IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 82, Original

THE STATE OF NEW MEXICO, PLAINTIFF

THE STATE OF ARKANSAS, APPLICANT FOR INTERVENTION

V.

THE STATE OF TEXAS, DEFENDANT

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

Steve Clark
Attorney General

J. Mark Davis
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201

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ORDER FOR APPEARANCE

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

STEVE CLARK
Attorney General of Arkansas

J. MARK DAVIS
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

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MOTION FOR LEAVE TO FILE MOTION TO INTERVENE AS A PLAINTIFF

The State of Arkansas, appearing by its Attorney General, moves the Court for leave to intervene as a plaintiff in this action, in order to assert the claims set forth in its proposed complaint, of which a copy is hereto attached.

This motion is made on grounds that the Applicant and its residents are consumers of electrical energy the interstate transportation of which the defendant has interfered with. The Applicant thus has a claim presenting questions both of law and fact which are common to the main action.

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Attorney General of Arkansas

J. MARK DAVIS
Assistant Attorney General
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Little Rock, Arkanaas 72201
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COMPLAINT

The State of Arkansas, by the Attorney General of Arkansas, brings this suit against defendant State of Texas and for its cause of action states:

1. Intervenor agrees with plaintiff's allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 14 and 15 of the complaint and hereby incorporates said paragraphs by reference into its conplaint.

2. Intervenor also agrees with plaintiff's allegations contained in paragraphs 9 and 11 as they relate to electric utilities in Arkansas in paragraph 12 with respect to estimated cost savings for the entire South Central region of the country, thereby incorporating them by reference into this complaint.

3. The intervenor State of Arkansas is one of the fifty states.

4. Electric utilities which operate in Arkansas, Louisiana, New Mexico, Oklahoma and Texas, or are connected with utilities which operate in these states are effectively precluded from utilizing economies of scale and diversity which would result from interconnections with ERCOT members. Consequently, the opportunity to maximize economic benefits to residential, commercial and industrial ratepayers of utilities in these states is unduly burdened.

5. Southwestern Electric Power Company (SWEPCO), an electric utility presently servicing much of western Arkansas, which is a subsidiary of Central and South West Corporation, a public utility holding company located in Texas, is directly affected by said Order No. 14. SWEPCO's inability to interconnect with members of ERCOT translates into unnecessary costs, estimated to be in excess of one hundred million dollars ($100,000,000.00) in the next twenty years, to the citizens, state institutions and businesses of Arkansas.

6. Indirect and as of yet unquantifiable savings of energy and capital to other Arkansas electric utilities and their customers could be achieved from interconnections with ERCOT members. The construction of unnecessary generating plants and duplicative transmission facilities and the consequent harm to the environment could also be avoided.

7. The State of Arkansas, through its Public Service Commission (PSC), has intervened in the Federal Energy Regulatory Commission hearing, Docket No. EL79-8, which involves subsidiaries of CSW and the consequences of Order No.

14. The PSC was required to intervene in this hearing in order to protect its and its citizens' interests because of a March 30, 1979, deadline set by the Commission.

WHEREFORE, intervenors 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 of interstate commerce of electric energy.

STEVE CLARK
Attorney General of Arkansas

J. MARK DAVIS
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

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

STATEMENT OF FACTS

Intervenor is in general agreement with plaintiff's statement of facts, but wishes to add the following statement.

Southwestern Electric Power Company (SWEPCO) is an electric utility which presently serves much of western Arkansas' electric energy needs. SWEPCO is also a subsidiary of Central and South West Corporation which owns and operates three other subsidiaries, Central Power and Light (CPL), which serves a portion of southern Texas; Public Service Company of

Oklahoma (PSO), an electric utility serving eastern and southwestern Oklahoma; and West Texas Utilities Company (WTU), which supplies electric energy to western and southwestern Texas. Of CSW's four subsidiaries, two are members of ERCOT (WTU and CPL) and two are affiliated with the Southwest Power Pool (SWEPCO and PSO). Presently, the CSW subsidiaries do not operate electrically interconnected.

