No. 112, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

vs.

STATE OF OKLAHOMA,

Defendant.

ORIGINAL ACTION

BRIEF ON THE MERITS FOR THE STATE OF OKLAHOMA

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ISSUES PRESENTED

I

Whether, under the facts developed, the small incidental effect Oklahoma's Act may have on the State of Wyoming's collection of coal severance tax -- at most, an effect of less than 1% -- is of a sufficient "serious magnitude" to warrant the continued exercise of this Court's original jurisdiction.

II

Under the facts developed, does the State of Wyoming have standing to challenge Oklahoma's Act on Commerce Clause grounds, when the facts as developed show: 1) Wyoming is not engaged in the Commerce affected by Oklahoma's Act, 2) Wyoming's consumer interest is not affected, and 3) at most, Oklahoma's Act has an incidental effect of less than 1% on Wyoming's collection of its coal severance tax.

III

Whether Oklahoma's Act advances legitimate local purposes that cannot be adequately served by reasonable non-discriminatory alternatives.

IV

Whether the provisions of Oklahoma's Act are within the lawful authority of a state to regulate matters relating to the local retail sale of electrical power, and thus not violative of the Commerce Clause.

V

Whether Oklahoma's Act, if found to unlawfully discriminate against interstate commerce when applied to privately owned utilities, may nevertheless be lawfully applied to a state-owned utility, as a market participant.

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1. WYOMING IS NEITHER ENGAGED IN THE COMMERCE DIRECTLY AFFECTED BY OKLAHOMA'S ACT, NOR A CONSUMER AFFECTED BY THE ACT;

2. IF A STATE'S LOSS OF TAX REVENUES, DUE TO A DECLINE IN COMMERCE, ALLEGEDLY CAUSED BY A SISTER STATE'S STATUTE, CONSTITUTED SUFFICIENT GROUNDS TO WARRANT THE EXERCISE OF ORIGINAL JURISDICTION, VIRTUALLY EVERY NEGATIVE COMMERCE CLAUSE CASE, IN WHICH THE COMMERCE IS SUBJECT TO STATE TAX, COULD BE BROUGHT AS AN ORIGINAL ACTION IN THIS COURT;

3. OKLAHOMA'S ACT, AT MOST, HAS AN INDIRECT AND DE MINIMIS EFFECT UPON THE COLLECTION OF WYOMING'S COAL SEVERANCE TAX;

4. OKLAHOMA'S ACT ONLY DELAYS THE COLLECTION OF SEVERANCE TAXES;

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STATE OF OKLAHOMA'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

INTRODUCTION

The Government of the State of Wyoming does not sell coal. (Stipulations para. 31; WY Appendix, A-19).[1] Despite the fact

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[1] Both the State of Wyoming and Oklahoma filed separate Appendixes. Throughout this brief the State of Oklahoma will refer to Wyoming's Appendix as "WY Appendix" and to Oklahoma's Appendix as "OK

that it is not itself engaged in the production or sale of coal, Wyoming, in this original action, brings a Commerce Clause challenge to an Oklahoma statute, which requires that coal-burning utility plants located in Oklahoma, and producing electricity for sale to consumers in Oklahoma, burn a minimum of 10% Oklahoma mined coal. Okla. Stat., tit. 45, §§ 939 and 939.1 (Supp. 1990) (Oklahoma Act).

The Oklahoma Act's requirement that a 10% Oklahoma mined coal mixture be burned is not an absolute requirement. Rather, it only attaches if the cost of compliance is within 5% of "the energy costs of existing long-term contracts for out-of-state coal." Okla. Stat., tit. 45, § 939.1 (Supp. 1990), and Okla. Stat. tit. 74, § 85.32 (Supp. 1990).

Appendix."

