IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 82, ORIGINAL

* * *

THE STATE OF NEW MEXICO,

Plaintiff

V.

THE STATE OF TEXAS,

Defendant

* * *

On Motion For Leave To File Complaint

* * *

BRIEF IN OPPOSITION

* * *

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* * *

QUESTIONS PRESENTED

1. Is New Mexico's interest sufficient to justify the invocation of this Court's original jurisdiction?

2. Should this Court defer to ongoing proceedings in the Court of Appeals for the Fifth Circuit, the Fifty-Third District Court of Travis County, Texas, and the Federal Energy Regulatory Commission and abstain from exercising its jurisdiction in this case?

STATEMENT

A. INTRODUCTION

The Public Utility Commission of Texas

(Commission) promulgated a series of orders in its Docket 14 in response to an emergency situation caused by the acts of Central and South West Corporation (Central and South West), a public utility holding company. At no time has the State of Texas or the Commission declared a policy of Texas electricity only for Texans. The opposite state of affairs is the true situation. Large portions of Texas are served by electric utilities such as El Paso Electric Company, Southwestern Public Service Company and Gulf States Utilities which operate in interstate commerce as a part of the Southwestern Power Pool (SWPP). A map showing the service areas of Texas electric utilities is separately bound and included as Appendix A.

B. WHAT CAUSED THE PUBLIC UTILITY COMMISSION OF TEXAS TO INSTITUTE THE PROCEEDINGS DESIGNATED AS DOCKET 14.[1]

The Texas Interconnected Systems (TIS) is a group of Texas electric utilities that have developed an interconnected network of bulk power generation and transmission facilities. The Electric Reliability Council of Texas (ERCOT) is a larger group of interconnected electric utilities, including members of TIS and other Texas utilities that lack bulk power generation and transmission facilities. Both TIS and ERCOT have operated on the understanding, as reflected in certain interconnection contracts as well as the membership provisions of the ERCOT agreement, that no member utility would commence interstate operations without prior notice to other members.

Members of TIS and ERCOT include Central Power

[1]Most of the information in this section is taken from the Brief of Houston Lighting and Power Company which it filed in *Central Power and Light Co., et al. v. Public Utility Commission of Texas, appeal docketed, No. 78-2319 (5th Cir., July 20, 1978).*

and Light and West Texas Utilities Co., as well as Houston Lighting & Power, the Lower Colorado River Authority, the City of Austin, the City Public Service Board of San Antonio, the Texas Municipal Power Pool, Texas Electric Service Co., Dallas Power & Light Co. and Texas Power & Light Co. The latter three companies are the three operating subsidiaries of Texas Utilities Co.

Central Power and Light and West Texas Utilities are subsidiaries of Central and South West Corporation, which also owns Public Service Company of Oklahoma, operating within the State of Oklahoma, and Southwestern Electric Power Co., operating in parts of Arkansas, Louisiana, Texas and Oklahoma.

The roots of the Docket 14 proceeding were planted by Congress when it passed in 1935 the Public Utility Holding Company Act, 15 U.S.C. §79(k), which gave the Securities and Exchange Commission (S.E.C.) authority to dissolve the holding companies that were widespread at the time. Pursuant to this statute, the S.E.C. initially concluded in 1944 that Central and South West should be dissolved because it was not operating as a "single, integrated public-utility system." *The Middle West Corp., et al.*, 15 S.E.C. 309, 330 (1944). In later reversing this decision and allowing the holding company to survive, the S.E.C. focused on the critical element of the operational coordination between West Texas Utilities and Public Service of Oklahoma. *The Middle West Corp., et al.*, 18 S.E.C. 296, 298 (1945). In attempting to design a system that would both fulfill the letter of the S.E.C. decision and allow its Texas subsidiaries to remain intrastate, Central and South West operated West Texas Utilities and Central Power and Light in synchronization with other members of TIS and in complete isolation from their two northern subsidiaries, except for the small northern division of West Texas Utilities which could operate in synchronization

either with the southern part of West Texas Utilities or with Public Service of Oklahoma, but never with both at the same time.

