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NO. 35883-2-II

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**COURT OF APPEALS FOR DIVISION II**

**STATE OF WASHINGTON**

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G-P GYPSUM CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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**BRIEF OF RESPONDENT**

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**I. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. RCW 82.14.230 authorizes, and Tacoma has imposed, a local tax for the privilege of using natural gas within Tacoma. The tax was authorized to allow cities to recapture revenue lost when deregulation of the natural gas industry allowed users to bypass the local public utility to purchase natural gas. Does this tax, known as the local brokered natural gas (BNG) use tax, apply to a company that bypasses the local public utility to purchase natural gas, which is then burned at a manufacturing plant located within the city?

B. By statute, taxpayers are required to state the reason why a tax refund should be reduced or abated in order to initiate an appeal for a tax refund in superior court. In light of this requirement, can a taxpayer assert a new reason for a tax refund after the time limitation for asserting a refund claim has passed?

**II. COUNTERSTATEMENT OF THE CASE**

**A. Statement of Facts**

During 1996 through 2000, G-P Gypsum Corporation (“G-P Gypsum”) manufactured gypsum wallboard in Tacoma, Washington. CP at 84, 174. In order to manufacture the wallboard, G-P Gypsum consumed

large amounts of natural gas at its plant in Tacoma. *Id.*; Pltf. Ex. 17. G-P Gypsum primarily purchased the gas for delivery to stations outside the city limits of Sumas, Washington, or Sumner, Washington, from several gas sellers. CP at 84, 174; RP at 19, 21 (Trial Proceedings, October 16, 2006). G-P Gypsum then arranged for transportation of the natural gas to its facility in Tacoma, where it was consumed. CP 174-75. When G-P Gypsum purchased natural gas for delivery directly to its plant in Tacoma, it purchased the gas from the local public utility. CP at 86 (“Additional gas needs are also purchased from PSE and delivered to GP at its Tacoma plant.”) G-P Gypsum purchased the gas outside Sumas because of favorable pricing. RP at 21 (Trial Proceedings, October 16, 2006).

G-P Gypsum purchased gas to use it at the Tacoma plant. As explained by G-P Gypsum’s witness at trial:

Q: Why does Georgia Pacific buy gas for use at all?

A: For our Tacoma plant, the plant uses it in the production of gypsum wallboard.

Q: And that, they do in Tacoma, Washington?

A: That’s correct.

RP at 19 (Trial Proceedings, October 16, 2006).

Despite using the natural gas at its Tacoma plant and reporting and paying Tacoma's local BNG use tax for years, G-P Gypsum now asserts that it should pay no local BNG use tax at all.

**B. Procedure Below**

Before filing a complaint in Thurston County Superior Court, G-P Gypsum sought a refund from the Washington State Department of Revenue ("Department") of Tacoma BNG use taxes for the period of January 1, 1996, to December 31, 2000.<sup>1</sup> CP at 83, 173. G-P Gypsum had previously paid the tax based on self-reporting the amount of gas subject to Tacoma's BNG use tax. CP at 6, 86. G-P Gypsum wrote several letters to the Department seeking the refund or an appeal of the Department's denial of the refund. CP 83, 173; Def. Ex. 20. In these letters, G-P Gypsum never raised a claim that it later raised at trial -- that some of the natural gas on which it paid Tacoma tax was sold off the pipeline before reaching Tacoma. CP at 83, 173; RP at 25-26 (Trial Proceedings, October 16, 2006). Rather, it asserted that the gas was first "used" at Sumas, Washington, where it was purchased, and could not be taxed after that. *Id.*

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<sup>1</sup> Although Tacoma imposes the local BNG use tax and receives the revenue from the tax, the Department administers the tax. RCW 82.14.050, 230. Accordingly, G-P Gypsum requested the refund from the Department rather than from Tacoma.

G-P Gypsum then filed a complaint in Thurston County Superior Court, again failing to raise the claim it later raised at trial, but alleging that “[a]t all times material, G-P first took possession, dominion and control of the gas ultimately burned at its Tacoma facility at Sumas, Washington.”<sup>2</sup> CP at 5.

After trial, the court ruled that the plain language of the statute “means quite simply what it says, and that is the City may fix and impose a use tax for the privilege of using natural gas or manufactured gas in the City as a consumer.” RP at 66 (Court’s Ruling, October 17, 2006). Thus, G-P Gypsum’s use of the natural gas within the City of Tacoma was subject to Tacoma’s local BNG use tax. *Id.* The court found that G-P Gypsum first assumed dominion or control of the gas outside Tacoma, but that “[G-P Gypsum’s] analysis of the statutory scheme seems to me to be a circular misplaced assertion that the definition of ‘use’ has to be first use or dominion and control anywhere in the State.” *Id.* at 62, 67.

The court explained further that the definition of “use” for state use tax purposes, which includes the first act by which a taxpayer assumes

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<sup>2</sup> G-P Gypsum asserts in its brief that the Department is “of the opinion” that it is not required to file an Answer in a tax refund lawsuit. App. Br. at 10 n.5. This is not only the Department’s opinion, it is state law. RCW 82.32.180 (“The trial in the superior court shall be de novo and without the necessity of any pleadings other than the notice of appeal.”) This is

dominion and control, is by statute incorporated into the local use tax system only “insofar as applicable.” *Id.* at 67. The court then reasoned that it defies logic to apply a definition of first use within the state to a city tax.<sup>3</sup> *Id.*

The court specifically refused to decide whether, for state BNG use tax purposes, the first “use” of the natural gas occurred at Sumas, Washington.<sup>4</sup> *Id.* at 71. State BNG use taxes were not at issue in the case. *Id.* The court also found that G-P Gypsum had not stated as a reason for its refund claim that some of the natural gas had not reached Tacoma. *Id.* at 61.

The trial court also denied G-P Gypsum’s motion for reconsideration and reopening of the judgment, rejecting G-P Gypsum’s attempt to offer further evidence of the alleged administrative practice of

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also apparently the opinion of G-P Gypsum, since it stipulated to this conclusion. CP at 84.

<sup>3</sup> In quoting the court’s oral ruling, G-P Gypsum claims the court recognized that the definition of “use” for state tax purposes applies to local taxes “with full force and effect.” App. Br. at 12. G-P Gypsum omits the portion of the court’s ruling immediately following its quote, where the court specifically refers to the statutory language stating that the definition is incorporated only “insofar as applicable.” App. Br. at 12; RP at 67 (Court’s Ruling, October 17, 2006). G-P Gypsum then implies that the court ignored statutory language merely because it defies logic, failing to note the court’s reliance on the “insofar as applicable” statutory language. *Id.*

<sup>4</sup> In addition to the local BNG use tax authorized by RCW 82.14.230, the state imposes a BNG use tax. RCW 82.12.022.

the Department. CP at 211. The court reasoned that the alleged administrative practice of the Department did not control its interpretation of statutes.<sup>5</sup> CP at 210. The court did not find that G-P Gypsum had established an administrative practice, but concluded that it need not make this finding because it was not material to its decision. *Id.* G-P Gypsum also failed to address the requirements for admission of post-trial evidence in its motion. CP at 190.

### III. SUMMARY OF ARGUMENT

Tacoma imposes a local BNG use tax for the privilege of using natural gas within the city as a consumer. Thus, G-P Gypsum's use of natural gas at its manufacturing plant in Tacoma is taxable. Tacoma's tax is expressly authorized by RCW 82.14.230 and is consistent with the legislative intent and history of that statute.

Moreover, the statutory provision expressing a legislative intent for uniformity between state and local retail sales and use taxes does not apply

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<sup>5</sup> G-P Gypsum submitted a declaration of a former Department employee to support its contention of an administrative practice of imposing state and local taxes upon the same taxable event. CP at 181-82. In its brief to this Court, G-P Gypsum refers to this former employee as the Department's "speaking agent." By no means does the Department consider the former employee to be its speaking agent. Nor has G-P Gypsum offered any evidence that the employee was designated a speaking agent with respect to local BNG use taxes during the relevant tax period. The conclusory and vague declaration also failed to refer to any

to BNG use taxes. Even if it were applicable, harmonizing the two statutes would still allow Tacoma to impose a local BNG use tax on G-P Gypsum's consumption of natural gas within the city.

Finally, G-P Gypsum cannot raise the new claim that some of the natural gas on which it paid Tacoma's use tax was not consumed within Tacoma. G-P Gypsum failed to state this reason for a refund within the time frame required by statute.

#### IV. ARGUMENT

##### A. Standard of Review

Statutory interpretation is a question of law reviewed *de novo* by an appellate court. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Findings of fact will be upheld if they are supported by substantial evidence in the record.<sup>6</sup> *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 874, 30 P.3d 8 (2001). Substantial evidence exists if, viewed in the light most favorable to the prevailing party below, it is sufficient to persuade a fair-minded person of the truth of a matter. *Id.* The taxpayer bears the burden of establishing

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circumstance in which a local BNG use tax was not applied because "first use" occurred outside the city. CP 181-82.

<sup>6</sup> G-P Gypsum specifically challenges only Finding of Fact No. 4. App. Br. at 1-6.

that it is entitled to a refund. *Lacey Nursing Center, Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 50, 905 P.2d 338 (1995).

**B. The BNG Use Tax Was Designed to Complement the Public Utility Tax**

**1. Natural Gas Deregulation.**

Before deregulation of the natural gas industry, the buying and selling of natural gas traditionally involved three distinct segments: producers, interstate pipelines, and local distribution companies (*i.e.*, the local gas company). *General Motors Corp. v. Tracy*, 519 U.S. 278, 283, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). Under this structure, producers of natural gas generally sold their gas to pipeline companies that resold the gas to local distribution companies. *Id.* In 1978, Congress passed the Natural Gas Policy Act to deregulate wellhead prices and to allow pipelines to transport gas for third parties that owned the gas. *Id.* In 1985, the Federal Energy Regulatory Commission ("FERC") issued an order to further encourage the transport of third-party gas by offering pipelines incentives. *Id.*

With the advent of the 1985 FERC order, large industrial users of natural gas increasingly bought gas directly from producers, bypassing the local distribution companies. *Tracy*, 519 U.S. at 284. By 1992, FERC ordered all interstate pipelines to unbundle transportation services from

natural gas sales and to provide transportation services to buyers that wished to ship gas. *Id.* The bypassing of local distribution companies by industrial users created inequities in the taxation of natural gas in Washington.

**2. The Legislature Enacted the BNG to Remedy Tax Inequities Created by Gas Deregulation.**

Before deregulation, Washington consumers of natural gas generally purchased gas from the local distribution company. *See id.* The local distribution company's gross income from sales of natural gas was subject to a state public utility tax and, if levied by a city, a local public utility tax as well. RCW 82.16.020 (state tax imposed); RCW 35.21.870 (local tax imposed). After deregulation, as industrial users began to bypass the local distribution company and purchase gas directly from producers, the gross income of these local distribution companies declined. *See* Laws of 1989, ch. 384, § 1. Because the local public utility tax was based on the gross income of the local distribution companies, cities lost significant revenue. *Id.*

Deregulation also created tax inequities by subjecting natural gas to differing tax rates. Sales by local distribution companies were subject to one rate, the public utility tax rate. RCW 82.16.020(1)(b); RCW 35.21.870(1). Sales by gas brokers, however, were subject to another rate,

the retail sales and use tax rates. RCW 82.12.0253 (1987) (exempts sales from use tax of RCW 82.12 only if sale was taxable under RCW 82.16). The local sales and use tax rate was significantly lower than the local public utility tax. *Compare* RCW 82.14.020 (authorizing local sales tax of up to 1.925%) *with* RCW 35.21.870 (authorizing local public utility tax up to 6%).<sup>7</sup> Thus, two consumers of natural gas that burned the gas within the same city would be taxed at two different rates depending on whether they purchased gas from a public utility or a broker.

The Legislature sought to remedy the revenue decline and the inequities in taxation by enacting the state BNG use tax and authorizing local BNG use taxes:

Due to a change in the federal regulation governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions.

Laws of 1989, ch. 384, § 1.

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<sup>7</sup> The state retail sales and use tax rate was higher than the state public utility tax rate, but combining the state and local taxes still resulted in buyers of brokered natural gas paying a lower tax rate. *Compare* RCW 82.08.020 (imposing state sales tax of 6.5%); RCW 82.14.020 (authorizing local sales tax of up to 1.925%) *with* RCW 82.16.020(1)(b) (imposing state public utility tax of 3.6%); RCW 35.21.870 (authorizing local public utility tax up to 6%).

The Legislature enacted BNG use taxes to complement public utility taxes and to prevent avoidance of these taxes by taxpayers purchasing natural gas from brokers. *Compare* RCW 82.12.022(2), (4) *and* RCW 82.14.230 (2), (3) *with* RCW 82.16.020 *and* RCW 35.21.870(1). Accordingly, the state and local BNG use taxes were imposed at a combined rate equal to the state and local public utility taxes. RCW 82.12.022(2); 82.14.230 (2). Because the taxes were designed to complement public utility taxes, the state or local BNG use taxes were not imposed if a state or local public utility tax had already been paid on the gas. RCW 82.12.022(4); RCW 82.14.230(3). Natural gas that was previously subjected to retail sales and use taxes also became exempt from such taxes. RCW 82.08.026; RCW 82.12.023; RCW 82.14.030(1). State and local BNG use taxes were intended to capture all natural gas not taxable under the public utility tax. *See* Laws of 1989, ch. 384, § 1.

**C. Tacoma's Natural Gas Use Tax Applies to Use Within the City of Tacoma**

**1. The plain meaning of the local BNG use tax statute and Tacoma's ordinance is that natural gas consumed in the City of Tacoma is taxable by the City.**

The plain meaning of Tacoma's taxing ordinance and the statute authorizing the ordinance is that natural gas used within the city of Tacoma is taxable. If a statute is unambiguous, courts apply its plain meaning without further analysis. *Group Health Coop. of Puget Sound,*

*Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986).

Tacoma's ordinance provides:

Pursuant to RCW 82.14.230, there is fixed and imposed upon every person a use tax for the privilege of using natural gas or manufactured gas in the City as a consumer.

TMC §6A.90.040. RCW 82.14.230 similarly provides:

The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas *in the city* as a consumer.

RCW 82.14.230(1) (emphasis added). Thus, if G-P Gypsum uses gas as a consumer within Tacoma, it is subject to the Tacoma BNG use tax.

It is undisputed that G-P Gypsum operates a manufacturing plant in Tacoma, and that it consumes natural gas in its operations there. CP at 174.<sup>8</sup> Because G-P Gypsum is using the gas in the city as a consumer, the plain language of the statute and Tacoma's ordinance makes such use of the natural gas subject to Tacoma's BNG use tax.

Nevertheless, G-P Gypsum urges this Court to conclude that it did not "use" the natural gas in Tacoma, and that it can therefore avoid paying

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<sup>8</sup> G-P Gypsum does not challenge these findings of fact. Accordingly, they are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). In any event, these facts were stipulated by the parties. CP at 84.

any local BNG use tax. Only a strained and unreasonable reading of Washington's taxing statutes could achieve such a result.

- a. **The definition of "use" for state use tax is incorporated into the local BNG use tax only "as applicable."**

G-P Gypsum argues that applying the definition of "use" set forth at RCW 82.12.010 results in G-P Gypsum avoiding all local BNG use taxes. Brief of Appellant (App. Br.) at 19-33. That statute provides:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer) and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state.

RCW 82.12.010(2) (1994).<sup>9</sup> By its own terms, this statutory definition applies only for purposes of chapter 82.12 RCW. Because the definition applies to the statewide use tax, the definition has no need to address issues of where within the state the tax is imposed.

The local use tax statute incorporates this definition of use only "insofar as applicable." RCW 82.14.020(7) (1983).<sup>10</sup> The legislature apparently recognized that literal application of statutory definitions

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<sup>9</sup> The definition of "use" is now codified at RCW 82.12.010(5). The Department notes that G-P Gypsum fails to include the entire definition of "use" when quoting or citing to the statute in its brief, routinely omitting the words "shall have their ordinary meaning, . . . ." *E.g.*, App. Br. at 19, 20, 24 n.19, 25, 27 n.24,

designed for the implementation of a uniform, statewide use tax system may have unintended consequences when applied to a local tax system. Therefore, it applied those definitions only “insofar as applicable.”

Washington cases have recognized the folly of blindly applying definitions from one chapter of the RCW to another chapter. The Washington Supreme Court addressed the same “insofar as applicable” language in holding that the definition of “consumer” for purposes of the state business and occupation (“B&O”) tax should not be applied to the use tax. *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 353, 243 P.2d 474 (1952). The court reasoned that the term “consumer,” as defined for the B&O tax, contained terms that did not make sense when applied to the use tax. Accordingly, the court, relying in part on the “in so far as applicable” language, used the generally understood meaning of “consumer” in applying the use tax. *Id.* at 353.

Just as in the *St. Paul & Tacoma Lumber* case, the definition of “use” in RCW 82.12.010 does not make sense in the context of RCW 82.14.230. The definition of “use,” “insofar as applicable” to the local BNG use tax statute, cannot mean the first act of dominion and control within the state, as Appellant suggests. The local BNG use tax statute authorizes cities to impose a tax on the use of natural gas within a city.

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<sup>10</sup> This statutory provision has been recodified at RCW 82.14.020(9).

RCW 82.14.230. It would make no sense to authorize a tax on use within a city and then to define “use” to mean dominion and control outside the city. The only meaningful way to harmonize the definition of “use” in RCW 82.12.010 “insofar as applicable” to the local BNG tax statute is to apply the definition of “use” to use within the city, as the trial court did in this case.<sup>11</sup> CP at 179.

**b. Taxing natural gas consumed in Tacoma is consistent with legislative intent.**

Even if the court determines that RCW 82.14.230 is ambiguous, the legislative intent and history of the bill enacting this law show that cities may impose tax on gas consumed within the city, regardless of whether the consumer obtained dominion and control of the gas outside the city. A court’s “primary duty in interpreting any statute is to discern and implement the intent of the legislature.” *Lakemont Ridge*, 156 Wn.2d 696, 698, 131 P.3d 905 (2006).

In this case, the legislative intent could not be clearer. In enacting the statute that authorizes a local BNG use tax, the Legislature referred to

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<sup>11</sup> Even if the statute did not require harmonization of the two statutes with its “insofar as applicable” language, the Court should seek to harmonize statutory provisions and construe the statute as a whole. *E.g.*, *Lakemont Ridge Homeowners Ass’n v. Lakemont Ridge Ltd. P’ship*, 156 Wn.2d 696, 698, 131 P.3d 905 (2006).

the type of transaction at issue in this case as one that the tax was designed to capture:

Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions.

Laws of 1989, ch. 384, §1. As discussed above, the reason cities lost significant revenues from the local utility tax is because consumers like G-P Gypsum were purchasing natural gas from brokers rather than from a public utility. Thus, the statute was enacted to reach the very type of transaction that G-P Gypsum is engaging in.

The legislature also intended to “provide equality of taxation between intrastate and interstate transactions.” *Id.* If G-P Gypsum were allowed to avoid paying local BNG use taxes on the gas it consumes within Tacoma, this legislative purpose would be frustrated. G-P Gypsum would avoid tax by making purchases from out of state, bypassing the local public utility. In contrast, natural gas purchased through a public utility would be subject to the local public utility tax.

G-P Gypsum argues that the legislature intended to recapture lost public utility tax revenue only if the consumer of natural gas accepts delivery of the gas within city limits. App. Br. at 33. Nothing in RCW

82.14.230, the stated legislative intent, or legislative history even hints at such a conclusion. Laws of 1989, ch. 384, §1; *see generally* Final House Bill Report, Substitute HB 1574, 51<sup>st</sup> Leg., Reg. Sess. (Wash. 1989). Indeed, if this were the intent of the Legislature, one would be hard pressed to conceive of a more roundabout way of achieving this result than through the strained interpretation of the statutory language proposed by G-P Gypsum.

G-P Gypsum's reliance on the *Vita Food* case is similarly misplaced. The *Vita Food* case stands only for the unremarkable proposition that the plain meaning of an unambiguous statute must be applied. *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). The statute addressed in *Vita Food* did not apply to the transaction that the State attempted to tax. In the present case, the plain meaning and obvious intent of the statute is to apply the local BNG use tax to gas that is consumed within a city. In contrast to the statute applied in *Vita Food*, G-P Gypsum can arrive at its desired result only through a series of questionable cross-references to other statutes.

Moreover, the legislative intent expressed in the present case is far more specific and identifiable than that addressed in *Vita Food*. Whereas the legislative intent in enacting the local BNG use tax expressed a desire to tax the very kind of transaction at issue in this case, the statute

addressed in *Vita Food* did not have an intent section. RCW 75.32.001-130 (1976).

**2. The local sales and use tax uniformity provision does not prevent local BNG use tax from being imposed on gas delivered outside a city.**

In an attempt to overcome the plain language of the local BNG use tax statute and clearly expressed legislative intent, G-P Gypsum argues that the local BNG use tax can only be imposed simultaneously with the state BNG use tax. G-P Gypsum further argues that state BNG use tax can only be imposed upon the first act of dominion and control of natural gas within the state, which happens to occur outside any city.<sup>12</sup> The uniformity provision in the local sales and use tax statute, RCW 82.14.070, does not apply to the local BNG tax statute. Even if it did apply to the local BNG tax statute, the Legislature merely expressed in RCW 82.14.070 a desire for uniformity “if possible,” and the Legislature’s more specific legislative intent of recapturing lost public utility tax revenues through the local BNG use tax takes precedence over uniformity.

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<sup>12</sup> The trial court properly refused to rule on the question of whether the state’s BNG use tax was imposed on the first act of dominion and control within the State because that issue was not before the court. RP at 71-72 (Court’s Ruling, October 17, 2006). Accordingly, the Department does not address it here.

**a. The uniformity provision does not apply to local BNG use tax.**

RCW 82.14.070 expresses a legislative intent that local sales and use taxes be as consistent and uniform as possible with the state sales and use taxes. The terms of this provision apply to “any local sales and use tax adopted pursuant to this chapter.” *Id.*<sup>13</sup> The local BNG use tax is not a “local sales and use tax.” Rather, the statutory provision authorizing local sales and use taxes specifically exempts natural or manufactured gas. RCW 82.14.030.<sup>14</sup> The statutory provision authorizing the local BNG use tax never uses the term “local sales and use tax.” RCW 82.14.230. This is not surprising, since sales tax is not imposed on the sale of natural gas to a consumer. RCW 82.08.0252, 026 (exempting sales of natural gas from state sales tax where seller is subject to public utility tax or BNG use tax); RCW 82.14.030 (exempting sales of natural gas from local sales and use tax).

Reflecting the distinction drawn by the legislature between sales and use taxes and the BNG use tax are an array of differences between the

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<sup>13</sup> A local sales tax is imposed on retail sales within a city. RCW 82.14.030. A local use tax is designed to complement the local retail sales tax and is imposed on items used in the city that would be subject to the local retail sales tax but upon which that tax was not paid. *Id.*

<sup>14</sup> G-P Gypsum repeatedly cites to RCW 82.14.030 for authority that the local BNG use tax is imposed at the same time as the state BNG use tax

two taxes. Most importantly, the purposes of the two taxes are entirely different. The use tax was designed, in large part, to prevent avoidance of the retail sales tax. *E.g., Gandy v. State*, 57 Wn.2d 690, 696, 359 P.2d 302 (1961). *See also* WAC 458-20-17401 (“The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used.”) The BNG use tax, on the other hand, prevents avoidance of the public utility tax by users who bypass public utilities. Laws of 1989, ch. 384, §1; RCW 82.14.230.

Because the public utility tax is imposed on the gross income of a gas distribution business, rather than on buyers for each purchase of natural gas, the BNG use tax contains a credit for gross receipts taxes paid to another state by the seller of the gas. RCW 82.12.022(5)(a); 82.14.230(4)(a). The local sales and use tax contains no such credit because it is designed to complement the sales tax, which applies to successive retail sales of the same property and is not a gross receipts tax on the seller. RCW 82.14.030.

