No. 07-1554

IN THE

Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

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BRIEF *AMICI CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AND THE COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an Ohio tax that levies a rate more than three times higher on interstate natural gas pipeline property than on property that belongs to local natural gas distribution companies violates the Commerce Clause bar against discriminatory taxes, and undermines federal natural gas policy, where the interstate and local companies offer directly competing services in some (but not all) of the markets in which they operate.

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INTEREST OF *AMICI CURIAE* [1]

The Interstate Natural Gas Association of America ("INGAA") and the Council On State Taxation ("COST") submit this brief *amici curiae* in support of the petition pursuant to the Court's Rule 37. Petitioner and Respondent consent to the filing.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than INGAA made a monetary contribution to the preparation or submission of this brief.

INGAA is a trade organization that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate pipelines and interstate natural gas storage companies operating in the United States, including Petitioner. Its members transport over 95 percent of the nation's natural gas through a network of over 200,000 miles of pipelines. INGAA pipelines are subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w.

Consistent with Congressional objectives in several major deregulatory initiatives, a competitive nationwide market for natural gas has evolved, permitting customers to purchase gas at the wellhead, and have it transported and stored on interstate pipelines and intrastate local distribution companies ("LDCs"). Within that newly competitive "wellhead-to-burnertip" market, INGAA's members often compete among themselves and with LDCs to transport and store natural gas. State taxing authorities often find interstate pipelines, with their substantial pipeline infrastructure assets literally sunk in state soil, attractive targets for discriminatory taxes. The additional tax burden handicaps interstate pipelines' ability to compete with the LDCs in transporting gas to customers.

Several INGAA members have a direct interest in the outcome of this case. Like petitioner, they provide interstate pipeline service into and through Ohio that competes with the tax-favored LDCs' comparable natural gas transportation and storage services, and are competitively disadvantaged as a result.[2]

In addition, all INGAA members have an interest in the outcome of this case. The decision below misreads this Court's dormant Commerce Clause precedent in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), to create what amounts to a safe harbor for states to discriminate against interstate pipelines in favor of their LDCs. The simple fact is that the regulatory landscape for gas delivery is significantly different than it was in 1997. The court below misapplied *General Motors* when it failed to give appropriate effect to competitive changes in both federal and Ohio regulation — changes that make it unnecessary to continue according special deference to Ohio LDCs. Allowing the decision below to stand will reinforce discriminatory state taxes already in place (*see* Appendix), encourage other states to follow suit, and may discourage potential natural gas transportation competition from interstate pipelines in end use markets for both large and small customers. INGAA thus has a substantial interest in how the Commerce Clause is applied to discriminatory state tax regimes, particularly where, as in this Ohio case, the tax-favored local companies compete with INGAA's interstate pipeline members.

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional busi-

[2] The other interstate pipelines that are (or will be) directly affected by Ohio's discriminatory property tax are ANR Pipeline Company, Dominion Transmission, Inc., Panhandle Eastern Pipeline Company, Rockies Express Pipeline, LLC, Tennessee Gas Pipeline Company, Texas Eastern Pipeline Company, Texas Gas Transmission, LLC, and Trunkline Gas Company, LLC.

ness entities. COST represents more than 600 of the largest multistate businesses in the United States, companies from every industry doing business in every state.

Many of COST's members are engaged in business in the State of Ohio and thus have a particular interest in the ultimate disposition of the tax scheme at issue in this case. In addition, the entire membership of COST has a vital interest in ensuring that states do not impede, through discriminatory property taxes, the rights of all businesses to engage in commerce in the national market. The Ohio tax scheme at issue in this case, like similar schemes currently in place in other states, impedes sellers' access to the national market by imposing higher property taxes on out-of-state sellers. That is precisely the sort of parochial favoritism that COST opposes, and that the Commerce Clause forbids.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio's personal property tax regime assesses natural gas pipeline property at 88 percent of its value if it is owned by an interstate pipeline company and 25 percent if it owned by an LDC. In upholding this disparity against Petitioner's Commerce Clause argument, the Ohio Supreme Court relied upon *General Motors, supra,* where this Court held that an Ohio sales tax that assessed higher rates for sales by interstate natural gas marketers than for sales by LDCs did not run afoul of the Commerce Clause because the LDCs and the marketers were not "similarly situated." App. 19a-30a. In *General Motors*, the Court acknowledged that there were markets in which the LDCs and marketers competed (e.g., retail sales to large industrial customers) and a market in which they did not (i.e., a captive market where LDCs provided bundled retail sales and delivery services to residential and small commercial customers). 519 U.S. at 303. Given a long history of Congressional deference to the States' regulation of bundled retail sales and distribution, the Court decided to give greater weight to the captive LDC market, and accordingly treated the marketers and LDCs as "dissimilar" for Commerce Clause purposes. *Id.* at 303-04.

