REPORT OF THE COMMITTEE ON TAX DEVELOPMENTS

The following report reflects a summary of the significant energy-related tax issues addressed by the courts, the Federal Energy Regulatory Commission (FERC or Commission), and the Internal Revenue Service (IRS) during the calendar year 1995.

I. DEVELOPMENTS AFFECTING REGULATED ELECTRIC UTILITIES AND NATURAL GAS COMPANIES

A. *Court Decisions*

1. What is a "tax" as opposed to an assessment, levy or claim by a government agency? *Chicago and North Western Transportation Company v. Webster County Board of Supervisors*[1]

Although this case involved a railroad, the general considerations of what actually constitutes a tax are relevant to all regulated public utilities. A drainage district decided to enlarge a drainage ditch crossing a railroad's right of way, pursuant to Iowa law, then ordered the railroad to install a new culvert. When the railroad refused, the drainage district built and paid for the culvert itself and sued the railroad to recover the costs incurred. The railroad argued that the drainage district's claim constituted a "discriminatory tax" under the Railroad Revitalization and Regulatory Reform Act.[2] The District Court held that the drainage district's claim for cost recovery did not constitute a tax and in any event, was not discriminatory.[3] The Court of Appeals affirmed, holding that the government assessment did not constitute a tax because it sought compensation only for that part of the drainage project that kept the railroad's roadway intact, as opposed to raising revenue to spend for the general public welfare. The District Court opinion is very instructive for its detailed discussion of what does and does not constitute a tax.

2. Louisiana use tax imposed on pipeline's compressor fuel: *Columbia Gulf Transmission Company v. Broussard*[4]

The State of Louisiana imposed a use tax on natural gas used by Columbia Gulf Transmission Company (Columbia Gulf) at its four compression stations in Louisiana. Columbia Gulf protested the tax on the grounds that the tax violated Louisiana's use tax statute and the Commerce Clause.[5] The Supreme Court of Louisiana held that the Louisiana use tax[6]

1. 71 F.3d 265 (8th Cir. 1995), *reh'g en banc denied,* 1996 U.S. App. LEXIS 75 (1996).
2. 49 U.S.C. § 11503 (1994).
3. Chicago and North Western Transp. Co. v. Webster Co., 880 F. Supp. 1290 (N.D. Iowa 1995).
4. 653 So.2d 522 (La. 1995), *cert. denied,* 116 S. Ct. 276 (1995).
5. U.S. CONST. art. I, § 8, cl. 3.

plainly intends to tax property consumed in the state and that natural gas comes to rest and becomes a part of the state's property when it is consumed in compressor stations. The court further held that under the controlling Commerce Clause case,[7] the imposition of a use tax on natural gas consumed in Columbia Gulf's Louisiana compressor stations did not violate the Commerce Clause for the following reasons: (1) Columbia Gulf's gas production and transportation have a substantial nexus with Louisiana; (2) the tax is fairly apportioned because it is imposed only on natural gas consumed in Louisiana compressor stations; (3) there is no discrimination against interstate commerce because the tax is imposed equally against interstate and intrastate pipelines; and (4) the tax is fairly related to state services because Columbia Gulf's employees use Louisiana services and facilities and because Columbia Gulf has the right to expropriate private property in Louisiana for its benefit. The court noted that courts in Mississippi,[8] Utah,[9] and Arkansas[10] have all determined that use taxes imposed on compressor fuel do not violate the Commerce Clause. A dissenting judge expressed the opinion that imposing the use tax on Columbia Gulf's compressor fuel violates Louisiana law because compressor fuel does not come to rest in Louisiana but is a continuous part of interstate commerce.

3. Property taxes imposed on interstate natural gas pipelines: *Iroquois Gas Transmission System v. Town of Athens Assessor*[11]

An interstate natural gas pipeline argued that it was entitled to a partial tax exemption under RPTL 485-6 on taxes imposed on its real property in the state of New York. RPTL 485-6 provides a partial tax exemption for real property used primarily for the buying or selling of goods and services. The County Assessor argued that, since the Iroquois system is used primarily to transport natural gas, the case is controlled by *Long Island Light Company v. Board of Assessors of County of Nassau,*[12] which held that the real property of a local utility was not exempt from property tax under RPTL 485-6 because the real property was primarily used for transmitting and distributing gas and electricity as opposed to selling services. The court agreed with the Assessor and held that Iroquois, like the local utility, is not exempt from the real property tax.