In March 1974, several of Public Service of Oklahoma's municipal and cooperative wholesale customers in Oklahoma filed a petition with the S.E.C. complaining that the West Texas Utilities system was a charade designed to hide the fact that Central and South West was not a single, integrated public-utility system and seeking dismemberment of the Central and South West holding company. *In the Matter of Central and South West Corporation, et al.*, S.E.C. Administrative Proceeding File No. 3-4951.

Because of its legal problems under the Holding Company Act, Central and South West devised a scheme to unify its four subsidiaries and to force the intrastate utilities of Texas into interstate commerce. On May 3, 1976, Central and South West, acting through Central Power and Light and West Texas Utilities, filed a petition in the United States District Court for the Northern District of Texas alleging that the refusal by Houston Lighting and Power and Texas Electric Service Company to remain interconnected with them if they commenced operation in interstate commerce was a violation of Section 1 of the Sherman Act.[2] Then in the early morning hours of May 4, 1976, acting under the cover of darkness and without notice, West Texas Utilities energized an existing span of wire across the Red River and began selling power to its sister

[2] *West Texas Utilities Co., et al. v. Texas Electric Service Co., et al.*, No. CA 35-76-0633F, (N.D. Tex. January 30, 1979). The trial of this cause commenced October 2, 1978. In his seventy-two page opinion the Hon. Robert W. Porter held that efforts to take advantage of statutory exemptions from federal regulation were not a violation of Section 1 of the Sherman Act.

subsidiary, Public Service of Oklahoma, in Oklahoma from the intrastate portion of the West Texas Utilities system. After learning of this "midnight wiring," Houston Lighting and Power and the Texas Utilities companies quickly severed their connections with Central Power and Light and West Texas Utilities.

Later on the morning of May 4, Central and South West again acting through its subsidiaries Central Power and Light and West Texas Utilities, filed a petition with the Federal Power Commission (FPC) alleging that as a result of this midnight wiring Houston Lighting and Power and Texas Utilities' subsidiaries had become subject to FPC jurisdiction and requesting the FPC to order Houston Lighting and Power and Texas Utilities subsidiaries to undertake interconnections with the SWPP, a result that that would aid Central and South West in its attempts to salvage its holding company. The FPC refused to hold Houston Lighting and Power or Texas Utilities' subsidiaries subject to federal jurisdiction or to order the interconnections sought by Central and South West. As one commissioner stated, the FPC should not "condone such blatant attempts as occurred here to force jurisdiction on otherwise non-jurisdictional companies." On appeal, the Court of Appeals remanded for further consideration. *Central Power & Light Co. v. FERC*, 575 F.2d 937 (D.C. Cir. 1978).

As a result of the May 4, 1976 connection by West Texas Utilities of a radial tie between a line which had traditionally linked its northern system with Public Service of Oklahoma (which is part of the SWPP) and its southern system (which is a part of TIS) thereby shifting the line from its northern system to its southern system, and subsequent disconnection from TIS of other member utilities (mainly Texas Utilities subsidiaries and Houston Lighting and Power), the TIS was operated as a split system with several utilities

operating in isolation. As a result of this situation, the Commission scheduled emergency hearings to investigate the reliability of electric utilities in Texas.

C. EVIDENTIARY SUPPORT FOR THE PUBLIC UTILITY COMMISSION'S ORDER IN DOCKET 14.

The Commission's main concern in Docket 14 was that the customers of the ERCOT member utilities be provided with safe, efficient, reliable electric service at the lowest possible cost. The reliability of the generation and transmission system is of paramount importance in protecting the health, safety, and welfare of the public from the harms that result from electrical failures. Through the Amended Final Order in Docket 14, the Commission has sought to insure the existence of a reliable, efficient generation and transmission system by making clear the requirement for Commission approval before a utility subject to its jurisdiction may alter its system and thereby possibly reduce its reliability and the reliability of the TIS.[3]

1. The Reliability of the TIS if Operated in Synchronization with the Southwestern Power Pool

From the first hearing conducted on May 7, 1976, Central Power and Light and West Texas Utilities evidenced an intent to complete synchronous operation between the four operating companies of Central and South West. Because of this announced intention, the