Policies promoting competition at the federal level and in Ohio have altered the foundation underlying *General Motors* and its applicability to this case. *General Motors* was premised on a federal regulatory scheme that left intact the state model of vertically integrated, monopolistic LDCs. Since 1997, federal policies have promoted full participation of LDCs in the deregulated market for interstate transportation of natural gas. More importantly, the pivotal consideration behind *General Motors* — deference to traditional State protection of their LDC markets — is no longer operative. Ohio, like many other states, has since adopted a "retail choice" program under which its LDCs no longer act as sole suppliers of bundled sales and distribution to a captive customer base. *See* Pet. at 6-9. Indeed, "Ohio has the second largest program with about 48 % of all eligible households participating and enrollment levels of nearly 1.4 million." Energy Information Administration, Dep't of Energy, *What Are Natural Gas Customer Choice Programs?* at 1-2 (June 2008), available at http://tonto.eia.doe.gov/energy_in_brief/natural_gas_customer_choice.cfm (hereinafter "EIA-*Customer Choice Programs*"). As a result, there is substantial head-to-head competition, sanctioned by Ohio legislation, between LDCs and natural gas marketers for the formerly protected LDC market for bundled gas sales and transportation, including for small volume customers.

The court below erred in grounding its decision on the fact the interstate pipelines do not themselves compete in the LDCs' residential and small customer market. The source of the competition is not pertinent to the *General Motors* reasoning. The important point is that the LDCs' residential/small customer market no longer enjoys Ohio-sanctioned protection from competition. In these circumstances, there is no longer a reason for this Court to stay its hand in applying traditional Commerce Clause relief to eliminate discrimination, particularly where the interstate pipelines and LDCs compete in the markets for storage service and transportation to large customers.

Review in this case is important because Ohio's misapplication of *General Motors* creates a safe harbor that invites and perpetuates state tax discrimination against interstate natural gas pipelines. There is an inherent danger of similar discriminatory taxation, given the nature of the natural gas pipeline industry. Large investments in interstate pipeline projects cannot feasibly be undone; they are literally sunk, and easy targets for discriminatory state taxes.

ARGUMENT

OHIO'S PROPERTY TAX VIOLATES THE COMMERCE CLAUSE BAR AGAINST DISCRIMINATORY TAXES AND UNDERMINES FEDERAL NATURAL GAS POLICY

A. The Court Below Misapplied *General Motors v. Tracy*.

The dormant Commerce Clause "prohibits economic protectionism — that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Department of Rev. of Kentucky v. Davis*, 128 S.Ct. 1801, 1808 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988) (internal quotes)). Application of the dormant Commerce Clause carries out the Framers' purpose to "preven[t] a State from . . . 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." *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330-31 (1996) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 180 (1995)).

Much of the Court's Commerce Clause jurisprudence is directed at state taxation, and "the Court has scrutinized claims that a tax discriminates against interstate commerce with considerable vigilance." Jerome R. Hellerstein & Walter Hellerstein, *2 State Taxation*, ¶4.13 (2000). *See, e.g., South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Fulton, supra*, 516 U.S. 325 (1996); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

It is undisputed that Ohio imposes a discriminatory tax, assessing LDC pipeline property at 25 percent of value, and interstate pipelines at 88 percent. Pet. App. 2a.[3] Under traditional Commerce

[3] The tax is imposed on "public utility" property. In 2000, Ohio reduced the assessment rate on a category of public utilities ("natural gas companies") from 88 to 25 percent. Pet. App. 1a-2a. In the decision below, the court rejected Petitioner's argument that its interstate pipeline meets Ohio's definition of

Clause jurisprudence, "if a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Davis*, 128 S.Ct. at 1808 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *accord*, *United Haulers v. Oneida-Herkimer Solid Waste Mgmt.*, 127 S.Ct. 1786 (2007). In order to make out a case of discrimination, there is a threshold showing that the disfavored interstate entity and the favored in-state entity are "similarly situated" in the competitive market, i.e., that they are in competition. *General Motors*, 519 U.S. at 298-300. Absent such a showing, the dormant Commerce Clause objective of preserving a competitive national market could not be vindicated. *Id*. at 299-300.

