No. _____

IN THE

# Supreme Court of the United States

MISSOURI GAS ENERGY, *et al.*,
*Petitioners,*

v.

STATE OF KANSAS, DIVISION OF PROPERTY VALUATION,
*Respondent.*

**On Petition For Writ Of Certiorari To The Kansas Supreme Court**

## PETITION FOR WRIT OF CERTIORARI


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APRIL 7, 2014

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## QUESTION PRESENTED

Whether a state may, consistent with the dormant Commerce Clause, impose an *ad valorem* tax on natural gas that is being transported through interstate commerce but temporarily stored in the state by a common carrier, even though the taxpayer has no control over where the gas is stored and no other connection with the state.

## PARTIES TO THE PROCEEDING

Petitioners in this case, who were taxpayers and appellants below, are Missouri Gas Energy, an operating unit of Laclede Gas Company; MidAmerican Energy; Northern States Power of Minnesota; Public Service Company of Colorado; Northern States Power of Wisconsin; Illinois Power Company dba Ameren IP; Central Illinois Light Co dba Ameren CILCO; Union Electric Company dba Ameren UE; Central Illinois Public Service Co dba Ameren CIPS; The Empire District Gas Company; Minnesota Energy Resources Corporation; and Superior Water, Light & Power Company.

Respondent, who was the appellee below, is the State of Kansas, Division of Property Valuation.

Other entities were also taxpayers and appellants below, but are not named as Petitioners here. They include BP Canada Energy Marketing Corp.; Northern States Power Company of Minnesota—Generation; U.S. Energy Services, Inc.; ProLiance Energy, L.L.C.; Oklahoma Natural Gas Company; ONEOK Energy Services Company, L.P.; Tenaska Gas Storage, L.L.C.; Interstate Power & Light Company; Wisconsin Power & Light Company; Colorado Springs Utilities; Great River Energy; Eastern Colorado Utility Company; City of Fort Morgan, Colorado; City of Trinidad, Colorado; National Public Gas Agency; Metropolitan Utilities District; Nexen Marketing U.S.A., Inc.; City Utilities of Springfield, Missouri; Jo-Carroll Energy, Inc.; NextEra Energy Power Marketing, L.L.C.; Chevron U.S.A., Inc.; Shell Energy Northern America (US), L.P.; Sioux Center Municipal Utilities; Circle Pines Utilities dba Centennial

Utilities; Clayton Energy Corp.; CCP Coast to Coast Partners, L.L.C.; DB Energy Trading, L.L.C.; and Cheyenne Light Fuel & Power Company.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Missouri Gas Energy is an operating unit of Laclede Gas Company, a wholly owned subsidiary of The Laclede Group, a publicly traded company.

Petitioner MidAmerican Energy Company is a wholly owned subsidiary of MHC Inc., a privately held corporation. MHC Inc. is a wholly owned subsidiary of MidAmerican Funding, LLC, a privately held limited liability company. MidAmerican Funding, LLC is a wholly owned subsidiary of MidAmerican Energy Holdings Company, a privately held corporation. MidAmerican Energy Holdings Company is a consolidated subsidiary of Berkshire Hathaway Inc., a publicly held company, which owns approximately 89.8% of the voting equity of MidAmerican Energy Holdings Company.

Petitioners Northern States Power of Minnesota, Public Service Company of Colorado, and Northern States Power of Wisconsin, are operating company subsidiaries of Xcel Energy, Inc., a publicly held company, which owns 100% of their stock.

Petitioners Illinois Power Company dba Ameren IP; Central Illinois Light Co dba Ameren CILCO; Union Electric Company dba Ameren UE; Central Illinois Public Service Co dba Ameren CIPS, are 100% owned subsidiaries of Ameren Corporation, a publicly held company.

Petitioner The Empire District Gas Company is a 100% owned subsidiary of The Empire District Electric Company, a publicly held company.

Petitioner Minnesota Energy Resources Corporation (MERC) is a 100% owned subsidiary of Integrys Energy Group, Inc., a publicly held company.

Petitioner Superior Water, Light & Power Company is a wholly owned subsidiary of ALLETE, Inc., a publicly held company.

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OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Kansas Supreme Court.

## OPINIONS BELOW

The decision of the Kansas Supreme Court (Pet.App. 1a) is reported at 313 P.3d 789. The decision of the Court of Tax Appeals of the State of Kansas (Pet.App. 44a) is unreported.

## JURISDICTION

The Kansas Supreme Court entered judgment on December 6, 2013. Pet.App. 1a. On February 27, 2014, Justice Sotomayor granted Petitioners' application for an extension of time to file a petition for writ of certiorari until April 7, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part: "The Congress shall have power . . . [t]o regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

## STATEMENT

The Kansas Supreme Court held that the *ad valorem* tax levied on Petitioners' natural gas was consistent with the dormant Commerce Clause because it was "a personal property tax on stored natural gas that was located in Kansas on the assessment date." Pet.App. 21a. That flawed reasoning exacerbated a division in authority among state courts, and would allow states to impose *ad valorem* taxes against any personal property physically present in the state, even for a fleeting moment. Left unreviewed, this re-

sult would unduly burden the interstate marketplace for natural gas—a burden made more untenable by the split in judicial authority that protects the same gas from tax when it passes through the state of Texas but subjects it to state taxes when passing through Oklahoma and Kansas.

The Kansas Supreme Court refused to consider factors that have informed this Court's Commerce Clause jurisprudence throughout history. In particular, its analysis ignored the crucial fact that Petitioners do nothing but tender their gas to interstate pipelines—common carriers that transport the gas through interstate commerce to designated points of delivery. These pipelines pass through and have underground facilities in Kansas and other states, so some portion of the gas delivered to Petitioners *may* transiently appear under Kansas soil at some time. But Petitioners have no claim to specific molecules of gas transported through or stored in Kansas, and it is impossible to determine whether they own any portion of the gas there. Moreover, the decision regarding where the gas travels belongs solely to the interstate pipelines. Petitioners have no control over—nor any knowledge of—the routing or location of their gas. Nor did the court account for Petitioners' lack of any other connections with Kansas, such as owning facilities in Kansas for the transmission, distribution, or storage of natural gas. It relied solely on the temporary physical presence of the natural gas that was mathematically attributed to Petitioners.

This decision departs from this Court's precedents, burdens the interstate natural-gas market with overreaching and inconsistent tax obligations, and deepens the direct conflict among state courts on the con-

stitutionality of *ad valorem* taxes on stored natural gas.

### A. The Shipment And Storage Of Natural Gas Through Interstate Pipelines

Petitioners are investor-owned utilities that contract with interstate pipelines to move gas through interstate commerce. They purchase natural gas from producers and marketers and tender that gas to the interstate pipelines for transportation. Pet.App. 6a. The interstate pipelines then deliver an equivalent amount of gas to Petitioners at a designated point of delivery. *Id.* Petitioners do not receive the same molecules of gas they put into the pipelines. *Id.* at 7a. Rather, the pipelines commingle all of their customers' gas. *Id.* Petitioners simply have a contractual right to withdraw the same *amount* of gas that they tendered to the pipelines. *Id.*

Between the time that natural gas is tendered to the interstate pipelines and delivered to Petitioners, the pipelines transport and store the gas "somewhere in the pipeline's storage or transportation systems." *Id.* at 6a. Four interstate pipelines transport and store the natural gas at issue in this case: Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Southern Star Central Gas Pipeline. *Id.* at 7a. As interstate pipelines, these companies are regulated by the Federal Energy Regulatory Commission ("FERC"). *Id.* Each interstate pipeline owns and operates pipelines and underground storage facilities in multiple jurisdictions, including Kansas. *Id.* Petitioners cannot designate a particular location for transportation or storage; the gas may be stored in Kansas or in another state. *Id.* at 6a, 48a. In fact,

Petitioners "have no knowledge regarding the specific nature and location of such storage." *Id.* at 48a. Instead, the pipelines maintain complete possession and control of the natural gas throughout their systems. *Id.* at 7a, 48a. Under FERC-approved tariffs, these pipelines bear all risk of loss and liability while in control and possession of the gas. *Id.* at 7a, 47a.

Storage "is integral to the pipelines' operations." *Id.* at 6a.[1] The interstate pipelines "continually" move natural gas "to and . . . from storage to satisfy essential pipeline pressure and balancing requirements." *Id.* at 49a; *see also id.* at 6a. In addition, storage allows the interstate pipelines to simultaneously receive and deliver natural gas at distant locations. *Id.* at 6a, 49a. No effort is (or could be) made to ensure that the same molecules of gas a Petitioner tenders to the pipeline system are placed into storage for, or ultimately delivered to, that same Petitioner. *Id.* at 7a, 48a. The identity of the gas transported, stored, and delivered to Petitioners "is under the complete control of the pipeline." *Id.* at 48a.

### B. Petitioners Lack Any Substantial Connection With The State Of Kansas

Petitioners own no facilities in Kansas for the transmission, distribution, or storage of natural gas. *Id.* at 7a. All of the gas transported by the pipelines for Petitioners is intended for ultimate use or sale *outside* of Kansas. *Id.* at 48a. Petitioners are regu-

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[1] FERC regulations treat "storage" as part of the transportation services provided by interstate pipelines. *See* 18 C.F.R. § 284.1(a) (defining "[t]ransportation" to include "storage").

lated as public utilities in other states, but not in Kansas. *Id.* at 7a, 46a.

For example, Petitioner Missouri Gas Energy is regulated as a public utility operating in Missouri, and it "is a merchant of natural gas within the state of Missouri only." *Id.* at 126a-27a. Any gas is intended for ultimate sale within the state of Missouri. *Id.* at 130a. Missouri Gas Energy does not serve any customers in Kansas and is not regulated as a public utility in Kansas. *Id.* at 126a. Similarly, Petitioner MidAmerican Energy Company is an Iowa corporation that is regulated as a natural-gas public utility operating in the state of Iowa. *Id.* at 105a-06a. MidAmerican Energy Company engages primarily in the business of selling natural gas to retail consumers in Iowa, South Dakota, Nebraska, and Illinois; it does not serve any customers in Kansas. *Id.* at 106a-07a. The record is replete with similar facts, such as the absence of customers or other contacts in Kansas, regarding the other Petitioners in this case. *See id.* at 73a-179a.

### C. The Taxes Assessed Against Petitioners

In 2009, Respondent Kansas Division of Property Valuation (the "Division") undertook to assess *ad valorem* taxes against Petitioners and other taxpayers, including out-of-state natural-gas marketing companies and out-of-state municipalities, for natural gas held in Kansas storage facilities. The Division determined that Petitioners (and the other taxpayers) were "public utilities" within the new statutory definition of that term, which subjected them to *ad valorem* taxes. *See* K.S.A. § 79-5a01; *see also* K.S.A. § 79-201f(a) ("public utilities" do not qualify for exemption); K.S.A. § 79-201m(b) (same).

Gas is commingled within the pipeline systems, so the Division could not and did not determine which Petitioners actually owned the gas located in Kansas. Pet.App. 7a. Instead, the Division based the tax assessment on a fictional attribution of ownership. Using an allocation formula adopted from a FERC-approved tariff, the Division arbitrarily attributed a quantity of gas to each Petitioner. *Id.* at 4a-5a. This formula divided an interstate pipeline's total Kansas inventories by the pipeline's total inventories in all states; then, it multiplied that ratio by the Petitioners' total volume present in the pipeline. *Id.* at 5a. This formula yielded the amount of gas in Kansas that Petitioners allegedly "owned."

The Division attributed this fictional ownership regardless of whether it was physically possible for Petitioners' gas to move through—much less be stored in—Kansas. For example, 70 percent of Northern Natural Gas Company customers' gas is tendered to the pipeline in Iowa, and half of its customers' gas is delivered in Minnesota. *Id.* at 7a. It is thus "'highly likely'" that a customer's gas will be received by the pipeline in Iowa and delivered in Minnesota—and never flow through Kansas. *Id.* at 7a-8a (describing the undisputed testimony of Northern Natural Gas vice president). But under the Division's allocation formula, those customers "would be taxed in Kansas even though [their gas] never physically entered the state." *Id.* at 8a. The Division did not reconcile these facts when assessing the amount of stored gas that a customer theoretically "owned" in Kansas.

The taxable values attributed to Petitioners were substantial. For Petitioner Missouri Gas Energy, the

assessed value was $10,689,469, *id.* at 132a; Petitioner Northern States Power Company of Minnesota was assessed at $8,029,347, *id.* at 144a. In total, the assessed value for all 12 Petitioners' natural gas in Kansas was over $41 million.[2]

### D. Petitioners' Challenge To The Tax

Petitioners, along with other taxpayers, appealed the Division's appraisals and filed requests for tax exemption. They claimed that the gas at issue was exempt under state law and that the tax was unconstitutional. *Id.* at 3a. After an evidentiary hearing, the Court of Tax Appeals denied the exemption requests. *Id.* at 64a. The Court of Tax Appeals did not consider the validity of the tax under the U.S. Constitution, because that court is not "vested with authority to address the constitutionality of statutes." *Id.* at 56a; *see also id.* at 10a.

Petitioners and the other taxpayers appealed. Both sides requested transfer of the appeal to the Kansas Supreme Court, which was granted. *Id.* at 10a. Before the Kansas Supreme Court, Petitioners argued that the gas was exempt from taxation under state law and that the tax violated the dormant Commerce Clause and the Due Process Clause of the U.S. Constitution. *Id.* at 10a-11a.

With respect to the dormant Commerce Clause, Petitioners argued that the natural-gas tax failed the four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), as informed by this Court's precedents. In *Complete Auto*, this Court

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[2] *See* Pet.App. 79a, 81a, 83a, 91a, 100a, 111a, 121a, 132a, 144a, 154a, 164a, 176a.

held that a tax is consistent with the dormant Commerce Clause only if (1) there is a substantial nexus between the taxpayer's activity and the taxing State; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the state. *Id.* at 279. Petitioners placed particular emphasis on the first and fourth prongs.

Arguing that their activity lacked a substantial nexus with Kansas, Petitioners emphasized that they do business primarily outside of the state of Kansas, and they do not own property or facilities in Kansas for the transmission, distribution, or storage of natural gas. Pet.App. 17a. Rather, they contract with common carriers—the interstate pipelines—to transport natural gas through interstate commerce; these common carriers are Petitioners' only connection with Kansas. *See id.* at 14a, 17a. Petitioners relied on this Court's bright-line rule for "common carriers," which holds that taxpayers "whose only connection with customers in the [taxing] state is by common carrier" cannot be taxed. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 758 (1967); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992) (reaffirming this rule).

Petitioners' nexus argument also relied on the longstanding "goods-in-transit" doctrine, which holds that if property found temporarily in a taxing state is in continuous transit, it cannot be taxed by the state. *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101 (1929). To determine whether there is a break in the continuity of transit, such that the property becomes taxable, this Court considers "the various factors of the situation." *Champlain Realty Co. v. Town of*

*Brattleboro*, 260 U.S. 366, 377 (1922). Petitioners argued that they did not control or possess the gas, and they did not purposefully direct their business activities to Kansas in any way. *See* Pet.App. 17a; *see also Champlain*, 260 U.S. at 377 (noting factors such as the intention of the owner and whether the taxpayer had control over the property). Petitioners simply tendered their gas to a common carrier which, by coincidence, has facilities in Kansas. *See* Pet.App. 17a; *see also* 14a.

Invoking the fourth prong, Petitioners also argued that the tax was not fairly related to services provided by the state. *See id.* at 16a. They argued that Kansas provided services to the pipeline companies themselves, but not to the theoretical "owners" of natural gas in Kansas, who have no specific claim to any gas in Kansas and no control over the gas located there.

### E. The Kansas Supreme Court Upheld The Tax Under The Dormant Commerce Clause

The Kansas Supreme Court disagreed with Petitioners, holding that the natural-gas tax was consistent with the dormant Commerce Clause. Assessing the first prong of *Complete Auto*, the court concluded that there was "axiomatically" a "substantial nexus between Kansas and the gas stored in this state," simply because some portion of gas was physically present in Kansas. Pet.App. 21a. Refusing to consider the factors relevant to the "goods-in-transit" doctrine, the court concluded that "the most important factor in determining whether a substantial nexus exists . . . is that this is a personal property tax on stored natural gas that was located in Kansas on the assessment date." *Id.* In addition, it rejected the

"common carrier" rule from *National Bellas Hess* and *Quill*, holding that these decisions are limited to sales and use taxes. *Id.* at 16a.

The court also held that the fourth prong of *Complete Auto* was satisfied because "ad valorem taxes, which are levied upon property situated in Kansas, are fairly related to the taxpayers' contact with Kansas, *i.e.*, their storage of gas in this state." *Id.* at 21a. It reasoned that "[a]ll property in Kansas is subject to ad valorem taxation," and Petitioners' gas was taxed at the same rate as other property. *Id.*

Finally, the Kansas Supreme Court addressed the state-law exemption arguments, separately analyzing three categories of taxpayers: local distribution companies certified as public utilities in other states, marketers and brokers of natural gas, and out-of-state municipal utilities. The Kansas Supreme Court held that the local distribution companies were subject to *ad valorem* taxes because they qualified as "public utilities" under Kansas law, even though they are not regulated as public utilities in Kansas. Pet.App. 40a-41a. But marketers and brokers of natural gas, as well as out-of-state municipal utilities, did not qualify as "public utilities" under Kansas law, and thus were exempt from taxation on their calculated shares of gas stored within Kansas. *See id.* at 37a-40a, 41a-43a. The court remanded to the Court of Tax Appeals to determine which taxpayers fell within each of these categories. *Id.* at 43a. The 12 Petitioners here stipulated that they are "public utilities" under the Kansas Supreme Court decision. *Id.*

at 188a-189a.[3] Petitioners now seek review of the Kansas Supreme Court's dormant Commerce Clause ruling.[4]

## REASONS FOR GRANTING THE PETITION

A California company fills a tanker with oil and hires a common carrier to transport that tanker to New Jersey. The trucking company has its driver take I-80, leaving California and driving through the states of Nevada, Utah, Wyoming, Nebraska, Iowa, Illinois, Indiana, Ohio, and Pennsylvania, before arriving in New Jersey. May each of those states, consistent with the Commerce Clause, impose an *ad valorem* tax on the value of the oil simply because the cargo passed through the state, or the driver made

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[3] This stipulation was filed with the Court of Tax Appeals. Pet.App. 180a. The stipulation also categorizes the remaining parties, with one exception. *See id.* at 186a-190a.

[4] The Kansas Supreme Court's decision is final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Where "the highest court of a State has finally determined the federal issue," but "there are further proceedings in the lower courts to come," this Court may grant review where, as here, "the federal issue is conclusive or the outcome of further proceedings preordained," or the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 477, 479-80. Both circumstances are present here. There is nothing left to be determined as to these 12 Petitioners, all of whom stipulated that they are non-exempt "public utilities" under the Kansas Supreme Court's decision. Thus, the outcome of any further state-court proceedings is preordained as to these Petitioners. *Id.* at 479. Indeed, any further state-court proceedings will determine the status of only one taxpayer. *See* Pet.App. 190a. Regardless of how that taxpayer is categorized, the dormant Commerce Clause issue "will survive and require decision." *Cox Broadcasting*, 420 U.S. at 480.

brief stops to rest or refuel along the way? The answer is "no." *See, e.g.*, *Quill*, 504 U.S. at 315 n.8, 317-18; *Carson*, 279 U.S. at 108-09; *Champlain*, 260 U.S. at 373-74.

This case presents the same issue, except that the taxed property is natural gas and the common carrier is a series of interstate pipelines. Yet the answer given by the Kansas Supreme Court was "yes." This is now the third time that the constitutionality of *ad valorem* taxes on natural gas moving in interstate commerce has reached this Court, and the question has divided state courts in Kansas, Texas, and Oklahoma. The result has been a patchwork of state-tax liability for entities that ship our Nation's natural gas through interstate pipelines across the country. This Court should grant certiorari to resolve this split in authority, which has created great uncertainty in the interstate natural-gas market.

**I.** As the Kansas Supreme Court acknowledged, state courts "have split on whether similar ad valorem taxes on natural gas stored in an interstate pipeline violate[] the Commerce Clause." Pet.App. 17a. Since 2010, when the Solicitor General previously recommended against review of this question, two key developments altered the legal landscape: (1) the Texas Court of Appeals decision became the last word on this issue in Texas, and (2) the Kansas Supreme Court entered the debate. These developments have created a 2-1 split among state courts, underscoring the strong need for this Court's review.

**II.** The decision of the Kansas Supreme Court departs dramatically from this Court's dormant Commerce Clause precedents. The Kansas Supreme Court upheld the tax on the sole basis that Petition-

ers theoretically owned natural gas physically present in Kansas on the assessment date. In applying this stark "physical presence" rule, the Kansas Supreme Court refused to consider factors that have informed this Court's dormant Commerce Clause opinions for many years. For example, it failed to consider the role of interstate pipelines as common carriers in transporting the gas, as well as Petitioners' inability to control where the gas is transported or stored, their lack of knowledge concerning the location of gas, and the absence of any meaningful connections between Petitioners and Kansas. This Court should grant certiorari to resolve the irreconcilable conflict between the decision below and this Court's directly applicable precedents.

**III.** The division among state courts has resulted in a patchwork of state tax liability, leading to confusion and uncertainty in the interstate market for natural gas, which is critical to our national economy. Now that Kansas has become the second state to endorse *ad valorem* taxes on natural gas moving in interstate pipelines, other states are likely to impose similar taxes on transient natural gas passing through their borders. Without this Court's guidance, diverging state court opinions will subject shippers to taxes in some states but not others. This Court should grant certiorari to ensure stability and predictability in the interstate natural-gas market.

## I. STATE COURTS ARE SHARPLY DIVIDED OVER THE CONSTITUTIONALITY OF *AD VALOREM* TAXES ON NATURAL GAS IN INTERSTATE PIPELINES

The Kansas Supreme Court expressly recognized that state courts "have split on whether similar ad

valorem taxes on natural gas stored in an interstate pipeline violate[] the Commerce Clause." Pet.App. 17a. In the decision below, Kansas joined Oklahoma in upholding the constitutionality of such taxes, thereby paving the way for other states to assess similar taxes. There is now an even greater need to address this issue than when this Court called for the views of the Solicitor General in the Oklahoma case. *See Missouri Gas Energy v. Schmidt*, 558 U.S. 811 (2009). This Court should grant certiorari to resolve the division among state courts.

### A. In Texas, *Ad Valorem* Taxes On Natural Gas In Interstate Pipelines Are Barred As Unconstitutional

Squarely addressing this issue, the Texas Court of Appeals held that the Commerce Clause prohibits *ad valorem* taxes on natural gas in interstate pipelines. *See Peoples Gas, Light & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208, 217-19 (Tex. Ct. App. 2008). After requesting full briefing on the merits, the Texas Supreme Court denied review.

In *Peoples*, The Peoples Gas, Light, and Coke Company ("Peoples"), a natural gas distribution company similar to Petitioners, appealed an *ad valorem* tax on natural gas that was temporarily held in an interstate pipeline's Texas storage facility while being shipped in interstate commerce. *Id.* at 211. The pipeline had many storage facilities, including one in Harrison County, Texas. *Id.* The Texas Court of Appeals concluded that Peoples owned the gas in storage. *Id.* at 214. Nevertheless, the court held that the tax violated the Commerce Clause, applying two separate tests. *Id.* at 215-19.

*First*, the court applied the long-established "goods-in-transit" doctrine, which determines whether property is in continuous transit in interstate commerce, such that it lacks a sufficient nexus with the taxing state. *See id.* at 215-16. The Texas court cited several factors relevant to the "goods-in-transit" analysis, including "the owner's intention, the owner's ability to change destination, the agency or method of transportation, the actual continuity of the journey, and the purpose of the interruption." *Id.* at 216 (citing *Champlain*, 260 U.S. at 377).

Based on these factors, the court held that the stored gas was in continuous transit, and lacked sufficient connections with Texas for purposes of taxation. *Id.* at 215-16. It reasoned that Peoples "ha[d] no control over where [the] natural gas is stored and how much is stored at any given location," and thus did not "ma[k]e the decision to store gas in [Texas] in order to serve its business purpose." *Id.* at 216. "Simply put," the court continued, "[Peoples] made no decision at all regarding the physical location of the stored natural gas." *Id.* The court deemed it irrelevant that Peoples may have incurred some benefit by storing gas at the facility, given that Peoples "ma[de] no decision to store the natural gas [in Texas] specifically." *Id.* at 216-17.

*Second*, the court applied the four-factor test from *Complete Auto*. The Texas Court of Appeals concluded that Peoples lacked a substantial nexus with Texas because it had no office, employees, representatives, or physical facilities in Texas. 270 S.W.3d at 218. Nor was there any evidence that Peoples delivered natural gas to Texas customers. *Id.* The court further noted that the pipeline owned the facility,

and the pipeline alone decided whether to use the Texas facility. *Id.* Therefore, the tax failed the first prong of the *Complete Auto* test.

The court also concluded that the fourth prong was not satisfied because the tax did not reasonably relate to the services provided by the state. *Id.* at 219. Fire and police services provided by the state, while valuable, protected the facility itself, which belonged to the pipeline. *Id.*

The appraisal district filed a petition for review with the Supreme Court of Texas, and Peoples filed a conditional cross-petition on the underlying question of whether Peoples owned the gas at issue. *See* Docket, Case No. 09-0053 (Tex.). The Texas Supreme Court requested responses to these petitions, and then ordered briefing on the merits. *See id.* Ultimately, the court denied the petitions for review. 2010 Tex. LEXIS 227 (Tex. Mar. 12, 2010). The Texas Supreme Court also requested a response to the appraisal district's motion for rehearing, which it later denied. *See* Docket, Case No. 09-0053 (Tex.). This Court denied certiorari. *Harrison Cent. Appraisal Dist. v. Peoples Gas, Light & Coke Co.*, 131 S. Ct. 2097 (2011).

One of the Solicitor General's principal reasons for opposing review in the Oklahoma case was the then-unsettled nature of the Texas ruling: "The Texas Supreme Court . . . is in the process of deciding whether to grant further review and has ordered full merits briefing." Br. for United States as *Amicus Curiae* 7-8, *Missouri Gas Energy v. Schmidt* (No. 08-1458) [hereinafter "SG Okla. Br."]. That uncertainty is gone. The Texas Supreme Court ultimately denied review in *Peoples*. As a result, the Texas Court of

Appeals decision is the last word on this issue in Texas: *Ad valorem* taxes on stored natural gas are unconstitutional.

