No. 82, Original

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW MEXICO, PLAINTIFF

v.

STATE OF TEXAS

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

JOSHUA Z. ROKACH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

INDEX

CITATIONS

Cases:

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 82, Original

STATE OF NEW MEXICO, PLAINTIFF

v.

STATE OF TEXAS

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This memorandum is filed in response to the Court's request of May 29, 1979.

STATEMENT

1. Central and South West Corporation ("CSC"), a public utility holding company registered under the Public Utility Holding Company Act, 15 U.S.C. 79 *et seq.*, owns and operates electric utilities in Arkansas, Louisiana, Oklahoma and Texas. Its Texas sub-

sidiaries are Central Power and Light Company ("CP&L") and West Texas Utilities Company ("WTU"). WTU, in turn, is composed of a northern and a southern division (Pltf. Br. 10).

CP&L and the southern division of WTU have been members of the Electric Reliability Council of Texas ("ERCOT") since its inception. The agreement forming that organization, to which all intrastate utilities in central and southern Texas belong, bars members from engaging in interstate commerce (Pltf. Br. 10). In accordance with that agreement, CP&L and the southern division of WTU were, prior to 1976, operating separately from the rest of CSC. See *West Texas Utilities Co.* v. *Texas Electric Service Co.*, 470 F. Supp. 798, 806 (N.D. Tex. 1979).[1]

As a public utility holding company, CSC must abide by the Public Utility Holding Company Act, which requires those companies to operate as integrated systems. 15 U.S.C. 79k(a). Because two of CSC's subsidiaries, CP&L and the southern division of WTU, were members of ERCOT, certain of CSC's customers contended that CSC was not in compliance with that requirement. Apparently under the prodding of an administrative proceeding before the

---

[1] The northern division of WTU operates in interstate commerce and has a connection with the CSC Oklahoma subsidiary. CSC's subsidiaries outside of Texas are members of the Southwest Power Pool. 470 F. Supp. at 806.

The southern division of WTU, CP&L and other members of ERCOT selling bulk power are also members of the Texas Interconnected System (TIS). TIS members are also confined by contract to intrastate commerce. *Ibid.*

Securities and Exchange Commission, CSC undertook to connect CP&L and the southern division of WTU with other CSC subsidiaries operating in other states (Texas Br. in Opp. 4-5).

CSC originally attempted to effect the interconnection through persuasion. The other ERCOT members refused to permit the interconnection, however, preferring to remain in intrastate commerce and thus outside the jurisdiction of the Federal Energy Regulatory Commission (the "Commission"). Persuasion having failed, CSC, in the early hours of May 4, 1976, closed the switch connecting the southern division of WTU to its northern division and to Oklahoma. By that action and as a result of interconnections among ERCOT members, all ERCOT members transmitted power in interstate commerce. This situation lasted for eight hours, until the other ERCOT members disconnected themselves from CP&L and WTU (Pltf. Br. 10; Texas Br. in Opp. 4-5).

2. These events triggered a number of legal proceedings. First, CP&L and WTU filed an antitrust suit in the United States District Court for the Northern District of Texas against Texas Electric Service Company and Houston Lighting and Power Company, both members of ERCOT. Plaintiffs claimed that defendants' refusal to permit use of their lines for the exchange of power among the CSC system companies constituted a conspiracy in restraint of trade. In January 1979, the district court found no antitrust violation. *West Texas Utilities*

Co. v. *Texas Electric Service Co., supra.* The case is now on appeal to the Fifth Circuit, No. 79-2677.

CSC also petitioned the Commission, under Sections 202(b) and (c) of the Federal Power Act, 16 U.S.C. 824a(b), (c), to compel the other ERCOT utilities to connect with CP&L and WTU, which, as a result of the actions of May 4, 1976, had been connected with interstate commerce. The Commission denied the petition on the ground that the other ERCOT utilities were not subject to its jurisdiction and could not, except on a limited emergency basis, be compelled to connect with CP&L and WTU. The District of Columbia Circuit remanded the case for the Commission to clarify its reasons for refusing to order ERCOT to connect with CP&L, WTU and interstate commerce on a permanent basis. *Central Power & Light Co.* v. *FERC*, 575 F.2d 937 (D.C. Cir.), cert. denied, No. 78-318 (Nov. 27, 1978). The Commission has not yet acted on the remand.