Moreover, the authorization for imposing the local BNG use tax is

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without advising the Court that RCW 82.14.030 specifically exempts local BNG use tax from its provisions. *E.g., App. Br. at 24, 26, 26 n.21.*

contained in an entirely separate section of chapter 82.14 RCW dedicated solely to local BNG use tax. RCW 82.14.230(1). In contrast to local sales and use taxes, and consistent with the purpose of the 1989 act, the local BNG use tax can be imposed only by cities, not counties.<sup>15</sup> *Id.* Similarly, the local BNG use tax is imposed at the same rate as the local public utility tax, while the local sales and use tax are imposed at a different rate. RCW 82.14.230; 82.14.030.<sup>16</sup>

These differing tax rates not only highlight the distinction between the two taxes, but they also give further evidence that the uniformity provision does not apply to the natural gas use tax. RCW 82.14.070 states an intent for the local sales and use tax to be as consistent and uniform as possible not only with state sales and use taxes, but also as consistent and

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<sup>15</sup> Only cities impose the local public utility tax. RCW 35.21.860(1)(a), 865, 870.

<sup>16</sup> Tacoma and other cities have recognized that the local BNG use tax is different in application and purpose by codifying it in sections other than the local sales and use tax. *E.g.*, Tacoma Muni. Code §6A.9A.040 (in same section imposing public utility tax); Seattle Muni. Code §5.68.010 (in section imposing only local BNG use tax); Spokane Muni. Code §08.07A.010 (in section imposing only local BNG use tax); Olympia Muni. Code §05.84.115 (in section imposing local public utility taxes); Wenatchee Muni. Code §5.82.010 (in section imposing only local BNG use tax).

uniform as possible with other local sales and use taxes. Yet the local BNG use tax is specifically authorized by statute to be imposed at a higher rate than other local sales and use taxes. RCW 82.14.230; 35.21.870. Legislative history of later amendments to the uniformity provision recognizes that the uniformity provision does not apply to the local BNG use tax in this regard. *See* Final Bill Report on S.B. 5783, 58<sup>th</sup> Leg., Reg. Sess. (2003), at 3 (“Sales and use taxes must be uniform within a jurisdiction, with the exceptions of (a) the use tax on natural gas or manufactured gas . . . .”)

The distinction between the local sales and use tax and the local BNG use tax in this context is further highlighted by the lack of the term “taxable event” in the local BNG use tax statute. RCW 82.14.230. The statutory definition of taxable event includes “any use of an article of tangible personal property, upon which a state tax is imposed pursuant to chapter 82.08 or 82.12 RCW.” RCW 82.14.020(8).<sup>17</sup> The local sales and use tax provides for the imposition of local use tax upon the occurrence of a “taxable event,” which supports the legislative intent of making local sales and use taxes uniform with state sales and use taxes. The local BNG tax statute, on the other hand, contains no such reference to “taxable

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<sup>17</sup> This definition is now codified at RCW 82.14.020(10).

event,” instead authorizing a tax “for the privilege of using natural gas or manufactured gas in the city as a consumer.” RCW 82.14.230.

G-P Gypsum asserts, without explanation, that the absence of the term “taxable event” in the local BNG use tax is irrelevant because the term is contained in other portions of the statute “necessary to administer the tax,” citing to RCW 82.14.020 and 070. App. Br. at 32 n.28.<sup>18</sup> The cited statutes do not advance G-P Gypsum’s argument. RCW 82.14.020 is merely the statute containing the definition for “taxable event.” RCW 82.14.070 is the uniformity provision, which aids only in making the following circular argument: 1) the term “taxable event” is applicable to RCW 82.14.230--even though RCW 82.14.230 does not use the term-- because the term is contained in RCW 82.14.070, which is necessary for the administration of RCW 82.14.230; 2) RCW 82.14.070 is necessary for the administration of RCW 82.14.230 because of the definition of “taxable event.”

The uniformity provision, upon which G-P Gypsum’s argument necessarily relies, simply does not apply to the local BNG use tax. Accordingly, G-P Gypsum’s claim must fail.

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<sup>18</sup> G-P Gypsum cited to RCW 82.12.020 and 070 in its brief, but this appears to be a typographical error. The context indicates that the intended citation was to RCW 82.14.020 and 070.

**b. Even if the uniformity provision applied to the local BNG use tax, the tax would still apply to consumption within a city.**

Even if this Court were to find that the uniformity provision of the local sales and use tax is applicable to local BNG use tax, longstanding rules of statutory construction require that the local BNG use tax be applied to consumption of natural gas within a city, regardless of where the consumer took initial delivery of the natural gas. The uniformity provision expresses a legislative intent that local sales and use taxes be as consistent and uniform “as possible” with the state sales and use tax. RCW 82.14.070. The provision also expresses a legislative intent that local sales and use taxes “shall be imposed upon an individual taxable event simultaneously with the imposition of the state sales or use tax upon the same taxable event.” *Id.* This statement of legislative intent was enacted in 1970, when the local sales and use tax was first authorized. Laws of 1970, ch. 94, § 10. At the time, there was no local BNG use tax in existence because consumers did not have the ability to purchase natural gas from brokers. RCW 82.14.230 (enacted in 1989).

When it enacted the local BNG use tax in 1989, the Legislature stated its intent to recapture revenue lost as a result of users like G-P Gypsum purchasing natural gas from brokers rather than through the local public utility. Laws of 1989, ch. 384, § 1. This intent is expressed not

only in section 1 of the 1989 act, but also in the plain language of RCW 82.14.230: “. . . any city . . . may impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer.”

When faced with potentially conflicting statutes, the court attempts to carry out legislative intent and give effect to each of the statutes. *Davis v. Dep't of Transp.*, \_\_\_ Wn. App. \_\_\_, 159 P.3d 427 (Wash. App. Div. 2, May 30, 2007). The more specific statute is given preference where two statutes seem to conflict. *Id.* The local BNG use tax is more specific than the local sales and use tax: it applies to a specific commodity and was enacted as a special tax with specific purposes different than those of the general sales and use tax. Thus, if there is any conflict between these two provisions of the statute, the local BNG use tax statute takes preference.

Requiring a local BNG use tax to be imposed only when natural gas is delivered within a city, rather than when the gas was used within a city, would also fail to give effect to both statutes. While the uniformity provision would remain intact, the local BNG use tax would effectively be written out of existence, applying only to those taxpayers that chose to pay the local BNG use tax by having their brokered gas delivered to a city. This would not only violate the canons of statutory construction with

respect to potentially conflicting statutes but would also lead to absurd results.

**3. G-P Gypsum's interpretation would lead to absurd results.**

G-P Gypsum's interpretation of the statute would stand the statute on its head – achieving the opposite of what the Legislature intended. The statute was designed to recapture revenue lost from natural gas users purchasing gas from brokers rather than from the local public utility. Laws of 1989, ch. 384, § 1. In addition, the statute was designed to prevent inequality in taxation whereby some natural gas consumed within a city was subject to public utility tax while other gas (that purchased from a broker) was not subject to the same rate. *Id.*

The result that G-P Gypsum advocates utterly defeats the purpose of the statute. G-P Gypsum and other users that purchase natural gas from brokers will avoid the local BNG use tax, the cities will lose the revenue source previously provided by taxing public utilities, and unequal taxation will result because some natural gas consumed in the city will be subject to local taxation and other gas will not.

G-P Gypsum contends that the local BNG use tax will not be rendered void because the tax can still apply to users that accept delivery of natural gas within a city from businesses that are not subject to the

public utility tax. App. Br. at 34. There is nothing in the record to suggest that such deliveries occur.<sup>19</sup> Rather, the record shows that the Sumas, Washington location (which is outside city limits), provides optimal pricing because it “is a larger point for transactions of natural gas, whether purchasing gas, selling gas or transporting gas from there.” RP at 52 (Trial Proceeding, October 16, 2006). Moreover, the regulatory and industry practice against which the Legislature acted is one of industrial users purchasing natural gas from brokers and bypassing the local distribution company for delivery or purchasing the natural gas at points outside a city. *E.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 284, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (citing Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 Tulsa L.J. 707, 723 (1994)).

Even if some deliveries from brokers to customers within a city have occurred in the past, G-P Gypsum’s interpretation would still defeat

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<sup>19</sup> G-P Gypsum states that “[c]ommon experience and the evidentiary record indicate that delivery at a taxpayer’s facility is the norm, not the exception.” App. Br. at 34. G-P Gypsum ignores the truly relevant question: how many customers that purchase natural gas from brokers, and thereby avoid the public utility tax, receive delivery at their facilities? Common experience and the evidentiary record give no indication that any such customers receive delivery of the gas at their facility. In fact, G-P Gypsum itself, when purchasing natural gas for delivery to its facility, purchases the gas from the local public utility, not from a broker. CP at 86; RP at 86-87 (Trial Proceeding, October 16, 2006).

the local BNG tax statute. Were this Court to adopt G-P Gypsum's reasoning, it seems highly likely that such deliveries within a city would dramatically decrease or cease altogether.<sup>20</sup> It is inconceivable that the Legislature intended to provide such a simple avenue for avoiding local BNG use taxes.

The Department therefore respectfully requests that the Court affirm the trial court decision that natural gas consumed within the city of Tacoma is subject to Tacoma's local BNG use tax.

**D. G-P Gypsum Did Not Satisfy RCW 82.32.180 With Respect to Natural Gas That Allegedly Did Not Reach Tacoma**

**1. G-P Gypsum did not satisfy the statutory requirement of stating the reason for a tax refund lawsuit.**

G-P Gypsum did not satisfy the statutory requirements for bringing a tax refund claim for natural gas allegedly sold or otherwise transferred

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<sup>20</sup> Although G-P Gypsum asserts that there are costs and liabilities associated with accepting delivery outside Tacoma, it is apparently cheaper for G-P Gypsum to obtain the natural gas at Sumas, Washington. RP at 21 (Trial Proceeding, October 16, 2006) ("But we would primarily buy it at Sumas because of the pricing that we're able to get at Sumas.") In addition, those costs and liabilities could be reduced significantly by taking delivery of the gas at points further down the pipeline, such as just outside a city. Such delivery points do exist and the record reflects that G-P Gypsum makes use of at least one. CP at 84-85; RP at 59 (Trial Proceedings, October 16, 2006). *See also* Pltf. Ex. 8 (agreement between G-P Gypsum and Washington Natural Gas to transport gas from the North Tacoma Gate, which is outside city limits, to G-P Gypsum's plant in the city of Tacoma). Presumably, other consumers could likewise take delivery just outside a city at this station or others.

before it reached Tacoma. Specifically, it never identified in its complaint the reason for the partial refund it now seeks. Accordingly, that claim is now barred by the applicable non-claim statute, RCW 82.32.060.

The state's excise tax refund statute sets forth specific requirements that must be met by a taxpayer bringing a refund lawsuit in superior court. RCW 82.32.180; *Lacey Nursing Center, Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 50, 905 P.2d 338 (1995). Because RCW 82.32.180 represents a partial waiver of sovereign immunity, the requirements are mandatory. *Lacey Nursing*, 128 Wn.2d at 50, 52. The court strictly construes the statute because it is a tax statute conferring a refund. *Id.* at 49. The specific terms of the statute also require adherence to these requirements: "[N]o court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided." RCW 82.32.180.

To properly initiate an action for a tax refund, a taxpayer must satisfy the following, specific conditions: "(1) identify themselves, (2) state the correct amount of tax each concedes to be the true amount, (3) state reasons why the tax should be reduced or abated, and then (4) prove that the tax paid by the taxpayer is incorrect." *Lacey Nursing*, 128 Wn.2d at 50 (summarizing RCW 82.32.180).

In *Lacey Nursing*, the court held that class action plaintiffs could not satisfy the requirements of RCW 82.32.180 because each individual plaintiff had not stated the correct amount of the tax and the reasons for the tax refund. *Id.* at 50. Some of the plaintiffs had given the amount of tax paid and the following reason for reduction or abatement of the taxes: “[A] substantial percentage of the income of plaintiff’s facility is derived as compensation for services rendered to patients and/or from the sale of prescription drugs.” *Id.* at 51 (internal quotes omitted). The court held that such a reason was too vague to satisfy the statutory requirement. *Id.* at 51.

In the present case, G-P Gypsum never claimed in its complaint or in its administrative request for a refund that some of the natural gas upon which it paid Tacoma BNG use tax was not ultimately consumed within Tacoma.<sup>21</sup> See CP at 4-7 (complaint); CP at 83 (stipulation describing letter to Department requesting refund). Rather, the complaint and the

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<sup>21</sup> Whether G-P Gypsum asserted this reason for a refund in letters to the Department is relevant because the time limitation in which G-P Gypsum may bring a tax refund lawsuit may be extended to 30 days after the Department has rejected an administrative refund request. RCW 82.32.180; *Todric Corp. v. Dep’t of Revenue*, 109 Wn. App. 785, 788-90, 37 P.3d 1238 (2002). At least some of G-P Gypsum’s claims would be barred by the time limitations set forth without this extension. RCW 82.32.060; RCW 82.32.050(3). The statute allowing for petition to the Department requires that the taxpayer state the reasons for the petition. RCW 82.32.170.

requests for refund rested solely on the legal argument that G-P Gypsum makes with regard to “first use” in Washington. Nowhere in the complaint or the letters to the Department does G-P Gypsum even hint that some of the gas upon which it paid Tacoma BNG use tax was not consumed within Tacoma. *Id.*

To the contrary, the language in the complaint and the letters to the Department strongly suggest that it admitted that the gas was ultimately consumed within Tacoma. The complaint alleges:

At all times material, G-P burned natural gas at its Tacoma facility. At all times material, G-P purchased the gas ultimately burned at its Tacoma facility at Sumas, Washington. At all times material, G-P first took possession, dominion and control of the gas ultimately burned at its Tacoma facility at Sumas, Washington. At all times material, G-P first used and consumed the gas ultimately burned at its Tacoma facility at Sumas, Washington.

CP 5 (paragraph numbering omitted). G-P then alleged, “G-P owed *no* Tacoma local natural gas use taxes because G-P did not *first* take possession, dominion or control of and did not otherwise *first* use or consume any such gas in Tacoma.” CP at 6 (emphasis added). *See also* CP at 83 (stipulating that G-P Gypsum claimed a refund by letter to the Department because “such taxes were paid on natural gas purchased and first used outside the city limits of Tacoma.”) By asserting that the gas was not “first” used in Tacoma, G-P Gypsum implied that the gas was later used in Tacoma. *See also* RP at 25 (Trial Proceedings, October 16,

2006) (G-P Gypsum's tax counsel agreeing that refund request was based on possession and delivery first occurring at Sumas). The implication that the gas upon which tax was paid ultimately reached Tacoma was reinforced by the fact that G-P Gypsum had previously included these amounts when reporting to the Department the amount of natural gas subject to Tacoma's BNG use tax. CP at 86.

In *Lacey Nursing*, the court found that vague statements were not sufficient to satisfy the "reason" requirement of RCW 82.32.180, even though the statements arguably stated the theory upon which the taxpayers were requesting a refund. *Lacey Nursing*, 128 Wn.2d at 51. In the present case, G-P Gypsum's alleged "reason" never even alluded to the theory upon which it now seeks a refund. Accordingly, the reasoning of *Lacey Nursing* applies with even greater force here and the Court should deny G-P Gypsum's attempt to raise new reasons not asserted in its complaint.

Not only did G-P Gypsum fail to state as a reason for the refund its newly asserted claim, but the reason it did state is inconsistent with the newly asserted claim. In light of the complaint's allegation that all of the natural gas was first used in Sumas, Washington, it would be odd indeed to divine a "reason" stated in the complaint that some of the gas was not used in Tacoma because it was diverted somewhere after leaving Sumas. If local BNG use tax is assessed upon "first use within the State," which

according to G-P Gypsum in its complaint occurred at Sumas, Washington, then it is immaterial what happened to the natural gas after that point. Likewise, if one accepts G-P Gypsum's theory upon which it requested a refund, it is immaterial whether the natural gas was ultimately consumed within Tacoma or elsewhere. While G-P Gypsum may be entitled to file a timely refund complaint containing alternative and inconsistent theories, it cannot belatedly pursue a legal theory inconsistent with the one it actually stated.<sup>22</sup> Thus, that refund claim is barred by the nonclaim statute.

G-P Gypsum also argues that RCW 82.32.180 requires that a taxpayer state only "the reason" for an excise tax refund, contrasting RCW 84.68.020, which requires a taxpayer seeking a property tax refund to state "all of the grounds" for asserting that the tax is unlawful or excessive. Under either statutory language, the meaning is clear: a taxpayer must explain why it is entitled to a refund. No reasonable reading of G-P Gypsum's complaint satisfies this requirement.

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<sup>22</sup> G-P Gypsum argues that the Court may not exclude its newly asserted claim "on the basis that G-P Gypsum did not explain or discuss in its complaint how the gas was used outside Tacoma . . . ." App. Br. at 39. A fatal flaw in this argument is that G-P Gypsum did explain or discuss in its complaint how the gas was used outside Tacoma, and that explanation is at odds with its newly asserted claim.

## 2. The tax refund statute is constitutional.

“The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. art. II, § 26.

Ignoring this constitutional provision, G-P Gypsum claims that the requirements of RCW 82.32.180 are an unconstitutional infringement on the court’s right to hear tax cases. G-P Gypsum’s argument, relying on article IV, section 6 of the Washington Constitution, is contrary to the Washington constitution and established case law.<sup>23</sup>

The Washington Supreme Court has previously applied the requirements of RCW 82.32.180 and even specifically upheld the constitutionality of its more restrictive predecessor. *E.g., Lacey Nursing*, 128 Wn.2d at 50 (holding that each taxpayer in class action must state reasons for its refund); *American Steel & Wire Co. of New Jersey v. State*, 49 Wn.2d 419, 302 P.2d 207 (1956) (upholding time limitation of one year after tax was paid despite fact that tax itself was unconstitutional). Washington courts have also upheld statutes of limitation and other

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<sup>23</sup> Article IV, section 6 of the Washington Constitution states, “. . . The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law . . . .” Thus, the provision does not elevate tax matters to an exalted status that cannot be

legislative restrictions on lawsuits against state constitutional challenges. *E.g., 1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 936-37, 6 P.3d 74 (2000) (upholding statute of repose against state constitutional challenges), *aff'd*, 144 Wn.2d 570, 29 P.3d 1249 (2001).

In general, statutes are presumed constitutional and a party challenging a statute has the burden of establishing its invalidity beyond a reasonable doubt. *State ex rel. Public Disclosure Comm'n v. Washington*, 156 Wn.2d 543, 556, 130 P.3d 352 (2006). Far from meeting this burden, the authority on which G-P Gypsum relies supports the Department. G-P Gypsum bases its constitutional argument on article IV, section 6 of the Washington Constitution. Yet, this Court has previously held that article IV, section 6 of the Washington Constitution is not self-executing. *Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 114-15, 70 P.3d 144 (2003). Thus, a plaintiff must rely on other statutory authority to invoke the Superior Court's jurisdiction. *Id.* In this case, that authority is RCW 82.32.180.

Nor do the cases cited by G-P Gypsum support its contention.

Two of the cases uphold the authority of the Legislature to prescribe the

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affected by legislative action, but is simply the provision describing the superior court's general jurisdiction.

manner in which lawsuits regarding taxation may be brought. *Roon v. King Cty.*, 24 Wn.2d 519, 524-25, 166 P.2d 165 (1946) (upholding dismissal of tax refund lawsuit brought more than one year after tax was due); *Casco v. Thurston Cty.*, 163 Wash. 666, 669, 675, 2 P.2d 677 (1931) (upholding denial of injunction because statutory requirements not met; stating “[w]e can see here no encroachment upon the constitutional power of the courts”). The third applies the court’s equitable powers to allow a remedy similar to that provided for in statute under the unique facts of the case, which would otherwise provide no avenue for judicial review whatsoever. *O’Brien v. Johnson*, 32 Wn.2d 404, 407, 202 P.2d 248 (1949).<sup>24</sup>

G-P Gypsum’s argument that it is unreasonable to prevent the judiciary from applying the law to facts already in the record would mean that nonclaim statutes and statutes of limitation could never be enforced. Taxpayers would be free to come up with new and alternative theories

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<sup>24</sup> In *O’Brien*, the court allowed a taxpayer to bring a tax refund lawsuit more than one year after the tax became due, as the statute at that time required. *Id.* at 405-06. The taxpayer alleged that the tax, which was due several years before he brought suit, had actually been paid. *Id.* Thus, even if the taxpayer paid the taxes for a second time, he would not be able to bring suit because the date the tax became due was more than one year prior. *Id.* Although the court allowed the suit to continue, it required the taxpayer to pay the tax in dispute in trust to the court before bringing the lawsuit. *Id.* at 408.

after trial, preventing the Department from thorough discovery, cross-examination, or preparation.

This case does not present a battle between protection of the public fisc and judicial power, as G-P Gypsum suggests. App. Br. at 40 n.33. Rather, it concerns a taxpayer that was afforded an avenue for judicial review – the same avenue that all taxpayers in Washington are afforded. It failed to raise in a timely manner the claim that some of the taxed natural gas did not reach Tacoma.<sup>25</sup> Just as with any taxpayer who fails to bring a refund claim until after the nonclaim statute has run, it cannot now assert the claim.

## V. CONCLUSION

G-P Gypsum purchased natural gas to use it within the City of Tacoma. Accordingly, Tacoma's BNG use tax properly applies to G-P Gypsum. G-P Gypsum's reliance on statutes implementing the local use tax that complements the local retail sales tax is misplaced and should not

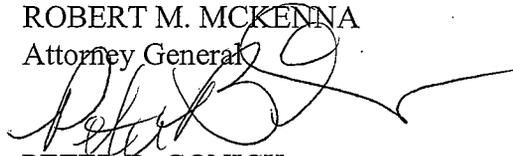
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<sup>25</sup> The local BNG use taxes G-P Gypsum paid were based on its own reporting of the amount consumed in Tacoma -- not based on an assessment issued after an audit by the Department. CP at 86, 177. Thus, any mistake in reporting the amount of natural gas consumed in Tacoma originated with G-P Gypsum.

allow G-P Gypsum to avoid its valid tax obligations. Accordingly, the Department respectfully requests that the Court affirm the judgment below.

RESPECTFULLY SUBMITTED this 18th day of July, 2007.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Peter B. Gonick", written over the typed name and title of the Assistant Attorney General.

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(2) Credit shall be allowed, in accordance with rules of the department, against the taxes imposed in this chapter for any petroleum product paid to another state with respect to the same petroleum product. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to that petroleum product. For the purpose of this subsection:

- (a) "Petroleum product tax" means a tax:
- (i) That is imposed on the act or privilege of possessing petroleum products, and that is not generally imposed on other activities or privileges;
- (ii) That is measured by the value of the petroleum product, in terms of wholesale value or other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax.
- (b) "State" means (i) a state of the United States other than Washington, or any political subdivision of such other state, (ii) the District of Columbia, and (iii) any foreign country or political subdivision thereof.

**NEW SECTION. Sec. 19.** The sum of four hundred thousand dollars, as much thereof as may be necessary, is appropriated from the pollution liability reinsurance program trust account to the Washington pollution liability reinsurance program for the biennium ending June 30, 1991, to carry out the purposes of this act.

**NEW SECTION. Sec. 20.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

**NEW SECTION. Sec. 21.** Sections 1 through 13 of this act constitute new chapter in Title 70 RCW. Sections 14 through 18 of this act shall constitute a new chapter in Title 82 RCW.

**NEW SECTION. Sec. 22.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately, except sections 14 through 19 of this act shall take effect July 1, 1989.

Passed the House April 20, 1989.

Passed the Senate April 19, 1989.

Approved by the Governor May 13, 1989.

Filed in Office of Secretary of State May 13, 1989.

### CHAPTER 384

[Substitute House Bill No. 1574]

#### NATURAL AND MANUFACTURED GAS—TAXATION

AN ACT Relating to the taxation of utilities and natural gas; amending RCW 82.14.030; adding a new section to chapter 82.14 RCW; adding new sections to chapter 82.12 RCW; adding a new section to chapter 82.08 RCW; creating a new section; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION. Sec. 1.** Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions.

**NEW SECTION. Sec. 2.** A new section is added to chapter 82.14 RCW to read as follows:

(1) The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer.

(2) The tax shall be imposed in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the tax on natural gas businesses under RCW 35.21.870 in the city in which the article is used. The "value of the article used," does not include any amounts that are paid for the hire or use of a natural gas business in transporting the gas subject to tax under this subsection if those amounts are subject to tax under RCW 35.21.870.

(3) The tax imposed under this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 35.21.870 with respect to the gas for which exemption is sought under this subsection.

(4) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 35.21.870 by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

The tax levied by RCW 82.12.020 shall not apply in respect to the use of natural or manufactured gas.

