

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GENERAL MOTORS CORPORATION, Petitioner v.
ROGER W. TRACY, TAX COMMISSIONER OF OHIO

CASE NO: 95-1232

PLACE: Washington, D.C.

DATE: Monday, October 7, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GENERAL MOTORS CORPORATION, :

4 Petitioner :

5 v. : No. 95-1232

6 ROGER W. TRACY, TAX :

7 COMMISSIONER OF OHIO :

8 - - - - -X

9 Washington, D.C.

10 Monday, October 7, 1996

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:06 a.m.

14 APPEARANCES:

15 TIMOTHY B. DYK, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 JEFFREY S. SUTTON, ESQ., State Solicitor, Columbus, Ohio;
18 on behalf of the Respondent.

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1 PROCEEDINGS

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-1232, General Motors Corporation v.
5 Roger W. Tracy.

6 Mr. Dyk.

7 ORAL ARGUMENT OF TIMOTHY B. DYK

8 ON BEHALF OF THE PETITIONER

9 MR. DYK: Mr. Chief Justice and may it please
10 the Court:

11 This case involves the question whether the
12 State of Ohio can discriminate against interstate
13 transactions in the application of its sales and use tax
14 of natural gas purchases.

15 If the purchaser in Ohio, such as General Motors
16 in this case, purchases from a local public utility which
17 supplies the gas through its own distribution lines, the
18 sale or use is exempt. On the other hand, if the gas is
19 supplied by an interstate marketer of natural gas which
20 has no distribution lines within the State, the purchase
21 is not exempt, and this is --

22 QUESTION: When you say discriminate, Mr. Dyk,
23 you suggest that these two entities should be treated as
24 equals.

25 MR. DYK: Well, I --

1 QUESTION: That there aren't really any factors
2 that distinguish them.

3 MR. DYK: There are no factors that distinguish
4 them in our view, Mr. Chief Justice. It's the same gas
5 that can come from the same well, distributed over the
6 same interstate pipeline, distributed through the same
7 local pipeline, and the local natural gas company may or
8 may not be selling tariff gas. In other words, it may
9 be --

10 QUESTION: Well, but isn't it a public utility
11 that we're talking about?

12 MR. DYK: Justice O'Connor, it is a public
13 utility, but the sales by the public utility are not
14 regulated sales.

15 QUESTION: Well, I'm very concerned about your
16 theory, frankly, because it seems to me that your theory
17 would really eviscerate public regulation of public
18 utilities.

19 MR. DYK: Well, I don't think so, Justice
20 O'Connor. First of all, what we have here is our local
21 public utilities, which are making to a very significant
22 extent nontariff sales. That's admitted at the very
23 outset of the respondent's brief at page 1 and 2. It's
24 reflected in the record, in the Joint Appendix at pages
25 229 and 230. As a result of local deregulation, natural

1 gas public utilities in Ohio, and this is true in other
2 States as well, are permitted to engage in the business of
3 gas marketing. In other words, they're largely
4 unregulated.

5 All they had to do during the period in question
6 was to file the contract with the public utility
7 commission. They in fact were allowed to do this, to
8 engage in these unregulated sales, because they faced
9 competition from these interstate marketers, and the
10 public utilities --

11 QUESTION: But I assume that the overall rate
12 the utility can earn is limited by regulation.

13 MR. DYK: Not in these sales, Justice O'Connor.
14 These sales are unregulated sales. There is no tariff for
15 them. The price at which the gas is sold is not
16 regulated. The whole purpose of this was to allow these
17 local public utilities to compete with the interstate
18 marketers so they wouldn't have to sell pursuant to a
19 tariff, so that they could engage in the same kind of
20 competition, the same kind of discounting, the same kind
21 of individual pricing that the out-of-State marketers --

22 QUESTION: Was this a new statute, Mr. Dyk, or
23 was -- the statutory permission for the utilities to do
24 unregulated sales, was that statute in effect during the
25 tax period here in question?

1 MR. DYK: It wasn't a statute during the tax
2 period in question. What you had was permission from the
3 Ohio Public Service Commission to engage in these kinds of
4 sales, and there was a 19 -- October 1987 order, for
5 example, with respect to East Ohio Gas, which I'll lodge
6 with the Court. It's not in the record, but it is a
7 public order of the commission which said yes, you can
8 engage in these kinds of sales, and these went on for a
9 number of years. This is reflected, as I said, in the
10 record at 229 to 230.

11 Then last June, this was formalized by statute
12 for the first time, and the Ohio legislature said, you
13 don't even have to bother to file these arrangements,
14 these marketing arrangements, with the public utilities
15 commission, you just go ahead and do it, and go on your
16 merry way.

17 QUESTION: Suppose the unregulated sales were
18 subject to the sales tax so that there would be
19 equivalence between the utility's unregulated sales and
20 the interstate sales, would your case then go away, or
21 would you still argue that there's discrimination?

22 MR. DYK: I still -- I would --

23 QUESTION: I take it your theory is that there's
24 still discrimination.

25 MR. DYK: I think that -- that is not this case,

1 but there is still discrimination involved, because the
2 public utilities are allowed, under an Ohio law, to file
3 volume discount tariffs and things of that sort which
4 allow them to compete even under the tariffs, and this
5 October 1987 order of the public utilities commission
6 which I mentioned shows on its face that Northeast Gas in
7 that particular case was able to compete and actually
8 offer a lower price pursuant to these tariffs.

9 QUESTION: But public utilities have a number of
10 other burdens on them, do they not, particularly serving
11 retail customers. They may have to provide gas to people
12 who can't pay the bill, or supply a certain amount of heat
13 during the winter.

14 MR. DYK: They may, Mr. Chief Justice, but they
15 also engage in this unregulated business, and the fact
16 that they are a favored local industry, that the State
17 wishes to protect them, has not in this Court's other
18 Commerce Clause cases been a sufficient basis for
19 discrimination.

20 QUESTION: But don't you have to look at their
21 entire business, and not just the part that you single
22 out?

23 MR. DYK: I don't think so, Mr. Chief Justice.
24 For example, in the Armco case, which is cited in the
25 amicus brief of Columbia Gas, they had a situation where

1 there was a discrimination against out-of-State
2 wholesalers, and the theory was, well, we can treat in-
3 State manufacturers/wholesalers differently, and the fact
4 that you may combine competitive interstate business with
5 some sort of local business doesn't justify discrimination
6 under the Commerce Clause, and I understand the Court in
7 that case to have directly addressed that question and to
8 resolve it in favor of invalidating the discrimination.

9 QUESTION: Mr. Dyk, when you say that these
10 nontariff sales are not part of its regular business, is
11 it also the case that for purposes of determining what
12 their allowable rate of return will be, the profits they
13 make from these sales are not considered, it's just the
14 separate -- they can make as much money as they want from
15 these nonregulated sales, and it will not be considered in
16 fixing their tariffs for the next year.