In addition to the foregoing proceedings, the Texas Public Utilities Commission ("Texas PUC") conducted proceedings that eventually led to an order that is the subject of this original complaint. Soon after the events of May 4, 1976, four intrastate utilities (and members of ERCOT) petitioned the Texas PUC for an order reconstituting ERCOT as an intrastate system and directing CP&L and the southern division of WTU to disconnect from interstate commerce. The Texas PUC issued interim and final orders prohibiting WTU and CP&L from connecting with interstate systems unless specifically authorized

by the Texas PUC or ordered to do so by the Federal Energy Regulatory Commission (Texas Br. in Opp. App. A-19 to A-20). In compliance with these orders, CP&L and the southern division of WTU disconnected themselves from interstate commerce.

The Texas PUC final order generated additional litigation. The CSC Texas subsidiaries, including both divisions of WTU, sought state court review of the Texas PUC order by filing an action in the 53rd District Court of Travis County (Cause No. 261,605). CP&L and WTU have alleged that the order violates state law, the Federal Power Act and the Commerce Clause of the United States Constitution (Texas Br. in Opp. App. A-33 to A-39). The Commission has appeared in this action as amicus curiae supporting the plaintiffs.

CP&L and WTU also filed suit in the United States District Court for the Western District of Texas, challenging the Texas PUC order on similar grounds. The United States and the FERC intervened in the federal suit as plaintiffs. The district court ruled that it should abstain from assuming jurisdiction over the case until completion of the state proceedings. On appeal, the Fifth Circuit affirmed. *Central Power & Light Co.* v. *The Public Utility Commission of Texas*, 592 F.2d 234 (5th Cir. 1979). The court held that state judicial construction of the Texas statute might eliminate the need for a constitutional ruling. *Id.* at 238. The court also reasoned that, at a minimum, abstention would produce a definitive interpretation of the relatively new Texas Public

Utility Regulatory Act. *Id.* at 237. No party has petitioned this Court for a writ of certiorari and the court of appeals decision is final.

3. After the adverse district court decisions, the CSC subsidiaries returned to the Commission for additional affirmative relief under the newly enacted Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117. Section 202 of PURPA, 92 Stat. 3135, added Section 210 to the Federal Power Act, and it gives the Commission authority to order interconnections of electric utilities, without regard to their interstate or intrastate status, in furtherance of certain specified objectives and on condition that certain statutory criteria are met. In addition, Section 203 of PURPA, 92 Stat. 3136, added Section 211 to the Federal Power Act, which permits the Commission to order wheeling (transmission of power from one utility to another over the lines of a third) under the same conditions. Finally, Section 205 of the PURPA, 92 Stat. 3140, authorizes the Commission to exempt a utility from the operation of a state law or regulatory order forbidding pooling, if the conditions for ordering interconnection under Section 202 of PURPA are met.

The CSC subsidiaries petitioned FERC for the issuance of orders under Sections 202-205 of PURPA. They sought interconnection and wheeling among the CSC companies and between the CSC companies and the rest of ERCOT, and an exemption from the Texas PUC Order. By order of July 26, 1979, the Commission set the matter for a hearing. Order Instituting

Investigation, Granting Intervention, Granting Motion to Dismiss in Part, Denying Motion to Dismiss in Part, and Establishing Hearing Procedures, Docket No. EL79-8 (July 26, 1979).[2] The Texas PUC has filed an application for rehearing of the July 26, 1979 order, which the Commission is presently considering.

DISCUSSION

We agree with the plaintiff that the order of the Texas PUC is an impermissible burden on interstate commerce in violation of the Commerce Clause, and invades the exclusive federal regulatory jurisdiction over the interstate transmission and sale for resale of electricity in violation of the Supremacy Clause; and we have so contended in the state and federal court actions in which we have appeared. We do not, however, believe that the case is appropriate for this Court's exercise of its original jurisdiction because there are other forums in which the issues presented by New Mexico can be (and are being) resolved and because neither the interests of New Mexico nor any other reason warrants the exercise of this Court's original jurisdiction.

1. This Court has established the general principle that " 'our original jurisdiction should be invoked

---

[2] The CSC subsidiaries also sought an interconnection order under Section 202(b) of the Federal Power Act, 16 U.S.C. 824a(b). However, the Commission dismissed that portion of the application, inasmuch as that section applies to interstate utilities and except for CP&L and WTU, ERCOT is composed of intrastate utilities. Order, *supra*, at 8.

sparingly' " and should be exercised only in "appropriate cases." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94 (1972). In that case the Court also stated (*ibid.*):

> 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.