Sec. 6. Section 4, chapter 94, Laws of 1970 ex. sess. as amended by section 17, chapter 49, Laws of 1982 1st ex. sess. and RCW 82.14.030 are each amended to read as follows:

(1) The governing body of any county or city while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose a sales and use tax in accordance with the terms of this chapter. Such tax shall be collected from those persons who are taxable by the state pursuant to chapters 82.08 and 82.12 RCW, upon the occurrence of any taxable event within the county or city as the case may be: PROVIDED, That except as provided in section 2 of this act, this sales and use tax shall not apply to natural or manufactured gas. The rate of such tax imposed by a county shall be five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such tax imposed by a city shall not exceed five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED, HOWEVER, That in the event a county shall impose a sales and use tax under this subsection, the rate of such tax imposed under this subsection by any city therein shall not exceed four hundred and twenty-five one-thousandths of one percent.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5, chapter 49, Laws of 1982 1st ex. sess., in addition to the tax authorized in subsection (1) of this section, the governing body of any county or city may by resolution or ordinance impose an additional sales and use tax in accordance with the terms of this chapter. Such additional tax shall be collected upon the same taxable events upon which the tax imposed under subsection (1) of this section is levied. The rate of such additional tax imposed by a county shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such additional tax imposed by a city shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED, HOWEVER, That in the event a county shall impose a sales and use tax under this subsection at a rate equal to or greater than the rate imposed under this subsection by a city within the county, the county shall receive fifteen percent of the city tax: PROVIDED FURTHER, That in the event that the county shall impose a sales and use tax under this subsection at a rate which is less than the rate imposed under this subsection by a city within the county, the county shall receive that amount of revenues from the city tax equal to fifteen percent of the rate of tax imposed by the county under this subsection. The authority to impose a tax under this subsection is

(5) The use tax hereby imposed shall be paid by the consumer. The administration and collection of the tax hereby imposed shall be pursuant to RCW 82.14.050.

NEW SECTION. Sec. 3. A new section is added to chapter 82.12 RCW to read as follows:

(1) There is hereby levied and there shall be collected from every person in this state a use tax for the privilege of using natural gas or manufactured gas within this state as a consumer.

(2) The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the public utility tax on gas distribution businesses under RCW 82.16.020(1)(b). The "value of the article used" does not include any amounts that are paid for the hire or use of a gas distribution business as defined in RCW 82.16.010(7) in transporting the gas subject to tax under this subsection if those amounts are subject to tax under that chapter.

(3) The tax levied in this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 82.16.020(1)(b) with respect to the gas for which exemption is sought under this subsection.

(4) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 82.16.020(1)(b) by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

(5) The use tax hereby imposed shall be paid by the consumer to the department.

(6) There is imposed a reporting requirement on the person who delivered the gas to the consumer to make a quarterly report to the department. Such report shall contain the volume of gas delivered, name of the consumer to whom delivered, and such other information as the department shall require by rule.

(7) The department may adopt rules under chapter 34.05 RCW for the administration and enforcement of sections 1 through 6 of this act.

NEW SECTION. Sec. 4. A new section is added to chapter 82.08 RCW to read as follows:

The tax levied by RCW 82.08.020 shall not apply to sales of natural or manufactured gas.

NEW SECTION. Sec. 5. A new section is added to chapter 82.12 RCW to read as follows:

intended in part to compensate local government for any losses from the phase-out of the property tax on business inventories.

NEW SECTION. Sec. 7. This act shall take effect July 1, 1990.

Passed the House April 18, 1989.

Passed the Senate April 13, 1989.

Approved by the Governor May 13, 1989.

Filed in Office of Secretary of State May 13, 1989.

CHAPTER 385

[House Bill No. 2060]

HORSE RACING INDUSTRY—WORKERS' COMPENSATION COVERAGE

AN ACT Relating to the horse racing industry; amending RCW 51.16.140, 51.32.073, and 67.16.020; adding a new section to chapter 51.16 RCW; adding a new section to chapter 67.16 RCW; creating a new section; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 51.16 RCW to read as follows:

(1) The department shall assess premiums, under the provisions of this section, for certain horse racing employments licensed in accordance with chapter 67.16 RCW. This premium assessment shall be for the purpose of providing industrial insurance coverage for employees of trainers licensed under chapter 67.16 RCW, including but not limited to exercise riders, pony riders, and grooms, and including all on or off track employment. For the purposes of sections 1 through 5 of this act a hotwalker shall be considered a groom. The department may adopt rules under chapter 34.05 RCW to carry out the purposes of this section, including rules providing for alternative reporting periods and payment due dates for coverage under this section. The department rules shall ensure that no licensee licensed prior to the effective date of this act shall pay more than the assessment fixed at the basic manual rate.

(2) The department shall compute industrial insurance premium rates on a per license basis, which premiums shall be assessed at the time of each issuance or renewal of the license for owners, trainers, and grooms in amounts established by department rule for coverage under this section. Premium assessments shall be determined in accordance with the requirements of this title, except that assessments shall not be experience rated and shall be fixed at the basic manual rate. However, rates may vary according to differences in working conditions at major tracks and fair tracks.

(3) For the purposes of paying premiums and assessments under this section and making reports under this title, individuals licensed as trainers by the Washington horse racing commission shall be considered employers. The premium assessment for a groom's license shall be paid by the trainer

responsible for signing the groom's license application and shall be payable at the time of license issuance or renewal.

(4) The fee to be assessed on owner licenses as required by this section shall not exceed one hundred fifty dollars. However, those owners having less than a full ownership in a horse or horses shall pay a percentage of the required license fee that is equal to the total percentage of the ownership that the owner has in the horse or horses. In no event shall an owner having an ownership percentage in more than one horse pay more than a one hundred fifty-dollar license fee. The assessment on each owner's license shall not imply that an owner is an employer, but shall be required as part of the privilege of holding an owner's license.

(5) Premium assessments under this section shall be collected by the Washington horse racing commission and deposited in the industrial insurance trust funds as provided under department rules.

NEW SECTION. Sec. 2. A new section is added to chapter 67.16 RCW to read as follows:

In addition to the license fees authorized by this chapter, the commission shall collect the industrial insurance premium assessments required under section 1 of this act from trainers, grooms, and owners. The industrial insurance premium assessments required under section 1 of this act shall be retroactive to January 1, 1989, and shall be collected from all licensees whose licenses were issued after that date. The commission shall deposit the industrial insurance premium assessments in the industrial insurance trust fund as required by rules adopted by the department of labor and industries.

Sec. 3. Section 51.16.140, chapter 23, Laws of 1961 as last amended by section 29, chapter 350, Laws of 1977 ex. sess. and RCW 51.16.140 are each amended to read as follows:

(1) Every employer who is not a self-insurer shall deduct from the pay of each of his or her workers one-half of the amount he or she is required to pay, for medical benefits within each risk classification. Such amount shall be periodically determined by the director and reported by him or her to all employers under this title: PROVIDED, That the state governmental unit shall pay the entire amount into the medical aid fund for volunteers, as defined in RCW 51.12.035, and the state apprenticeship council shall pay the entire amount into the medical aid fund for registered apprentices or trainees, for the purposes of RCW 51.12.130. The deduction under this section is not authorized for premiums assessed under section 1 of this 1989 act.

(2) It shall be unlawful for the employer, unless specifically authorized by this title, to deduct or obtain any part of the premium or other costs required to be by him or her paid from the wages or earnings of any of his or her workers, and the making of or attempt to make any such deduction shall be a gross misdemeanor.

- 82.12.02569 Exemptions—Use of tangible personal property related to a building or structure that is an integral part of a laser interferometer gravitational wave observatory.
- 82.12.0257 Exemptions—Use of tangible personal property of the operating property of a public utility by state or political subdivision.
- 82.12.0258 Exemptions—Use of tangible personal property previously used in farming and purchased from farmer at auction.
- 82.12.0259 Exemptions—Use of tangible personal property by federal corporations providing aid and relief.
- 82.12.02595 Exemption—Use of donated tangible personal property by nonprofit organization or governmental entity.
- 82.12.0261 Exemptions—Use of purebred livestock for breeding—Cattle and milk cows.
- 82.12.0262 Exemptions—Use of poultry for producing poultry and poultry products for sale.
- 82.12.0263 Exemptions—Use of fuel by extractor or manufacturer thereof.
- 82.12.0264 Exemptions—Use of dual-controlled motor vehicles by school for driver training.
- 82.12.0265 Exemptions—Use by bailee of tangible personal property consumed in research, development, etc., activities.
- 82.12.0266 Exemptions—Use by residents of motor vehicles and trailers acquired and used while members of the armed services and stationed outside the state.
- 82.12.0267 Exemptions—Use of semen in artificial insemination of livestock.
- 82.12.0268 Exemptions—Use of form lumber by persons engaged in constructing, repairing, etc., structures for consumers.
- 82.12.02685 Exemptions—Use of tangible personal property related to agricultural employee housing.
- 82.12.0269 Exemptions—Use of sand, gravel, or rock to extent of labor and service charges for mining, sorting, crushing, etc., thereof from county or city quarry for public road purposes.
- 82.12.0271 Exemptions—Use of wearing apparel only as a sample for display for sale.
- 82.12.0272 Exemptions—Use of tangible personal property in single trade shows.
- 82.12.0273 Exemptions—Use of pollen.
- 82.12.0274 Exemptions—Use of tangible personal property by political subdivision resulting from annexation or incorporation.
- 82.12.02745 Exemptions—Use by free hospitals of certain items.
- 82.12.02747 Exemptions—Use by blood, bone, or tissue bank—Exceptions.
- 82.12.02748 Exemptions—Use of human blood, tissue, organs, bodies, or body parts for medical research or quality control testing.
- 82.12.0275 Exemptions—Use of prescription drugs.
- 82.12.0276 Exemptions—Use of returnable containers for beverages and foods.
- 82.12.0277 Exemptions—Use of insulin, prosthetic and orthotic devices, medicines used in treatment by a naturopath, ostomic items, and medically prescribed oxygen.
- 82.12.0279 Exemptions—Use of ferry vessels by the state or local governmental units—Components thereof.
- 82.12.0282 Exemptions—Use of vans as ride-sharing vehicles.
- 82.12.0283 Exemptions—Use of certain irrigation equipment.
- 82.12.0284 Exemptions—Use of computers or computer components, accessories, or software donated to schools or colleges.
- 82.12.02915 Exemptions—Use of items by health or social welfare organizations for alternative housing for youth in crisis—Expiration of section.
- 82.12.0293 Exemptions—Use of food products for human consumption.
- 82.12.0294 Exemptions—Use of feed for cultivating or raising fish for sale.
- 82.12.0295 Exemptions—Lease amounts and repurchase amount for certain property under sale/leaseback agreement.
- 82.12.0296 Exemptions—Use of feed consumed by livestock at a public livestock market.
- 82.12.0297 Exemptions—Use of food purchased with food stamp coupons.
- 82.12.0298 Exemptions—Use of diesel fuel in operating watercraft in commercial deep sea fishing or commercial passenger fishing boat operations outside the state.
- 82.12.031 Exemptions—Use by artistic or cultural organizations of certain objects.
- 82.12.0311 Exemptions—Use of materials and supplies in packing horticultural products.
- 82.12.0315 Exemptions—Rental or sales related to motion picture or video productions—Exceptions.
- 82.12.033 Exemption—Use of certain used mobile homes.
- 82.12.034 Exemption—Use of used floating homes.
- 82.12.0345 Exemptions—Use of newspapers.
- 82.12.0347 Exemptions—Use of academic transcripts.
- 82.12.035 Credit for retail sales or use taxes paid to other jurisdictions with respect to property used.
- 82.12.036 Exemptions and credits—Pollution control facilities.
- 82.12.037 Credits and refunds—Debts deductible as worthless.
- 82.12.038 Exemptions—Vehicle battery core deposits or credits—Replacement vehicle tire fees—"Core deposits or credits" defined.
- 82.12.040 Retailers to collect tax—Penalty.
- 82.12.045 Collection of tax on motor vehicles by county auditor or director of licensing—Remittance.
- 82.12.060 Installment sales, leases, bailments.
- 82.12.070 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless.
- 82.12.080 Administration.

**82.12.010 Definitions.** For the purposes of this chapter:

(1)(a) "Value of the article used" shall mean the consideration, whether money, credit, rights, or other property except trade-in property of like kind, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. The term includes, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

(b) In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe. In case any such articles of tangible personal property are used in respect to the construction, repairing, decorating, or improving of, and which become or are to become an ingredient or component of, new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any such articles therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, then the value of the use of such articles so used shall be determined according to the retail selling price of such articles, or in the absence of such a selling price, as nearly as possible according to the retail selling price at place of use of similar products of like quality and character or, in the absence of either of these

selling price measures, such value may be determined upon a cost basis, in any event under such rules as the department of revenue may prescribe.

(c) In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

(d) In the case of articles manufactured or produced by the user and used in the manufacture or production of products sold or to be sold to the department of defense of the United States, the value of the articles used shall be determined according to the value of the ingredients of such articles.

(e) In the case of an article manufactured or produced for purposes of serving as a prototype for the development of a new or improved product, the value of the article used shall be determined by: (i) The retail selling price of such new or improved product when first offered for sale; or (ii) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale;

(2) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;

(3) "Taxpayer" and "purchaser" include all persons included within the meaning of the word "buyer" and the word "consumer" as defined in chapters 82.04 and 82.08 RCW;

(4) "Retailer" means every seller as defined in RCW 82.08.010 and every person engaged in the business of selling tangible personal property at retail and every person required to collect from purchasers the tax imposed under this chapter;

(5) The meaning ascribed to words and phrases in chapters 82.04 and 82.08 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under the provisions of this chapter. "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. [1994 c 93 § 1. Prior: 1985 c 222 § 1; 1985 c 132 § 1; 1983 1st ex.s. c 55 § 2; 1975-'76 2nd ex.s. c 1 § 1; 1975 1st ex.s. c 278 § 52; 1965 ex.s. c 173 § 17; 1961 c 293 § 15; 1961 c 15 § 82.12.010; prior: 1955 c 389 § 24; 1951 1st ex.s. c 9 § 3; 1949 c 228 § 9; 1945 c 249 § 8; 1943 c 156 § 10; 1939 c 225 § 18; 1937 c 191 § 4; 1935 c 180 § 35; Rem. Supp. 1949 § 8370-35.]

Effective date—1994 c 93: "This act shall take effect July 1, 1994." [1994 c 93 § 3.]

Effective dates—1983 1st ex.s. c 55: See note following RCW 82.08.010.

Application to preexisting contracts—1975-'76 2nd ex.s. c 1; 1975 1st ex.s. c 90: "In the event any person has entered into a contract prior to July 1, 1975 or has bid upon a contract prior to July 1, 1975 and has been awarded the contract after July 1, 1975, the additional taxes imposed by chapter 90, Laws of 1975 1st ex. sess., section 5, chapter 291, Laws of 1975 1st ex. sess. and this 1975 amendatory act shall not be required to be paid by such person in carrying on activities in the fulfillment of such contract." [1975-'76 2nd ex.s. c 1 § 3; 1975 1st ex.s. c 90 § 4.]

Severability—1975-'76 2nd ex.s. c 1: "If any provision of this 1975 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 1 § 4.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

Effective date—1965 ex.s. c 173: See note following RCW 82.04.050.

**82.12.020 Use tax imposed.** (1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7), or any amusement or recreation service defined as a retail sale in RCW 82.04.050(3)(a).

(2) This tax shall apply to the use of every service defined as a retail sale in RCW 82.04.050(3)(a) and the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state.

(3) Except as provided in RCW 82.12.0252, payment by one purchaser or user of tangible personal property or service of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property or service from the taxes imposed by such chapters.

(4) The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the retail sales tax under RCW 82.08.020. [1996 c 148 § 5; 1994 c 93 § 2; 1983 c 7 § 7; 1981 2nd ex.s. c 8 § 2; 1980 c 37 § 79; 1977 ex.s. c 324 § 3; 1975-'76 2nd ex.s. c 130 § 2; 1975-'76 2nd ex.s. c 1 § 2; 1971 ex.s. c 281 § 10; 1969 ex.s. c 262 § 32; 1967 ex.s. c 149 § 22; 1965 ex.s. c 173 § 18; 1961 c 293 § 9; 1961 c 15 § 82.12.020. Prior: 1959 ex.s. c 3 § 10; 1955 ex.s. c 10 § 3; 1955 c 389 § 25; 1949 c 228 § 7; 1943 c 156 § 8; 1941 c 76 § 6; 1939 c 225 § 14; 1937 c 191 § 1; 1935 c 180 § 31; Rem. Supp. 1949 § 8370-31.]

Severability—Effective date—1996 c 148: See notes following RCW 82.04.050.

Effective date—1994 c 93: See note following RCW 82.12.010.

Construction—Severability—Effective dates—1983 c 7: See notes following RCW 82.08.020.

Intent—1980 c 37: See note following RCW 82.04.4281.

Effective date—1975-'76 2nd ex.s. c 130: See note following RCW 82.08.020.

Application to preexisting contracts—1975-'76 2nd ex.s. c 1: See note following RCW 82.12.010.

Severability—1975-'76 2nd ex.s. c 1: See note following RCW 82.12.010.

**82.12.022 Natural or manufactured gas—Use tax imposed—Exemption.** (1) There is hereby levied and there shall be collected from every person in this state a use tax for the privilege of using natural gas or manufactured gas within this state as a consumer.

(2) The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the public utility tax on gas distribution businesses under RCW 82.16.020. The "value of the article used" does not include any amounts that are paid for the hire or use of a gas distribution business as defined in RCW 82.16.010(7) in transporting the gas subject to tax under this subsection if those amounts are subject to tax under that chapter.

(3) The tax levied in this section shall not apply to the use of natural or manufactured gas delivered to the consumer by other means than through a pipeline.

(4) The tax levied in this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 82.16.020 with respect to the gas for which exemption is sought under this subsection.

(5) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 82.16.020 by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

(6) The use tax hereby imposed shall be paid by the consumer to the department.

(7) There is imposed a reporting requirement on the person who delivered the gas to the consumer to make a quarterly report to the department. Such report shall contain the volume of gas delivered, name of the consumer to whom delivered, and such other information as the department shall require by rule.

(8) The department may adopt rules under chapter 34.05 RCW for the administration and enforcement of sections 1 through 6, chapter 384, Laws of 1989. [1994 c 124 § 9; 1989 c 384 § 3.]

Intent—1989 c 384: "Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions." [1989 c 384 § 1.]

Effective date—1989 c 384: "This act shall take effect July 1, 1990." [1989 c 384 § 7.]

**82.12.023 Natural or manufactured gas, exempt from use tax imposed by RCW 82.12.020.** The tax levied by RCW 82.12.020 shall not apply in respect to the use of natural or manufactured gas that is taxable under RCW 82.12.022. [1994 c 124 § 10; 1989 c 384 § 5.]

[Title 82 RCW—page 60]

Intent—Effective date—1989 c 384: See notes following RCW 82.12.022.

**82.12.0251 Exemptions—Use by nonresident while temporarily within Washington of tangible personal property brought into Washington—Use by nonresident of motor vehicle or trailer licensed in another state—Use by resident or nonresident member of armed forces of household goods, personal effects, and private automobiles acquired in another state while a resident—"State" defined.** The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property brought into the state of Washington by a nonresident thereof for his or her use or enjoyment while temporarily within the state of Washington unless such property is used in conducting a nontransitory business activity within the state of Washington; or in respect to the use by a nonresident of Washington of a motor vehicle or trailer which is registered or licensed under the laws of the state of his or her residence, and which is not required to be registered or licensed under the laws of Washington, including motor vehicles or trailers exempt pursuant to a declaration issued by the department of licensing under RCW 46.85.060; or in respect to the use of household goods, personal effects, and private automobiles by a bona fide resident of Washington or nonresident members of the armed forces who are stationed in Washington pursuant to military orders, if such articles were acquired and used by such person in another state while a bona fide resident thereof and such acquisition and use occurred more than ninety days prior to the time he or she entered Washington.

For purposes of this section, "state" means a state of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof. [1987 c 27 § 1; 1985 c 353 § 4; 1983 c 26 § 2; 1980 c 37 § 51. Formerly RCW 82.12.030(1).]

Intent—1980 c 37: See note following RCW 82.04.4281.

**82.12.0252 Exemptions—Use of tangible personal property upon which tax has been paid—Use of tangible personal property acquired by a previous bailee from same bailor before June 9, 1961.** The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property purchased at retail or acquired by lease, gift or bailment if the sale thereof to, or the use thereof by, the present user or his bailor or donor has already been subjected to the tax under chapter 82.08 or 82.12 RCW and such tax has been paid by the present user or by his bailor or donor; or in respect to the use of property acquired by bailment and such tax has once been paid based on reasonable rental as determined by RCW 82.12.060 measured by the value of the article at time of first use multiplied by the tax rate imposed by chapter 82.08 or 82.12 RCW as of the time of first use; or in respect to the use of any article of tangible personal property acquired by bailment, if the property was acquired by a previous bailee from the same bailor for use in the same general activity and such original bailment was prior to June 9, 1961. [1980 c 37 § 52. Formerly RCW 82.12.030(2).]

Intent—1980 c 37: See note following RCW 82.04.4281.

Findings—Intent—Effective date—1996 c 149: See notes following RCW 82.32.050.

**82.12.060 Installment sales, leases, bailments.** In the case of installment sales and leases of personal property, the department, by regulation, may provide for the collection of taxes upon the installments of the purchase price, or amount of rental, as of the time the same fall due.

In the case of property acquired by bailment, the department, by regulation, may provide for payment of the tax due in installments based on the reasonable rental for the property as determined under RCW 82.12.010(1). [1975 1st ex.s. c 278 § 54; 1961 c 293 § 16; 1961 c 15 § 82.12.060. Prior: 1959 ex.s. c 3 § 13; 1959 c 197 § 8; prior: 1941 c 178 § 11, part; Rem. Supp. 1941 § 8370-34a, part.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

**82.12.070 Tax may be paid on cash receipts basis if books are so kept—Exemption for debts deductible as worthless.** The department of revenue, by general regulation, shall provide that a taxpayer whose regular books of account are kept on a cash receipts basis may file returns based upon his cash receipts for each reporting period and pay the tax herein provided upon such basis in lieu of reporting and paying the tax on all sales made during such period. A taxpayer filing returns on a cash receipts basis is not required to pay such tax on debts which are deductible as worthless for federal income tax purposes. [1982 1st ex.s. c 35 § 38; 1975 1st ex.s. c 278 § 55; 1961 c 15 § 82.12.070. Prior: 1959 ex.s. c 3 § 14; 1959 c 197 § 9; prior: 1941 c 178 § 11, part; Rem. Supp. 1941 § 8370-34a, part.]

Severability—Effective dates—1982 1st ex.s. c 35: See notes following RCW 82.08.020.

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

**82.12.080 Administration.** The provisions of chapter 82.32 RCW, insofar as applicable, shall have full force and application with respect to taxes imposed under the provisions of this chapter. [1961 c 15 § 82.12.080. Prior: 1949 c 228 § 9, part; 1945 c 249 § 8, part; 1943 c 156 § 10, part; 1939 c 225 § 18, part; 1937 c 191 § 4, part; 1935 c 180 § 35, part; Rem. Supp. 1949 § 8470-35, part.]

### Chapter 82.14

#### LOCAL RETAIL SALES AND USE TAXES

##### Sections

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**82.14.010 Legislative finding—Purpose.** The legislature finds that the several counties and cities of the state lack adequate sources of revenue to carry out essential county and municipal purposes. The legislature further finds that the most efficient and appropriate methods of deriving revenues for such purposes is to vest additional taxing powers in the governing bodies of counties and cities which they may or may not implement. The legislature intends, by enacting this chapter, to provide the means by which essential county and municipal purposes can be financially served should they choose to employ them. [1970 ex.s. c 94 § 1.]

