IN THE

# Supreme Court of the United States

OCTOBER, 1978

No. 82, Original

THE STATE OF NEW MEXICO, *Plaintiff*

V.

THE STATE OF TEXAS, *Defendant*

## *REPLY BRIEF*

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# SUBJECT INDEX

# INDEX OF AUTHORITIES

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## ARGUMENT AND AUTHORITIES

### I

### ORDER 14 OF THE TEXAS UTILITY COMMISSION IS A DISCRIMINATORY BARRIER ERECTED TO IMPEDE THE FREE FLOW OF ELECTRICITY IN INTERSTATE COMMERCE AND AS SUCH SHOULD BE BE STRUCK DOWN AS VIOLATIVE OF THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

In this Reply Brief the State of New Mexico will not undertake to restate its principal arguments, as found in its Petition and Motion, but will simply respond briefly to the arguments presented by the State of Texas in its Brief in Opposition. That Brief contains a lengthy discussion of the facts surrounding the issuance of Order 14, but the Plaintiff submits that those factual arguments can be reduced to the following three propositions:

1. On July 11, 1977, the Texas Utility Commission issued a permanent order (Order 14) requiring that the Texas Interconnected Systems be reestablished and maintained as it existed prior to May 4, 1976 without the interstate connection made on that day;

2. The Texas Utility Commission issued Order 14 for good reasons; and

3. Order 14 has been the subject of intense controversy and litigation ever since.

The State of New Mexico contends that in its very defense the State of Texas has admitted facts sufficient to support the granting of Plaintiff's petition under the rule of law established in *City of Philadelphia v. State of New Jersey,* ____ U.S. ____, 98 S.Ct. 2531 (1978). This case is controlling on the substantive issue of law before this Court, since it established a *per se* rule invalidating state erected barriers which discriminated against interstate

commerce, *even if* such barriers were established for some presumably legitimate economic goal. This is precisely the type of barrier to interstate commerce created by Order 14, since Texas' own explanation for the issuance of that order cites purposes other than public health and safety.

In *City of Philadelphia v. New Jersey, supra,* New Jersey had passed a law prohibiting the importation of most solid or liquid wastes which originated or were collected outside the territorial limits of the State. This Court declared such a statute to be in violation of the Commerce Clause, with the following comments:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See, e.g., *Hood & Sons v. Du Mond, supra; Toomer v. Witsell,* 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167, 92 L.Ed. 1460; *Baldwin v. G.A.F. Seelig, supra; Buck v. Kuykendall,* 267 U.S. 307, 315-316, 45 S.Ct. 342, 325-326, 69 L.Ed. 623. 98 S.Ct. at 2535

The State of Texas argues that the need to achieve "reliability" in the generation of electrical power is the justification for Order 14's prohibition of the exportation or importation of electrical power in interstate commerce (See Brief in Opposition, p. 6-11). Even if one were to accept such an explanation, the language of Order 14 and the factual basis on which it was issued fall within the sphere of prohibited state action, as defined by the *City of Philadelphia v. New Jersey, supra,* case. At this Court ruled in that case:

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect ch. 368 violates this principle of non-discrimination. 98 S.Ct. at 2537

> Also relevant here are the Court's decisions holding that a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders. *Oklahoma v. Kansas Natural Gas Co.,* 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716; *Pennsylvania v. West Virginia,* 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117. These cases stand for the basic principle that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demand or because they are needed by the people of the State" *Foster Packing Co. v. Haydel, supra,* 278 U.S. at 10, 49 S.Ct. at 4. 98 S.Ct. at 2538

> It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. 98 S.Ct. at 2538

Texas does not deny that Order 14 interrupted the flow of interstate commerce in electricity, or that the effect of that order is a continuing barrier to that commerce. Its argument is that the attempt to create the interstate connection was "under the cover of darkness and without notice," and constituted a "midnight wiring." (Brief in Opposition, pp. 4-5). Further, its argument proceeds, the Texas Public Utility Commission had to hold hearings in

Docket 14 because the reliability of the system was threatened by the interstate connection, and such a rationale became the ultimate justification for Order 14.

However, if one closely examines the language of Order 14, particularly paragraph 4, (Appendix to Brief in Opposition, pp. 19-20) it is apparent that the standard of "reliability" is not incorporated into the prohibitions against the reconnection. Order 14's prohibition against reconnection is qualified such that if:

1. The contractual prohibitions are adjudicated to be void or voidable,

2. The Commission or the Federal Power Commission shall order the connection, or

3. A court of competent jurisdiction shall order that the intertie may be reconnected.

As such, this order is an invitation to litigation on a series of legal questions, with a recognition by the Public Utility Commission of Texas that the result of such litigation may be the reconnection in interstate commerce, even if it would effect the reliability of the system.