The Court recently applied those principles in *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), in denying the State of Arizona leave to file an original complaint against the State of New Mexico challenging the constitutionality of New Mexico's electric energy tax. The Court concluded that a pending action in a New Mexico court brought by three Arizona utilities who were subject to, but who refused to pay, the tax provided an adequate alternative forum for the adjudication of the issues presented by Arizona in its original complaint and for the protection of Arizona's interests. 425 U.S. at 797-798.

We believe the same principles warrant the denial of plaintiff's motion for leave to file its original complaint. In this case there are two forums in which the issues presented by plaintiff can be adjudicated and which may provide relief fully protecting plaintiff's interests. First, as in *Arizona* v. *New Mexico*, *supra*, the affected utilities have brought an action in a Texas state court challenging the Texas PUC order not only on the same constitutional grounds

relied on by plaintiff here but also on state statutory grounds. The Texas courts may invalidate the order on state grounds without reaching the constitutional questions. If they uphold the order on both state and constitutional grounds, this Court's review of the constitutional issues may then be sought by a petition for a writ of certiorari. See *Arizona Public Service Co.* v. *Snead*, No. 77-1810 (Apr. 19, 1979), in which this Court reviewed (and held invalid) the tax challenged in *Arizona* v. *New Mexico*, *supra*, after the New Mexico courts had adjudicated the matter.

In addition, the affected utilities have petitioned the Federal Energy Regulatory Commission for relief under the recently enacted Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, which, as we have noted (page 6, *supra*), authorizes the Commission, in appropriate circumstances, to order the interstate interconnections that the Texas PUC order has prohibited. If the Commission does so, its order would end the controversy by the terms of the Texas PUC order itself, which has prohibited the interconnections "unless * * * the [the Federal Energy Regulatory Commission] shall order a connection * * *" (Texas Br. in Opp. App. A-20).

In view of the pending state court and federal administrative proceedings, this Court's exercise of its original jurisdiction is neither necessary nor warranted.

2. Another consideration militating against the exercise of original jurisdiction in this case is the

attenuated and speculative nature of plaintiff's interest in the matter. A number of utilities operate in interstate commerce between Texas and New Mexico, but no ERCOT utility has ever served or been connected with utilities serving New Mexico. The interconnection that has been sought by CSC (and that was forcibly effected for eight hours in May 1976) is between the southern division of WTU and a CSC subsidiary serving Oklahoma, which has no operating interconnections with utilities serving New Mexico. With some minor exceptions,[3] the only effect the Texas PUC order has on New Mexico is that it would prevent utilities from constructing and operating a new connection between Texas and New Mexico unless permitted to do so by the Texas PUC or the Commission. We know of no utility that has proposed or expressed an interest in constructing and operating such a connection. Furthermore, if such a proposal were made, it might be approved by the Texas PUC or the Commission. The effect of the

[3] Plaintiff asserts (Br. 11) that one effect of the Texas PUC order is to prevent Southwestern Public Service Company, which serves parts of New Mexico, Texas, Oklahoma and Kansas, from using "an existing intertie it has with [WTU]." This "intertie," which plaintiff does not further identify, appears to refer to several connections between Southwestern Public Service Company and the northern (interstate) division of WTU. Southwestern Public Service Company has never, to our knowledge, been directly connected to the southern division of WTU, and even if they were indirectly connected (through the northern division of WTU), the amount of electricity that could be exchanged between the two over existing lines does not appear to be significant.

Texas PUC order on the interests of New Mexico is thus entirely speculative.

3. This case contrasts sharply with *Maryland* v. *Louisiana*, No. 83, Original, in which this Court granted leave to file the complaint on June 18, 1979. The challenged Louisiana tax in that case had immediate and substantial adverse consequences to the plaintiff states that could not adequately be remedied by litigation in other forums; in particular, the fact that interstate customers would have to bear the substantial burden of the challenged tax pending the adjudication of its validity. In addition, there were substantial questions whether the state court proceeding that was pending in that case was properly maintainable. (See Brief of the United States and the Federal Energy Regulatory Commission in No. 83, Original at 10-14). Those circumstances are not present in this case.

CONCLUSION

The Motion for Leave to File Bill of Complaint should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

JOSHUA Z. ROKACH
Attorney
Federal Energy Regulatory Commission

SEPTEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 300528 73