No. 112, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

NEAL LEADER*
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

THOMAS L. SPENCER
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CIVIL DIVISION
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

ATTORNEYS FOR DEFENDANT

June, 1988

* Counsel of Record

QUESTIONS PRESENTED

I.

Does the interest of Wyoming, as the complaining state, establish the "strictest necessity" required for invoking this Court's original jurisdiction.

II.

Whether the challenged Oklahoma statutes are invalid because they violate the Commerce Clause of the United States Constitution.

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STATEMENT OF THE CASE

The State of Wyoming has petitioned this Court asking it to set aside its primary appellate functions, and assume original jurisdiction in this cause against the State of Oklahoma.

It is the position of the State of Oklahoma that the interests advanced by the State of Wyoming in support of its

application are simply insufficient to establish the "strictest necessity" required for the invoking of this Court's original jurisdiction.

The complaint tendered by Wyoming asks this Court to adjudge an Oklahoma law invalid as violative of the Commerce Clause of the United States Constitution.

The challenged statutes require that utilities, providing electrical power generated from coal-fired plants located in Oklahoma and sold to consumers in Oklahoma, burn a mixture of coal that contains a minimum of 10% Oklahoma mined coal, as calculated on a British Thermal Unit basis. Okla. Stat. tit. 45, § 939. Under the statutory scheme, this requirement would not attach if the cost to the

utility for Oklahoma mined coal exceeded energy costs of existing long-term contracts for out-of-state coal or resulted in higher rates to Oklahoma consumers. Okla. Stat. tit. 45, § 939.1.[1]

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[1] Wyoming also attempts to attack Oklahoma Senate Resolution No. 21, passed by the Fortieth Legislature, 1985 Okla. Sess. Laws, 1694, and attempts to use the Resolution to interpret an act passed in the next legislative session. Plaintiff's reliance on this resolution for such purpose is misplaced. In Oklahoma concurrent resolutions, not being law, are not binding. Being nonbinding, such resolutions are often passed in short order, without the careful consideration afforded statutory law. In point of fact, the Resolutions relied upon by Plaintiff was adopted by the respective chambers of the Legislature within a day of each other (1985 Okla. Sess. Laws, 1694).

During the same session, the Fortieth Legislature used like concurrent resolutions to consider such weighty topics as: designation of square dance day (H.C. Res. No. 1010, 1985 Okla. Sess. Laws, 1717); adoption

(continued...)

The challenged statutes apply to four Oklahoma utilities with one or more coal-fired plants. One of these utilities is the Grand River Dam Authority which is owned and operated by the State of Oklahoma.

The Oklahoma statutes do not, as argued, create a barrier to the exportation of Wyoming coal at Oklahoma's state lines. Rather, under the statutory scheme, Wyoming may export as much coal as it desires to Oklahoma.

Nor do the Oklahoma statutes, as argued by Wyoming, directly interfere with Wyoming's imposition of coal

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[1](...continued) of milk as the official beverage (S.C. Res. No. 2, 1985 Okla. Sess. Laws, 1691); and designation of Langley, Oklahoma as the fiddle capitol of the world (S.C. Res. No. 29, 1985 Okla. Sess. Laws, 1702).

severance taxes. To the contrary, Wyoming is free to impose a tax on all coal Wyoming produces severed from the earth in Wyoming. It is clear that Wyoming's tax is imposed on severance from the earth, not on the sale of coal. In point of fact, the statute relied upon by Wyoming specifically contains a section on the valuation of coal severed and used without sale. Wyo. Stat. 39-2-202(d) (1977). As such there is no direct, necessary relationship between Oklahoma's law and Wyoming's power to tax coal as it is severed from the ground in Wyoming.

