IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

82

No. ____, *Original*

THE STATE OF NEW MEXICO, *PLAINTIFF*

V.

THE STATE OF TEXAS, *DEFENDANT*

ORDER FOR APPEARANCE, MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

TONEY ANAYA
Attorney General of New Mexico

ELLIOT TAUBMAN
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501

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ORDER FOR APPEARANCE

The Clerk will please enter our appearance as counsel for the State of New Mexico.

TONEY ANAYA
Attorney General of New Mexico

ELLIOT TAUBMAN
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

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MOTION FOR LEAVE TO FILE COMPLAINT

The State of New Mexico, appearing by its Attorney General, the Honorable Toney Anaya, respectfully moves the Court for leave to file its complaint against the State of Texas, submitted herewith.

TONEY ANAYA
Attorney General of New Mexico

ELLIOT TAUBMAN
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

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COMPLAINT

The State of New Mexico, by the New Mexico Attorney General, bring this suit against defendant State of Texas and for its claim for relief states:

1. The plaintiff State of New Mexico is one of the fifty sovereign states.

2. The defendant State of Texas is one of the fifty sovereign states.

3. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. Section 1251.

4. On July 11, 1977, the Texas Public Utilities Commission issued its final Order No. 14; this Order was

issued pursuant to Texas statutes which give the state's authority over the regulation of electric utilities to the Texas Public Utilities Commission.

5. The said Order No. 14 provides, in pertinent part, that no Texas electric utility which is a member of the Electric Reliability Council of Texas (ERCOT) may connect up in interstate commerce with another electric utility except where specifically allowed by the Texas PUC or the Federal Energy Regulatory Commission (FERC); to the date of this complaint neither the Texas PUC nor the FERC has allowed or required any ERCOT member to make an interconnection into interstate commerce.

6. The said Order No. 14 constitutes a burden on interstate commerce and violates the Commerce Clause of the United States Constitution.

7. The specific burden on interstate commerce of Order No. 14 is the prevention of interties, wheeling and pooling of electric power between ERCOT members and electric utilities who are not ERCOT members in the surrounding regions.

8. Investor owned utilities, municipal utilities and rural electric cooperatives, both within the State of Texas and the surrounding states, are unable to utilize any economies of scale and diversity which may exist between such utilities and ERCOT members.

9. Electric utilities which operate in both New Mexico and Texas, or are connected up to utilities which operate in both states, cannot utilize economies of scale and diversity to maximize the economic benefits to the ratepayers of utilities in both New Mexico and Texas.

10. The New Mexico Public Service Commission (NMPSC), acting under the authority of the State of New

Mexico to regulate electric utilities which operate with the state's borders, has had its lawful jurisdiction limited by the said Order No. 14. The NMPSC has been forced to approve the construction of new utility plant, and security issuances to finance new plant, which it would have the option to not approve if said order No. 14 did not exist.

11. Since Order No. 14 has existed, there has been no cause for utilities which operate within both New Mexico and Texas to fully explore what economies would exist with connections to ERCOT members; as a result, substantial economies have been foregone.

12. The citizens, state institutions, and businesses, in New Mexico have been injured in the past and will be injured in the future by the loss of the economic efficiency from interconnections with ERCOT members; such losses of economic efficiency are estimated to be in excess of one billion dollars ($1,000,000,000.00) in the next twenty years; the loss for the entire South Central region of the Country is estimated at in excess of five billion dollars ($5,000,000,000.00). Additional, but as yet unquantified environmental harm will result from the construction and operation of unnecessary generating plant.

13. While there is litigation in a number of forums regarding Order No. 14 and its consequences, no court has yet decided whether the Order itself violates the Commerce Clause, and New Mexico is not a party to any of these other proceedings.

14. It is necessary that the validity of Order No. 14 be resolved by this Court as soon as feasible before there is any futher waste of natural and financial resources.

15. It is a waste of natural and financial resources to allow unnecessary utility plant to be built pending lower court adjudication of the issues raised in this complaint.

WHEREFORE, the plaintiffs respectfully pray that a decree be entered declaring invalid and enjoining the enforcement by the State of Texas or its agents of Order No. 14 of the Texas Public Utilities Commission insofar as said order interferes with the free flow in interstate commerce of electric energy.

