7452 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 1, 2003

The Honorable Glenn F. McConnell
Chairman, Senate Judiciary Committee
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have raised concerns regarding the constitutionality of S.C. Code Ann. Section 40-82-240(A). You set forth the following facts by way of background:

> This week, I learned from a constituent regarding the provisions of Section 40-82-240(A) of the South Carolina Code annotated dealing with LPG storage capacity requirements within close proximity to the service area. The law goes on to state that a waiver can be granted. Mr. Henry Minshew of M & M Oil, Inc. d/b/a Fas Gas brought this to me in light of the refusal of the LPG Board to grant him a waiver. At first, I was stunned that he was denied a waiver, since the storage tank he uses is right next to him and he had been operating that way for many years, including prior to this law being passed. In other words, he had an agreement to use the storage tank of the gas company next door to him to service his customers.
>
> I asked him why there was such a 30,000-gallon storage requirement. He explained that this was put in to prevent out-of-state suppliers along the borders from servicing consumers in South Carolina. A review of the statute says a dealer must have storage capacity of a minimum of 30,000 water gallons, but the law fails to say this capacity must be owned, must be exclusive, and/or must bear a relationship to the number of customers serviced in all cases. The statute does say if the capacity is leased, it must be exclusive. This Board has interpreted 40-82-140(A) as preventing a waiver where a dealer such as M & M uses tanks under agreement and only has about 95 customers in the area.
>
> Since the statute's capacity for storage requirement appears to me to not be related to some ratio to the public served, it suggests regulation to limit competition. It appears to me to be an unreasonable restraint of trade, and limits the choices the consumer has in a market as well as prevent competitive service along our borders,

Request Letter

thus interfering in interstate commerce. Now, a South Carolina owned private business is losing its existence because of this over regulation.

I intend to try to amend this law in the next session of the General Assembly to delete this requirement and/or amend it so that storage capacity bears a direct relationship to the number of people served in the event the law is constitutional. My constituent appears to be losing his business because of a denial based on a law which is unconstitutionally vague and which unduly restrains interstate commerce and local competition. Is such a storage requirement constitutional without bearing some relationship to the number of people served, the immediate protection of the people in the vicinity of the physical location, or some other specific operating procedure to protect the employees of the company? I do not believe just trying to insure adequate supply in times of a shortage or to deter out-of-state supplies constitutionally justifies such a vague law which diminishes competition and thus limits available suppliers. We don't have laws, for instance, that require food markets or distributors of food products to have so much storage capacity in order to sell food to the public. The marketplace will take care of itself if not over regulated.

Additionally, I point out that though the statute requires the capacity, it does not require the supplier to keep it full or three-quarters full or whatever amount full – only to have it. How can that guarantee supply?

If such a requirement is constitutional, then I will probably proceed to draw legislation to link capacity to the number of customers served and require that the tank be kept filled generally to that capacity. The law would thus be fair and serve a public purpose. If the law is unconstitutional, then I hope to wipe it off the books or prevent the LPG industry from passing a corrective amendment so the marketplace can operate freely for the public and competition can grow.

I also note that in Section 40-82-200, it says a person who violates a regulation of the Board is guilty of a misdemeanor and upon conviction must be fined one thousand dollars nor more than two thousand dollars or imprisoned for not less than ninety days nor more than one year. I believe that only the General Assembly can, by law, specifically make an action a criminal offense and that this is an unconstitutional delegation of legislative authority to the LPG Board to make regulation criminal laws. Is this constitutional as the statute is written?

Law / Analysis

S.C. Code Ann. Section 40-82-5 et seq. regulates liquid petroleum gas. Section 40-82-10 establishes the Liquified Petroleum Gas Board. In addition, Section 40-82-20 defines certain terms used in the Act including the term "dealer" which is defined by § 40-82-20(4) as

> ... a person engaging in the installation of liquified petroleum gas systems or in the manufacture, distribution, sale, storing, or transporting by truck, tank trailer, or container of liquid petroleum gases or engaging in installing, servicing, repairing, adjusting, disconnecting, or connecting appliances to liquified petroleum gas systems and containers.