17 MR. DYK: That is my understanding, Justice
18 Scalia --

19 QUESTION: Well --

20 MR. DYK: -- and the purpose of this is, what
21 you have as a result of Federal deregulation is you have a
22 lot of competition in the natural gas market. Anybody can
23 sell gas, transport it over interstate pipelines, and the
24 same kind of deregulation has taken place at the State
25 level. You can take the gas over the local public utility

1 lines and sell it. Anybody can go into that business.

2 And as a result of this competition, what
3 happened was that the local public utilities were
4 suffering. People were going to these interstate
5 marketers, and the local public utilities commissions
6 wanted to find some way of enabling these companies to
7 compete with these new marketers, and the way they figured
8 out to allow them to compete in many instances was to say,
9 okay, we'll allow you, too, to make unregulated sales and
10 to act as marketers, and to compete with these interstate
11 businesses so you don't lose the in-State business.

12 Now, there's a very important reason for that,
13 of course. They wanted them to earn additional money to
14 increase their profitability, but that did not come into
15 account in fixing the rates pursuant to the tariffs for
16 natural gas --

17 QUESTION: Mr. Dyk, may I ask you a question on
18 that score?

19 You've indicated that the same intrastate
20 pipelines are used by both the independent seller and the
21 public utility, and are those pipelines owned by the
22 public utility?

23 MR. DYK: They're owned by the public utility,
24 and --

25 QUESTION: And how do they determine the charge

1 for the gas sold that's delivered through those pipelines
2 in the independent marketer sales?

3 MR. DYK: Well, what you have is both open
4 access -- that is, people who are not in the public
5 utility business have the right to use those
6 transportation facilities -- and so-called unbundling,
7 which was a concept that originated at the Federal level
8 but also exists at the State level, in which there are
9 separate statements for transportation charges and the
10 transportation charges have to be -- has to be -- have to
11 be justified.

12 Of course, the public utilities really remain as
13 public utilities when they're supplying the transportation
14 service, but that's unbundled. It's charged separately,
15 and the rates are calculated separately.

16 QUESTION: And those are -- they're charged
17 separately, but are they controlled by the State public
18 utility commission?

19 MR. DYK: The transportation rates are still
20 controlled by the State public utility commission, though
21 in some instances even those transportation rates are now
22 being individually negotiated. But by and large those are
23 pursuant to tariffs set by the public utility --

24 QUESTION: If they're individually negotiated,
25 it would seem to me that the market would take care of the

1 disparity between the taxed and the no-tax sellers.

2 MR. DYK: Justice Stevens, I'm not under -- I'm
3 not sure why I understand the market would take care of
4 that.

5 What you have is the charges for the gas are
6 stated separately, and if the public utility has an
7 advantage, there's no 5- to 7-percent use tax on the
8 purchases from them, they have an advantage over the
9 interstate seller, who must sell to a purchaser, and the
10 tax is on the purchaser, the purchaser has to pay this 5-
11 to 7-percent tax, and in a business like this, which is
12 highly competitive, 5- to 7-percent can be a significant
13 amount of money and a significant advantage.

14 Now, what the State says is, oh well, we impose
15 a gross receipts tax on the public utilities. The problem
16 is that the gross receipts tax doesn't satisfy this
17 Court's standards for a compensatory tax. It's not
18 imposed on a substantially equivalent event. It's not
19 even imposed on the same people.

20 QUESTION: Mr. Dyk, is it clear that for what
21 you call the unregulated sales both before it was
22 formalized in the law and under the new law, that those
23 unregulated sales also escaped the sales tax?

24 MR. DYK: Yes, because the natural gas company
25 is still a supplier of natural gas. It is still a natural

1 gas company which is supplying the gas over its own
2 distribution lines within the State, and --

3 QUESTION: Well, couldn't -- could Ohio say,
4 because the public utility has obligations that the State
5 imposes on it, and because the regulated sales have
6 bundled together these other aspects, while there won't be
7 an escape from the sales tax entirely, there will be an
8 allocation, so that only the part that's attributable to
9 the commodity is subject to the sales tax and not the part
10 that's attributable to these other items?

11 MR. DYK: Well, there is no sales or use tax on
12 the transportation. There's only a sales or use tax now
13 on the gas purchase, so what you have is a discriminatory
14 situation, and these public utilities have the advantage
15 of being able to act as gas marketers.

16 QUESTION: Even with respect to the gas, the
17 obligation that you must have enough supply to serve
18 everybody at all times, could that be factored out so that
19 you could make the gas sale of the regulated company
20 similar to the unregulated sale?

21 MR. DYK: Justice Ginsburg, there are many ways
22 that the State could achieve its interest here without
23 discriminating against interstate commerce, as you
24 suggest. For example, if there is concern, and that's
25 expressed in some of the amicus briefs in support of the

1 respondent, if there's concern that residential customers
2 shouldn't have to pay the sales or use tax on gas
3 purchases, it's a simple matter to just exempt residential
4 customers from the sales or use tax. It's very easy to
5 construct a system that treats equally purchasers from
6 interstate companies and purchasers from local public
7 utilities. It's not hard at all, and there's no
8 justification for the State framing it the way it does in
9 a discriminatory manner.

10 I should add that --

11 QUESTION: Well, you suggested that if there
12 were an exemption for residential customers, no sales tax,
13 that would be all right, but you're recognizing that there
14 can be some recognition by the State that it is imposing,
15 that this is a regulated industry. What else could the
16 State do to take into account the obligations that the
17 regulated utility is under?

18 MR. DYK: Well, obviously they could reduce the
19 gross receipts tax, which appears to be what they've done
20 in this new legislation of last June in House bill 476.
21 They don't have to impose this kind of gross receipts tax
22 on public utilities, but what they can't do under this
23 Court's jurisprudence is to say, we're going to have two
24 identical purchases here. On one of them we're going to
25 have a use tax; on the other one we're not going to have a

1 use tax.

2 There's a rule of strict equality here, and it
3 makes particular sense in the context of this very highly
4 competitive natural gas market, and this is not only true
5 with respect to industrial purchasers, and industrial
6 purchasers are the ones who suffered during the period
7 we're involved in here, but it's going to happen in the
8 residential market also.

9 These -- there are tariffs being filed in Ohio
10 and elsewhere, and I think this is again recognized in the
11 Columbia Gas brief, that will allow competition at the
12 residential level. The whole industry is changing
13 dramatically as a result of congressional policy,
14 reflected in the 1978 and 1989 statutes and the
15 implementing FERC regulations. There's going to be
16 competition at the residential level for gas sales between
17 the public utilities and between the out-of-State
18 marketers.

19 QUESTION: I take it an apportioned gross
20 receipts tax would be constitutional, and if everybody
21 paid their gross receipts tax then your client's suppliers
22 would pay an apportioned gross receipts tax.

23 MR. DYK: Well, I think it would be
24 constitutional to have an apportioned gross receipts tax,
25 except for the fact that you probably can't reach out-of-

1 State sellers with a gross receipts tax because of Public
2 Law 86-272, so the State would probably choose to approach
3 it by having a use tax imposed on all people and to
4 remit -- as they apparently are seeking to do in the new
5 legislation remit the gross receipts tax so it doesn't
6 bear so heavily on the public utilities.