In *General Motors*, the Court rejected a Commerce Clause attack on an Ohio sales tax that discriminated against interstate natural gas marketers in favor of Ohio LDCs. While the Court acknowledged that the interstate marketers and LDCs competed in certain markets (e.g. for large industrial customers), it was undisputed that the marketers were not in competition to serve the LDCs' captive market for bundled sales and local distribution service to residential and small retail customers. *Id.* at 302-03. The Court acknowledged that where entities compete in some markets but not others "there is no *a priori* answer" to whether the two entities should be treated alike for dormant Commerce Clause purposes, and that "a choice is possible[.]" *Id*. at 304; *see also id.* at 307 (referring to the "choice" before the Court). After reviewing the prevailing regulatory context, the Court

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a "natural gas company." *Id*. at 5a-15a. The result is that Petitioner's and other interstate pipelines' property is assessed at 88 percent while LDCs are eligible for the reduced 25 percent rate applicable to "natural gas companies."

deferred to "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers[,]" *id*. at 306, and concluded that the marketers and LDCs "should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause." *Id.* at 310. "First and most important" to the Court's decision was its concern that an order barring the tax discrimination in favor of LDCs would "imperil the delivery by regulated LDCs of bundled gas to the noncompetitive market." *Id*. at 304.

In rejecting Petitioner's Commerce Clause argument, the court below misapplied *General Motors*. Petitioner pointed out that since *General Motors* was decided, Ohio has implemented "retail choice" legislation that required LDCs to unbundle their gas sales, transportation/distribution, and storage services, thus affording their customers the freedom to purchase gas on the open market with the LDC serving as a common carrier. *See* Pet. at 6-8; *see also* EIA-*Customer Choice Programs*, *supra*, page 5. While acknowledging that the LDCs thus now face competition in the formerly captive residential and small business market, the court held it dispositive under *General Motors* that the interstate pipelines did not themselves compete in those markets:

> [*General Motors*] determined that LDCs and independent marketers were not "similarly situated" for dormant Commerce Clause purposes because they did not compete in the LDCs' core residential market, and eliminating any tax differential between the LDCs and marketers would not alter the competitive nature of this market. Gen. Motors Corp., 519 U.S. at 297-303,

> 117 S.Ct. 811, 136 L.Ed.2d 761. Columbia has not shown in this case that it competes with LDCs in the residential market or that it would compete in this market should we rule in its favor.

Pet. App. 28a; *see also id*. at 29a ("In conclusion, Columbia's failure to show that it is in direct competition with Ohio's LDCs in the residential market proves fatal to its dormant Commerce Clause claim.").

This is a misreading and misapplication of the *General Motors* decision. The important point of the change in state regulation that opened up LDCs in Ohio to competition in their formerly captive markets is *not* that interstate pipelines do not compete in that market sector, but that *Ohio no longer deems it necessary to preserve the traditional protected monopoly operations of its LDCs from competition in general*. To be sure, as Petitioner acknowledges (Pet. 3), LDCs' "natural monopoly" in municipal distribution will almost always forclose interstate pipelines from competing for natural gas transportation service to the LDCs' residential customer base, but others (gas marketers affiliated with other LDCs and independent marketers) can and do compete with LDCs for commodity sales in this market, using the LDCs' unbundled distribution service to deliver the gas. Pet. App. 27a. More importantly, interstate pipelines continue to compete with the LDCs to serve the other markets — transportation to large industrial and electric power end users, storage customers, and customers of natural gas gathering and production services. Pet. App. 25a.

Given *General Motors'* observation that there is no *a priori* answer to the proper application of the dormant Commerce Clause in a mixed market situation (*General Motors*, 519 U.S. at 304), i.e., where the LDC operates in monopolistic and competitive markets at the same time (*see id*. at 314 (Stevens, J., dissenting)), the fact that LDCs in Ohio no longer have that monopolistic market undermines reliance on the *General Motors* reasoning here. The ground for the Court's "choice" in *General Motors* — the concern that a Commerce Clause-based discrimination remedy would imperil Ohio's protection of its LDCs residential consumers — has been eliminated. If the Ohio legislature is prepared to expose its LDCs to the market, there is no reason for special protection from the courts.