[3]Judge Porter in *West Texas Utilities Co., et al. v. Texas Electric Service, Co.*, note 2, *supra*, recites the history of various attempts to develop reliable interstate operation and concludes the problems and failures support the decision of TIS and ERCOT members to currently limit their operations.

actions of West Texas Utilities and Central Power and Light must be viewed with their ultimate goal in mind. It was certainly relevant to the Commission which is charged with the statutory duty of regulation, that actions of public utilities within its jurisdiction be taken in, and not against, the best interest of its customers. All of the evidence indicates that Central and South West is acting only to protect its corporate self interest with no consideration of the impact on its utility customers.[4]

The evidence before the Commission reflected that the TIS and ERCOT possess an excellent reputation and performance record compared to other systems in the United States. The system is optimal; it is small enough to be manageable and responsive, yet it is large enough to be resourceful and have adequate power reserves from diverse fuels to meet normally occurring contingencies. The size of a system affects its reliability by complicating the process of problem identification, communication, and response.

The TIS was not designed to operate with the SWPP. All parties to the Commission's proceedings agreed that given the present facilities of both, it is not possible to operate the TIS and the SWPP in synchronization. To make interconnection between TIS and SWPP possible, at least three general types of alterations would be required. First, actual interconnecting lines would have to be constructed. Second, additional transmission lines to transmit power between Central Power and Light, West Texas Utilities, and their sister operating companies would be required. Third, additional

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[4]Judge Porter concluded in *West Texas Utilities Co., et al. v. Texas Electric Service Co.*, note 2, *supra*, that the purpose of West Texas Utilities' midnight wiring was to force Texas Electric Service Company and Houston Lighting and Power into interstate commerce against their will and the motive for the midnight wiring was to protect Central and South West's status as a holding company.

transmission capacity within each TIS and ERCOT member utility would be required to compensate for the loss of governing action from increased system size. It was estimated that the cost of these additions could run as high as $1 billion. Even if all the construction of additional lines were completed, the resulting system would not be more reliable than the present TIS.

2. The Reliability of the TIS after May 4, 1976 and Prior to May 2, 1977.

As a general proposition, all parties to the Commission proceedings recognized that the TIS as it existed prior to May 4, 1976, and as it exists currently, provides optimum reliability given the existing facilities. The chain of events occurring on May 4, 1976, began with West Texas Utilities' wiring of a radial tie and resulted in a serious impairment of reliability for the ERCOT member utilities.

The reliability of an electrical generation and transmission system is judged by its ability to respond to outages and is measured by looking at frequency deviations and system response time. Electric generators are designed to operate at a frequency of 60 cycles per second. Deviations in frequency causing sustained operations at a level of 58.5 cycles per second can cause severe damage to turbines. Information from turbine manufacturers indicates that turbines can tolerate only 60 minutes cumulative operation at 58.5 cycles per second without causing serious damage to the unit. Frequency deviations can be caused by loss of generation or transmission, or by increases in load. When generators are connected and in synchronous operation, all generators on the system respond to help restore the frequency of the system to 60 cycles per second. The length of time necessary to restore system frequency to 60 cycles per second is reffered to as the stabilization time.

After the split of May 4, 1976, the TIS operated in a bifurcated mode with Houston Lighting and Power, Texas Power and Light, Texas Electric Service, Texas Municipal Power Pool and Brazos Electric Power Cooperative, Inc. comprising one system (the Houston Lighting and Power/Texas Utilities System), and West Texas Utilities, the Lower Colorado River Authority, City of Austin, City of San Antonio, Central Power and Light, South Texas Electric Cooperative, and Medina Electric Cooperative comprising another (the West Texas/Central Power and Light System). The split resulted in West Texas Utilities, the Lower Colorado River Authority, Austin, San Antonio, and Central Power & Light being disconnected from approximately 75% of the total TIS generating capacity.

Despite an attempt to compensate for loss of backup generation capacity by increasing spinning reserves, the utilities in the West Texas Utilities/Central Power and Light System still suffered impaired reliability. This situation was vividly demonstrated during the period in which West Texas Utilities attempted to sustain synchronous operations with the SWPP. West Texas Utilities conducted two experiments on synchronous operation with the SWPP on May 14, 1976. These experiments foreshadowed future operating problems by reflecting that the various ties between the West Texas Utilities, the Central Power and Light, and Lower Colorado River Authority systems were tending to open after only short intervals of operation.