7 QUESTION: Can you tell me, getting back to the
8 unregulated sales that the utilities make, is there
9 anything in the record that gives us an idea of the
10 significance, the percentage of sales that were -- the
11 utility made that were unregulated sales during the tax
12 period in question?

13 MR. DYK: No, there's no statistic for that.
14 What I think the record reflects is that about 20 percent
15 of the industrial sales continued to be made by public
16 utilities during the period, but there's no breakdown as
17 to what part of that 20 percent is unregulated sales and
18 what part might be pursuant to volume discount tariffs or
19 other things of that sort.

20 Now, what -- the State --

21 QUESTION: Mr. Dyk, I just wanted to make sure,
22 in light of what you said about, that even the residential
23 sales are being deregulated. You responded to me, to my
24 question, what could the State do to recognize that this
25 is a public utility? You said, it could exempt sales to

1 residential users, and you stand by that?

2 MR. DYK: Well, I -- sure. Of course they
3 could exempt sales to residential users, as long as a
4 residential user who chooses to purchase from the out-of-
5
6 State marketer as opposed to the in-State public utility
7 is treated the same way.

8 QUESTION: Right now, there isn't that choice,
9 is there?

10 MR. DYK: In some places there is, but by and
11 large there isn't. It's a coming phenomenon. It hasn't
12 really arrived in substantial degree yet.

13 What Ohio supreme court said here is, well, we
14 don't have any problem here, because this excise tax to be
15 sure is not imposed on the local public utilities, but it
16 is imposed on local gas marketers who are not public
17 utilities under this Court's precedents for over 100
18 years, ranging from the Brimmer case way back when up to
19 this Court's decision in Carbone.

20 The fact that some local people may be
21 disadvantaged is no excuse under the Commerce Clause, and
22 what the State is trying to do now -- and this is not an
23 argument that it made below and not an argument that was
24 adopted by the Ohio supreme court -- it is saying, well,
25 the Federal regulatory scheme has blessed this

1 discrimination that we have made in amendments to the
2 Natural Gas Act that were passed in the early 1950's,
3 which allowed the State public utilities commissions to
4 continue to regulate the interstate gas market and
5 effectively overruled this Court's decision in East Ohio.

6 And we've shown in our brief, I think, that
7 these 1950 amendments had nothing to do with permitting
8 discriminatory taxation by the States. Even this Court's
9 decision in East Ohio recognized that the tax doctrines
10 really didn't have much to do with this and it was
11 addressing itself only to regulatory issues.

12 But I think the most significant thing is not
13 that Congress in the fifties authorized this kind of
14 discrimination, but that Congress in the seventies and
15 1980's has taken a very strong position that it wishes to
16 have a competitive natural gas market, that it has taken
17 actions again and again and again to create a competitive
18 natural gas market in this country, and it has recognized
19 that natural gas is a commodity which should be treated
20 separate from transportation -- in other words, this is
21 the unbundling aspect of it -- and it has said that it
22 wants all the competitors who were selling natural gas to
23 have an equal opportunity, and if there's any Federal
24 policy here, we respectfully suggest, it is a Federal
25 policy that everybody should be treated the same and --

1 QUESTION: Mr. Dyk, can I interrupt you for just
2 a second?

3 In response to Justice Kennedy, you said that
4 the record indicated that about 20 percent of the utility
5 sales were industrial sales, but you don't know how much
6 of those were un -- pursuant to volume discount tariffs,
7 and how much were unregulated.

8 Assume they were all pursuant to volume discount
9 tariffs. Would you win or lose this case?

10 MR. DYK: Well, I think we would still win,
11 because I think whether the public utility sales are made
12 pursuant to tariffs or are unregulated, that in either
13 event the public utility is a competitor with the out-of-
14 State marketer, and that --

15 QUESTION: But without the power to set its own
16 prices.

17 MR. DYK: Well, it has the power to set its own
18 prices in the sense that it can propose tariffs, some of
19 which may be marginal cost tariffs rather than fully
20 allocated tariffs.

21 QUESTION: Let me put the question a little
22 differently. The record doesn't tell us how much the 20
23 percent is unregulated and how much isn't, and I suppose
24 you have the burden of establishing unconstitutionally
25 generally, and if the amount of unregulated sales are

1 critical to your case, I suppose you have the burden of
2 showing us how many they were, so is it correct that we
3 should decide the case on the hypothesis that all of those
4 20 percent were actually regulated?

5 MR. DYK: Oh, I don't think you need to do that,
6 Justice Stevens. I think this Court has made clear in a
7 lot of cases that if there is even a small discrimination
8 against interstate commerce, and if you look at the
9 unregulated sales as being the only significant ones,
10 which we don't, there were still some of them, and for
11 example, in Associated Industries and Bacchus the court
12 has said, well, even if the favored sales are very small
13 in volume, and maybe wouldn't be considered economically
14 significant, there's no de minimis doctrine under the
15 Commerce Clause. It's still invalid. You just can't
16 discriminate.

17 QUESTION: Would the whole tax be invalid, or
18 only the tax as applied to those sales, assuming that the
19 tax as applied to other sales by the utility is okay? Why
20 would we strike down even the sales that were pursuant to
21 volume discounts?

22 MR. DYK: Well, I don't --

23 QUESTION: Tariff volume discounts?

24 MR. DYK: Justice Scalia, I don't think you're
25 striking down particular sales that were favored. I think

1 what you are doing is saying, you can't disfavor the
2 General Motors purchases from the out-of-State marketer of
3 natural gas, and the fact that there is only a small
4 volume of favored sales doesn't matter, that the whole
5 volume of disfavored sales is still treated
6 unconstitutionally.

7 QUESTION: Just what does the record show about,
8 not the volume of discount sales, but the unregulated
9 sales of the utility?

10 MR. DYK: It shows that they occurred, at pages
11 229 and 230, and as I mentioned at the beginning of the
12 argument, in the very outset of the respondent's brief
13 they mention that these sales occurred, too, and it's
14 confirmed in the amicus brief in support of the respondent
15 filed by Columbia Gas Company.

16 QUESTION: And your position is, even if only 1
17 percent of the 20 percent was this kind of sale, your
18 client is exempt from paying the sales tax, the use tax.

19 MR. DYK: Well, it is until the sales tax is
20 made constitutional, that our view is that any amount of
21 discrimination against interstate commerce and in favor of
22 a local seller or a purchaser from a local seller is
23 unconstitutional, and I think that this Court has never
24 required that there be a particular volume of
25 discrimination, and I think it's made quite clear that it

1 doesn't matter what the scope of the discrimination is,
2 it's still forbidden.

3 QUESTION: Well, again, I take it your view,
4 even if zero percent is unregulated, it's
5 unconstitutional. The discrimination exists.

6 MR. DYK: Well, yes, Justice Kennedy, my
7 position is that it's still unconstitutional, but that
8 would be on a different theory. I think obviously there
9 have to -- on the theory that the discrimination here is
10 between unregulated sales by the public utility and the
11 out-of-State marketer, there has to be some volume of
12 sales. There is. The record confirms that, and the
13 amicus brief confirms that.