"Liquified petroleum gas" is defined in subsection (6) as "material composed predominantly of hydrocarbons or mixtures of hydrocarbons, including propane, propylene, butanes (normal butane or isobutane), and butylenes."

Section 40-82-30 makes it unlawful to manufacture, distribute, sell, store or transport liquified petroleum gases or install, service or repair liquified gas systems without a license. Pursuant to § 40-82-70, the Liquified Petroleum Board is empowered to enforce the laws governing liquified petroleum gases and to investigate complaints and impose sanctions for actions deemed "hazardous to the public safety" or for violations of laws or regulations applicable to the liquified petroleum gas industry. A violation of Chapter 81 of Title 40 constitutes a misdemeanor subjecting a violator to a fine and/or imprisonment.

Section 40-82-240 imposes certain minimum storage capacities upon a liquified petroleum gas dealer in South Carolina. This Section provides:

> (A) A dealer conducting business in the State:
>
> (1) must have storage capacity of a minimum of 30,000 water gallons located within close proximity to the area to be served;
>
> (2) whose headquarters are outside of the State, must have storage capacity located in the State within close proximity to the area served in the State.
>
> (B) The board may waive the minimum bulk storage facility requirement of subsection (A).
>
> (C) If the storage capacity required by subsection (A) is leased, the storage capacity must be dedicated to the exclusive use of the lessee and must include separate piping and loading – unloading facilities.

We begin with the legal proposition that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within ... [its] constitutional power despite the fact that, in practice, ... [its] laws result in some inequality ...." State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office may strike down an act of the General Assembly as unconstitutional. While this Office may comment upon what we deem an apparent unconstitutionality, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

A recent case decided by the Eighth Circuit Court of Appeals, R & M Oil and Supply, Inc. v. Saunders, 307 F.3d 731 (8th Cir. 2002) is clearly analogous to the situation which you present. In R & M, a Missouri statute requiring certain minimum storage capacity for propane gas was challenged on grounds that the statute violated the Commerce Clause of the federal Constitution.

The Missouri statute required that "persons engaged in the bulk sale of propane at retail ... maintain and operate a minimum storage capacity of 18,000 gallons in the State." Pursuant to this statute, there was no obligation that retail dealers "keep an actual propane reserve" or that "the retailer actually use the tank." Id. Compliance with the statute cost retailers $25,000 for the tank's purchase and installation and an additional cost of between $10,000 and $35,000 for the land upon which the tank was placed. A further cost for maintenance and upkeep of the propane storage area cost the dealer about $500 annually.

Missouri contended that the purpose of the statute was to avoid shortages and disruptions of propane during the winter. It was shown that as a result of high demand for propane during winter months, retailers often experienced substantial delays at the pipeline terminals while waiting for their "allocation" of propane. As a result, "retailers must either travel a greater distance to another pipeline terminal or forego filling their customers' orders altogether." Id.

The Eighth Circuit articulated the constitutional standard for violations of the Commerce Clause as follows:

> [t]he commerce clause of the United States Constitution grants to Congress the power "[t]o regulate Commerce among the several States." Art. I, § 8, cl. 3. Even where Congress fails to legislate on a matter affecting interstate commerce, the courts have recognized that a "dormant implication of the Commerce Clause prohibits state ... regulation ... that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" General Motors Corp. v. Tracy, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (quoting

> Reeves, Inc. v. Stake, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980)). When a claim is made that a state statute violates the dormant commerce clause, we first determine whether the "law in question overtly discriminates against interstate commerce." Hampton Feedlot [, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001)], 249 F.3d at 818. If it does, then the law is unconstitutional unless the state can demonstrate, "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Id. (quoting C & A Carbone, Inc. v. Town of Charleston, 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994)). A statute "overtly discriminates" if it is discriminatory on its face, in its purpose, or through its effects. U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1067 (8th Cir. 2000). For purposes of this analysis, "'discrimination'" means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Id. [quoting Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)].