TONEY ANAYA
Attorney General of New Mexico

ELLIOT TAUBMAN
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521

IN THE

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STATEMENT OF FACTS AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

A controversy exists between the plaintiff and defendant concerning the authority of the defendant to restrict the flow of electricity in interstate commerce.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under the Judiciary Act.

STATEMENT OF FACTS

Electrical generation in the United States is a multi-billion dollar operation. New large generating plants often cost over one billion dollars each. When the costs are so large, any economies which can be realized, even of only a few percent, become very important. The parties have generally agreed on what historically has occurred, but there is disagreement about the economic impact of those physical facts.

The present controversy has its most immediate roots in actions taken by Central and Southwestern Company (CSC) on May 4, 1976. Central and Southwestern Company is a utility holding company which owns West Texas Utilities Company (WETU), an electric utility which operates in North Central Texas and Southern Oklahoma.[1] All the intrastate utilities in the Southern and Central part of Texas are members of the Electric Reliability Council of Texas (ERCOT). The ERCOT members have a contract which provides (in clause 11) that none of them will connect with another utility in interstate commerce, and that any member who does so interconnect will be immediately disconnected from the other ERCOT members.

CSC has sought for some time to interconnect its various companies, but was unsuccessful in convincing the other ERCOT members to agree.[2] The primary motive of the other ERCOT members appears to be fear of Federal Energy Regulatory Commission (FERC) jurisdiction. When nothing seemed to change, CSC decided take action. CSC brought suit on May 3, 1978, to have the intrastate only clause adjoined as a violation of the federal antitrust laws. On May 4, 1978, it connected the north and south parts of WETU at the Oklahoma border. The connection lasted eight hours until the ERCOT members disconnected WETU, thus making the entire ERCOT system unstable.

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1. CSC also owns Oklahoma Public Service Company (PSOK) which operates in Oklahoma, Southwestern Electric Power Company which operates in parts of Arkansas and Louisiana, and Central Power and Light Company (CEPL) which operates in substantial parts of east and south Texas. WETU and CEPL are both members of the Electric Reliability Council of Texas (ERCOT) while PSOK and SOEP are part of the Southwestern Power Pool (SWPR).

2. Economists and engineers who have studied the CSC system have testified to a savings of over two billion dollars in the next twenty years, just for the CSC system.

After the eight hour connection of ERCOT in interstate commerce, the Texas Public Utilities Commission issued a series of orders. The effect of these orders was to reconstitute the ERCOT system as it had been before the interstate connection. The most important of these orders was Final Order No. 14, issued on July 11, 1977, this enforced the group boycott provisions of the ERCOT contracts and further specifically made it a violation of Texas law for ERCOT members to connect up in interstate commerce.

Order No. 14 has harmed non-ERCOT utilities in Texas and in surrounding states. Among other effects, Southwestern Public Service Company (SWPS)[3] has been unable to use an existing intertie it has with WETU. The order has also reduced future economies of scale for SWPS in further connections with New Mexico as in the map attached as Appendix A. In addition, Lea County Electric Cooperative (Lovington, New Mexico) and New Mexico Electric Company (Hobbs, New Mexico) have reduced opportunities to have power wheeled[4] to them over the lines of SWPS which presently is their only wholesale supplier of power.

Order No. 14 also affects El Paso Electric Company (ELPE). The primary service area of ELPE is around El Paso, Texas and Las Cruces, New Mexico (the second largest city in New Mexico). The New Mexico Public Service Commission has had cause to question the need of El Paso Electric Company for new generating capacity, and

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3. SWPS serves a substantial part of eastern New Mexico, the Texas and Oklahoma panhandles and a small part of Kansas.

4. Power is "wheeled" when utility A delivers power to utility C over the lines of utility B. Interties can exist for wheeling, merely to ensure system reliability or to provide a pooling of power plant resources in a region. These issues are all subsumed under the heading of "bulk power supply."

has ordered ELPE to study the technical and economic efficiency of interconnecting to the east with utilities such as SWPS, WETU, CEPL and Texas Electric Service Company (TEES). A preliminary report to the NMPSC by consultants for ELPE has indicated that a connection to an ERCOT member is not a viable alternative until Order No. 14 of the Texas Commission is changed. WETU and CEPL, in letters on file with the New Mexico PSC, have both expressed an interest in an interconnection with ELPE if they can avoid Order No. 14.