6. LA. REV. STAT. ANN. § 47:305E (West 1990 & Supp. 1996).
7. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).
8. Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).
9. Quester Pipeline v. Tax Commission, 817 P.2d 316 (Utah 1991).
10. Pledger v. Arkla, Inc., 827 S.W.2d 126, *cert. denied,* 113 S. Ct. 203 (1992).
11. 627 N.Y.S.2d 150, (N.Y. App. Div. 1995).
12. 616 N.E.2d 845 (1993).

4. Sales tax imposed on sales by gas marketer to end-user: *Chrysler Corporation v. Tracy*[13]

The State of Ohio imposed a sales tax on sales of natural gas by Access Energy Corporation (Access) to Chrysler Corporation. Access purchased the natural gas from producers and arranged for transportation to Chrysler through facilities of interstate pipelines and a local distribution company, East Ohio Gas Company. Chrysler argued that the sales tax did not apply under an Ohio statute[14] because Access was a "natural gas company" under Ohio law. The court held that Access was not a natural gas company under Ohio law because it was not a public utility "supplying" natural gas to Chrysler. The court relied heavily on an unreported opinion of the Public Utilities Commission of Ohio that determined that Access' predecessor, Yankee Resources, was not a public utility and was therefore not a natural gas company or pipeline under Ohio law.[15]

B. *FERC Decisions*

1. Income Tax Allowance for Limited Partnership With Non-Corporate Partners: *Lakehead Pipe Line Co., L.P.*[16]

In *Lakehead Pipe Line Co., L.P.*, the FERC concluded that a limited partnership (Lakehead) comprised of corporate and individual partners should not receive an income tax allowance with respect to income attributable to limited partnership interests held by individuals. The FERC has previously determined that a limited partnership is entitled to an income tax allowance in its cost-of-service, calculated at corporate tax rates, with respect to the income attributable to corporate partners.[17] In *Lakehead*, the FERC held that, because individual limited partners are entitled to an after-tax return (commensurate with returns on investments in other enterprises having corresponding risks),[18] if an income tax allowance were included in a limited partnership's rates with respect to income attributable to individual limited partners, those investors would earn a return "in excess of that to which they are entitled for Lakehead's risks.

The FERC also dealt with partnership tax issues in *KansOk Partnership*[19] and *Tuscarora Gas Transmission Co.*[20]. In *KansOk*, the FERC declined to recognize a tax allowance unless the partnership (KansOk) adduced evidence that its partners are corporations. In the same decision, the FERC noted that if KansOk qualifies for a tax allowance, then the

13. 652 N.E.2d 185 (1995).

14. OHIO REV. CODE ANN. § 5739.02(B)(7) (Banks-Baldwin 1994)(exempting sales of natural gas by a natural gas company).

15. *Yankee Resources, Inc.*, PUCO No. 82-108-GA-ARJ (Sept. 9, 1982).

16. 71 F.E.R.C. ¶ 61,338 (1995).

17. *See, e.g.*, *Great Lakes Gas Transmission L.P.*, 53 F.E.R.C. ¶ 61,264 (1990); *Riverside Pipeline Co., L.P.*, 48 F.E.R.C. ¶ 61,309 at 62,017 (1989); *Pelican Interstate Gas System*, 29 F.E.R.C. ¶ 61,062 at 61,135 (1984). *See also*, *SunShine Interstate Transmission Co.*, 67 F.E.R.C. ¶ 61,229 at 61,710 (1994).

18. Fed. Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 603 (1942).

19. 71 F.E.R.C. ¶ 61,340 (1995).

20. 71 F.E.R.C. ¶ 61,011 (1995).

Commission's policy regarding normalization for income taxes recognized in the cost of service should be applied in calculating KansOk's tax expense. In *Tuscarora*, a general partnership comprised solely of corporate partners filed an application for authority to construct, own, and operate an interstate natural gas pipeline and sought approval, *inter alia*, of its initial rates and proposed tariff. In a preliminary order granting the application, the FERC reiterated its practice "to regulate partnerships owned solely by corporations as though they were corporate subsidiaries of parents." In addition, the Commission directed Tuscarora to maintain its books of account "based on the Commission's [Uniform System of Accounts] as if it were a corporation, including the deferred income tax accounting requirements of the [Uniform System of Accounts]."