SUMMARY OF ARGUMENT

Oklahoma's statute requiring electric utilities to burn a small amount of Oklahoma coal does not directly harm the State of Wyoming as a

sovereign state. Wyoming has only advanced a hypothetical loss of coal severance tax caused by a hypothetical drop in Wyoming coal sales and any harm does not affect its citizens generally. Wyoming's "interest" in the case is indirect, at best, and falls far short of establishing the "strictest necessity" for the invocation of this Court's original jurisdiction. Wyoming coal producers that might establish such a sales drop could easily litigate the issue in another forum.

Oklahoma's statute is immune from Commerce Clause attack since it is part of its regulation of domestic retail utility rates expressly authorized by Congress. It serves the legitimate local purposes of avoiding dependence

on a single energy source, increasing competition and lowering utility rates.

ARGUMENT

PROPOSITION I.

BECAUSE OF THE UNCOMPELLING NATURE OF THE INTEREST WYOMING SEEKS TO VINDICATE AND BECAUSE OF THE AVAILABILITY OF ALTERNATIVE FORUMS IN WHICH THE ISSUES PRESENTED CAN BE LITIGATED, WYOMING HAS FAILED TO ESTABLISH THE "STRICTEST NECESSITY" REQUIRED INVOKE ORIGINAL JURISDICTION.

INTRODUCTION

As noted in Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), "[i]t has long been this Court's philosophy that its 'original jurisdiction should be invoked sparingly.'" (quoting from Utah v. United States, 394 U.S. 89, 95 [1969]).

In conformity with this philosophy, this Court has held that its original jurisdiction should not be exercised

unless it is "absolutely necessary." Commenting on the character of its original jurisdiction, this Court in Louisiana v. Texas, 176 U.S. 1, 15 (1900), stated:

> [I]t is apparent that the [original] jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute. . . .

Similarly, in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 505 (1971), this Court required the establishment of the "strictest necessity" to justify the invoking of original jurisdiction.

This Court has also required that a state seeking to invoke original jurisdiction to control the conduct of another state must establish that the threatened invasion of its rights is of "serious magnitude." State of

Connecticut v. Commonwealth of Massachusetts, 282 U.S. 660, 669 (1931); New York v. New Jersey, 256 U.S. 296, 309 (1921); and Missouri v. Illinois, 200 U.S. 496, 521 (1906). Additionally, a state seeking such relief has a greater burden than that generally required of private parties seeking injunctive relief. State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. at 669; and North Dakota v. Minnesota, 263 U.S. 365, 374 (1923).

As noted in Justice Rehnquist's dissent in Maryland v. Louisiana, 451 U.S. 725, 762 (1981), this Court has recognized that expending its time and resources on original jurisdiction cases detracts from the Court's primary appellate duties.

> "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." . . . Original-jurisdiction cases represent an "intrusion on society's interest in our most deliberate and considerate performance of our paramount role as a supreme federal appellate court . . ."

In employing the "absolute necessity" standard to determine whether original jurisdiction should be assumed, this Court not only looks to the nature of the interest of the complaining state (the essential quality of the right asserted), but also inquires whether recourse to original jurisdiction is necessary to protect the state. Washington v. General Motors Corp., 406 U.S. 109, 113 (1972); Illinois v. Milwaukee, 406 U.S.

91, 93 (1972); and Massachusetts v. Missouri, 308 U.S. 1, 18 (1939).

In the case at hand, the availability of other forums in which to adjudicate the issues presented, the existence of a small group of citizens (Wyoming coal producers or their association) likely to litigate the matter, and the uncompelling nature of the interests asserted, do not necessitate the exercise of this Court's original jurisdiction.

A. THE SO-CALLED "DIRECT" INTEREST ASSERTED BY WYOMING -- SEVERANCE TAX COLLECTIONS -- IS NOT OF SUFFICIENTLY SERIOUS MAGNITUDE TO "NECESSITATE" INVOKING THIS COURT'S DELICATE AND GRAVE ORIGINAL JURISDICTION.