307 F.3d at 734.

The plaintiff conceded and the Eighth Circuit found that the Missouri statute establishing minimum storage requirements for propane retailers "is facially neutral" in that it required "both in-state and out-of-state businesses to maintain and operate a Missouri storage facility." Id. However, R & M argued that the statute has a "discriminatory effect on out-of-state distributors." Id., at 735. Evidence presented showed that distributors of propane likely have their operational tanks where they are headquartered. Thus, argued R & M, out-of-state distributors "must realistically maintain two storage facilities under [the Missouri statute] ... while in-state distributors must maintain only one." However, the Court concluded "that R & M has failed to prove that non-Missouri distributors must, as a practical matter, maintain more than one storage facility to operate in Missouri." Moreover, in the Court's view, even if such showing had been made, there was "no basis for concluding that this places out-of-state distributors at a competitive disadvantage vis-a-vis distributors headquartered in Missouri." Id.

Even so, the Eighth Circuit recognized that even if the Missouri statute did not "overtly discriminate against interstate commerce," a statute "may still violate the dormant Commerce Clause if the local interests that it serves do not justify the burden that it imposes upon interstate commerce." 307 F.3d at 735 (quoting U & I Sanitation, 205 F.3d at 1069.) Quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the R & M Court noted that it must determine whether the local interest "'could be promoted as well with a lesser impact on interstate activities' to help us determine whether 'the burden imposed on [interstate] commerce is clearly excessive in relation to putative local benefit.'" Id.

The Eighth Circuit first examined "the local benefit" of the Missouri statute. In the Court's view, the state's argument that the statute is a health and safety regulation designed to protect those

who rely on propane for home heating was tenuous. Articulating its doubt more fully, the Court questioned

> ... whether the Missouri statute will have any measurable tendency to prevent propane shortages, because the State presented no evidence to the district court that the propane storage capacity in existence before the passage of the statute was insufficient. In addition, we agree with the district court that the shortages that concerned the state stemmed "primarily from the pipeline delivery system as opposed to any claim of inadequate propane storage capacity." Finally, since § 323.060.1 does not actually require distributors to keep propane in the required tanks, as the district court found, the state has been unable to "identify any actual benefit from the statute as currently written."
>
> Even if we assume that § 323.060.1 is designed to further Missouri's legitimate interest in protecting the health and safety of its citizens, we are of the view that the local benefit actually derived from the statute is minimal or nonexistent. Like the district court, we find it most difficult to see how this statute will protect Missourians from propane shortages. It is even conceivable that the statute will have precisely the opposite effect. Given the choice between investing in a Missouri storage facility or not doing business in Missouri, R & M might well conclude that there is not enough existing or potential business in Missouri to justify the increased costs incurred by complying with Missouri law. Thus, Missouri citizens could very easily lose the benefit of R & M's existing storage capacity, some 60,000 gallons worth, located just miles across the border.

Id., at 735-736.

The Eighth Circuit thus "[f]inding relatively little local benefit in the statute, as written," next proceeded to determine "the statute's burden on interstate commerce." Id., at 736. In the Eighth Circuit's view, such burden imposed by the Missouri amendment was significant. In the opinion of the Eighth Circuit, compliance with the recently enacted amendment would now impose a substantial hardship on propane distributors doing business in Missouri. The Court explained that

> [t]he financial burden imposed upon R & M by the Missouri statute – an initial investment of $35,000 to $60,000 – is, standing alone, not in itself inconsequential. In comparing the putative local benefit of the statute to the burden imposed on commerce, moreover, we are not constrained (indeed, we are not allowed) to look only at the burden on R & M. Instead, we must look at the cumulative effects of the Missouri statute on all propane distributors. See U & I Sanitation, 205 F.3d at 1069. Although there is nothing in the stipulated record that indicates the number of propane distributors doing business in Missouri without in-state storage capacity, we think that it would be reasonable to assume that R&M is not alone.

Moreover, in the view of the Eighth Circuit, the burden on interstate commerce would increase considerably if other states were to join Missouri in enacting a similar provision requiring all propane dealers to maintain an in-state storage capacity. The Court observed that

> [i]n addition to the cumulative effects of the Missouri statute, we must also consider the "interstate effect on the [propane] market if several jurisdictions were to adopt similar [statutes]." Id. at 1069; see also Healy v. Beer Inst., 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering ... what effect would arise if not one, but many or every, state adopted similar legislation."). Again, there is little evidence in the record to suggest how many distributors would find themselves in R & M's position if each state were to adopt statutes like Missouri's. But we would be turning a blind eye to reality if we did not acknowledge that such a situation would create a substantial burden on interstate commerce along the borders of states throughout the country. In any event, a precise aggregation is not necessary. We think that there is clearly a burden substantial enough to outweigh the de minimis putative local benefit of the law.

