

# BOARD TO CONSIDER WHETHER INTERSTATE PIPELINE FEES SUBJECT TO UTILITY EXCISE TAX

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MEMBER

The Tax Commissioner of Ohio (the “Commissioner”) recently issued a Final Determination (“FD”) affirming an assessment of public utility excise tax on a portion of the transportation fees collected by an interstate natural gas pipeline. The FD has been appealed to the Ohio Board of Tax Appeals (the “Board”). The FD and the taxpayer’s subsequent Notice of Appeal (“NOA”) to the Board raise an interesting legal issue on a state’s ability to tax a portion of the natural gas transportation fees received by an interstate pipeline company.

The taxpayer, Rockies Express Pipeline, LLC (“REX”), operates a natural gas pipeline. REX does not sell natural gas. REX receives fees for the transportation of natural gas within the pipeline. The assessment was imposed on the transportation fees REX received to move natural gas from one point within Ohio to another point in Ohio. REX argued that all of its transportation fees qualified for the statutory exclusion in R.C. 5727.33(B)(1) for “All receipts derived wholly from interstate business.”

The question of whether transportation fees are from interstate or intrastate commerce would, at first blush, appear to be a factual question that could be easily answered. However, a review of the FD and the NOA at the Board suggests the issue is more complicated. The FD indicates that REX provided testimony during the hearing at the legal division of the commissioner’s office that all of the natural gas it transported was in interstate commerce. The Commissioner disagreed, finding that the transportation was intrastate where gas shipments started and ended in Ohio.

Interestingly, REX argues that even the sales within Ohio are considered interstate commerce. REX argues that the Natural Gas Act of 1938, which conferred upon the Federal Energy Regulatory Commission (“FERC”) the power to regulate the transportation of natural gas in interstate commerce, treats the transfer of natural gas within Ohio by an interstate pipeline, such as REX, as interstate commerce. REX is regulated by FERC, not the Public Utilities Commission of Ohio (“PUCO”). REX argues that the transfer of natural gas within Ohio is governed by a FERC-approved Tarriff, which is only imposed on interstate commerce. PUCO does not regulate REX’s transfer of natural gas in Ohio.

REX also relies heavily on the Supreme Court of Ohio’s (the “Court”) decision in *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511 (2008). In *Columbia Gas*, the Court considered whether a pipeline company that also had some direct sales of natural gas was a natural gas company eligible for a lower listing percentage for purposes of calculating the public utility personal property tax. For purposes of the public utility personal property tax, the Commissioner adopts the FERC definitions of interstate transportation or transmission versus the local distribution of gas. Thus, the Court considered the FERC treatment of the pipeline’s gas sales: “Rather the FERC defines interstate transportation as beginning at the point where the interstate pipeline receives gas from the gathering or production area and ending at the point where the interstate pipeline delivers gas into the LDC’s distribution facility (commonly known as the “city gate”). \* \* \* both FERC and federal courts have found that the transportation of natural gas by an interstate pipeline directly to an end user constitutes transportation in interstate commerce, not local distribution.” ¶ 62-63.

The second issue considered by the parties is whether imposing the public utility excise tax on REX violates the Commerce Clause of the United States Constitution. In the FD, the Commissioner concludes that the assessment satisfies the four-prong test of *Complete Auto Transit* because Ohio is only taxing the transportation fees associated with natural gas entering and exiting the pipeline in Ohio. REX asserts that the assessment discriminates against interstate commerce and is not fairly related to the services provided by Ohio. REX argues that almost all of the deliveries REX made in Ohio that were assessed the Ohio public utility excise tax were to other interstate pipelines and that it is unknown whether any of the natural gas was then delivered into Ohio. REX also asserts that the assessment discriminates against interstate commerce because a shipment wholly within Ohio is taxed, while a delivery originating or ending in another state would be exempt. Further, REX argues that the assessment does not rationally relate to benefits received because most of the gas is delivered outside of Ohio. REX also argues that the assessment violates the Due Process Clause.

The case is currently pending at the Board. The Board cannot render decisions on constitutional matters. However, the Board could rule on the statutory definition of “wholly from interstate business” and whether the transportation fees REX received fall within the definition. If the Board does not find for the taxpayer on statutory grounds, the case may have to be appealed to the Court before final resolution can be obtained. Interstate pipelines that paid or that have been assessed tax on fees for the transportation of natural gas originating and delivered in Ohio should consider whether a refund or an offset opportunity may exist.

**If you have any questions about Utility Excise Tax, contact Deb McGraw or any other ZHF professional.**

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