14 But I think, as you suggest, we would also say
15 that even if there had been no sales, which is not the
16 situation here, even if there had been no sales we would
17 still prevail in this case because you can't --

18 QUESTION: How can an amicus brief confirm a
19 factual question? I mean, I can imagine the record might.

20 MR. DYK: Well, the record does confirm that.

21 QUESTION: But how can an amicus brief do it?

22 MR. DYK: Well, it's an amicus who's in this
23 business and who said --

24 QUESTION: But the State isn't bound -- the
25 State may -- the respondent may be bound by its statements

1 in its own brief, but certainly it's not bound by
2 statements in some amicus brief, even though the amicus is
3 in support of the respondent.

4 MR. DYK: Well, I'm not suggesting they're bound
5 by it, Mr. Chief Justice, and I think the record and the
6 public orders of the public utilities commission and the
7 respondent's brief provides ample evidence that these
8 kinds of sales occurred, and occurred during the period
9 that's involved here.

10 QUESTION: Mr. Dyk, who was the witness who was
11 testifying at 229 and 230? Is he your witness, or the
12 State's witness?

13 MR. DYK: I believe it's the State's witness,
14 but if I look at the record here for a moment I can tell
15 you.

16 QUESTION: It's a Mr. Duffy.

17 MR. DYK: No, that's the counsel. Mr. Duffy's
18 sitting here. He wasn't the witness.

19 QUESTION: He would like to have testified.

20 MR. DYK: It's the tax commissioner's witness.

21 QUESTION: Mr. Dyk, you would be making the
22 argument that you're making even if every sale by the
23 public utility was regulated.

24 MR. DYK: Yes, I would because --

25 QUESTION: And would you spell out what that

1 argument is?

2 MR. DYK: Well, I think the argument is that
3 where you have a competitive gas market like this, and --
4 you cannot favor an in-State interest simply because it
5 has public utility status, and I think this Court's
6 decision in Buck and Kuckendall, which is 267 U.S.,
7 dealing with motor transport -- it's an opinion by Justice
8 Brandeis from 1925, but I think it's still good law --
9 says that you can't come in here and say, well, this is a
10 market that needs to be regulated and we're going to
11 require certificates of public interest, convenience and
12 necessity, we're not going to let people compete from out
13 of State.

14 I think the argument that you could treat a
15 public utility differently might have had and made sense
16 20 years ago. I don't think it makes sense now. There's
17 a competitive market, there's a competitive market there
18 as a result of national policy, and I think even if you
19 had nothing but tariff sales, that you couldn't
20 discriminate against the out-of-State marketers. That
21 wouldn't be permissible under the Commerce Clause.

22 QUESTION: You're saying that to do that under
23 this market is really to adopt by subterfuge a
24 compensatory tax justification, I take it, then.

25 MR. DYK: Well, I -- certainly it's possibly

1 based on that. They suggest that it's designed to
2 compensate for the gross receipts tax, and our answer is,
3 fine, if you think the gross receipts tax is a problem,
4 fix the gross receipts tax, but have equality in the use
5 tax so that some sellers are not advantaged and others
6 disadvantaged.

7 Mr. Chief Justice, I'd like to reserve the
8 remainder of my time.

9 QUESTION: Very well, Mr. Dyk.

10 Mr. Sutton, we'll hear from you.

11 ORAL ARGUMENT OF JEFFREY S. SUTTON

12 ON BEHALF OF THE RESPONDENTS

13 MR. SUTTON: Thank you, Mr. Chief Justice, may
14 it please the Court:

15 I'd like to start by addressing an argument that
16 I began thinking about about 8:00 last night, and that is
17 the nontariff argument that was just made. It's a very
18 clever argument, because what it does is try to take on
19 what I think is our best argument. Our best argument is
20 that the marketers are trying to have their cake and eat
21 it too. They want the benefits of utility status, but not
22 the burdens.

23 And what General Motors is now saying is,
24 they're saying, well, that's not actually true, the
25 utilities are trying to do the same thing, and that's the

1 reason they've relied on this 1987 order, and that's the
2 reason they suggested that there actually were nontariff
3 sales by utilities during the audit period. That's a
4 great argument. It's just not supported by the record or
5 by the law.

6 It's not supported by the record because if you
7 look at pages 229 and 230, it doesn't make any indication
8 that there were actually nontariff sales during the audit
9 period, 1987 through 1989. There's nothing in the record
10 at all that indicates that.

11 The notion that 20 percent of the sales to
12 industrial consumers were nontariff sales is also
13 unsupported. That's simply not true. But let me --

14 QUESTION: Well, do we have to take this case on
15 the basis that we assume they were tariff-regulated sales?

16 MR. SUTTON: Your Honor, yes, I think you do,
17 but I can make another point, and that is that even if
18 they were nontariff sales, let's say the record actually
19 did support their argument, they've got another hurdle to
20 clear, and that's that Ohio has a doctrine called the dual
21 capacity doctrine.

22 What the dual capacity doctrine says, and we've
23 cited a case called American Transportation in our brief
24 that deals with it, the dual capacity doctrine
25 acknowledges that utilities can sometimes operate as

1 utilities in a tariff setting, and then other times they
2 can be operating like other businesses. In this instance,
3 it would be a marketer.

4 A good example is precisely the facts of
5 American Transportation. That was a situation where a
6 utility -- it happened to be a motor carrier -- decided to
7 get into the business not just of delivering services,
8 that is, transporting people or goods, they decided also
9 to get into the business of actually manufacturing part of
10 the trucks, and they thought they could do that and still
11 get utility status with respect to certain tax benefits.

12 They didn't get it, and the Ohio supreme court
13 recognized that very doctrine.

14 There's a recent decision that we relied on in
15 our brief called Carnegie, which makes the precise same
16 point. It was decided less than a year ago, and
17 recognized that you can operate in one setting as a
18 utility, and in another not as a utility.

19 QUESTION: This is a decision of the supreme
20 court of Ohio?

21 MR. SUTTON: The Carnegie decision, Your Honor,
22 is not. The American Transportation decision is an Ohio
23 supreme court decision.

24 The Carnegie decision is a decision from the
25 Ohio Board of Tax Appeals, which is our intermediate tax

1 court. It applies throughout the State. It binds the tax
2 commissioner, the PUC, and the Attorney General's Office.

3 QUESTION: Was that the decision that said an
4 out-of-State public utility regulated by some other State
5 but not Ohio remains a public utility even though it's
6 acting as a marketer in Ohio?

7 MR. SUTTON: Your Honor, that is the decision.

8 QUESTION: And is -- are you adhering to that
9 decision? Are you adopting that decision as part of your
10 position, that once a public utility always a public
11 utility, whether in Indiana, Pennsylvania, Ohio --

12 MR. SUTTON: Your Honor, the candid answer is
13 the Ohio supreme court and the Ohio courts are wrestling
14 with that issue right now.