West Texas Utilities commenced synchronous operation with the SWPP on August 28, 1976, and continued until January 22, 1977. At least nine occasions of tie openings were documented during the period of synchronous operation. While the opening of ties and resulting separation of the systems does not necessarily mean a loss of service to customers, it is an indication of serious operational problems on the system. The

difficulties experienced by the West Texas Utilities/Central Power and Light interconnected system would not have been as severe or caused the opening of ties if the TIS had been constituted as it was prior to May 4, 1976.

Three occasions of operational problems showing an impairment of reliability on the West Texas Utilities/Central Power and Light system were particularly well documented before the Commission. They are as follows:

a. On September 7, 1976, the loss of a 150 megawatt generator located in Mexico resulted in both a separation of the ties between Public Service of Oklahoma and West Texas Utilities, and the loss of two generating units by West Texas Utilities.

b. On January 10, 1977, the loss of a 330 megawatt generator on the San Antonio system resulted in a severe frequency deviation leaving the West Texas Utilities/Central Power and Light system with little generation reserve.

c. On January 17, 1977, the Lower Colorado River Authority system experienced a frequency drag which lasted approximately 1-1/2 hours. The frequency drag was caused by uncontrollable power flows out of Lower Colorado River Authority's system. The frequency of the SWPP was well below 60 cycles per second and was causing the Authority's frequency to be below normal. In an attempt to maintain its frequency at 60 cycles per second, the Lower Colorado River Authority increased its generation. Because of the nature of electricity, the increased generation caused uncontrolled power flows out of the Lower Colorado River Authority system at a time when the Lower Colorado River Authority was operating at peak. The ties between West Texas Utilities and Lower Colorado River Authority,

> and West Texas Utilities and Central and Power and Light opened as a result of the attempt to maintain frequency.

On January 22, 1977, West Texas Utilities ceased synchronous operation with the SWPP. Even West Texas Utilities witness Randall Meador was willing to admit in testimony before the Commission that West Texas Utilities and its customers probably suffered a net detriment from the events of May 4, 1976.

D. Litigation Involving Docket 14.

Central power and Light and West Texas Utilities filed suit on May 17, 1977 in the United States District Court for the Western District of Texas seeking a declaratory judgment that two orders, including the Amended Final Order, issued by the Commission in Docket 14 were invalid on both state statutory and federal constitutional grounds. (The two orders are included as Appendices B and C, separately bound). The United States and the Federal Energy Regulatory Commission (FERC) intervened as plaintiffs. Houston Lighting and Power, Texas Power and Light, Texas Electric Service Co., the City of San Antonio and the Lower Colorado River Authority intervened as defendants. The District Court on May 11, 1978 granted the Commission's motion that the Court exercise its discretion and abstain so the state courts of Texas could be afforded the opportunity to settle potentially dispositive state law issues which were matters of first impression under the recently enacted Public Utility Regulatory Act, Article 1446c, TEX.REV.CIV. STAT.ANN. (Supp. 1978). The plaintiffs and aligned intervenors appealed from the dismissal order of the District Court to the United States Court of Appeals for the Fifth Circuit. Briefs of the parties have been filed and that appeal is currently pending. *Central Power and Light Company, et al v. Public Utility Commission*

of Texas, appeal docketed, No. 78-2319, (5th Cir., July 20, 1978).

Central Power and Light and West Texas Utilities also filed a state court appeal of Docket 14 on May 31, 1977, pursuant to the provisions of the Texas Register and Administrative Procedure Act, Article 6252-13a, TEX.REV.CIV.STAT.ANN. (Supp. 1978) and the Public Utility Regulatory Act, Article 1446c, TEX.REV.CIV.STAT.ANN. (Supp. 1978). The orders in Docket 14 were again alleged to be invalid on state statutory and federal constitutional grounds. Briefs have been filed, oral argument presented and the case is currently under submission to the 53rd District Court of Travis County, Texas. *Central Power & Light Company, et al v. Public Utility Commission of Texas, et al*, Cause No. 261,605, (53rd D.Ct. Travis County, Texas, filed May 31, 1977). The FERC participated as an *amicus curiae* aligned with the plaintiffs. Texas Utilities' subsidiaries, Houston Lighting and Power, the Cities of San Antonio and Austin, the Lower Colorado River Authority, the South Texas Electric Cooperative, Inc. and the Medina Electric Cooperative, Inc. intervened aligned with the defendants.