FOUR CONSUMERS AFFECTED BY OKLAHOMA'S ACT

The Oklahoma Statute affects only four consumers of coal - three privately owned, and one state owned:

1. Oklahoma Gas and Electric (OG&E),
2. Public Service Company of Oklahoma (PSO),
3. Western Farmers Electric Cooperative (WFEC), and
4. The Grand River Dam Authority (GRDA), a state owned utility. (Stipulation, para. 8; WY Appendix, A-5, and Stipulation, para. 30; WY Appendix, A-19).

HISTORY OF VOLUNTARY PURCHASES OF OKLAHOMA COAL BEFORE THE PASSAGE OF OKLAHOMA'S ACT

Long before the Act's effective date, January 1, 1987, Oklahoma's coal-burning utilities were purchasing Oklahoma coal. In 1984, Oklahoma utilities purchased 20,100 tons of Oklahoma coal; in 1985, they purchased 24,200 tons; and in 1986, they purchased 255,700 tons of Oklahoma coal. (Stipulations, paras. 10-13; WY Appendix, A-7 - A-9).

GOAL OF OKLAHOMA'S ACT

In enacting the challenged statutes, Oklahoma sought to: 1) lessen its utility companies' reliance on a single source of supply, primarily shipped by one railroad company, and 2) lessen the potential harm to their consumers cause by energy supply cutoffs. (WY Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a).

HIGH COST OF TRANSPORTING WYOMING COAL BY RAILROAD AND SOLE RELIANCE ON SINGLE RAILROAD.

All Wyoming coal coming into Oklahoma is shipped by railroad. When Oklahoma's Act was enacted and went into effect, all Wyoming coal destined for Oklahoma was shipped out of Wyoming on one railroad -

the Burlington Northern. (Stipulation, para. 28; WY Appendix, A-18).

The fact that all Wyoming coal comes to Oklahoma by way of rail is significant because the cost of transporting the coal from Wyoming by railroad constituted between 45% to 76% of the delivered price of Wyoming coal. Between 1981 and 1988, the cost of railroad transportation constituted from 59.9% to 76.4% of the Grand River Dam Authorities' total delivered cost of Wyoming coal. (OK Exhibit C, Affidavit of Mary Stauffer; OK Appendix, 6a). Between 1981 and 1988, Oklahoma Gas and Electric Company's cost of rail transportation constituted from 55% to 73% of the total delivered cost of Wyoming coal. (OK Exhibit D, Affidavit of J.T. Coffman; OK Appendix, 8a). Between 1982 and 1988, the cost of rail transportation constituted from 50% to 70% of the total delivered price of coal for Western Farmers

Electric Cooperative. (OK Exhibit E, Affidavit of Roger A. Orme; OK Appendix, 10a-11a). And between 1979 and 1988, the cost of rail transportation constituted from 45% to 65% of Public Service Company's total cost of Wyoming coal, delivered to its Oologah plant. (OK Exhibit F, Affidavit of Masoud Mohmoud-nejad; OK Appendix, 12a-13a).

Given the fact that so much of the cost of Wyoming coal is its railroad transportation cost, it is not surprising that Oklahoma, seeking to control local utility rates, looked to local coal supplies.

COMPARISON OF PHYSICAL PROPERTIES OF WYOMING AND OKLAHOMA COAL

Although local Oklahoma coal supplies are available, those supplies, by virtue of the physical characteristics of Oklahoma's coal, do not constitute a primary source of fuel for Oklahoma utilities.

__Sulfur Content__

Oklahoma coal, in the main, is high sulfur coal. While the average sulfur content of coal from Wyoming's Powder River Basin, from 1980 to 1988, ranged from 0.38 to 0.40, the average sulfur content of Oklahoma coal delivered to Oklahoma utilities between 1985 and 1989 ranged from 1.20 to 1.86. (Stipulations, para. 24 and 25; WY Appendix, A-17 -- A-18.)

__Burning of a 10%/90% Coal Mixture Meets Sulfur Emission Standards.__

While Oklahoma's high sulfur coal does not burn as cleanly as Wyoming's lower sulfur coal, all coal-fired generating units in Oklahoma can burn a 10%/90% blend of Oklahoma to Wyoming coal without violating sulfur emission standards. (OK

Exhibit H, Affidavit of James S. Hamm, Jr. para. 4, B; OK Appendix, 28a).