15 The dichotomy they're trying to deal with is, do
16 you decide it's a status-based inquiry, once a utility,
17 always a utility, or do you look at the activity and
18 determine on a case-by-case basis whether they're acting
19 as a utility? The American Transportation case seems to
20 take this case-by-case, activity-by-activity approach.

21 We're not saying Carnegie should be good law,
22 should bind this Court, should bind the Ohio supreme
23 court. The reason we're relying on Carnegie is for a very
24 different point. We rely on it to show that there are no
25 facial lines here, that the Ohio supreme court has yet to

1 address the question whether utilities actually are
2 defined by State boundaries, so that was part of our
3 alternative argument, Justice Ginsburg.

4 QUESTION: Well, to the extent the case is as
5 you first described it, it's -- and I was listening to it.
6 It seemed to me to help Mr. Dyk's position more than
7 yours, i.e., that this is not a utility for some purposes,
8 and therefore it should be comparable to the out-of-State
9 suppliers that sell to GM.

10 MR. SUTTON: Your Honor, that's not true, and if
11 I said that, I misspoke. Every single --

12 QUESTION: You didn't say that. It was just the
13 inference I was drawing, and maybe I'm --

14 MR. SUTTON: Well, I mis -- would it be, I
15 implied, you inferred.

16 The thing I'm trying to say is that the
17 utilities in this instance, all of the sales, every single
18 sale at issue in this case was a tariff sale. There's
19 absolutely no evidence that any were nontariff, and so
20 they simply can't rely on that argument. That's my first
21 point, that it's just --

22 QUESTION: Well, it may be the next case, but
23 can you tell me under the new law, are the unregulated
24 sales exempt from sales tax?

25 MR. SUTTON: Your Honor, the new law does not

1 address that.

2 QUESTION: Well, either they're -- they have an
3 exemption under current law. Does that exemption apply to
4 the unregulated sales?

5 MR. SUTTON: Your Honor, what I'm saying is, the
6 new law went into effect a month ago. To my
7 understanding, it does not address the question what
8 happens to a nontariff sale, so it's not simply -- it's
9 not been decided by the General Assembly of Ohio, and it's
10 not something the Ohio courts addressed --

11 QUESTION: Yes, but until that law of a month or
12 so ago, during the period developed in this lawsuit, if
13 the utility made unregulated sales, they were exempt from
14 tax. That's clear, I think, is it not?

15 MR. SUTTON: Your Honor --

16 QUESTION: If they made any.

17 MR. SUTTON: Your Honor, it's not entirely
18 clear. That is not entirely clear, and that goes back to
19 the American Transportation case. The American
20 Transportation case was a situation in which the utility
21 was acting as a manufacturer, and it was treated by a
22 manufacturer in that capacity.

23 My guess, my assumption is that they're probably
24 going to treat utilities across the board as regulated
25 entities when it comes to tariff or nontariff sales, but

1 that's just not been decided by the record.

2 In fact, in the order they're citing, this 1987
3 order, the utility was not even allowed to earn a profit
4 on the gas. It was acting as an agent of the producer, so
5 the nontariff hypothetical they're positing is one, not
6 only it wasn't presented there, I'm just not sure what the
7 precise facts are that they're talking about.

8 QUESTION: Mr. Sutton, did you want us to decide
9 this case on your assumption, or would you be content with
10 a narrow decision that says, at least since we don't know
11 in this case that any nontariff sales are exempted from
12 the tax, it's certainly okay to exempt tariff sales from
13 the tax, and that's all we have to decide?

14 MR. SUTTON: Your Honor, that's correct. That's
15 precisely correct. There's --

16 QUESTION: You'll -- what's correct, that you'll
17 take the latter?

18 MR. SUTTON: Absolutely, Your Honor.

19 QUESTION: Take the latter and run.

20 MR. SUTTON: Absolutely, which is precisely the
21 way the --

22 (Laughter.)

23 QUESTION: Right.

24 MR. SUTTON: Which is precisely the way the case
25 has been argued, or briefed at least, until now, the

1 assumption being that they all were tariff sales.

2 Ohio's not contriving this regulatory
3 distinction between utilities on the one hand and all
4 other businesses on the other. It's been with us for as
5 long as we've had a dormant Commerce Clause, and it's a
6 distinction that in one way or another is reflected in the
7 statutes of every State in the country, including the
8 District of Columbia.

9 What's going on in this instance, and the danger
10 presented by this case, is that you've got a situation in
11 which marketers have been allowed to enter a natural gas
12 business, they've been allowed to enter the business in an
13 unregulated capacity, which as they acknowledge is
14 critical to this business being -- even being in
15 existence.

16 What they're now trying to do is reach over this
17 regulatory wall and pick off some of the benefits of
18 utility status without sharing in any of those burdens.
19 That simply just doesn't make sense as a matter of
20 Commerce Clause jurisprudence.

21 QUESTION: Well, they're just saying, you know,
22 we don't want all the benefits. There are a lot of other
23 benefits you can give to utilities. All they're saying
24 is, there's one particular benefit you can't give to
25 utilities, and that is, in transactions that are

1 equivalent, giving them a commercial advantage by reason
2 of your tax.

3 I mean, you can help these utilities a lot of
4 different ways. You don't have to do it this way.

5 MR. SUTTON: Your Honor, these transactions,
6 however, simply aren't equivalent. There's nothing about
7 them that is equivalent.

8 In one setting you have prices that are set by
9 the free market, what the market will bear. The
10 obligations that the seller takes upon themselves are
11 solely obligations that are a matter of contract.

12 On the other side of the line, you have a
13 completely different sale.

14 QUESTION: You're assuming all tariff -- all
15 these sales were tariff sales.

16 MR. SUTTON: Absolutely. The rates are not set
17 by the seller, so they can't price-compete. They have a
18 public duty to the whole State, to all consumers. That
19 public duty requires them to supply natural gas on demand
20 at all times in the year, on the coldest day of the
21 winter.

22 What's critical about that, and what makes these
23 two transactions so different, is that utilities, as a
24 result of their public duty obligation, must enter into
25 long-term contracts to make sure the commodity is

1 available on the coldest day of the winter, and they must
2 also reserve space on interstate pipelines to make sure
3 that they can ship it when they need to.

4 QUESTION: What if you have a long-term contract
5 by the independent marketer who -- that contains all those
6 provisions, we'll deliver gas when it's cold, and we'll
7 guarantee that it will be there and the pipe will be. Why
8 then are they different?

9 MR. SUTTON: Your Honor, because in that
10 instance they would be imposing those obligations upon
11 themselves as a matter of contract, not as a matter of
12 State law. They would be able independently to bargain,
13 both the buyer and the seller, as to whether they wanted
14 to do that.

15 But let me add another point, Your Honor.

16 QUESTION: But the other thing that's puzzling
17 about it, the whole rationale for regulating the prices of
18 the utilities are to prevent them from charging too much.