Obviously the standard of reliability is an important one to be applied by a state regulatory commission in its oversight of electric utilities within its jurisdiction, whether a proceeding involves rate-making, power plant construction, or interties of power generation systems. However, the State of New Mexico is not attacking an order of the Public Utility Commission of Texas framed by a standard of reliability. Paragraph 4 of Order 14 is a prohibition against interconnections that the Commission acknowledged might be litigated over issues of contract law, or FPC (FERC) jurisdiction, as well as other non-reliability issues, and in a variety of federal and state forums. Furthermore, by its very terms that order could be superceded by an appropriate administrative agency or

judicial determination, without any determination as to "reliability."

The State of New Mexico submits that when the factual underbrush surrounding the State of Texas' position is cleared away, what remains is the issue of law presented by the *City of Philadelphia v. New Jersey, supra,* case, namely that Texas has prohibited the free flow of electricity in interstate commerce by an order which is a *per se* violation of the Commerce Clause to the U.S. Constitution.

## II

## THE STATE OF NEW MEXICO'S INTEREST IN THE ENFORCEMENT OF THE COMMERCE CLAUSE IS SUBSTANTIAL, AND CAN NOT BE FAIRLY AND PROPERLY ADJUDICATED IN ANY OTHER JUDICIAL OR ADMINISTRATIVE FORUM.

### A. *New Mexico's Interest*

The Plaintiff submits that the major non-jurisdictional issue in this case is whether or not there has been a *per se* violation of the Commerce Clause. Set against this legal backdrop, Texas' argument that New Mexico has not stated facts sufficient to justify invocation of this Court's original jurisdiction must fail.

New Mexico, in fact every state in the union, has a legitimate state interest in insuring that the Commerce Clause is protected from erosion by state action of the type which is the subject of this litigation. A state's right to litigate that question in the Supreme Court should not be conditioned upon an elaborate factual showing as to the effect of that barrier on the commerce of a given state, or the purpose of a *per se* rule will have been lost. New Mexico has alleged in its complaint and stands ready to prove that it will suffer substantial harm to itself and its citizens due

to the barrier created by Texas in the interstate market for electricity, and no stronger factual showing is required by any of the cases cited by the Defendant.

In making this argument the State of New Mexico also relies on the line of cases cited in Defendant's Brief in Opposition which established the principle that the Court will exercise its original jurisdiction in appropriate cases.

Although the defendant relies heavily on the case of *Arizona v. New Mexico,* 425 U.S. 794 (1976), that case did not establish a rule which is contrary to the Plaintiff's claim or which would support the denial of Plaintiff's petition. Quite the contrary, the list of disputes cited by the *Arizona v. New Mexico* opinion as examples of issues inappropriate for this Court's original jurisdiction—application of state laws concerning "taxes, motor vehicles, decedent's estates, business torts, and governmental contracts," 425 U.S. at 797-798—is not inclusive of, or even suggestive of, a dispute between two states over the *transmission* of electricity in interstate commerce.

*Arizona v. New Mexico, supra,* involved a claim by Arizona that the New Mexico Electric Energy Tax was a burden on interstate commerce. The Electric Energy Tax was imposed on all generation of electricity whether for sale in or out of New Mexico; however, a credit was allowed for the New Mexico Gross Receipts Tax and any other state's Gross Receipts Tax imposed in amounts greater than the New Mexico Electric Energy Tax. Arizona sought to invoke this Court's original jurisdiction even though its own political subdivision, the Salt River Project, had already raised *identical* factual and legal claims before a District Court in New Mexico. In refusing jurisdiction this Court noted that the controversy was already pending in the District Court and that that forum was well on its way to adjudicating all the issues. The *Arizona v. New Mexico* case was a tax case involving no direct blockage in interstate commerce, but a tax on generation which is analogous to a severance tax. Further, Arizona would

incur no harm from delay since by action of law no tax would actually be paid over to New Mexico until the tax was finally adjudicated as valid. The intertie case is very different in a number of respects. The Court in *Arizona v. New Mexico* distinguished *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), on grounds that there was no present harm to Arizona from the remand to a different forum; by contrast, New Mexico alleges and can prove substantial harm from the delay in adjudication. Another important distinction between this case and *Arizona v. New Mexico, supra,* is the difference between a complete *blockade* in the *transmission* of electricity in interstate commerce and a *tax* on the *generation* of electricity in a single state. This Court has been reluctant to interfere with state taxing policy and only in extreme cases reverses a state judgment in this area.