Copies of relevant pleadings are included as Appendices D and E in the separately bound appendix.

SUMMARY OF ARGUMENT

The factual issues concerning the interconnection of one electric system with another electric system are exceedingly technical and complex. New Mexico has not alleged a sufficient interest or present harm to justify invoking this Court's original jurisdiction in such a complex technical field. The FERC has pending before it two proceedings involving the interconnection of ERCOT and SWPP. The federal constitutional issues raised by New Mexico are currently being vigorously litigated in state and federal forums. This Court should

not entertain New Mexico's claim because of its speculative nature and this Court should defer to the alternate forums and abstain from exercising its original jurisdiction.

ARGUMENT AND AUTHORITIES

I. PLAINTIFF HAS NO SUFFICIENT INTEREST TO JUSTIFY THE INVOCATION OF THIS COURT'S ORIGINAL JURISDICTION.

It is clear that this Court's original jurisdiction over controversies between states does not extend to suits brought in the name of a state but for the benefit of individuals. *Oklahoma v. Cook*, 304 U.S. 387 (1938); *Kansas v. United States*, 204 U.S. 331 (1907); *see also Illinois v. Michigan*, 409 U.S. 36 (1972). Rather, to invoke the Court's jurisdiction properly, "the plaintiff state must be pursuing either a narrow proprietary interest or a broad public interest that involves at least a large number of its citizens." Wright, Miller & Cooper, Federal Practice And Procedure, Jurisdiction, §4047 (1978). Moreover, the state's proprietary and public interests must be substantial and threatened with serious injury. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). *See also Colorado v. Kansas*, 320 U.S. 383, 392-94 (1943); *Washington v. Oregon*, 297 U.S. 517, 529 (1936).

New Mexico has shown no injury to either its proprietary interest or the interests of its citizens to warrant the invocation of this Court's original jurisdiction. In asserting injury, New Mexico speaks only in terms of what *might* happen in the *future*, not of any existing or imminent harm to New Mexico or its citizens. The claims of harm espoused by New Mexico consist of the alleged approval of unknown plant construction at an unknown location by an unknown utility plus an amorphous and unsubstantiated claim of

potential economies of scale.[5]

New Mexico cites *Pennsylvania v. West Virginia, supra,* for authority that it may properly invoke this Court's original jurisdiction. *Pennsylvania v. West Virginia,* however, is clearly distinguishable from the instant question at hand. *Pennsylvania* decided "whether [West Virginia] may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of another." 262 U.S. at 591. Clearly, the Commission's complained of order in Docket 14 withdrew no electricity from an established current of interstate commerce moving from Texas into New Mexico. The Court found standing for states challenging West Virginia's action because the states, as proprietors, and the states' citizens for some time had been purchasing supplies of natural gas threatened to be curtailed or terminated by West Virginia. New Mexico has not shown, and indeed cannot show, any similar harm to whatever interests it might have.[6]

In a further attempt to support its position, New Mexico cites *Georgia v. Pennsylvania Railroad,* 324 U.S. 439 (1945), wherein this Court granted leave to seek relief for alleged violations of federal antitrust laws resulting in the application of discriminatory freight rates. The rates would have had a direct effect on the

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[5]Judge Porter in *West Texas Utilities, et al v. Texas Electric Service Co., et al, supra,* note 2, found the economies claims of Central and South West's subsidiaries to be doubtful and highly speculative. Furthermore, the record developed before the Commission clearly established that substantial costs of up to one billion dollars would be incurred by interconnecting ERCOT with the SWPP.

