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ATTORNEY GENERAL
STATE OF ILLINOIS

January 4, 1995

FILE NO. 95-001

REVENUE:
Applicability of Gas Revenue
Tax to Interstate Sales of
Gas for Use or Consumption

Raymond T. Wagner, Jr.
Director
Illinois Department of Revenue
101 West Jefferson Street
Springfield, Illinois 62794

Dear Mr. Wagner:

I have your letter wherein you inquire concerning the continuing validity of an opinion issued by Attorney General Grenville Beardsley, dated September 28, 1959, which relates to the applicability of section 2 of the Gas Revenue Tax Act (see 35 ILCS 615/2 (West 1992)) to interstate sales of natural gas for use or consumption. Section 2 provides, in pertinent part:

> "A tax is imposed upon persons engaged in the business of distributing, supplying, furnishing or selling gas to persons for use or consumption and not for resale at the rate of 2.4 cents per therm of all gas which is so distributed, supplied, furnished, sold or transported to or for each customer in the course of such business, or 5% of the gross receipts received from each customer from such business, whichever is the lower rate as applied to each customer for that customer's

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> billing period * * *. However, such taxes are not imposed with respect to any business in interstate commerce, or otherwise to the extent to which such business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.
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"

As you know, my predecessor concluded that interstate sales of natural gas such as those you have described were not subject to taxation under section 2 of the Act. For the reasons hereinafter stated, it is my opinion that such sales continue to be excluded from taxation under that provision.

Interstate pipelines for the transportation of natural gas have been in existence for many years. According to the information which you have provided, since 1978, when Congress acted to loosen the regulation of interstate sales of gas, natural gas marketing companies have developed. Such marketing companies purchase gas outside of Illinois, and contract with pipeline companies for the transportation of the gas to Illinois customers. The customers may be either utility companies, which purchase the gas for resale, or others who purchase the gas for use or consumption. The marketing company which you have described is a subsidiary of the pipeline company with which it generally contracts, and it maintains its corporate headquarters within Illinois. The observation that the company does a great

deal of business in Illinois, however, does not change the fact that its purchases and sales of natural gas are transactions in interstate commerce.

An occupation tax was first imposed on the sale of gas for use or consumption in Illinois as part of the Public Utility Tax Act enacted in 1935 (see Ill. Rev. Stat. 1935, ch. 120, par. 440 et seq.). A second public utilities revenue act was passed in 1937 (see Ill. Rev. Stat. 1937, ch. 120, par. 468 et seq.). These statutes imposed a tax upon the gross receipts of persons "engaged in the business of transmitting telegraph or telephone messages or of distributing, supplying, furnishing or selling gas or electricity to persons for use or consumption and not for resale * * *". (Ill. Rev. Stat. 1937, ch. 120, par. 469.) Both statutes, however, provided that the "taxes are not imposed with respect to any transaction in interstate commerce, or otherwise, which transaction may not, under the constitution and statutes of the United States, be made the subject of taxation by this State". (Ill. Rev. Stat. 1935, ch. 120, par. 441; Ill. Rev. Stat. 1937, ch. 120, par. 469.) At the time that these taxing measures were adopted, Federal case law clearly prohibited a State from collecting a direct tax on gross receipts from inter-state commerce. See New Jersey Bell Telephone Co. v. State Board

of Taxes and Assessments (1930), 280 U.S. 338, 74 L. Ed. 463, 50 S. Ct. 111.

In 1945, the General Assembly divided the public utilities tax act into three separate statutes: the Messages Tax Act (Ill. Rev. Stat. 1945, ch. 120, par. 467.1 et seq.), which was applicable to the transmission of messages; the Gas Revenue Tax Act (Ill. Rev. Stat. 1945, ch. 120, par. 467.16 et seq.), which was applicable to the selling of natural gas; and the Public Utilities Revenue Act (Ill. Rev. Stat. 1945, ch. 120, par. 468 et seq.), which taxed the business of selling electricity. At the time of the revision of the Public Utilities Tax Act, Federal case law continued to prohibit a State from taxing gross receipts derived from interstate commerce. See Joseph v. Carter and Weekes Stevedoring Co. (1947), 330 U.S. 422, 432-34, 91 L. Ed. 993, 1003-04, 67 S. Ct. 815, 821.

