [gas is] moved one mile or three hundred." *Case of the State Freight Tax,* 82 U.S. (15 Wall.) at 273. It is therefore simply "an unapportioned levy on the transportation of the entire volume of gas." *Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 749 n.18.

Contrary to Louisiana's contention (Answer at 10, 12, ¶¶ XXXIV, XXXVII), the tax is not apportioned simply because it applies only if the gas is subjected to one of the enumerated uses. The Louisiana taxable "uses," like the taking of gas by a pipeline at the outlet of a processing plant, are inseparable elements of the interstate transmission of gas. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra.* As the Court there stated, in terms that are strikingly appropriate to this case, there are "aspect[s] of interstate transportation [which] cannot be 'carve[d] out from what is an entire or integral economic process,' * * * by legislative whimsy and segregated as a basis for [a] tax" (347 U.S. at 169, quoting *Nippert* v. *Richmond,* 327 U.S. 416, 423 (1946)).

2. One of the unquestioned principles in this Court's Commerce Clause jurisprudence is that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business" (*Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959)). See also *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963); *Nippert* v. *Richmond,* 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U.S. 113 (1908); *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U.S. 275 (1876). "The probation against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individid-

ual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange* v. *State Tax Comm'n*, *supra*, 429 U.S. at 329, quoting from *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951). The First Use Tax discriminates against interstate commerce in two distinct ways.

First, Louisiana has prohibited the purchasers of gas subject to the First Use Tax from shifting any or all of that tax to the producer. La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979), abrogates provisions of contracts that require persons other than purchasers of such gas to pay the First Use Tax. On the other hand, Louisiana does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer. To the contrary, Louisiana permits the purchasers and sellers of such gas to determine, by contract, who shall bear that tax. La. Rev. Stat. Ann. § 47:633.1 (West Supp. 1979).

The practical effect of prohibiting the shifting of the First Use Tax while allowing the shifting of the severance tax is to impose a tax on OCS, federal enclave, and imported gas which is greater than the tax imposed on gas produced within Louisiana. As matters now stand, purchasers of gas produced in Louisiana, and sold in either interstate or intrastate commerce, can seek the advantage of the lower tax burden that is denied to interstate purchasers of the gas subject to the First Use Tax. There is no constitutional warrant for such discriminatory treatment. *Boston Stock Exchange* v. *State Tax Commission*, *supra*, 429 U.S. at 333-336. "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated taxpayers is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Co.* v. *Reily*, *supra*, 373 U.S. at 70.

The Louisiana First Use Tax also discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits designed to ensure that Louisiana consumers are relieved of First Use Tax liability.

La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1979) (Mot. App. 4a-5a),[45] provides that the First Use Tax shall not be levied against natural gas, otherwise subject to the tax, which is consumed in specified uses within Louisiana. However, natural gas subject to the tax which is consumed in identical uses in other states is not granted a similar exemption. So,

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[45] The First Use Tax does "not apply to natural gas otherwise subject [to the tax] * * * used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor * * * to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes natural or casinghead gasoline or other liquefied hydrocarbons * * *[;] nor * * * to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." § 47:1303 A.

also, the related Severance Tax Credit [46] permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax on natural gas. As a result of this credit, Louisiana imposes a higher tax on those persons who do not pay Louisiana severance taxes than it does on those who do.[47] Thus, Louisiana businesses enjoy a distinct commercial advantage over their out-of-state competitors in the form of lower prices for natural gas.

Finally, Act No. 599 [48] allows every Louisiana electric generating plant, gas distribution service, and direct purchaser of natural gas from an interstate pipeline, to recoupt that portion of increased rates they pay for natural gas which is attributable to increased transportation and marketing costs for natural gas from the federal domain of the Outer Continental Shelf through direct credits against any tax or combination of taxes, other than severance taxes,

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[46] First Use Tax On Natural Gas—Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West), La. Rev. Stat. Ann. § 47:647 (West Supp. 1979).