Under a directive of the Securities and Exchange Commission and pursuant to the Public Utility Holding Company Act, CSW commissioned several studies during 1974 to 1978 to determine the most efficient electrical expansion plan for the corporation to follow which would provide maximum economic benefits to its customers. These studies recommended that CSW should interconnect its four subsidiaries with transmission lines, embark on a joint generating plant expansion effort, and engage the latest technology to optimally utilize fuels and generating capacity. The specific plan CSW adopted would result in capital savings of over $2 billion over the next twenty years for the CSW system alone.

An immediate effect of Order No. 14 has been to preclude SWEPCO from engaging in synchronous operation of its facilities with those of its sister subsidiaries. The estimated loss of rate savings to SWEPCO customers over the next twenty years is in excess of $100 million. This figure does not include as of yet unquantifiable losses to customers of other Arkansas utilities (e.g., capital savings resulting from maximum utilization of existing and possibly future transmission lines between SWEPCO and Arkansas Power and Light Company). In addition, the Arkansas Public Service Commission, as well as the NMPSC, is precluded by the Texas Commission's order from

considering maximum utilization of transmission capabilities by Arkansas utilities as a result of the proposed interconnection as an alternative to construction of new electric generating plants. Likewise, the electric customers of the ERCOT companies are deprived of the opportunity to benefit from efficiencies that would result from interconnections with utilities in neighboring states.

BRIEF

JURISDICTION

The Court has exclusive jurisdiction over disputes between the States by virtue of Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1). This case presents such a dispute. Under the authority of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. tit. 32, art. 1446(c), § 37 (Vernon), the Texas Public Utility Commission is "vested with all authority and power of the State of Texas to insure compliance with the obligations of public utilities. . . . " In pursuance of this authority, the Commission issued Final Order No. 14, which sanctioned an agreement between members of ERCOT to refrain from the transportation of electrical energy in interstate commerce. Actions of statutory, corporate agencies of a State must be treated as those of the State itself. *New York* v. *New Jersey,* 256 U.S. 296, 302 (1921). The States of New Mexico and Arkansas, through their respective Attorneys General, are acting in their sovereign capacity by submitting their complaints. The Attorney General of Arkansas is specifically empowered to "maintain and defend the interests of the State in matters before the United States Supreme Court." Ark. Stat. Ann. § 12-712 (1968 Repl.).

The parameters of the original jurisdiction of this Court have been defined by Mr. Justice Douglas as follows.

> It has long been this Court's philosophy that 'our original jurisdiction should be involved sparingly' (citation omitted). We construe 28 U.S.C. 1251 (a)(1), as we do Art. III, § 2, Cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the 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. *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972).

The most recent application of this test appeared in *Arizona* v. *New Mexico,* 425 U.S. 794 (1976). The State of Arizona brought an original action against the State of New Mexico, seeking declaratory and injunctive relief on grounds that New Mexico's tax on the generation of electrical energy, as applied to three Arizona utilities operating in New Mexico, constituted an unconstitutional discrimination against and burden upon interstate commerce.[1] However, at the time this action was filed, the three Arizona utilities were involved in a New Mexico District Court suit and had raised the same constitutional issues presented in Arizona's bill of complaint. The Court held that "the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated". *Id.*at 797.

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(1) The Complaint also alleged that the tax denied Arizona citizens due process and equla protection of the laws, and abridged their privileges and immunities under Art. IV, § 2.

Is another forum available to resolve the issues tendered in this suit and to grant appropriate relief? Intervenor submits that this question represents the threshold issue of this case.

The newly created Federal Energy Regulatory Commission (FERC) may, upon application of any governmental entity, grant any electric utility an exemption from any State law, rule or regulation which prohibits or prevents the voluntary coordination (pooling) of electric utilities. Public Utility Regulatory Policies Act of 1978, § 205. The Commission's grant of an exemption is conditioned upon the following determinations:

> (a) that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area,
>
> (b) that the affected State law, rule or regulation is not required by any authority of Federal law, and
>
> (c) that the affected State law, rule or regulation is not designed to protect public health, safety or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.