C. *Internal Revenue Service Rulings*

1. Allocation of Tax Benefits Associated with Disallowed Investment: Private Letter Rulings 95-47-008[21] and 95-52-007.[22]

In two private letter rulings which might have significant implications on the issue of stranded generation assets, the IRS has ruled that the Internal Revenue Code's requirements of normalization do not permit regulators to flow the tax benefits associated with disallowed investment through to ratepayers.[23]

Ruling 95-47-009 concerned allocation of accelerated depreciation and investment tax credit (ITC) tax benefits associated with generation plant investment which had been disallowed on prudence grounds. As a result of this disallowance, the investment was excluded from the utility's rate base and not recoverable through the depreciation expenses included in the cost of service. Pursuant to the I.R.C.'s "normalization" requirements, the utility had not been flowing the tax benefits of ITC and liberalized depreciation through to ratepayers currently and had been booking them as provision for deferred federal income taxes. In the prudence proceeding, an intervenor proposed that the accumulated tax benefits associated with the disallowed plant should be flowed through immediately to ratepayers.

The IRS held that the immediate flow-through of the ITC and liberalized depreciation tax benefits associated with the disallowed plant would violate the normalization requirement that there be consistency between the treatment of items for rate base and regulated depreciation expense purposes and their treatment for computing the current tax cost component of recoverable operating expenses.

21. Priv. Ltr. Rul. 95-47-008 (Aug. 23, 1995).

22. Priv. Ltr. Rul. 95-52-007 (Sep.22, 1995).

23. The Code's "normalization" rules provide that the tax expense component of recoverable operating expenses for publicly regulated utilities utilizing the investment tax credit (repealed as of 1986) or liberalized depreciation with respect to public utility property, may not flow the tax benefits so generated through to ratepayers faster than *pro rata* over the service life of the property. *See*, I.R.C. § 168(i)(9) (1994).

Private Letter Ruling 95-52-007 likewise involved the treatment of depreciation expenses associated with the portion of generation plant costs disallowed on prudence grounds. A rate proceeding intervenor had proposed that the utility's future reimbursable federal income tax expenses should be reduced annually to reflect the income tax depreciation deductions associated with the disallowed plant.

The IRS held that the intervenor's proposal would again violate the consistency requirements of the I.R.C. § 168 normalization provisions because it would include 100 per cent of the Taxpayer's basis in the plant for purposes of calculating reimbursable tax expense component of the cost of service, while including less than 100 per cent of the Taxpayer's basis for determining the reimbursable depreciation expense and for determining rate base.

These rulings seem to suggest that in the case of partial prudence disallowances as to "public utility property," the I.R.C.'s normalization requirements preclude flow through of the tax benefits associated with the disallowed plant to ratepayers. They leave open the question, however, of whether a different result will be obtained if the plant is disallowed or written off in its entirety. These rulings may have significant implications if state commissions require utilities to write down and absorb the costs of "stranded" assets.

2. Treatment of Contributions in Aid of Construction

The IRS has construed I.R.C. § 118(b) (which denies customer contributions in aid of construction (CIACs) tax free treatment) in several rulings affecting publicly regulated utilities.[24]

a. Contributions Toward Gas Transportation Interconnections

Private Letter Ruling 95-43-008[25] addressed whether contributions received by a utility from a municipal power authority to construct gas interconnection facilities were taxable customer CIACs under I.R.C. § 118(b), or were, instead, non-taxable contributions to capital because they did not facilitate the delivery of utility services. The municipal authority purchased the gas from third party suppliers for the purpose of generating electricity and paid the utility only for transportation service. The ruling held that the contribution was taxable CIAC income, and that gas transportation service was the sort of utility service contemplated by Congress in enacting I.R.C. § 118(b). The ruling rejected the analogy between the contributions for the gas interconnection at hand and contributions for electric transmission interconnections for PURPA qualifying facilities, which are not treated as CIAC income on the grounds that the interconnection's primary function was to facilitate sales to, not sales by, the customer.

24. In general, a contribution for construction will be a taxable CIAC under Section 118(b) if it is contributed "to provide or encourage the provision of services to or for the benefit of the person making the contribution. . . ." H.R. Rep. No. 99-426, 644 (1985).