As noted above, the challenged Oklahoma statutes merely require that utilities providing electric power

generated from coal-fired plants located in Oklahoma and sold to Oklahoma consumers, burn a mixture of coal containing a minimum of 10% Oklahoma mined coal, calculated on a British Thermal Unit basis. Okla. Stat. tit. 45, § 939.

The Oklahoma enactment further provides that the cost of coal to the utility shall not exceed the costs of existing long-term contracts for out-of-state coal including preference given Oklahoma vendors, or result in higher rates to Oklahoma consumers. Okla. Stat. tit. 45, § 939.1. Accordingly, the requirement that a 10% mixture be used does not apply if the use of such a mixture would require the utility to pay a cost in excess of the costs of long-term contracts for out-

of-state coal. Thus, depending on the price of coal, the statute may or may not require utilities to use coal mined in Oklahoma.

The challenged statutes do not, as Plaintiff argues, prohibit exportation of Wyoming coal to Oklahoma. Rather, under the statutory scheme, Wyoming producers may export as much coal to Oklahoma as they wish.

Wyoming, arguing that Oklahoma's statutes prohibit the sale of Wyoming coal in Oklahoma, asserts that its severance tax collection will decline as a direct result of Oklahoma's enactment. In examining this interest, it should be noted that there is no direct correlation between the sale of coal by Wyoming producers in Oklahoma, and the collection of Wyoming's

severance tax. The Wyoming tax is not imposed upon the sale of coal, but rather upon the completion of the mining process -- severance. Wyo. Stat. § 39-2-202(a) and (b) (1977). Recognizing that the tax is not imposed on sales, the Wyoming statute specifically provides for a method of evaluation, when the coal being severed is used without sale. Wyo. Stat. § 39-2-202(d) (1977).

Because Wyoming's tax is imposed on severance, not sales, Oklahoma's statutory enactment, even if it could be said to prohibit sales within Oklahoma (which it does not), would not directly affect Wyoming's ability to tax coal when it is severed from the ground.

Wyoming's claim that Oklahoma's law directly injures it is based on three unarticulated assumptions:

1. Consumption of Oklahoma mined coal in Oklahoma will ipso facto result in reduced sales of Wyoming coal in Oklahoma;
2. Reduced sales of Wyoming coal in Oklahoma will ipso facto result in an overall reduction in the sale of Wyoming coal; and
3. Reduced overall sales of Wyoming coal will ipso facto result in reduced severance of coal in Wyoming.

These assumptions, all of which are necessary to Wyoming's claim of "direct injury," show how tenuous and remote any connection between the claimed injury and the Oklahoma enactment is.

Any one or all of the assumptions may prove false, and failure of any assumption would cut off any connection (even indirect connections) between Oklahoma's law and Wyoming's claimed injury.

Wyoming's so-called "direct interest" is remote at best, and hardly the "direct" interest of "serious magnitude and dignity" required to "necessitate" the assumption of original jurisdiction.

The so-called "direct interest" asserted by Wyoming is certainly not included in the typical interests asserted in original action, such as: disputes over state boundaries, water rights, escheat property, or similar claims related to a state's proprietary interest. Nor is the interest pre-

sented the "makeweight" interest of a consumer. See Georgia v. Pennsylvania, 324 U.S. 439, 450 (1945); and Georgia v. Tennessee Copper Company, 206 U.S. 230, 237 (1907).

The so-called "direct injury" asserted by Wyoming is not an injury directly or necessarily resulting from Oklahoma's statutory enactment. Even if Oklahoma's laws were to have an incidental effect on the amount of coal that producers severed from the ground in Wyoming, such would not directly affect Wyoming's power to tax. If such were to occur, the Wyoming Legislature could make whatever adjustments it deems necessary to insure the

collection of adequate revenue to meet the State's needs.[2]

In sum, the so-called direct interest asserted by Wyoming is not an interest of serious magnitude necessitating the exercise of this Court's original jurisdiction. Nor does the parens patriae interest asserted by Wyoming rise to such magnitude.