[47] This difference can be illustrated by the following example. Owner A has 1000 Mcf of OCS gas; Owner B has 500 Mcf of OCS gas and 500 Mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use tax payment against his severance tax liability.

[48] Tax credit for electric and natural gas service, 1978 La. Sess. Law Serv. 1112 (West), codified as La. Rev. Stat. Ann. § 47:11 (West Supp. 1979).

owed to Louisiana. Since the First Use Tax is "deemed [to be] a cost associated with" the transportation and marketing of OCS, federal enclave, and imported natural gas (La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979) (Mot. App. 5a)), Louisiana consumers of such gas may effectively recoup the amounts attributable to that tax through a reduction in other state taxes. The legislative history indicates that the sole purpose of Act No. 599 is to ensure that Louisiana consumers do not incur any increased costs for natural gas as a result of the First Use Tax.[49]

In sum, the equivalence between the First Use Tax and the Severance Tax that Louisiana claims is illusory. Purchasers of gas subject to severance tax can shift the burden of the tax to the producer of gas but purchasers of gas subject to the "equivalent" First Use Tax cannot shift the burden of the levy. Moreover, the burden of the First Use Tax falls entirely on out-of-state consumers of gas. The Louisiana First Use Tax therefore "falls short of substantially even-handed treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n*, *supra*, 429 U.S. at 332.

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[49] *Hearings on H.B. 786 Before the Commission on Ways and Means of the Louisiana House of Representatives, supra*, at 4 (Representative Tauzin and unidentified speakers), 5 (Colloquy between Representatives Sour and Bagert), 6 (Representative Laborde).

III. RESOLUTION OF THE QUESTIONS PRESENTED DOES NOT REQUIRE THE APPOINTMENT OF A SPECIAL MASTER

In light of the foregoing, we submit that there are no genuine issues as to any material facts that would require the appointment of a Special Master. Louisiana's pro forma denials of the material allegations of the complaint, its assertion "that many factual controversies have been raised by the pleadings," and its recitation of eight matters as to which it wishes to present evidence (Answer at 24-25 ¶ LXX), fail to establish that an evidentiary hearing is necessary to resolve the claims advanced in Plaintiff's Motion for Judgment on the Pleadings.

The initial question to be addressed in this case is whether the gas which is subject to the First Use Tax moves in interstate commerce when any of the enumerated taxable uses occur. As we have pointed out, the decisions of this Court establish beyond question as a matter of law that the gas moves in interstate commerce when the enumerated taxable uses occur. Once the interstate movement of the gas is recognized, plaintiff's claims under the Supremacy and Commerce Clauses can be resolved by testing the Louisiana tax statute under the decisions of this Court. Thus, contrary to Louisiana's assertion (Answer at 25 ¶ LXX, Item (7)), no evidence is required on these constitutional questions.

In sum, the claims presented in the Plaintiffs' Motion for Judgment on the Pleadings, present questions which can, and should, be resolved without the

the appointment of a Special Master.[50] *South Carolina* v. *Katzenbach,* 383 U.S. 301, 307 (1966); *United States* v. *California,* 332 U.S. 19, 24 (1947); *United States* v. *Texas,* 339 U.S. 707, 712, 715; 720 (1950).

Finally, there is a compelling need for a prompt decision on the merits in this case. So long as the validity of the Louisiana tax remains unresolved, millions of natural gas consumers face the prolonged imposition of very substantial additional costs,[51] with little hope of recompense for the economic burdens imposed by such costs.[52]

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[50] As we have pointed out (*supra,* pages 30-31 and note 34), the disposition of one of plaintiff's claims may resolve the entire case. The plaintiffs allege (Br. at 9-10, 14-16, 20-24) and the United States and the Commission believe, that Section 47:1303C. La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979), which abrogates "[a]ny 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 other party in interest, other than a purchase of such gas," directly conflicts with the Commission's authority to regulate interstate gas sales and transportation of natural gas. If Section 47:1303 C is invalid, the Louisiana statute provides that the First Use Tax "shall be null and void * * *" (§ 4(2), 1978 La. Sess. Law Serv. 486). Thus, a decision on this claim would be dispositive of the entire case.