In addition to the presently known harm to the citizens of New Mexico due to the inability of SWPS and ELPE to connect with ERCOT members, there is a loss of long range economic efficiencies. In Appendix A are possible sites of power lines and power plants in New Mexico, Oklahoma and Texas which would be more economically viable if Order No. 14 was eliminated. While Texas is a wealthy state with a strong industrial base, New Mexico is 46th in per capita income and has very little industry. Further, industry which does exist in New Mexico is primarily based on extraction of raw materials from the ground rather than manufacturing. Substantial parts of New Mexico are heavily mountainous and have their highest usage of electricity in the winter, while even parts which have higher summer use are generally temperate and dry. In contrast, most of the ERCOT utilities have a heavy summer air-conditioning load and a humid climate. In addition, there is one hour time zone differential between New Mexico and Texas. All these differences contribute to the economic efficiency of connections between New Mexico and ERCOT utilities.

It is the contention of the State of New Mexico that unless this Court acts promptly, tremendous harm will be done to the south-central region of the country in the loss of economic efficiency in bulk power supply. The construction of new utility plant often takes ten years. Planning and financing are initiated far in advance of actual construction. This controversy should not be allowed to

meander for the next five or ten years through the maze of state and federal bodies which are concerned with the issues, and only then have this Court decide the precise issue that is presented here. The wait is not only harmful to New Mexico, it would be a burden on the entire regional economy and environment.

POINTS OF LAW

Texas should not be allowed to place an artificial block in the free flow of electricity in interstate commerce. Electricity is as much a commodity subject to the Commerce Clause as any other good. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1938). Electricity is a necessity of modern life, *Jones v. Portland*, 245 U.S. 217 (1914); *Memphis Light, Gas & Water Division v. Craft*, ____ U.S. ____, 56 L.Ed. 2d 30 (1978), and should be available in free competitive circumstances to the extent possible. *Conway v. Federal Power Commission*, 426 U.S. 271 (1976); *City of Lafayette v. Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978). No state has the right to limit the free flow of energy in interstate commerce. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). This case is equivalent to a hypothetical one in which New Mexico had placed a dam on the Rio Grande River and said that Texas could have none of the water. Such a case would clearly be within the original jurisdiction of this Court. *See e.g. Colorado v. Kansas*, 320 U.S. 383 (1943), *Wyoming v. Colorado*, 259 U.S. 419 (1922).

Jurisdiction

Jurisdiction lies for disputes between sovereign states solely in the United States Supreme Court. United States Constitution, Article III, Section 2, Clause 2; 28 U.S.C. Section 1251 (a)(1). This suit specifically involves the actions of the Texas state government in its sovereign capacity, acting under specific Texas statutes. Public Utility Regulator Act, Title 32, Article 1446(c); Section 37

V.A.C.S. The State of New Mexico is also acting in both its sovereign and proprietary capacity through its Attorney General. The Attorney General, a constitutionally elected officer, has specific authority to bring actions in federal court when in his judgment the interest of the state must be protected, New Mexico Statutes Section 4-3-2(J).

While no action precisely like the instant case has been heard in this court's original jurisdiction, *Pennsylvania v. West Virginia*, 262 U.S. 533 (1923) provides a ready precedent. In the *Pennsylvania v. West Virginia* case, Pennsylvania challenged the right of West Virginia to keep natural gas for its own use rather than retaining a free market for the gas. The Supreme Court held that it had original jurisdiction to hear the case and enjoined West Virginia's interference with interstate commerce. Similarly, New Mexico seeks to open up the flow of electricity between itself and all of Texas and to eliminate artificial legal barriers to that flow. For the purposes of this case, there is no difference between natural gas and electricity.

Another case in point is *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). The allegation made by the plaintiff, Georgia, was that the Pennsylvania Railroad was discriminating against Georgia and its citizens in the setting of railroad rates and thereby limiting the free-flow of commerce and violating the anti-trust laws. The Supreme Court found such an action as within its original jurisdiction. In this action both the sovereign and proprietary interests of New Mexico are harmed by utility practices more harmful than those alleged in the *Georgia* case. This proceeding is one between sovereign states while the *Georgia* case involved a state and a utility, thus this case is more clearly within the Supreme Court's jurisdiction.