Indeed, the Texas Court of Appeals subsequently relied on *Peoples* to strike down a tax on crude oil passing through tank farms that were operated by a pipeline system. *See Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d 215, 223-24 (Tex. Ct. App. 2009). After requesting responses and briefing on the merits, the Texas Supreme Court denied review of *Midland Central Appraisal District* on the very same day it denied review of *Peoples*. 2010 Tex. LEXIS 234 (Tex. Mar. 12, 2010), *cert. denied* 131 S. Ct. 2097 (2011).

Further delay in addressing the constitutional question will not alleviate the conflict. The Texas Supreme Court in *Peoples* received multiple rounds of briefing, including merits briefing, on this issue. Yet it chose to deny review, notwithstanding the obvious conflict between the Texas and Oklahoma rulings, and the Texas Court of Appeals' subsequent reliance on *Peoples*. Only this Court's review will clarify the confusion among state courts on this constitutional question of national importance.

### B. In Oklahoma, The Same *Ad Valorem* Taxes Are Allowed As Constitutional

Barely a month after the Texas Court of Appeals decided *Peoples*, the Oklahoma Supreme Court reached the opposite result, creating a clear conflict among state courts regarding the constitutionality of these natural-gas taxes. *In re Assessment of Pers. Prop. Taxes Against Missouri Gas Energy*, 234 P.3d 938, 959 (Okla. 2008).

The Oklahoma case began when Missouri Gas Energy ("Missouri Gas") protested an *ad valorem* tax assessed on natural gas stored in Woods County, Oklahoma, on an interstate pipeline owned by the Panhandle Eastern Pipe Line, LP ("Panhandle"). *Id.* at 943. Panhandle offered a storage service to its shippers at one of two storage facilities—one in Kansas and one in Oklahoma—but shippers could not specify which storage facility would receive the gas. *Id.* at 944-45. Missouri Gas shipped and stored gas with Panhandle, and all of the stored gas originated in Oklahoma. *See id.* at 943, 949. But Missouri Gas did not sell gas in Oklahoma, nor did it maintain facilities or employees there. *Id.* at 943. Nevertheless, a portion of its gas was taxed by Oklahoma. *Id.*

Unlike the Texas Court of Appeals in *Peoples*, the Oklahoma Supreme Court upheld the *ad valorem* tax, concluding that it satisfied all four prongs of *Complete Auto*. *See id.* at 954-59. Addressing the first prong, the court held that there was a substantial nexus between the taxed property and Oklahoma, simply because "[l]arge volumes of gas are stored in Wood County for a substantial part of the year." *Id.* at 954. Despite recognizing that state courts must "follow directly applicable precedents," the Oklahoma Supreme Court expressly refused to apply the "traditional rule" set forth in the "goods-in-transit" cases. *Id.* (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). It further held that "[t]o the extent that the subjective factors [from the 'goods-in-transit'] analysis retain a role under the [*Complete Auto*] test," those factors were "inconclusive," and the case was "better decided on the basis of the objective fact" that the gas was stored in Oklahoma. *Id.* at 955.

Addressing the fourth prong of the *Complete Auto* test, the Oklahoma Supreme Court held that the tax was reasonably related to services provided by Oklahoma because "[t]he tax . . . operate[d] on the presence of personal property in Woods County," which was "taxed to the same extent as all other personal property in the county." *Id.* at 959. The court concluded that Missouri Gas "[wa]s therefore being asked to shoulder no more than its fair share." *Id.* (quotation omitted).

This decision, like that of the Kansas Supreme Court, is contrary to the Texas Court of Appeals' decision in *Peoples* and creates a direct conflict between state courts.

### C. The Kansas Supreme Court Decision Deepened The Split, Joining Oklahoma

In the decision below, the Kansas Supreme Court expressly acknowledged the split in authority between Texas and Oklahoma, and it deepened this split by siding with Oklahoma.

Unlike the Texas Court of Appeals in *Peoples*, the Kansas Supreme Court held that the tax satisfied the first and fourth prongs of the *Complete Auto* analysis. Addressing the first prong, the court "agree[d] with the Oklahoma Supreme Court that the most important factor in determining whether a substantial nexus exists . . . is that this is a personal property tax on stored natural gas that was located in Kansas on the assessment date." Pet.App. 21a. Without further explanation, the court concluded that "[t]here is axiomatically a substantial nexus between Kansas and the gas stored in this state." *Id.* The court focused solely on the relationship between the stored gas and Kansas; it never addressed the absence of any other

connection between *Petitioners* and Kansas, and it never considered the "goods-in-transit" factors. *See id.* This approach differed markedly from that of the Texas Court of Appeals, which examined Peoples' relationship with Texas and the "goods-in-transit" factors, including the purpose of storage in Texas and the taxpayer's lack of control over the storage location. *See Peoples*, 270 S.W.3d at 216.

With respect to the fourth prong, the court concluded that "ad valorem taxes, which are levied upon property situated in Kansas, are fairly related to the taxpayers' contact with Kansas, *i.e.*, their storage of gas in this state." Pet.App. 21a. Much like the Oklahoma Supreme Court, the Kansas Supreme Court reasoned that because "[a]ll property in Kansas is subject to ad valorem taxation," and Petitioners' gas was taxed at the same rate as other property, the tax must satisfy *Complete Auto*'s fourth prong. *Id.* But the Kansas Supreme Court failed to identify any state services or benefits that related to Petitioners or to the stored gas. *See id.* Again, this approach conflicted with the Texas Court of Appeals' analysis, which inquired into the specific benefits that the state of Texas conferred on Peoples.

The conflict is not going away. This Court should grant certiorari to resolve it.

## II. THE DECISION OF THE KANSAS SUPREME COURT DRAMATICALLY DEPARTS FROM THIS COURT'S PRECEDENTS

The Kansas Supreme Court's holding cannot be squared with this Court's longstanding Commerce Clause precedents, which continue to inform the first prong of the *Complete Auto* test. For decades before *Complete Auto*, this Court decided numerous cases

that provided clear rules concerning the constitutionality of state taxes on goods in interstate commerce. *See, e.g.*, *Nat'l Bellas Hess*, 386 U.S. at 758; *Champlain*, 260 U.S. at 376-77; *Carson*, 279 U.S. at 108-09. *Complete Auto* did not overrule these cases, but instead articulated a four-factor test that distills and draws upon their principles. Indeed, as the Solicitor General argued in the Oklahoma case, this Court's pre-*Complete Auto* cases "may inform the first prong of the *Complete Auto* inquiry" to determine "whether the relevant goods have a constitutionally sufficient nexus to the taxing State." SG Okla. Br. at 12.

Rather than considering this Court's directly applicable pre-*Complete Auto* precedents, the Kansas Supreme Court applied *Complete Auto* in a vacuum. It refused to follow this Court's bright-line "common carrier" rule from *National Bellas Hess* and *Quill*, and it failed to even consider the factors underlying the well-established "goods-in-transit" doctrine. Instead, it applied *Complete Auto* in a crabbed and incompletely informed manner, commenting that "[t]h[is] Court's Commerce Clause jurisprudence has evolved substantially over time—particularly as to states' taxing powers" (Pet.App. 13a), as though all other precedent from this Court was irrelevant. The Kansas Supreme Court's failure to consider this Court's precedents provides yet another ground for review: When the "precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.

### A. This Court's Pre-*Complete Auto* Precedents Evaluate The Nexus Between A Taxpayer's Activities And The Taxing State

Well before this Court articulated the "substantial nexus" requirement in *Complete Auto*, it developed principles that effectively determined whether a substantial nexus existed between a taxpayer's activity and a taxing state. The cases setting forth these principles fall within two related categories.

1. In *National Bellas Hess*, this Court applied a bright-line rule to assess the strength of the nexus between the taxpayer's activities and a taxing state. *National Bellas Hess* distinguished between "mail order sellers with retail outlets, solicitors, or property within a State," on the one hand, and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," on the other. 386 U.S. at 758. This Court adopted a bright-line rule that "a seller whose only connection with customers in the State is by common carrier or the United States mail" may not be taxed. *Id.*; *see also Quill*, 504 U.S. at 317-18 (reaffirming the continuing viability of *National Bellas Hess* after *Complete Auto*). The Court's holding mirrored its earlier statements, in the context of determining whether goods were in transit, that "[w]hen [property] is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune" from taxation. *Champlain*, 260 U.S. at 376; *see also Coe v. Errol*, 116 U.S. 517, 525 (1886) (observing that goods "delivered to a carrier for . . . transportation" are not taxable). In such cases, a taxpayer "lack[s] the requi-

site minimum contacts with the State." *Quill*, 504 U.S. at 301 (describing *National Bellas Hess*).

**2.** A closely related line of cases also evaluates the sufficiency of the connection between a taxpayer's activities and a taxing state. The longstanding "goods-in-transit" doctrine establishes that if property found temporarily in a taxing state retains its "continuity of transit," it cannot be taxed by the state. *Carson*, 279 U.S. at 101 ("The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit."). To determine whether there is a break in the continuity of transit, such that the property becomes taxable, this Court considers "the various factors of the situation," among them the extent of and reason for the interruption of the interstate journey, the intention of the owner, the means of transit, and whether the taxpayer had control over the property. *Champlain*, 260 U.S. at 377; *see also, e.g.*, *Carson*, 279 U.S. at 108-09 (storage of oil in tanks awaiting arrival of ships to complete transportation could not be taxed); *Champlain*, 260 U.S. at 373-74 (logs floating on a river were in transit even though they were temporarily detained to allow high water to subside); *Kelley v. Rhoads*, 188 U.S. 1, 5-9 (1903) (sheep herded across Wyoming were in transit even though they stopped to graze along the way). Like the bright-line "common carrier" rule, these factors help determine whether there is real substance (now referred to as "substantial nexus") to the relationship between the taxpayer's activities and the taxing state.

### B. This Court's Earlier Precedents Remain Viable After *Complete Auto*

In *Complete Auto*, this Court synthesized its prior case law and articulated a four-pronged test for assessing the constitutionality of state taxes. *See* 430 U.S. at 277-78 & n.6, 279 & n.8 (citing cases). Eschewing formalistic distinctions, the Court held that courts should examine the practical effect of a tax by considering whether there is substantial nexus with the state and whether the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *Id.* at 279. This Court later characterized *Complete Auto*'s approach as "a case-by-case evaluation of the actual burdens imposed [on interstate commerce] by particular regulations or taxes." *Quill*, 504 U.S. at 315; *see also id.* at 313 ("The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.").

After *Complete Auto*, this Court granted certiorari in *Quill* to determine whether the "common carrier" rule from *National Bellas Hess* should be overruled as inconsistent with *Complete Auto*. *Quill*, 504 U.S. at 301-02. Recognizing that *Complete Auto* renounced formalistic rules in favor of a practical, "case-by-case evaluation," the *Quill* Court nonetheless confirmed the validity of the "common carrier" rule. *Id.* at 317-18. It explained that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law." *Id.* at 317. In

*Quill*, the taxpayer's only connection with North Dakota was via a common carrier and "a few floppy diskettes" present in the state. *See id.* at 315 n.8. This Court held that neither a common-carrier connection nor the physical presence of floppy disks was sufficient to establish a substantial nexus. *See id.* at 315 n.8, 317-18. *Quill* thus confirms that even after *Complete Auto*, there is still a bright-line "safe harbor for vendors 'whose only connection with customers in the taxing State is by common carrier or the United States mail.'" *Id.* at 315.

Just as the rule from *National Bellas Hess* remains good law after *Complete Auto*, so too does the longstanding "goods-in-transit" doctrine. This doctrine, which determines the constitutionality of a state tax based on an evaluation of the "various factors" demonstrating substance of the state's relationship with the taxpayer, *Champlain*, 260 U.S. at 377, is wholly consistent with the "case-by-case evaluation" of *Complete Auto*, *see Quill*, 504 U.S. at 315. Specifically, the "goods-in-transit" test informs the first prong of the *Complete Auto* analysis, which asks whether "the tax is applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U.S. at 279. Factors such as the taxpayer's control over the property, the purpose and extent of the property's physical presence in the state, and the intention of the taxpayer bear directly on the relationship between the taxed activity and the taxing state. *See Champlain*, 260 U.S. at 377; *see also Carson*, 279 U.S. at 108-09. Moreover, principles of *stare decisis* justify adherence to this constitutional doctrine. *See Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment).

This Court in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-31 (1988), did not nullify the "goods-in-transit" doctrine. There, this Court stated that "*Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the State," and thus "it really makes little difference for Commerce Clause purposes whether [the taxpayer's] catalogs 'came to rest' in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce." *Id.* But while this Court has renounced formalistic distinctions between "interstate" and "intrastate" commerce, the factors underlying the "goods-in-transit" doctrine transcend artificial labels and go to the very heart of whether there is a "substantial nexus" under *Complete Auto*.[5] As the Solicitor General has recognized,

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[5] Chief Justice Taft's opinion for the Court in *Champlain* emphasized that the continuity-of-transit analysis was not a formalistic exemption to taxation for goods traveling in interstate commerce, but, like the "evolved" jurisprudence identified by the Kansas Supreme Court below, was instead designed to allow states to tax goods in interstate commerce except when the goods' only connection with the state was the act of traveling in interstate commerce itself:

> The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or

even after *Complete Auto* and *D.H. Holmes*, "the 'continuity of transit' cases remain potentially relevant to the constitutional analysis." SG Okla. Br. at 12. Specifically, "the same factors that the Court previously considered to determine continuity of transit may inform the first prong of the *Complete Auto* inquiry—*i.e.*, whether the relevant goods have a constitutionally sufficient nexus to the taxing State." *Id.* This Court's pre-*Complete Auto* cases, including the "goods-in-transit" line of cases, are directly applicable today. This case now gives the Court the opportunity to clarify and confirm the relationship between these important strands of constitutional doctrine.

### C. The Kansas Supreme Court Departed From This Court's Directly Applicable Precedents

Rather than allowing this Court's earlier precedents to inform its analysis, the Kansas Supreme Court applied *Complete Auto* in a vacuum, as though this Court's state-tax jurisprudence began with that decision. When assessing the nexus between Petitioners' activities and Kansas, the Kansas Supreme Court refused to apply the "common carrier" rule from *National Bellas Hess* and failed to even consider the factors underlying the "goods-in-transit" cases. Pet.App. 16a, 21a. Instead, it crafted a simplistic, "axiomati[c]" *per se* rule: "There is axiomatically a substantial nexus between Kansas and the gas stored in this state" because the gas "was located in Kansas on the assessment date." *Id.* at 21a. It never consid-

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> convenient transit, then the continuity of the interstate trip is not broken.

260 U.S. at 376.

ered factors such as the reason the gas was in Kansas, the inability of Petitioners to control where a common carrier sent the gas, Petitioners' intentions regarding shipment and storage of gas, or the absence of any other connections—such as facilities for transmitting natural gas—in the state. *See id.* Rather, under the Kansas Supreme Court's rationale, any property physically present in a state for even a fleeting moment on assessment day is subject to *ad valorem* taxation. This analysis is directly contrary to the fact-specific inquiry of *Complete Auto*, the well-established factors underlying the "goods-in-transit" cases, and the clear "common carrier" rule. It also flatly contradicts *Quill*, which held that the mere physical presence of property in a state is an insufficient nexus, *see* 504 U.S. at 315 n.8, and that pre-*Complete Auto* precedents continue to inform the dormant Commerce Clause analysis, *see id.* at 314.

Had the Kansas Supreme Court properly applied this Court's precedents, it would have reached a different result. There was no substantial nexus between Petitioners and Kansas. Petitioners do not own facilities in Kansas for the transmission, distribution, or storage of natural gas; do not direct their business activities to Kansas; and all of their gas is intended for ultimate use or sale *outside* of Kansas. Pet.App. 7a. Moreover, the property's location in Kansas is insufficient. Petitioners have no control over the transportation or storage location, and "*no knowledge* regarding the specific nature and location of such storage." *Id.* at 48a (emphasis added); *see also Quill*, 504 U.S. 315 n.8. Instead, the interstate pipelines—which are common carriers under *National Bellas Hess* and *Quill*—maintain complete possession and control of the natural gas in their systems.

Pet.App. 7a, 48a. Any incidental benefit Petitioners might enjoy from the temporary presence of gas in Kansas is overshadowed by the inability of Petitioners to control where the gas is transported or stored, as well as the pipelines' need to store gas for their own purposes, such as pressure and balancing requirements and the timely receipt and delivery of gas. *See id.* at 6a, 49a. Whether analyzed in light of the "goods-in-transit" factors or the bright-line rule from *National Bellas Hess*, it is clear that there is an insufficient nexus between Petitioners' activities and Kansas. Indeed, Petitioners' lack of any "purposeful[] avail[ment] of the benefits of an economic market in the forum State" of Kansas makes it doubtful that the tax could survive even the more generous Due Process Clause "minimum contacts" nexus requirement. *Quill*, 504 U.S. at 307-08; *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality op.)

The Kansas Supreme Court justified its failure to consider the "common carrier" rule by reading that rule as confined to sales and use taxes. Pet.App. 16a. This unduly restrictive reading of *National Bellas Hess* and *Quill* has itself divided state courts. *Compare, e.g.*, *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176, 177 (N.J. 2006) (per curiam) (limiting *National Bellas Hess* and *Quill* to sales and use taxes); *A & F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 194-95 (N.C. Ct. App. 2004) (same), *with Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 299-300 (Tex. Ct. App. 2000) (applying *National Bellas Hess* and *Quill* to franchise tax); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999) (applying these cases to franchise and excise tax).

Even assuming, for the sake of argument, that *National Bellas Hess* and *Quill* are so limited, the Kansas Supreme Court should have at least considered the underlying principle of the rule—which recognizes the role of a common carrier in controlling goods shipped through interstate commerce—when applying the first factor of *Complete Auto*. Indeed, this "common carrier" principle has animated this Court's dormant Commerce Clause jurisprudence for over a century. *See, e.g.*, *Champlain*, 260 U.S. at 376 (property "shipped by a common carrier from one State to another" in continuous transit is immune from taxation); *Coe*, 116 U.S. at 525 (goods "delivered to a carrier for . . . transportation" are not taxable). In any event, this Court need not decide whether the Kansas Supreme Court correctly limited *National Bellas Hess* and *Quill* to sales and use taxes. It need only address whether *ad valorem* taxes on natural gas are constitutional in the common situation presented by this case and others—that is, when a taxpayer ships natural gas through pipelines with storage facilities located in the taxing state, but the taxpayer has no control over the transportation or storage location and no other connection with the state. That is the question that has divided state courts. It is also the question squarely presented by this case, and this Court should grant review to address it.

### D. Lower Courts Are Confused About The Proper Analytical Framework

This Court's review would lend much-needed clarity to this area of dormant Commerce Clause jurisprudence. In addition to being sharply divided over the constitutionality of *ad valorem* taxes on natural gas, state courts are obviously confused about the

proper analytical framework for addressing this issue.

Despite the Solicitor General's recommendation that pre-*Complete Auto* precedents may inform the first prong of the *Complete Auto* test, no state court has clearly adopted that approach. The Oklahoma Supreme Court expressly declined to apply the "traditional rule" set forth in the "goods-in-transit" cases. *See In re Missouri Gas Energy*, 234 P.3d at 954. It briefly acknowledged that the "goods-in-transit" factors could potentially "retain a role under the [*Complete Auto*] test," but it ultimately disregarded these factors because they "cut both ways on the question of nexus" and thus were "inconclusive." *Id.* at 955. The court instead rested its holding on the notion that there was some stored gas deemed to be physically located in Oklahoma, explaining that "the nexus issue is better decided on the basis of th[is] objective fact." *Id.*

By contrast, the Texas Court of Appeals applied pre-*Complete Auto* cases when faced with this same issue. But not even the Texas court fully embraced the Solicitor General's recommended approach. While the Texas Court of Appeals implicitly considered some of the "goods-in-transit" factors in its "substantial nexus" analysis, *see Peoples*, 270 S.W.3d at 218, it explicitly treated the "goods-in-transit" cases as an inquiry separate and apart from *Complete Auto*, *see id.* at 215-18.

The decision of the Kansas Supreme Court perpetuates this confusion. It declined to apply any of this Court's pre-*Complete Auto* precedents and went further than the Oklahoma Supreme Court by failing to even address the "goods-in-transit" factors. *See*

Pet.App. 21a. Courts are in need of direction, and this case provides an opportunity for the Court to clear up the substantial confusion on this important constitutional issue.

## III. THE CONSTITUTIONALITY OF STATE TAXATION OF NATURAL GAS IS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

"[T]he importance of the issues in the functioning of the interstate market in natural gas" has long been acknowledged by this Court. *Transcont'l Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 411 (1986). The constitutionality of *ad valorem* taxes on such gas is a significant and recurring question with enormous practical consequences for the interstate natural-gas market—and for our Nation. The present patchwork of tax liability undermines the proper functioning of this marketplace and creates uncertainty and confusion for companies and states alike.[6]

As demonstrated by the trio of cases from Oklahoma, Kansas, and Texas, the constitutionality of *ad valorem* taxes on natural gas repeatedly arises in state courts. Now that Kansas has joined Oklahoma, becoming the second state to endorse this form of taxation, other states are likely to follow suit. Interstate pipelines sprawl across the nation, *see* EIA, *Interstate Natural Gas Supply Dependency* (2007) (illustrating map of pipelines),[7] and no fewer than 25

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[6] As this case demonstrates, state law may compound the confusion by imposing taxes on some shippers while exempting others. *See* Pet.App. 37a-43a.

[7] *Available at* http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/dependstates_map.html.

states have FERC-regulated storage facilities, *see* FERC, *Jurisdictional Storage Fields in the United States by Location* (May 23, 2013).[8] Without this Court's guidance, diverging state-court opinions will subject shippers to multiple, inconsistent taxing schemes. This patchwork will create strong incentives for shippers to utilize pipelines with storage facilities in tax-friendly states, while avoiding those through which taxes may be levied.

Consistency and predictability in the interstate natural-gas market—and, more specifically, in the fields of interstate pipelines and storage facilities—is imperative. Interstate natural-gas pipelines move nearly a quarter of the Nation's energy resources long distances to markets in the 48 contiguous states, and they are "vital to the economy." FERC, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* 4 (2013).[9] The Kansas Supreme Court recognized that storage facilities are "integral to the pipelines' operations." Pet.App. 6a. Storage facilities allow interstate pipelines to achieve proper pipeline pressure and balancing, and to efficiently receive and deliver gas at distant locations. *Id.* They are an indispensable component of the interstate natural-gas market.

The taxation of stored natural gas has enormous practical impact. The value of stored gas inventories in this case alone is staggering. The gas that the Di-

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[8] *Available at* http://www.ferc.gov/industries/gas/indus-act/storage/fields-by-location.pdf.

[9] *Available at* https://www.ferc.gov/for-citizens/citizen-guides/citz-guide-gas.pdf.

vision allocated to the 12 Petitioners in 2009 had a fair market value of $125 million; far more was at stake in the proceedings below. *Supra* n.2. The assessed value of Petitioners' gas, for purposes of levying *ad valorem* taxes, was over $41 million. *Id.* And the stored gas inventories in this case only scratch the surface. Nationally, FERC-regulated facilities have the capacity to store over 5 trillion cubic feet of natural gas. *See* FERC, *Jurisdictional Storage Fields in the United States by Location*.[10] That number is growing. Since 2000, FERC has approved the construction and operation of over 100 new underground storage fields, adding 1.25 trillion cubic feet of storage capacity. *See* FERC, *Certificated Storage Projects Since 2000 for Expansion of or New Capacity* (Mar. 5, 2013).[11] Additional projects are pending. *See* FERC*, Pending Storage Projects* (Mar. 5, 2013).[12] These numbers confirm that the taxation of stored natural gas carries significant real-world import, both to taxpayers and to taxing authorities. Such taxes impact a broad range of actors, including the interstate pipelines with storage facilities, as well as the consumers who ultimately bear the burden of additional taxes.

Unless and until this Court addresses this issue, the constitutionality of *ad valorem* taxes on stored natural gas will subject market participants to taxes

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[10] *Supra* n.8.

[11] *Available at* https://www.ferc.gov/industries/gas/indus-act/storage/certificated.pdf.

[12] *Available at* https://www.ferc.gov/industries/gas/indus-act/storage/pending.pdf.

in some states but not others, depending on where a given pipeline has storage facilities and whether the tax is constitutional in each state. This Court should grant certiorari to provide certainty and predictability in this important area of the law, thereby promoting the stability of our nation's interstate natural-gas market.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 7, 2014

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# APPENDIX

# APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 105,785

In the Matter of the Appeals of Various Applicants from a Decision of the DIVISION OF PROPERTY VALUATION of the STATE OF KANSAS for Tax Year 2009 Pursuant to K.S.A. 74-2438

and

In the Matter of the Application of Various Applicants for Exemption from Property Taxation in the STATE OF KANSAS.

SYLLABUS BY THE COURT

1.

Administrative agencies do not have authority to decide questions regarding the constitutionality of statutes. In judicial review of an agency action, courts consider such questions in the first instance; and the reviewing court must grant relief under K.S.A. 2012 Supp. 77-621(c)(1) only if the agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied.

2.

Kansas statutes are presumed constitutional, and all doubts must be resolved in favor of their validity. If there is any reasonable way to construe a statute

as constitutionally valid, courts must do so. A statute must clearly violate the constitution before it may be struck down.

3.

A legislative definition of a constitutional term must bear a reasonable and recognizable similarity to generally accepted definitions and the common understanding of the term by the people of Kansas.

4.

In interpreting and construing a constitutional amendment, the court must examine the language used and consider it in connection with the general surrounding facts and circumstances that caused the amendment to be submitted.

Appeal from Court of Tax Appeals. Opinion filed December 6, 2013. Affirmed in part, reversed and vacated in part, and remanded with directions.

*Robert W. Coykendall*, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *Will B. Wohlford*, of the same firm, was with him on the briefs for appellants.