On March 19, 1979, the Arkansas Public Service Commission, on behalf of the Southwestern Electric Power Company, petitioned FERC to intervene in the pending hearing involving the subsidiaries of Central and South West Corporation, Docket No. EL79-8. In its petition, the Commission requested that FERC grant an exemption from the Texas Public Utility Commission's Order No. 14 as provided in § 205 of PURPA. As of yet, FERC has neither held a hearing nor resolved the issues

presented in this petition.

The crucial question facing this Court in regard to whether or not original jurisdiction should be taken in this case is: Is FERC an appropriate forum for the resolution of the issues presented in this case, and can it provide appropriate relief? A comparison of the available remedies and issues tendered in both cases indicates that FERC is not such a forum. Plaintiff and intervenor argue that the Texas order is constitutionally impermissible in that it represents an undue burden on the interstate commerce of electrical energy. FERC may only grant an electric utility an exemption from the order. These remedies are mutually inconsistent. An exemption presumes that the order is constitutionally valid. Intervenor seeks to disprove that very presumption. Whereas a state or federal court has jurisdiction to decide the constitutionality of a given law, FERC does not. Furthermore, should FERC deny the exemption request, plaintiff and intervenor could still petition this Court for constitutional relief.

The issues tendered in this case could not be raised at the FERC hearing. Ostensibly, the facts involved in a determination by FERC to decide whether to grant an exemption resemble those factors this Court often utilizes in its "balancing tests" under the Commerce Clause, namely, weighing the burdens imposed by the state regulation with the state interests sought to be achieved. However, intervenor argues later in this brief that such a balancing test is inapplicable to this case. Intervenor submits that the Texas order represents a regulation designed to economically isolate Texas electric utilities from interstate commerce. Such trade barriers have been repeatedly rejected by this Court. *City of Philadelphia* v. *New Jersey*, ____ U.S. ____, 98 S. Ct. 2531 (1978). A closer look at § 205 of PURPA indicates that es-

sentially no balancing test is involved. FERC shall not grant an exemption if it finds that the State law is *designed* to protect public health, safety or welfare, or the environment or encourage energy conservation, despite a finding by FERC that the proposed pooling arrangement is designed to obtain economical utilization of the facilities and resources involved. In light of the present uncertainty as to the precise meaning of the language in § 205, Intervenor has genuine doubts as to when and under what circumstances such an exemption would be granted.

Intervenor vigorously maintains that only this Court is equipped to decide the constitutional issues presented in this case. No other appropriate forum exists. The controversy involved merits the Court's "sparing use" of its exclusive original jurisdiction.

Finally, according to Rule 9(2) of this Court's rules, the Federal Rules of Civil Procedure shall apply in original jurisdiction cases except to the extent that Court's rules are to the contrary. Intervenor bases its right to intervene in this case under Rule 24 of the Federal Rules of Civil Procedure. Not only do common questions of law and fact exist between our claim and the main action, but our interests in this case must be protected by means of intervention else our ability to do so would be substantially impaired.

STANDING

This Court has repeatedly held that a State seeking to invoke the Court's original jurisdiction must demonstrate that "the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

New York v. *New Jersey,* 256 U.S. 296 (1921); *Missouri* v. *Illinois,* 200 U.S. 496 (1906). Arkansas does and will suffer damage to its sovereign as well as proprietary interests as a result of Order No. 14. These combined damages will result in the loss of millions of dollars to the State and its resident ratepayers. These respective interests are sufficient for standing in cases of this nature. *North Dakota* v. *Minnesota,* 263 U.S. 365 (1953); *Georgia* v. *Pennsylvania Railroad Co.,* 262 U.S. 353 (1923); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois, supra.* Intervenor is prepared to demonstrate by clear and convincing evidence that the threatened injury is imminent and of serious magnitude.