British Thermal Units

To some extent, the average high sulfur content of Oklahoma coal is offset by its correspondingly high BTU (British Thermal Unit) rating. It takes much less Oklahoma coal to generate the same amount of energy, as compared to Wyoming coal. (Stipulation para. 32; WY Appendix, A-19). While the average BTU content of Wyoming coal delivered to Oklahoma utilities, since 1981, has ranged between 7,760 to 8,936 per pound, the average BTU content of Oklahoma coal delivered to Oklahoma utilities, since 1981, is much higher, ranging between 11,346 and 13,651 per pound. (Stipulation, paras. 33 and 34; WY Appendix, A-19).

Thus, though Oklahoma coal is higher in sulfur content, it takes far less Oklahoma coal to produce the needed BTU's. In fact,

given the statistics above, it would, on average, take more than a pound-and-a-half of Wyoming coal to equal the British Thermal Unit output of one pound of Oklahoma coal. (Id.)

OKLAHOMA'S CONSERVATION MEASURE BASED ON DIFFERING PHYSICAL PROPERTIES OF OKLAHOMA AND WYOMING COAL

The high BTU properties of Oklahoma coal, combined with its high sulfur content, make the use of Oklahoma coal, in a 10/90 blend, well suited to producing the needed energy, while conserving cleaner Wyoming coal for use by future generations. If Wyoming coal reserves were sufficient to meet energy needs for the next 100 years, burning Wyoming coal in a 10/90 blend with Oklahoma coal, would extend the availability of the cleaner coal for an additional ten years.

WYOMING'S COAL SEVERANCE TAX

As noted above, the State of Wyoming is not in the coal production business, and does not sell coal. While eight Wyoming companies have, since 1980, shipped coal into Oklahoma (Stipulation, para. 9; WY Appendix, A-6 -- A-7), none of those companies has brought an action to challenge Oklahoma's Act. Rather, Wyoming seeks to challenge the statute based upon its taxing interest. Wyoming taxes the severance of coal, and brings its challenge based on an alleged loss of severance tax revenues, allegedly caused by Oklahoma's Act.

WYOMING COAL PRODUCERS PAY SEVERANCE TAX FOR THE PRIVILEGED OF SEVERING COAL FROM THE GROUND

The State of Wyoming's severance tax is a tax upon the privilege of severing or extracting coal within the State of Wyoming. (Stipulation, para. 3; WY

Appendix A-4). The severance tax is assessed against those persons or companies who sever or extract coal within the State of Wyoming, and is not imposed upon Oklahoma utilities. (Stipulations, paras. 3 and 4; WY Appendix, A-4).

SEVERANCE TAX NOT A SALES TAX

The severance tax is not a sales tax. The tax is assessed whether the coal is sold or not. (Stipulation, para. 4; WY Appendix, A-4). The amount of the Wyoming severance tax is determined by multiplying the applicable statutory rate by the severed coal's fair market value. (Stipulation, para. 5; WY Appendix, A-4 -- A-5).

WYOMING'S VOLUNTARY REDUCTION OF ITS SEVERANCE TAX RATE

Between 1983 and 1987, the Wyoming severance tax rate was 10.5% (Stipulation, para. 6; WY Appendix, A-4). Wyoming lowered its severance tax rate to 8.5% in 1988. (Stipulation, para. 6; WY Appendix, A-4 and A-5).

ALLEGED REDUCTION IN SEVERANCE TAX COLLECTION AS BASIS FOR WYOMING'S COMMERCE CLAUSE CLAIM.