*William E. Waters*, of Division of Property Valuation, Kansas Department of Revenue, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: This is a consolidated tax appeal disputing whether natural gas stored in facilities located in Kansas under contract with interstate companies is subject to ad valorem taxation. The Kansas Constitution, Article 11, § 1 (2012 Supp.) exempts merchants' inventory from such taxation, but that exemption does not include tangible

personal property owned by a public utility. The taxpayers claim they are entitled to the exemption. They are 40 business entities that fall into three general categories: out-of-state natural gas marketing companies, out-of-state local distribution companies certified as public utilities in their states, and out-of-state municipalities. Each buys natural gas from producers or other marketers and then delivers it to the pipelines under contracts with the pipeline companies allowing the taxpayer to withdraw equivalent amounts of gas at a later time from out-of-state distribution points.

The Kansas Court of Tax Appeals (COTA) determined this natural gas is not exempt because of a statute broadly defining what constitutes a "public utility" for these purposes. See K.S.A. 2012 Supp. 79-5a01. The taxpayers challenge COTA's decision arguing, in part, that it violates the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as Article 11, § 1(b) of the Kansas Constitution (2012 Supp.), which provides for the ad valorem tax exemption for merchants' inventory.

We hold this taxation does not violate the Commerce Clause or Due Process Clause. And we hold further that K.S.A. 2012 Supp. 79-5a01 is constitutional as applied to the out-of-state local distribution companies. But we also hold that K.S.A. 2012 Supp. 79-5a01 is unconstitutional as applied to the out-of-state natural gas marketing companies and those taxpayers that are out-of-state municipalities. These entities are not public utilities as that term was commonly understood when Kansas

voters excluded public utility personal property from the merchants' and manufacturers' inventory exemption.

The COTA order is affirmed in part and reversed and vacated in part. We remand to COTA for further proceedings to decide where each taxpayer falls within the three described categories because the record on appeal is inadequate for this court to make these individual determinations.

## FACTUAL AND PROCEDURAL BACKGROUND

This is the fourth time this court has addressed taxation of natural gas stored in interstate pipelines. And with each case, the governing laws have changed, presenting different legal questions and possible outcomes. We refer to those previous cases as necessary because they lay the groundwork for the principles guiding the present controversy's resolution.

This particular litigation began in 2009, when the Kansas Division of Property Valuation (PVD) determined the taxpayers were public utilities for property tax purposes under a newly amended statute defining the term "public utility" in the Kansas tax statutes. See L. 2009, ch. 97, sec. 5 (effective July 1, 2009) (now K.S.A. 2012 Supp. 79-5a01[a]). PVD concluded the taxpayers were holding natural gas for resale in storage facilities located in the state and appraised the gas and fixed assessed values thereto for ad valorem tax purposes for the 2009 tax year. See K.S.A. 2012 Supp. 79-5a01(c). PVD determined the quantity of gas each taxpayer owned in the Kansas storage facilities based on an allocation formula, adopted from one of the

Federal Energy Regulatory Commission (FERC)-approved tariffs, stating:

> "For purposes of reporting storage inventories for state ad valorem taxes, the total inventories of Gas in Market Area Storage Facilities and Field Area Storage Facilities in any particular state shall be determined. Inventories in Market Area Storage Facilities shall be allocated to all Shippers with inventories under Rate Schedules PS, and if provided from Market Areas Storage Facilities, WS, FS, and IWS, *based on the ratio of total inventories for the state divided by total Storage inventories for all states times the Shipper's total Stored Volume under such Rate Schedules*; inventories in Field Area Storage facilities shall be allocated to all Shippers with inventories for the state divided by total Storage inventories for all states times the Shipper's total Stored Volume under such Rate Schedules." (Emphasis added.)

Taxpayers do not challenge this allocation methodology, but they individually appealed the appraisals and filed requests for ad valorem tax exemption. In doing so, they advanced various arguments to shield themselves from the tax. They claimed the natural gas at issue was exempt as: (1) personal property moving in interstate commerce under K.S.A. 2012 Supp. 79-201f(a); (2) merchants' and manufacturers' inventory under K.S.A. 79-201m; and (3) merchants' and manufacturers' inventory under Article 11, § 1(b) of the Kansas Constitution (2012 Supp.). They also argued taxation of this gas violates the Commerce Clause, Due Process Clause, and Import Export Clause of the United States Constitution.

PVD disagreed. It filed the exemption requests with COTA, but recommended they be denied. PVD claimed these taxpayers were public utilities, as defined by K.S.A. 2012 Supp. 79-5a01, and noted public utility inventories are not exempt under K.S.A. 2012 Supp. 79-201f or Article 11, § 1 of the Kansas Constitution (2012 Supp.). COTA consolidated the appeals and held an evidentiary hearing based in part on stipulated facts applicable to each taxpayer.

*The Taxpayers*

COTA classified the taxpayers into three general groups: (1) out-of-state natural gas marketing companies; (2) out-of-state local distribution companies that are certified as public utilities in their respective states; and (3) out-of-state municipalities. And although some of their characteristics will distinguish one group from another in a substantive way, each taxpayer shares a common business model in that it purchases natural gas from various producers or marketers and then designates when and where that gas will be delivered to one of four interstate pipelines. The taxpayer then schedules with the designated pipeline when and where an equivalent amount of gas will be redelivered to an out-of-state location where the taxpayer will take possession of it. In the meantime, gas is stored for the taxpayer somewhere in the pipeline's storage or transportation systems, which may be in Kansas or some other state. Storage is integral to the pipelines' operations, and natural gas is continually deposited and removed to satisfy essential pipeline pressure and balancing requirements, as well as to permit interstate

transportation such as the simultaneous delivery and redelivery of natural gas at distant locations.

The pipelines that own the facilities in which the taxpayers' gas was stored for this tax year are FERC-regulated and owned separately by Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Southern Star Central Gas Pipeline. Each pipeline company commingles the gas one customer deposits with gas deposited by other customers. No effort is made—nor could one succeed—to ensure that the same gas initially brought into the system by a customer is placed into storage and then redelivered to that same customer. The taxpayer's contractual right is simply to withdraw an amount of natural gas equivalent to the amount it deposited into the system. Each pipeline company possesses and controls the gas deposited into its system. Under FERC-approved tariffs, the pipeline companies carry the risk of loss during storage.

Each pipeline company owns and operates underground storage facilities in multiple jurisdictions, including Kansas. And none of the taxpayers owns any facilities in Kansas for the transmission, distribution, or storage of natural gas. None are certified or regulated as Kansas natural gas public utilities or vested with eminent domain powers in this state.

*COTA Proceedings*

At the COTA hearing, Kent Miller, a Northern Natural Gas vice president, testified that 70 percent of its pipeline customers injected at a delivery point in Ogden, Iowa, and that half of its deliveries were made in Minnesota. This, he said, makes it "highly

likely" that a Northern customer will deliver gas in Iowa and then take redelivery in Minnesota. Miller testified that under the PVD's allocation methodology natural gas would be taxed in Kansas even though it never physically entered the state.

Jeff Balfort, an official with Panhandle Eastern Pipeline Company, testified that Panhandle's pipelines cross eight or nine states and Panhandle sells various services related to the transportation and storage of natural gas for shippers. Generally, he said, Panhandle receives gas from Kansas, North Texas, and Oklahoma. And he said it transmits gas to Ohio, Illinois, Indiana, and Michigan. He testified Panhandle has "field zone" storage in Kansas and Oklahoma and has market zone storage in Michigan, Illinois, Indiana, and Ohio. A field zone is a geographic area where natural gas is produced and gathered for sale to gas distributors, while a market zone is the geographic area where gas is sold to customers. See *In re Assessment of Personal Property Taxes*, 234 P.3d 938, 944, n.4-5 (Okla. 2008), *cert. denied sub nom. Missouri Gas Energy v. Schmidt*, 559 U.S. 970 (2010).

John Wine, a Kansas attorney who had previously served as Kansas Securities Commissioner and chair of the Kansas Corporation Commission, submitted a report and testified on the taxpayers' behalf. He expressed his opinion that public utilities share certain common characteristics in that they: (1) enjoy natural monopolies; (2) provide essential services; (3) possess restricted or protected service territories; (4) are subject to regulations that restrict the rates they can charge for services; (5) are obligated to provide a nondiscriminatory service to

the public; and (6) are usually given eminent domain powers by the state. Wine also testified that the definition of public utility enacted by the Kansas Legislature in K.S.A. 2012 Supp. 79-5a01 was not consistent with his view of what constitutes a public utility, stating:

> "[T]he fact that someone might be brokering or marketing a—a commodity, a natural gas commodity, does not make it a public utility looking at those common characteristics in—in any way. I mean, any more than a—a facility that held some coal that might eventually be delivered to an electric utility to burn to make electricity, it wouldn't make that—that marketer of coal a public utility."

Wine later limited this assertion to the taxpayers who are marketers and brokers of natural gas, stating: "The Marketers, Brokers, or other entities that trade in gas, and possess the right to take delivery of that gas from a federally regulated pipeline do not possess any characteristics of a public utility except for the fact that they deal in natural gas, a commodity that is highly regulated."

Regarding the other taxpayers, Wine testified that three local distribution companies operated in their home states in a manner consistent with the general meaning of a public utility, as did 13 public utilities. And when asked whether there was anything "inconsistent with them being public utilities for [certain] purposes in one state and not another," Wine responded, "There is nothing inconsistent about that at all." But when PVD attempted to elicit similar testimony from Wine concerning five municipal utilities PVD considered local distribution

companies, Wine testified he did not know if it was appropriate to call them local distribution companies if they were not a public utility, even though the municipal utilities were providing analogous services. This statement was not further clarified, and COTA factual finding No. 22, which summarizes Wine's testimony, does not address the out-of-state municipal utilities. This factual anomaly hampers our discussion of the issues related to these entities as discussed below.

COTA denied the taxpayers' exemption requests. It held that all the taxpayers were public utilities under K.S.A. 2012 Supp. 79-5a01 and, therefore, their gas did not qualify for the merchants' inventory exemption as codified in K.S.A. 79-201m. It also held the out-of-state municipalities' gas did not qualify for exemption under K.S.A. 2012 Supp. 79-201a *Second* because that statute's plain language applies only to property of municipalities or political subdivisions of the state of Kansas. Finally, COTA refrained from addressing whether the tax assessments violated the United States Constitution.

Taxpayers timely appealed. Both sides filed requests to transfer the appeal to this court under K.S.A. 20-3017 and Kansas Supreme Court Rule 8.02 (2012 Kan. Ct. R. Annot. 71), which we granted. On appeal, taxpayers argue: (1) taxing their gas violates the Due Process and Commerce Clauses of the United States Constitution; (2) the gas is exempt merchants' and manufacturers' inventory under K.S.A. 79-201m and Article 11, § 1(b) of the Kansas Constitution (2012 Supp.); (3) the gas is exempt under K.S.A. 2012 Supp. 79-201f(a) because it is moving in interstate commerce and not considered public utility inventory

under K.S.A. 2012 Supp. 79-5a01; and (4) the out-of-state municipal utilities qualify for exemption under Article 11, § 1(b) of the Kansas Constitution (2012 Supp.) and K.S.A. 2012 Supp. 79-201f(a).

Our resolution permits us to reduce the issues further. We consider first the arguments concerning the Commerce and Due Process Clauses, and then whether taxpayers in any of the three groups (out-of-state natural gas marketing companies, out-of-state local distribution companies certified as public utilities in their respective states, and out-of-state municipalities) may be considered public utilities in Kansas.

THE COMMERCE AND DUE PROCESS CLAUSES

Taxpayers argue these ad valorem tax assessments violate the United States Constitution's Due Process and Commerce Clauses by taxing out-of-state corporations for natural gas stored in Kansas. They claim this is unconstitutional because their gas is under a common carrier's control and intermingled with other customers' gas so that there is no evidence their gas was ever actually stored in Kansas. They also note the interstate pipeline companies determine whether the gas in the pipeline's system will be stored in Kansas.

The Commerce and Due Process Clauses are closely related, but each presents distinct limits on a state's taxing power. A tax satisfying one clause does not necessarily satisfy the other because the clauses "reflect different constitutional concerns." *Quill Corp. v. North Dakota*, 504 U.S. 298, 305, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). The Due Process Clause "centrally concerns the fundamental fairness of governmental activity." 504 U.S. at 312. But the

Commerce Clause and its nexus requirement "are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." 504 U.S. at 312. These clauses also are subject to different limits of congressional power because Congress can authorize state action burdening interstate commerce, but it cannot authorize due process violations. 504 U.S. at 305.

*Standard of Review*

The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, typically establishes the standard of review for appeals from COTA decisions. But COTA lacks jurisdiction to address whether taxation of the taxpayers' gas violates our state or federal Constitutions. See *In re Tax Appeal of Weisgerber*, 285 Kan. 98, 102, 169 P.3d 321 (2007); *Zarda v. State*, 250 Kan. 364, Syl. ¶ 3, 826 P.2d 1365, *cert. denied* 504 U.S. 973 (1992). Accordingly, COTA correctly refrained from addressing the constitutional claims. But those questions remain in controversy, so this court reviews them in the first instance. *Weisgerber*, 285 Kan. at 102. In the judicial review of an agency action, the reviewing court must grant relief under K.S.A. 2012 Supp. 77-621(c)(1) only if the agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied.

An appellate court's review of a statute's constitutionality is unlimited. *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012). But in addressing constitutional issues, courts are only concerned with whether the legislature had the power to enact the statute, not the wisdom behind it.

A statute is presumed constitutional and all doubts must be resolved in favor of its validity. This court has both the authority and duty to construe the statute as constitutionally valid if there is any reasonable way to do so. 295 Kan. at 646-47; *In re Tax Appeal of Barton-Dobenin*, 269 Kan. 851, 855, 9 P.3d 9 (2000). A statute must clearly violate the constitution before it may be struck down. 269 Kan. at 855.

*Commerce Clause*

The Commerce Clause of the United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. This clause has long been recognized as having both an affirmative and negative sweep. *Quill*, 504 U.S. at 309. The negative, or dormant, Commerce Clause prohibits certain state taxation even when Congress has failed to legislate on the subject. *Oklahoma Tax Comm'n v. Jefferson Lines*, Inc., 514 U.S. 175, 179, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). The purpose of the negative powers is to prevent "a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." 514 U.S. at 179-80.

The Court's Commerce Clause jurisprudence has evolved substantially over time—particularly as to states' taxing powers. *Quill*, 504 U.S. at 309. The Court's earliest cases broadly prohibited any form of state taxation on interstate commerce. 504 U.S. at 509 (quoting *Leloup v. Port of Mobile*, 127 U.S. 640,

648, 8 S. Ct. 1380, 32 L. Ed. 311 [1888]). But that wholesale prohibition has eroded. Under the Court's current jurisprudence, interstate commerce may be required to pay its fair share of state taxes within certain limitations. See *Quill*, 504 U.S. at 309-11.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), the Court retreated from formal, categorical prohibitions of state taxation. It adopted instead a four-part test emphasizing the importance of the tax statute's practical effect. See *Quill*, 504 U.S. at 310. It held that a state may tax an activity without violating the Commerce Clause if that tax: (1) applies to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services or benefits provided by the taxing state. *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto*, 430 U.S. at 279).

The taxpayers' threshold argument is that the four-prong *Complete Auto* analysis does not govern their Commerce Clause claim because the tax here violates a bright-line rule prohibiting states from assessing taxes if the assessees' only connection with the state is through a common carrier. They rely on the United States Supreme Court's *Quill* decision. The gravamen of their claim is that interstate pipelines are common carriers, the pipelines establish the taxpayers' only connection with Kansas, and that connection is insufficient for the purpose of assessing taxes.

In *Quill*, a North Dakota statute required an out-of-state mail-order house with no North Dakota outlets or sales representatives to collect and pay use

tax on goods purchased for use in North Dakota. The Court had previously declared a similar Illinois statute unconstitutional under the Due Process and Commerce Clauses in *Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). The mail-order house appealed on those grounds. But the North Dakota Supreme Court declined to declare the tax unconstitutional under *Bellas Hess*, concluding that decision was rendered obsolete by the Court's later jurisprudence.

A majority of the *Quill* Court reaffirmed *Bellas Hess* as establishing a bright-line rule for sales and use taxes under the Commerce Clause: A state may not impose a use tax on an out-of-state vendor whose only connection with the state is through a common carrier. *Quill*, 504 U.S. at 314-15. And in declaring the North Dakota tax unconstitutional, the majority noted that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," but *Bellas Hess* was not "inconsistent" with *Complete Auto* and the Court's later cases. *Quill*, 504 U.S. at 311. The majority also noted the bright-line rule established in *Bellas Hess* had "engendered substantial reliance and has become part of the basic framework of a sizeable industry." *Quill*, 504 U.S. at 317. It affirmed its rule that "in the area of sales and use taxes" a state may not impose a use tax collection on an out-of-state vendor whose only connection with the state is through a common carrier. 504 U.S. at 314-15.

There is a split of authority in our sister states on whether the Court's holding in *Quill* is limited to sales and use taxes. See *Lanco, Inc. v. Director, Div.*

*of Taxation*, 188 N.J. 380, 382-83, 908 A.2d 176 (2006) (noting the split). In *Lanco*, the New Jersey Supreme Court held that the better interpretation of *Quill* limits its application to sales and use taxes as reflected by the Court's plain language limiting *Quill*'s holding to that context. It also held the *Quill* Court did not "attempt to equate the substantial-nexus requirement with a universal physical-presence requirement." *Lanco*, 188 N.J. at 383.

We agree with the *Lanco* court. *Quill* is best restricted to sales and use taxes because the *Quill* Court specifically limited the case's holding to that context and because the Court largely relied upon stare decisis to reach its result. We reject the taxpayers' reliance on *Quill* for these reasons. We consider next what test should apply.

The taxpayers' second Commerce Clause argument relates to the *Complete Auto* test, which requires that the tax applies to an activity with a substantial nexus to the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. See *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto*, 430 U.S. at 279). Taxpayers argue the tax violates the first and fourth prongs of the *Complete Auto* test, *i.e.*, the tax is neither fairly apportioned, nor fairly related to services provided by the state.

We note those prongs are related and require a "substantial nexus and a relationship between the tax and state-provided services, limit[ing] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. The taxpayers

argue the tax here violates the Commerce Clause because their business is conducted primarily outside Kansas, none of them have Kansas facilities or employees, and none "own property or facilities in Kansas for the transmission, distribution or storage of natural gas." They contend the natural gas stored in Kansas does not establish the required nexus because the taxpayers do not control or possess the gas; the gas is intermingled with gas owned by others; and they do not direct their business activities to Kansas—the pipeline companies determine where the gas is stored.

We are not the first court to address this question. The Oklahoma Supreme Court and Texas Court of Appeals have split on whether similar ad valorem taxes on natural gas stored in an interstate pipeline violated the Commerce Clause. See *In re Assessment*, 234 P.3d at 952-59 (Oklahoma tax assessments did not violate Commerce Clause); *Peoples Gas, Light v. Harrison Cent. App.*, 270 S.W.3d 208, 217-19 (Tex. App. 2008) (Texas tax assessments violated Commerce Clause). These cases demonstrate this is a difficult question. But after reviewing both, we agree with the Oklahoma Supreme Court and hold these taxes do not violate the Commerce Clause.

In *Peoples*, a Texas taxing jurisdiction assessed ad valorem taxes against a natural gas distribution company's gas stored in an interstate pipeline company's storage facility. The pipeline company's method of allocating stored gas to the distribution company was not disputed. The Texas court first held that Peoples owned the natural gas at issue, even though the pipeline company had full custody

and control of the gas. The court noted that FERC regulations did not permit ownership rights to the gas to be transferred to the pipeline company, so it held "legal title must lie with Peoples." 270 S.W.3d at 213-14. Nevertheless, the court struck down the Texas assessment under the Commerce Clause after holding it failed to meet the first and fourth prongs of the *Complete Auto* test. *Peoples*, 270 S.W.3d at 217-19.

As to the first prong's substantial nexus requirement, the court held there was not a substantial nexus between the taxing entity and the taxpayer, property, or transaction subject to the tax. It reached this result, even though the natural gas distributor owned tangible personal property located in Texas, because Peoples did not have any employees, representatives, or physical facilities in the state. It also found persuasive the argument that the pipeline company controlled whether the natural gas was stored in Texas; and it held Peoples' only connection to Texas was the pipeline company's decision to store natural gas there. The court concluded that "such a connection is too tenuous to subject Peoples to ad valorem taxation in Texas." 270 S.W.3d at 218.

The *Peoples* court also held that the fourth prong, requiring the tax be fairly related to the services provided by the state, was not met. In particular, Peoples was not the beneficiary of Texas services. The court explained that, in its view, the pipeline company was the only beneficiary, stating:

> "[S]ervices such as law enforcement and the fire department would serve the [Texas] facility itself, and the facility undoubtedly belongs to Pipeline,

> which does pay ad valorem taxes on both the 'cushion' gas it maintains in the facility and the physical plant of the facility itself." 270 S.W.3d at 219.

In contrast, the Oklahoma Supreme Court upheld the taxation of a Missouri natural gas distributor's gas, which was similarly stored in an interstate pipeline company's storage facility. *In re Assessment*, 234 P.3d at 952-59. The distribution company (MGE) did not sell natural gas in Oklahoma, employ anyone in Oklahoma, or maintain any Oklahoma facilities. But it purchased gas from suppliers in other states and used a pipeline company with Oklahoma storage facilities to transport and store the natural gas. Like the taxpayers in this case, the gas distribution company argued the assessment violated the Due Process and Commerce Clauses.

Regarding the Commerce Clause, a majority of the Oklahoma court held that *Complete Auto*'s substantial nexus requirement was satisfied, even though the distributor had no control over where the gas was stored and the pipeline company benefited from its ability to store it. The court said the "storage of gas [was] not only anticipated by MGE [the distributor], but intended." *In re Assessment*, 234 P.3d at 955. It went on to explain:

> "While MGE cannot direct the pipeline to use the Woods County facility, it contracts for storage knowing that the Woods County facility is one of two Field Zone storage facilities. If gas is stored there, and it is, MGE cannot claim it does not intend for that to happen. Were the court making the old 'in transit' or 'at rest' determination, this

> record would make that determination very difficult. Inasmuch as the subjective factors are inconclusive, *the nexus issue is better decided on the basis of the objective fact that Panhandle stored gas on behalf of MGE and that a certain amount of it was held at North Hopeton at all times during the tax years in question."* (Emphasis added.) 234 P.3d at 955.

The court also held the tax was reasonably related to services provided by the state. In reaching this holding, the court determined the controlling question was "'whether the state has given anything for which it can ask return.'" 234 P.3d at 959. The court concluded MGE was simply shouldering its fair share of the taxes "for the support of government-provided services and the receipt of 'the advantages of a civilized society.'" 234 P.3d at 959. It noted the tax was assessed against personal property located in the taxing jurisdiction and MGE's gas was taxed to the same extent as other personal property in the jurisdiction. 234 P.3d at 959.

But there is one distinction between *In re Assessment* and this case because MGE's natural gas was not just stored in Oklahoma—it also was produced there. And this could arguably impact the substantial nexus analysis. But the *In re Assessment* court did not indicate production of the gas within the state was significant to its analysis of the first and fourth *Complete Auto* prongs. And we see no distinction of merit, principally because this is an ad valorem tax on stored natural gas, not a severance tax. *Cf. Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) (upholding severance tax on coal mined in

Montana and noting substantial nexus between activity of coal mining and state in which the activity occurs). We agree with the Oklahoma Supreme Court that the most important factor in determining whether a substantial nexus exists to tax the taxpayers' gas is that this is a personal property tax on stored natural gas that was located in Kansas on the assessment date.

We reject the taxpayers' arguments that ad valorem taxation of their stored natural gas fails to satisfy the first and fourth prongs of the *Complete Auto* test. There is axiomatically a substantial nexus between Kansas and the gas stored in this state. And ad valorem taxes, which are levied upon property situated in Kansas, are fairly related to the taxpayers' contact with Kansas, *i.e.*, their storage of gas in this state. All property in Kansas is subject to ad valorem taxation, unless otherwise exempt. K.S.A. 79-101. For the purposes of this Commerce Clause analysis, ad valorem taxes will be levied upon the assessed value of the taxpayers' gas at the same rate as ad valorem taxes levied upon the other assessed property in the applicable taxing jurisdictions. See K.S.A. 79-5a25 (assessed value of public utility property to be apportioned among taxing jurisdictions in which property is located); K.S.A. 2012 Supp. 79-1803 (tax levy rate to apply equally to all real and personal property subject to the same tax); accord *In re Assessment*, 234 P.3d at 959. We hold that the challenged ad valorem tax does not violate the Commerce Clause.

*Due Process*

The United States Supreme Court has held that due process "'requires some definite link, some

minimum connection, between a state and the person, property or transaction it seeks to tax,'" as well as some rational relationship between the tax and the "'values connected with the taxing State.'" *Quill*, 504 U.S. at 306; accord *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 24, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008). The taxpayers argue they lack the necessary minimum contacts with Kansas to permit ad valorem taxation of their gas and that the pipeline companies' independent decisions to store the gas in Kansas cannot establish the necessary contacts.

PVD argues minimum contacts exist because the taxpayers "have some expectation that some of the natural gas that they consign to the pipelines will be stored in Kansas." It then characterizes the pipeline companies as independent contractors and argues their activities are enough to establish the necessary contact. PVD further argues that "it is not the taxpayers' activities that are taxed, but tangible personal property—natural gas—that is owned by the taxpayers and physically located in the state."

The Oklahoma Supreme Court in *In re Assessment of Personal Property Taxes*, 234 P.3d 938 (Okla. 2008), *cert. denied* 559 U.S. 970 (2010), also addressed a similar, but differently framed due process issue. In that case, the taxpayer argued the assessment violated due process because its gas was moving in interstate commerce and therefore did not have a tax situs in Oklahoma. The court noted due process requires a nexus between the taxed property and the taxing state, but that this nexus requirement is minimal under the Due Process Clause. 234 P.3d at 950. It held the gas' "sojourn in storage in

Oklahoma gives it at least a minimal nexus . . . sufficient to establish tax situs and to survive the due process attack," even if the parties intended that the natural gas would ultimately be delivered to Missouri. 234 P.3d at 950.