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[2] Any failure on the part of the Legislature to act in such a case, may well make any incidental damage a self-inflicted injury. Such injuries are not actionable. This Court held in Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976), that a state may not be heard to complain about damage inflicted by its own hand.

B. THE PARENS PATRIAE INTERESTS ASSERTED BY WYOMING ARE NOT OF SUFFICIENT SERIOUSNESS TO NECESSITATE THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION. THIS IS PARTICULARLY TRUE IN LIGHT OF THE EXISTENCE OF A SMALL GROUP OF CITIZENS LIKELY TO CHALLENGE OKLAHOMA'S LAW (THE WYOMING COAL PRODUCERS OR THEIR ASSOCIATION), AND THE AVAILABILITY OF ALTERNATE FORUMS IN WHICH THE ISSUES PRESENTED CAN BE LITIGATED.

A state is not permitted to enter a controversy as a nominal party in order to forward the complaint of its individual citizens. See e.g., Maryland v. Louisiana, 451 U.S. 725, 737 (1981); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 394 (1938); and New Hampshire v. Louisiana, 108 U.S. 76, 90-91 (1883). A state may, however, act as a representative of its citizens in original actions where the injury affects the general population

of a state in a substantial way. See e.g., Maryland v. Louisiana, supra at 737; State of Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 449-50 (1945); Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923); and Missouri v. Illinois, 180 U.S. 208, 241 (1901).

In Pennsylvania v. West Virginia, supra, the threat complained of was complete cessation of natural gas delivery, and thus could be said to directly and seriously affect the health, safety and welfare of the citizens in general. In State of Georgia v. Pennsylvania, the complained of injury was pervasive railroad rate price fixing resulting in direct harm to all citizen consumers. In Maryland v. Louisiana, the complained of injury was the direct imposition of a "first-

use" tax on certain uses of natural gas, which was meant to be, and was in fact, passed on to all citizen consumers. Thus the parens patriae interest advanced was a direct increase in cost to all natural gas consumers.

In Missouri v. Illinois, it was a health menace to the entire state from the spread of contagious disease such as typhoid that was advanced.

No such serious interest exists in the case now before the Court.

In the case at hand, the asserted parens patriae interests are the citizens' interest in state revenue collection, the state subdivisions' interest in revenue collection, and a generally asserted interest in maintaining energy-related industries.

These asserted _parens_ _patriae_ interests are just as remote and tenuous as the so-called direct interest asserted by Wyoming. All rely on the same three assumptions as Wyoming's so-called direct interest. The asserted interests simply do not establish sufficient direct links between the challenged statutes and the alleged harm or the health, safety or welfare of the general population. This is particularly true in light of the fact that the issues presented can be raised in alternative forums, by Wyoming coal producers.

In determining if the case "necessitated" the assumption of original jurisdiction, this Court in _Maryland v. Louisiana_ particularly noted the absence of a small group of

citizens who were likely to challenge the tax directly. In the case at hand, the Wyoming coal producers or the Wyoming Mining Association constitute a small group of citizens likely to challenge Oklahoma's statutes.

It should be noted here that coal producers or their association would have other forums available in which to make such a challenge. Federal district courts would be available to them, just as they were available to the plaintiff in Hunt v. Washington State Apple Commission, 432 U.S. 333 (1977).[3] Additionally, the state courts of Oklahoma would also be

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[3] In point of fact, the law firm of Holland and Hart, on behalf of the Wyoming Mining Association, has written Oklahoma's Attorney General seeking permission to file an *amicus curiae* brief in support of Wyoming's position in this case.

available to them. Okla. Const. art. II, § 6; and Okla. Stat. tit. 12, § 1651. Thus, a forum would exist in which the issues presented could be litigated elsewhere. See Arizona v. New Mexico, 425 U.S. 794, 798 (1926).