The severance tax statutes serve as the basis for Wyoming's challenge to Oklahoma's Act.[2] Wyoming argues that a ton of coal

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[2] Although not plead in its Complaint, Wyoming attempted to introduce unpleaded grounds as additional bases for their challenge, including an alleged reduction in the amount of ad valorem taxes Wyoming collects from coal mined in Wyoming, and an alleged reduction of royalties received on coal mined from federally owned land in Wyoming. The Special Master in his Report refused to consider these additional unpleaded grounds, finding that it would be inappropriate to do so, since Wyoming neither sought nor was granted leave to file an amended Complaint. (Report of Special Master, 14 and 15). Because

not sold to an Oklahoma utility, by virtue of the challenged Act, is a ton of coal that is not produced, and therefore a ton of coal on which severance tax is not collected. (Response of State of Wyoming to the State of Oklahoma's Motion for Summary Judgment and Brief in Support of Response, at 16). Thus, Wyoming concludes that it has been injured by the challenged Act, because it has not been able to collect as much severance taxes as it would have, if more coal had been sold in Oklahoma.[3]

Wyoming's brief does not quarrel with this ruling of the Special Master, those unplead grounds are not properly before this Court, and accordingly are not addressed in this brief.

[3] In addition to this argument, Wyoming also alleged that because of the alleged reduction in tax revenue, it had standing as parens patriae to bring an action on behalf of its citizens. (Complaint, para. 9, 5). The Special Master rejected Wyoming's argument that it had standing to sue on the basis of parens patriae (Report of the Special Master, 17). Because Wyoming's brief does not quarrel

<u>PRODUCTION OF WYOMING COAL INCREASED AFTER PASSAGE OF OKLAHOMA'S ACT</u>

In short, Wyoming takes the position that Oklahoma's Act has a direct effect on Wyoming coal production and thus has an effect upon Wyoming's severance tax collections. As the stipulated facts demonstrate, however, from 1983 until the present, Wyoming's coal production has generally increased.

In the only two years since the passage of the Act for which complete figures are available, Wyoming coal production continued to increase. (Exhibit 3 to Exhibit A, Stipulation of Facts; OK Appendix, 63a) Indeed, in 1986, Wyoming was the second leading state in the nation in coal production, and in 1988, after Oklahoma's Act had been in effect for

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with this finding of the Special Master, this issue is not before the Court, and is not addressed in this brief.

nearly two years, Wyoming became the nation's leading coal producer. (Stipulation para. 29; WY Appendix A-18 - 19).

<u>DECLINE IN SEVERANCE TAX REVENUE DUE TO REDUCTION IN TAX RATE AND FALL IN THE PRICE OF WYOMING COAL.</u>

While Wyoming's coal severance revenues may have declined, the decline was not due to a decrease in production, but rather was due to two other factors:

1. The decline in the price of Wyoming coal (OK Exhibit G, Affidavit of David M. Weinstein, para. 7; OK Appendix, 19a-21a), and

2. Wyoming's lowering of its severance tax rate from 10.5% to 8.5% (Stipulation, para. 6; WY Appendix, A-4 -- A-5).

As noted above, Wyoming's severance tax is assessed when the coal is severed, whether the coal ever sells or not (Stipulation, para. 4; WY Appendix, A-4). Indeed, while the severance tax is based upon the fair cash market value of the coal when severed, the Wyoming statutes specifically provide for methods of evaluation when the severed coal is not sold. Wyo. Stat., § 39-2-202(d). Wyoming, through its artful language, continues to suggest that "the amount of severance tax collected depends directly on the sale of Wyoming coal by Wyoming producers." (Corrected Exceptions of the State of Wyoming to the Report of the Special Master, 6). Wyoming statutes and the stipulations of the parties, however, make it clear that there is no such direct dependence. Wyoming severance tax is collected whether the severed coal is sold or not.

AT MOST OKLAHOMA'S ACT HAS AN INDIRECT AND DE MINIMIS EFFECT ON SEVERANCE TAX COLLECTIONS.