We agree with the *In re Assessment* court and hold there are sufficient contacts between the taxpayers' gas and the State of Kansas to eliminate any due process concerns. Specifically, the taxpayers own tangible personal property stored in Kansas. And the property is stored in this state under the taxpayers' contracts with pipeline companies that own storage facilities in Kansas. Accordingly, there is a sufficient nexus between the taxpayers' gas and the State of Kansas to establish the minimum contacts necessary to satisfy due process.

TAXPAYERS' STATUS AS PUBLIC UTILITIES

The Kansas Constitution, Article 11, § 1(b) (2012 Supp.) exempts merchants' and manufacturers' inventory from property taxation, except inventory owned by a public utility. The legislature has defined what will constitute this subclass of public utility tangible personal property. See Kan. Const. art. 11, § 1(a) (2012 Supp.) ("Class 2—tangible personal property . . . shall be defined by law for the purpose of subclassification"—*i.e.*, subclass [3]). The statutory definition of "public utility" subject to this appeal appears in K.S.A. 2012 Supp. 79-5a01[a], which states in pertinent part:

> "[T]he terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in

> an underground formation in this state, or now or hereafter are in control, manage or operate a business of:
>
> . . . .
>
> (4) transporting or distributing to, from, through or in this state natural gas, oil or other commodities in pipes or pipelines, or engaging primarily in the business of storing natural gas in an underground formation." K.S.A. 2012 Supp. 79-5a01(a)(4).

PVD argues the taxpayers' Kansas-stored gas is taxable public utility tangible personal property under the Kansas Constitution, Article 11, § 1 (2012 Supp.) and K.S.A. 2012 Supp. 79-5a01. The taxpayers admit they fit within the statutory definition but argue the definition's expansive scope is inconsistent with the common meaning of "public utility" when Kansas voters ratified the constitutional amendment excepting public utility tangible personal property from the merchants' and manufacturers' inventory exemption. See L. 1992, ch. 342, sec. 1 (now Kan. Const. art. 11, § 1 [2012 Supp.]). This, the taxpayers contend, renders the statute unconstitutional. We begin by summarizing the history underlying the constitutional provision and its statutory progeny.

*Article 11 and Our Cases Involving Taxing Stored Natural Gas*

A constitutional amendment exempting merchants' and manufacturers' inventory from ad valorem taxation was first adopted by voters in 1986. It read: "[M]erchant[s'] and manufacturer[s'] inventories . . . . shall be exempted from property taxation." L. 1985, ch. 364, sec. 1; Kan. Const. art. 11, § 1(b)(2). At that

time, public utility tangible personal property was not exempt from ad valorem taxation. See Kan. Const. art. 11, § 1(b)(1— Class 2, subclass (C). In 1988, the legislature statutorily enacted the merchants' and manufacturers' inventory exemption. See L. 1988, ch. 375, sec. 2 (now K.S.A. 79-201m). It defined the terms "merchant" and "inventory" as follows:

> "'(a) "Merchant" means and includes every person, company or corporation who shall own or hold, subject to their control, any tangible personal property within this state which shall have been purchased for resale without modification or change in form or substance, and without any intervening use;
>
> . . .
>
> "'(c) "inventory" means and includes those items of tangible personal property that: (1) Are held for sale in the ordinary course of business (finished goods); (2) are in process of production for such sale (work in process); or (3) are to be consumed either directly or indirectly in the production of finished goods (raw materials and supplies). Assets subject to depreciation or cost recovery accounting for federal income tax purposes shall not be classified as inventory. A depreciable asset that is retired from regular use and held for sale or as standby or as surplus equipment shall not be classified as inventory.'" *Colorado Interstate Gas Co. v. Board of Morton County Comm'rs*, 247 Kan. 654, 656-57, 802 P.2d 584 (1990) (quoting K.S.A. 1988 Supp. 79-201m[a], [c]).

Litigation quickly arose over whether natural gas stored in pipelines located within the state was exempt merchants' inventory under these definitions. See *Colorado Interstate Gas*, 247 Kan. at 655.

In *Colorado Interstate Gas*, the taxpayers were interstate pipeline companies that owned the natural gas at issue. They argued their stored gas was exempt merchants' and manufacturers' inventory, and PVD agreed based on the plain language of the then-existing statute, K.S.A. 1988 Supp. 79-201m. But the Board of Tax Appeals (BOTA), which was the predecessor to COTA, reversed PVD's determination. BOTA accepted that the stored natural gas was "inventory," but BOTA concluded the pipeline companies were not "merchants" or "manufacturers." *Colorado Interstate Gas*, 247 Kan. at 658. In support, BOTA cited the legislative development of the constitutional provision; the fact that public utilities were taxed under a different statute before the provision was adopted; and various affidavits from legislators claiming the provision was not intended to alter the assessment and taxation of public utility inventories. See 247 Kan. at 661-62. The pipeline companies appealed.

The *Colorado Interstate Gas* court held the pipeline companies were "merchants" as defined by K.S.A. 1988 Supp. 79-201m. The court reached that conclusion after finding the relevant portions of Article 11, § 1 of the Kansas Constitution exempting merchants' and manufacturers' inventory were self-executing, which meant the exemptions were granted by the amendment itself. 247 Kan. at 659. The court then summarized the legislature's limited authority in this area, stating:

"'The rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of [the] constitutional right to make it more available. Thus, even in the case of a constitutional provision which is self-executing, the legislature may enact legislation to facilitate the exercise of the powers directly granted by the constitution; legislation may be enacted to facilitate the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. And, even though a provision states that it is self-executing, some legislative action may be necessary to effectuate its purposes. But legislative authority to provide the method of exercising a constitutional power exists only where the constitutional provisions themselves do not provide the manner and means and methods for executing the powers therein conferred. Procedure prescribed in a self-executing provision must be followed to the exclusion of that prescribed by statute, and failure to comply with the provisions of a statute which differ from those in the constitutional provision is not a defect.

"'It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature. Also, the legislature is neither required nor permitted to enact laws purporting to confer rights in excess of and different from those contemplated by the constitution. A liability imposed by a self-

> executing provision is absolute and not subject to legislative enlargement or lessening or restriction as to manner of enforcement.'" 247 Kan. at 659-60 (quoting 16 Am. Jur. 2d, Constitutional Law § 139).

To determine whether the pipeline companies were merchants or manufacturers within the constitution's meaning, the court recited several rules of constitutional construction, one of which was that "[a] constitution . . . should be held to mean what the words imply to the common understanding of men." 247 Kan. at 660. It noted this test is "what meaning people of common understanding would give to the words in question." 247 Kan. at 660. The court observed that the K.S.A. 1988 Supp. 79-201m definition of "merchant" was consistent with definitions of "merchant" used in prior Kansas caselaw and found in a dictionary. It then held the pipeline companies were merchants because they "are clearly and undisputedly in the business of buying and selling natural gas." 247 Kan. at 661. The court discredited BOTA's analysis to determine that public utilities cannot be merchants or manufacturers, stating:

> "The problem here is that in enacting the proposed constitutional amendment the legislature determined the size of the mesh in the net and the requisite number of voters approved the mesh size. The mesh size is thus fixed in the constitution. The fact that unintended varieties of fish may pass through the mesh has little bearing on anything." 247 Kan. at 662.

In other words, the *Colorado Interstate Gas* court applied what it determined to be the constitution's

plain language to hold that the pipeline companies were included within the merchants' inventory exemption, regardless of any contrary legislative intent. 247 Kan. at 662 ("Under the circumstances, this court can only apply the clear language of the [constitutional] amendment.").

In 1992, Article 11, § 1 of the Kansas Constitution was amended to accomplish what the previous amendment establishing the merchants' and manufacturers' inventory exemption had not: it expressly excluded property falling within the public utility tangible personal property subclass from the exemption. Kan. Const. art. 11, § 1(b) (2012 Supp.); L. 1992, ch. 42, sec. 1. Article 11, § 1 retained its clear grant of authority to the legislature to define the public utility tangible personal property subclass. See Kan. Const. art. 11, § 1(a) (2012 Supp.).

At the time the 1992 constitutional amendment was adopted, K.S.A. 79-5a01(a) (Ensley 1989) defined the term "public utility" in part as:

> "every individual, company, corporation, association of persons, lessees or receivers that now or hereafter are in control, manage or operate a business of:
>
> . . . .
>
> (4) transporting or distributing *to, from, through or in this state* natural gas, oil or other commodities in pipes or pipelines, or engaging primarily in the business of storing natural gas in an underground formation." (Emphasis added.) L. 1986, ch. 371, sec. 1.

The statutory provisions defining public utility to include the natural gas pipelines remained

unchanged when litigation arose again regarding taxation of natural gas stored in Kansas pipelines. See K.S.A. 2002 Supp. 79-5a01; *In re Tax Exemption Application of Central Illinois Public Services Co.*, 276 Kan. 612, 78 P.3d 419 (2003). But in *Central Illinois*, the taxpayers were no longer pipeline companies because by this time FERC had issued a federal regulatory order divesting pipeline companies of their ownership interest in the gas, so the property tax was levied against the pipeline companies' customers.

In *Central Illinois*, the taxpayers were three out-of-state public utilities, one out-of-state municipal corporation, and one out-of-state political subdivision. Each owned gas stored in an interstate pipeline system's Kansas storage facility. The taxpayers sought ad valorem tax exemptions for their gas pursuant to the merchants' inventory exemption. All five taxpayers engaged in the business of selling or distributing natural gas, and all owned gas stored in a Kansas pipeline—but none delivered, sold, traded, or otherwise disposed of natural gas within Kansas. BOTA granted the exemption requests, holding the taxpayers were not public utilities, as defined in K.S.A. 2002 Supp. 79-5a01, and the taxpayers' gas therefore constituted exempt merchants' inventory. This court agreed. 276 Kan. at 621-22.

The *Central Illinois* court began its decision by affirming the previous rationale from *Colorado Interstate Gas* that the Article 11 merchants' inventory exemption was self-executing. But it also noted the 1992 constitutional amendment gave the legislature some authority to define what would constitute the public utility tangible personal

property subject to the amendment's exemption. But that authority, the court held, was not limitless because "as we stated in *Colorado Interstate Gas*, the legislature's definition *must conform to the commonly understood meaning of the term*." (Emphasis added.) 276 Kan. at 619. Citing *State ex rel. Stephan v. Parrish*, 256 Kan. 746, 762, 887 P.2d 127 (1994), this court explained that the legislative definition "must bear a reasonable and recognizable similarity to generally accepted definitions and the common understanding of the term by the people of Kansas." *Central Illinois*, 276 Kan. at 620.

The *Central Illinois* court held that the statutory definition of "public utility" in K.S.A. 2002 Supp. 79-5a01 conformed to the common understanding of the term at the time of the constitutional amendment's adoption, despite the fact that the statute defined public utilities to include only those entities doing business in Kansas. The court explained that it approved this statutory definition because the legislature did not limit it to "avoid a constitutional provision by defining a constitutional term in a manner different from the common understanding." 276 Kan. at 620. The court also cited a rule of construction requiring that "'[a] statute and pertinent constitutional provisions must be construed together with a view to make effective the legislative intent rather than defeat it.'" 276 Kan. at 621. And it held the only way to determine legislative intent was to look at the statutes in existence at the time the constitutional amendment was proposed and adopted. The court then applied the definition of public utility in K.S.A. 2002 Supp. 795a01 and held the taxpayers qualified for the merchants' inventory exemption because they were

not public utilities operating in Kansas. See 276 Kan. at 622. The court made no effort to provide its own definition for the term "public utility."

In 2004, the year following the *Central Illinois* decision, the legislature once again redefined public utility to include entities that "own, control and hold for resale stored natural gas in an underground formation in this state . . . ." (Emphasis added.) L. 2004, ch. 171, sec. 4. And in response to that statutory change, PVD assessed natural gas stored by 44 out-of-state municipal utilities, marketing companies, and public utilities, which led to another round of litigation. See *In re Appeal of Director of Property Valuation*, 284 Kan. 592, 593, 161 P.3d 755 (2007) (citing K.S.A. 2006 Supp. 79-5a01).

In that appeal, the taxpayers argued they were not public utilities within the plain language of K.S.A. 2006 Supp. 79-5a01 because they did not control the natural gas while it was in the pipelines. BOTA agreed, ruling that K.S.A. 2006 Supp. 79-5a01 imposed three requirements—that the public utility own, control, and hold for resale the natural gas in underground storage. It held all three requirements were not met. The PVD appealed, arguing in part that BOTA "ignored legislative intent." PVD also argued the "and" in K.S.A. 2006 Supp. 79-5a01 should be construed as "or." And as an alternative claim, PVD argued the taxpayers had satisfied all three requirements. See 284 Kan. at 596-601.

The court agreed with the taxpayers and held they fell outside the K.S.A. 2006 Supp. 79-5a01(a) definition of public utility because the pipeline companies, rather than the taxpayers, controlled the natural gas at all times it was in the pipeline system.

With this rationale, the natural gas was exempt as merchants' inventory. 284 Kan. at 606.

In 2009, the legislature amended the definition of public utility in K.S.A. 79-5a01 again. L. 2009, ch. 97, sec. 5; see K.S.A. 2012 Supp. 79-5a01. That amendment led to the controversy underlying this appeal.

*Current Law*

K.S.A. 2012 Supp. 79-5a01(a) now defines public utility to include "every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers *that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state* . . . ." (Emphasis added.) The taxpayers admit they fit within that definition, but they argue K.S.A. 2012 Supp. 79-5a01 is unconstitutional because it is inconsistent with the commonly understood meaning people of Kansas would have given the words "public utility tangible personal property" at the time they voted for the constitutional amendment in 1992. They also claim "the meaning of the term 'public utility' as used in [the] constitutional amendment passed in 1992 is the statutory definition of 'public utility' for ad valorem tax purposes that was in existence at the time of the passage of the amendment," citing this court's *Central Illinois* decision.

PVD disagrees and argues the definition of public utility adopted in K.S.A. 2012 Supp. 79-5a01 is consistent with people's common understanding of the term and is a valid exercise of the legislature's authority to define property for subclassification

under Article 11, § 1 of the Kansas Constitution (2012 Supp.).

We begin with the taxpayers' argument that under the *Central Illinois* decision the constitutional definition of public utility is frozen in time and the statutory definition in existence in 1992 has become the constitutional definition. The taxpayers urge this court to interpret *Central Illinois* as establishing the one and only definition of public utility applicable to Article 11, § 1 of the Kansas Constitution (2012 Supp.). Support for their argument principally arises from the court's application of the rule that legislative intent must be determined by the statutes that existed *at the time the constitutional amendment was proposed and adopted*. 276 Kan. at 621-22. But, if that is true, the statute in effect at the time the amendment was adopted would always control; and that runs afoul of the legislature's continuing (but limited) constitutional authority to define the subclasses, including public utility tangible personal property.

In *Central Illinois*, the court simply upheld the statutory definition of public utility in K.S.A. 2002 Supp. 79-5a01(a), even though it was not the only definition that could conform to the common understanding of the term. And unlike the *Colorado Interstate Gas* court, which examined prior caselaw and the dictionary in an attempt to ascertain the common meaning of merchants' inventory, the *Central Illinois* court simply looked at the statute and determined it was close enough—without defining more generally the term's common meaning. Otherwise, Article 11's grant of legislative authority

to define the subclasses would be meaningless. See 276 Kan. at 621-22.

This view of *Central Illinois* is consistent with how the court treated the legislature's failed attempt to modify K.S.A. 2006 Supp. 79-5a01(a) in the more recent decision of *In re Appeal of Director of Property Valuation*, 284 Kan. at 604. There this court held the legislature was unsuccessful in its first attempt to redefine public utility because the taxpayers were not included within the unambiguous statutory language defining public utility in K.S.A. 2006 Supp. 79-5a01(a). 284 Kan. at 606. Notably, the court did not hold the legislature was limited to the definition of public utility in K.S.A. 2002 Supp. 79-5a01(a). We held the legislature was—and is—free to amend the definition of public utility. We address next whether the legislature's definition of public utility under K.S.A. 2012 Supp. 79-5a01 is unconstitutional.

To be constitutional, the legislative definition must bear a reasonable and recognizable similarity to generally accepted definitions and the common understanding of the term by the people of Kansas. See *Central Illinois*, 276 Kan. at 620. The parties present two sources for identifying the common meaning of the term "public utilities": the common characteristics recognized by the taxpayers' expert witness and a dictionary definition.

John Wine, the former Kansas Corporation Commission chair, was the only witness to testify about the characteristics commonly associated with public utilities. He identified these as: (1) enjoying natural monopolies; (2) providing essential services; (3) possessing restricted or protected service territories; (4) subjection to regulation that restricts

the rates that can be charged for services; (5) obligations to provide nondiscriminatory services to the public; and (6) usually enjoying eminent domain powers. The taxpayers advocate for this court to adopt Wine's definition of public utility.

PVD urges this court to use the dictionary definition from Webster's II New College Dictionary 952 (1st ed. 1984), which describes a public utility as "'[a] private business organization, subject to governmental regulation, that provides an essential commodity or service, such as water, electricity, or communication, to the public." *Cf.* Merriam-Webster's Collegiate Dictionary 1006 (11th ed. 2003) ("a business organization [as an electric company] performing a public service and subject to special governmental regulation").

PVD interprets the dictionary definition as having three elements: (1) an essential commodity; (2) private business organizations; and (3) subject to regulation. PVD argues the first element is satisfied because natural gas is an essential commodity. It reaches that conclusion by ignoring the surrounding words which require that a public utility "*provides an* essential commodity . . . *to the public*." PVD then argues the second element is met because the taxpayers are private business organizations. But this is not accurate as to all the taxpayers because some are publicly held out-of-state municipal utilities, some are out-of-state public utilities, and some are out-of-state marketers and brokers. Finally, PVD argues the marketers and brokers are subject to regulation by the federal Energy Policy Act of 2005, which regulates the purchase and sale of natural gas. PVD's deconstruction saps the

dictionary definition of all meaning and reaches an absurd result.

But despite both parties' attempts to lump the taxpayers into one group and conclude that either all or none of them are public utilities, we must address each group individually because they have different business purposes and structures. See *Cities Service Gas Co. v. State Corporation Commission*, 222 Kan. 598, 609, 567 P.2d 1343 (1977) ("[W]hether a business is a public utility must, of necessity, be determined by the character of its operations.").

*Marketers and Brokers of Natural Gas*

Wine concluded that none of the taxpayers met his definition of a public utility, although on a closer examination of his testimony it appears different reasoning applied to particular groups. As to the marketers and brokers, he said they did not meet the common characteristics he established. But as to the other two groups, his conclusion appears to have been based on the prior language of K.S.A. 79-5a01 defining public utility to exclude entities not doing business in Kansas.

In his report, Wine stated: "The Marketers, Brokers, or other entities that trade in gas, and possess the right to take delivery of that gas from a federally regulated pipeline do not possess any characteristics of a public utility except for the fact that they deal in natural gas, a commodity that is highly regulated." But at the hearing, Wine testified the current definition of public utility adopted by the Kansas Legislature in K.S.A. 2012 Supp. 79-5a01 was inconsistent with his view of what a public utility is, stating:

> "[T]he fact that someone might be brokering or marketing a—a commodity, a natural gas commodity, does not make it a public utility looking at those common characteristics in—in any way. I mean, any more than a—a facility that held some coal that might eventually be delivered to an electric utility to burn to make electricity, it wouldn't make that—that marketer of coal a public utility."

PVD urges this court to find the marketers and brokers are nevertheless public utilities, analogizing the marketers and brokers to resellers of telecommunication services. PVD cites *In re Appeal of United Teleservices, Inc.*, 267 Kan. 570, 983 P.2d 250 (1999). In that case, United Telephone Long Distance Company (UTLD) claimed it could not be taxed under K.S.A. 79-5a01(a)(3), which defined a public utility as a company operating a business of "'transmitting to, from, through, or in this state telephonic messages.'" 267 Kan. at 573. UTLD was a reseller of long distance services, which its expert described as:

> "'[W]hat resellers do is resell the services of the interexchange companies. And so in effect they don't own fiber, they don't own switches, they don't own what we call POPs, points of presence. They're simply a marketing entity that tries to find a market and sell what they have purchased from the interexchange carriers.'" 267 Kan. at 573.

The question before the *United Teleservices* court was "whether the State has authority to assess UTLD as a business transmitting telephonic messages, *i.e.*, a public utility." 267 Kan. at 573. The parties' arguments concerned the interpretation of

K.S.A. 79-5a01(a)(3). But the parties did not argue the statutory language was inconsistent with the meaning of the term "public utility" in Article 11, § 1. See Kan. Const. art. 11, § 1 (2012 Supp.). In other words, the court was asked whether UTLD fit the definition of public utility established by the legislature in K.S.A. 79-5a01(a)(3)—not whether that definition was consistent with people's common understanding of the term. The court held UTLD met the statutory definition because it purchased access for long distance service from Sprint and then sold that service to consumers. Thus, "UTLD operates a business of transmitting telephonic messages by contracting for the service." 267 Kan. at 581-82.

PVD is correct that both UTLD and the marketers and brokers of natural gas in this appeal are resellers of a commodity. But *United Teleservices* is distinguishable because a different question was asked and answered. The *United Teleservices* court did not decide whether the legislature's definition of public utility was consistent with the Kansas Constitution. It simply determined whether UTLD fit within a statutory definition the legislature had established. Therefore, this case does not support PVD's claim that these marketers and brokers are public utilities under the common meaning of the term as constitutionally adopted in Kansas.

We hold that the natural gas marketers and brokers in this appeal are not public utilities as that term is used in Article 11, § 1 of the Kansas Constitution (2012 Supp.). This is because they are not obligated to provide nondiscriminatory services to the public, do not have eminent domain powers, and

do not enjoy natural monopolies. These entities do not possess Wine's common public utility characteristics, and they do not fall within the dictionary definition of "public utility." Accordingly, we conclude they are not public utilities under that term's common meaning as used in Article 11, § 1. See *Colorado Interstate Gas Co. v. Board of Morton County Comm'rs*, 247 Kan. 654, 660-61, 802 P.2d 584 (1990). K.S.A. 2012 Supp. 79-5a01 is unconstitutional as applied to the natural gas brokers and marketers.

*Local Distribution Companies Certified as Public Utilities in Other States*

At the COTA hearing, Wine conceded the public utilities operating in other states and the local distribution companies met his definition of "public utilities," *i.e.*, including them within the K.S.A. 2012 Supp. 79-5a01 definition was consistent with the term's common meaning. The taxpayers' argument for why these entities are exempt is not entirely clear. But it appears to be premised on the contention, rejected above, that this court must define "public utility" for the purposes of Article 11, § 1 of the Kansas Constitution (2012 Supp.), as the term was defined in K.S.A. 2002 Supp. 79-5a01 at the time of the *Central Illinois* decision. And absent the previous statutory language in K.S.A. 2002 Supp. 79-5a01 limiting public utilities to utilities operating in this state, there is no basis for concluding these entities are not public utilities for the purposes of Article 11, § 1 of the Kansas Constitution (2012 Supp.) or K.S.A. 2012 Supp. 79-5a01.

We hold the statute is constitutional as applied to these taxpayers, and we affirm the denial of their tax

exemption claims. See *State v. Limon*, 280 Kan. 275, 302-03, 122 P.3d 22 (2005) (constitutional part of statute may stand while the unconstitutional part is rejected); *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 316, 955 P.2d 1136 (1998) (same).

*Out-of-state Municipal Utilities*

PVD also attempted to elicit testimony from Wine concerning the municipal utilities it considered local distribution companies, but Wine testified he did not know if it was appropriate to call them local distribution companies if they were not public utilities, even though the municipal utilities were providing analogous services. This statement was not further clarified, and COTA did not make a finding relevant to this taxpayer group.

Notably, the dictionary definition of "public utility" PVD cites to this court limits public utilities to "private business organization[s]." Webster's II New College Dictionary 952 (1st ed. 1984). But see Merriam-Webster's Collegiate Dictionary 1006 (11th ed. 2003) (defining "public utility" as "a business organization . . . performing a public service and subject to special governmental regulation"). We hold that people's common understanding of the term "public utility" would not bring within its grasp municipally owned entities providing utility services to a municipality's citizens.

PVD's favored definition of "public utility" includes within the term only private business organizations, and Wine could not say whether municipal utilities could be considered public utilities under the common characteristics to which he testified. Moreover, both PVD's and Wine's understanding of the term included

a regulatory component. And at the time Kansas voters added the "public utility" subclass to the constitution in 1985—and in the decades prior—Kansas treated municipal utilities and public utilities differently for regulatory purposes. Specifically, municipal utilities enjoyed a degree of self-regulation not available to other public utilities. See L. 1978, ch. 263, secs. 1, 2 (now codified at K.S.A. 2012 Supp. 66-104) ("public utility" subject to Kansas Corporation Commission's regulatory jurisdiction do not include municipally owned or operated utility located in municipality's corporate boundaries, but such entities "deemed" public utilities for certain purposes); see also *Kansas Public Service Co. v. State Corporation Commission*, 199 Kan. 736, 746, 433 P.2d 572 (1967) (power to control and regulate "'one-city' public utilities" belongs exclusively to city); *Holton Creamery Co. v. Brown*, 137 Kan. 418, 421, 20 P.2d 503 (1933) (state utilities act provided that no category applied to any public utility owned and operated by municipality in this state was "'plain and unambiguous exclusion from the definition of "public utilities" of public utilities owned and operated by municipalities.'" [quoting *Humphrey v. City of Pratt*, 93 Kan. 413, 417, 144 P. 197 (1914)]).

The definition PVD advances, which restricts public utilities to private business organizations, is consistent with the common meaning of public utility—particularly in light of Kansas' regulatory discernment between true public utilities on one hand and municipal utilities on the other. It is also consistent to exclude municipal utilities as governmental entities from a provision intended to impose a tax burden. And it is unrealistic to believe voters would understand the amendment to impose

an ad valorem tax on a governmental body. Out-of-state municipal utilities are exempt under Article 11, § 1(b) of the Kansas Constitution (2012 Supp.).

In light of this holding, the remaining issues raised on appeal are moot. We remand to COTA to determine which taxpayers fall within each of the three generally described categories identified previously by COTA. The record on appeal provided to this court does not give sufficient detail to complete that analysis.