19 MR. SUTTON: That's absolutely -- that's
20 absolutely correct.

21 Your Honor, the other problem that marketers are
22 going to have in the situation, I think ultimately there's
23 an end game here. The suggestion that deregulation that
24 is started at the Federal level is going to inexorably
25 extend to the State level, I think is mistaken. I think

1 there's a stopping point, and the stopping point is that
2 if you're going to have State utility laws like Ohio does
3 that require utilities -- and let's say they impose it on
4 marketers as well -- to make sure natural gas can be
5 supplied year-round, what happens is, you end up in a
6 situation where the marketer has to own pipeline.

7 There's simply no way the marketer can
8 guarantee, if he or she does not own pipeline, that
9 natural gas is going to be supplied year-round on the
10 coldest day of the winter. That is a business that
11 utilities will always control, utilities always will have
12 to control. That's something marketers can never do.

13 They can say as a matter of contract we'll do
14 our best, but the reason they can't guarantee it is,
15 someone else owns the pipeline, and that's the public
16 utility, so that's a fundamental distinction. It's a
17 fundamental distinction that will always be there, and I
18 think as a matter of a State's police power, it's properly
19 always going to be saying to itself, we've got to have a
20 utility industry.

21 It might be a different utility industry than we
22 had 20, 30 years ago, but the reason we need a utility
23 industry, the reason we can't keep going down this
24 deregulation road, is people die if they don't have heat
25 in winter. There's no elected official I know of that's

1 going to let the private market, in simply contracts
2 between buyers and sellers, determine whether natural gas
3 is delivered in Cleveland, Ohio, in January of a given
4 year.

5 QUESTION: We do it for food.

6 MR. SUTTON: Your Honor, in the food setting,
7 number one --

8 QUESTION: It's no less essential, and we don't
9 feel the need to have the Government take over bread
10 distribution.

11 MR. SUTTON: The distinction between food, Your
12 Honor, and natural gas is that in one you've got a natural
13 monopoly setting and in the other you do not. There's
14 nothing about the delivery of food that requires you to
15 lay pipelines, telephone wires, or some other form of
16 distribution system to get the good, the commodity from
17 the producer or wholesaler to the individual consumer, so
18 a State would never go down that road because they
19 wouldn't need to.

20 What's unique about your natural monopolies is,
21 it's a situation where monopolies are actually a good
22 thing. They're a good thing visually because no one wants
23 pipelines criss-crossing their State more than necessary.
24 They're a good thing economically because they're much
25 more efficient. It's much more efficient to have one

1 natural gas pipeline, or two or three at the most, serving
2 an area, than it is to have several. All economists would
3 agree with that.

4 That's a problem, Your Honor, that just doesn't
5 exist in the food setting or in other commodity settings.
6 It just doesn't exist.

7 I'd like to make another point.

8 QUESTION: Mr. Sutton, what about Mr. Dyk's
9 argument that of course you can recognize that these are
10 public utilities, but not by the sales tax exemption so
11 long as you're imposing a compensating use tax. You can
12 adjust the gross receipts tax, you can exempt residential
13 sales. How do you respond to that?

14 MR. SUTTON: Our principle argument, Justice
15 Ginsburg, beyond the argument that they're differently
16 situated, is that these are actually transactions that
17 can't be reconciled. I don't think the court under the
18 guise of the Commerce Clause should be forcing States to
19 reconcile what are inherently irreconcilable transactions.

20 The reason they're irreconcilable is number 1,
21 because one involves the sale of a naked commodity, the
22 other is a commodity in the service, so they're just, to
23 begin with, different transactions, different in a way
24 that would be true of other sales services versus just a
25 sale.

1 The other difference is, of course, the rate
2 control and the duty you have to the public. I don't know
3 quite how -- I mean, if the Court -- let's just take as an
4 example, if the Court's decision, God forbid, were okay,
5 Ohio, when it comes to public utility sales, you now have
6 to put a 5- to 7-percent tax on all of those sales.
7 Why -- why is that compensating? It's not clear to me
8 that it's compensating. It's not clear to me that there's
9 any more integrity in that system than there is in the
10 current one, and that's because the transactions and the
11 sellers are so very different.

12 In fact, I think this Court's compensatory tax
13 cases most recently *Fulton*, from just last term, and
14 *Associated Industries* from three terms ago, stand for that
15 very point.

16 In rejecting -- in rejecting the State's efforts
17 to establish that there was a compensatory tax which
18 justified discrimination, the Court was saying, in effect,
19 we're not going to look at apples and oranges comparisons.
20 They've got to be mutually exclusive proxies before you
21 can justify a discriminatory tax.

22 QUESTION: Do most States or almost all States
23 decline to impose sales tax on gas or electricity sold
24 through a utility?

25 MR. SUTTON: Your Honor, there are seven State

1 statutes which are cited in the Kansas amicus brief that
2 are precisely like ours. I should note one of them is
3 from the District of Columbia, which of course is
4 something Congress controls and would create, I think, an
5 anomaly here if Ohio was forced to make this change, the
6 District of Columbia would not.

7 QUESTION: Do other States -- you say seven
8 don't. Does that mean that --

9 MR. SUTTON: No, I'm sorry, seven have precisely
10 the same system we have. I'm not aware of the numbers
11 that have, you know, one form of tax and another.

12 QUESTION: You think Congress controls the
13 District of Columbia more than it controls Ohio? I mean,
14 the only point is, Congress could change it in the
15 District of Columbia. It certainly could change it in
16 Ohio if it wanted to.

17 MR. SUTTON: Oh, absolutely. I agree
18 completely. The point I'm saying is, you have a situation
19 where a different branch of Government would be compelling
20 Ohio to do something. It would be a branch of Government
21 that couldn't compel the District of Columbia to do it. I
22 think that's an anomaly. In fact, Dean Milk, the 1951
23 case, suggests that's quite relevant. What is Congress
24 doing with respect to the District of Columbia in an
25 interstate commerce discrimination setting?

1 But Justice Kennedy, I want to come back to your
2 point, because I think it's an important one. There
3 are -- of the States that have taxation systems with
4 respect to utilities and other businesses, 31 divide their
5 taxation systems between those entities that are public
6 utilities and those that are other businesses.

7 The problem with General Motors' position in
8 this argument, and I think this also responds to
9 something, Justice Ginsburg, you were asking, is that if
10 you say Ohio has to endorse or adopt a sales tax that's
11 precisely the same for marketers as it is for utilities,
12 then you're going to have to go down a road which requires
13 you to examine the differential treatment in each of these
14 31 States for utilities on the one hand and other
15 businesses on the other.

16 I can give you an example of how that plays out
17 in Ohio. In Ohio, all businesses are required to pay what
18 is effectively an income tax. It's a corporate franchise
19 tax. Now, utilities don't pay that tax. They've never
20 paid it. They pay lots of other taxes. In fact, they're
21 a very heavily taxed entity.

22 But if we lose this case, the next case, and
23 it's one that should be filed the next day, would come in
24 and say, marketers should no longer be forced to pay a
25 corporate income tax, and the reason is because their

1 competitors, public utilities, do not. Westinghouse would
2 require that very proposition if you adopted the view that
3 they're similarly situated entities that must be taxed and
4 treated the same.