25. Priv. Ltr. Rul. 95-43-008 (July 20, 1995).

Private Letter Ruling 95-48-010 addressed the treatment of contributions for the construction of two gas interconnection facilities to be owned by an interstate pipeline (Pipeline), one with a local distribution company (LDC), and the other with an industrial customer (Customer). The reimbursement agreements gave legal ownership of the facilities to the Pipeline to facilitate compliance with federal safety guidelines and regulations, and the value of the facilities were not includible in the Pipeline's rate base. The LDC and the Customer purchased only interruptible transportation service from the Pipeline.

The IRS again held that the value of the contributions of the LDC and Customer were taxable CIACs under I.R.C. § 118(b), rather than contributions to capital under I.R.C. § 118(a), and were, accordingly, currently taxable income to the Pipeline. The ruling again rejected efforts to analogize the gas interconnection facilities to electric transmission interconnections with PURPA qualifying facilities.

b. Contributions for Electric Transmission Interconnection with Processing Facility Serving PURPA QF: Private Letter Ruling 95-32-024[26]

This ruling addressed the treatment of contributions for the construction of transmission interties servicing a PURPA qualified facility (QF) plant and an associated mill which processed crop byproduct for use as fuel in the QF. The transmission interties were owned by the local utility, which also purchased the QF's electricity output. The interties served the dual purpose of transmitting purchased power from the QF to the utility, and supplying electricity to the mill needed to process the byproduct fuel. Some of the mill's electricity was to be supplied by the utility through two substations, but most of it was to come from the QF.

The IRS held that the contributions for construction of the interties between the utility's substations and the QF were not taxable CIACs because these interties primarily facilitated the sale of electricity from the QF to the utility and not vice versa.[27] The contributions to the mill interties on mill property, were, likewise not taxable CIACs. The contributions to the mill interties on the utility's property were, however, CIACs taxable as ordinary income to the utility in the year of transfer.

c. Contributions to Replace Gridiron Transmission Towers with LessObtrusive Transmission Poles: Private Ruling 95-40-030[28]

This ruling dealt with funds which a non-profit corporation contributed to a publicly regulated utility to beautify a city's downtown by replac-

26. Priv. Ltr. Rul. 95-32-024 (May 11, 1995).

27. Notice 880129, 1988-2 C.B. 541, as modified by Notice 90-60, 1990-2 C.B. 345, contains "safe harbor" provisions dealing with contributions in aid of transmission interties to qualifying facilities. In general, not more than 5 per cent of the electricity which flows through the intertie can be going to the QF.

28. Priv. Ltr. Rul 95-40-030 (July 7, 1995).

ing two gridiron type transmission towers with a much less obtrusive single pole type tower. The IRS held that these contributions were not taxable CIACs because they fell under the public benefit exception to I.R.C. § 118(b). The ruling, moreover, held that these funds were to be treated as non-taxable contributions to capital by persons other than shareholders under I.R.C. § 118(a) because: (a) the replacement pole would become a permanent part of the utility's capital plant; (b) the non-profit was not making the payments in compensation for services; (c) the non-profit was making the payments pursuant to a bargained for exchange; (d) the payments would foreseeably result in a benefit to taxpayer commensurate with their value, because they would extend the life and improve taxpayer's transmission system; and (e) the towers would be used by the utility in its trade or business to produce income.

3. Treatment of DSM and Conservation Revenues and Expenditures: Rev.Rul 95-32[29], and Private Letter Ruling 95-48-004[30]

The IRS issued two rulings regarding the treatment revenues and expenditures associated with Demand Side Management (DSM) and other government mandated conservation or load management programs.

Rev. Rul. 95-32 addressed treatment of the costs of a DSM program which were capitalized and accorded rate base treatment for ratemaking purposes. The DSM program costs included: (a) payments to contractors to install energy efficient equipment and make energy efficiency structural improvements in and to residences; (b) rebates to industrial customers for installing energy efficient lighting systems and high-efficiency motors; and (c) employee compensation costs for helping industrial customers design efficient manufacturing processes. None of the DSM customers were obligated to purchase power from the utility in the future, and the customers, rather than the utility, held legal title to the improvements funded by the program.

The revenue ruling held that the expenditures were ordinary business expenses currently deductible under I.R.C. § 162 because they did not result in the creation or acquisition of any asset retained by the utility. It was irrelevant for tax purposes that the utility capitalized these DSM expenses for ratemaking purposes and accorded them rate base treatment.