The COTA decision is affirmed in part and reversed and vacated in part, and the matter is remanded to COTA with directions.

## APPENDIX B

BEFORE THE COURT OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEALS OF *VARIOUS APPLICANTS (SEE EXHIBIT "A")* FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR THE YEAR 2009

Docket Nos. 2009-8554-PV, *et al.*

AND

IN THE MATTER OF THE APPLICATIONS OF *VARIOUS APPLICANTS (SEE EXHIBIT "A")* FOR EXEMPTION FROM PROPERTY TAXATION IN THE STATE OF KANSAS

Docket Nos. 2009-8610-PVX, *et al.*

ORDER

The above captioned matters come on for consideration and decision by the Court of Tax Appeals of the State of Kansas. A consolidated hearing on these matters was held on March 9, 2010. Robert W. Coykendall, Attorney, represented the Taxpayers/Applicants ('Taxpayers'). William E.

Waters, Attorney, represented the State of Kansas, Division of Property Valuation ('PVD'). Clinton E. Patty, Attorney, appeared on the amicus curiae brief for Meade, Morton, and Rice Counties, Kansas ('Amicus').

After considering the evidence and submissions presented, the Court finds and concludes as follows: The Court has jurisdiction over the subject matter as timely appeals and tax exemption applications have been filed pursuant to K.S.A. 2009 Supp. 74-2438 and 2009 Supp. 79-213, respectively. In regard to the valuation appeals, the tax year in issue is 2009. The subject property is the 2009 gas assessments for each Taxpayer as listed in the joint stipulations.

These consolidated matters are appeals of PVD final notices of value for tax year 2009 and applications for ad valorem tax exemption filed by forty separate Taxpayers as listed in the attached Exhibit A. Taxpayers contend the gas is not taxable and not properly allocated to Taxpayers. If the gas is held-taxable, Taxpayers assert it is exempt from ad valorem taxation pursuant to several Kansas statutory and constitutional provisions. Lastly, Taxpayers argue K.S.A. 2009 Supp. 79-5a01, the statute that defines "public utility" for purposes of the exemption provisions, is unconstitutional.

## I. Findings of Fact

The Parties' stipulations of fact are hereby adopted and incorporated herein as if set forth verbatim. Following is a summary of pertinent facts gleaned from these stipulations, and from testimony and evidence presented at the hearing.

1. Taxpayers are various types of business entities including natural gas marketing companies,

municipalities, and local distribution companies certified as public utilities in other states.

2. PVD determined Taxpayers were public utilities for property tax purposes, the stored gas had situs in Kansas, and was subject to valuation and assessment pursuant to K.S.A. 79-5a01 *et seq.*

3. Taxpayers are not certified or regulated as natural gas public utilities in Kansas; nor do they engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7) in Kansas.

4. Taxpayers do not "control, manage or operate a business of transporting or distributing to, from, through or in this state natural gas, oil, or other commodities in pipes or pipelines or engage primarily in the business of storing natural gas in an underground formation." Taxpayers are not authorized to exercise the power of eminent domain in Kansas.

5. Taxpayers do not own facilities in Kansas for the transmission, distribution or storage of natural gas.

6. Taxpayers purchase natural gas from various producers and marketers, and deliver it to one or more interstate natural gas pipelines/common carriers for storage or deferred delivery. Taxpayers designate when and where gas will be delivered to the pipelines, and schedule a time and location on the pipeline's where the Taxpayer will receive an equivalent amount of gas.

7. Four companies—Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Southern Star Central Gas Pipeline (collectively known herein

as 'Interstate Pipelines')—were determined by PVD to be holding natural gas for resale in facilities in Kansas on January 1, 2009.

8. The Interstate Pipelines are regulated by the Federal Energy Regulatory Commission ('FERC'). Gas storage and deferred delivery services furnished by Interstate Pipelines are provided in accordance with and subject to FERC approved tariffs. The Interstate Pipelines own and operate underground gas storage facilities in multiple jurisdictions including Kansas, which are subject to regulation by FERC.

9. The FERC approved tariffs contain specific provisions regarding control and possession of natural gas delivered to the interstate pipelines for storage or deferred delivery. Taxpayers do not control the gas during the time between its delivery to the Interstate Pipelines and the subsequent redelivery of the gas to the Taxpayers. Control and possession of the gas is vested in Interstate Pipelines pursuant to applicable provisions of FERC-approved tariffs. Each of the FERC tariffs includes provisions providing that the risk of loss, and liability for damages is on the Interstate Pipelines during the period the gas is in their control and possession.

10. Between the time the natural gas is delivered to the Interstate Pipelines and redelivered to Taxpayers it is stored by the Interstate Pipelines somewhere in the pipeline's storage or transportation systems.

11. Customers that contract with a pipeline for delivery of natural gas are bound by the FERC approved tariffs that govern the transportation and storage of the gas by such pipeline. Neither FERC

regulation nor the applicable pipeline tariffs permit Taxpayers to designate a particular location for storage, and Taxpayers have no knowledge regarding the specific nature and location of such storage. The Interstate Pipelines commingle the natural gas of its customers. No effort is made or could be made to ensure that the same gas delivered into the pipeline system is placed into storage. Likewise, no effort is or could be made to ensure that the gas stored and allocated to Taxpayers is produced and delivered to Taxpayers when called for. The gas storage and the identity of the gas stored and subsequently delivered to Taxpayers is under the complete control of the pipeline. The Taxpayers right to the gas is limited solely to a contractual right to withdraw an amount of gas equivalent to that which they previously delivered to the pipeline.

12. Any stored natural gas held on behalf of Taxpayers is held as inventory and is intended for ultimate use or sale outside of Kansas.

13. Panhandle Eastern and Southern Star reported to PVD the amount of natural gas held in underground storage in Kansas for resale by each of its customers on January 1, 2009.

14. Northern Natural and Colorado Interstate reported to PVD the total net quantity of natural gas stored by each of its storage customers in its storage facilities on January 1, 2009. These Interstate Pipeline companies also reported to PVD the percentage of its aggregate storage inventory that was in its Kansas storage facilities on January 1, 2009.

15. PVD used the methodology prescribed by FERC to determine the amounts of natural gas held

by Northern Natural's and Colorado Interstate's customers in underground storage in Kansas on January 1, 2009.

16. Taxpayers sole challenge to the valuation of the gas was the allocation of gas for ad valorem taxation purposes. Taxpayers presented no allocation formula for determining the amount of gas stored for resale in underground formations in Kansas on January 1, 2009.

17. The Taxpayers are merchants of natural gas. The gas they have purchased and delivered to Interstate Pipelines for transportation and temporary underground storage or deferred delivery service is inventory intended for resale.

18. The gas delivered to Interstate Pipelines for transportation and underground storage is moving in interstate commerce.

19. The storage function is an integral part of the ongoing operations of the Interstate Pipelines. Natural gas is continually delivered to and removed from storage to satisfy essential pipeline pressure and balancing requirements, and to permit interstate transportation services such as the simultaneous delivery and redelivery of natural gas at distant locations.

20. Jeff Balfort, Director of Gas Operations for Panhandle Eastern, appeared as a witness for the Taxpayers. Balfort testified from the time Panhandle Eastern receives the gas to the time the gas is redelivered to its customer, Panhandle Eastern is in control of the gas, makes decisions as to how the gas moves in Panhandle Eastern's storage and transportation system, and bears the risk of loss as to the gas. Balfort further testified a customer/shipper

has no say regarding where the gas delivered to the pipeline system goes and no control over the gas while in the system. Balfort estimated the gas delivered in Kansas would take approximately four days to reach the market in Indiana or Ohio. However, a customer who delivers a quantity of gas in Kansas does not have to wait four days to receive delivery of the same quantity of gas in Indiana or Ohio. Balfort submitted Panhandle Eastern does nothing to ensure that the same gas that is delivered for storage is redelivered after transportation to its designated market.

21. Kent Miller, Vice President of Customer Service and Business Development for Northern Natural, appeared as a witness for the Taxpayers. Miller testified seventy percent of Northern Natural's customers inject gas at a delivery point in Iowa and half of Northern Natural's deliveries to its customers are made in Minnesota. Miller further testified it is very likely for a customer to deliver gas to Northern Natural in Iowa and subsequently take delivery of gas in Minnesota without the gas ever having been in Kansas. Miller testified it was his understanding that, pursuant to PVD's allocation methodology, such customer would still receive a tax bill from the State of Kansas.

22. John Wine, former Chairman of the Kansas Corporation Commission, and an Attorney with 30 years experience in state regulation of businesses, appeared as a witness for the Taxpayers. Wine testified public utilities had the following common characteristics: A natural monopoly, restricted or protected service territory, an obligation to provide a nondiscriminatory service to the public, essential

services, and public utilities were often given powers of eminent domain by the state. Wine testified the definition of public utility contained in K.S.A. 2009 Supp. 79-5a01 was not consistent with his experience of what constituted a public utility. Wine further testified the instant Taxpayers did not conduct business in a way that would qualify them as a public utility as the term would have been used in 1992. Wine, indicated that those Taxpayers who were public utilities in their State of domicile would comport with what persons of common understanding would believe to be a public utility, but only in their state of domicile.

23. Roger Dallam, PVD Appraiser, appeared as a witness for PVD. Dallam appraises Class I and III railroads, gas transportation and distribution pipelines, and small water utilities and underground gas storage properties. Dallam testified regarding the methodology PVD employed to gather and value Taxpayers' gas for taxation purposes. Dallam testified the allocation method he followed made no distinction between inventories actually held for resale as opposed to inventories held for use by the customer.

## II. History of Stored Gas Inventory Taxation in Kansas

A brief review of legislation and case law leading up to the instant appeal is instructive. In 1986, the Kansas electorate amended the Kansas Constitution exempting various types of property from ad valorem taxation. Among other things, the amendment provided that merchants' and manufacturers' inventory shall be exempt for property taxation. Kan. Const. Art. 11, § 1(b)(2), Kan. Sess. L. 1985, ch. 364,

§ 1. Soon thereafter, the Kansas legislature enacted legislation codifying this constitutional amendment and defining the terms merchant, manufacture, and inventory for purposes of the exemption. K.S.A. 79-201m, Kan. Sess. L. 1988, ch. 375, § 2.

Subsequently, various public utilities who owned and stored natural gas in Kansas underground formations requested PVD classify the gas as merchants' and manufacturers' inventory exempt from taxation. PVD agreed with the public utilities and allowed the exemption. Various Counties appealed this decision and the issue was ultimately decided by the Kansas Supreme Court in *Colorado Interstate Gas Co. v. Bd. of Morton County Comm'rs*, 247 Kan. 654, 802 P.2d 584 (1990). The Court held that natural gas owned by public utilities and stored for resale was exempt pursuant to the merchants' and manufacturers' inventory exemption. The Court found the public utilities were merchants under the provisions of K.S.A. 79-201m as they were in the business of buying and selling severed natural gas, which is tangible personal property. *Id.* at 661.

While the appeal of *Colorado Interstate Gas* was pending, the Kansas legislature amended the merchants' and manufacturers' exemption under K.S.A. 79-201m. The amendment added an exception to the scope of the exemption and made taxable "any tangible personal property of a public utility as defined by K.S.A. 79-5a01. . . ." K.S.A. 79-201m. In November 1992, Kansas voters approved an amendment to the Kansas Constitution making the Constitution consistent with this legislation. Kan. Const. Art. 11, § 1(b)(2), Kan. Sess. L. 1992, ch. 342, § 1. Pursuant to these statutory and constitutional

provisions, the stored natural gas inventories of public utilities, including pipelines, became taxable in Kansas.

In 1992, the Federal Energy Regulatory Commission ('FERC') issued an order that fundamentally restructured the interstate pipeline industry. FERC Order 636 required pipelines to unbundle their sales services from their transportation services. As a result, interstate pipeline companies no longer owned the gas stored in their systems. Instead, these companies would accept, transport, store, and redeliver gas owned by other entities. FERC Order 636 was issued in 1992, however its changes took effect in 1999. As a result, title to the natural gas remained with the pipeline customers upon delivery of the gas to the storage systems. Subsequent to FERC Order 636, entities such as gas marketers, out-of-state utilities, municipalities, and various other types of entities became owners of gas stored in pipelines and underground formations.

The State of Kansas, through PVD, again sought to tax the gas owned by these entities and Taxpayers resisted contending they did not meet the statutory definition of a public utility. In 2003, the Kansas Supreme Court again addressed the issue of taxation of natural gas stored in Kansas holding that pipeline customers did not meet the definition of "public utilities" found in K.S.A. 79-5a01 as they did not operate a business of transporting or distributing natural gas though or in the state of Kansas nor did they engage primarily in the business of storing natural gas in an underground formation. *In re Central Illinois Public Service Co.*, 276 Kan. 612, 78

P.3d 419 (2003). Therefore, the Court held that the gas owned by these entities was exempt from taxation as merchants' inventory pursuant to K.S.A. 79-201m.

After *Central Illinois*, the 2004 Kansas legislature again enacted legislation redefining "public utilities" under K.S.A. 79-5a01 to encompass "every individual, company, corporation, association . . . that now or hereafter own, control, and hold for resale stored natural gas in an underground formation in this state . . . ." K.S.A. 79-5a01, S.B. 147, Kan. Sess. L. 2004, Ch. 171, § 4. Based on this new definition, PVD allocated, assessed and taxed gas owned by various non-Kansas municipalities, non-Kansas natural gas marketing companies, and non-Kansas public utilities — many of which are litigants herein. After these Taxpayers appealed the assessments, the Kansas Supreme Court, affirming the decision of this Court, denied the assessments finding the Taxpayers did not meet the statutory definition of a public utility because they did not control and hold for resale stored natural gas in an underground formation of the state. *In the matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592, 606, 161 P.3d 755 (2007). The Court further held the stored natural gas was exempt from ad valorem taxation pursuant to K.S.A. 79-201m as merchants' inventory. *Id.*

In 2007, the Kansas legislature again amended the definition of "public utility" found in K.S.A. 79-5a01. The amendment provided the statutory definition of "public utility" included "every individual, company, corporation, association of persons, brokers, marketers, lessees, or receivers that now or hereafter

own, broker or market natural gas inventories stored in underground formations in this state . . .” K.S.A. 2009 Supp. 79-5a01(a), House Substitute for S.B. 98, L. 2009, ch. 97, §5. Nothing in the Kansas Constitution with respect to the definition of public utility and the merchants’ and manufacturers’ inventory exemption was amended in 2009.

III. Court Findings and Conclusions

Taxpayers submit the subject natural gas, which is delivered to interstate pipelines for storage or deferred delivery and allocated to Kansas, is not taxable in Kansas. If the gas is deemed taxable, Taxpayers argue it is exempt from taxation as merchants’ inventory pursuant to either K.S.A. 2009 Supp. 79-201m or Article 11, § 1 of the Kansas Constitution. Taxpayers contend the Kansas legislature’s 2009 amendment of K.S.A. 79-5a01 improperly redefined “public utility” in a manner inconsistent with its controlling constitutional definition. Consequently, regardless of this recent statutory amendment, Taxpayers assert they are not “public utilities” within the meaning of said term as provided in the Kansas Constitution. As the public utility exclusion to the merchants’ and manufacturers’ inventory exemption does not apply, Taxpayers submit the subject gas is exempt as merchants’ inventory pursuant to Article 11, § 1(b) of the Kansas Constitution.

Taxpayers next contend the gas is exempt as personal property moving in interstate commerce under K.S.A. 2009 Supp. 79-201f. Taxpayers, further, assert the gas owned by Taxpayers that are municipal utilities is exempt pursuant to Article 11, § 1 of the Kansas Constitution and K.S.A. 2009 Supp.

79-201a. Lastly, Taxpayers contend taxation of the gas violates the Due Process Clause, the Commerce Clause, and the Import-Export Clause of the U.S. Constitution.

PVD and Amicus contend Taxpayers do not satisfy either the statutory or constitutional requirements for exemption under any of the requested provisions. In regard to Taxpayers' exemption requests pursuant to K.S.A. 2009 Supp. 201f and 2009 Supp. 79-201m, and Article 11, § 1 of the Kansas Constitution, PVD and Amicus submit Taxpayers meet both the statutory and constitutional definitions of public utility.

In regard to the Taxpayers' various constitutional challenges, it is well settled that the Court has not been vested with authority to address the constitutionality of statutes. Therefore, the Court must presume all statutes are constitutional as drafted. *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365, *cert denied*, 504 U.S. 973, 119 L.Ed. 2d 566, 112 S.Ct. 2941 (1992).

K.S.A. 79-201m and K.S.A. 79-201f

The Court will first address Taxpayers' statutory exemption requests pursuant to K.S.A. 2009 Supp. 79-201m and 2009 Supp. 79-201f as both provisions contain exclusions for public utility inventories as defined by K.S.A. 2009 Supp. 79-5a01.

All property in this state that is not expressly exempt is taxable. *See* K.S.A. 79-101. The fundamental rule in Kansas is that tax exemption statutes shall be construed strictly in favor of taxation and against exemption and the burden of establishing exemption from taxation rests with the applicant. *See In re Application of Central Kansas*

*E.N.T. Associates, P.A.*, 275 Kan. 893, 897, 69 P.3d 595 (2003); *Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 454, 691 P.2d 1303 (1984); *see also Manhattan Masonic Temple Ass'n v. Rhodes*, 132 Kan. 646, 296 P. 734 (1931).

In construing a statute, the Court recognizes the fundamental rule of statutory construction that the intent of the legislature governs if that intent can be ascertained from the plain language of the statute. *State v. Scherzer*, 254 Kan. 926, 869 P.2d 729 (1994). Further, the Court finds when determining whether a statute is open to construction, ordinary words must be given their ordinary meanings. *State ex rel Stephan v. Board of County Commissioners*, 254 Kan. 446, 447, 866 P.2d 1024 (1994). When a statute is clear and unambiguous, the Court must give effect to the legislative intent expressed in the statutory language rather than make a determination of what the law should or should not be. *Id.*

K.S.A. 2009 Supp. 79-201m provides in part as follows:

> To the extent herein specified, merchants' and manufacturers' inventory shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas.
>
> (a) As used in this section:
>
> (1) "Merchant" means and includes every person, company or corporation who shall own or hold, subject to their control, any tangible personal property within this state which shall have been purchased primarily for resale in the ordinary course of business without modification or change in form or substance, and without any intervening use, except

that, an incidental use, including but not limited to the rental or lease of any such property, shall not be deemed to be an intervening use;

. . .

(3) "inventory" means and includes those items of tangible personal property that: (1) Are primarily held for sale in the ordinary course of business (finished goods); (2) are in process of production for such sale (work in process); or (3) are to be consumed either directly or indirectly in the production of finished goods (raw materials and supplies). A capital asset subject to depreciation or cost recovery accounting for federal income tax purposes that is retired from regular use by its owner and held for sale or as standby or surplus equipment by such owner shall not be classified as inventory.

(b) The provisions of this section shall not apply to any tangible personal property of a public utility as defined by K.S.A. 79-5a01, and amendments thereto.

K.S.A. 2009 Supp. 79-201f provides in part as follows:

> The following described property, to the extent herein specified, shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:
>
> (a) Personal property which is moving in interstate commerce through or over the territory of the state of Kansas, except public utility inventories subject to taxation pursuant to K.S.A. 79-5a01 *et seq.*, and amendments thereto.

K.S.A. 2009 Supp. 79-5a01 provides in part as follows:

> (a) As used in this act, the terms "public utility" or "public utilities" means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state . . . .

Based on the stipulations of the Parties and evidence presented at the hearing, the Court finds Taxpayers own, broker, or market natural gas inventories stored for resale in underground formations in the state and, therefore, satisfy the statutory definition of a public utility set forth in K.S.A. 2009 Supp. 79-5a01. As such, Taxpayers are public utilities as defined by said statute and are not entitled to the merchants' and manufacturers' inventory exemption provided by K.S.A. 2009 Supp. 79-201m. Further, as the Taxpayers are public utilities, the subject gas does not qualify for tax exemption as property moving in interstate commerce as provided by K.S.A. 2009 Supp. 79-201f.

Article 11, § 1(b) of the Kansas Constitution

Taxpayers alternatively request exemption pursuant to the merchants' and manufacturers' inventory exemption provided in the Kansas Constitution. Taxpayers contend this constitutional provision is self-executing and therefore can be given effect without the aid of legislation. Taxpayers submit the public utility definition provided in the Kansas Constitution was what was commonly understood at the time of passage of the 1992

amendment adding the public utility exception to Article 11, § 1(b). Taxpayers contend this common understanding, as it related to natural gas, defined a public utility as an entity engaged in transportation of gas in pipelines or engaged primarily in the storage of natural gas in underground formations. A definition previously held inapplicable to many of the instant Taxpayers by the Kansas Supreme Court. *Central Illinois Public Services*, 276 Kan. at 612.

The rules governing interpretation of constitutional provisions differ from those governing statutory provisions. A constitutional provision is not to be narrowly or technically construed, but its language should be interpreted to mean what the words imply to men of common understanding. *State, ex rel. Frizzell v. Highwood Service, Inc.*, 205 Kan. 821, Syl. ¶ 4, 473 P.2d 97 (1970). A constitution should not be interpreted in any refined or subtle sense, but should be held to mean what the words imply to the common understanding of men. *State v. Sessions*, 84 Kan. 856, Syl. ¶ 1, 115 Pac. 641 (1911). When interpreting the constitution, each word must be given due force and appropriate meaning. *State, ex rel., v. Hines*, 163 Kan. 300, 304, 182 P.2d 865 (1947).

Article 11, § 1 of the Kansas Constitution governs the assessment and taxation of property in the state. Property is classified as real and personal and further classified into various separate subclasses, including class 2, subclass (3) public utility tangible personal property including inventories thereof. Article 11, § 1(b) of the Kansas Constitution provides exemption for "[a]ll property used exclusively for . . . merchants' and manufacturers' inventories, other

than public utility inventories included in subclass (3) of class 2 . . . ." Article 11, § 1(a) of the Kansas Constitution provides, in pertinent part, as follows:

> Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly at the following percentages of value
>
> . . .
>
> (3) Public utility tangible personal property including inventories thereof . . . ."

Taxpayers principally rely on the Kansas Supreme Court's finding in *Colorado Interstate Gas* that the merchants' and manufacturers' inventory exemption in the Kansas Constitution is a self-executing provision. 247 Kan. at 659. While constitutional provisions clearly supercede statutory provisions, the Court in *Colorado Interstate Gas* indicated that "a self-executing provision of the Constitution does not necessarily exhaust legislative power on the subject." *Id.* (*quoting* 16 Am. Jur. 2d. Constitutional Law § 139, p. 510). The Court continued stating, "even in the case of a constitutional provision which is self-executing, the legislature may enact legislation to facilitate the exercise of powers directly granted by the constitution [and] legislation may be enacted to facilitate the operation of such a provision...." *Id.*

The interplay between the constitutional and statutory provisions relating to the merchants' and manufacturers' exemption was addressed by the Kansas Supreme Court in *Central Illinois Public Services*, 276 Kan. at 612. In said matter, Appellant Meade County, Kansas requested the Court utilize

the public utility definition found in the merchants' and manufacturers' inventory exemption in the Kansas Constitution instead of the statutory definition provided in K.S.A. 2002 Supp. 79-5a01. The County argued the statutory definition was improperly narrow and inconsistent with the definition provided in the self-executing provision in the Kansas Constitution. The Court rejected this argument finding although the merchants' and manufacturers' exemption provided in the Constitution was self-executing, the public utility inventories exclusion from the exemption was not. 276 Kan. at 619. The Court noted that the exemption exclusion referred to public utility inventories included in subclass (3) of class 2 of Article 11, § 1(a). Article 11, § 1(a), in turn, provided that "tangible personal property shall be further classified into six subclasses [and] *shall be defined by law for purposes of subclassification* . . . ." (Emphasis added.) While the Court agreed the legislative definition of public utility should conform to the commonly understood meaning of the term, it also held the exclusion provision of the constitution vested the legislature with some authority to define what constituted public utility. *Id.*

*Central Illinois*' interpretation of the merchants' and manufacturers' inventory exemption in the Kansas Constitution is directly applicable herein. This Court finds that Taxpayers' request for a merchants' inventory exemption solely pursuant to the provisions of Article 11, Section 1(b) of the Kansas Constitution ignores the clear constitutional language authorizing the legislature's participation in crafting the public utility definition. K.S.A. 2009

Supp. 79-5a01 is the codification of that legislative participation.

Applicants requesting tax exemption have the burden of persuasion and may only prevail if the property clearly qualifies for exemption. Tax exemption provisions are to be strictly construed in favor of taxation. Herein, Taxpayers have not presented evidence or authority to persuade the Court that the gas is exempt pursuant to the merchants' inventory exemption found in the Kansas Constitution.

K.S.A. 79-201a *Second.*

Consolidated herein are exemption applications filed by several nonresident municipalities who request exemption from property taxation pursuant to K.S.A. 2009 Supp. 79-201a *Second*. This statute provides an exemption from ad valorem taxes for "[a]ll property used exclusively by the state or any municipality or political subdivision of the state." *Id.* The Court finds the express terms of the statute indicate that exemption is available only to Kansas municipalities and political subdivisions. *See State v. Holcomb*, 85 Kan. 178, 116 P. 251 (1911). As it is undisputed that the Taxpayers requesting this exemption are all non-Kansas municipalities, the Court concludes that this exemption request pursuant to K.S.A. 2009 Supp. 79-201a *Second* is denied.

Allocation of Natural Gas to Kansas for Taxation Purposes

In regard to the stored natural gas valuation, Taxpayers did not dispute PVD's valuation of the gas; however, Taxpayers challenged PVD's allocation of natural gas to Kansas for ad valorem tax purposes.

Examination of the record indicates Taxpayers did not present any evidence beyond their broad contentions that this allocation was unconstitutional and improper. Further, Taxpayers did not offer an allocation formula or methodology for determining the allocations of stored gas in underground formations in Kansas.

PVD presented evidence detailing the FERC approved methodology it employed to compile the 2009 tax year stored gas inventory allocations for each respective Taxpayer. As it is undisputed that the Taxpayers have the burden of proof in these matters, the Court finds and concludes that the Taxpayers' challenge to PVD's gas allocations is denied as no substantial credible evidence was presented in support thereof.