Yet, even if there were a direct relationship between a lost sale in

Oklahoma, and Wyoming's severance tax collection, the loss to Wyoming's severance tax collection is de minimis. Wyoming's own expert, based upon this direct correlation theory of Wyoming's, estimated that in 1987 the State of Wyoming would have lost $535,886, and in 1988, $542,352 (WY Exhibit B, Affidavit of Richard J. Marple, para. 12, 3; Appendix to Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion). When these amounts are compared with the total amount of severance tax collected in those years, $115,554,537, and $85,473,232, (OK Exhibit B, Plaintiff's Response to Defendant's Interrogatory, Exhibit 4 at page 2, OK Appendix, 72a), we see that even if a direct relationship exists between a lost sale in Oklahoma and Wyoming's severance tax collection, the loss, at most, would amount to but a fraction of 1% of the severance tax collected by Wyoming.

POSITION OF THE STATE OF OKLAHOMA

It is the position of the State of Oklahoma that:

1. Under the facts developed, the case before the Court is not an appropriate case for the exercise of this Court's original jurisdiction.

2. Under the facts developed, the State of Wyoming lacks the requisite standing to challenge Oklahoma's Act on Commerce Clause ground.

3. Oklahoma's Act advances legitimate local purposes that cannot be adequately served by reasonable, non-discriminatory alternatives.

4. Oklahoma's Act is part of the State's regulations relating to the retail rates charged by public utilities, a regulatory area which Congress has left to the states.

5. Even if otherwise infirm, Oklahoma's Act, being severable, can be

constitutionally applied to state-owned utilities.

SUMMARY OF THE ARGUMENT

The interest Wyoming asserts in challenging Oklahoma's Act, on Commerce Clause grounds, is not the interest of a market participant or a consumer, but rather the interest of a tax collector. Under the facts developed, Oklahoma's Act, at most, has an indirect and de minimis effect upon Wyoming's collection of coal severance taxes. Under the evidence most favorable to Wyoming, the tax has less than a 1% effect upon its tax collection efforts. That indirect effect is further minimized by the fact that Oklahoma's Act, in conserving clean-burning Wyoming coal for future use, only delays, and does not preclude, Wyoming's tax collection efforts.

Under the facts developed, this Court would be establishing a dangerous precedent by continuing to exercise original jurisdiction in this cause. If a state's loss of de minimis tax revenues, due to a decline in commerce allegedly caused by a sister state constituted sufficient grounds to warrant the exercise of this Court's original jurisdiction, virtually every negative commerce clause case, in which the commerce was subject to state tax, could be brought as an original action in this Court.

Because the State of Wyoming is not a participant in the commerce affected by Oklahoma's Act, nor a consumer affected by the Act, and because the indirect, de minimis impairment of Wyoming's coal severance tax collections, if any, does not constitute sufficient injury to support standing, the State of Wyoming lacks standing to challenge Oklahoma's Act.

Oklahoma has a vital interest in 1) insuring that electrical power is available to its citizens at the lowest possible price, and 2) avoiding interruptions in utility service caused by catastrophes such as railroad strikes, supply cutoffs and the like. To further these legitimate interests, Oklahoma adopted the challenged Act to 1) reduce Oklahoma utility companies' reliance on a single source of fuel supply, primarily shipped by one railroad company, and 2) reduce the potential harm to its consumers caused by energy supply cutoffs. Clean-burning coal is conserved by requiring that clean-burning Wyoming coal be burnt with 10%, high sulfur Oklahoma coal. This requirement, which enables Oklahoma utilities to meet sulfur emission standards, conserves and preserves clean-burning Wyoming coal for future use, thus advancing Oklahoma's interest in avoiding long term fuel supply unavailability.

Oklahoma's Act also has an immediate effect upon fuel supplies, by limiting Oklahoma's reliance on a single source shipped by one rail company, thus enabling Oklahoma stockpiles of cleaner Wyoming coal to last 10% longer.