In 1955, the Illinois Supreme Court specifically ruled that the Gas Revenue Tax Act did not impose a tax upon the owner/operator of an interstate gas pipeline with respect to its gross receipts from sales of gas for use or consumption in Illinois. (Mississippi River Fuel Corp. v. Hoffman (1955), 4 Ill. 2d 459, cert. denied, Wright v. Mississippi River Fuel Corp., 349 U.S. 935, 99 L. Ed 1264, 75 S. Ct. 789 (1955).) In so holding, the court relied upon Federal authorities prohibiting such a tax, including Puget Sound v. Tax Commission (1937), 302 U.S. 90, 82

L. Ed. 68, 58 S. Ct. 72. Justice Schaefer, in dissent, however, cited other Federal authorities which permitted some taxes related to business activities in interstate commerce, perhaps foreshadowing subsequent developments in commerce clause law. Memoranda which I have received from the Department and from counsel for a gas marketing company reveal a disagreement as to the meaning of the decision in Mississippi River Fuel Corp. v. Hoffman and the exemption language of section 2 of the Act. It is the position of the Department, as expressed clearly by Justice Schaefer (Mississippi River Fuel Corp. v. Hoffman (1955), 4 Ill. 2d 468, 479), that the interstate commerce exemption in section 2 exempts only those transactions which the State is precluded by the Federal Constitution or Federal statutes from taxing. The gas distribution company, on the other hand, argues that the exemption language exempts from taxation all revenue from interstate commerce (as well as any other which the State may be prohibited from taxing), and that the decision in Mississippi River Fuel v. Hoffman merely determined that the sales in issue were in fact in interstate commerce. For the reasons discussed below, I do not believe that it is necessary to resolve these differences in interpretation in order to determine the applicability of the tax.

In Complete Auto Transit v. Brady (1977), 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076, the Supreme Court specifically

overruled its prior holding that a State tax on the privilege of doing business is per se unconstitutional when it is applied to interstate commerce. Instead, the court held that such a tax does not violate the commerce clause when applied to an interstate activity which has a substantial nexus with the taxing State, which is fairly apportioned, which does not discriminate against interstate commerce, and which is fairly related to services provided by the State. Subsequently, based upon Complete Auto Transit v. Brady, the court effectively overruled Puget Sound v. Tax Commission, upon which our supreme court relied in deciding Mississippi River Fuel Corp. v. Hoffman. (Washington v. Association of Washington Stevedoring Companies (1978), 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388.) Thus, under current Federal case law, a tax such as this could constitutionally be applied to some transactions in interstate commerce.

Section 2 of the Gas Revenue Tax Act has been amended four times since its enactment in 1945. The changes have related to the rate of the tax, the manner of computing the tax, and the time frames for its collection. The amendments have not purported to change or redefine the transactions which are subject to taxation. The language exempting interstate transactions has remained essentially unchanged since its original enactment.

The Illinois Supreme Court has had occasion to revisit the interstate transaction exemption language as it appeared, in identical form, in the Messages Tax Act in Illinois Bell Telephone Co. v. Allphin (1982), 93 Ill. 2d 241. In that case, the Department argued that the language in question is flexible and taxes interstate service to the extent that the Federal constitutional law may from time to time permit. The court rejected that argument, stating:

" * * *

> We do not find the Department's argument that the purview of the tax expands with removal of constitutional limitations on a State's right to tax interstate transactions sound. The scope of a statute is fixed by the conditions which exist and the law which prevails at the time the statute is adopted. This court has observed that '[s]tatutes are to be construed as they were intended to be construed when they were passed.' (Emphasis added.) (People v. Boreman (1948), 401 Ill. 566, 572; see People v. Day (1926), 321 Ill. 552.) Some statutes utilize words that clearly envision that their operation and scope are to change with changes in the underlying law without the need for further approval by the legislature. The Messages Tax Act is not such a statute. It does not expressly provide that changes in the constitutional law by judicial decision or constitutional amendment which authorize the General Assembly to do what it previously was restricted from doing should expand the reach of the statute without further legislative action. On the contrary, as we read the statute, the legislature would then have to

> decide whether it wished to exercise its expanded authority.
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> * * * "
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> Illinois Bell Telephone Co. v. Allphin (1982), 93 Ill. 2d 241, 255.