IT IS THEREFORE ORDERED BY THE COURT OF TAX APPEALS OF THE STATE OF KANSAS that, for the reasons set forth above, the Taxpayers' appeals and exemption requests are denied.

Any party to this action who is aggrieved by this decision may file a written petition for reconsideration with this Court as provided in K.S.A. 2009 Supp. 77-529. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Court's order is unlawful, unreasonable, capricious, improper or unfair. Any petition for reconsideration shall be mailed to: Secretary, Court of Tax Appeals, Docking State Office Building, Suite 451, 915 SW Harrison St., Topeka, KS 66612-1505. *A copy of the petition, together with any accompanying documents, shall be mailed to all parties at the same time the petition is mailed to the*

*Court. Failure to notify the opposing party shall render any subsequent order voidable.* The written petition must be received by the Court within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute). If at 5:00 pm on the last day of the specified period the Court has not received a written petition for reconsideration of this order, no further appeal will be available.

IT IS SO ORDERED THE KANSAS COURT OF TAX APPEALS


/s/ Bruce F. Larkin
BRUCE F. LARKIN, CHIEF JUDGE

/s/ J. Fred Kubik
J. FRED KUBIK, JUDGE

RECUSED
TREVOR C. WOHLFORD, JUDGE PRO TEM

/s/ Jolene R. Allen
JOELENE R. ALLEN, SECRETARY

**ATTACHMENT**

| | | | |
|---|---|---|---|
| 2009-8554 PV | BP Canada Energy Marketing Corp. | PVD ID NO. G4270 | 2009 |
| 2009-8555 PV | Northern States Power Company of Minnesota | PVD ID NO. G4343 | 2009 |
| 2009-8556 PV | Northern States Power Company of Minnesota | PVD ID NO. G4344 | 2009 |
| 2009-8557 PV | Northern States Power Company of Wisconsin | PVD ID NO. G4342 | 2009 |
| 2009-8558 PV | Public Service Company of Colorado | PVD ID NO. G4216 | 2009 |
| 2009-8559 PV | U.S. Energy Services, Inc. | PVD ID NO. G4336 | 2009 |
| 2009-8560 PV | ProLiance Energy, L.L.C. | PVD ID NO. G4204 | 2009 |
| 2009-8561 PV | Oklahoma Natural Gas Company | PVD ID NO. G4253 | 2009 |
| 2009-8562 PV | ONEOK Energy Services Company, L.P. | PVD ID NO. G4243 | 2009 |
| 2009-8563 PV | Tenaska Gas Storage, L.L.C. | PVD ID NO. G4259 | 2009 |
| 2009-8564 PV | Interstate Power & Light Company | PVD ID NO. G4268 | 2009 |
| 2009-8565 PV | Wisconsin Power & Light Company | PVD ID NO. G4257 | 2009 |

| | | | |
|---|---|---|---|
| 2009-8566 PV | Colorado Springs Utilities | PVD ID NO. G4211 | 2009 |
| 2009-8567 PV | Great River Energy | PVD ID NO. G4302 | 2009 |
| 2009-8568 PV | Eastern Colorado Utility Company | PVD ID NO. G4212 | 2009 |
| 2009-8569 PV | City of Fort Morgan, Colorado | PVD ID NO. G4213 | 2009 |
| 2009-8570 PV | City of Trinidad, Colorado | PVD ID NO. 64218 | 2009 |
| 2009-8571 PV | National Public Gas Agency | PVD ID NO. G4251 | 2009 |
| 2009-8572 PV | Central Illinois Light Company dba AmerenCILCO | PVD ID NO. G4200 | 2009 |
| 2009-8573 PV | Central Illinois Public Service Company dba AmerenCIPS | PVD ID NO. G4207 | 2009 |
| 2009-8574 PV | Illinois Power Company dba AmerenIP | PVD ID NO. G4208 | 2009 |
| 2009-8575 PV | Union Electric Company dba AmerenUE | PVD ID NO. G4205 | 2009 |
| 2009-8576 PV | Metropolitan Utilities District | PVD ID NO. G4314 | 2009 |
| 2009-8577 PV | Missouri Gas Energy | PVD ID NO. G4201 | 2009 |
| 2009-8578 PV | Nexen Marketing U.S.A., Inc. | PVD ID NO. G4318 | 2009 |

| | | | |
|---|---|---|---|
| 2009-8579 PV | City Utilities of Springfield, Missouri | PVD ID NO. G4231 | 2009 |
| 2009-8580 PV | Jo-Carroll Energy, Inc. | PVD ID NO. G4307 | 2009 |
| 2009-8581 PV | NextEra Energy Power Marketing, L.L.C. | PVD ID NO. G4319 | 2009 |
| 2009-8582 PV | Chevron U.S.A., Inc. | PVD ID NO. G4279 | 2009 |
| 2009-8583 PV | Empire District Gas Company (The) | PVD ID NO. G4209 | 2009 |
| 2009-8584 PV | Shell Energy North America (US), L.P. | PVD ID NO. G4331 | 2009 |
| 2009-8930 PV | Minnesota Energy Resources Corp. | PVD ID NO. G4316 | 2009 |
| 2009-8610 PVX | BP Canada Energy Marketing Corp. | PVD ID NO. G4270 | 2009 |
| 2009-8611 PVX | Northern States Power Company of Minnesota | PVD ID NO. G4343 | 2009 |
| 2009-8612 PVX | Northern States Power Company of Minnesota | PVD ID NO. G4344 | 2009 |
| 2009-8613 PVX | Northern States Power Company of Wisconsin | PVD ID NO. G4342 | 2009 |
| 2009-8614 PVX | Public Service Company of Colorado | PVD ID NO. G4216 | 2009 |

| | | | |
|---|---|---|---|
| 2009-8615 PVX | U.S. Energy Services, Inc. | PVD ID NO. G4336 | 2009 |
| 2009-8616 PVX | ProLiance Energy, L.L.C. | PVD ID NO. G4204 | 2009 |
| 2009-8617 PVX | Oklahoma Natural Gas Company | PVD ID NO. G4253 | 2009 |
| 2009-8618 PVX | ONEOK Energy Services Company, L.P. | PVD ID NO. G4243 | 2009 |
| 2009-8619 PVX | Tenaska Gas Storage, L.L.C. | PVD ID NO. G4259 | 2009 |
| 2009-8620 PVX | Interstate Power & Light Company | PVD ID NO. G4268 | 2009 |
| 2009-8621 PVX | Wisconsin Power & Light Company | PVD ID NO. G4257 | 2009 |
| 2009-8622 PVX | Colorado Springs Utilities | PVD ID NO. G4211 | 2009 |
| 2009-8623 PVX | Great River Energy | PVD ID NO. G4302 | 2009 |
| 2009-8624 PVX | Eastern Colorado Utility Company | PVD ID NO. G4212 | 2009 |
| 2009-8625 PVX | City of Fort Morgan, Colorado | PVD ID NO. G4213 | 2009 |
| 2009-8626 PVX | City of Trinidad, Colorado | PVD ID NO. G4218 | 2009 |
| 2009-8627 PVX | National Public Gas Agency | PVD ID NO. G4251 | 2009 |
| 2009-8628 PVX | Central Illinois Light Company dba AmerenCILCO | PVD ID NO. G4200 | 2009 |

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|---|---|---|---|
| 2009-8629 PVX | Central Illinois Public Service Company dba AmerenCIPS | PVD ID NO. G4207 | 2009 |
| 2009-8630 PVX | Illinois Power Company dba AmerenIP | PVD ID NO. G4208 | 2009 |
| 2009-8631 PVX | Union Electric Company dba AmerenUE | PVD ID NO. G4205 | 2009 |
| 2009-8632 PVX | Metropolitan Utilities District | PVD ID NO. G4314 | 2009 |
| 2009-8633 PVX | Missouri Gas Energy | PVD ID NO. G4201 | 2009 |
| 2009-8634 PVX | Nexen Marketing U.S.A., Inc. | PVD ID NO. G4318 | 2009 |
| 2009-8635 PVX | City Utilities of Springfield, Missouri | PVD ID NO. G4231 | 2009 |
| 2009-8636 PVX | Jo-Carroll Energy, Inc. | PVD ID NO. G4307 | 2009 |
| 2009-8637 PVX | NextEra Energy Power Marketing, L.L.C. | PVD ID NO. G4319 | 2009 |
| 2009-8638 PVX | Chevron U.S.A., Inc. | PVD ID NO. G4279 | 2009 |
| 2009-8639 PVX | Empire District Gas Company (The) | PVD ID NO. G4209 | 2009 |
| 2009-8640 PVX | Shell Energy North America (US), L.P. | PVD ID NO. G4331 | 2009 |

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|---|---|---|---|
| 2009-8926 PVX | Sioux Center Municipal Utilities | PVD ID NO. G4283 | 2009 |
| 2009-8927 PVX | Superior Water, Light & Power Co. | PVD ID NO. G4333 | 2009 |
| 2009-8928 PVX | Circle Pines Utilities dba Centennial Utilities | PVD ID NO. G4281 | 2009 |
| 2009-8929 PVX | Clayton Energy Corp. | PVD ID NO. G4285 | 2009 |
| 2009-9093 PVX | Minnesota Energy Resources Corporation | PVD ID NO. G4316 | 2009 |
| 2009-9776 PVX | MidAmerican Energy Company | PVD ID NO. G4315 | 2009 |
| 2010-96 PVX | CCP Coast to Coast Partners, L.L.C. | PVD ID NO. G4273 | 2009 |
| 2010-122 PVX | DB Energy Trading, L.L.C. | PVD ID NO. G4290 | 2009 |
| 2010-305 PVX | Cheyenne Light Fuel & Power Company | PVD ID NO. G4210 | 2009 |

CERTIFICATE OF SERVICE

I, Joelene R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket Nos. 2009-8554-PV *et al.* and any attachments thereto, was placed in the United States Mail, on this 13th day of January, 2011, addressed to:

Robert W Coykendall, Attorney
Janet Huck Ward, Attorney
Morris Laing Evans Brock & Kennedy, Chtd
300 N Mead Ste 200
Wichita, KS 67202-2722

Clinton E. Patty
John C. Frieden
Kevin M. Fowler
Justin L. McFarland
FRIEDEN & FORBES
555 S. Kansas Ave, Ste 303
Topeka, KS 66603

and a copy was placed in capitol complex building mail, addressed to:

William E. Waters, Attorney
Division of Property Valuation
DSOB, 915 SW Harrison, 4th Floor
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

/s/ Jolene R. Allen
Joelene R. Allen, Secretary

## APPENDIX C

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS**
**ILLINOIS POWER COMPANY, DBA AMERENIP**
**CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, DBA AMERENCIPS**
**CENTRAL ILLINOIS LIGHT COMPANY DBA AMERENCILCO**

COMES NOW Applicants Illinois Power Company dba Ameren IP ("AmerenIP"), Central Illinois Public Service Company dba AmerenCIPS and ("AmerenCIPS") and Central Illinois Light Company dba Ameren CILCO ("AmerenCILCO") (collectively "Applicants"), and the Department of Revenue,

Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicants are Illinois corporations. On or about August 21, 2009, they received Notices Attached as Exhibits "A", "B" and "C". Exhibit "A", directed to AmerenIP purports to establish a Kansas assessed value for gas held by interstate pipelines in storage in Kansas, which gas was allocated to this Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $918,402. Exhibit "B", directed to AmerenCIPS purports to establish a Kansas assessed value for gas held by interstate pipelines in storage in Kansas, which gas was allocated to this Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $2,333,256. Exhibit "C", directed to AmerenCILCO purports to establish a Kansas assessed value for gas held by interstate pipelines in storage in Kansas, which gas was allocated to this Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $2,615,280. Applicants appealed that assessment, and filed exemption applications.

2. Applicants are regulated by the Illinois Commerce Commission as public utilities operating in the state of Illinois. They do not serve any customers in Kansas. They are not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. They cannot exercise the power of eminent domain in Kansas. Applicants do not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

3. AmerenCIPS was lead plaintiff in, and AmerenCILCO and AmerenIP are similarly situated to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory * * *."

4. AmerenCIPS was also plaintiff and, and AmerenCILCO and AmereinIP also are similarly situated to the taxpayers in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * * ."

6. Because Applicants engage primarily in the business of providing natural gas sales and transportation services to retail consumers in Illinois,

Applicants are merchants of natural gas within the state of Illinois. Applicants own no facilities for the transportation, distribution, or storage of natural gas in Kansas.

7. Applicants purchase natural gas from various producers and marketers at various locations, and deliver that gas to interstate natural gas pipeline systems owned and operated by Panhandle Eastern Pipe Line Company ("Panhandle"). Panhandle is regulated by and files tariffs with the Federal Energy Regulatory Commission ("FERC"). Panhandle owns and operates underground natural gas storage facilities in multiple jurisdictions including the State of Kansas ("Kansas storage facilities"), which are subject to regulation by FERC.

8. Applicants designate when and where gas will be delivered to the Panhandle system, and schedules a time and location on the pipeline's system where Applicants will receive an equivalent amount of gas.

9. Under the general FERC tariff terms that govern the relationship between Applicants and Panhandle, Panhandle is "deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of the Shipper at the Point of Delivery." A copy of the applicable tariff provision is attached as Exhibit "D" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

10. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas

purchased by Applicants is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicants to designate a location for storage, and Applicants have no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by Applicants are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicants are produced and delivered to Applicants when called for by Applicants. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicants is under the complete control of the pipeline. Applicants' right are effectively limited to a contract right to withdraw an amount of gas that equals the amount that they have had delivered to the pipeline.

11. To the extent that a pipeline has allocated some of the natural gas owned by Applicants to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicants.

12. Any stored natural gas held on behalf of Applicants is held as inventory and is intended for ultimate use or sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicants

Director of Property Valuation

By /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG—ILLINOIS POWER CO
DBA AMEREN IP
JOE MEYER
PROPERTY TAX DEPT
PO BOX 66149 (CODE 210)
ST LOUIS, MO 63166-6149

August 21, 2009

**PVD ID No.** G4208

**DIRECTOR'S 2009 UNIT VALUE:** **2,783,036**

APPLICATION TO KANSAS:
ALLOCATION CALCULATION:

| | | |
|---|---|---|
| Kansas Investment/System Investment | | |
| 2,783,036 2,783,036 Allocation Factor: | | 1.000000 |
| Director's Unit Value | | 2,783,036 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 2,783,036 |
| Assessment Rate @33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **918,402** |

COMPANY INDICATORS
COST APPROACH:

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 2,783,036 |

MARKET APPROACH:

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

EXHIBIT A

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-CENTRAL IL PUB SERV
DBA AMEREN CIPS
JOE MEYER
PROPERTY TAX DEPT
PO BOX 66149 (MC 210)
ST LOUIS, MO 63166-6149

August 21, 2009

**PVD ID No.** G4207

| | | |
|---|---|---|
| **DIRECTOR'S 2009 UNIT VALUE:** | | **7,070,473** |
| **APPLICATION TO KANSAS:** | | |
| **ALLOCATION CALCULATION:** | | |
| Kansas Investment/System Investment | | |
| 7,070,473 7,070,473 Allocation Factor: | | 1.000000 |
| Director's Unit Value | | 7,070,473 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 7,070,473 |
| Assessment Rate @33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **2,333,256** |

**COMPANY INDICATORS**
**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 7,070,473 |

MARKET APPROACH

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

EXHIBIT B

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-CENTRAL IL LIGHTCO
DBA AMEREN CILCO
JOE MEYER
PROPERTY TAX DEPARTMENT
PO BOX 66149 (CODE 210)
ST LOUIS, MO 63166-6149

August 21, 2009

**PVD ID No.** G4200

| | | |
|---|---|---|
| **DIRECTOR'S 2009 UNIT VALUE:** | | **7,925,090** |
| **APPLICATION TO KANSAS:** | | |
| **ALLOCATION CALCULATION:** | | |
| Kansas Investment/System Investment | | |
| 7,925,090 7,925,090 Allocation Factor: | | 1.000000 |
| Director's Unit Value | | 7,925,090 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 7,925,090 |
| Assessment Rate @33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **2,615,280** |

**COMPANY INDICATORS**

**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 7,925,090 |

MARKET APPROACH:

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

EXHIBIT C

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

Panhandle Tariff—General Terms and Conditions

**Original Sheet No. 218**

**Effective Date: June 30, 2004**

GENERAL TERMS AND CONDITIONS
(Continued)

5. RESPONSIBILITY DURING TRANSPORTATION, STORAGE OR PARKING

As between Panhandle and Shipper, Panhandle shall be deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of Shipper at the Point of Delivery. Shipper shall be deemed to be in control and possession at all other times. Whichever of Panhandle or Shipper is deemed to be in control and possession of the Gas shall be responsible for and shall indemnify the other party with respect to any losses, injuries, claims, liabilities or damages caused thereby and occurring while the Gas is in its possession.

**EXHIBIT D**

## APPENDIX D

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS**
**UNION ELECTRIC COMPANY DBA AMEREN UE**

COMES NOW Applicants Union Electric Company dba AmerenUE and ("AmerenUE" or "Applicant"), and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant is a Missouri corporation. On or about August 21, 2009, it received the Notice Attached as Exhibit "A", that purports to establish a Kansas assessed value for gas held by interstate

pipelines in storage in Kansas, which gas was allocated to Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $2,779,297. Applicant appealed that assessment, and filed an exemption application.

2. Applicant is regulated by the Missouri Public Service Commission as a public utility operating in the state of Missouri. It does not serve any customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It cannot exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

3. AmerenUE was a plaintiff in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory * * *."

4. AmerenUE was also plaintiff in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan, 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in

pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Because Applicant engages primarily in the business of providing natural gas sales and transportation services to retail consumers in Missouri, Applicant is a merchant of natural gas within the state of Missouri. Applicant owns no facilities for the transportation, distribution, or storage of natural gas in Kansas.

7. Applicant purchases natural gas from various producers and marketers at various locations, and delivers that gas to interstate natural gas pipeline systems owned and operated by Panhandle Eastern Pipe Line Company ("Panhandle"). Panhandle is regulated by and files tariffs with the Federal Energy Regulatory Commission ("FERC"). Panhandle owns and operates underground natural gas storage facilities in multiple jurisdictions including the State of Kansas ("Kansas storage facilities"), which are subject to regulation by FERC.

8. Applicant designates when and where gas will be delivered to the Panhandle system, and schedules a time and location on the pipeline's system where Applicant will receive an equivalent amount of gas.

9. Under the general FERC tariff terms that govern the relationship between Applicant and Panhandle, Panhandle is "deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is

received at the Point of Receipt, and before it is delivered to or for the account of the Shipper at the Point of Delivery." A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

10. Pursuant to contract with the pipeline, and consistent with FERC regulation; some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's rights are effectively limited to a contract right to withdraw an amount of gas that equals the amount that they have had delivered to the pipeline.

11. To the extent that a pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas

placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

12. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate use or sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicant

Director of Property Valuation

By /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG—UNION ELECTRIC DBA AMEREN UE
JOE MEYER
PROPERTY TAX DEPT
PO BOX 66149 (CODE 210)
ST LOUIS, MO 63166-6149

August 21, 2009

**PVD ID No.** G4205

**DIRECTOR'S 2009 UNIT VALUE:** **8,422,113**

APPLICATION TO KANSAS:
**ALLOCATION CALCULATION:**

| | | |
|---|---|---|
| Kansas Investment/System Investment | | |
| 8,422,113 8,422,113 Allocation Factor: | | 1.000000 |
| Director's Unit Value | | 8,422,113 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 8,422,113 |
| Assessment Rate @33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **2,779,297** |

COMPANY INDICATORS
**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 8,422,113 |

MARKET APPROACH:

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

EXHIBIT A

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

Panhandle Tariff—General Terms and Conditions

**Original Sheet No. 218**
**Effective Date: June 30, 2004**

GENERAL TERMS AND CONDITIONS
(Continued)

5. RESPONSIBILITY DURING TRANSPORTATION, STORAGE OR PARKING

As between Panhandle and Shipper, Panhandle shall be deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of Shipper at the Point of Delivery. Shipper shall be deemed to be in control and possession at all other times. Whichever of Panhandle or Shipper is deemed to be in control and possession of the Gas shall be responsible for and shall indemnify the other party with respect to any losses, injuries, claims, liabilities or damages caused thereby and occurring while the Gas is in its possession.

**EXHIBIT B**

## APPENDIX E

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS**
**EMPIRE DISTRICT GAS COMPANY**

COMES NOW Applicant Empire District Gas Company, ("Applicant"), and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant is a natural gas distributor operating in Missour. On or about August 21, 2009, it received a Notice Attached as Exhibit "A", which purports to establish a Kansas assessed value for gas

held by interstate pipelines in storage in Kansas, which gas was allocated to this Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $981,178. Applicant appealed that assessment, and filed an exemption application.

2. Applicant is a natural gas public utility operating only in Missouri. It is regulated as a natural gas utility by the Missouri Public Service Commission.

3. It does not serve any customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

4. Applicant is similarly situated to the taxpayers in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory * * *."

5. Applicant also is similarly situated to the plaintiffs in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

6. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of*

*Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

7. Because Applicant engages primarily in the business of selling natural gas to retail consumers in Missouri, Applicant is a merchant of natural gas within the state of Missouri only; Applicant does not deliver, sell, trade, or otherwise disposes of natural gas within the state of Kansas; neither does Applicant own facilities for the transportation, distribution, or storage of natural gas in Kansas.

8. Applicant purchases natural gas from various producers and marketers at various locations, and delivers that gas to interstate natural gas pipeline systems owned and operated by Southern Star Central Gas Pipeline ("Southern Star") or Panhandle Eastern Pipe Line company ("Panhandle"). Both Southern Star and Panhandle are regulated by, and files tariffs with the Federal Energy Regulatory Commission ("FERC"). They each own and operate underground natural gas storage facilities in multiple jurisdictions including the State of Kansas ("Kansas storage facilities"), which are subject to regulation by FERC.

9. Applicant designates when and where the gas will be delivered to the pipeline, and schedules a time and location on the pipeline system where Applicant will receive an equivalent amount of gas. No effort is

or could be made to redeliver to Applicant the molecules of gas that Applicant purchased and delivered to Southern Star.

10. The FERC tariff terms that control the relationship between Applicant and Southern Star provide: "Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery * * * ." A copy of this portion of the applicable tariff is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

11. Under the general FERC tariff terms that govern the relationship between Applicant and Panhandle, Panhandle is "deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of the Shipper at the Point of Delivery." A copy of the applicable tariff provision is attached as Exhibit "C" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

12. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does

not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that they have had delivered to the pipeline.

13. To the extent that a pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

14. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate sale within the state of Missouri.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

MORRIS, LAING, EVANS, BROCK &
KENNEDY, CHTD.

By /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicants

Director of Property Valuation

By /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-EMPIRE GAS
CHRISTINE BROADWATER
PROPERTY TAX DEPT
PO BOX 127
JOPLIN, MO 64802

August 21, 2009

**PVD ID No.** G4209

**DIRECTOR'S 2009 UNIT VALUE:** **2,973,268**

APPLICATION TO KANSAS:
**ALLOCATION CALCULATION:**

| | | |
|---|---|---|
| Kansas Investment/System Investment | | |
| 2,973,268 2,973,268 Allocation Factor: | | 1.000000 |
| Director's Unit Value | | 2,973,268 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 2,973,268 |
| Assessment Rate @ 33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **981,178** |

COMPANY INDICATORS
**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 2,973,268 |

**MARKET APPROACH:**

| | |
|---|---|
| Equity Residual | 0 |

| | |
|---|---|
| Stock and Debt | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

| | |
|---|---|
| Southern Star Central Gas Pipeline, Inc. | Second Revised Sheet No. 280 |
| FERC Gas Tariff Original Volume No. 1 | Superseding First Revised Sheet No. 280 |

GENERAL TERMS AND CONDITIONS

19. POSSESSION OF GAS AND TITLE

Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery; provided, however, Southern Star shall not be responsible for damages or injuries caused by natural gas it receives while such gas is in the possession and control of any third party. However, Shipper at all times, shall retain title to the gas or the right to deliver all gas to Southern Star under an executed service agreement free and clear of all liens, encumbrances and claims whatsoever. Shipper shall also be responsible for obtaining its own insurance (including self-insurance) for its gas in storage, and shall hold Southern Star harmless from any loss, cost, or expense arising from any loss of such gas that results from a Force Majeure event.

Southern Star shall not be liable to the Shipper or any of its agents, servants, or employees, or to any person whomsoever for any loss, damage, or

injury resulting from the said gas or its uses before entering Southern Star's system at the point(s) of receipt and after leaving Southern Star's system at the point(s) of delivery, all risks thereof and therefrom being assumed, as between Southern Star and Shipper, by Shippers except such losses proximately caused by gross negligence of Southern Star.

Each party assumes full responsibility and liability for the operation of the facilities owned by it and agrees to hold the other party harmless from and against all liability of whatever nature arising from installation, ownership and operation therefrom.

Unless otherwise provided in Section 8.12 regarding exercise of processing rights of Shippers, all substances, whether or not of commercial value, including all liquid and liquefiable hydrocarbons of whatever nature, that Southern Star or a third party recovers for Southern Star's account shall be Southern Star's sole property, and Southern Star shall not be obligated to account to Shipper for any value, whether or not realized by Southern Star, that may attach or be said to attach to such substances. However, nothing in this provision shall require Southern Star to accept gas which does not meet the applicable quality provisions otherwise provided in this tariff.

**EXHIBIT B**

Issued by: Daryl R, Johnson, Vice President, Rates and Regulatory
Issued on: June 8 , 2009 Effective on: July 10, 2009

Panhandle Tariff—General Terms and Conditions

**Original Sheet No. 218**
**Effective Date: June 30, 2004**

GENERAL TERMS AND CONDITIONS
(Continued)

5. RESPONSIBILITY DURING TRANSPORTATION, STORAGE OR PARKING

As between Panhandle and Shipper, Panhandle shall be deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of Shipper at the Point of Delivery. Shipper shall be deemed to be in control and possession at all other times. Whichever of Panhandle or Shipper is deemed to be in control and possession of the Gas shall be responsible for and shall indemnify the other party with respect to any losses, injuries, claims, liabilities or damages caused thereby and occurring while the Gas is in its possession.