These legitimate local purposes advanced by Oklahoma's Act cannot be adequately served by reasonable non-discriminatory alternatives, as Oklahoma's Act is based upon the differing physical characteristics between Wyoming and Oklahoma coal, and designed to avoid the high cost of transporting Wyoming coal by rail, which constitutes between 45% and 76% of the total delivered cost of Wyoming coal.

Oklahoma's Act operates to regulate local utility rates, and accordingly is within the "lawful authority" of the State, and is not violative of the Commerce Clause.

Even if Oklahoma's Act were found to violate the Commerce Clause, when applied to privately owned utilities, the Act, nevertheless could be applied to the Grand River Dam Authority, a state owned utility, under the market participate doctrine. The Oklahoma Legislature's intent that the Act be applied to State utilities, even if it could not be applied to privately owned utilities, was manifested by the Legislature's inclusion of a severability clause in the Oklahoma Act. The Legislature's intent is consistent with longstanding Oklahoma law that where a statute on its face is applicable to several classes of persons or cases, the constitutionality of the statute as applied to one class may be upheld at the same time as its applicability to other classes is stricken down as unconstitutional.

ARGUMENT

PROPOSITION I

UNDER THE FACTS DEVELOPED, WYOMING'S CLAIM THAT OKLAHOMA'S ACT HAS CAUSED IT TO LOSE COAL SEVERANCE TAX REVENUES IS NOT OF A SUFFICIENTLY SERIOUS MAGNITUDE TO "NECESSITATE" THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION, AS:

1. **WYOMING IS NEITHER ENGAGED IN THE COMMERCE DIRECTLY AFFECTED BY OKLAHOMA'S ACT, NOR A CONSUMER AFFECTED BY THE ACT;**

2. **IF A STATE'S LOSS OF TAX REVENUES, DUE TO A DECLINE IN COMMERCE, ALLEGEDLY CAUSED BY A SISTER STATE'S STATUTE, CONSTITUTED SUFFICIENT GROUNDS TO WARRANT THE EXERCISE OF ORIGINAL JURISDICTION, VIRTUALLY EVERY NEGATIVE COMMERCE CLAUSE CASE, IN WHICH THE COMMERCE IS SUBJECT TO STATE TAX, COULD BE BROUGHT AS AN ORIGINAL ACTION IN THIS COURT;**

3. **OKLAHOMA'S ACT, AT MOST, HAS AN INDIRECT AND DE MINIMIS EFFECT UPON THE COLLECTION OF WYOMING'S COAL SEVERANCE TAX;**

4. **OKLAHOMA'S ACT ONLY DELAYS THE COLLECTION OF SEVERANCE TAXES;**

5. ALTERNATIVE FORUMS ARE AVAILABLE TO THE REAL PARTIES IN INTEREST - THE WYOMING COAL PRODUCERS - SHOULD THEY SEEK TO CHALLENGE OKLAHOMA'S ACT.

INTRODUCTION

As noted above, Wyoming is neither engaged in the commerce affected by Oklahoma's Act, nor does Oklahoma's Act affect Wyoming's consumer interest. The interest which Wyoming seeks to protect is its interest as a tax collector.

If the incidental loss of tax revenues, which accompanies a reduction in interstate commerce, is sufficient to warrant this Court's exercise of original jurisdiction, than virtually every negative commerce clause case -- where the commerce is subject to state tax -- could be brought as an original action. Thus, if subject to state tax, any reduction in the in-state sale of timber, cement, milk, cantaloupe, or live fish bait, and the like, if reduced by the action of a sister state, could form the basis of an original action. This Court's prior teachings on the nature of its original jurisdiction militate against this Court exercising original jurisdiction upon such grounds, and thus militate against continuing to exercise original jurisdiction under the facts present in this case.

STANDARDS FOR DETERMINING WHEN EXERCISE OF ORIGINAL JURISDICTION IS APPROPRIATE

As noted in Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), "[i]t has long been this Court's philosophy that 'our 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 a "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. . .' [citations omitted].

THE INTEREST ADVANCED BY WYOMING IS DE MINIMIS AND WYOMING'S OWN FACTS AND FIGURES SHOW IT.