In view of the joint history and parallel language of the Messages Tax Act and the Gas Revenue Tax Act, there is no basis upon which to distinguish between the two provisions with respect to the court's holding in Illinois Bell Telephone Co. v. Allphin. Absent appropriate action by the General Assembly, section 2 must be construed as it was intended to be construed when it was enacted, and as it was construed by the court only a few years later in Mississippi River Fuel Corp. v. Hoffman.

In 1992, the General Assembly adopted section 39c-2 of the Civil Administrative Code (20 ILCS 2505/39c-2 (West 1992)), which provides:

> "It is the intent of the General Assembly that provisions in any Illinois tax statute that restrict application of the statute by stating substantially as follows:
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> > 'such taxes are not imposed with respect to any business in interstate commerce, or otherwise to the extent to which such business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State'
>
> shall be construed to preclude taxation of only businesses not subject to taxation under the latest interpretation of the United States Constitution and statutes of the United States."

The language which is the subject of this section is identical to that found in section 2 of the Revenue Gas Act.

The meaning and effect to be accorded to this new section is problematic. It is clear that the General Assembly cannot, in keeping with the principle of separation of powers, retroactively change the construction of a statute which has been otherwise construed by the courts. (Bates v. Board of Education (1990), 136 Ill. 2d 260, 267.) As stated by the court therein:

> " * * *
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> * * * In the context of the interplay between the legislature and the judiciary, this [separation of powers] provision has been interpreted to mean that it is the legislature's role to make the law, and the judiciary's role to interpret the law. [Citation.]
>
> When the appellate court interpreted section 17--2.11a, the court's explication of the statute became, in effect, a part of the statute. [Citation.] While the General Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent [citation], it cannot effect a change in that construction by a later declaration of what it had originally intended. [Citation.]
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> * * * "

Therefore, section 39c-2, which became effective July 1, 1992, cannot constitutionally have any effect upon the law as it was construed in Mississippi River Fuel Corp. v. Hoffman and Illinois Bell Telephone Co. v. Allphin, which were decided prior to that date.

Section 39c-2 does not attempt to amend the Gas Revenue Tax Act, or any other statute to which it might apply. It merely creates a rule of construction. It attempts to construe a statute, already construed by the supreme court, in a manner contrary to the court's construction. The section does not change the intent of the General Assembly at the time that the Gas Revenue Tax Act was enacted, and it does not directly amend that statute. General rules of construction are not observed when they are inconsistent with the intent of a specific enactment. (People v. Lindheimer (1939), 371 Ill. 367, 376.) In my opinion, section 39c-2 has no effect on the construction of the interstate commerce exemption in section 2 of the Gas Revenue Tax Act, as construed by the Illinois Supreme Court in Mississippi River Fuel Corp. v. Hoffman, and, by analogy, in Illinois Bell Telephone Co. v. Allphin.

I will not attempt to predict the validity of any further legislation which may purport to impose a tax upon such transactions. I note that, following the decision in Illinois Bell Telephone Co. v. Allphin, the General Assembly enacted the

Telecommunications Excise Tax Act (35 ILCS 630/1 et seq. (West 1992)), which replaced the Messages Tax Act, and imposed a tax upon the transmission of interstate messages. That Act has been upheld. (Goldberg v. Johnson (1987), 117 Ill. 2d 493.) A similar revision of the Gas Revenue Tax Act is within the authority of the General Assembly to enact, should it choose to do so.

Respectfully yours,

ROLAND W. BURRIS
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