Private Letter Ruling 95-48-004 considered the treatment of revenues and expenditures in connection with seven programs implemented by a publicly regulated utility pursuant to state mandated conservation requirements enacted under the 1978 National Conservation Act. As administered by the state regulatory commission, funding for these programs was collected through rates on existing customers. These funds were to be used exclusively for the approved conservation purposes, and the utility was required to make an accounting of the program every six months, and pay

29. Rev. Rul. 95-32., 1995-1 C.B. 8.
30. Priv. Ltr. Rul. 95-48-004 (Aug. 9, 1995.)

interest on any over-recoveries accumulated at the end of each six month period. The costs of this program were not billed separately or even separately stated on customer invoices, and the utility had significant flexibility in designing the conservation program. Several of the individual programs offered by the utility involved fuel substitution, and thereby increased the utility's customer base and sales.

The ruling held that these revenues were reportable as ordinary income. It held that these revenues were not analogous to receipts held in trust by the utility for the benefit of others because the customers paying for the program had no control over how these funds were expended, and were not the primary beneficiaries. The ruling also held that the utility did not stand in the shoes of a debtor with respect to these funds because it was under no obligation to refund them to ratepayers.

Regarding expenditures associated with these conservation programs, the ruling held that those expenditures which did not expand the utility's customer base or sales and were currently deductible as ordinary business expenses under I.R.C. § 162. Those expenditures which would result in the acquisitions of new customers (*e.g.* the "Replacement of Oil Heating" and "Cogeneration Promotion and Feasibility Audit Program") would, however, have to be capitalized pursuant to I.R.C. § 263.

4. Depreciable Service Life of Natural Gas Gathering System: Private Letter Ruling 95-48-003[31]

The issue here was the proper recovery period (or depreciable service life) of pipeline system assets acquired by the taxpayer (an unregulated second tier subsidiary of a regulated public utility company) under the Modified Accelerated Cost Recovery System (MACRS). Specifically, should the gathering system pipelines be treated as "Pipeline Transportation" assets (Asset Class 46.0) subject to a 15 year recovery period, or as either "Exploration for and Production of Petroleum and Natural Gas Deposits" (Asset Class 13.2) or "Natural Gas Production Plant" assets subject to a seven year recovery period. The taxpayer purchased most of the gas shipped through this gathering system from producers in the field under "percentage of the proceeds" contracts, and obtained only a small portion of its revenues for transporting third party gas for a fee. The taxpayer delivered the gas either to its own processing plants or to third-party processing plants. The taxpayer performed some processing of the gas within its pipelines, including catching free liquids, compression, dehydration, and NGL extraction. The IRS held that the pipelines were Pipeline Transportation assets subject to the 15 year recovery period. Even though the pipelines were "used" by producers to get their gas to market, they did not qualify as production assets because the taxpayer did not have an ownership interest in the wells producing the gas. Moreover, the pipelines were not primarily dedicated to the processing of natural gas because the limited processes performed on the gas within the pipelines were ancillary to the

31. Priv. Ltr. Rul. 95-48-003 (July 31, 1995).

primary transportation purpose of the pipelines, and only a fraction of the gas was processed in plants owned by the subsidiary. In summary, for MACRS purposes, "the gathering pipelines of pipeline companies are properly associated with the pipeline transportation business activity."

II. Developments Affecting Electric Generation

B. *IRS Rulings*

1. Cogeneration Facility Owned by University is Not Unrelated Trade or Business, at Least to Extent Output Used by University: Private Letter Ruling 95-27-035[32]

This ruling concerned the status of a cogeneration plant constructed by a university whose primary purpose was to provide electricity and steam to the university to promote the university's tax exempt purpose, but which also would sell excess output to the local utility. The IRS held that the cogeneration facility is not an unrelated trade or business under I.R.C. § 513, at least to the extent the electricity and steam are sold only to the university. Accordingly, the "profits" allocable to the plant from furnishing electricity to the university were not taxable. The profits from selling surplus electricity to the local utility might, however, constitute unrelated trade or business income subject to tax under I.R.C. § 511.