COMMERCE CLAUSE CLAIMS

The constitutional issue before this Court is: Does Order No. 14 of the Texas Public Utility Commission constitute an unconstitutional state regulation of the interstate commerce of electric energy? Intervenor submits that the order does so in violation of the Commerce Clause. United States Constitution, Article I, Section 8. Ostensibly, the Commerce Clause is nothing more than an affirmative grant of power to the United States Congress. However, since *Cooley* v. *Board of Wardens of Philadelphia,* 53 U.S. 299 (1851), this Court has recognized that the Commerce Clause also contains a negative implication[2]

(2) Simply stated, the doctrine is "that in the absence of affirmative consent (by Congress) a Congressional negative will be presumed in the courts against state action which in its effect upon interstate commerce constitutes an unreasonable interference with ration interests, the presumption being rebuttable at the pleasure of Congress." Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1 (1940).

which serves to limit the authority of a State to regulate articles of interstate commerce. Absent conflicting legislation by Congress, a state may enact laws regarding local concerns which to a degree affect interstate commerce. *Southern Pacific* v. *Arizona,* 325 U.S. 761 (1945). Such laws, however, may not conflict with the Commerce Clause's mandate for a national "common market." *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977). In determining whether a particular state law conflicts with the Clause's requirement of a national common market, this Court has consistently engaged a balancing test, weighing the competing national and local interests affected by the state law. *Hunt* v. *Washington State Apple Advertising Commission, supra; Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago,* 393 U.S. 129 (1968); *Bibb* v. *Navajo Freight Lines,* 325 U.S. 761 (1959) and *Southern Pacific* v. *Arizona, supra.* In each instance, the Court's task is to discern between state laws which unduly discriminate against out-of-state commerce or are protectionist measures designed to achieve "economic isolation" and state laws which are directed to legitimate local concerns such as public health, safety or welfare that affect interstate commerce only incidentally.

Frequently, a State will attempt to achieve a legitimate state goal by isolating the State from the national economy. *City of Philadelphia* v. *New Jersey, supra,* New Jersey statute prohibiting the importation of solid or liquid waste collected outside this state; *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511 (1935), a New York regulation which prohibited the sale in New York of milk produced outside New York, unless the price paid to out-of-state producers was not less than the price required to be paid to New York producers; *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923), a West Virginia law requiring local pipe-line com-

panies to retain all natural gas produced in the state for local needs, thereby substantially impairing the ability of the companies to transmit such gas to other States; and *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), an Oklahoma statute which prohibited pipe-line companies incorporated in the State from transmitting gas to persons engaged in transporting or furnishing gas to points outside of the state. In each of these cases, the Court struck down the state legislation on grounds that it was nothing more than a parochial measure aimed at economic isolationism. Intervenor maintains that Order No. 14 represents an artificial trade barrier of the same intolerable nature.

As Mr. Justice Stevens recently noted, "[u]tility service is a necessity of modern life." *Memphis Light, Gas & Water Division* v. *Craft*, ____ U.S. ____, 56 L. Ed. 2d 30, 44 (1978). Intervenor agrees with Plaintiff that electricity is a proper subject of interstate commerce. The controversy surrounding the nuclear accident at the Three Mile Island plant in Harrisburg, Pennsylvania, and the public debate that followed is demonstrative evidence of the fact that the problems concerning future sources of electric energy transcend state boundaries and localized interests, even national boundaries. And yet Order No. 14 of the Texas Public Utility Commission validates an agreement among several Texas electric utilities to forbid ninety per cent of all electric energy produced in Texas to be transported in interstate commerce.[3] Such an attempt to isolate Texas from commerce with other states is repugnant to the very spirit of the Commerce Clause. The putative state interests involved in such

(3) It is estimated that the members of the Texas Interconnect System, of which ERCOT is a part, produce about 90% of electricity produced in Texas.

an order are irrelevant. The future energy needs of our country require, at the very least, uniformity of regulation. As no man is an island, neither is a State.

In *City of Philadelphia* v. *New Jersey, supra,* Mr. Justice Stewart stated, "[W]here simple economic protectionalism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." 98 S. Ct. at 2535. The present case offers a classic example.

Steve Clark
Attorney General
State of Arkansas

J. Mark Davis
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201

CERTIFICATE OF SERVICE

I, Steve Clark, Attorney General of the State of Arkansas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of April, 1979, I served copies of the foregoing, by first class mail, postage prepaid, to the office of the Governor and Attorney General, respectively, of the States of New Mexico and Texas.

STEVE CLARK
Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201