**EXHIBIT C**

## APPENDIX F

BEFORE THE COURT OF TAX APPEALS OF THE STATE OF KANSAS

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION OF MIDAMERICAN ENERGY COMPANY FOR EXEMPTION FROM PROPERTY TAXATION OF PROPERTY LOCATED IN VARIOUS COUNTIES IN KANSAS. | ) ) ) ) ) ) ) | Docket No. 2009-9776-PVX |

### STIPULATION OF MATERIAL FACTS
### MIDAMERICAN ENERGY COMPANY

COME NOW Applicant MidAmerican Energy Company ("Applicant") and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein.

1. Applicant is an Iowa corporation. On or about August 21, 2009, it received the notice attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held by Northern Natural Gas Company ("Northern") in storage in Kansas, which gas was allocated to Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $4,364,842. Applicant filed an exemption application.

2. Applicant is regulated by the Iowa Utilities Board as a natural gas public utility operating in the

state of Iowa. Applicant does not serve any customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission; it does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

3. Applicant is similarly situated to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612,78 P.3d 419 (2003). There, the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory* * *."

4. Applicant was one of the taxpayers in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored

for resale in an underground formation in this state * * *."

6. Because Applicant engages primarily in the business of selling natural gas to retail consumers in Iowa, South Dakota, Nebraska and Illinois, Applicant is a merchant of natural gas within those states. Applicant does not deliver, sell, trade or otherwise dispose of natural gas within the state of Kansas. Applicant does not own facilities for the transportation, distribution, or storage of natural gas in Kansas.

7. Applicant purchases natural gas from various producers and marketers at various locations Applicant has contracted for Firm Deferred Delivery ("FDD") Service from Northern Natural Gas Company. Pursuant to its agreement with Northern, Applicant delivers natural gas for injection into FDD at Ogden, Iowa ("Ogden"), and later withdraws natural gas at Ogden for use in its system.

8. Applicant designates when the natural gas will be delivered to Northern at Ogden, and schedules when Applicant will receive an equivalent amount of gas at Ogden. Both the point of receipt of the natural gas for FDD by Northern, and the point of re-delivery of natural gas by Northern to Applicant is located at Ogden which is north of Kansas.

9. Northern is regulated by and files tariffs with the Federal Energy Regulatory Commission ("FERC"). Applicable FERC tariff terms that govern the relationship between Applicant and the pipeline provide as follows:

> Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time

> that it is received by Northern for transportation hereunder at the Pointe s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of negligence of such party, its agents or employees.

A copy of the applicable tariff provision is attached as Exhibit "B" hereto. However, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection. During the time between receipt by the pipeline and delivery to Applicant, the pipeline exercises complete control over the gas from the time it enters the pipeline system until it leaves that system.

10. Pursuant to contract with Northern and to FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by Northern for withdraw on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had delivered to Northern.

11. To the extent that Northern has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, Northern does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

12. Any stored natural gas held on behalf of Applicant is held as inventory and is exclusively intended for ultimate use or sale outside the State of Kansas.

**WHEREFORE**, having stipulated to these material facts, the parties request that the Court adopt same for the purpose of further proceedings herein.

**STIPULATIONS APPROVED AND AGREED TO:**

MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered

By: /s/Janet Huck Ward
Robert W. Coykendall, # 10137
Janet Huck Ward, # 15529
Attorneys for Applicant

Director of Property Valuation

By: /s/ William E. Waters
William E. Waters, # 12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-MIDAMERICAN ENERGY COMPANY
DAVE BADURA
PROPERTY TAX DEPT
4299 NW URBANDALE DR
URBANDALE, IA 50322

August 21, 2009

PVD ID No. G4315

| | |
|---|---|
| DIRECTOR'S 2009 UNIT VALUE: | **13,226,793** |

**APPLICATION TO KANSAS:**
**ALLOCATION CALCULATION:**

Kansas Investment/System Investment

13,226,793 13,226,793 Allocation Factor: 1.000000

| | |
|---|---|
| Director's Unit Value | 13,226,793 |
| Kansas Allocation Factor | x 1.000000 |
| Kansas Market Value | 13,226,793 |
| Assessment Rate @33% | x 0.33000 |
| **KANSAS ASSESSED VALUE** | **4,364,842** |

**COMPANY INDICATORS**

**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |

| | | | | |
|---|---|---|---|---|
| Reproduction Cost Less Depreciation | | | | 13,226,793 |
| **MARKET APPROACH:** | | | | |
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |
| **INCOME APPROACH:** | | | | |
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A. 795a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., ROOM 400, TOPEKA, KS 66612

Voice 785-296-2365 Fax 785-368-7399
http://www.ksrevenue.org/

GENERAL TERMS AND CONDITIONS

6. POSSESSION OF GAS AND RESPONSIBILITY

Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of

negligence of such party, its agents or employees.

7. LIABILITY OF PARTIES

Northern and the Shipper/Purchaser shall each assume full responsibility and liability for the maintenance and operation of their respective properties.

Northern shall not be liable to the Shipper/Purchaser for its failure to receive and or deliver gas, and the Shipper/Purchaser shall not be liable to Northern for its failure to deliver or receive gas other than to make payments, when such

Issued by: Mary Kay Miller, V.P. Regulatory and Customer Service
Issued on: May 1, 2003 Effective: November 22, 2003

**EXHIBIT B**

## APPENDIX G

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS**
**MINNESOTA ENERGY RESOURCES CORPORATION**

COMES NOW Applicant Minnesota Energy Resources Corporation, ("Applicant"), and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant is a Delaware corporation, and it serves approximately 210,000 retail end use customers in Minnesota and South Dakota. MERC also provides a transportation service to support gas service to a small number of customers in Iowa. On or about October 9, 2009, it received the Notice

Attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held by Northern Natural Gas ("Northern") in storage in Kansas, which gas was allocated to Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $2,826,345. This notice was provided after an informal valuation conference between Applicant and the Kansas' Director of the Division of Property Valuation had been held. Applicant appealed that assessment, and filed an exemption application.

2. Applicant serves no customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

3. Applicant is similarly situated to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory* * *."

4. Applicant is similarly situated to the taxpayers in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Applicant purchases natural gas from various producers and marketers at various locations. Applicant designates when and where gas will be delivered to Northern's pipeline, and schedules a time and location on the pipeline's system where Applicant will receive an equivalent amount of gas.

7. Northern is regulated by and files tariffs with the Federal Energy Regulatory Commission ("FERC"). Applicable FERC tariff terms that govern the relationship between Applicant and the pipeline provide:

> Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred

> Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of negligence of such party, its agents or employees.

A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection. During the time between receipt by the pipeline and delivery to Applicant, the pipeline exercises complete control over the gas from the time it enters the pipeline system until it leaves that system.

8. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the

specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had delivered to Northern.

9. To the extent that the pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

10. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.

By /s/ Robert W. Coykendall
Robert W. Coykendall, # 10137
Attorneys for Applicant

Director of Property Valuation

By /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG—MINNESOTA ENERGY RESOURCES (MERC)
SHAWN GILLESPIE
PROPERTY TAX DEPT
1412 HOWARD ST
OMAHA, NE 68102

October 9, 2009

*Amended Notice*
PVD ID No. G4316

| | |
|---|---|
| **DIRECTOR'S 2009 UNIT VALUE:** | 8,564,681 |
| **APPLICATION TO KANSAS:** | |
| **ALLOCATION CALCULATION:** | |
| Kansas Investment/System Investment | |
| 8,564,681 8,564,681 Allocation Factor: | 1.000000 |
| Director's Unit Value | 8,564,681 |
| Kansas Allocation Factor | x 1.000000 |
| Kansas Market Value | 8,564,681 |
| Assessment Rate @33% | x 0.33000 |
| **KANSAS ASSESSED VALUE** | **2,826,345** |
| **COMPANY INDICATORS** | |
| **COST APPROACH:** | |
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less | 8,564,681 |

| | | | | |
|---|---|---|---|---|
| Depreciation | | | | |
| **MARKET APPROACH:** | | | | |
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |
| **INCOME APPROACH:** | | | | |
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

I have considered the information presented at the hearing for your company and have made a review of the materials and testimony available to me. From this examination, I have concluded that the Director's Unit Value of your company is as shown above. This "Notice" constitutes the Director's final action to date.

I wish to extend a note of appreciation for the courteous manner in which your company was represented.

/s/ Mark S. Bok
Director

**EXHIBIT A**

DOCKING STATE OFFICE
BUILDING, 915 SW HARRISON ST.,
ROOM 400, TOPEKA, KS 66612-1585
Voice 785-296-2365 Fax 785-368-7399
http://www.ksrevenue.org/

GENERAL TERMS AND CONDITIONS

6. POSSESSION OF GAS AND RESPONSIBILITY

Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of

negligence of such party, its agents or employees.

7. LIABILITY OF PARTIES

Northern and the Shipper/Purchaser shall each assume full responsibility and liability for the maintenance and operation of their respective properties.

Northern shall not be liable to the Shipper/Purchaser for its failure to receive and or deliver gas, and the Shipper/Purchaser shall not be liable to Northern for its failure to deliver or receive gas other than to make payments, when such

Issued by: Mary Kay Miller, V.P. Regulatory and Customer Service
Issued on: May 1, 2003 Effective: November 22, 2003

**EXHIBIT B**

## APPENDIX H

## BEFORE THE COURT OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

## STIPULATION OF MATERIAL FACTS MISSOURI GAS ENERGY

COMES NOW Applicant Missouri Gas Energy, a division of Southern Union Company, ("Applicant"),

and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant is a division of Southern Union Company, a corporation organized under the laws of Delaware. On or about August 21, 2009, it received a Notice Attached as Exhibit "A", which purports to establish a Kansas assessed value for gas held by interstate pipelines in storage in Kansas, which gas was allocated to this Applicant. Pursuant to this notice, the 2009 assessed value of this gas was $10,689,469. Applicant appealed that assessment, and filed an exemption application.

2. Applicant is regulated by the Missouri Public Service Commission as a public utility operating in Missouri. It serves one-half million customers in 155 communities in western Missouri, from St. Joseph in the north to Joplin and surrounding areas in southern Missouri, and from the Kansas state line east to Ozark, near Springfield.

3. It does not serve any customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(l) through (7).

4. Applicant was a party in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were]

therefore exempt from taxation under K.S.A, 79-201m as merchant's inventory * * *."

5. Applicant was also plaintiff in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), to which the Court held that the taxpayers do not control stored natural gas in Kansas, and that then natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

6. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation of this state * * *."

7. Because Applicant engages primarily in the business of selling natural gas to retail consumers in Missouri, Applicant is a merchant of natural gas within the state of Missouri only; Applicant does not deliver, sell, trade, or otherwise disposes of natural gas within the state of Kansas; neither does Applicant own facilities for the transportation, distribution, or storage of natural gas in Kansas.

8. Applicant purchases natural gas from various producers and marketers at various locations, and delivers that gas to interstate natural gas pipeline systems owned and operated by Panhandle Eastern Pipe Line Company ("Panhandle") or by Southern

Star Central Gas Pipeline ("Southern Star"). Both Panhandle and Southern Star are regulated by, and file tariffs with the Federal Energy Regulatory Commission ("FERC"). Both own and operate underground natural gas storage facilities in multiple jurisdictions including the State of Kansas ("Kansas storage facilities"), which are subject to regulation by FERC.

9. For the gas on the Panhandle system, Applicant designates when and where gas will be delivered to Panhandle, and schedules a time and location on the pipeline's system where Applicants will receive an equivalent amount of gas.

10. Under the general FERC tariff terms that govern the relationship between Applicants and Panhandle, Panhandle is "deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of the Shipper at the Point of Delivery," A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

11. For gas on, the Southern Star system, Applicant designates when and where the gas will be delivered to Southern Star, and schedules a time and location on Southern Star's system where Applicant will receive an equivalent amount of gas. Between the time the gas is delivered to Southern Star and the time that an equivalent amount of gas is taken by the Applicant, gas may (or may not) be held by

Southern Star somewhere in Southern Star's pipeline transportation or storage system. No effort is or could be made to redeliver to Applicant the molecules of gas that Applicant purchased and delivered to Southern Star.

12. The FERC tariff terms that control the relationship between Applicant and Southern Star provide: "Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery * * *." A copy of this portion of the applicable tariff is attached as Exhibit "C" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing with objection.

13. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when gas is called for by Applicant. The decision on the specific source of the molecules of gas

placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that they have had delivered to the pipeline.

14. To the extent that a pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

15. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate sale within the state of Missouri.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By/s/Robert W. Coykendall

Robert W. Coykendall, #10137
Attorneys for Applicants

Director of Property Valuation

By/s/William E. Peters

William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG—MISSOURI GAS ENERGY August 21, 2009
JOHN DAVIS

3420 BROADWAY
KANSAS CITY, MO 64114 PVD ID No. G4201

| | | | |
|---|---|---|---|
| **DIRECTOR'S 2009 UNIT VALUE:** | | | 32,392,329 |
| **APPLICATION TO KANSAS:** | | | |
| **ALLOCATION CALCULATION:** | | | |
| Kansas Investment/System Investment | | | |
| 32,392,329 | 32,392,329 | Allocation Factor: | 1.000000 |
| Director's Unit Value | | | 32,392,329 |
| Kansas Allocation Factor | | | x1.000000 |
| Kansas Market Value | | | 32,392,329 |
| Assessment Rate @ 33% | | | x0.330000 |
| **KANSAS ASSESSED VALUE** | | | **10,689,469** |
| **COMPANY INDICATORS** | | | |
| **COST APPROACH:** | | | |
| Book Original Cost | | | 0 |
| Book Original Cost Less Depreciation | | | 0 |
| Net Investment Adjusted for Obsolescence | | | 0 |
| Reproduction Cost Less Depreciation | | | 32,392,329 |
| **MARKET APPROACH:** | | | |

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |
| **INCOME APPROACH:** | | | | |
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A. 79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final section to date.

/s/ Mark S. Bok
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., ROOM 400, TOPEKA, KS 6661
Voice 785-296-2365 Fax 785-368-7399
http://www.ksrevenue.org/

Panhandle Tariff—General Terms and Condition

Page 1 of 1

**Original Sheet No. 218**
**Effective Date: June 30, 2004**

GENERAL TERMS AND CONDITIONS
(Continued)

5. RESPONSIBILITY DURING TRANSPORTATION, STORAGE OR PARKING

As between Panhandle and Shipper, Panhandle shall be deemed to be in control and possession of the Gas transported and/or stored and/or parked hereunder only after the Gas is received at the Point of Receipt, and before it is delivered to or for the account of Shipper at the point of Delivery. Shipper shall be deemed to be in control and possession at all other times. Whichever of Panhandle or Shipper is deemed to be in control and possession of the Gas shall be responsible for and shall indemnify the other party with respect to any losses, injuries, claims, liabilities or damages caused thereby and occurring while the Gas is in its possession.

**EXHIBIT B**

Southern Star Central
Gas Pipeline, Inc.

| | |
|---|---|
| FERC Gas Tariff | Second Revised Sheet No. 280 |
| Original Volume No. 1 | Superseding |
| | First Revised Sheet No. 280 |

GENERAL TERMS AND CONDITIONS

19. POSSESSION OF GAS AND TITLE

Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery; provided, however, Southern Star shall not be responsible for damages or injuries caused by natural gas it receives while such gas is in the possession and control of any third party. However, Shipper at all times, shall retain title to the gas or the right to deliver all gas to Southern Star under an executed service agreement free and clear of all liens, encumbrances and claims whatsoever. Shipper shall also be responsible for obtaining its own insurance (including self-insurance) for its gas in storage, and shall hold Southern Star harmless from any loss, cost, or expense arising from any loss of such gas that results from a Force Majeure event.

Southern Star shall not be liable to the Shipper or any of its agents, servants, or

employees, or to any person whomsoever for any loss, damage, or injury resulting from the said gas or its uses before entering Southern Star's system at the point(s) of receipt and after leaving Southern Star's system at the point(s) of delivery, all risks thereof and therefrom being assumed, as between Southern Star and Shipper, by Shippers except such losses proximately caused by gross negligence of Southern Star.

Each party assumes full responsibility and liability for the operation of the facilities owned by it and agrees to hold the other party harmless from and against all liability of whatever nature arising from installation, ownership, and operation therefrom.

Unless otherwise provided in Section 8.12 regarding exercise of processing rights of Shippers, all substances, whether or not of commercial value, including all liquid and liquefiable hydrocarbons of whatever nature, that Southern Star or a third party recovers for Southern Star's account shall be Southern Star's sole property, and Southern Star shall not be obligated to account to Shipper for any value, whether or not realized by Southern Star, that may attach or be said to attach to such substances. However, nothing in this provision shall require Southern Star to accept gas which does not meet the applicable quality provisions otherwise provided in this tariff.

**EXHIBIT C**

Issued by: Daryl R. Johnson, Vice President, Rates and Regulatory

Issued on: June 8, 2009 Effective on: July 10, 2009

Previous Next Search

## APPENDIX I

**BEFORE THE COURT OF TAX APPEALS OF THE STATE OF KANSAS**

IN THE MATTER OF
THE APPEALS OF
VARIOUS APPLICANTS
FROM A DECISION OF
THE DIVISION OF
PROPERTY
VALUATION OF THE
STATE OF KANSAS
FOR TAX YEAR 2009
PURSUANT TO K.S.A.
74-2438

Docket Nos. 2009-554-PV, et al

AND

IN THE MATTER OF
THE APPLICATION OF
VARIOUS APPLICANTS
FOR EXEMPTION
FROM PROPERTY
TAXATION LOCATED
IN VARIOUS
COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS NORTHERN STATES POWER COMPANY OF MINNESOTA**

COMES NOW Applicant Northern States Power Company of Minnesota ("Applicant" or "NSP-MN"), and the Department of Revenue, Division of Property

Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant NSP-MN is a Minnesota corporation. On or about August 21, 2009, it received the Notice Attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held by Northern Natural Gas ("Northern") in storage in Kansas, which gas was allocated to NSP-MN. Pursuant to that notice, the 2009 assessed value of this gas was $8,029,347. NSP-NM appealed that assessment, and filed an exemption application.

2. Applicant is regulated by the Minnesota Public Utilities Commission as a natural gas public utility operating in the state of Minnesota. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7). Applicant is not regulated as a public utility by the Federal Energy Regulatory Commission ("FERC") or any other federal governmental agency.

3. Applicant is situated similarly to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory* * *."

4. Applicant was one of the taxpayers in *In the Matter of the Appeal of the Director of Property*

*Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Because Applicant engages primarily in the business of selling natural gas to retail consumers in Minnesota, Applicant is a merchant of natural gas within the state of Minnesota. Applicant owns no facilities for the transportation, distribution, or storage of natural gas in Kansas.

7. Applicant purchases natural gas from various producers and marketers at various locations. Applicant has contracted for Deferred Delivery Service from Northern Natural Gas, an interstate natural gas pipeline company regulated by the Federal Energy Regulatory Commission (FERC) which owns and operates underground natural gas storage facilities in the State of Kansas, which are also subject to regulation by the FERC.

8. Applicant designates when and where gas will be delivered to Northern's pipeline, and schedules a

time and location on the pipeline's system where Applicant will receive an equivalent amount of gas.

9. Northern is regulated by and files tariffs with the Federal Energy Regulatory Commission. Applicable FERC tariff terms that govern the relationship between Applicant and the pipeline provide:

> Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility

for acts of negligence of such party, its agents or employees.

A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection. During the time between receipt by the pipeline and delivery to Applicant, the pipeline exercises complete control over the gas from the time it enters the pipeline system until it leaves that system.

10. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had

delivered to the interstate pipeline system of Northern.

11. To the extent that the pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline docs not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

12. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate use or sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By: /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicant

Direct of Property Valuation

By: /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-NORTHERN STATES POWER CO-MINNESOTA
CURT DALLINGER
XCEL ENERGY
550 15TH ST
DENVER, CO 80202

August 21, 2009

**PVD ID No.** G4344

**DIRECTOR'S 2009 UNIT VALUE:** **24,331,356**

**APPLICATION TO KANSAS:**
**ALLOCATION CALCULATION:**

| Kansas Investment/System Investment | | | |
|---|---|---|---|
| 24,331,356 | 24,331,356 | Allocation Factor: | 1.000000 |
| Director's Unit Value | | | 24,331,356 |
| Kansas Allocation Factor | | x | 1.000000 |
| Kansas Market Value | | | 24,331,356 |
| Assessment Rate @ 33% | | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | | **8,029,347** |

**COMPANY INDICATORS**
**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 24,331,356 |

**MARKET APPROACH:**

| | |
|---|---|
| Equity Residual | 0 |
| Stock and Debt | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A.79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bock
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

GENERAL TERMS AND CONDITIONS

6. POSSESSION OF GAS AND RESPONSIBILITY

Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of negligence of such party, its agents or employees.

7. LIABILITY OF PARTIES

Northern and the Shipper/Purchaser shall each assume full responsibility and liability for the

maintenance and operation of their respective properties.

Northern shall not be liable to the Shipper/Purchaser for its failure to receive and or deliver gas, and the Shipper/Purchaser shall not be liable to Northern for its failure to deliver or receive gas other than to make payments, when such

**EXHIBIT B**

Issued by: Mary Kay Miller, V.P., Regulatory and Customer Service
Issued on: May 1, 2003 Effective: November 22, 2003

## APPENDIX J

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF
THE APPEALS OF
VARIOUS APPLICANTS
FROM A DECISION OF
THE DIVISION OF
PROPERTY
VALUATION OF THE
STATE OF KANSAS
FOR TAX YEAR 2009
PURSUANT TO K.S.A.
74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF
THE APPLICATION OF
VARIOUS APPLICANTS
FOR EXEMPTION
FROM PROPERTY
TAXATION LOCATED
IN VARIOUS
COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS NORTHERN STATES POWER COMPANY OF WISCONSIN**

COMES NOW Applicant Northern States Power Company of Wisconsin ("Applicant" or "NSP-WI"), and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following

material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant NSP-WI is a Wisconsin corporation. On or about August 21, 2009, it received the Notice Attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held by Northern in storage in Kansas, which gas was allocated to NSP-WI. Pursuant to that notice, the 2009 assessed value of this gas was $1,534,462. NSP-WI appealed that assessment, and filed an exemption application.

2. Applicant is regulated by the Wisconsin Public Service Commission as a natural gas public utility operating in the state of Wisconsin. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7). Applicant is not regulated as a public utility by the Federal Energy Regulatory Commission ("FERC") or any other federal governmental agency.

3. Applicant is situated similarly to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There, the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory* * *."

4. Applicant was one of the taxpayers in the case *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which

the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, § 5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Because Applicant engages primarily in the business of selling natural gas to retail consumers in Wisconsin, Applicant is a merchant of natural gas within the state of Wisconsin. Applicant owns no facilities for the transportation, distribution, or storage of natural gas in Kansas.

7. Applicant purchases natural gas from various producers and marketers at various locations. Applicant has contracted for Deferred Delivery Service from Northern Natural Gas, an interstate natural gas pipeline company regulated by the Federal Energy Regulatory Commission (FERC) which owns and operates underground natural gas storage facilities in the State of Kansas, which are also subject to regulation by the FERC.

8. Applicant designates when and where gas will be delivered to Northern's pipeline, and schedules a

time and location on the pipeline's system where Applicant will receive an equivalent amount of gas.

9. Northern is regulated by and files tariffs with the Federal Energy Regulatory Commission. Applicable FERC tariff terms that govern the relationship between Applicant and the pipeline provide:

> Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility

for acts of negligence of such party, its agents or employees.

A copy of the applicable tariff provision is attached as Exhibit "B" hereto, however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection. During the time between receipt by the pipeline and delivery to Applicant, the pipeline exercises complete control over the gas from the time it enters the pipeline system until it leaves that system.

10. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had

delivered to the interstate pipeline system of Northern.

11. To the extent that the pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

12. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate use or sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By: /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicant

Direct of Property Valuation

By: /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-NORTHERN STATES POWER CO WISCONSIN
CURT DALLINGER
XCEL ENERGY, INC
550 15TH ST
DENVER, CO 80202

August 21, 2009

**PVD ID No.** G4342

**DIRECTOR'S 2009 UNIT VALUE:** **4,649,885**

APPLICATION TO KANSAS:
**ALLOCATION CALCULATION:**

Kansas Investment/System Investment
4,649,885 4,649,885 Allocation Factor: 1.000000

| | | |
|---|---|---|
| Director's Unit Value | | 4,649,885 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 4,649,885 |
| Assessment Rate @ 33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **1,534,462** |

COMPANY INDICATORS
**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 4,649,885 |

MARKET APPROACH:

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |

INCOME APPROACH:

| | | | | |
|---|---|---|---|---|
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A. 79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bock
Director

EXHIBIT A

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

NORTHERN NATURAL GAS COMPANY
FERC Gas Tariff
Fifth Revised Volume No. 1

First Revised Sheet No. 214
Superseding
Original Sheet No. 214

GENERAL TERMS AND CONDITIONS

6. POSSESSION OF GAS AND RESPONSIBILITY

Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve

either party hereto from responsibility for acts of negligence of such party, its agents or employees.

6. LIABILITY OF PARTIES

Northern and the Shipper/Purchaser shall each assume full responsibility and liability for the maintenance and operation of their respective properties.

Northern shall not be liable to the Shipper/Purchaser for its failure to receive and or deliver gas, and the Shipper/Purchaser shall not be liable to Northern for its failure to deliver or receive gas other than to make payments, when such

Issued by: Mary Kay Miller, V. P. Regulatory and Customer Service

Issued on: May 1 , 2003 Effective: November 22, 2003

**EXHIBIT B**

## APPENDIX K

**BEFORE THE COURT OF TAX APPEALS OF THE STATE OF KANSAS**

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS PUBLIC SERVICE COMPANY OF COLORADO**

COMES NOW Applicant Public Service Company of Colorado ("Applicant"), and the Department of

Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant is a Colorado corporation. On or about August 21, 2009, it received the Notice Attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held in storage in Kansas, which gas was allocated to Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $4,014,298. Applicant appealed that assessment, and filed an exemption application.