This Court's original jurisdiction, which is evoked sparingly, is exercised in appropriate cases where required by the strictest necessity. In the case at hand, neither the so-called direct interest of Wyoming, nor the parens patriae interest of Wyoming are serious enough in magnitude to "absolutely necessitate" the exercise of this Court's jurisdiction. Accordingly, jurisdiction should not be assumed.

PROPOSITION II.

OKLAHOMA'S STATUTE CONCERNING THE USE OF OKLAHOMA COAL IN OKLAHOMA BASED PUBLIC UTILITIES IS PART OF THE STATE'S REGULATION OF RETAIL RATES CHARGED BY PUBLIC UTILITIES EXPRESSLY AUTHORIZED BY CONGRESS AND IS IMMUNE FROM COMMERCE CLAUSE ATTACK.

A. TITLE 45, §§ 939 AND 939.1 OF THE OKLAHOMA STATUTES REQUIRE THAT OKLAHOMA ELECTRIC UTILITIES PROVIDING POWER TO OKLAHOMA CONSUMERS BURN 10% OKLAHOMA MINED COAL ONLY IF THERE IS NO INCREASED COST TO THE OKLAHOMA CONSUMER.

In its brief, the State of Wyoming has tried to characterize Oklahoma's statutes as an absolute requirement that Oklahoma utility companies burn 10% Oklahoma mined coal. Wyoming also attempts to use the wording of a legislative resolution to demonstrate legislative intent even though the resolution was not enacted during the same legislative session and does not

constitute a law or other expression of intent of the Oklahoma Legislature.

Without quoting the statute at length Oklahoma mandates that 10% of the coal burned by Oklahoma utilities providing power to Oklahoma consumers must be mined in Oklahoma under certain conditions. This requirement is limited by the fact that purchase of Oklahoma coal by such utilities may not increase the cost to Oklahoma consumers. Oklahoma's motivation is clearly an attempt to motivate Oklahoma utilities to begin burning domestic coal but Oklahoma is equally concerned that the cost to its ratepayers not suffer. In other words, Oklahoma has not enacted a blind preference solely for the benefit of Oklahoma coal companies no matter what the cost.

After reading the brief of the State of Wyoming, one would think that Oklahoma had declared war on Wyoming coal producers. In buttressing its arguments Wyoming has erroneously relied on a resolution of the Legislature in 1985 which does not form the basis for any legislative history for the statutes they attack. The statutes under attack are §§ 939 and 939.1 of Title 45 of the Oklahoma Statutes passed in 1986. Both statutes were passed as part of one bill, Senate Bill No. 458, 1986 Okla. Sess. Laws, 73. The Oklahoma Senate Resolution cited by the State of Wyoming in its brief was passed the year before in 1985. It was never signed by the Governor and never became law.

In Oklahoma such a legislative resolution is merely an expression of opinion and has no force or effect of law. Hawks v. Bland, 9 P.2d 720 (Okla. 1932). Only measures passed by both houses of the Legislature and then signed by the Governor become law in Oklahoma. Oklahoma News Co. v. Ryan, 224 P. 969 (Okla. 1924). Most importantly this 1985 resolution does not even constitute part of the legislative history of the 1986 act. Oklahoma really has no such legislative history in the form of committee reports or other expressions of legislative intent. Even legislative resolutions such as that cited in Wyoming's brief may not be used to express legislative intent. Stephens

Produce Co. v. Stephens, 332 P.2d 674 (Okla. 1958).

While the enactment of these statutes assisted the Oklahoma coal industry in becoming competitive it was not the primary intent of the law. As will be discussed later, Oklahoma's primary long term goal is to assist the Oklahoma electric ratepayers by reducing Oklahoma's reliance on a single source of coal.