5 QUESTION: Why do you figure Westinghouse?

6 MR. SUTTON: Your Honor, because Westinghouse
7 was a case involving corporate taxation, and I'm making
8 the point that this would be a corporate taxation setting.

9 Westinghouse establishes that you can have a
10 Commerce Clause discrimination at the corporate level --
11 in other words, where sellers are being taxed differently
12 at the corporate level depending on whether they sell in-
13 State or out-of-State, so while I don't want to be arguing
14 against myself if we lose, I'm just making the point that
15 this would be a problem that would come down the road.

16 That's just the income tax. There are other
17 problems as well. Why is it that utilities, for example,
18 should get franchises? Why should they get exclusive
19 areas where they alone sell a product and no one else
20 does? It seems to me that if General Motors is correct --

21 QUESTION: Of course, in most of those
22 situations they don't have competitors.

23 MR. SUTTON: Most --

24 QUESTION: This is an usual case, because a
25 public utility has a competitor for a significant part of

1 its business, but in most public utility regulation
2 there's -- it's a natural monopoly and there's no
3 competitor to be concerned about.

4 MR. SUTTON: I'm not sure I'm following that,
5 Your Honor. I mean, the point I'm making is that
6 utilities get a franchise. That franchise allows them to
7 be the distributor of all natural gas in that area and, if
8 they're asked, to be the seller of the gas and the
9 service. What I'm saying is that General Motors and its
10 marketers would be allowed to come in and say --

11 QUESTION: Maybe they could get Congress to pass
12 a must-carry provision.

13 (Laughter.)

14 MR. SUTTON: I thought I should have read the
15 briefs below in the case before.

16 The other point I'd like to make, Your Honor,
17 and I think this is -- as I read your decisions in the
18 Commerce Clause area it's an efficiency inquiry. I know
19 some of you have disagreed on that point, but it seems to
20 me if you look at the Court's most aggressive Commerce
21 Clause cases, what I see going on is an efficiency
22 inquiry. Is the State doing something that is compelling
23 an activity that could be done more efficiently somewhere
24 else within its borders? That's what I see the Court
25 saying in Carbone. That's what I see it saying in West

1 Lynn Creamery, and certainly Boston Stock Exchange.

2 I think fundamentally General Motors is a
3 problem in that area. I don't see the efficiency problem
4 going on here.

5 We know, if you look at the natural gas industry
6 and divide the different transactions that go on, there's
7 nothing we're doing discriminatory with respect to
8 solicitation. That can be done by utilities and marketers
9 anywhere, in-State, out-of-State. We're not doing
10 anything with respect to where the gas originates. Is it
11 from Ohio? Is it from Texas? There's nothing there.
12 What we're doing that's discriminatory, we're told, is
13 with respect to the ultimate distribution.

14 The problem with that efficiency argument is,
15 there's absolutely no way as a matter of common sense and
16 economics to have a more efficient distribution system of
17 natural gas in a State other than Ohio. That can't be
18 done. In Ohio, an elected official that said we ought to
19 ensure that the distribution lines are working properly in
20 Indiana would be laughed out of office.

21 There's an inherent nature to utility sales that
22 they have to be in-State. There's nothing wrong about
23 that, and as long as Ohio is not saying as a precondition
24 to being --

25 QUESTION: Well, to say there's an inherent

1 nature that they have to be in-State, the reason they have
2 to be in-State generally is because of a legal provision.
3 It's that Indiana won't allow an Ohio public utility to
4 come into Indiana, and vice versa.

5 MR. SUTTON: Well, I mean, actually Ohio would
6 allow an Indiana utility to come into Ohio. What Ohio
7 would say is that if you're going to take on an obligation
8 to supply natural gas year-round to every corner of the
9 State, you've got to own pipelines here, and that's the
10 problem. You can't --

11 QUESTION: Are there any -- are there any
12 Indiana utilities which presently serve retail customers
13 in Ohio?

14 MR. SUTTON: Your Honor, I am not aware of any,
15 but I will say this, and it's reflected in the amicus
16 brief of Columbia Gas, Columbia Gas is a great example of
17 a national utility. They have utility operations I think
18 in at least four States, including Ohio. There's nothing
19 about Ohio law that says an Ohio -- an Hawaii-owned
20 utility can't buy transportation lines and take on the
21 obligations of an Ohio utility.

22 QUESTION: And that would be the case for the
23 Indiana utility, the Chief Justice's -- if that Indiana
24 utility did provide services in Ohio, it would become an
25 Ohio utility as well, right?

1 MR. SUTTON: Absolutely. Absolutely. The point
2 I'm making is --

3 QUESTION: Now we still have in limbo, Mr.
4 Sutton, that Carnegie you sort of cite, and you say, I
5 want to use it whichever way I can use it, but that seems
6 to be at least one tribunal in Ohio saying, if you are a
7 public utility any place, we'll treat you as a public
8 utility here, even though you're acting as a marketer
9 here.

10 MR. SUTTON: Right. Your Honor, I want to make
11 it perfectly clear, Carnegie helps us. The reason
12 Carnegie helps us is because that's a setting, or that's a
13 case that suggests of a utility transaction took place
14 outside of Ohio -- in other words, we're not dealing what
15 the Chief -- Mr. Chief Justice was just asking about. The
16 utility transaction actually takes place in Indiana alone.

17 Carnegie suggests you would still get the use
18 tax exemption. The reason we're relying on Carnegie --
19 and I want to make it clear, it's for a very narrow ground
20 for this decision. The reason we rely on Carnegie is, it
21 shows that Ohio treats, or at least potentially treats
22 utilities the same whether they own transportation
23 equipment in Ohio or outside of Ohio.

24 We're trying to -- we're taking on the facial
25 absolutism component of General Motors' argument, the

1 notion that you own -- you set a requirement that you own
2 transportation equipment in the State, and because you do
3 that that's a facial line, it discriminates against other
4 entities, you lose. We're saying, that's not true. We
5 can even respond to the facial absolutism argument.

6 QUESTION: Well, but you can't be exempted from
7 the sales tax as a utility unless you own pipes, pipeline
8 in Ohio, isn't that so?

9 MR. SUTTON: No, that's precisely the quandary
10 that Carnegie suggests, and here's why that's true, Your
11 Honor. You get the benefit of the use tax exemption if it
12 would be a transaction that would be exempt had it been a
13 sale in the State, okay.

14 If we have an Indiana transaction, what happens
15 is the Indiana utility sells to General Motors or
16 Pipeline, uses its transportation equipment, it winds up
17 in Ohio, there's an argument -- it's an argument that
18 there's a use tax applicable. That is not our preferred
19 ground.

20 In fact, I think it would be dangerous for the
21 Court to issue an opinion that suggests that in 1996 or
22 1997 that the only way utilities in this country -- and
23 it's just not natural gas utilities, it's all
24 utilities -- the only way they can be constitutional is if
25 you don't have a requirement that they own transportation

1 equipment in the State.