2. Applicant is a Colorado corporation and is an operating public utility engaged, *inter alia*, in the purchase, distribution, sale and transportation of natural gas and in the generation, transmission, distribution and sale of electricity in various areas in the State of Colorado. Public Service is a Colorado public utility as defined in C.R.S. § 40-1-103 and is subject to the jurisdiction of the Colorado Public Utilities Commission. Applicant does not serve any customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7). Applicant is not regulated as a public utility by the Federal Energy Regulatory Commission ("FERC") or any other federal governmental agency.

3. Applicant is similarly situated to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276

Kan. 612, 78 P.3d 419 (2003). There the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory* * *."

4. Applicant was one of the taxpayers in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service*, and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Applicant purchases natural gas from various producers and marketers at various locations. It delivers natural gas to several federally-regulated interstate pipeline systems, including Colorado Interstate Gas ("CIG") or Southern Star Central Gas Pipeline ("Southern Star"), interstate pipelines regulated by the FERC. Both pipelines own and operate underground natural gas storage facilities in

multiple jurisdictions, including the State of Kansas, which are subject to regulation by the FERC.

7. Applicant designates when and where gas will be delivered to the pipeline, and schedules a time and location on the pipeline's system where Applicant will receive an equivalent amount of gas. Applicant does not purchase or deliver any volumes of gas within the state of Kansas.

8. The general FERC tariff terms that govern the relationship between Applicant and CIG, provide: "Transporter [CIG] shall be in exclusive control and possession of such Gas while in Transporter's possession." A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

9. The general FERC tariff terms that govern the relationship between Applicant and Southern Star, provide: "Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery * * *." A copy of the applicable tariff provision is attached as Exhibit "C" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection.

10. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed

into storage by the pipeline for withdrawal on a seasonal and scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had delivered to the interstate pipeline systems of CIG or Southern Star.

11. To the extent that a pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

12. Any stored natural gas held on behalf of Applicant is held as inventory and is intended exclusively for resale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:
**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By: /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicant

Direct of Property Valuation

By: /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS
DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-PUBLIC SERVICE CO OF COLORADO
RAELYNN MCKENERICK
PROPERTY TAX DEPT
550 15TH ST
DENVER, CO 80202

August 21, 2009

**PVD ID No.** G4216

| | | | |
|---|---|---|---|
| **DIRECTOR'S 2009 UNIT VALUE:** | | | **12,164,540** |
| **APPLICATION TO KANSAS:** | | | |
| **ALLOCATION CALCULATION:** | | | |
| Kansas Investment/System Investment | | | |
| 12,164,540 | 12,164,540 | Allocation Factor: | 1.000000 |
| Director's Unit Value | | | 12,164,540 |
| Kansas Allocation Factor | | | x1.000000 |
| Kansas Market Value | | | 12,164,540 |
| Assessment Rate @ 33% | | | x0.330000 |
| **KANSAS ASSESSED VALUE** | | | **4,014,298** |
| **COMPANY INDICATORS** | | | |
| **COST APPROACH:** | | | |
| Book Original Cost | | | 0 |
| Book Original Cost Less Depreciation | | | 0 |
| Net Investment Adjusted for Obsolescence | | | 0 |
| Reproduction Cost Less Depreciation | | | 12,164,540 |
| **MARKET APPROACH:** | | | |

| | | | | |
|---|---|---|---|---|
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |
| INCOME APPROACH: | | | | |
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A. 79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bock
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

GENERAL TERMS AND CONDITIONS
(Continued)

ARTICLE 16—WARRANTY

16.1 Warranty. Each Party warrants that the title to all Gas Tendered to the other Party hereunder will at the time of Tender be free from all liens and adverse claim, and each Party shall indemnify the other Party against all damages, costs, and expenses of any nature whatsoever arising from every claim against said Gas.

ARTICLE 17—RESPONSIBILITY FOR GAS AND PRODUCTS

17.1 Responsibility for Gas. Shipper shall be in exclusive control and possession of the Gas until such has been received by Transporter at the Point(s) of Receipt and after such Gas has been received by Shipper, or for Shipper's account, at the Point(s) of Delivery. Transporter shall be in exclusive control and possession of such Gas while it is in Transporter's possession. The Party which is or is deemed to be in exclusive control and possession of such Gas shall be responsible for all injury, damage, loss, or liability caused thereby.

17.2 Responsibility for Products. Any Shipper, or its designee, may exercise its rights to process and remove Products from its Gas prior to Delivery to

Transporter. Provided, however, if Shipper, or its designee, does not exercise its rights to process and remove Products from its Gas prior to Delivery to Transporter, the following provisions shall apply.

If Shipper, or its designee, timely notifies Transporter, in writing, of its election to exercise its rights to process its Gas, then Transporter may process or cause to have processed such Gas if Transporter and Shipper agree upon the terms and conditions under which the Gas is to be processed.

Shippers, who have not elected to exercise their rights to process their Gas, shall have no rights with respect to Products obtained by Transporter from the Gas while the Gas is in Transporter's possession. Title to all such products shall vest in Transporter and the nonelecting Shipper shall indemnify Transporter against all damages, costs, and expenses of any nature whatsoever arising from any claim relating to said Products or the right to payment for same.

**EXHIBIT B**

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Issued by: R. G. Smead, Senior Vice President
Issued on: April 30, 1999 Effective on: June 1, 1999

Southern Star Central
Gas Pipeline, Inc.
FERC Gas Tariff — Second Revised Sheet No. 280
Original Volume No. 1 — Superseding First Revised Sheet No. 280

GENERAL TERMS AND CONDITIONS

19. POSSESSION OF GAS AND TITLE

Southern Star shall be in control and possession of the natural gas it receives hereunder and responsible, as between Southern Star and Shipper, for any damage or injury caused thereby until the same has been delivered to Shipper at the point of delivery; provided, however, Southern Star shall not be responsible for damages or injuries caused by natural gas it receives while such gas is in the possession and control of any third party. However, Shipper at all times, shall retain title to the gas or the right to deliver all gas to southern Star under an executed service agreement free and clear of all liens, encumbrances and claims whatsoever. Shipper shall also be responsible for obtaining its own insurance (including self-insurance) for its gas in storage, and shall hold Southern Star harmless from any loss, cost, or expense arising from any loss of such gas that results from a Force Majeure event.

Southern Star shall not be liable to the Shipper or any of its agents, servants, or employees, or to any person whomsoever for any loss, damage, or injury resulting from the said gas or its uses before entering Southern Star's system at the point(s) of receipt and

after leaving Southern Star's system at the point(s) of delivery, all risks thereof and therefrom being assumed, as between Southern Star and Shipper, by Shippers except such losses proximately caused by gross negligence of Southern Star.

Each party assumes full responsibility and liability for the operation of the facilities owned by it and agrees to hold the other party harmless from and against all liability of whatever nature arising from installation, ownership, and operation therefrom.

Unless otherwise provided in Section 8.12 regarding exercise of processing rights of Shippers, all substances, whether or not of commercial value, including all liquid and liquefiable hydrocarbons of whatever nature, that Southern Star or a third party recovers for Southern Star's account shall be Southern Star's sole property, and Southern Star shall not be obligated to account to Shipper for any value, whether or not realized by Southern Star, that may attach or be said to attach to such substances. However, nothing in this provision shall require Southern Star to accept gas which does not meet the applicable quality provisions otherwise provided in this tariff.

**EXHIBIT C**

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Issued by: Daryl R. Johnson, Vice President, Rates and Regulatory
Issued on: June 8, 2009 Effective on: July 10, 2009

## APPENDIX L

**BEFORE THE COURT OF TAX APPEALS**
**OF THE STATE OF KANSAS**

IN THE MATTER OF
THE APPEALS OF
VARIOUS APPLICANTS
FROM A DECISION OF
THE DIVISION OF
PROPERTY
VALUATION OF THE
STATE OF KANSAS
FOR TAX YEAR 2009
PURSUANT TO K.S.A.
74-2438

Docket Nos. 2009-8554-PV, et al

AND

IN THE MATTER OF
THE APPLICATION OF
VARIOUS APPLICANTS
FOR EXEMPTION
FROM PROPERTY
TAXATION LOCATED
IN VARIOUS
COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX, et al

**STIPULATION OF MATERIAL FACTS SUPERIOR WATER, LIGHT & POWER CO.**

COMES NOW Applicant Superior Water, Light & Power Co., ("Applicant"), and the Department of Revenue, Division of Property Valuation, and stipulate and agree to the following material facts for

adoption by the Kansas Court of Tax Appeals in further proceedings herein:

1. Applicant a company that sells electricity, water and natural gas in Superior Wisconsin, and in adjacent areas. On or about August 21, 2009, it received the Notice Attached as Exhibit "A." That notice purports to establish a Kansas assessed value for gas held by Northern Natural Gas ("Northern") in storage in Kansas, which gas was allocated to Applicant. Pursuant to that notice, the 2009 assessed value of this gas was $140,952. Applicant filed an exemption application.

2. Applicant serves no customers in Kansas. It is not certificated or regulated as a natural gas public utility by the Kansas Corporation Commission. It does not exercise the power of eminent domain in Kansas. Applicant does not engage in those activities specified in K.S.A. 79-5a01(a)(1) through (7).

3. Applicant is similarly situated to the non-Kansas public utility parties in the case *In re Application of Central Illinois Public Service*, 276 Kan. 612, 78 P.3d 419 (2003). There the Kansas Supreme Court held that those similarly situated parties were "not public utilities as defined by K.S.A. 2002 Supp. 79-5a01 and that their natural gas inventories [were] therefore exempt from taxation under K.S.A. 79-201m as merchant's inventory * * *."

4. Applicant is similarly situated to the taxpayers in *In the Matter of the Appeal of the Director of Property Valuation*, 284 Kan. 592 (2007), in which the Court held that the taxpayers do not control stored natural gas in Kansas, and that their natural gas rights and inventories are exempt from taxation under K.S.A. 79-201m as merchants' inventories.

5. Since the Court's decisions in *In re Application of Central Illinois Public Service* and in *In the Matter of the Appeal of the Director of Property Valuation*, K.S.A. 79-5a01 has been amended by House Substitute for Senate Bill 98, §5 to provide in pertinent part: "As used in this act, the terms 'public utility' or 'public utilities' means every individual, company, corporation, association of persons, brokers, marketers, lessees or receivers that now or hereafter own, broker or market natural gas inventories stored for resale in an underground formation in this state * * *."

6. Applicant purchases natural gas from various producers and marketers. Applicant designates when and where gas will be delivered to Northern's pipeline, and schedules a time and location on the pipeline's system where Applicant will receive an equivalent amount of gas.

7. Northern is regulated by and files tariffs with the Federal Energy Regulatory Commission ("FERC"). Applicable FERC tariff terms that govern the relationship between Applicant and the pipeline provide:

> Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred

> Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of negligence of such party, its agents or employees.

A copy of the applicable tariff provision is attached as Exhibit "B" hereto; however, the parties stipulate that the entire tariff governing the relationship between the Applicant and the pipeline may be admitted into evidence at the hearing without objection. During the time between receipt by the pipeline and delivery to Applicant, the pipeline exercises complete control over the gas from the time it enters the pipeline system until it leaves that system.

8. Pursuant to contract with the pipeline, and consistent with FERC regulation, some of the gas purchased by Applicant is designated as being placed into storage by the pipeline for withdrawal on a scheduled basis. FERC regulation does not permit Applicant to designate a location for storage, and Applicant has no knowledge or control as to the

specific location and nature of such storage. No effort is or could be made to see that the same molecules of gas that were delivered into the pipeline's system by the Applicant are placed in storage. Likewise, no effort is or could be made to see that the molecules of gas placed in storage and allocated to Applicant are produced and delivered to Applicant when called for by Applicant. The decision on the specific source of the molecules of gas placed into storage, and the identity of the molecules of gas produced and delivered to Applicant is under the complete control of the pipeline. Applicant's right is effectively limited to a contract right to withdraw an amount of gas that equals the amount that it has had delivered to Northern.

9. To the extent that the pipeline has allocated some of the natural gas owned by Applicant to its Kansas storage facilities, the pipeline does not claim to trace the exact source of the molecules of gas placed into storage, nor does it promise that those same molecules of gas will be delivered to Applicant.

10. Any stored natural gas held on behalf of Applicant is held as inventory and is intended for ultimate sale outside the state of Kansas.

WHEREFORE, having stipulated to these material facts, the parties request that the Board adopt same for the purpose of further proceedings herein.

STIPULATIONS APPROVED AND AGREED TO:

**MORRIS, LAING, EVANS, BROCK & KENNEDY, CHTD.**

By: /s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Attorneys for Applicant

Director of Property Valuation

By: /s/ William E. Waters
William E. Waters, #12639
Attorney for Director of Property Valuation
Department of Revenue
State of Kansas

JOAN WAGNON, SECRETARY

KANSAS

DEPARTMENT OF REVENUE
DIVISION OF PROPERTY VALUATION

MARK PARKINSON, GOVERNOR

SG-SUPERIOR WATER,
LIGHT & POWER CO
BILL BOMBICH
PROPERTY TAX DEPT
PO BOX 519
SUPERIOR, WI 54880-
0519

August 21, 2009

**PVD ID No.** **G4333**

**DIRECTOR'S 2009 UNIT VALUE:** **427,128**

**APPLICATION TO KANSAS:**

**ALLOCATION CALCULATION:**

| Kansas Investment/System Investment | | | |
|---|---|---|---|
| 427,128 | 427,128 | Allocation Factor: | 1.000000 |

| | | |
|---|---|---|
| Director's Unit Value | | 427,128 |
| Kansas Allocation Factor | x | 1.000000 |
| Kansas Market Value | | 427,128 |
| Assessment Rate @ 33% | x | 0.330000 |
| **KANSAS ASSESSED VALUE** | | **140,952** |

**COMPANY INDICATORS**

**COST APPROACH:**

| | |
|---|---|
| Book Original Cost | 0 |
| Book Original Cost Less Depreciation | 0 |
| Net Investment Adjusted for Obsolescence | 0 |
| Reproduction Cost Less Depreciation | 427,128 |

| | | | | |
|---|---|---|---|---|
| **MARKET APPROACH:** | | | | |
| Equity Residual | | | | 0 |
| Stock and Debt | | | | 0 |
| **INCOME APPROACH:** | | | | |
| Forecast NOI | 0 | Rate | .0000 | 0 |
| Actual NOI | 0 | Rate | .0000 | 0 |

An informal conference may be requested if there are any objections to the "Director's Unit Value" as stated on this "Notice" (K.S.A. 79-5a05). All conference request must: (1) be within 15 days of this Notice, (2) be in writing, (3) be made to the Director, (4) state the objection/s. Any document or written evidence to be presented at the conference must be submitted to this office no less than two (2) days prior to the conference.

This "Notice" constitutes the Director's final action to date.

/s/ Mark S. Bok
Director

**EXHIBIT A**

DOCKING STATE OFFICE BUILDING, 915 SW
HARRISON ST., ROOM 400,
TOPEKA, KS 66612-1585

Voice 785-296-2365 Fax 785-368-7399

http://www.ksrevenue.org/

GENERAL TERMS AND CONDITIONS

6. POSSESSIONS OF GAS AND RESPONSIBILITY

Northern shall be deemed to be in possession of the gas delivered hereunder by Shipper under a Throughput Service Agreement only from the time that it is received by Northern for transportation hereunder at the Point(s) of Receipt until it is delivered to Shipper at the Point(s) of Delivery. Unless Northern is selling gas to Shipper/Purchaser, Shipper shall be deemed to be in possession of such gas prior to such receipt by Northern and after such delivery by Northern. As between Northern and Purchaser under a Deferred Delivery Agreement, Northern shall be in control and possession of the gas from the time Purchaser delivers gas to Northern at a receipt point, and prior to the time the same shall have been redelivered to Purchaser. During such times as the gas is deemed to be in the control and possession of the respective party as set forth herein, said party shall be responsible for risk of the loss of the gas and shall hold harmless the other party of and from any and all damages, liabilities, expenses (including attorneys' fees and court costs), and/or injuries, including death of persons, arising during said party's possession. The foregoing provisions of this paragraph shall not relieve either party hereto from responsibility for acts of negligence of such party, its agents or employees.

7. LIABILITY OF PARTIES

Northern and the Shipper/Purchaser shall each assume full responsibility and liability for the maintenance and operation of their respective properties.

Northern shall not be liable to the Shipper/Purchaser for its failure to receive and or deliver gas, and the Shipper/Purchaser shall not be liable to Northern for its failure to deliver or receive gas other than to make payments, when such

**EXHIBIT B**

Issued by: Mary Kay Miller, V.P., Regulatory and Customer Service
Issued on: May 1, 2003 Effective: November 22, 2003

## APPENDIX M

BEFORE THE COURT OF TAX APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEALS OF VARIOUS APPLICANTS FROM A DECISION OF THE DIVISION OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEAR 2009 PURSUANT TO K.S.A. 74-2438



AND

Docket Nos. 2009-8554-PV et al.

IN THE MATTER OF THE APPLICATION OF VARIOUS APPLICANTS FOR EXEMPTION FROM PROPERTY TAXATION OF PROPERTY LOCATED IN VARIOUS COUNTIES IN KANSAS

Docket Nos. 2009-8610-PVX et al.

AGREED ORDER OF STIPULATION

*APPEARANCES*:

For the Director: William E. Waters, #12639
Division of Property Valuation
Kansas Department of Revenue
Docking State Office Building,
4th Floor
915 S.W. Harrison Street
Topeka, KS 66612-1585
Telephone: (785) 296-4035

For the Taxpayer: Robert W. Coykendall, #10137
Janet Huck Ward, #15529
Morris, Laing, Evans, Brock & Kennedy, Chartered
300 North Mead, Suite 200
Wichita, KS 67202-2745
Telephone: (316) 262-2671

The Supreme Court of the State of Kansas, in Appellate Case No. 11-105785-AS, remanded the above-captioned matter back to the Court of Tax Appeals of the State of Kansas ("COTA") for COTA to determine which taxpayers in the above-captioned matter fall within each of the below generally described categories previously identified by COTA:

A. Out-of-State Municipal Utilities;

B. Marketers and Brokers of Natural Gas; and

C. Local Distribution Companies Certified as Public Utilities in Other States.

The above-captioned matter comes on for consideration and decision by COTA pursuant to an agreed Stipulation entered into by the parties which Stipulation allocates each taxpayer into one of the three categories identified above.

Upon consideration of the parties' Stipulations, the Court finds and concludes as follows:

1. The Court has jurisdiction of the subject matter and the parties.

2. After full consideration of the pertinent facts and governing law, the parties stipulate and agree that the Taxpayers in the above-captioned matter are categorized on Exhibits "A," "B," "C," and "D" attached hereto and made a part hereof, as follows. Out-of-State Municipal Utilities are set forth on

Exhibit "A"; Marketers and Brokers of Natural Gas are set forth on Exhibit "B"; Local Distribution Companies Certified as Public Utilities in Other States are set forth on Exhibit "C"; and Companies Not Presently Allocated to a Category are set forth on Exhibit "D."

3. The parties further stipulate and agree that the stored natural gas in Kansas held on behalf of the Taxpayers identified above as (i) Out-of-State Municipal Utilities and (ii) Marketers and Brokers of Natural Gas is held by those Taxpayers as inventory intended for ultimate sale or use outside the State of Kansas and is exempt from ad valorem taxation as merchants' and manufacturers' inventory pursuant to Article II, § 1(b) of the Kansas Constitution (2012 Supp.) and K.S.A. § 79-201m.

4. The parties further stipulate and agree that Northern States Power-GEN ("NSP-GEN"), in Docket Nos. 2009-8555-PV and 2009-8611-PVX, is an electric generation company certified as a Public Utility in another state; however, it is not engaged in distribution of natural gas to customers. The stored natural gas in Kansas held on behalf of NSP-GEN is held by NSP-GEN not for resale, but for use by the taxpayer itself in generating electricity, and is exempt from ad valorem taxation pursuant to Article II, § 1(b) of the Kansas Constitution (2012 Supp.) and K.S.A. § 79-201m.

5. The Court hereby adopts the stipulations of the parties as set forth herein and dismisses all of the cases of the Taxpayers identified above in the categories of (i) Out-of-State Municipal Utilities as reflected on Exhibit "A," (ii) Marketers and Brokers of Natural Gas as reflected on Exhibit "B," and (iii)

NSP-GEN, Docket Nos. 2009-8555-PV and 2009-8611-PVX.

*IT IS THEREFORE ORDERED BY THE COURT OF TAX APPEALS OF THE STATE OF KANSAS* that the Taxpayers shall be allocated to the categories as set forth above and on the attached Exhibits "A," "B," "C," and "D" and the stored gas in Kansas held on behalf of those Taxpayers identified as (i) Out-of-State Municipal Utilities as reflected on Exhibit "A," and (ii) Marketers and Brokers of Natural Gas as reflected on Exhibit "B" shall be exempt from ad valorem taxation as merchants and manufacturers' inventory pursuant to Article II, § 1(b) of the Kansas Constitution (2012 Sup.) and K.S.A. § 79-201m.

*IT IS FURTHER ORDERED* that the stored gas in Kansas held on behalf of NSP-GEN in Docket Nos. 2009-8555-PV and 2009-8611-PVX shall be exempt from ad valorem taxation as the gas is held by NSP-GEN not for resale, but for use by NSP-GEN itself in generating electricity.

IT IS FURTHER ORDERED BY THE COURT that the Division of Property Valuation of the Kansas Department of Revenue is directed to correct its records accordingly, and to notify the various County Treasurers of the applicable exemptions so that the County Treasurers may abate the tax liability of the designated Taxpayers, and refund any tax paid by the Taxpayers as required by law or by the terms of the Stipulations adopted herein.

*IT IS SO ORDERED.*

THE COURT OF TAX APPEALS

Sam H. Sheldon, Chief Judge

James D. Cooper, Judge

Ronald C. Mason, Judge

PREPARED BY:

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**EXHIBIT "A"**
**OUT-OF-STATE MUNICIPAL UTILITIES**

| TAXPAYER | DOCKET NUMBERS TAX APPEAL | DOCKET NUMBERS EXEMPTION |
|---|---|---|
| Circle Pines Utilities d/b/a Centennial Utilities | ----- | 2009-8928-PVX |
| City of Fort Morgan | 2009-8569-PV | 2009-8625-PVX |
| City of Trinidad | 2009-8570-PV | 2009-8626-PVX |
| City Utilities of Springfield | 2009-8579-PV | 2009-8635-PVX |
| Colorado Springs Utilities | 2009-8566-PV | 2009-8622-PVX |
| Metropolitan Utilities District (MUD) | 2009-8576-PV | 2009-8632-PVX |
| National Public Gas | 2009-8571-PV | 2009-8627-PVX |
| Sioux Center Municipal Utilities | ----- | 2009-8926-PVX |

**EXHIBIT "B"**
**MARKETERS AND BROKERS OF NATURAL GAS**

| TAXPAYER | DOCKET NUMBERS TAX APPEAL | DOCKET NUMBERS EXEMPTION |
|---|---|---|
| BP Canada Energy | 2009-8554-PV | 2009-8610-PVX |
| CCP Coast to Coast Partners, LLC | ----- | 2010-96-PVX |
| Chevron U.S.A. Inc | 2009-8582-PV | 2009-8638-PVX |
| Clayton Energy | ----- | 2009-8929-PVX |
| DB Energy Trading, LLC | ----- | 2010-122-PVX |
| Great River Energy | 2009-8567-PV | 2009-8623-PVX |
| Nexen Marketing | 2009-8578-PV | 2009-8634-PVX |
| NextEra Energy | 2009-8581-PV | 2009-8637-PVX |
| ONEOK Energy | 2009-8562-PV | 2009-8618-PVX |
| ProLiance Energy | 2009-8560-PV | 2009-8616-PVX |
| Shell Energy | 2009-8584-PV | 2009-8640-PVX |
| Tenaska Gas | 2009-8563-PV | 2009-8619-PVX |
| U. S. Energy Services | 2009-8559-PV | 2009-8615-PVX |

**EXHIBIT "C"**
**LOCAL DISTRIBUTION COMPANIES CERTIFIED AS PUBLIC UTILITIES IN OTHER STATES**

| TAXPAYER | DOCKET NUMBERS TAX APPEAL | DOCKET NUMBERS EXEMPTION |
|---|---|---|
| Central IL Public Service Company/ Ameren CIPS | 2009-8573-PV | 2009-8629-PVX |
| Central IL Light Co./Ameren CILCO | 2009-8572-PV | 2009-8628-PV |
| Cheyenne Light Fuel & Power Company | ----- | 2010-305-PVX |
| Eastern Colorado Utilities | 2009-8568-PV | 2009-8624-PVX |
| Empire Gas | 2009-8583-PV | 2009-8639-PVX |
| Illinois Power Company/Ameren IP | 2009-8574-PV | 2009-8630-PVX |
| Interstate Power & Light | 2009-8564-PV | 2009-8620-PVX |
| Mid American Energy Co. | ----- | 2009-9776-PVX |
| Minnesota Energy Resource Corp. | 2009-8930-PV | 2009-9093-PVX |
| Missouri Gas Energy | 2009-8577-PV | 2009-8633-PVX |
| Northern States Power-MN-GEN | 2009-8555-PV | 2009-8611-PVX |
| Northern States Power-WI | 2009-8557-PV | 2009-8613-PVX |

| TAXPAYER | DOCKET NUMBERS TAX APPEAL | DOCKET NUMBERS EXEMPTION |
|---|---|---|
| Northern States Power-MN | 2009-8556-PV | 2009-8612-PVX |
| Oklahoma Natural Gas | 2009-8561-PV | 2009-8617-PVX |
| Public Service of Colorado | 2009-8558-PV | 2009-8614-PVX |
| Superior Water, Light & Power Co. | ----- | 2009-8927-PVX |
| Union Electric Company/Ameren UE | 2009-8575-PV | 2009-8631-PVX |
| Wisconsin Power & Light | 2009-8565-PV | 2009-8621-PVX |

**EXHIBIT "D"**
**COMPANIES NOT PRESENTLY ALLOCATED TO A CATEGORY**

| TAXPAYER | DOCKET NUMBERS TAX APPEAL | DOCKET NUMBERS EXEMPTION |
|---|---|---|
| Jo-Carroll Energy | 2009-8580-PV | 2009-8636-PVX |