**82.14.020 Definitions—Where retail sale occurs.** For purposes of this chapter:

(1) A retail sale consisting solely of the sale of tangible personal property shall be deemed to have occurred at the retail outlet at or from which delivery is made to the consumer;

(2) A retail sale consisting essentially of the performance of personal business or professional services shall be deemed to have occurred at the place at which such services were primarily performed;

(3) A retail sale consisting of the rental of tangible personal property shall be deemed to have occurred (a) in the case of a rental involving periodic rental payments, at the primary place of use by the lessee during the period covered by each payment, or (b) in all other cases, at the place of first use by the lessee;

(4) A retail sale within the scope of the second paragraph of RCW 82.04.050, and a retail sale of taxable personal property to be installed by the seller shall be deemed to have occurred at the place where the labor and services involved were primarily performed;

(5) A retail sale consisting of the providing to a consumer of telephone service, as defined in RCW 82.04.065, other than a sale of tangible personal property under subsection (1) of this section or a rental of tangible personal property under subsection (3) of this section, shall be deemed to have occurred at the situs of the telephone or other instrument through which the telephone service is rendered;

(6) "City" means a city or town;

(7) The meaning ascribed to words and phrases in chapters 82.04, 82.08 and 82.12 RCW, as now or hereafter amended, insofar as applicable, shall have full force and effect with respect to taxes imposed under authority of this chapter;

(8) "Taxable event" shall mean any retail sale, or any use of an article of tangible personal property, upon which a state tax is imposed pursuant to chapter 82.08 or 82.12 RCW, as they now exist or may hereafter be amended: PROVIDED, HOWEVER, That the term shall not include a retail sale taxable pursuant to RCW 82.08.150, as now or hereafter amended;

(9) "Treasurer or other legal depository" shall mean the treasurer or legal depository of a county or city. [1983 2nd ex.s. c 3 § 31; 1982 c 211 § 1; 1981 c 144 § 4; 1970 ex.s. c 94 § 3.]

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Intent—Severability—Effective date—1981 c 144:** See notes following RCW 82.16.010.

**82.14.030 Sales and use taxes authorized—Additional taxes authorized—Maximum rates.** (1) The governing body of any county or city while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose a sales and use tax in accordance with the terms of this chapter. Such tax shall be collected from those persons who are taxable by the state pursuant to chapters 82.08 and 82.12 RCW, upon the occurrence of any taxable event within the county or city as the case may be: PROVIDED, That except as provided in RCW 82.14.230, this sales and use tax shall not apply to natural or manufactured gas. The rate of such tax imposed by a county shall be five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such tax imposed by a city shall not exceed five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED, HOWEVER, That in the event a county shall impose a sales and use tax under this subsection, the rate of such tax imposed under this subsection by any city therein shall not exceed

four hundred and twenty-five one-thousandths of one percent.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5, chapter 49, Laws of 1982 1st ex. sess., in addition to the tax authorized in subsection (1) of this section, the governing body of any county or city may by resolution or ordinance impose an additional sales and use tax in accordance with the terms of this chapter. Such additional tax shall be collected upon the same taxable events upon which the tax imposed under subsection (1) of this section is levied. The rate of such additional tax imposed by a county shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such additional tax imposed by a city shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED HOWEVER, That in the event a county shall impose a sales and use tax under this subsection at a rate equal to or greater than the rate imposed under this subsection by a city within the county, the county shall receive fifteen percent of the city tax: PROVIDED FURTHER, That in the event that the county shall impose a sales and use tax under this subsection at a rate which is less than the rate imposed under this subsection by a city within the county, the county shall receive that amount of revenues from the city tax equal to fifteen percent of the rate of tax imposed by the county under this subsection. The authority to impose a tax under this subsection is intended in part to compensate local government for any losses from the phase-out of the property tax on business inventories. [1989 c 384 § 6; 1982 1st ex.s. c 49 § 17; 1970 ex.s. c 94 § 4.]

**Intent—Effective date—1989 c 384:** See notes following RCW 82.12.022.

**Intent—Construction—Effective date—Fire district funding—1982 1st ex.s. c 49:** See notes following RCW 35.21.710.

**Additional tax for high capacity transportation service:** RCW 81.104.170.  
**Imposition of additional tax on sale of real property in lieu of tax under RCW 82.14.030(2):** RCW 82.46.010(3).

**82.14.032 Alteration of tax rate pursuant to government service agreement.** The rate of sales and use tax imposed by a city under RCW 82.14.030 (1) and (2) may be altered pursuant to a government service agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 11.]

**82.14.034 Alteration of county's share of city's tax receipts pursuant to government service agreement.** The percentage of a city's sales and use tax receipts that a county receives under RCW 82.14.030 (1) and (2) may be altered pursuant to a government service agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 12.]

**82.14.036 Imposition or alteration of additional taxes—Referendum petition to repeal—Procedure—Exclusive method.** Any referendum petition to repeal a county or city ordinance imposing a tax or altering the rate of the tax authorized under RCW 82.14.030(2) shall be filed with a filing officer, as identified in the ordinance, within seven days of passage of the ordinance. Within ten days, the filing officer shall confer with the petitioner concerning form

chapter which is collected by the department of revenue shall be deposited by the state department of revenue in the local sales and use tax account hereby created in the state treasury. Moneys in the local sales and use tax account may be spent only for distribution to counties, cities, transportation authorities, and public facilities districts imposing a sales and use tax. All administrative provisions in chapters 82.03, 82.08, 82.12, and 82.32 RCW, as they now exist or may hereafter be amended, shall, insofar as they are applicable to state sales and use taxes, be applicable to taxes imposed pursuant to this chapter. Except as provided in RCW 43.08.190, all earnings of investments of balances in the local sales and use tax account shall be credited to the local sales and use tax account and distributed to the counties, cities, transportation authorities, and public facilities districts monthly. [1991 sp.s. c 13 § 34; 1991 c 207 § 2; 1990 2nd ex.s. c 1 § 201; 1985 c 57 § 81; 1981 2nd ex.s. c 4 § 10; 1971 ex.s. c 296 § 3; 1970 ex.s. c 94 § 6.]

**Effective dates—Severability—1991 sp.s. c 13:** See notes following RCW 18.08.240.

**Applicability—1990 2nd ex.s. c 1 §§ 201-204:** "Sections 201 through 204 of this act shall not be effective for earnings on balances prior to July 1, 1990, regardless of when a distribution is made." [1990 2nd ex.s. c 1 § 205.]

**Severability—1990 2nd ex.s. c 1:** See note following RCW 82.14.300.

**Effective date—1985 c 57:** See note following RCW 18.04.105.

**Severability—1981 2nd ex.s. c 4:** See note following RCW 43.85.130.

**Legislative finding, declaration—Severability—1971 ex.s. c 296:** See notes following RCW 82.14.045.

**82.14.060 Distributions to counties, cities, transportation authorities, and public facilities districts—Imposition at excess rates, effect.** Monthly the state treasurer shall make distribution from the local sales and use tax account to the counties, cities, transportation authorities, and public facilities districts the amount of tax collected on behalf of each taxing authority, less the deduction provided for in RCW 82.14.050. The state treasurer shall make the distribution under this section without appropriation.

In the event that any ordinance or resolution imposes a sales and use tax at a rate in excess of the applicable limits contained herein, such ordinance or resolution shall not be considered void in toto, but only with respect to that portion of the rate which is in excess of the applicable limits contained herein. [1991 c 207 § 3; 1990 2nd ex.s. c 1 § 202; 1981 2nd ex.s. c 4 § 11; 1971 ex.s. c 296 § 4; 1970 ex.s. c 94 § 7.]

**Applicability—1990 2nd ex.s. c 1:** See note following RCW 82.14.050.

**Severability—1990 2nd ex.s. c 1:** See note following RCW 82.14.300.

**Severability—1981 2nd ex.s. c 4:** See note following RCW 43.85.130.

**Legislative finding, declaration—Severability—1971 ex.s. c 296:** See notes following RCW 82.14.045.

**82.14.070 Consistency and uniformity with other taxes—Rules—Ordinances—Effective dates.** It is the intent of this chapter that any local sales and use tax adopted pursuant to this chapter be as consistent and uniform as possible with the state sales and use tax and with other local

sales and use taxes adopted pursuant to this chapter. It is further the intent of this chapter that the local sales and use tax shall be imposed upon an individual taxable event simultaneously with the imposition of the state sales or use tax upon the same taxable event. The rule making powers of the state department of revenue contained in RCW 82.08.060 and 82.32.300 shall be applicable to this chapter. The department shall, as soon as practicable, and with the assistance of the appropriate associations of county prosecutors and city attorneys, draft a model resolution and ordinance. No resolution or ordinance or any amendment thereto adopted pursuant to this chapter shall be effective, except upon the first day of a calendar month. [1970 ex.s. c 94 § 10.]

**82.14.080 Deposit of tax prior to due date—Credit against future tax or assessment—When fund designation permitted—Use of tax revenues received in connection with large construction projects.** The taxes provided by this chapter may be deposited by any taxpayer prior to the due date thereof with the treasurer or other legal depository for the benefit of the funds to which they belong to be credited against any future tax or assessment that may be levied or become due from the taxpayer: PROVIDED, That the taxpayer may with the concurrence of the legislative authority designate a particular fund of such county or city against which such prepayment of tax or assessment is made. Such prepayment of taxes or assessments shall not be considered to be a debt for the purpose of the limitation of indebtedness imposed by law on a county or city.

By agreement made pursuant to chapter 39.34 RCW, counties or cities may utilize tax revenues received under the authority of this chapter in connection with large construction projects, including energy facilities as defined in RCW 80.50.020, for any purpose within their power or powers, privileges or authority exercised or capable of exercise by such counties or cities including, but not limited to, the purpose of the mitigation of socioeconomic impacts that may be caused by such large construction projects: PROVIDED, That the taxable event need not take place within the jurisdiction where the socioeconomic impact occurs if an intergovernmental agreement provides for redistribution. [1982 c 211 § 2.]

**82.14.090 Payment of tax prior to taxable event—When permitted—Deposit with treasurer—Credit against future tax—When fund designation permitted.** When permitted by resolution or ordinance, any tax authorized by this chapter may be paid prior to the taxable event to which it may be attributable. Such prepayment shall be made by deposit with the treasurer or other legal depository for the benefit of the funds to which they belong. They shall be credited by any county or city against any future tax that may become due from a taxpayer: PROVIDED, That the taxpayer with the concurrence of the legislative authority may designate a particular fund of such county or city against which such prepayment of tax is made. Prepayment of taxes under this section shall not relieve any taxpayer from remitting the full amount of any tax imposed under the authority of this chapter upon the occurrence of the taxable event. [1982 c 211 § 3.]

the number of months the city imposes the tax authorized under RCW 82.14.030(2) at the full rate.

(d) The department of revenue shall advise the state treasurer of the amounts calculated under (b) and (c) of this subsection and the state treasurer shall distribute these amounts to the new city from the municipal sales and use tax equalization account subject to the limitations imposed in subsection (6) of this section.

(e) Revenues estimated under this subsection shall not affect the calculation of the state-wide weighted average per capita level of revenues for all cities made under subsection (1) of this section.

(6) If inadequate revenues exist in the municipal sales and use tax equalization account to make the distributions under subsection (3), (4), or (5) of this section, then the distributions under subsections (3), (4), and (5) of this section shall be reduced ratably among the qualifying cities. At such time during the year as additional funds accrue to the municipal sales and use tax equalization account, additional distributions shall be made under subsections (3), (4), and (5) of this section to the cities.

(7) If the level of revenues in the municipal sales and use tax equalization account exceeds the amount necessary to make the distributions under subsections (2) through (5) of this section, then the additional revenues shall be apportioned among the several cities within the state ratably on the basis of population as last determined by the office of financial management: PROVIDED, That no such distribution shall be made to those cities receiving a distribution under subsection (2) of this section. [1996 c 64 § 1; 1991 sp.s. c 13 § 16; 1990 2nd ex.s. c 1 § 701; 1990 c 42 § 314; 1985 c 57 § 83; 1984 c 225 § 2; 1982 1st ex.s. c 49 § 22.]

Effective date—1996 c 64: "This act shall take effect July 1, 1996." [1996 c 64 § 2.]

Effective dates—Severability—1991 sp.s. c 13: See notes following RCW 18.08.240.

Effective dates—1990 2nd ex.s. c 1: See note following RCW 84.52.010.

Severability—1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Purpose—Headings—Severability—Effective dates—Application—Implementation—1990 c 42: See notes following RCW 82.36.025.

Effective date—1985 c 57: See note following RCW 18.04.105.

Intent—1984 c 225: "It is the intent of the legislature to provide for the allocation of moneys by the department of revenue from the municipal sales and use tax equalization account to cities and towns initially incorporated on or after January 1, 1983." [1984 c 225 § 1.]

Applicability—1984 c 225: "Sections 1 and 2 of this act apply to distributions for calendar year 1984 and thereafter which are made to cities and towns that were initially incorporated on or after January 1, 1983, and that impose the tax authorized by RCW 82.14.030(1)." [1984 c 225 § 3.] "Sections 1 and 2 of this act" consist of the intent section footnoted above and the 1984 c 225 amendment to RCW 82.14.210.

Rules—1984 c 225: "The department of revenue shall adopt rules as necessary to implement this act." [1984 c 225 § 7.]

Intent—Construction—Effective date—Fire district funding—1982 1st ex.s. c 49: See notes following RCW 35.21.710.

**82.14.212 Transfer of funds pursuant to government service agreement.** Funds that are distributed to counties or cities pursuant to RCW 82.14.200 or 82.14.210 may be transferred by the recipient county or city to another unit of local government pursuant to a government service

agreement as provided in RCW 36.115.040 and 36.115.050. [1994 c 266 § 13.]

**82.14.215 Apportionment and distribution—Withholding revenue for noncompliance.** The governor may notify and direct the state treasurer to withhold the revenues to which the county or city is entitled under this chapter if a county or city is found to be in noncompliance pursuant to RCW 36.70A.340. [1991 sp.s. c 32 § 35.]

Section headings not law—1991 sp.s. c 32: See RCW 36.70A.902.

**82.14.220 Figures for apportionments and distributions under RCW 82.14.200 and 82.14.210.** The apportionments and distributions by the state treasurer under RCW 82.14.200 and 82.14.210 shall be based on figures supplied by the department of revenue. [1984 c 225 § 4.]

Rules—1984 c 225: See note following RCW 82.14.210.

**82.14.230 Natural or manufactured gas—Cities may impose use tax.** (1) The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer.

(2) The tax shall be imposed in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the tax on natural gas businesses under RCW 35.21.870 in the city in which the article is used. The "value of the article used," does not include any amounts that are paid for the hire or use of a natural gas business in transporting the gas subject to tax under this subsection if those amounts are subject to tax under RCW 35.21.870.

(3) The tax imposed under this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax under RCW 35.21.870 with respect to the gas for which exemption is sought under this subsection.

(4) There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

(a) The person who sold the gas to the consumer when that tax is a gross receipts tax similar to that imposed pursuant to RCW 35.21.870 by another state with respect to the gas for which a credit is sought under this subsection; or

(b) The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

(5) The use tax hereby imposed shall be paid by the consumer. The administration and collection of the tax hereby imposed shall be pursuant to RCW 82.14.050. [1989 c 384 § 2.]

Intent—Effective date—1989 c 384: See notes following RCW 82.12.022.

**82.14.300 Local government criminal justice assistance—Finding.** The legislature finds and declares that local government criminal justice systems are in need of assistance. Many counties and cities are unable to provide sufficient funding for additional police protection, mitigation

under RCW 82.14B.070 and 82.14B.090. [1991 c 54 § 14; c 17 § 4.]

Referral to electorate—1991 c 54: See note following RCW 82.14B.030.

**82.14B.900 Severability—1981 c 160.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1981 c 160 § 7.]

## Chapter 82.16 PUBLIC UTILITY TAX

### Sections

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**82.16.010 Definitions.** For the purposes of this chapter, unless otherwise required by the context:

(1) "Railroad business" means the business of operating any railroad, by whatever power operated, for public use in the conveyance of persons or property for hire. It shall not, however, include any business herein defined as an urban transportation business.

(2) "Express business" means the business of carrying property for public hire on the line of any common carrier operated in this state, when such common carrier is not owned or leased by the person engaging in such business.

(3) "Railroad car business" means the business of operating stock cars, furniture cars, refrigerator cars, fruit cars, poultry cars, tank cars, sleeping cars, parlor cars, buffet cars, tourist cars, or any other kinds of cars used for transportation of property or persons upon the line of any railroad operated in this state when such railroad is not owned or leased by the person engaging in such business.

(4) "Water distribution business" means the business of operating a plant or system for the distribution of water for hire or sale.

(5) "Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.

(6) "Telegraph business" means the business of affording telegraphic communication for hire.

(7) "Gas distribution business" means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural.

(8) "Motor transportation business" means the business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier or contract carrier as defined by RCW 81.68.010 and 81.80.010: PROVIDED, That "motor transportation business" shall not mean or include the transportation of logs or other forest products exclusively upon private roads or private highways.

(9) "Urban transportation business" means the business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. Included herein, but without limiting the scope hereof, is the business of operating passenger vehicles of every type and also the business of operating cartage, pickup, or delivery services, including in such services the collection and distribution of property arriving from or destined to a point within or without the state, whether or not such collection or distribution be made by the person performing a local or interstate line-haul of such property.

(10) "Public service business" means any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), and (9) or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature, except telephone business as defined in RCW 82.04.065 and low-level radioactive waste site operating companies as redefined in RCW 81.04.010. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, toll bridge, toll logging road, water transportation and wharf businesses.

(11) "Tugboat business" means the business of operating tugboats, towboats, wharf boats or similar vessels in the towing or pushing of vessels, barges or rafts for hire.

(12) "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(13) The meaning attributed, in chapter 82.04 RCW, to the term "tax year," "person," "value proceeding or accruing," "business," "engaging in business," "in this state," "within this state," "cash discount" and "successor" shall apply equally in the provisions of this chapter. [1996 c 150 § 1; 1994 c 163 § 4; 1991 c 272 § 14; 1989 c 302 § 203. Prior: 1989 c 302 § 102; 1986 c 226 § 1; 1983 2nd ex.s. c 3 § 32; 1982 2nd ex.s. c 9 § 1; 1981 c 144 § 2; 1965 ex.s. c 173 § 20; 1961 c 293 § 12; 1961 c 15 § 2 82.16.010; prior:

1959 ex.s. c 3 § 15; 1955 c 389 § 28; 1949 c 228 § 10; 1943 c 156 § 10; 1941 c 178 § 12; 1939 c 225 § 20; 1937 c 227 § 11; 1935 c 180 § 37; Rem. Supp. 1949 § 8370-37.]

**Effective date—1996 c 150:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 25, 1996]." [1996 c 150 § 3.]

**Effective dates—1991 c 272:** See RCW 81.108.901.

**Finding, purpose—1989 c 302:** See note following RCW 82.04.120.

**Effective date—1986 c 226:** "This act shall take effect July 1, 1986." [1986 c 226 § 3.]

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Effective date—1982 2nd ex.s. c 9:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect August 1, 1982." [1982 2nd ex.s. c 9 § 4.]

**Intent—1981 c 144:** "The legislature recognizes that there have been significant changes in the nature of the telephone business in recent years. Once solely the domain of regulated monopolies, the telephone business has now been opened up to competition with respect to most of its services and equipment. As a result of this competition, the state and local excise tax structure in the state of Washington has become discriminatory when applied to regulated telephone company transactions that are similar in nature to those consummated by nonregulated competitors. Telephone companies are forced to operate at a significant state and local tax disadvantage when compared to these nonregulated competitors.

To remedy this situation, it is the intent of the legislature to place telephone companies and nonregulated competitors of telephone companies on an equal excise tax basis with regard to the providing of similar goods and services. Therefore competitive telephone services shall for excise tax purposes only, unless otherwise provided, be treated as retail sales under the applicable state and local business and occupation and sales and use taxes. This shall not affect any requirement that regulated telephone companies have under Title 80 RCW, unless otherwise provided.

Nothing in this act affects the authority and responsibility of the Washington utilities and transportation commission to set fair, just, reasonable, and sufficient rates for telephone service." [1981 c 144 § 1.]

**Severability—1981 c 144:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 144 § 12.]

**Effective date—1981 c 144:** "This act shall take effect on January 1, 1982." [1981 c 144 § 13.]

**Effective date—1965 ex.s. c 173:** See note following RCW 82.04.050.

**82.16.020 Public utility tax imposed—Additional tax imposed—Deposit of moneys.** (1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(a) Express, sewerage collection, and telegraph businesses: Three and six-tenths percent;

(b) Light and power business: Three and sixty-two one-hundredths percent;

(c) Gas distribution business: Three and six-tenths percent;

(d) Urban transportation business: Six-tenths of one percent;

(e) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(f) Motor transportation, railroad, railroad car, and tugboat businesses, and all public service businesses other

than ones mentioned above: One and eight-tenths of one percent;

(g) Water distribution business: Four and seven-tenths percent.

(2) An additional tax is imposed equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under subsection (1) of this section.

(3) Twenty percent of the moneys collected under subsection (1) of this section on water distribution businesses and sixty percent of the moneys collected under subsection (1) of this section on sewerage collection businesses shall be deposited in the public works assistance account created in RCW 43.155.050. [1996 c 150 § 2; 1989 c 302 § 204; 1986 c 282 § 14; 1985 c 471 § 10; 1983 2nd ex.s. c 3 § 13; 1982 2nd ex.s. c 5 § 1; 1982 1st ex.s. c 35 § 5; 1971 ex.s. c 299 § 12; 1967 ex.s. c 149 § 24; 1965 ex.s. c 173 § 21; 1961 c 293 § 13; 1961 c 15 § 82.16.020. Prior: 1959 ex.s. c 3 § 16; 1939 c 225 § 19; 1935 c 180 § 36; RRS § 8370-36.]

**Effective date—1996 c 150:** See note following RCW 82.16.010.

**Finding, purpose—1989 c 302:** See note following RCW 82.04.120.

**Severability—1986 c 282:** See RCW 82.18.900.

**Severability—Effective date—1985 c 471:** See notes following RCW 82.04.260.

**Construction—Severability—Effective dates—1983 2nd ex.s. c 3:** See notes following RCW 82.04.255.

**Effective date—1982 2nd ex.s. c 5:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect August 1, 1982." [1982 2nd ex.s. c 5 § 2.]

**Severability—Effective dates—1982 1st ex.s. c 35:** See notes following RCW 82.08.020.

**Effective dates—Severability—1971 ex.s. c 299:** See notes following RCW 82.04.050.

**82.16.030 Taxable under each schedule if within its purview.** Every person engaging in businesses which are within the purview of two or more of schedules of RCW 82.16.020(1), shall be taxable under each schedule applicable to the businesses engaged in. [1989 c 302 § 205; 1982 1st ex.s. c 35 § 6; 1961 c 15 § 82.16.030. Prior: 1935 c 180 § 38; RRS § 8370-38.]

**Finding, purpose—1989 c 302:** See note following RCW 82.04.120.

**Severability—Effective dates—1982 1st ex.s. c 35:** See notes following RCW 82.08.020.

**82.16.040 Exemption.** The provisions of this chapter shall not apply to persons engaging in one or more businesses taxable under this chapter whose total gross income is less than two thousand dollars for a monthly period or portion thereof. Any person claiming exemption under this section may be required to file returns even though no tax may be due. If the total gross income for a taxable monthly period is two thousand dollars, or more, no exemption or deductions from the gross operating revenue is allowed by this provision. [1996 c 111 § 4; 1961 c 15 § 82.16.040. Prior: 1959 ex.s. c 3 § 17; 1959 c 197 § 27; 1935 c 180 § 39; RRS § 8370-39.]

**Findings—Purpose—Effective date—1996 c 111:** See notes following RCW 82.32.030.

**82.16.045 Exemptions and credits—Pollution control facilities.** See chapter 82.34 RCW.

**82.16.047 Exemptions—Ride sharing.** This chapter does not apply to any funds received in the course of commuter ride sharing or ride sharing for the elderly and the handicapped in accordance with \*RCW 46.74.010. [1979 c 111 § 18.]

\*Reviser's note: RCW 46.74.010 was amended by 1996 c 244 § 2 changing the term "ride sharing for the elderly and the handicapped" to "ride sharing for persons with special transportation needs."

Severability—1979 c 111: See note following RCW 46.74.010.

**82.16.048 Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Penalty—Report to legislature. (Expires December 31, 2000.)** (1) Employers in this state who are taxable under this chapter and provide financial incentives to their employees for ride sharing, for using public transportation, or for using nonmotorized commuting before June 30, 2000, shall be allowed a credit for amounts paid to or on behalf of employees for ride sharing in vehicles carrying two or more persons, for using public transportation, or for using nonmotorized commuting, not to exceed sixty dollars per employee per year. The credit shall be equal to the amount paid to or on behalf of each employee multiplied by fifty percent, but may not exceed sixty dollars per employee per year. For ride sharing in vehicles carrying two persons, the credit shall be equal to the amount paid to or on behalf of each employee multiplied by thirty percent, but may not exceed sixty dollars per employee per year. The credit may not exceed the amount of tax that would otherwise be due under this chapter.