[51] The First Use Tax will add approximately $225 million per year to the rates paid by natural gas consumers which receive gas subject to that tax. Br. at 7-8; Complt. 12; Brief for the United States and the Commission as Amici Curiae in support of the Motion for Leave to File at 3.

[52] The possibility of future refunds with interest provides, at best, inadequate compensation for the burdens imposed while the constitutionality of the tax is litigated. *Cf. FPC* v. *Hunt,* 376 U.S. 515, 524-525 (1964); *FPC* v. *Tennesese Gas Transmission Co.,* 371 U.S. 145, 154-155 (1962).

CONCLUSION

Plaintiff's motion for judgment on the pleadings should be granted.

Respectfully submitted.

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APPENDIX A

Sections 4, 5, and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d and 717f, provide:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

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

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

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

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

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

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

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

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

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

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

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

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

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

APPENDIX B

Sections 2, 110, 315 and 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 3352, 3368, 3393, 3409, provide:

SEC. 2. DEFINITIONS

* * * * *

(18) COMMITTED OR DEDICATED TO INTERSTATE COMMERCE.—

(A) GENERAL RULE.—The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) EXCLUSION.—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

SEC. 110. TREATMENT OF STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.

(a) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(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.

(b) LIMITATION ON STATE SEVERANCE TAXES.—The State severance tax allowable under subsection (a)(1) with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) DEFINITION OF STATE SEVERANCE TAX.—For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas—

(1) by any State or Indian tribe (as defined in section 106(b)(2)(B)(ii)); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

SEC. 121. ELIMINATION OF PRICE CONTROLS FOR CERTAIN NATURAL GAS SALES.

* * * * *

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental pricing rule required under section 201, the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c)(1), (2), (3), or (4).

* * * * *

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT.—

(1) SALES.—

(A) NATURAL GAS NOT COMMITTED OR DEDICATED.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.

(B) COMMITTED OR DEDICATED NATURAL GAS.—Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—

(i) high-cost natural gas (as defined in section 107(c)(1), (2), (3), or (4) of this Act);

(ii) new natural gas (as defined in section 102(c) of this Act); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103(c) of this Act).

(C) AUTHORIZED SALES OR ASSIGNMENTS.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 302 (a) or 311(b); or

(ii) pursuant to any assigned authorized under section 312(a).

(D) NATURAL-GAS COMPANY. — For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) ALASKAN NATURAL GAS.—Subparagraph (B)(ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) TRANSPORTATION.—

(A) JURISDICTION OF THE COMMISSION.—For purposes of section 1(b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the

Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 302(c) or section 303 (b), (c), (d), or (h) of this Act; or

(ii) authorized by the Commission under section 311(a) of this Act.

(B) NATURAL-GAS COMPANY. — For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) CHARGES DEEMED JUST AND REASONABLE. —

(1) SALES.—

(A) FIRST SALES.—Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—

(i) such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

(B) EMERGENCY SALES. — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 302(a) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) SALES BY INTRASTATE PIPELINES.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311(b) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) ASSIGNMENTS.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment authorized under section 312(a) shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under title I of this Act.

(E) AFFILIATED ENTITIES LIMITATION.—For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) OTHER CHARGES.—

(A) ALLOCATION.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303(b), (c), or (d) of this Act shall be deemed to be just and reasonable if such amount is prescribed by the President under section 303(h)(1).

(B) TRANSPORTATION. — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 311(a) of this Act shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) GUARANTEED PASSTHROUGH.—

(1) CERTIFICATE MAY NOT BE DENIED BASED UPON PRICE.—The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) RECOVERY OF JUST AND REASONABLE PRICES PAID.—For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201 (including any amendment under section 202),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

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