B. Evolution of Federal and State Regulatory Policy Since *General Motors* Eliminates the Rationale for Deference to Ohio LDCs in Remedying Discrimination that Violates the Commerce Clause.

The Court is already familiar with the evolution of the natural gas industry up to 1997, from the original clean line between separately regulated state and federal spheres created under the NGA in 1938, to the more recent Congressional legislation and FERC initiatives designed to create a competitive nationwide market for natural gas and its transportation. As more fully set out in *General Motors*, 519 U.S. at 283-85, 288-97, the federal program has transformed the industry by deregulating wholesale prices, and promoting a competitive market for transportation of gas by both interstate and intrastate pipelines.

In *General Motors*, the Court recounted these developments, and observed that "the question raised by this case is whether the opportunities for competition between marketers and LDCs in the noncaptive market requires treating marketers and utilities as alike for dormant Commerce Clause purposes." 519 U.S. at 303. As discussed above, the Court ultimately declined to offer a Commerce Clause remedy for the discriminatory tax out of deference to the traditional State protection of LDCs' captive residential customer base.

Petitioner has shown how the decision below permits continued discrimination against it and other interstate pipelines, contrary to the Congressional purposes underlying federal decontrol legislation and FERC's implementation of it. Pet. 23-29. Another facet of this federal program pertinent here is FERC's approach to bypass cases, where customers served by LDCs seek a direct connection to an interstate pipeline. At one time, FERC had a policy preference that led it to disallow such connections, principally out of the same concern that led this Court to defer to the LDCs in *General Motors* — a concern that the bypass would raise the cost of service for the LDCs' remaining customers. *See, e.g., Northern Natural Gas Co.*, 48 FERC ¶ 61,232 at pp. 61,827-29 (1989) (explaining policy evolution). FERC abandoned the policy preference in the 1980s in favor of the Congressional policy to advance nationwide competition in the industry by permitting consumers to obtain direct access to gas supplies even if that meant bypassing the LDC to connect directly to an interstate pipeline. *See id.; see also Kansas Power & Light Co. v. FERC*, 891 F.2d 939, 941-42 (D.C. Cir. 1989) (discussing policy change). As this Court recognized in *General Motors*, 519 U.S. at 306 & n.14, the courts of appeals have approved this change in policy. *See Board of Water, Light, and Sinking Fund Commissioners v. FERC*, 294 F.3d 1317, 1324-27 (11th

Cir. 2002); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992); *Kansas Power, supra*, 891 F.2d 939, and *Michigan Consolidated Gas Co. v. FERC,* 883 F.2d 117, 122-123 (D.C. Cir. 1989).

In sum, through this bypass policy that permits direct head-to-head gas transportation competition between LDCs and interstate pipelines, FERC, with the approval of the courts of appeals, has determined that Congress's pro-competitive natural gas policy in the federal sphere trumps federal deference to the States interest in protecting the monopoly markets of the LDCs. State taxes, like Ohio's, undermine the consumer benefits Congress intended by handicapping one of the principal sources of competitive transportation.

Of particular importance here is state reaction to this permissive federal bypass policy. To minimize the effects of bypassing of LDCs, a number of states have instituted open access programs of their own that permit and in some cases require LDCs to unbundle their gas sales and distribution services to open *both* the small-volume residential and large volume commercial and industrial markets to competition. *See* Energy Information Administration, Dep't of Energy, *Distribution of Natural Gas: The Final Step in the Transmission Process* at 6 (June 2008), available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/featurearticles/2008/ldc2008/ldc2008.pdf. In the period 1994-2006, "at least 23 states introduced customer choice programs intended to benefit small customers." *Id*. at 5. Importantly, most of this evolution has taken place since the Court's 1997 *General Motors* decision.

Given the State of Ohio's decision to expose its LDCs to competition discussed above, the federal policy articulated in the bypass cases to bring the benefits of a nationwide competitive market to the end consumers served by LDCs, and state action to open up their own LDCs' markets, there is no good reason to apply *General Motors'* special LDC carve out from Commerce Clause jurisprudence.