Id.

The final step in the Eighth Circuit's analysis was to determine whether the local interest could have been promoted as well if the State imposed a lesser burden upon interstate commerce. The Court quoted the U.S. Supreme Court's admonition in Pike v. Bruce Church, supra, a case in which the Supreme Court had struck down an Arizona regulation prohibiting a grower of high quality cantaloupes from transporting uncrated cantaloupes from its Arizona ranch to a nearby California city for packing and processing. Pike cautioned that

> [t]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.

397 U.S. at 145. In the opinion of the Eighth Circuit, the standard enunciated in Pike doomed the Missouri statute. Concluded the R & M Court:

> [l]ike the regulation in Pike, Missouri's statute requires business operations that had evidently been performed efficiently outside the state to be performed in state, at an increased cost. And Missouri had less burdensome alternatives available to it at the time it enacted § 323.060.1. For instance, if there was a serious concern that propane distributors did not have enough storage capacity to meet their customer's demand during times of shortage (and there is no evidence that storage capacity was in short

> supply), Missouri could have required those distributing propane within the state to have a minimum storage capacity within a reasonable specified distance from (rather than in the same state as) their customers. This would have ensured an adequate storage capacity without requiring that business operations be performed on the Missouri side of the borders. There are no doubt other alternatives that also would impose less of a burden on interstate commerce than the statute at issue here.

Id. Thus, the Court "[i]n accord with the presumptions set forth in Pike," concluded that the Missouri statute did not provide "the least burdensome means of promoting the state interest." Accordingly, the District Court's issuance of an injunction against the statute's enforcement was affirmed.

Section 40-82-240 is very similar to the Missouri statute struck down in R & M. The statute requires any dealer to have "a storage capacity of a minimum of 30,000 water gallons located within close proximity to the area being served." The term "close proximity" is not defined. However, it is clear that out-of-state dealers (those whose headquarters are outside of the State) "must have storage capacity located in the State within close proximity to the area served in the State." Thus, the out-of-state dealer must maintain a considerable storage capacity in this State in close proximity to the service area. This is the same requirement imposed by the Missouri statute which the Eighth Circuit ruled to be unconstitutional.

Other parallels to the Missouri statute struck down by the Eighth Circuit are telling as well. As you indicate, nothing in § 40-82-240 requires the dealer to "keep an actual propane reserve and there is no requirement that the [dealer] ... actually use the tank." R & M, 307 F.3d at 731. Moreover, § 40-80-240's requirement that dealers maintain a storage area of 30,000 gallons is almost twice as large a capacity as was required in R & M. Presumably, therefore, the cost of maintenance would be considerably greater upon out-of-state dealers than even that imposed by the unconstitutional Missouri statute. Moreover, the State's interest in avoiding shortages in harsh weather may be less for South Carolina than even Missouri could demonstrate.

The Eighth Circuit's analysis, set forth in detail above, would, therefore most likely be controlling if the issue were litigated. While the State undoubtedly could demonstrate the promotion of some benefit to the State, a court, following the reasoning of the Eighth Circuit, might well conclude that the statute's burden on interstate commerce was substantially greater and that the State had not chosen the least burdensome means of promoting the State's interest. If the statute were challenged, the State would have to present evidence to the court demonstrating that South Carolina's interest in requiring in-state the storage capacity is greater than the burden placed upon interstate commerce by the statute. In addition, the State would have to show that there was no less burdensome alternative available for the promotion of its interest. This will be a very difficult task in light of the R & M case.

Conclusion

Of course, § 40-82-240 must be presumed constitutional and this statute must continue to be enforced unless set aside by a court or repealed by the General Assembly. However, we advise that the Eighth Circuit Court of Appeals has enjoined a similar Missouri statute as imposing an unconstitutional burden upon interstate commerce. It is our opinion, therefore, that § 40-82-240 is constitutionally suspect and would in all probability be declared unconstitutional by a court as violative of the Commerce Clause

Yours very truly,

Henry McMaster

HM/an