III. Developments Affecting Oil and Gas Production

A. *Court Decisions*

1. Tax credits for production of tight formation gas: *Marathon Oil Company v. FERC*[33]

Two natural gas producers appealed the FERC's refusal to accept state agencies' determinations that their wells produce tight formation gas. The producers contended that the FERC's refusal to act prejudiced their chances of receiving a federal tax credit for such production. The Court of Appeals held that the producers lacked standing for the appeal because they failed to show substantial injury. As a result of the Natural Gas Wellhead Decontrol Act of 1989, the FERC eliminated incentive prices for tight formation gas produced from wells spudded or recompleted after May 12, 1990. However, in 1990 Congress instituted a tax credit for natural gas from newly drilled wells in tight formations if the gas was: (1) produced from a well drilled or facility placed in service after December 31, 1979, and before January 1, 1993; and (2) sold before January 1, 2003. The FERC continued to process initial determinations of state agencies until April 30, 1994, but discontinued such processing thereafter because the determinations had no regulatory significance.

On June 20, 1994, the FERC refused to accept two state agencies' tight formation determinations. The FERC neither reversed the designations

32. Priv. Ltr. Rul. 95-27-057 (Apr. 10, 1995).
33. 68 F.3d 1376 (D.C. Cir. 1995).

nor remanded them to the respective states. The producers appealed, contending that the FERC's inaction prejudiced their chances of receiving the tax credit. The court held that there was no reason to believe that the IRS would ignore the state decisions. The court also stated that the IRS may conceivably choose to ignore the FERC's determinations during the phase-out period of regulation. In any event, the court noted that the producers would have the opportunity to present their substantive arguments in favor of the tight formation designations if the IRS denied the tax credit.

2. Severance tax imposed on removal of oil and gas produced from lands allotted to members of Indian tribes and held in trust by U.S. Government: *Mustang Fuel Corporation v. Viola Hatch*[34]

The Cheyenne-Arapaho Tribes of Oklahoma (Tribes) imposed a severance tax on the oil and gas removed by non-members of the Tribes from allotted lands, *i.e.,* lands held in trust by the U.S. Government for individual members of the Tribes as opposed to lands held in trust for the Tribes themselves. The court upheld the tax.

Plaintiffs contended that the Tribes had exceeded their taxing jurisdiction, and in addition, one plaintiff contended that the tax violated the Commerce Clause of the U.S. Constitution. The essence of the plaintiffs' jurisdictional argument was that the "allotted" lands had been set aside for use by individual members of the Tribes and that the Tribes therefore have no jurisdiction to tax non-member activities on those allotted lands.

The court rejected the plaintiffs' argument after a careful consideration of the history of Indian law and cases construing the taxing authority of Indian Tribes. The court also rejected the Commerce Clause argument, holding that: (1) there was no need for the Tribes to tax Indian royalty owners because such interests were exempt as direct income from trust lands, and (2) the Tribes did in fact use the money to provide government services to Indians and non-Indians alike on the land.

B. *FERC Decisions*

1. Treatment of Wyoming and Colorado *Ad Valorem* Taxes Under NGPA Section 110; *Williams Natural Gas Co.*[35]

On February 21, 1995, the FERC denied rehearing of an earlier order[36] holding that Wyoming and Colorado *ad valorem* taxes qualify as recoverable add-ons to the maximum lawful price of "first sale" gas under § 110 of the Natural Gas Policy Act (NGPA). In so holding, the Commission applied the standard articulated in *Colorado Interstate Gas Co.*[37] for determining which taxes qualify for recovery under NGPA § 110. In

34. 890 F. Supp. 995 (W.D. Okla. 1995).
35. 70 F.E.R.C. ¶ 61,202 (1995).
36. *Williams Natural Gas Co.*, 69 F.E.R.C. ¶ 61,373 (1994).
37. 65 F.E.R.C. ¶ 61,292 (1993). *Colorado Interstate Gas Co.* was discussed in *Report of The Committee on Tax Developments*, 16 ENERGY L.J. 245, 253 (1995).

rejecting the Missouri Public Service Commission's (Missouri) request for rehearing, the FERC expanded on its earlier discussion of the criteria for determining if a tax is levied on the "act of severing" a resource from the earth, and whether such tax "varies in direct proportion to the amount of gas produced."[38]

COMMITTEE ON TAX DEVELOPMENTS

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38. Missouri has appealed the FERC's decision permitting recovery of Colorado *ad valorem* taxes. *Missouri Pub. Serv. Comm. v. FERC*, Docket No. 95-1138 (D.C. Cir.)(filed March 3, 1995). *See*, *Williams Natural Gas Co.*, 72 F.E.R.C. ¶ 61,275, at n. 7 (1995).