(2) Application for tax credit under this chapter may only be made in the form and manner prescribed in rules adopted by the department.

(3) The credit shall be taken not more than once quarterly and not less than once annually against taxes due for the same calendar year in which the amounts for which credit is claimed were paid to or on behalf of employees for ride sharing, for using public transportation, or for using nonmotorized commuting and must be claimed by the due date of the last tax return for the calendar year in which the payment is made.

(4) The director shall on the 25th of February, May, August, and November of each year advise the state treasurer of the amount of credit taken during the preceding calendar quarter ending on the last day of December, March, June, and September, respectively.

(5) On the first of April, July, October, and January of each year, the state treasurer based upon information provided by the department shall deposit a sum equal to the dollar amount of the credit provided under subsection (1) of this section from the air pollution control account to the general fund.

(6) The commute trip reduction task force shall determine the effectiveness of this tax credit as part of its ongoing evaluation of the commute trip reduction law and report no later than December 1, 1997, to the legislative transportation committee and to the fiscal committees of the house of representatives and the senate. The report shall include information on the amount of tax credits claimed to date and recommendations on future funding for the tax credit program.

(7) Any person who knowingly makes a false statement of a material fact in the application for a credit under subsection (1) of this section is guilty of a gross misdemeanor.

(8) A person may not receive credit for amounts paid to or on behalf of the same employee under both this section and RCW 82.04.4453. [1996 c 128 § 3; 1994 c 270 § 4.]

Effective date—Expiration date—1996 c 128: See note following RCW 82.04.4453.

Finding—Expiration date—1994 c 270: See notes following RCW 82.04.4453.

Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Definitions: RCW 82.04.4455.

**82.16.049 Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Ceiling. (Expires December 31, 2000.)** (1) The department shall keep a running total of all credits granted under RCW 82.04.4453 and 82.16.048 during each calendar year, and shall disallow any credits that would cause the tabulation for any calendar year to exceed one million five hundred thousand dollars.

(2) No employer shall be eligible for tax credits under RCW 82.04.4453 and 82.16.048 in excess of one hundred thousand dollars in any calendar year.

(3) No employer shall be eligible for tax credits under RCW 82.16.048 in excess of the amount of tax that would otherwise be due under this chapter.

(4) No portion of an application for credit disallowed under this section may be carried back or carried forward. [1996 c 128 § 4; 1994 c 270 § 5.]

Effective date—Expiration date—1996 c 128: See note following RCW 82.04.4453.

Finding—Expiration date—1994 c 270: See notes following RCW 82.04.4453.

Credit—Ride-sharing, public transportation, or nonmotorized commuting incentives—Definitions: RCW 82.04.4455.

**82.16.050 Deductions in computing tax.** In computing tax there may be deducted from the gross income the following items:

(1) Amounts derived by municipally owned or operated public service businesses, directly from taxes levied for the support or maintenance thereof: PROVIDED, That this section shall not be construed to exempt service charges which are spread on the property tax rolls and collected as taxes;

(2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, for resale as such within this state. This deduction is allowed only with respect to water distribution, light and power, gas distribution or other public service businesses which furnish water, electrical energy, gas or any other commodity in the performance of public service businesses;

(3) Amounts actually paid by a taxpayer to another person taxable under this chapter as the latter's portion of the consideration due for services furnished jointly by both, if the total amount has been credited to and appears in the gross income reported for tax by the former;

(4) The amount of cash discount actually taken by the purchaser or customer;

(5) The amount of credit losses actually sustained by taxpayers whose regular books of accounts are kept upon an accrual basis;

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(7) Amounts derived from the distribution of water through an irrigation system, for irrigation purposes;

(8) Amounts derived from the transportation of commodities from points of origin in this state to final destination outside this state, or from points of origin outside this state to final destination in this state, with respect to which the carrier grants to the shipper the privilege of stopping the shipment in transit at some point in this state for the purpose of storing, manufacturing, milling, or other processing, and thereafter forwards the same commodity, or its equivalent, in the same or converted form, under a through freight rate from point of origin to final destination; and amounts derived from the transportation of commodities from points of origin in the state to an export elevator, wharf, dock or ship side on tidewater or navigable tributaries thereto from which such commodities are forwarded, without intervening transportation, by vessel, in their original form, to interstate or foreign destinations: PROVIDED, That no deduction will be allowed when the point of origin and the point of delivery to such an export elevator, wharf, dock, or ship side are located within the corporate limits of the same city or town;

(9) Amounts derived from the production, sale, or transfer of electrical energy for resale or consumption outside the state;

(10) Amounts derived from the distribution of water by a nonprofit water association and used for capital improvements by that nonprofit water association;

(11) Amounts paid by a sewerage collection business taxable under RCW 82.16.020(1)(a) to a person taxable under chapter 82.04 RCW for the treatment or disposal of sewage. [1994 c 124 § 12; 1989 c 302 § 103; 1987 c 207 § 1; 1982 2nd ex.s. c 9 § 3; 1977 ex.s. c 368 § 1; 1967 ex.s. c 149 § 25; 1965 ex.s. c 173 § 22; 1961 c 15 § 82.16.050. Prior: 1959 ex.s. c 3 § 18; 1949 c 228 § 11; 1937 c 227 § 12; 1935 c 180 § 40; Rem. Supp. 1949 § 8370-40.]

Finding, purpose—1989 c 302: See note following RCW 82.04.120.

Effective date—1982 2nd ex.s. c 9: See note following RCW 82.16.010.

**82.16.053 Deductions in computing tax—Light and power businesses.** (1) In computing tax under this chapter, a light and power business may deduct from gross income the lesser of the amounts determined under subsections (2) through (4) of this section.

(2)(a) Fifty percent of wholesale power cost paid during the reporting period, if the light and power business has fewer than five and one-half customers per mile of line.

(b) Forty percent of wholesale power cost paid during the reporting period, if the light and power business has more than five and one-half but less than eleven customers per mile.

(c) Thirty percent of the wholesale power cost paid during the reporting period, if the light and power business has more than eleven but less than seventeen customers per mile of line.

(d) Zero if the light and power business has more than seventeen customers per mile of line.

(3) Wholesale power cost multiplied by the percentage by which the average retail electric power rates for the light and power business exceed the state average electric power rate. If more than fifty percent of the kilowatt hours sold by a light and power business are sold to irrigators, then only sales to nonirrigators shall be used to calculate the average electric power rate for that light and power business. For purposes of this subsection, the department shall determine state average electric power rate each year based on the most recent available data and shall inform taxpayers of its determination.

(4) Four hundred thousand dollars per month. [1996 c 145 § 1; 1994 c 236 § 1.]

Effective date—1996 c 145: "This act shall take effect July 1, 1996." [1996 c 145 § 2.]

Effective date—1994 c 236: "This act shall take effect July 1, 1994." [1994 c 236 § 2.]

**82.16.055 Deductions relating to energy conservation or production from renewable resources.** (1) In computing tax under this chapter there shall be deducted from the gross income:

(a) An amount equal to the cost of production at the plant for consumption within the state of Washington of:

(i) Electrical energy produced or generated from cogeneration as defined in RCW 82.35.020; and

(ii) Electrical energy or gas produced or generated from renewable energy resources such as solar energy, wind energy, hydroelectric energy, geothermal energy, wood, wood wastes, municipal wastes, agricultural products and wastes, and end-use waste heat; and

(b) Those amounts expended to improve consumers' efficiency of energy end use or to otherwise reduce the use of electrical energy or gas by the consumer.

(2) This section applies only to new facilities for the production or generation of energy from cogeneration or renewable energy resources or measures to improve the efficiency of energy end use on which construction or installation is begun after June 12, 1980, and before January 1, 1990.

(3) Deductions under subsection (1)(a) of this section shall be allowed for a period not to exceed thirty years after the project is placed in operation.

(4) Measures or projects encouraged under this section shall at the time they are placed in service be reasonably expected to save, produce, or generate energy at a total incremental system cost per unit of energy delivered to end use which is less than or equal to the incremental system cost per unit of energy delivered to end use from similarly available conventional energy resources which utilize nuclear energy or fossil fuels and which the gas or electric utility could acquire to meet energy demand in the same time period.

(5) The department of revenue, after consultation with the utilities and transportation commission in the case of investor-owned utilities and the governing bodies of locally regulated utilities, shall determine the eligibility of individual projects and measures for deductions under this section. [1980 c 149 § 3.]

Legislative finding—1980 c 149: See RCW 80.28.024.

**RCW 35.21.870**

**Electricity, telephone, natural gas, or steam energy business — Tax limited to six percent — Exception.**

(1) No city or town may impose a tax on the privilege of conducting an electrical energy, natural gas, steam energy, or telephone business at a rate which exceeds six percent unless the rate is first approved by a majority of the voters of the city or town voting on such a proposition.

(2) If a city or town is imposing a rate of tax under subsection (1) of this section in excess of six percent on April 20, 1982, the city or town shall decrease the rate to a rate of six percent or less by reducing the rate each year on or before November 1st by ordinances to be effective on January 1st of the succeeding year, by an amount equal to one-tenth the difference between the tax rate on April 20, 1982, and six percent.

Nothing in this subsection prohibits a city or town from reducing its rates by amounts greater than the amounts required in this subsection.

Voter approved rate increases under subsection (1) of this section shall not be included in the computations under this subsection.

[1984 c 225 § 6; 1983 c 99 § 5; 1982 1st ex.s. c 49 § 4.]

**Notes:**

**Rules -- 1984 c 225:** See note following RCW 82.14.210.

**Severability -- 1983 c 99:** See note following RCW 82.14.200.

**Intent -- Construction -- Effective date -- Fire district funding -- 1982 1st ex.s. c 49:** See notes following RCW 35.21.710.

**Chapter 6A.90**

**NATURAL OR MANUFACTURED GAS TAX**

Sections:

- 6A.90.010 Administrative provisions.
- 6A.90.020 Definitions.
- 6A.90.030 Occupations subject to tax – Rate.
- 6A.90.040 Natural or manufactured gas use tax.
- 6A.90.050 Exemptions and deductions.
- 6A.90.060 Monthly payment of tax.
- 6A.90.070 Overpayment of tax.

**6A.90.010 Administrative provisions.**

The administrative provisions of Chapter 6A.10 shall be fully applicable to the provisions of this chapter except as expressly stated to the contrary herein. (Ord. 27297 § 1; passed Nov. 23, 2004)

**6A.90.020 Definitions.**

“Gross income” means the value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees, or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses. (Ord. 27297 § 1; passed Nov. 23, 2004)

**6A.90.030 Occupations subject to tax - Rate.**

Pursuant to RCW 82.14.230, there is hereby levied upon and shall be collected from every person engaged in or carrying on the business of transmitting, distributing, and selling natural or manufactured gas a fee or occupation tax equal to 6 percent of the total gross income from such business in the City.

Activity	or	Rate
Natural		6%
Manufactured Gas		

(Ord. 27297 § 1; passed Nov. 23, 2004)

**6A.90.040 Natural or manufactured gas use tax.**

A. Pursuant to RCW 82.14.230, there is fixed and imposed upon every person a use tax for the privilege of using natural gas or manufactured gas in the City as a consumer.

B. The tax shall be in an amount equal to the value of the article used by the taxpayer multiplied by a rate which is equal to the rate specified in Section 6A.90.030 of this chapter.

C. The “value of the article used” shall have the meaning set forth in RCW 82.12.010(2)(a), and does not include any amounts that are paid for the hire or use of a natural gas business in transporting the gas subject to tax under this section if those amounts are subject to a tax which is imposed and paid under Section 6A.90.030 of this chapter.

D. The tax under this section shall not apply to the use of natural or manufactured gas if the person who sold the gas to the consumer has paid a tax imposed pursuant to Section 6A.90.030 of this chapter.

E. There shall be a credit against the tax levied under this section in an amount equal to any tax paid by:

1. The person who sold the gas to the consumer, when that tax is a gross receipts tax similar to that imposed pursuant to Section 6A.90.030 of this chapter; by another state with respect to the gas for which a credit is sought under the subsection; or
2. The person consuming the gas upon which a use tax similar to the tax imposed by this section was paid to another state with respect to the gas for which a credit is sought under this subsection.

F. The use tax hereby imposed shall be paid by the consumer. The administration and collection of the tax hereby imposed shall be pursuant to RCW 82.14.050. (Ord. 27297 § 1; passed Nov. 23, 2004)

**6A.90.050 Exemptions and deductions.**

There shall be exempted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from business which the City is prohibited from taxing under the constitution or laws of the state of Washington or the United States or the City Charter, and any retail sales or use taxes collected by the taxpayer from consumers to be remitted to the Washington State Department of Revenue.

There shall also be deducted from gross income subject to tax under this chapter income derived from

## Tacoma Municipal Code

the activities of selling tangible personal property or providing services of a type that can be sold or provided by persons not in the business of transmitting, distributing, or selling natural gas for which a separate charge is made; provided, that income derived from activity incidental to transmitting, distributing, or selling natural gas may not be deducted from gross income subject to the tax under this chapter. Income excluded or deducted from the measure of tax under this chapter as a result of this section may be taxable under another chapter within Subtitle 6A, as appropriate.

Activity incidental to the transmission, distribution, or sale of natural gas involves service performed in connection with the transmission, distribution, or sale of natural gas for an existing natural gas customer. Incidental service charges include charges such as line extensions, testing, replacing meters, line repairs, line raisings, and meter reading fees, as well as charges for interest or penalties. Incidental activities do not include the sale of appliances. (Ord. 27297 § 1; passed Nov. 23, 2004)

### **6A.90.060 Monthly payment of tax.**

The license fee or tax required by this chapter is based upon gross income and the taxpayer shall pay his or her fee or tax monthly. (Ord. 27297 § 1; passed Nov. 23, 2004)

### **6A.90.070 Overpayment of tax.**

If, upon application by a taxpayer for a refund or for an audit of his or her records or upon an examination of the returns or records of any taxpayer, it is determined by the Director that within 2 years immediately preceding the receipt by the Director of the application by the taxpayer for a refund or for an audit, or, in the absence of such an application, within the 2 years immediately preceding the commencement by the Director of such examination, a tax has been paid in excess of that properly due, the excess amount paid within such period of 2 years shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at his or her option. No refund or credit shall be allowed with respect to any payment made to the Director more than 2 years before the date of such application or examination. Where a refund or credit may not be made because of the lapse of said 2-year period, the amount of the refund or credit which would otherwise be allowable for the portion of the statutory assessment period preceding the 2-year period may be offset against the amount of any tax deficiency which may be determined by the Director for such preceding period. Interest upon any such refund or credit shall

be allowed by the Director at the rate of 3 percent per annum. (Ord. 27297 § 1; passed Nov. 23, 2004)

FINAL BILL REPORT

SB 1574

BY House Committee on Revenue (originally sponsored by Representatives Wang, D. Sommers, Haugen and Nealey)

Authorizing cities and towns to impose an excise tax on brokered natural gas.

House Committee on Revenue

Senate Committee on Ways & Means

AS PASSED LEGISLATURE

BACKGROUND:

The state and some cities levy a public utility tax on the gross income received by natural gas utilities from the production or distribution of gas in Washington State. The state public utility tax rate for natural gas utilities is 3.852 percent. Cities may levy a utility tax at a rate not exceeding 6 percent unless city voters approve a higher rate.

Until recently, federal regulations required users of natural gas to purchase directly from in-state natural gas utilities. Due to changes in these regulations, large companies may now bypass in-state utilities and obtain natural gas directly from an out-of-state producer or broker. Purchases of brokered natural gas are not subject to public utility taxation, and are subject to sales or use tax instead.

Manufactured gas is treated the same as natural gas for tax purposes.

SUMMARY:

Brokered natural gas is exempted from both state and local sales and use taxation. A new state tax is imposed for the privilege of using natural gas in the state, with a rate equal to the state public utility tax on non-brokered natural gas. Cities are authorized to impose a new tax for the privilege of using natural gas in the city, with a rate equal to the city public utility tax on natural gas.

These new state and city use taxes do not apply to the use of natural gas if the seller of the gas has paid a state or city public utility tax on the gas. The tax base does not include

charges for the transmission of gas that is subject to the new use taxes.

Credits are allowed against the new use taxes for 1) taxes similar to Washington's state and local public utility taxes that are paid by the seller to another state, and 2) taxes similar to the use taxes imposed by this bill that are paid by the consumer to another state.

The consumer of the gas is responsible for payment of taxes to the Department of Revenue. The person delivering the gas to the consumer must report quarterly to the department on the volume of gas delivered and the name of the consumer to whom the gas was delivered.

VOTES ON FINAL PASSAGE:

House	93	4	
Senate	45	0	(Senate amended)
House	92	5	(House concurred)

EFFECTIVE: July 1, 1990

# FINAL BILL REPORT

## SB 5783

C 168 L 03

Synopsis as Enacted

**Brief Description:** Implementing the streamlined sales and use tax agreement.

**Sponsors:** Senators Finkbeiner and Regala; by request of Department of Revenue.

**Senate Committee on Ways & Means**  
**House Committee on Finance**

**Background:** Washington and 45 other states impose retail sales and use taxes. These taxes are imposed on the retail sale or use of most items of tangible personal property and some services. The rates, definitions, and administrative provisions relating to sales and use taxes vary greatly among the 7,500 state and local taxing jurisdictions. This variety is one reason cited in *Quill v. North Dakota*, 112 S.Ct. 1904 (1992), where the United States Supreme Court held that the federal commerce clause prohibits a state from requiring mail-order, and by extension internet, firms to collect sales tax unless they have a physical presence in the state. Physical presence is constituted by property, inventory, or employees in the state.

An effort was started in early 2000 by the Federation of Tax Administrators, the Multistate Tax Commission, the National Conference of State Legislatures, and the National Governors Association to simplify and modernize sales and use tax collection and administration nationwide. The effort is known as the Streamlined Sales Tax Project. The project seeks to incorporate uniform definitions within tax bases, simplify audit and administrative procedures, and explore emerging technologies to reduce the burdens of tax collection, for both main street and remote sellers. The Department of Revenue (Department) participates in this project under legislation enacted in 2002.

On November 12, 2002, members of the Streamlined Sales Tax Project voted to approve the Streamlined Sales and Use Tax Agreement (Agreement). The Agreement provides model tax rules designed to provide a "cooperative, simplified system for the application and administration of sales and use taxes." The Agreement does not invalidate or amend any provision of state law. Instead, the Agreement contemplates individual states amending their own sales and use tax laws to bring them into conformance with the Agreement. Washington already conforms with several major provisions of the Agreement, which include: a uniform state and local tax base; a single state sales and use tax rate; a single local sales and use tax rate per taxing jurisdiction; and state administration of both state and local sales and use taxes.

Washington does not conform, however, with all of the Agreement's provisions. For some issues, Washington will have to change what is subject to tax in order to conform with the Agreement.

**Summary:** Washington State sales and use tax statutes are modified to conform with many of the Agreement's provisions. These modifications relate either to defining taxable items

or to administrative provisions. Several of the definitions have fiscal impact in Washington, as they modify the scope of what is taxable, while the other definitions and the administrative provisions either will have no fiscal impact or the impact is offset by a new statutory exemption.

Definitions. The changes in definition to the following terms WILL have fiscal impacts:

1. "Sales price," "selling price," "purchase price," "value of article used," and "value of service used" are defined as equivalent terms. Current Washington law does not include delivery charges in the purchase price of repair services subject to use tax, but delivery charges are included under this new definition.
2. "Food and food ingredients," "prepared food," and "baked goods" -- Bottled water is currently taxed. The Agreement's definition of "food" exempts bottled water.
3. "Soft drinks" -- Under the definition of "soft drink," beverages that contain less than 50 percent fruit juice are taxed.
4. "Prescription," "prosthetic device," "durable medical goods," and "mobility enhancing equipment" -- Eyeglass frames purchased with prescription lenses are currently taxed, but will be exempt. Additionally, purchases of some orthotic items (slings), as well as repair parts, are currently taxed but will be exempt. All other items under these definitions will remain as they are currently treated under Washington law.

The changes in definition to the following terms will NOT have fiscal impacts:

"Delivery charges," "lease or rental," "computer," and "computer software." In addition, "prewritten computer software" is substituted for "canned software."

The changes in definition to the following terms would have fiscal impacts, but sections are included in the bill providing exemptions, to maintain the effect of current law. Therefore, these changes will NOT have fiscal impacts:

1. "Tangible personal property" includes steam and electricity, currently not taxed in Washington state, but a section is included in the bill to exempt them.
2. "Dietary supplement" -- Purchases of dietary supplements are currently taxed, while purchases made pursuant to a prescription are exempt from tax. A separate statute is created to maintain the exempt status of dietary supplements purchased by prescription.
3. "Over-the-counter drug" and "drug" are defined and their exemptions are modified to reflect the new definitions.

Administrative Provisions. These provisions all adjust statute, yet only some change current practice, and none changes revenues or expenditures significantly.

1. A prohibition on independent sales and use tax audits by local governments on sellers registered under the Agreement.

2. The method of rounding fractional amounts of sale and use tax.
3. Bad debt credit provisions.
4. A local sales and use tax rate increase imposed on services applies to the first billing period starting on or after the effective date of the increase. A local sales and use tax rate decrease imposed on services applies to bills rendered on or after the effective date of the decrease. The Department is required to notify catalog sellers 120 days in advance of any boundary or local sales and use tax change. The Department must provide all other sellers with 60 days advance notice of any local sales and use tax change. Sellers who have not received timely notice of rate and boundary changes due to actions or omissions of the Department are not liable for the difference in the amount due until they have received the appropriate period of notice. Purchasers are still liable for any uncollected amounts of tax.
5. A purchaser's cause of action against the seller for over-collected sales or use tax does not accrue until the purchaser has provided written notice to the seller and the seller has 60 days to respond. The notice to the seller must contain the information necessary to determine the validity of the request.
6. The Department may not attribute nexus with Washington to any seller solely by virtue of the seller registering under the streamlined sales and use tax agreement.
7. Under the Agreement, sellers cannot be required to administer exemptions that have limits or caps on exemption amounts. Washington has sales and use exemptions for items incorporated into a prototype for aircraft parts, auxiliary equipment, or modifications. These exemptions are capped at \$100,000 per person per year. These exemptions are changed so that the sellers collect tax on these items, but the purchaser can request a refund of tax from the Department.
8. The process of determining where a transaction is taxable is commonly referred to as "sourcing." The telecommunications sourcing rules are consistent with current law, except for private communication services and "post-paid" calls that are paid with credit cards or billed to third numbers. A sale of private communication service is sourced to the jurisdiction in which the customer channel termination points are located. A sale of post-paid calling service is sourced to the origination point of the telecommunications signal. There are very few transactions that will be affected by the private communication and post-paid sourcing rules.
9. Sales and use taxes must be uniform within a jurisdiction, with the exceptions of (a) the use tax on natural gas or manufactured gas, (b) solid waste collection tax, (c) local public facility tax, (d) local lodging tax, and (e) the sale, rental, lease, or use of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.

Other. The Department must conduct a study of the fiscal impact on local jurisdictions of the sourcing provisions. The Department must use, and regularly consult, a committee composed of city and county officials to assist with the study. Committee responsibilities include identification of elements of the study including mitigation options for jurisdictions negatively impacted by the sourcing provision. The Department must report the results of

the study, which at minimum must include the identification of the fiscal impacts on local governments of the sourcing provisions, by December 1, 2003, to the Governor and fiscal committees of the Legislature.

**Votes on Final Passage:**

Senate	47	1	
House	83	14	(House amended)
Senate	47	1	(Senate concurred)

**Effective:** July 27, 2003

January 1, 2004 (Sections 301-305)

July 1, 2004 (Sections 101-104, 201-216, 401-412, 501, 502, 601-604, 701-704, 801, 901 and 902).

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P

General Motors Corp. v. Tracy  
U.S.Ohio,1997.

Supreme Court of the United States  
GENERAL MOTORS CORPORATION, Petitioner  
v.  
Roger W. TRACY, Tax Commissioner of Ohio.  
No. 95-1232.

Argued Oct. 7, 1996.  
Decided Feb. 18, 1997.