2 I think that's an odd rule, and that's why our
3 fundamental argument is that they're differently situated
4 entities, and even if Ohio law does require you to own the
5 transportation equipment within the State boundaries, it's
6 still constitutionally permissible under the Commerce
7 Clause.

8 QUESTION: May I ask, just supposing, if Ohio
9 wanted to, could it impose on the competitor, the
10 independent marketer that sells to General Motors, an
11 obligation to sell only at the same price that the utility
12 can charge?

13 MR. SUTTON: Your Honor, I think in this
14 instance they'd have difficulty doing that, because the
15 transactions occurred out of State, so that they simply
16 couldn't do that.

17 But to answer your question with respect to what
18 happened if it were in-State, and that happens here, some
19 of these transactions were by in-State marketers,
20 absolutely. In fact, I think it's important --

21 QUESTION: And also, I suppose, could require
22 them to supply their customers in the winter even if they
23 don't pay their bills.

24 MR. SUTTON: Oh, Your Honor, that's precisely --
25 it's ironic why we're here. The reason we're here is

1 because back in 1982 some marketers came to Ohio and said,
2 listen, we'd like to sell natural gas, but we'd like to do
3 it in a deregulated capacity, and Ohio at that point had
4 the choice to say, no. You're a utility, or you're not a
5 utility, and we could still do that under the Natural Gas
6 Act.

7 But Ohio chose not to, and what Ohio chose to do
8 was to say, well, we think deregulated gas is a good
9 thing. It's particularly good for industrial consumers.
10 We're just -- the only thing we're going to condition it
11 on is that there's a regulatory line, and if you're on the
12 deregulated side you get the benefits and burdens of it,
13 if you're on the regulated side you get the benefits and
14 burdens as well, but you can't pick and choose. Once
15 you're one you have to comply with all of those rules and
16 all of those laws.

17 QUESTION: If they were compelled to comply with
18 the rules, then of course they could not -- they would
19 also get the tax exemption, you're saying.

20 MR. SUTTON: Oh, yes, absolutely. Absolutely.
21 They of course would ultimately probably have to get
22 transportation equipment as well, right. This gets back
23 to the point we were talking about earlier, that Ohio --
24 the Ohio Public Utilities Commission, it's elected
25 officials, can't be certain that a company will be able to

1 provide natural gas whenever it is needed, however cold,
2 unless that company owns transportation equipment, so I
3 think fundamentally -- I mean, I don't know of an Ohio
4 opinion that says that, but I think as a practical matter,
5 they probably would end up saying that very point.

6 QUESTION: Mr. Sutton, just to clear out one
7 thing, you're not arguing standing any more at this --

8 MR. SUTTON: No, we're not, Your Honor.

9 Your Honor, I'd like to very briefly address the
10 congressional authority argument that we have also raised.
11 Let me tell you why it's a difficult argument, but why I
12 think we can still make it. It's a difficult argument
13 because back in 1938 when the Natural Gas Act was passed,
14 and again when it was amended in 1953, I don't think it
15 was in any Congressman or -woman's mind that they needed
16 to pass this law to constitutionalize the status of
17 utilities, so that's a problem I had. It simply just
18 wasn't something they were after. They were trying to
19 fill a regulatory void with respect to interstate
20 transportation of gas.

21 But that said, the language does the trick. The
22 language indicates that there's a dichotomy between all
23 retail sales on the one hand and all wholesale sales on
24 the other. In this instance, that's all we have. All we
25 have are retail transactions, and under section 1(b) and

1 (c) of the act, which is codified at 15 U.S.C. 717b and c,
2 that's precisely what Ohio's allowed to do.

3 Now, General Motors has argued that's not true.
4 The enabling language simply gives you authority to
5 regulate rates, services. It doesn't use the magic words,
6 tax. We don't think Congress had to use the magic words,
7 tax, in order to bless this form of transaction, and the
8 reason is straightforward.

9 Number 1, the text of the Commerce Clause
10 itself, of course, uses the word regulate. It says
11 nothing about tax, and we wouldn't be here if the word
12 regulate in the Constitution didn't cover discriminatory
13 taxes, so that's a starting point.

14 A second point is a matter of common sense. As
15 this Court has indicated, is the word regulate does cover
16 tax. Indeed, in General Motors' own opening brief at page
17 28, and again in one of their amicus briefs, at page 13 of
18 the Chamber of Commerce brief, they made that very point.
19 The Chamber of Commerce said, what's going on here is Ohio
20 is using taxes as a back-door way to regulate marketers,
21 so I think as a matter of common understanding, everyone
22 understands the broad term regulate to cover taxes.

23 There's another reason why this is legitimate,
24 under congressional blessing, and that's the fact that
25 what Ohio has done to all of the marketers -- and I think

1 this is important for the Commerce Clause issue as well.
2 What Ohio has done is treated the marketers like all other
3 businesses.

4 QUESTION: Thank you, Mr. Sutton.

5 MR. SUTTON: Thank you, Your Honor.

6 QUESTION: Mr. Dyk, you have 5 minutes
7 remaining.

8 REBUTTAL ARGUMENT OF TIMOTHY B. DYK

9 ON BEHALF OF THE PETITIONER

10 MR. DYK: Just very briefly, Mr. Chief Justice,
11 Mr. Sutton suggests that he's not sure, but maybe these
12 unregulated sales by public utilities would not be taxed,
13 would not be exempt. There's no basis for that in the
14 statute. The statute does not distinguish between
15 regulated and unregulated sales by public utilities. All
16 public utility sales are exempt. All natural gas sales
17 are exempt.

18 And while we think the interpretation of the
19 Carnegie case that they supply is not correct, if that
20 interpretation is correct, what they're saying is, anybody
21 who can claim the status of public utility can come into
22 any part of the State and make exempt sales as a gas
23 marketer, whereas the out-of-State companies are never
24 going to get the exemption if they can't claim that public
25 utility status.

1 The congressional policy here, we suggest, is
2 clear. It's in favor of competition. It's in favor of
3 allowing everybody to compete on an equal footing. We
4 respectfully suggest that that policy leads to the same
5 conclusion that this Court's Commerce Clause precedents
6 do, and that is the discrimination here is not acceptable.

7 QUESTION: What's your best case that we look to
8 of congressional policy in determining whether or not
9 there's a violation of the dormant Commerce Clause, some
10 of the rubbish cases, or -- I can't think of a Commerce
11 Clause case where we specifically really rely on the
12 congressional policy.

13 MR. DYK: I can't remember one either, Justice
14 Kennedy, but suggest that this might be an appropriate
15 instance in which to rely on that policy as illuminating
16 the meaning of the Commerce Clause, but we think we don't
17 need that. We don't need a finding as to congressional
18 policy. We think the result here is absolutely clear
19 under the Commerce Clause precedents, even without that.

20 Thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dyk.

22 The case is submitted.

23 (Whereupon, at 12:04 p.m., the case in the
24 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

GENERAL MOTORS CORPORATION, Petitioner v. ROGER W. TRACY, TAX
COMMISSIONER OF OHIO
CASE NO. 95-1232

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Manti Federico

(REPORTER)