In the case at hand, the interest advanced by Wyoming, does not, under the facts developed in this case, justify the court's continued exercise of original jurisdiction. Here Wyoming's claim is derivative. Oklahoma's Act, viewed in the light most favorable to Wyoming, only has a de minimis effect on Wyoming's severance tax collection. Wyoming's own facts and figures demonstrate this. In 1987, Wyoming collected $115,554,537 in severance tax revenues. (OK Exhibit B, Plaintiff's Response to Defendant's Interrogatory, Exhibit 4 at page 2; OK Appendix, 64a). Wyoming's own witness testified that the loss attributable to Oklahoma's Act was far less than 1% of the total taxes collected. (WY Exhibit B, Affidavit of Richard J.

Marple, at 3; Appendix to Motion of the State of Wyoming for Summary Judgment).

In 1988, the State of Wyoming collected $85,473,232 in coal severance tax, and Wyoming's expert testified that the lost tax revenues he attributed to Oklahoma's Act again amount to less than 1% of the total collected. (Id.) Thus, even if this Court were to accept Wyoming's position that there is a direct correlation between a lost sale in Oklahoma and production of coal in Wyoming, the incidental effect upon Wyoming's collection of coal severance tax revenues is <u>de minimis</u>, as it amounts, at most, to less than a 1% reduction.

As noted, this Court has required that a state seeking to invoke original jurisdiction to control the conduct of another state establish that the threatened invasion of its rights is of a "serious magnitude." <u>State of Connecticut v. Commonwealth of Massachusetts</u>, 282 U.S.

660, 669 (1931); New York v. New Jersey, 256 U.S. 296, 309 (1921); Missouri v. Illinois, 200 U.S. 496, 521 (1906). The incidental, de minimis, less-than-1% effect that Oklahoma's Act may have upon Wyoming's severance tax collection does not present a matter of such "serious magnitude"; this is particularly so, as this less-than-1% effect only amounts to a delay in tax collection.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BECAUSE OKLAHOMA'S ACT DOES NOT PRECLUDE TAX COLLECTION, BUT MERELY DELAYS COLLECTION.

One of the reasons that Oklahoma requires the burning of a 10%/90% blend of Oklahoma to Wyoming coal is to lessen the potential harm to Oklahoma consumers caused by energy supply cutoffs. (WY Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a). The burning of 10% Oklahoma coal, which, in the main, has a high sulfur content, has the effect of conserving cleaner Wyoming coal's availability to Oklahoma consumers. If Wyoming's coal reserves were sufficient to meet the energy needs of the Oklahoma utilities for the next one hundred years, the burning of the required blend would prolong that availability an additional ten years. This conservation of Wyoming coal for sale in the future does not reduce Wyoming severance tax collection, rather, it merely delays it. Viewed in this light, the effect of Oklahoma's Act upon Wyoming's tax collections is de minimis in the extreme.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BY NOTING THAT BEFORE THE PASSAGE OF OKLAHOMA'S ACT, OKLAHOMA UTILITIES VOLUNTARILY BOUGHT OKLAHOMA COAL.

The de minimis nature of the effect of Oklahoma's Act upon Wyoming's tax collections is further demonstrated by noting that prior to the Oklahoma Act's effective date, Oklahoma utilities had been voluntarily purchasing significant amounts of Oklahoma coal. In 1984, Oklahoma utilities purchased 20,100 tons of Oklahoma coal, increased that amount, in 1985, to 24,200 tons, and multiplied that many fold, in 1986, by purchasing 255,700 tons of Oklahoma coal. (Stipulations, para. 10-13; WY Appendix A-7 - A-9). Wyoming's witness failed to take these purchases into account when he estimated the Act's effect on the collection of coal severance tax. (OK Exhibit G, Affidavit of David Weinstein, para. 8; OK Appendix, 21a). Thus, his estimates, though only showing a de minimis effect, overstated the Act's effect on tax collection.