[6]With the exception of the eight hour period following West Texas Utilities' clandestine intertie, ERCOT members have sold electricity only in intrastate commerce. The Commission and Judge Porter in *West Texas Utilities, et al. v. Texas Electric Service Co., et al.* note 2, *supra,* found that the ERCOT facilities were incapable of reliably serving any larger area by interconnection with SWPP at the present time.

pecuniary interests of the state and its citizens; New Mexico has shown no similar effect arising from the actions of the Commission in Docket 14.

In granting leave to file in *Georgia*, this Court noted that "in its discretion [the Court] has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency, and justice. ...And it has been held that exercise of that jurisdiction is not mandatory in every case". 324 U.S. at 464-65. Leave to file in *Georgia* was granted solely because it had not been shown that there was an alternative forum that could hear the entire case.

II. THE EXISTENCE OF ALTERNATIVE FORUMS PRECLUDES NEW MEXICO'S INVOCATION OF THIS COURT'S ORIGINAL JURISDICTION.

It is well settled that this Court's "original jurisdiction should be invoked sparingly". *Utah v. United States*, 394 U.S. 89, 95 (1969); *Louisiana v. Texas*, 176 U.S. 1 (1900). The admonition was repeated in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) wherein the Court noted that 28 U.S.C. §1251(a)(1) and Art. III, §2, cl. 2 of the Constitution make original jurisdiction "obligatory only in appropriate cases". *Id.* at 93, 92 S.Ct. 1388, 31 L.Ed.2d 718. Measures of appropriateness were considered to be:

> [t]he seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. *Id.*

In *Arizona v. New Mexico*, 425 U.S. 794 (1976), this

Court declined to exercise its original jurisdiction in circumstances very similar to those at hand. Arizona had sought to challenge a New Mexico tax statute purportedly having a discriminatory impact on rates paid by Arizona consumers of electricity generated in New Mexico. The Arizona utilities affected had already brought an action in New Mexico state court challenging the tax. Quoting *Illinois v. City of Milwaukee, supra; Massachusetts v. Missouri*, 308 U.S. 1 (1939) and *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court recognized that concern for its other responsibilities[7] precluded granting leave to file without a clear showing that alternative forums are unsatisfactory. This Court held:

> In the circumstances of this case we are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. §1257(2).
>
> In denying the State of Arizona leave to file, we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities. We also are not unmindful of Mr. Justice Harlan's cautionary advice. . . :
>
> 'As our social system has grown more

[7]In recent years, this Court has become acutely aware of its finite judicial resources and is alert to appropriate opportunities to avoid unnecessary expenditures of those resources. *See Poe v. Ullman*, 367 U.S. 497, 502-09 (1961); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-75 (1947).

> complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.' (citation omitted)

425 U.S. at 797-98.

It is respectfully submitted that considerations here which are even stronger than those involved in *Arizona v. New Mexico* impel the denial of New Mexico's motion for leave to file complaint.

First, the validity of the Commission's order in Docket 14 is presently subject to judicial inquiry in two separate court actions.[8] Issues raised in New Mexico's bill of complaint are under close scrutiny therein and are being vigorously represented by those directly affected, Central Power and Light and West Texas Utilities, subsidiaries of Central and South West. If New Mexico wishes to participate directly in that litigation involving its raised issues, New Mexico should seek leave to intervene or file brief *amicus curiae*, but it should not seek to burden this Court initially with matters presently being considered in appropriate alternative

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[8]*Central Power and Light Co., et al. v. Public Utility Commission of Texas*, appeal docketed, No. 78-2319, (5th Cir., July 20, 1978); *Central Power and Light Co., et al. v. Public Utility Commission of Texas*, Cause No. 261,605, 53rd Judicial District, Travis County, Texas.

forums.[9] Moreover, should those matters be resolved in favor of New Mexico's position, there may be no need for this Court's inquiry; on the other hand, issues decided adversely to New Mexico may be ultimately brought within this Court's cognizance pursuant to 28 U.S.C. §1257(2).