Buyer of natural gas from out-of-state marketer sought refund of use tax. The State Board of Tax Appeals denied the request, and buyer appealed, challenging exemption of local distribution companies from sales and use taxes on sellers of natural gas. The Supreme Court of Ohio, 73 Ohio St.3d 29, 652 N.E.2d 188, upheld the exemption and ruled that buyer lacked standing, and certiorari was granted. The Supreme Court, Justice Souter, held that: (1) buyer of natural gas had standing to raise commerce clause challenge; (2) exemption did not violate commerce clause; and (3) exemption did not violate equal protection clause.

Affirmed.

Justice Scalia filed a concurring opinion.

Justice Stevens filed a dissenting opinion.  
West Headnotes

[1] Commerce 83 74.5(3)

83 Commerce

83II Application to Particular Subjects and  
Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(3) k. Selective Taxes. Most

Cited Cases

(Formerly 92k42.2(1))

Buyer of natural gas had standing to raise commerce clause challenge to exemption of local distribution companies from sales and use taxes imposed on sellers of natural gas, even though buyer was not one of the sellers said to suffer discrimination under the challenged tax laws. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ohio R.C. §§ 5727.01(D)(4), 5739.02(B)(7).

[2] Commerce 83 56

83 Commerce

83II Application to Particular Subjects and  
Methods of Regulation

83II(B) Conduct of Business in General

83k56 k. Regulation and Conduct in  
General; Particular Businesses. Most Cited Cases

(Formerly 92k42.2(1))

Cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom state ultimately discriminates, and customers of that class may also be injured. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] Commerce 83 62.71

83 Commerce

83II Application to Particular Subjects and  
Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited  
Cases

Commerce 83 62.75

83 Commerce

83II Application to Particular Subjects and  
Methods of Regulation

83II(E) Licenses and Taxes

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## 83k62.70 Taxation in General

83k62.75 k. Discrimination. Most

## Cited Cases

Negative or dormant implication of the commerce clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[4] Commerce 83 ⇌62.75**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.75 k. Discrimination. Most

## Cited Cases

Any notion of discrimination under commerce clause assumes comparison of substantially similar entities, as difference in products may mean that different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, in which case eliminating the tax or other regulatory differential would not serve dormant commerce clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a state upon its residents or resident competitors. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[5] Commerce 83 ⇌56**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(B) Conduct of Business in General

83k56 k. Regulation and Conduct in General; Particular Businesses. Most Cited Cases

In the absence of actual or prospective competition between supposedly favored and disfavored entities in a single market, there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant commerce clause may apply. U.S.C.A.

Const. Art. 1, § 8, cl. 3.

**[6] Commerce 83 ⇌56**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(B) Conduct of Business in General

83k56 k. Regulation and Conduct in General; Particular Businesses. Most Cited Cases

Dormant commerce clause protects markets and participants in markets, not taxpayers as such.

U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[7] Commerce 83 ⇌74.5(2)**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(2) k. Particular Subjects and Transactions. Most Cited Cases

**Taxation 371 ⇌3626**

## 371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(B) Regulations

371k3625 Validity of Acts and Ordinances

371k3626 k. In General. Most Cited

## Cases

(Formerly 371k1212.1)

Ohio's regulatory response to the needs of the local natural gas market results in noncompetitive bundled gas product that distinguishes its regulated sellers from independent marketers to the point that the enterprises should not be considered "similarly situated" for purposes of a claim of facial discrimination under the commerce clause, so that exemption of local distribution companies from sales and use taxes imposed on other sellers of natural gas does not violate dormant commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ohio R.C. § 5739.02(B)(7).

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**[8] Commerce 83 ↻74.5(2)**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(2) k. Particular Subjects and Transactions. Most Cited Cases

Court had obligation to proceed cautiously in considering commerce clause challenge to taxation of natural gas sales lest it imperil the delivery by regulated companies of bundled gas to the noncompetitive captive market. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ohio R.C. § 5739.02(B)(7).

**[9] Commerce 83 ↻62.71**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited Cases

Courts lack expertness and institutional resources necessary to predict the effects of judicial intervention invalidating state's tax scheme on utilities' capacity to serve captive market and, should intervention by the national government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[10] Gas 190 ↻13(2)**

## 190 Gas

190k13 Supply to Private Consumers

190k13(2) k. Rules and Regulations. Most Cited Cases

State regulation of natural gas sales to consumers serves important interests in health and safety in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months.

**[11] Commerce 83 ↻12**

## 83 Commerce

83I Power to Regulate in General

83k11 Powers Remaining in States, and Limitations Thereon

83k12 k. In General. Most Cited Cases

Commerce clause was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[12] Commerce 83 ↻12**

## 83 Commerce

83I Power to Regulate in General

83k11 Powers Remaining in States, and Limitations Thereon

83k12 k. In General. Most Cited Cases

Health and safety considerations may be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant commerce clause are present. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[13] Commerce 83 ↻12**

## 83 Commerce

83I Power to Regulate in General

83k11 Powers Remaining in States, and Limitations Thereon

83k12 k. In General. Most Cited Cases

If state discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, the facial discrimination will be subject to a high level of judicial scrutiny under commerce clause even if it is directed toward a legitimate health and safety goal. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**[14] Commerce 83 ↻74.5(2)**

## 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

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83k74.5 Sales and Use Taxes  
83k74.5(2) k. Particular Subjects and Transactions. Most Cited Cases

**Taxation 371 ↪3626**

## 371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(B) Regulations

371k3625 Validity of Acts and Ordinances

371k3626 k. In General. Most Cited

Cases

(Formerly 371k1212.1)

Ohio tax scheme that exempted local distribution companies from sales and use taxes on sellers of natural gas did not facially discriminate on theory that exemption might not apply to sales by out-of-state local distribution companies. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ohio R.C. § 5739.02(B)(7).

**[15] Constitutional Law 92 ↪3560**

## 92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)6 Taxation

92k3560 k. In General. Most Cited

Cases

(Formerly 92k228.5)

State tax classifications require only a rational basis to satisfy the equal protection clause. U.S.C.A. Const.Amend. 14.

**[16] Taxation 371 ↪3608**

## 371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(A) In General

371k3607 Power to Impose

371k3608 k. In General. Most Cited

Cases

(Formerly 371k1205.1)

In taxation, even more than in other fields, legislatures possess the greatest freedom in

classification. U.S.C.A. Const.Amend. 14.

**[17] Constitutional Law 92 ↪3560**

## 92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)6 Taxation

92k3560 k. In General. Most Cited

Cases

(Formerly 92k228.5)

**Taxation 371 ↪3627**

## 371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(B) Regulations

371k3625 Validity of Acts and Ordinances

371k3627 k. Equality and Uniformity

in General. Most Cited Cases

(Formerly 371k1213)

In some peculiar circumstances, state tax classifications facially discriminating against interstate commerce may violate the equal protection clause even when they pass muster under the commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 14.

**[18] Constitutional Law 92 ↪3576**

## 92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)6 Taxation

92k3576 k. Sales and Use Taxes. Most Cited Cases

(Formerly 92k229.4)

**Constitutional Law 92 ↪3697**

## 92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

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92XXVI(E)12 Trade or Business  
92k3681 Licenses and Regulation  
92k3697 k. Mining and Excavation;  
Oil and Gas. Most Cited Cases  
(Formerly 92k229.4)

#### Constitutional Law 92 ⇄3686

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(E) Particular Issues and Applications  
92XXVI(E)12 Trade or Business  
92k3681 Licenses and Regulation  
92k3686 k. Carriers and Public Utilities; Railroads. Most Cited Cases  
(Formerly 92k229.4)

#### Taxation 371 ⇄3627

371 Taxation  
371IX Sales, Use, Service, and Gross Receipts Taxes  
371IX(B) Regulations  
371k3625 Validity of Acts and Ordinances  
371k3627 k. Equality and Uniformity in General. Most Cited Cases  
(Formerly 371k1213)

Ohio tax scheme that exempted local distribution companies from sales and use taxes on sellers of natural gas did not violate equal protection clause. U.S.C.A. Const.Amend. 14; Ohio R.C. § 5739.02(B)(7).  
*Syllabus*<sup>FN\*</sup>

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Ohio imposes general sales and use taxes on natural gas purchases from all sellers, whether in-state or out-of-state, that do not meet its statutory definition of a "natural gas company." Ohio's state-regulated

natural gas utilities (generally termed "local distribution companies" or LDC's) satisfy the statutory definition, but the State Supreme Court has determined that producers and independent marketers generally do not. LDC gas sales thus enjoy a tax exemption inapplicable to gas sales by other vendors. The very possibility of nonexempt gas sales reflects an evolutionary change in the natural gas industry's structure. Traditionally, nearly all sales of natural gas directly to consumers were by LDC's, and were therefore exempt from Ohio's sales and use taxes. As a result of congressional and regulatory developments, however, a new market structure has \*\*814 evolved in which consumers, including large industrial end users, may buy gas from producers and independent marketers rather than from LDC's, and pay pipelines separately for transportation. Indeed, during the tax period in question, petitioner General Motors Corporation (GMC) bought virtually all the gas for its plants from out-of-state independent marketers, rather than from LDC's. Respondent Tax Commissioner applied the general use tax to GMC's purchases, and the State Board of Tax Appeals sustained that action. GMC argued on appeal, *inter alia*, that denying a tax exemption to sales by marketers but not LDC's violates the Commerce and Equal Protection Clauses. The Supreme Court of Ohio initially concluded that the tax regime does not violate the Commerce Clause because Ohio taxes natural gas sales at the same rate for both in-state and out-of-state companies that do not meet the statutory definition of "natural gas company." The court then stepped back to hold, however, that GMC lacked standing to bring a Commerce Clause challenge, and dismissed the equal protection claim as submerged in GMC's Commerce Clause argument.

#### *Held:*

1. GMC has standing to raise a Commerce Clause challenge. Cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates. Customers of that class may also be injured, as in this case where the

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customer is liable to pay the tax and as a result \*279 presumably pays more for gas purchased from out-of-state producers and marketers. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 3053, 82 L.Ed.2d 200. Pp. 818-819.

2. Ohio's differential tax treatment of natural gas sales by public utilities and independent marketers does not violate the Commerce Clause. Pp. 818-830.

(a) Congress and this Court have long recognized the value of state-regulated monopoly arrangements for gas sales and distribution directly to local consumers. See, e.g., *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993. Even as congressional and regulatory developments resulted in increasing opportunity for a consumer to choose between gas sold by marketers and gas bundled with state-mandated rights and benefits as sold by LDC's, two things remained the same: Congress did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises, and those franchises continued to provide bundled gas to the vast majority of consumers who had neither the capacity to buy on the interstate market nor the resilience to forgo the reliability and protection that state regulation provided. To this day, all 50 States recognize the need to regulate utilities engaged in local gas distribution. Pp. 819-823.

(b) Any notion of discrimination under the Commerce Clause assumes a comparison of substantially similar entities. When the allegedly competing entities provide different products, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. If the difference in products means that the entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, eliminating the burden would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors. Here, the

LDCs' bundled product reflects the demand of a core market-typified by residential customers to whom stability of rate and supply is important-that is neither susceptible to competition by the interstate sellers nor likely to be served except by the regulated natural monopolies that have historically supplied its needs. So far as this noncompetitive market is concerned, competition would not be served by eliminating any tax differential as between sellers, and the dormant Commerce Clause has no job to do. On the other hand, eliminating the tax differential at issue might well intensify competition between LDC's and marketers for the noncaptive market of bulk buyers like GMC, which have no need for bundled protection. Thus, the question \*\*815 here is whether the existence of competition between marketers and LDC's in the noncaptive market requires treating the entities as alike for dormant \*280 Commerce Clause purposes. A number of reasons support a decision to give the greater weight to the distinctiveness of the captive market and the LDCs' singular role in serving that market, and hence to treat marketers and LDC's as dissimilar for Commerce Clause purposes. Pp. 823-827.

(c) First and most important, this Court has an obligation to proceed cautiously lest it imperil the LDCs' delivery of bundled gas to the noncompetitive captive market. Congress and the Court have recognized the importance of not jeopardizing service to this market. *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, *supra*. State regulation of gas sales to consumers serves important health and safety interests in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual domestic buyers are not frozen out of their houses in the cold months. The legitimate state pursuit of such interests is compatible with the Commerce Clause, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444, 80 S.Ct. 813, 816, 4 L.Ed.2d 852, and such a justification may be weighed in the process of deciding the threshold question addressed here. Second, the Court lacks the expertness and the institutional resources

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necessary to predict the economic effects of judicial intervention invalidating Ohio's tax scheme on the LDCs' capacity to serve the captive market. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341-342, 116 S.Ct. 848, 859, 133 L.Ed.2d 796. Thus, the most the Court can say is that modification of Ohio's tax scheme could subject LDCs to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision of bundled services to the captive market. Finally, should intervention by the National Government be necessary, Congress has both the power and the institutional competence to decide upon and effectuate any desirable changes in the scheme that has evolved. For a half century Congress has been aware of this Court's conclusion in *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128, that the Natural Gas Act of 1938 exempts state regulation of in-state retail gas sales from the dormant Commerce Clause, and since that decision has only reaffirmed the States' power in this regard. Pp. 826-830.

(d) GMC's argument that Ohio's tax regime facially discriminates because the sales and use tax exemption would not apply to sales by out-of-state LDCs is rejected. Ohio courts might extend the challenged exemption to out-of-state utilities if confronted with the question, and this Court does not deem a hypothetical possibility of favoritism to constitute discrimination transgressing constitutional commands. *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 654, 114 S.Ct. 1815, 1824, 128 L.Ed.2d 639. Pp. 829-830.

\*281 3. Ohio's tax regime does not violate the Equal Protection Clause. The differential tax treatment of LDC and independent marketer sales does not facially discriminate against interstate commerce, and there is unquestionably a rational basis for Ohio's distinction between these two kinds of entities. Pp. 829-830.

73 Ohio St.3d 29, 652 N.E.2d 188, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ. SCALIA, J., filed a concurring opinion, *post*, p. 830. STEVENS, J., filed a dissenting opinion, *post*, p. 831.

Timothy B. Dyk, Washington, DC, for petitioner.  
Jeffrey S. Sutton, Washington, DC, for respondent. For U.S. Supreme Court briefs, see: 1996 WL 257618 (Pet.Brief) 1996 WL 469161 (Pet.Brief) 1996 WL 411031 (Resp.Brief)  
\*\*816 Justice SOUTER delivered the opinion of the Court.

The State of Ohio imposes its general sales and use taxes on natural gas purchases from all sellers, whether in-state or \*282 out-of-state, except regulated public utilities that meet Ohio's statutory definition of a "natural gas company." The question here is whether this difference in tax treatment between sales of gas by domestic utilities subject to regulation and sales of gas by other entities violates the Commerce Clause or Equal Protection Clause of the Constitution. We hold that it does not.

## I

During the tax period at issue,<sup>FN1</sup> Ohio levied a 5% tax on the in-state sales of goods, including natural gas, see Ohio Rev.Code Ann. §§ 5739.02, 5739.025 (Supp.1990), and it imposed a parallel 5% use tax on goods purchased out-of-state for use in Ohio. See § 5741.02 (1986). Local jurisdictions were authorized to levy certain additional taxes that increased these sales and use tax rates to as much as 7% in some municipalities. See § 5739.025 (Supp.1990); Reply Brief for Petitioner 13, n. 11.

FN1. The natural gas purchases that gave rise to petitioner's challenge were made during the period from October 1, 1986, to June 30, 1990.

519 U.S. 278, 175 P.U.R.4th 392, 117 S.Ct. 811, 136 L.Ed.2d 761, 65 USLW 4086, 135 Oil & Gas Rep. 646, Util. L. Rep. P 14,147, 97 FCDR 763, 97 Cal. Daily Op. Serv. 1070, 97 Daily Journal D.A.R. 1597, 97 CJ C.A.R. 233, 10 Fla. L. Weekly Fed. S 263  
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Since 1935, when Ohio's first sales and use taxes were imposed, the State has exempted natural gas sales by "natural gas compan[ies]" from all state and local sales taxes. § 5739.02(B)(7).<sup>FN2</sup> Under Ohio law, "[a]ny person ... [i]s a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." § 5727.01(D)(4) (1996); see also § 5727.01(E)(4) (Supp.1990); § 5727.01(E)(8) (1986). It is undisputed that natural gas utilities (generally termed "local distribution companies" or LDC's) located in Ohio satisfy this definition of "natural gas company." The Supreme Court of Ohio has, however, interpreted the statutory term to exclude non-LDC gas sellers, such as producers and independent marketers, see \*283 *Chrysler Corp. v. Tracy*, 73 Ohio St.3d 26, 652 N.E.2d 185 (1995), and the State has accordingly treated their sales as outside the exemption and so subject to the tax.

FN2. The exemption was originally codified at Ohio Gen.Code Ann. § 5546-2(6) (Baldwin 1952). As part of a general recodification in 1953, it was moved to Ohio Rev.Code Ann. § 5739.02(B)(7), where it remains today.

The very question of such an exclusion, and consequent taxation of gas sales or use, reflects a recent stage of evolution in the structure of the natural gas industry. Traditionally, the industry was divisible into three relatively distinct segments: producers, interstate pipelines, and LDC's. This market structure was possible largely because the Natural Gas Act of 1938 (NGA), 52 Stat. 821, 15 U.S.C. § 717 *et seq.*, failed to require interstate pipelines to offer transportation services to third parties wishing to ship gas. As a result, "interstate pipelines [were able] to use their monopoly power over gas transportation to create and maintain monopsony power in the market for the purchase of gas at the wellhead and monopoly power in the market for the sale of gas to LDCs." Pierce, *The Evolution of Natural Gas Regulatory Policy*, 10 Nat. Resources & Env't 53, 53-54 (Summer 1995)

(hereinafter *Pierce*). For the most part, then, producers sold their gas to the pipelines, which resold it to utilities, which in turn provided local distribution to consumers. See, e.g., *Associated Gas Distributors v. FERC*, 824 F.2d 981, 993 (C.A.D.C.1987), cert. denied, 485 U.S. 1006, 108 S.Ct. 1468, 99 L.Ed.2d 698 (1988); Mogel & Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, 4 Energy L.J. 155, 157 (1983).

Congress took a first step toward increasing competition in the natural gas market by enacting the Natural Gas Policy Act of 1978, 92 Stat. 3350, 15 U.S.C. § 3301 *et seq.*, which was designed to phase out regulation of wellhead prices charged by producers of natural gas, and to "promote gas transportation by interstate and intrastate pipelines" for third parties. 57 Fed.Reg. 13271 (1992). Pipelines were reluctant to provide common carriage, however, when doing so would displace their own sales, see \*\*817 *Associated Gas Distributors v. FERC*, *supra*, at 993, and in 1985, the Federal \*284 Energy Regulatory Commission (FERC) took the further step of promulgating Order No. 436, which contained an "open access" rule providing incentives for pipelines to offer gas transportation services, see 50 Fed.Reg. 42408. In 1992, this evolution culminated in FERC's Order No. 636, which required all interstate pipelines to "unbundle" their transportation services from their own natural gas sales and to provide common carriage services to buyers from other sources that wished to ship gas. See 57 Fed.Reg. 13267.

Although FERC did not take the further step of requiring intrastate pipelines to provide local transportation services to ensure that gas sold by producers and independent marketers could get all the way to the point of consumption, <sup>FN3</sup> under the system of open access to interstate pipelines that had emerged in the mid-1980's "larger industrial end-users" began increasingly to bypass utilities' local distribution networks by "construct[ing] their own pipeline spurs to [interstate] pipeline[s]...." Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within*

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the Natural Gas Industry, 29 Tulsa L.J. 707, 723 (1994). Bypass posed a problem for LDC's, since the departure of large end users from the system left the same fixed costs to be spread over a smaller customer base. The State of Ohio consequently took steps in 1986 to keep some income from large industrial customers within the utility system by adopting regulations that allowed industrial end users in Ohio to buy natural gas from producers or independent marketers, pay interstate pipelines for interstate transportation, and pay LDC's for local transportation. See *In re Commission\*285 Ordered Investigation of the Availability of Gas Transportation Service Provided by Ohio Gas Distribution Utilities to End-Use Customers*, No. 85-800-GA-COI (Ohio Pub. Util. Comm'n, Apr. 15, 1986); see generally Natural Gas Marketing and Transportation Committee, 1990 Annual Report, in Natural Resources Energy and Environmental Law, 1990 Year in Review 57, 91-92, and n. 207 (1991).

FN3. Section 1(b) of the NGA, 52 Stat. 821, 15 U.S.C. § 717(b), explicitly exempts "local distribution of natural gas" from federal regulation. In addition, the Hinshaw Amendment to the NGA, 15 U.S.C. § 717(c), exempts from FERC regulation intrastate pipelines that operate exclusively in one State and with rates and service regulated by the State. See *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 898, n. 2 (C.A.D.C.1995). See also *infra*, at 821.

This new market structure led to the question whether purchases from non-LDC sellers of natural gas qualified for the state sales tax exemption under Ohio Rev.Code Ann. § 5739.02(B)(7) (Supp.1990). In *Chrysler Corp. v. Tracy*, the Ohio Supreme Court held that they do not. The court reasoned that independent marketers do not "suppl[y]" natural gas as required by § 5727.01(D)(4), because they do "not own or control any physical assets to ... distribute natural gas." 73 Ohio St.3d, at 28, 652 N.E.2d, at 187. This determination of state law led in turn to the case before us now.

During the tax period in question here, petitioner General Motors Corporation (GMC) bought virtually all the natural gas for its Ohio plants from out-of-state marketers, not LDC's.<sup>FN4</sup> Respondent Tax Commissioner of Ohio applied the State's general use tax to GMC's purchases, and the State Board of Tax Appeals sustained that action. GMC appealed to the Supreme Court of Ohio on two grounds. GMC first contended that its purchases should be exempt from the sales tax because independent marketers fell within the statutory definition of "natural gas company." The State Supreme Court, citing its decision the same day in *Chrysler*, rejected this argument. See *General Motors Corp. v. Tracy*, 73 Ohio St.3d 29, 30, 652 N.E.2d 188, 189 (1995). GMC also argued that denying the tax exemption to sales by marketers violated the Commerce and Equal Protection Clauses. The Ohio court initially concluded that the State's \*286 regime did not violate the Commerce Clause because Ohio taxes sales by "compan[ies] that d[o] not own any production, transportation, or distribution\*\*818 equipment" at the same rate regardless of "whether [the companies sell] natural gas in-state or out-of-state." *Id.*, at 31, 652 N.E.2d, at 190. The court then stepped back to rule, however, that GMC lacked standing to bring its Commerce Clause challenge:

FN4. App. 156. Pursuant to Ohio's regulations authorizing LDC's to provide local transportation services, GMC took delivery of much of this gas from local utilities. *Id.*, at 156-157.

"On close inspection, GM actually argues that the commissioner's application burdens out-of-state vendors of natural gas. However, GM is not a member of that class and lacks standing to challenge the constitutionality of this application on that basis; our further comment on this question is inappropriate." *Ibid.*

Finally, the court dismissed GMC's equal protection claim as "submerged in its Commerce Clause argument." *Id.*, at 31-32, 652 N.E.2d, at 190. We granted GMC's petition for certiorari to address the

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question of standing as well as the Commerce and Equal Protection Clause issues. 517 U.S. 1118, 116 S.Ct. 1349, 134 L.Ed.2d 519 (1996).

## II

[1][2] The Supreme Court of Ohio held GMC to be without standing to raise this Commerce Clause challenge because the company is not one of the sellers said to suffer discrimination under the challenged tax laws. But cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

\*287 On similar facts, we held in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), that in-state liquor wholesalers had standing to raise a Commerce Clause challenge to a Hawaii tax regime exempting certain alcohols produced in-state from liquor taxes. Although the wholesalers were not among the class of out-of-state liquor producers allegedly burdened by Hawaii's law, we reasoned that the wholesalers suffered economic injury both because they were directly liable for the tax and because the tax raised the price of their imported goods relative to the exempted in-state beverages. *Id.*, at 267, 104 S.Ct., at 3053; see also *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (in-state stockholder challenged tax regime imposing higher taxes on stock from issuers with out-of-state operations than on stock from purely in-state issuers); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (in-state milk dealers challenged tax and

subsidy scheme discriminating against out-of-state milk producers). *Bacchus* applies with equal force here, and GMC "plainly ha[s] standing to challenge the tax in this Court," *Bacchus Imports v. Dias*, *supra*, at 267, 104 S.Ct., at 3053. We therefore turn to the merits.