B. CONGRESS HAS GIVEN AUTHORITY TO THE FEDERAL ENERGY REGULATORY COMMISSION TO SET WHOLESALE ELECTRIC UTILITY RATES, BUT HAS EXPRESSLY LEFT THE REGULATION OF RETAIL RATES AND OTHER REGULATORY MATTERS CONCERNING DOMESTIC UTILITY COMPANIES, TO THE STATES.

Since 1935, with the creation of the Federal Power Commission, Congress has specifically delineated the extent to which states may regulate public

utility companies and the rates charged consumers. Federal jurisdiction over public utilities generating electricity is now vested with the Federal Energy Regulatory Commission. 16 U.S.C. § 824 (1982). This statute provides in pertinent part as follows:

> (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) <u>shall not apply to any other sale of electric energy</u> . . .

(Emphasis added.) 16 U.S.C. § 824(b)(1)(1982). Between 1935 and 1983, the line between state and federal jurisdiction was quite clear. The states had jurisdiction over retail rates charged to its citizens and the federal government had jurisdiction over wholesale rates charged by utility

companies. In <u>Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission</u>, 461 U.S. 375 (1983), this Court recognized a state's broader jurisdiction over public utility companies generating electricity within its borders. In this case the court upheld Arkansas' jurisdiction over wholesale rates of the Arkansas Electric Cooperative.

Even though allowing Arkansas to regulate wholesale rates had <u>some</u> effect on interstate commerce, the court noted that the state's traditional role in regulating public utilities had no negative impact on the nation's commerce.

> Finally, although we recognize that the PSC's regulation of the rates AECC charges to its members will have an incidental effect on interstate commerce, we are convinced that "the burden

> imposed on such commerce is not clearly excessive in relation to the putative local benefits." Part of the power AECC sells is received from out-of-state. But the same is true of most <u>retail</u> utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States.

461 U.S. at 395. Oklahoma has clear authority to regulate retail electric rates and other utility matters which have only incidental effects on interstate commerce.

C. AS CONGRESS HAS LEFT JURISDICTION OVER RETAIL ELECTRIC RATES CHARGED BY ELECTRIC UTILITY COMPANIES TO THE STATES IN ADDITION TO OTHER REGULATORY MATTERS OVER THESE COMPANIES, OKLAHOMA STATUTES NECESSARY IN CARRYING OUT ITS RATEMAKING JURISDICTION ARE IMMUNE FROM COMMERCE CLAUSE ATTACK.

As previously stated, 16 U.S.C. § 824 (1982) essentially carves out

jurisdiction over certain electric utility matters and gives it to FERC. The federal government (through FERC) has no power to prescribe retail electric rates charged by electric utility companies. <u>Federal Power Commission v. Conway Corp.</u>, 426 U.S. 271, 276 (1976). All other matters in the regulation of electric utilities are left to the states.

Even though the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, Article I, § 8, cl. 3, unquestionably limits a state's ability to burden or interfere with interstate commerce in the absence of Congressional action. <u>Western & Southern Life Insurance Co. v. State Board of Equalization</u>, 451 U.S. 648,

652 (1981); and <u>Lewis v. BT Investment Managers, Inc.</u>, 447 U.S. 27, 35 (1980). Congress' power over commerce, however, also allows it to delegate the regulation of certain aspects of commerce to the states. As this Court held in <u>White v. Massachusetts Council of Construction Employers</u>, 460 U.S. 204 (1983):

> Congress, unlike a state legislature . . . , is not limited by any negative implications of the Commerce Clause . . . Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause. . .

460 U.S. at 213. In <u>Western & Southern</u>, this Court analyzed a California "retaliatory" tax imposed on certain out-of-state insurance companies and not imposed on California companies. Congress had previously

passed a statute which specifically left the regulation of insurance companies to the states. In rejecting the Commerce Clause arguments in this case this Court held as follows:

> If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.

(Emphasis added.) 451 U.S. at 652, 653. See Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System, 472 U.S. 159 (1985).