Standing

This Court has held that leave to file will not be granted unless the threatened injury is of serious magnitude and imminent. *New York v. New Jersey, supra.* Damages in the instant case from loss of electrical interties are in the billions of dollars and will continue to mount daily as long as the flow of electricity between Texas and New Mexico remains artificially inhibited. Situations where one state impedes the flow of water necessary for commerce into another are analogous.

New Mexico suffers damage to sovereign as well as proprietary interests as a result of Texas' actions to prohibit interties. These interests have been recognized to be sufficient for standing in numerous cases before the Court. *North Dakota v. Minnesota*, 263 U.S. 365; *Georgia v. Pennsylvania Railroad Co., supra, Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois, supra.* The Attorney General is authorized by statute to protect in court the interests of the state and its citizenry. State institutions expend substantial funds for electricity and the actions of the State of Texas to restrain the flow of electricity necessarily increase the cost to these institutions.

The sovereign interests are both those of the citizens of the State and State Government. *Georgia v. Pennsylvania Railroad Co., supra.* In this instance there is interference with the authority of the New Mexico Public Service Commission and a cost burden is placed on the state's citizens. *Cf. Re El Paso Electric Co.* Case No. 1354 (NMPSC 1978).

Commerce Clause Claim

The power is given to the United States Congress: "To regulate commerce with foreign nations, and among the several states, and with Indian Tribes." United States Constitution, Article I, Section 8. This power does not pre-

clude the authority of a state to regulate utilities within its borders, but limits that power to circumstances which do not interfere with the free flow of commerce between the states. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). *Federal Power Commission of Oklahoma*, 362 F.Supp. 522, (W.D. Okla. 1973) (Three Judge Court) *affirmed* 415 U.S. 961 (1974). The *Pennsylvania v. West Virginia* and *FPC* cases both held that State regulation of the flow of natural gas is abrogated when that state regulation interferes with the flow of gas in interstate commerce. There is no conceptual difference between gas and electricity in the context of this case. If anything, a stronger case for interstate commerce in electricity can be made. Electricity is not in limited supply as in natural gas, and in many cases is produced from renewable or long term resources. This distinction is recognized in the recently passed National Energy Act. In the Natural Gas Policy Act, some distinctions are maintained for intrastate versus interstate users of gas, *Cf. e.g.* §103 and 104, Natural Gas Policy Act (H.R. 5289). In contrast, under both the Public Utilities Regulatory Policy Act of 1978 (H.R. 4018) and the Power Plant and Industrial Fuel Use Act of 1978 (H.R. 5146), little if any distinction is made between intrastate and interstate use and production of electricity. Under the Federal Power Act, jurisdiction exists in the FERC for all sales of electricity for resale if any power at all flows in interstate commerce. This contrasts with the Natural Gas Act, where historically only sales *in* interstate commerce came under FERC jurisdiction. At the time the *Pennsylvania* and *Oklahoma Corporation Commission* cases were decided the courts would have been aware of the dichotomy between gas and electricity, thus additional grounds exist for applying these precedents to electricity.