## III

### A

[3] The negative or dormant implication of the Commerce Clause prohibits state taxation, see, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 312-313, 112 S.Ct. 1904, 1913-1914, 119 L.Ed.2d 91 (1992), or regulation, see, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579, 106 S.Ct. 2080, 2083-2084, 90 L.Ed.2d 552 (1986), that discriminates against or unduly burdens interstate commerce and thereby "imped [es] free private trade in the national marketplace," *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980). GMC claims that Ohio's differential tax treatment of natural gas sales by marketers and regulated local utilities constitutes "facial" or "patent" discrimination in violation of the Commerce Clause, and it argues that differences in the nature of the businesses of LDC's and interstate marketers \*288 cannot justify Ohio's differential treatment of these in-state and out-of-state entities. Although the claim is not that the Ohio tax scheme \*\*819 distinguishes in express terms between in-state and out-of-state entities, GMC argues that by granting the tax exemption solely to LDC's, which are in fact all located in Ohio, the State has "favor[ed] some in-state commerce while disfavoring all out-of-state commerce," Brief for Petitioner 16. That is, because the favored entities are all located within the State, "the tax exemption did not need to be drafted explicitly along state lines in order to demonstrate its discriminatory design," *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury*, 490 U.S. 66, 76, 109 S.Ct. 1617, 1623, 104 L.Ed.2d 58 (1989). Assessing these arguments

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requires an understanding of the historical development of the contemporary retail market for natural gas, to which we referred before and now turn in greater detail.

## B

Since before the Civil War, gas manufactured from coal and other commodities had been used for lighting purposes, and of course it was understood that natural gas could be used the same way. See Dorner, *Initial Phases of Regulation of the Gas Industry*, in 1 *Regulation of the Gas Industry* §§ 2.03-2.06 (American Gas Assn.1996) (hereinafter Dorner). By the early years of this century, areas in "proximity to the gas field[s]," *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 246, 31 S.Ct. 564, 567, 55 L.Ed. 716 (1911), did use natural gas for fuel, but it was not until the 1920's that the development of high-tensile steel and electric welding permitted construction of high-pressure pipelines to transport natural gas from gas fields for distant consumption at relatively low cost. Pierce 53. By that time, the States' then-recent experiments with free market competition in the manufactured gas and electricity industries had dramatically underscored the need for comprehensive regulation of the local gas market. Companies supplying manufactured gas proliferated in the latter half of the 19th century \*289 and, after initial efforts at regulation by statute at the state level proved unwieldy, the States generally left any regulation of the industry to local governments. See Dorner §§ 2.03, 2.04. Many of those municipalities honored the tenets of laissez-faire to the point of permitting multiple gas franchisees to serve a single area and relying on competition to protect the public interest. *Ibid.* The results were both predictable and disastrous, including an initial period of "wasteful competition," FN5 followed by massive consolidation and the threat of monopolistic pricing.FN6 The public suffered through essentially the same evolution in the electric industry.FN7 Thus, by the time natural gas became a widely marketable commodity, \*290 the States had learned from chastening experience that

public streets could not be continually torn up to lay competitors' pipes, \*\*820 that investments in parallel delivery systems for different fractions of a local market would limit the value to consumers of any price competition, and that competition would simply give over to monopoly in due course. It seemed virtually an economic necessity for States to provide a single, local franchise with a business opportunity free of competition from any source, within or without the State, so long as the creation of exclusive franchises under state law could be balanced by regulation and the imposition of obligations to the consuming public upon the franchised retailers.

FN5. During this period, "[t]he public grew weary of the interminable rate wars which were invariably followed by a period of recoupment during which the victorious would attempt to make the price of the battle of the consumers by way of increased rates. Investors suffered heavy losses through the manipulation of fly-by-night paper concerns operating with 'nuisance' franchises.... Everybody suffered the inconvenience of city streets being constantly torn up and replaced by installation and relocation of duplicate facilities. The situation in New York City alone, prior to the major gas company consolidations, threatened municipal chaos." Dorner § 2.03 (quoting Welch, *The Odyssey of Gas-A Record of Industrial Courage*, 24 *Pub. Utils. Fortnightly* 500, 501-502 (1939)).

FN6. Reticence was not the order of the day. When, for example, the last two surviving gas companies supplying the citizens of Brooklyn announced their merger in October 1883, they also announced that gas prices would immediately double. Dorner § 2.03.

FN7. The electric industry burgeoned following Thomas Edison's patent on the

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first incandescent electric lamp in 1878. Dorner, *Beginnings of the Gas Industry*, in 1 Regulation of the Gas Industry § 1.06 (American Gas Assn.1996). Again, after an initial period of unsuccessful regulation by state statute, States mostly left regulation of the electric industry to municipal or local government. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 Nat. Res. J. 289, 298 (1992). “[M]ultiple franchises were handed out, and duplicative utility systems came into being.” *Id.*, at 299. The results were “ruinous and short lived.” *Ibid.* For example, 45 mostly overlapping franchises were granted for electric utility operation in Chicago between 1882 and 1905. By 1905, however, a single monopoly entity had emerged from the chaos, and customers ended up paying monopoly prices. *Id.*, at 300.

Almost as soon as the States began regulating natural gas retail monopolies, their power to do so was challenged by interstate vendors as inconsistent with the dormant Commerce Clause. While recognizing the interstate character of commerce in natural gas, the Court nonetheless affirmed the States' power to regulate, as a matter of local concern, all direct sales of gas to consumers within their borders, absent congressional prohibition of such state regulation. See, e.g., *Pennsylvania Gas Co. v. Public Serv. Comm'n of N. Y.*, 252 U.S. 23, 28-31, 40 S.Ct. 279, 280-282, 64 L.Ed. 434 (1920); *Public Util. Comm'n of Kan. v. Landon*, 249 U.S. 236, 245-246, 39 S.Ct. 268, 269-270, 63 L.Ed. 577 (1919). At the same time, the Court concluded that the dormant Commerce Clause prevents the States from regulating interstate transportation or sales for resale of natural gas. See, e.g., *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 307-310, 44 S.Ct. 544, 545-546, 68 L.Ed. 1027 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-600, 43 S.Ct. 658, 664-666, 67 L.Ed. 1117, reaffirmed on rehearing, 263 U.S. 350, 44 S.Ct. 123, 67 L.Ed. 1144 (1923). See generally

*Illinois Natural Gas Co. v. Central Ill. Public Service Co.*, 314 U.S. 498, 504-505, 62 S.Ct. 384, 386-387, 86 L.Ed. 371 (1942) (summarizing prior cases distinguishing between permissible and impermissible state regulation of commerce in natural gas). Thus, the Court never questioned the power of the States to regulate retail \*291 sales of gas within their respective jurisdictions. Dorner § 2.06.<sup>FN8</sup>

FN8. In *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), we rejected the bright-line distinction between wholesale and retail sales drawn by these older cases and concluded that state regulation of wholesale sales of electricity transmitted in interstate commerce is not precluded by the Commerce Clause. Reasoning that utilities should not be insulated from our contemporary dormant Commerce Clause jurisprudence by formalistic judge-made rules, *id.*, at 391, 103 S.Ct., at 1916, we looked instead to “ ‘the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.’ ” *id.*, at 390, 103 S.Ct., at 1915 (quoting *Illinois Natural Gas Co. v. Central Ill. Public Service Co.*, 314 U.S. 498, 505, 62 S.Ct. 384, 386-387, 86 L.Ed. 371 (1942)), to determine whether States have a sufficient interest in regulating wholesale rates within their borders, and had no problem concluding that States do indeed have such an interest, with the result that state regulation of wholesale rates is not precluded by the Commerce Clause (in the absence of pre-emptive congressional action), *id.*, at 394-395, 103 S.Ct., at 1917-1918. While the holding of *Arkansas Electric* thereby expanded both the permissible scope of state utility regulation and judicial recognition of the important state interests in such regulation,

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the reasoning of the case equally implies that state regulation of retail sales is not, as a constitutional matter, immune from our ordinary Commerce Clause jurisprudence, and to the extent that our earlier cases may have implied such immunity they are no longer good law. Nothing in *Arkansas Electric* undermines the earlier cases' recognition of the powerful state interest in regulating sales to domestic consumers buying at retail, however, which we reaffirm here. In addition, *Arkansas Electric* does not disturb the relevance of the wholesale/retail distinction for construing the jurisdictional provisions of statutes such as the NGA, which we discuss immediately below. See *id.*, at 380, and n. 3, 103 S.Ct., at 1910, and n. 3; see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale").

When federal regulation of the natural gas industry finally began in 1938, Congress, too, clearly recognized the value of such state-regulated monopoly arrangements for the sale and distribution of natural gas directly to local consumers. Thus, § 1(b) of the NGA, 15 U.S.C. § 717(b), explicitly exempted "local distribution of natural gas" from federal regulation, even as the NGA authorized the Federal Power \*292 Commission (FPC) to begin regulating interstate pipelines. Congress's\*\*821 purpose in enacting the NGA was to fill the regulatory void created by the Court's earlier decisions prohibiting States from regulating interstate transportation and sales for resale of natural gas, while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers. *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516-522, 68 S.Ct. 190, 194-198, 92 L.Ed. 128 (1947). Thus, the NGA "was drawn with meticulous regard for the

continued exercise of state power, not to handicap or dilute it in any way," *id.*, at 517-518, 68 S.Ct., at 195-196; "the scheme was one of cooperative action between federal and state agencies" to "protect consumers against exploitation at the hands of natural gas companies," *id.*, at 520, 68 S.Ct., at 197 (internal quotation marks omitted); and "Congress' action ... was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service," *id.*, at 521, 68 S.Ct., at 198; see also *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334, 71 S.Ct. 777, 780, 95 L.Ed. 993 (1951) ("Direct sales [of natural gas] for consumptive use were designedly left to state regulation" by the NGA). Indeed, the Court has construed § 1(b) of the NGA as altogether exempting state regulation of in-state retail sales of natural gas from attack under the dormant Commerce Clause:

"The declaration [in the NGA], though not identical in terms with the one made by the McCarran Act, 59 Stat. 33, 15 U.S.C. § 1011, concerning continued state regulation of the insurance business, is in effect equally clear, in view of the [NGA's] historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. Cf. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 [ (1946) (upholding discriminatory state taxation of out-of-state insurance companies as authorized \*293 by the McCarran Act) ]." *Panhandle-Indiana, supra*, at 521, 68 S.Ct., at 197.

And Congress once again acknowledged the important role of the States in regulating intrastate transportation and distribution of natural gas in 1953 when, in the wake of a decision of this Court permitting the FPC to regulate intrastate gas transportation by LDC's, see *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950), Congress amended the NGA to "leav [e] jurisdiction" over "companies engaged in the distribution" of natural gas "exclusively in the States, as always has been intended." S.Rep. No. 817, 83d Cong., 1st Sess., 1-2 (1953); see 15

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U.S.C. § 717(c).

For 40 years, the complementary federal regulation of the interstate market and congressionally approved state regulation of the intrastate gas trade thus endured unchanged in any way relevant to this case. The resulting market structure virtually precluded competition between LDC's and other potential suppliers of natural gas for direct sales to consumers, including large industrial consumers. The simplicity of this dual system of federal and state regulation began to erode in 1978, however, when Congress first encouraged interstate pipelines to provide transportation services to end users wishing to ship gas,<sup>FN9</sup> and thereby moved toward providing a real choice to those consumers who were able to buy gas on the open market and were willing to take it free of state-created obligations to the buyer. The upshot of congressional and regulatory developments over the next 15 years was increasing opportunity for a consumer in that class to choose between gas sold by marketers and gas bundled with rights and benefits mandated by state regulators as sold by LDC's. But amidst such changes, two things remained the same throughout the period involved in this case. Congress\*294 did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises, and the local franchised utilities (though no longer guaranteed monopolies as to all natural gas demand) continued to provide bundled gas to the vast majority of consumers who had neither\*\*822 the capacity to buy on the interstate market nor the resilience to forgo the reliability and protection that state regulation provided.

FN9. For a more complete description of these changes in federal regulatory policy, and the relevant modifications of Ohio regulation of local utilities that they prompted, see *supra*, at 816-817.

To this day, all 50 States recognize the need to regulate utilities engaged in local distribution of natural gas.<sup>FN10</sup> \*295 Ohio's treatment\*\*823 of its gas utilities has been a typical blend of limitation

and affirmative obligation. Its natural gas utilities, during the period in question, bore with a variety of \*296 requirements: they had to submit annual forecasts of future supply and demand for gas, Ohio Rev.Code Ann. § 4905.14 (Supp.1990), comply with a range of accounting, reporting, and disclosure rules, §§ 4905.14, 4905.15 (1977 and Supp.1990), and get permission from the state Public Utilities Commission to issue securities and even to enter certain contracts, §§ 4905.40, 4905.41, 4905.48. The "just and reasonable" rates to which they were restricted, see §§ 4905.22, 4905.32, 4909.15, 4909.17, included a single average cost of gas, see Ohio Admin. Code 4901:1-14, Ohio Monthly Record (Nov.1991), together with a limited return on investment.<sup>FN11</sup> \*297 The LDC's could not exact "a greater or lesser compensation for any services rendered ... than [exactd] ... from any other [customer] for doing a like and contemporaneous service under substantially the same circumstances and conditions." Ohio Rev.Code Ann. § 4905.33 (Supp.1990).

FN10. Alabama: Ala.Code § 37-4-1(7)(b) (Supp.1996); see generally §§ 37-1-80 through 37-1-105 (1992 and Supp.1996); Alaska: Alaska Stat. Ann. §§ 42.05.141, 42.05.291, 42.05.990(4)(D) (1989 and Supp.1995); see generally §§ 42.05.010-42.05.995; Arizona: Ariz.Rev.Stat. Ann. §§ 40-201.4, 40-203 (1996); see generally §§ 40-201 through 40-495; Arkansas: Ark.Code Ann. §§ 23-1-101(4)(A)(i), 23-4-101 (1987 and Supp.1995); see generally §§ 23-1-101 through 23-4-637; California: Cal. Pub. Util.Code Ann. §§ 216, 701 (West 1975 and Supp.1996); see generally §§ 201 through 882 (West 1975 and Supp.1996), § § 1001 through 1906 (West 1994 and Supp.1996); Colorado: Colo.Rev.Stat. §§ 40-1-103(1)(a), 40-3-101 (1993); see generally §§ 40-1-101 through 40-8.5-107 (1993 and Supp.1996); Connecticut: Conn. Gen.Stat. Ann. §§ 16-1(a)(4), (9), 16-6b (West 1988 and Supp.1996); see

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generally §§ 16-1 through 16-50f; Delaware: Del.Code Ann., Tit. 26, § 102(2) (Supp.1996); see generally Tit. 26, §§ 101 through 511 (1989 and Supp.1996); District of Columbia: D.C.Code Ann. §§ 43-203, 43-212 (1990); see generally §§ 43-101 through 43-1107 (1990 and Supp.1996); Florida: Fla. Stat. Ann. §§ 366.02(1), 366.03 (West Supp.1997); see generally §§ 366.01 through 366.14 (West 1968 and Supp.1997); Georgia: Ga.Code Ann. § 46-2-20(a) (1992); see generally §§ 46-2-20 through 46-2-94 (1992 and Supp.1996); Hawaii: Haw.Rev.Stat. Ann. §§ 269-1, 269-6, 269-16 (Michie 1992 and Supp.1996); see generally §§ 269-1 through 269-32; Idaho: Idaho Code §§ 61-129, 61-501, 61-502 (1994); see generally §§ 61-101 through 61-714; Illinois: Ill. Comp. Stat., ch. 220, §§ 5/3-105, 5/4-101, 5/9-101 (1994); see generally ch. 220, §§ 5/1-101 through 5/10-204; Indiana: Ind.Code §§ 8-1-2-1, 8-1-2-4, 8-1-2-87 (West Supp.1996); see generally §§ 8-1-2-1 through 8-1-2-127; Iowa: Iowa Code Ann. § 476.1 (West Supp.1996); see generally §§ 476.1 through 476.66 (West 1991 and Supp.1996); Kansas: Kan. Stat. Ann. §§ 66-104, 66-1,200 through 66-1,208 (1985 and Supp.1995); Kentucky: Ky.Rev.Stat. Ann. § 278.010(3)(c) (Baldwin 1992); see generally §§ 278.010 through 278.450; Louisiana: La.Rev.Stat. Ann. § 33:4161 (West 1988); see generally §§ 33:4161 through 33:4174, 33:4301 through 33:4308, 33:4491 through 33:4496 (West 1988 and Supp.1996); Maine: Me.Rev.Stat. Ann., Tit. 35-A, §§ 102, 103, 301 (1988 and Supp.1996-1997); see generally Tit. 35-A, §§ 101-120; Maryland: Md. Ann.Code, Art. 78, §§ 1, 2(o) (1991); see generally Art. 78, §§ 1 through 2, 23 through 27A, 51 through 54K, 68 through 88 (1991 and Supp.1994); Massachusetts: Mass. Gen. Laws §§ 164:1, 164:93, 164:94 (1994);

see generally ch. 164, §§ 1 through 128; Michigan: Mich. Comp. Laws Ann. §§ 460.6-460.6b (West 1991 and Supp.1996-1997); see generally §§ 460.1 through 460.8; Minnesota: Minn.Stat. Ann. §§ 216B.02(4), 216B.03 (West 1992); see generally §§ 216B.01 through 216B.67 (1994 and Supp.1995); Mississippi: Miss.Code Ann. §§ 77-3-3(d)(ii), 77-3-5 (1991 and Supp.1996); see generally §§ 77-3-1 through 77-3-307; Missouri: Mo.Rev.Stat. §§ 386.020, 393.130 (1994); see generally §§ 386.010 through 386.710, 393.010 through 393.770; Montana: Mont.Code Ann. §§ 69-3-101, 69-3-102, 69-3-201 (1995); see generally § 69-3-101 through 69-3-713; Nebraska: Neb.Rev.Stat. § 14-2119 (Supp.1996); see generally §§ 19-4601 through 19-4623 (1991 and Supp.1996); Nevada: Nev.Rev.Stat. Ann. § 704.020(2)(a) (1995); see generally §§ 704.001 through 704.320, 704.755; New Hampshire: N.H.Rev.Stat. Ann. §§ 362:2, 374:1, 374:2 (1995); see generally §§ 378:1 through 378:42; New Jersey: N.J. Stat. Ann. § 48:2-13 (West Supp.1996); see generally § 48:2-13 through 48:2-91, 48:9-5 through 48:9-32 (West 1969 and Supp.1996-1997); New Mexico: N.M. Stat. Ann. §§ 62-3-3, 62-6-4, 62-8-1 (1993 and Supp.1996); see generally §§ 62-1-1 through 62-13-14; New York: N.Y. Pub. Serv. Law § 65 (McKinney 1989); see generally §§ 30 through 52, 64 through 77 (McKinney 1989 and Supp.1996); North Carolina: N.C. Gen.Stat. §§ 62-3(23), 62-30 (1989 and Supp.1996); see generally §§ 62-1 through 62-171; North Dakota: N.D. Cent.Code §§ 49-02-01, 49-02-02, 49-04-02 (1978 and Supp.1995); see generally §§ 49-02-01 through 49-07-06; Ohio: Ohio Rev.Code Ann. (1991); 4905.03(A)(6), 4905.04, 4905.22 (1991); see generally §§ 4901.01-4909.99 (Baldwin 1991 and Supp.1995);

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Oklahoma: Okla. Stat., Tit. 17, §§ 15, 152, 160.1 (West 1986 and Supp.1997); Oregon: Ore.Rev.Stat. §§ 757.005, 757.020, 756.040 (1991); see generally §§ 756.010 through 757.991; Pennsylvania: Pa. Stat. Ann., Tit. 66, §§ 102, 501, 1301 (Purdon 1979 and Supp.1996-1997); see generally Tit. 66, §§ 101 through 2107; Rhode Island: R.I. Gen. Laws §§ 39-1-2(7), 39-1-3(a) (Supp.1996); see generally §§ 39-1-1 through 39-2-19 (1990 and Supp.1996); South Carolina: S.C.Code Ann. §§ 58-5-10(3), 58-5-210 (1976 and Supp.1995); see generally §§ 58-5-10 through 58-5-1070; South Dakota: S.D. Codified Laws §§ 49-34A-1, 49-34A-4, 49-34A-6 (1993 and Supp.1996); see generally §§ 49-34A-1 through 49-34A-78; Tennessee: Tenn.Code Ann. §§ 65-4-101, 65-5-201 (Supp.1996); see generally §§ 65-4-101 through 65-5-205 (1993 and Supp.1996); Texas: Tex.Rev.Civ. Stat. Ann., Art. 6050, § 1(a)(4), Art. 6053 (Vernon Supp.1996-1997); see generally Arts. 6050 through 6066g (Vernon 1962 and Supp.1996-1997); Utah: Utah Code Ann. §§ 54-2-1(8), 54-3-1, 54-4-1 (1994 and Supp.1996); see generally §§ 54-2-1 through 54-4-30; Vermont: Vt. Stat. Ann., Tit. 30, § 215 (1986); Virginia: Va.Code Ann. §§ 56-232, 56-234 (1995); see generally §§ 56-232 through 56-260.1 (1995 and Supp.1996); Washington: Wash. Rev.Code §§ 80.04.010, 80.28.020 (West 1991 and Supp.1996-1997); see generally §§ 80.04.010 through 80.04.520, 80.28.010 through 80.28.260; West Virginia: W. Va.Code § 24-2-1 (1992); see generally §§ 24-1-1 through 24-5-1 (1992 and Supp.1996); Wisconsin: Wis. Stat. Ann. §§ 196.01(5), 196.02, 196.03 (West 1992 and Supp.1996-1997); see generally §§ 196.01 through 196.98; Wyoming: Wyo. Stat. §§ 37-1-101(a)(vi)(D), 37-2-112 (1996); see generally §§ 37-1-101 through 37-6-107.

FN11. Ohio's Amended Substitute House Bill 476, signed into law in 1996, requires the state Public Utilities Commission to exempt certain sales of natural gas and/or related services by an LDC from this rate regulation if the commission finds that the LDC is subject to effective competition with respect to such service and that the customers for such service have reasonably available alternatives, Ohio Rev.Code Ann. § 4929.04, as amended by H.R. 476, § 1, effective Sept. 17, 1996. Although this law had not been enacted at the time of the purchases involved in this case, petitioner contended at oral argument that during the tax period in question here, Ohio permitted some natural gas sales by public utilities at unregulated, negotiated rates, and that those sales were not subject to sales tax. The record provides no support for this contention, and the constitutionality of Ohio exempting from state sales tax utility sales that are not price regulated is therefore not before the Court in this case.

The State also required LDC's to serve all members of the public, without discrimination, throughout their fields of operations. See, e.g., *Industrial Gas Co. v. Public Utilities Comm'n of Ohio*, 135 Ohio St. 408, 21 N.E.2d 166 (1939). They could not "pick out good portions of a particular territory, serve only select customers under private contract, and refuse service ... to ... other users," *id.*, at 413, 21 N.E.2d, at 168, or terminate service except for reasons defined by statute and by following statutory procedures, Ohio Rev.Code Ann. §§ 4933.12, 4933.121 (Supp.1990). When serving "human needs" consumers including "residential [and] other customers ... where the element of human welfare [was] the predominant factor," *In re Commission Ordered Investigation of the Availability of Gas Transportation Service Provided by Ohio Gas Distribution Utilities to End-Use Customers*, No. 85-800-GA-COI (Ohio Pub.Util.Comm'n, Aug. 1, 1989), Ohio LDC's were required to provide a firm backup supply of gas, see *ibid.*, and administer specific protective schemes, as

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by helping to assure a degree of continued service to low-income customers despite unpaid bills. See, e.g., Ohio Admin. Code 4901:1-18 (Ohio Monthly Record Nov. 1991).

#### IV

The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketer's unbundled gas, raises a hurdle for GMC's claim \*298 that Ohio's differential tax treatment of natural gas utilities and independent marketers violates our "'virtually *per se* rule of invalidity,'" *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647, 114 S.Ct. 1815, 1820, 128 L.Ed.2d 639 (1994) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978)), prohibiting facial discrimination against interstate commerce.