C. The Decision Below Threatens to Encourage Similar Discriminatory State Tax Legislation.

The Court has acknowledged that the States have an incentive to favor intrastate interests at the expense of interstate interests. *See, e.g., Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945) ("to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"). The federal Constitution's protections against this discrimination, including the Commerce Clause, counterbalance the State's "strong political motives to engage in discriminatory taxation." Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1833 n.569 (1991); *see also* David P. Currie, *The Constitution in the Supreme Court*, 37 CATH. U.L. REV. 39, 61 (1987) ("Since geographical outsiders have no vote, they are in special need of constitutional protection. * * * [T]his approach also helps to explain the Court's long-standing insistence that interstate commerce may not be subjected to discriminatory burdens."); Donald H. Regan, *The Supreme Court and State Protectionism*, 84 MICH. L. REV. 1091, 1092 (1986) (describing states' motives for protectionism, and this

Court's concern with "preventing states from engaging in purposeful economic protectionism").

Notwithstanding the substantial precedent in this Court barring such discrimination under the Commerce Clause, many states persist in imposing discriminatory taxes on interstate pipelines. They are easy targets: once an interstate pipeline invests the substantial funds necessary to purchase rights of way and build pipeline facilities in a state, those costs are sunk, and the pipeline has little bargaining power. The problem is not theoretical. Based on a 2008 survey of INGAA members, eight other states currently impose discriminatory state property taxes on interstate pipelines that favor their own parochial interests, effectively subsidizing local companies at the expense of interstate pipelines and their customers. See the Appendix to this brief showing the impact of discriminatory state taxes on interstate pipelines.

Finally, the Ohio Supreme Court's decision has serious potential to distort the national market for the sale of all goods, not just natural gas. Perhaps the most significant aspect of this case lies not in the existence of a plethora of identical or similar property tax schemes in other states, but in its jurisprudential justification for discriminatory state tax schemes that favor in-state commerce to the detriment of interstate commerce. Analogous taxation schemes that favor in-state commerce over interstate commerce have been overturned by this Court in many Commerce Clause decisions. Such decisions leave no room for discrimination, yet state courts persist in attempting to carve out exceptions for their own transgressor statutes. This Court cannot tolerate such a result without permitting the enervation of a critical line of Commerce Clause jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for *certiorari*.

Respectfully submitted,

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APPENDIX

INGAA STATE TAX DISCRIMINATION SURVEY

(Compiled February 8, 2008)

State	2007 Actual Property Taxes Paid by Interstate Natural Gas Pipelines	Equivalent Property Tax if Assessed the Same as Other State Businesses	Discriminatory Tax Amount
Alabama	$ 14,939,636	$ 9,959,757	$ 4,979,879 [1]
Kansas	$ 45,495,021	$ 33,130,952	$ 12,364,069 [2]
Kentucky	$ 6,881,457	$ 5,032,465	$ 1,848,992 [3]
Louisiana	$ 63,864,376	$ 40,058,046	$ 23,806,330 [4]
Mississippi	$ 35,229,197	$ 17,614,599	$ 17,614,599 [5]
Montana	$ 15,076,597	$ 3,778,752	$ 11,297,845 [6]

cont'd

[1] Alabama discrimination is based on the difference between a 30% assessment ratio applied to the value of interstate pipeline property versus a 20 % ratio applied to other businesses.

[2] Kansas discrimination is based on the difference between an interstate pipeline ratio of 33% on all property while other business taxpayers are assessed at a 25% ratio.

[3] Kentucky's discriminatory tax is based on "4-R" tangible State tax rate of .2403 (pipelines at .45) and a local personal property assessment multiplier of 56% (pipelines at 100%).

[4] Louisiana discrimination is based on the difference between the pipeline ratio of 25% and an assessment ration of 15% applied to other businesses.

[5] Mississippi discrimination is based on the difference between the pipeline ratio of 30% and other businesses at a ratio of 15%.

[6] The Montana tax rate currently applicable to pipelines (class 9) is 12%. The tax rate for other businesses (commercial and industrial) currently is 3%.

Ohio	$ 43,148,570	$ 12,438,783	$ 30,709,787 [7]
Oklahoma	$ 14,967,796	$ 8,328,931	$ 6,638,865 [8]
Tennessee	$ 8,245,493	$ 4,663,050	$ 3,582,443 [9]
Totals	**$ 247,848,143**	**$ 135,005,335**	**$ 112,842,808**

[7] As discussed in the brief, Ohio discrimination is based on the difference between the 88% assessment ratio for interstate pipelines and the 25% ratio applicable to LDCs and others.

[8] Oklahoma discrimination is based on the difference between the pipeline ratio of 22.85% and 12.5% applicable to other businesses.

[9] Tennessee discrimination is based on the difference between the pipeline assessment ratio of 55% (all property) and the Commercial and Industrial assessment ratio of 40% for real property and 30% for personal property.