In order to regulate the retail rates charge domestic utility companies to its citizens, the State of Oklahoma must insure that its utility companies have as many available markets as possible. Reliance on out-of-state coal or simply one market source could

eventually lead to an uncomfortable reliance on the prices charged by companies beyond the control of the state. This very legitimate concern about supplies being cutoff by an out-of-state producer was recognized as a legitimate concern in _Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission_, 341 U.S. 329 (1951).

The regulation of domestic public utilities and the rates they charge consumers is unlike other forms of state regulation since utilities are really a regulated monopoly. The Oklahoma consumers do not have a choice in where Oklahoma utilities purchase their coal. In Oklahoma, the goal of utility regulation is to insure the lowest possible utility rates for its

ratepayers by preventing needless duplication of facilities that could result in increased cost to these ratepayers. See Data Transmission Co. v. Corporation Commission, 561 P.2d 50, 54 (Okla. 1977). This Court has recognized that ". . . the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative, 461 U.S. at 377.

In Panhandle Eastern Pipeline Co., this Court upheld the State of Michigan's action in preventing an out of state pipe line company from directly selling to its consumers. The court recognized the long standing principle that the sale of gas or utility service to local customers is

essentially a local concern and subject to state regulation. The court also recognized that the absence of regulation in the public utility arena can ultimately result in higher cost to ratepayers.

The State of Oklahoma has determined that an effective and helpful way of ensuring lower utility rates is to seek more competitive prices for coal and a multitude of markets for coal. To accomplish this Oklahoma requires Oklahoma based utilities to burn a small percentage of Oklahoma coal and only if it is cost effective. This minimal requirement is well within Oklahoma's authority to regulate retail rates of electric utilities recognized by Congress. It may not be attacked on

Commerce Clause grounds.

PROPOSITION III.

ANY ALLEGED DISCRIMINATION FROM REQUIRING OKLAHOMA UTILITIES TO BURN A SMALL AMOUNT OF OKLAHOMA COAL IS JUSTIFIED BY THE NEED FOR MULTIPLE MARKETS FOR COAL SUPPLIES.

As stated previously, the Commerce Clause grants Congress the right to regulate commerce among the states, but acts as a limitation on a state's ability to burden or interfere with state commerce. Maine v. Taylor, 477 U.S. 131 (1986). This limitation on a state's power, however, will not prevent a state from regulating matters of legitimate local concern. Maine v. Taylor, 477 U.S. at 138; and Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350 (1977). Essentially if a state statute is found to discriminate against interstate

commerce, the state must show that the statute serves a legitimate local purpose and that the purpose cannot be served by other non- discriminatory ways. _Maine v. Taylor_, 477 U.S. at 138; _Minnesota v. Clover Leaf Creamery Co._, 449 U.S. 456, 471 (1981); _Hughes v. Oklahoma_, 441 U.S. 322, 336 (1979); and _Hunt v. Washington State Apple Advertising Commission_, 432 U.S. at 350. Put in a slightly different way, states have the authority to legislate matters of local concern even if the legislation has some effect on interstate commerce, if Congress has not acted. _Lewis v. BT Investment Managers, Inc._, 447 U.S. at 36; and _City of Philadelphia v. New Jersey_, 437 U.S. 617, 623-624 (1978). There must be a reason for the discrimination

against articles of interstate commerce apart from their origin. Lewis v. BT Investment Managers, Inc., 447 U.S. at 36; and City of Philadelphia v. New Jersey, 437 U.S. at 626-627.

In order to keep utility rates at a minimum over the long term, it is vital that the State of Oklahoma have a variety of coal markets. Clearly, the more markets that are available, the more competitive the price will be. Multiple markets will also limit the impact of Oklahoma utilities relying on a single market source. Setting aside a small portion of coal purchases by utilities for Oklahoma based coal fosters these legitimate local purposes.