This Court appears never to have taken original jurisdiction in a tax dispute between states. See Note, "United States Supreme Court Original Jurisdiction," 11 Stan.L.Rev. 665 (1959). In contrast, it has taken original jurisdiction on a number of occasions in which there have been direct limitations imposed on the flow of goods and services in interstate commerce. See *e.g., Pennsylvania v. West Virginia, supra.*

B. *Availability of Other Forums.*

Texas claims that New Mexico has a remedy by participating in one of three proceedings. These proceedings are *Central Power & Light Co. v. Public Utility Comm'n of Texas,* Cause No. 261, 605 (53rd D.Ct., Travis County, Texas, filed May 31, 1977) (to be referred to as the "State Court" case); *Central Power & Light Co. v. Public Utility Comm'n of Texas,* appeal docketing No. 78-3219 (5th Cir. July 20, 1978) (to be referred to as the "Fifth Circuit" case); and *Re Central Power & Light Co., et al.,* FERC Docket No. EL 79-8, Notice of Feb. 22, 1979) (to be referred to as

the "FERC" case). It is submitted that none of these proceedings is an adequate or appropriate forum for the adjudication of the New Mexico claims.

The State Court case is the only proceeding in which the infringement on interstate commerce of Order 14 is a legal issue which has been raised by the parties. But also at issue are a variety of non-constitutional issues, such as the various procedural and substantive defects claimed by Central Power and Light Co. and West Texas Utilities in the issuance of Order 14. Although it is impossible to predict the course of that litigation with total accuracy, the Commerce Clause question would only be decided if all other grounds for relief were eliminated, given the rule that constitutional issues are avoided if other grounds for decision exist. Furthermore, the State of New Mexico was not a party to the Texas Public Utility Commission proceeding, nor to the State Court appeal, and infringement on commerce with New Mexico is not a factual issue in the case. A decision by that court would not be dispositive of New Mexico's claims.

Therefore, that proceeding should not be considered an "appropriate" or "available" forum for purposes of denying New Mexico's petition before this Court.

The Fifth Circuit and FERC cases are both being litigated in federal forms, neither of which has before it the issue of the Commerce Clause as it relates to New Mexico. Furthermore, this Court, in its recently announced decision of *California v. Arizona,* ____ U.S. ____, 47 LW 4174, reiterated the rule that a state cannot be forced to litigate constitutional claims in inferior federal courts or other federal tribunals.

> The constitutional grant to this Court of original jurisdiction is limited to cases involving the States and the envoys of foreign nations. The Framers seem to have been concerned with matching the dignity of the parties to the status of the court:

> "The evident purpose [of the grant of original jurisdiction] was to open and keep open the highest court of the nation for determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made. . . ." *Ames v. Kansas, supra,* at 464.

See the Federalist, No. 81, 507-509 (Lodge ed. 1888) (A. Hamilton). Elimination of this Court's original jurisdiction would require those sovereign parties to go to another court, in derogation of this constitutional purpose. Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States, but it is extremely doubtful that they include the power to limit in this matter the original jurisdiction conferred upon this Court by the Constitution.

47 LW at 4175-6

New Mexico seeks from this Court a simple declaration of rights as to the meaning and effect of the Commerce Clause of the United States Constitution as applied to Order 14 of the Texas Utility Commission. Either that Order is a *per se* violation of the Commerce Clause, or it is not, and that determination is a legal question which the State of New Mexico urges this Court to address swiftly and decisively. New Mexico submits that the case of *City of Philadelphia v. New Jersey, supra,* is a controlling precedent on the constitutional issue in this case, and that Texas'

attempt to block the flow of electricity in interstate commerce is of such paramount importance to the State of New Mexico, as well as nearby states, that this Court should exercise its original jurisdiction.

Respectfully submitted,

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## PROOF OF SERVICE

I, Jeff Bingaman, Attorney General, State of New Mexico, Attorney 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 April, 1979, I served copies of the foregoing Reply Brief by first class mail, postage pre-paid, to the Office of the Governor and Attorney General, respectively, of the State of Texas.

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Attorney General
State of New Mexico