Second, Section 210(a) of the Public Utility Regulatory Policies Act of 1978, Pub.L. No. 95-617, (November 9, 1978) provides in pertinent part that:

> (1) Upon application of any electric utility, Federal power marketing agency, qualifying cogenerator, or qualifying small power producer, the [Federal Energy Regulatory Commission] may issue an order Requiring --
>
> (A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant,
>
> (B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,
>
> (C) such sale or exchange of electric energy, or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or

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[9]As an example of the tremendous burden these matters may place on judicial resources, the United States District Court, Northern District of Texas required a seven week non-jury trial producing over 3,500 pages of testimony and about 1,000 exhibits to consider West Texas Utilities' and Central Power and Light's allegations that ERCOT's actions violated the antitrust laws. *Opinion of Robert W. Porter*, at 2,18, note 2, *supra.*

> (D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).
>
> (2) Any State regulatory authority may apply to the Commission for an order for any action referred to in subparagraph (A), (B), (C), or (D) of paragraph (1).

Under the authority of Section 210, utilities affected by Docket 14 have applied to the Federal Energy Regulatory Commission (FERC) for an order requiring the very relief sought by New Mexico in their bill of complaint.[10] Moreover and notwithstanding New Mexico's claim to the contrary, Section 210(a)(2) would seem to provide authority for the appropriate agency of the State of New Mexico to seek whatever interconnect relief is desired. The FERC is better equipped than this Court for an expert and time consuming appraisal of the myriad substantive technological questions presented concerning ERCOT's ability to maintain adequate operations if compelled to interconnect its systems with other systems. Once again, a concern for this Court's other responsibilities would compel denial of New Mexico's motion for leave to file complaint when the complex and other technical issues involved are capable of resolution before an expert administrative forum.

Finally, this Court in *Arizona v. New Mexico* noted that it was "not unmindful that the legal incidence of the electrical energy tax is upon the utilities". 425 U.S. at 797-98. Additionally, in concurring with the Court, Mr. Justice Stevens added that failing to allege an impact on electricity rates paid by Arizona consumers, "Arizona is

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[10]Application of Central Power and Light, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company; F.E.R.C. Docket No. EL79-8, notice of February 22, 1979.

not sufficiently affected by the New Mexico tax to justify its invocation of the 'original and exclusive jurisdiction' of this Court...." 425 U.S. at 798. In the case at hand, the legal burden of the Commission's order in Docket 14 is on Central and South West not the State of New Mexico. Further, neither Central and South West nor any of its subsidiaries operate within the boundaries of the State of New Mexico; any possible injury to New Mexico could only occur as a derivative of Central and South West's injury through loss of highly speculative interties which could conceivably furnish electricity indirectly to facilities located in the State. Moreover, the potential relief New Mexico avowedly seeks is not precluded by the Commission's Order in Docket 14. New Mexico and its consumers are, and if at all, only remotely and indirectly related to the consequences of Docket 14, and are not sufficiently affected to justify the invocation of this Court's original jurisdiction.

CONCLUSION

The Public Utility Commission of Texas acted in the public interest in Docket 14 to prevent serious harm to the public which could result from an impaired electric utility interconnect system. The disruption to ERCOT reliability was caused by the acts of Central and South West Corporation undertaken to save its holding company status while ignoring the impact on utility consumers. The Commission acted to preserve the status quo pending necessary technical and economic studies to determine if interconnection of ERCOT and SWPP would be in the public interest. The Federal Energy Regulatory Commission now has pending before it two proceedings concerning possible interconnection. Pending litigation in state and federal forums will resolve the federal constitutional issues raised by New Mexico. New Mexico has raised only speculative and amorphous claims of harm which are in no way directly connected to the Commission's effort to insure reliable

electric service to ERCOT customers. New Mexico is asking, in effect, for the right to undermine reliable electric service to those customers and also thereby aid Central and South West in its efforts to save its holding company. The demonstrated unreliability of the interconnection of SWPP and ERCOT at the present time, the availability of appropriate alternative forums, and the lack of any realistic basis for New Mexico's claim of harm requires this Court to deny New Mexico's Motion For Leave To File Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John David Hughes, a member of the Bar of the Supreme Court of the United States, do now enter my

appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Defendant. I do hereby certify that nine copies of the foregoing Brief in Opposition have been served on Plaintiff by placing three copies of same in the United States Mail, First Class, Certified and Postage Prepaid, on this the ___ day of March 1979, addressed to each of the following:

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