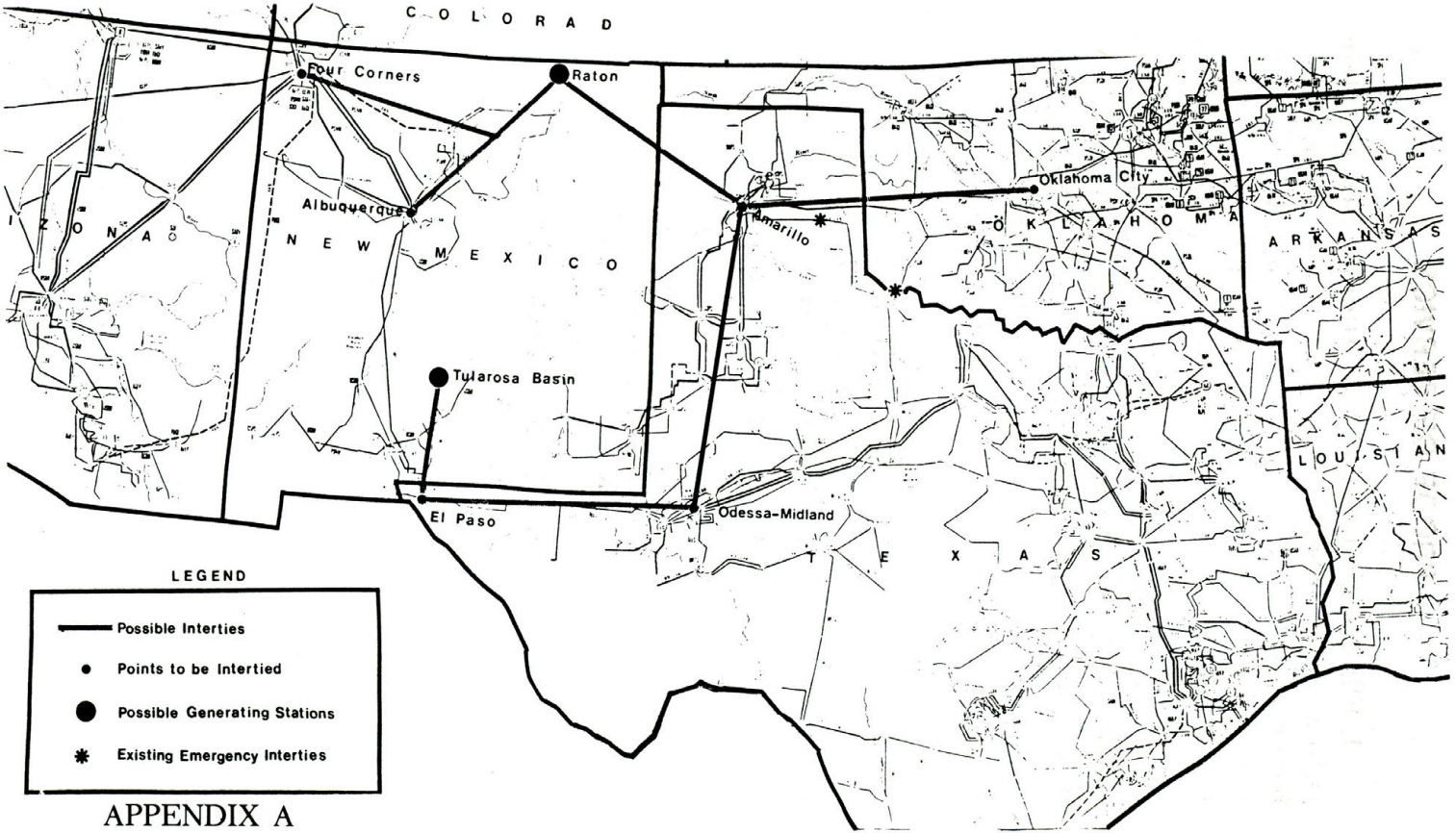
The state of New Mexico, itself, has no remedy before the Federal Energy Regulatory Commission under the new provisions of the National Energy Act. Only utilities have standing to assert any rights, if any exists.

Texas cannot continue to ignore the rest of the nation in economic relationships. While many New Mexicans share the view that there is too much federal regulation of commerce, in this instance, it is not more regulation that New Mexico is asking for, but the elimination of anti-competitive regulation. While the Federal government could preempt the Texas regulation by Federal regulation, *Cf. Free v. Bland*, 369 U.S. (1962), all that is requested here is the elimination of improper state regulation. Examples of such action are *City of Philadelphia v. State of New Jersey*, ____ U.S. ____, 98 S. Ct. 2531, (1978) (waste disposal) and *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1911) (flow of natural gas).

Respectfully submitted,

TONEY ANAYA
Attorney General of New Mexico

ELLIOT TAUBMAN
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 827-5521


C O L O R A D
Four Corners
Raton
Albuquerque
N E W M E X I C O
Amarillo
Oklahoma City
O K L A H O M A
A R K A N S A S
Tularosa Basin
El Paso
Odessa-Midland
T E X A S
LEGEND
Possible Interties
Points to be Intertied
Possible Generating Stations
Existing Emergency Interties

APPENDIX A

PROOF OF SERVICE

I, Elliot Taubman, Assistant Attorney General, State of New Mexico, one of the Attorneys for the Complainant herein, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the ____ day of December, 1978, I served copies of the foregoing Order for Appearance, Motion for Leave to File Complaint, Complaint and Statement of Facts and Brief in Support of Motion for Leave to File Complaint, by first class mail, postage pre-paid, to the Office of the Governor and Attorney General, respectively, of the State of Texas.

ELLIOT TAUBMAN
Assistant Attorney General
State of New Mexico