Oklahoma's statute is far less burdensome than other state legislation

struck down by this Court and even some statutes approved by this Court. Oklahoma is not cutting Wyoming off from Oklahoma's markets and is not placing an overall burden on Wyoming coal producers in doing business in Oklahoma. This Court has struck down several state statutes where a state has attempted to completely ban a particular article of interstate commerce. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (complete ban on exportation of hydroelectric power); City of Philadelphia v. New Jersey, (complete ban on the importation of most solid and liquid waste); and Hughes v. Oklahoma, (complete ban on the exportation of minnows taken from Oklahoma waters). Similarly this

Court has upheld bans on certain articles of interstate commerce far <u>more</u> intrusive than the legislation state at issue in this case. <u>Exxon Corp. v. Governor of Maryland</u>, 437 U.S. 117 (1978) (complete ban on producers and refiners of petroleum products operating retail service stations); <u>Maine v. Taylor</u>, (complete ban on the importation of live bait); and <u>Minnesota v. Clover Leaf Creamery</u>, (complete ban on the sale of milk in plastic, non-returnable containers).

It would certainly be a different case indeed if Oklahoma attempted to ban all importation of coal or if Oklahoma assessed a tax on imported coal that it did not assess on Oklahoma coal. Rather than place an overall burden on interstate commerce Oklahoma

has chosen to require its domestic utility companies to use a small amount of Oklahoma coal and only if the costs justify it. This slight burden on interstate commerce is completely justified in holding electric utility rates down and avoiding possible disruption of electric service through dependence on one energy source.

PROPOSITION IV.

EVEN ASSUMING OKLAHOMA STATUTES IMPROPERLY DISCRIMINATE AGAINST INTERSTATE COMMERCE THIS STATUTE IS STILL CONSTITUTIONAL AS APPLIED TO PURCHASES BY THE GRAND RIVER DAM AUTHORITY WHICH IS A STATE OWNED PUBLIC UTILITY.

The Grand River Dam Authority is a state owned and operated agency. Okla. Stat. tit. 82, § 861. One of the coal fired electric plants mentioned by the State of Wyoming in its brief is maintained and operated by the Grand

River Dam Authority. Initially it should be pointed out that the jurisdiction of FERC does not generally extend to the state's, authorities or instrumentalities of states, unless a specific provision brings them under FERC jurisdiction. 16 U.S.C. § 824(f) (1982). Secondly, since the Grand River Dam Authority is owned and operated by the State of Oklahoma the same general Commerce Clause principles do not apply. This Court has long recognized the difference between states acting as market participants and as market regulators. When the State of Oklahoma, makes purchases of coal through its agency, the Grand River Dam Authority, it may indeed favor Oklahoma citizens in making such purchases.

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), this Court dealt with a case where the State of South Dakota temporarily confined its sales of cement at a state owned cement plant, to state residents. In upholding South Dakota's preference for its own residents this Court held as follows:

> The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place. [citations omitted.] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

447 U.S. at 436, 437. See also White v. Massachusetts Council of Construction Employers, Inc., 460 U.S.

204 (1983); and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

It is interesting to point out that the State of Wyoming successfully defended its own state purchasing preferences for its own citizens recently in State v. Antonich, 694 P.2d 60 (Wyo. 1985); and Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital, 641 P.2d 745 (Wyo. 1982).

Even assuming Oklahoma's domestic coal preference statute may not be constitutionally applied to privately owned utilities, it is certainly constitutional as applied to coal purchases of the Grand River Dam Authority.

CONCLUSION

This Court should not assume original jurisdiction because Wyoming has not advanced sufficient sovereign interests to protect and its domestic coal producers have an available forum to litigate the issue. Oklahoma's statute serves legitimate local purposes and was enacted pursuant to congressional authorization. If Oklahoma must defend its statute it should be done through the course of normal litigation where the facts may be fully analyzed.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

NEAL LEADER
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

THOMAS L. SPENCER
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CIVIL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR DEFENDANT

NL:TLS:lma
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