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[4][5][6] Conceptually, of course, any notion of discrimination <sup>FN12</sup> assumes a comparison of substantially similar entities. Although\*299 this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors. In Justice

Jackson's now-famous words:

FN12. Although GMC raises only a "facial discrimination" challenge to Ohio's tax scheme, our cases have indicated that even nondiscriminatory state legislation may be invalid under the dormant Commerce Clause, when, in the words of the so-called *Pike* undue burden test, "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). There is, however, no clear line between these two strands of analysis, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 106 S.Ct. 2080, 2084, 90 L.Ed.2d 552 (1986), and several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations, see, e.g., *Pike, supra*, at 145, 90 S.Ct., at 849 (declaring packing order "virtually *per se* illegal" because it required business operation to be performed in-state); *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 677, 101 S.Ct. 1309, 1319-1320, 67 L.Ed.2d 580 (1981) (plurality opinion of Powell, J.) (noting that in adopting invalidated truck-length regulation the State "seems to have hoped to limit the use of its highways by deflecting some through traffic"); *id.*, at 679-687, 101 S.Ct., at 1320-1325 (Brennan, J., concurring in judgment) (emphasizing that truck-length regulation should be invalidated solely in view of its protectionist purpose); see generally Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L.Rev. 1091 (1986). Nonetheless, a small number of our cases have invalidated state laws under the dormant Commerce Clause

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that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (train lengths); see also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88, 107 S.Ct. 1637, 1649, 95 L.Ed.2d 67 (1987) (“This Court’s recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations”); L. Brilmayer, *Conflict of Laws* § 3.2.3, pp. 144-148 (2d ed.1995) (discussing Court’s review of conflicting state laws under the dormant Commerce Clause). In the realm of taxation, the requirement of apportionment plays a similar role by assuring that interstate activities are not unjustly burdened by multistate taxation. See generally *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184-185, 115 S.Ct. 1331, 1338, 131 L.Ed.2d 261 (1995) (discussing “internal” and “external” consistency tests for apportionment of state taxes). Of course, the fact that Ohio exempts local utilities from its sales and use taxes could not support any claim of undue burden in this nondiscriminatory sense, since the exemption itself does not give rise to conflicting regulation of any transaction or result in malapportionment of any tax.

“Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and

no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect \*300 him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 69 S.Ct. 657, 665, 93 L.Ed. 865 (1949).

See also, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 469, 112 S.Ct. 789, 808, 117 L.Ed.2d 1 (1992) (SCALIA, J., dissenting) (“Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market ...”); \*\*825 *Reeves, Inc. v. Stake*, 447 U.S., at 437, 100 S.Ct., at 2277 (The dormant Commerce Clause prevents “state taxes and regulatory measures impeding free private trade in the national marketplace”); *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350, 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977) (referring to “the Commerce Clause’s overriding requirement of a national ‘common market’”). Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

Our cases have, however, rarely discussed the comparability of taxed or regulated entities as operators in arguably distinct markets; the closest approach to the facts here occurred in *Alaska v. Arctic Maid*, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961). In *Arctic Maid*, a 4% tax on the value of salmon taken from territorial waters by so-called freezer ships and frozen for transport and later canning outside the State was challenged as discriminatory in the face of a 1% tax on the value of fish taken from territorial waters and frozen by on-shore cold storage facilities for later sale on the domestic fresh-frozen fish market. The State prevailed on the Court’s holding that the claimants

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and cold storage facilities served separate markets, did not compete with one another, and thus could not properly be compared for Commerce Clause purposes. The proper comparison, the Court held, was between the freezer \*301 ships and domestic salmon canners, who shipped interstate into the same markets served by the freezer ships. Since the canners were taxed even more heavily than the freezer ships, there was no unfavorable burden upon the latter. *Id.*, at 204, 81 S.Ct., at 932. Although the Court's opinion did not discuss the possibility that competition in the domestic fresh-frozen market might have occurred in the absence of the tax disparity between the two types of salmon freezers, the freezer ships had made no attempt to compete in that market and neither claimed nor demonstrated an interest in entering it. See Brief for Respondents in *Alaska v. Arctic Maid*, O.T.1960, No. 106, pp. 27-33.

*Arctic Maid* provides a partial analogy to this case. Here, natural gas marketers did not serve the Ohio LDCs' core market of small, captive users, typified by residential consumers who want and need the bundled product. See, e.g., Darr, A State Regulatory Strategy for the Transitional Phase of Gas Regulation, 12 Yale J. Reg. 69, 99 (1995) ("[T]he large core residential customer base is bound to the LDC in what currently appears to be a natural-monopoly relationship"); App. 199 (a marketer from which GMC purchased gas does not hold itself out to the general public as a gas supplier, but rather selectively contacts industrial end users that it has identified as potentially profitable customers). While this captive market is not geographically distinguished from the area served by the independent marketers, it is defined economically as comprising consumers who are captive to the need for bundled benefits. These are buyers who live on sufficiently tight budgets to make the stability of rate important, and who cannot readily bear the risk of losing a fuel supply in harsh natural or economic weather. See, e.g., *Consolidated Edison Co. of N.Y. v. FERC*, 676 F.2d 763, 766, n. 5 (C.A.D.C.1982) ("[R]esidential users [of natural gas cannot] switch temporarily to other fuels and so they must endure cold homes" if

their gas supply is interrupted); Samuels, Reliability of Natural Gas Service for Captive\*302 End-Users Under the Federal Energy Regulatory Commission's Order No. 636, 62 Geo. Wash. L.Rev. 718, 749 (1994) ("Gas service disruptions lasting just a few days can cause severe health risks to captive end-users"). They are also buyers without the high volume requirements needed to make investment in the transaction costs of individual purchases on the open market economically feasible. Pierce, Intrastate Natural Gas Regulation: An Alternative Perspective, 9 Yale J. Reg. 407, 409-410 (1992) ("Purchasing gas service [from marketers] requires considerable time and expertise. Its benefits are likely to exceed its costs only for consumers who purchase very large quantities of gas"). The \*\*826 demands of this market historically arose free of any influence of differential taxation (since there was none during the pre-1978 period when only LDCs generally served end users), and because the market's economic characteristics appear to be independent of any effect attributable to the State's sales taxation as imposed today, there is good reason to assume that any pricing changes that could result from eliminating the sales tax differential challenged here would be inadequate to create competition between LDCs and marketers for the business of the utilities' core home market.

On the other hand, one circumstance of this case is unlike what *Arctic Maid* assumed, for there is a possibility of competition between LDCs and marketers for the noncaptive market. Although the record before this Court reveals virtually nothing about the details of that competitive market, in the period under examination it presumably included bulk buyers like GMC, which have no need for bundled protection, see, e.g., State Issue: Atlanta Gas Light Takes Step to Abandon Gas Sales by Unbundling Services for Non-Core Customers, Foster Natural Gas Report, June 20, 1996, p. 22 (indicating that prior to "unbundling" marketers accounted for 80% of sales to large commercial and industrial users in Georgia), and consumers of middling volumes of natural gas who found \*303 some value in Ohio's state-imposed protections but

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not enough to offset lower price at some point, see, e.g., Pierobon, *Small Customers: The Yellow Brick Road to Deregulation?*, 134 Pub. Utils. Fortnightly, No. 6, pp. 14, 15 (1996) (marketers' efforts in California are increasingly directed to attracting consumers in the "small commercial sector," including "schools, hospitals, hotels, restaurants, laundromats, and master-metered apartments," which currently purchase bundled gas from utilities); Salpukas, *New Choices for Natural Gas: Retailers Find Users Puzzled as Industry Deregulates*, N.Y. Times, Oct. 23, 1996, pp. D1, D4 (indicating that some natural gas marketers in New York City are attempting to lure "mom-and-pop businesses like restaurants and dry-cleaners" away from LDC's, with mixed success). Eliminating the sales tax differential at issue here might well intensify competition between LDC's and marketers for customers in this noncaptive market.

#### B

[7][8][9] In sum, the LDCs' bundled product reflects the demand of a market neither susceptible to competition by the interstate sellers nor likely to be served except by the regulated natural monopolies that have historically supplied its needs. So far as this market is concerned, competition would not be served by eliminating any tax differential as between sellers, and the dormant Commerce Clause has no job to do. There is, however, a further market where the respective sellers of the bundled and unbundled products apparently do compete and may compete further. Thus, the question raised by this case is whether the opportunities for competition between marketers and LDC's in the noncaptive market requires treating marketers and utilities as alike for dormant Commerce Clause purposes. Should we accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities\*304 alone operate? Although there is no *a priori* answer, a number of reasons support a decision to give the greater weight to the captive market and

the local utilities' singular role in serving it, and hence to treat marketers and LDC's as dissimilar for present purposes.' First and most important, we must recognize an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's of bundled gas to the noncompetitive captive market. Second, as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market. Finally, should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets.

#### 1

Where a choice is possible, as it is here, the importance of traditional regulated service\*\*827 to the captive market makes a powerful case against any judicial treatment that might jeopardize LDCs' continuing capacity to serve the captive market. Largely as a response to the monopolistic shakeout that brought an end to the era of unbridled competition among gas utilities, regulation of natural gas for the principal benefit of householders and other consumers of relatively small quantities is the rule in every State in the Union. Congress has also long recognized the desirability of these state regulatory regimes. *Supra*, at 820-821. Indeed, half a century ago we concluded that the NGA altogether exempts state regulation of retail sales of natural gas (including in-state sales to large industrial customers) from the strictures of the dormant Commerce Clause, see *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128 (1947), and to this day, notwithstanding the national regulatory revolution, Congress has done nothing to limit its unbroken recognition of the state regulatory authority that \*305 has created and preserved the local monopolies.<sup>FN13</sup> The clear implication is that Congress finds the benefits of the bundled product for captive local buyers well within the realm of what the States may reasonably promote

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and preserve.

FN13. In the present case, the parties have not briefed the question whether the present amended version of the NGA and related federal legislation continues the express Commerce Clause exemption for state regulation and taxation of retail natural gas sales recognized in *Panhandle-Indiana*, and we do not decide this issue. We note, however, that the language of § 1(b) of the NGA, which the *Panhandle-Indiana* Court construed as creating the exemption, itself remains unchanged. (Compare 52 Stat. 821 with 15 U.S.C. § 717(b) (1994).)

This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market, and in circumstances remarkably similar to those of the present case. In *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951), Ford Motor Company had entered a contract with an interstate pipeline for supply of gas at Ford's plant in Dearborn, Michigan, thus bypassing the local distribution company. The Michigan Public Service Commission ordered the pipeline to cease and desist from making direct sales of natural gas to the State's industrial customers without a certificate of public convenience and necessity, and the pipeline brought a Commerce Clause challenge to the commission's action. The Court observed that

"[a]ppellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in [the LDC's] over-all costs of service and its rates to customers whose only source of supply is [the LDC]. This clearly presents a situation of ... vital interest to the State of Michigan." *Id.*, at 334, 71 S.Ct., at 780.

In view of the economic threat that competition for large industrial consumers posed to gas service to

small captive \*306 users, the Court again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers, even if such regulation resulted in an outright prohibition of competition for even the largest end users. *Id.*, at 336-337, 71 S.Ct., at 781; see also *Panhandle-Indiana*, *supra* (upholding state regulation of direct sales to large industrial users as not pre-empted by the NGA or precluded by the dormant Commerce Clause).<sup>FN14</sup>

FN14. Under today's altered market structure, see *supra*, at 816-817, several Courts of Appeals have held that the NGA confers jurisdiction on FERC, rather than the States, to regulate such bypass arrangements for supplying gas to large industrial consumers when the sale of gas itself occurs outside the State and an interstate pipeline merely transports the gas to the industrial consumer for delivery in-state. See *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1414-1422 (C.A.10 1992); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1301 (C.A.6 1989), cert. denied, 494 U.S. 1079, 110 S.Ct. 1806, 108 L.Ed.2d 937 (1990); *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 121-122 (C.A.D.C.1989), cert. denied, 494 U.S. 1079, 110 S.Ct. 1807, 108 L.Ed.2d 937 (1990). We express no view on the correctness of these decisions.

[10][11][12][13] The continuing importance of the States' interest in protecting the captive market from the effects of competition for the \*\*828 largest consumers is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. State regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that

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individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months. We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was " 'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.' " \*307 *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444, 80 S.Ct. 813, 816, 4 L.Ed.2d 852 (1960) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103, 23 L.Ed. 819 (1876)). Just so may health and safety considerations be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present.<sup>FN15</sup>

FN15. Of course, if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 626-628, 98 S.Ct. 2531, 2536-2538, 57 L.Ed.2d 475 (1978); *Dean Milk Co. v. Madison*, 340 U.S. 349, 353-354, 71 S.Ct. 295, 297-298, 95 L.Ed. 329 (1951).

2

The size of the captive market, its noncompetitive character, the values served by its traditional regulation: all counsel caution before making a choice that could strain the capacity of the States to continue to demand the regulatory benefits that have served the home market of low-volume users since natural gas became readily available. Here we have to assume that any decision to treat the LDC's as similar to the interstate marketers would change the LDC's' position in the noncaptive market in which (we are assuming) they compete, at least at the margins, by affecting the overall size of the

LDCs' customer base. As we recognized in *Panhandle*, a change in the customer base could affect the LDCs' ability to continue to serve the captive market where there is no such competition.

To be sure, what in fact would happen as a result of treating the marketers and LDC's alike we do not know. We might assume that eliminating the tax on marketers' sales would leave those sellers stronger competitors in the noncaptive market, especially at the market's boundaries, and that any resulting contraction of the LDCs' total customer base would increase the unit cost of the bundled product. We might also suppose that the State would not respond to our decision by subjecting the LDC's and marketers both to the \*308 same sales tax now imposed on marketers alone, since the utilities are already subject to a complicated scheme of property taxation quite different from the tax treatment of the marketers.<sup>FN16</sup> It seems, in fact, far more likely that eliminating the tax challenged here would portend, among other things, some reduction of the total taxes levied against LDC's, in order to strengthen their position in trying to compete with marketers in the noncaptive market.

FN16. For example, public utilities pay personal property tax on 88% of true value, Ohio Rev.Code Ann. § 5727.111 (1996), while marketers pay personal property tax on 25% of their true value, § 5711.22(D). Public utilities also pay a special tax assessment for the expenses of the Public Utility Commission, § 4905.10 (1991), and for the expenses of the Ohio Consumer Counsel, § 4911.18. Moreover, natural gas utilities must pay a gross receipts tax of 4.75% on gas sales, § 5727.38 (1996), while marketers pay none.

Independent marketers, for their part, are subject to a franchise tax, § 5733.01, that does not apply to utilities, § 5733.09(A). Thus, this sales and use tax challenge would not be the last available to marketers and their customers; the franchise tax, which also does not apply to

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utilities, is presumably next in line.

3

The degree to which these very general suggestions might prove right or wrong, however, is not really significant; the point is simply that all of them are nothing more than suggestions, pointedly couched in terms of assumption or supposition. This is necessarily<sup>829</sup> so, simply because the Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S., at 341-342, 116 S.Ct., at 859, and authorities cited therein; Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 Emory L.J. 89, 108 (1983) ("It is virtually impossible for a court, with its limited resources, to determine with any degree of accuracy the costs to a town, county, or state of a particular industry"); see also Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L.Rev. 1203, 1211 (1986) (noting that "[e]ven expert economists" may have difficulty determining "whether the overall economic benefits<sup>309</sup> and burdens of a regulation favor local inhabitants against outsiders"). We are consequently ill qualified to develop Commerce Clause doctrine dependent on any such predictive judgments, and it behooves us to be as reticent about projecting the effect of applying the Commerce Clause here, as we customarily are in declining to engage in elaborate analysis of real-world economic effects, *Fulton Corp.*, *supra*, at 341-342, 116 S.Ct., at 859, or to consider subtle compensatory tax defenses, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 105, 114 S.Ct. 1345, 1353, 128 L.Ed.2d 13 (1994). The most we can say is that modification of Ohio's tax scheme could subject LDC's to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision of bundled services to the captive market. The conclusion counsels against taking the step of treating the bundled gas seller like any other, with the consequent necessity of uniform taxation of all gas sales.

Prudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress despite its noncompetitive, monopolistic character. Still less is that risk justifiable in light of Congress's own power and institutional competence to decide upon and effectuate any desirable changes in the scheme that has evolved. Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear. See, e.g., *Bush v. Lucas*, 462 U.S. 367, 389, 103 S.Ct. 2404, 2417, 76 L.Ed.2d 648 (1983) (Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts"). One need not adopt Justice Black's extreme reticence in Commerce Clause jurisprudence to recognize in this instance the soundness of his statement that a challenge<sup>310</sup> like the one before us "call[s] for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302, 64 S.Ct. 950, 955, 88 L.Ed. 1283 (1944) (concurring opinion). This conclusion applies *a fortiori* here, because for a half century Congress has been aware of our conclusion in *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128 (1947), that the NGA exempts state regulation of instate retail natural gas sales from the dormant Commerce Clause and in the years following that decision has only reaffirmed the power of the States in this regard.

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Accordingly, we conclude that Ohio's regulatory response to the needs of the local natural gas market has resulted in a noncompetitive bundled gas product that distinguishes its regulated sellers from

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independent marketers to the point that the enterprises should not be considered "similarly situated" for purposes of a claim of facial discrimination under the Commerce Clause. GMC's argument that the State discriminates between regulated local gas utilities and unregulated marketers must therefore fail.

**\*\*830 C**

[14] GMC also suggests that Ohio's tax regime "facially discriminates" because the State's sales and use tax exemption would not apply to sales by out-of-state LDC's. See, e.g., Reply Brief for Petitioner 2, n. 1. As respondent points out, however, the Ohio courts might well extend the challenged exemption to out-of-state utilities if confronted with the question. Indeed, in *Carnegie Natural Gas Co. v. Tracy*, No. 94-K-526 (Ohio Bd. Tax App., Nov. 17, 1995), reported in CCH Ohio Tax Rep. ¶ 402-254, the Ohio Board of Tax Appeals accepted the argument of a Pennsylvania public utility\*311 that insofar as the out-of-state utility sold natural gas to Ohio consumers it qualified as a utility under Ohio Rev.Code Ann. § 5727.01 and was therefore exempt from the State's corporate franchise tax. Out-of-state public utilities may therefore also qualify for Ohio's sales and use tax exemption. Because "we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands," *Associated Industries of Mo. v. Lohman*, 511 U.S., at 654, 114 S.Ct., at 1824, this argument, too, must be rejected.

V

[15][16] Finally, GMC claims that Ohio's tax regime violates the Equal Protection Clause by treating LDCs' natural gas sales differently from those of producers and marketers. Once again, the hurdle facing GMC is a high one, since state tax classifications require only a rational basis to satisfy the Equal Protection Clause. See, e.g., *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept.*

*of Treasury*, 490 U.S., at 80, 109 S.Ct., at 1625-1626. Indeed, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

[17][18] It is true, of course, that in some peculiar circumstances state tax classifications facially discriminating against interstate commerce may violate the Equal Protection Clause even when they pass muster under the Commerce Clause. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 874-883, 105 S.Ct. 1676, 1679-1684, 84 L.Ed.2d 751 (1985).<sup>FN17</sup> But as we explain in Part IV, *supra*, Ohio's \*312 differential tax treatment of LDC and independent marketer sales does not facially discriminate against interstate commerce. And in any event, there is unquestionably a rational basis for Ohio's distinction between these two kinds of entities.

FN17. *Ward* involved an Alabama statute that facially discriminated against interstate commerce by imposing a lower gross premiums tax on in-state than out-of-state insurance companies. The case did not present a Commerce Clause violation only because Congress, in enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, intended to authorize States to impose taxes that burden interstate commerce in the insurance field. *Ward*, 470 U.S., at 880, 105 S.Ct., at 1682-1683. We nonetheless invalidated Alabama's classification because "neither of the two purposes furthered by the [statute] ... is legitimate under the Equal Protection Clause...." *Id.*, at 883, 105 S.Ct., at 1684.

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We conclude that Ohio's differential tax treatment of public utilities and independent marketers violates neither the Commerce Clause nor the Equal Protection Clause and that petitioner's claims are

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without merit otherwise. The judgment of the Supreme Court of Ohio is affirmed.

*It is so ordered.*

Justice SCALIA, concurring.

I join the Court's opinion, which thoroughly explains why the Ohio tax scheme at issue in this case does not facially discriminate against interstate commerce. I write separately to note my continuing adherence to the view that the so-called "negative" Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain. "The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate Commerce." *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 263, 107 S.Ct. 2810, 2828, 97 L.Ed.2d 199 (1987) (SCALIA, J., concurring in part and dissenting in part).

\*\*831 I have previously stated that I will enforce on *stare decisis* grounds a "negative" self-executing Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210, 114 S.Ct. 2205, 2220, 129 L.Ed.2d 157 (1994) (opinion concurring in judgment); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78, 113 S.Ct. 1095, 1106, 122 L.Ed.2d 421 (1993) (opinion concurring in part and concurring in \*313 judgment) (collecting cases). Although petitioner contends that Ohio facially discriminates against interstate commerce with respect to natural gas sales, its argument is based on a novel premise: that private marketers engaged in the sale of natural gas are similarly situated to public utility companies. Nothing in this Court's negative Commerce Clause jurisprudence compels that conclusion. To hold that States must tax gas sales by these two types of entities equally would broaden the negative Commerce Clause beyond its existing scope, and intrude on a regulatory sphere traditionally occupied by Congress and the States.

Justice STEVENS, dissenting.

In Ohio, as in other States, regulated utilities selling natural gas—referred to by the Court as "LDC's"—operate in two markets, one that is monopolistic and one that is competitive.

In the first, they sell a "noncompetitive bundled gas product," *ante*, at 829, to small consumers who have no practical alternative source of supply. The LDCs' dominant position in that market justifies detailed regulation of their activities in order to protect consumers from the risk of exploitation by a seller with monopoly power. See *ante*, at 822-824. The basic purpose of that regulation is to protect consumers, not to subsidize the LDC's.

The second market in which LDC's sell natural gas is a competitive market in which large customers like the General Motors Corporation (GMC) have alternative sources of supply. Although Ohio possesses undoubted power to regulate the activities of all sellers in that market, *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951); it has not done so in any manner relevant here. The purchasers in this competitive market do not need the protections afforded by the state regulation of the monopolistic market, see *ante*, at 23, and the benefits provided by these regulations will thus not affect a competitive\*314 consumer's choice of seller. Customers like GMC are not "captive to the need for bundled benefits," *ante*, at 825. Nor do the burdens imposed by the regulations have a significant impact on LDCs' activities within this market. Thus, while the gas sold by LDC's on the competitive market may be subject to the same regulations as the gas sold in the noncompetitive market, the different impact of the regulations on the economic decisions of both consumers and sellers makes it appropriate to characterize all gas sold in that market as "unbundled gas," see *ante*, at 824. Although the physical composition of the gas sold in the two markets is identical, I agree with what I understand the Court to be assuming, namely, that as a matter of economics "bundled gas" and "unbundled gas" should be viewed as different products. See *ante*, at 824, 825-826.

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It is not uncommon for a firm with a monopolistic position in one market also to sell a second product in a competitive market. See, e.g., *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936). Even regulated monopolies such as electric utilities may distribute goods, such as light bulbs, in a competitive market. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). There is no reason why an LDC might not develop a product line, such as thermostats or gas furnaces, to sell in the competitive market for such products. I do not believe that the fact that the LDC is heavily regulated in the "bundled gas" market would justify granting it a special preference in the market for thermostats or gas furnaces. Nor do I discern a significant relevant difference between competition in "unbundled gas" and competition in thermostats or gas furnaces.

**\*\*832** It may well be true that without a discriminatory tax advantage in the competitive market, the LDC's would lose business to interstate competitors and therefore be forced to increase the rates charged to small local consumers. This circumstance may require the States to find new, and nondiscriminatory, methods for accommodating the needs of small \*315 consumers for regular and reasonably priced natural gas service. As the Court recognizes, speculation about the "real-world economic effects" of a decision like this one is beyond our institutional competence. See *ante*, at 829. Such speculation is not, therefore, a sufficient justification for a tax exemption that discriminates against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

Accordingly, while I agree with Parts II and IV of the Court's opinion, I respectfully dissent from the judgment.

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G-P GYPSUM CORPORATION,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Respondents.

DECLARATION OF  
MAILING

I, Kristin D. Jensen, states and declares as follows:

I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On July 18, 2007, I provided a true and correct copy of Brief of Respondent and this Declaration of Mailing sent US Mail Postage Prepaid via Consolidated Mail Service to:

Franklin G. Dinces  
Attorney at Law  
9202 Glencove Road Kp N  
Gig Harbor, WA 98329-5567

I certify under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

Executed this 18<sup>th</sup> day of July, 2007, in Olympia, Washington.

  
KRISTIN D. JENSEN  
Legal Assistant