THE DE MINIMIS NATURE OF WYOMING'S CLAIM IS FURTHER REDUCED BY THE FACT THAT ONE OF THE FOUR CONSUMERS WHO MUST COMPLY WITH THE ACT IS THE STATE OF OKLAHOMA ITSELF.

Making the Oklahoma Act's effect upon Wyoming severance tax collection even more de minimis is the fact that one of the four consumers required to comply with the Act is the State of Oklahoma itself, namely, the state-owned utility, the Grand River Dam Authority. The State, as market participant, may choose to prefer the products of one producer over another without violating the Commerce Clause.

IN LIGHT OF THE DE MINIMIS TAX COLLECTION INTEREST ASSERTED BY WYOMING, IT WOULD ESTABLISH A DANGEROUS PRECEDENT TO EXERCISE ORIGINAL JURISDICTION.

Given the de minimis effect that Oklahoma's Act has upon Wyoming's severance tax collection, this Court would be creating a dangerous precedent by continuing to exercise its original jurisdiction in this cause. Such a precedent could make available this Court's original jurisdiction in any negative commerce clause case, in which the commerce affected happens to be the subject of some State tax.

The incidental, de minimis effect that Oklahoma's Act has upon Wyoming's severance tax collection is not of a "serious magnitude," and does not justify this Court's further exercise of its original jurisdiction, particularly when the Oklahoma Act may readily be challenged by the real parties in interest, the Wyoming coal producers, in state or federal district courts. Federal district courts would be available, just as they were in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). Oklahoma State courts would also be available. Okla. Const. art. II, § 6; and Okla. Stat. tit. 12, § 16-1. Thus the issues presented could be litigated in other forums.

For the reasons set forth above, the State of Oklahoma respectfully submits that this Court's continued exercise of its original jurisdiction in this case would, under the facts developed, not be appropriate.

<u>PROPOSITION II</u>

THE STATE OF WYOMING LACKS THE REQUISITE STANDING TO CHALLENGE OKLAHOMA'S ACT ON COMMERCE CLAUSE GROUNDS BECAUSE:

1. **WYOMING IS NEITHER A PARTICIPANT IN THE COMMERCE AFFECTED BY THE ACT, NOR A CONSUMER AFFECTED BY THE ACT; AND**

2. **THE INDIRECT, <u>DE MINIMIS</u> IMPAIRMENT OF WYOMING'S COAL SEVERANCE TAX REVENUES, IF ANY, DOES NOT CONSTITUTE SUFFICIENT INJURY TO SUPPORT STANDING.**

<u>OKLAHOMA'S ACT DOES NOT AFFECT COMMERCE ENGAGED IN BY WYOMING, OR WYOMING'S CONSUMER INTEREST.</u>

Wyoming's standing to sue is based on the assertion that Oklahoma's Act results in lost coal sales by the eight companies that have sold Wyoming coal to Oklahoma's four utilities. Wyoming's standing is predicated on the premise that lost coal sales in Oklahoma result in a loss of Wyoming's coal severance tax revenues.

This injury alleged loss of tax revenue is not the type of direct injury that this

Court has recognized when a state is itself engaged in the commerce affected, or is affected as a consumer.

In Oklahoma v. A. T & Santa Fe Ry Co., 220 U.S. 277 (1911), the State of Oklahoma attempted to bring an action in this Court against a railroad, alleging certain rate overcharges to its citizens. The Court refused to accept jurisdiction and found that the real controversy was between the railway company and certain Oklahoma citizens who shipped by rail. Since the State of Oklahoma was not shipping goods in its governmental capacity, it could not invoke the original jurisdiction of the Court.

The State of Wyoming's attempted challenge in this case is similar to what the State of Louisiana attempted to do in Louisiana v. Texas, 176 U.S. 1 (1900). That case arose out of a quarantine that a Texas State Health Officer placed on all goods imported from New Orleans, Louisiana. The quarantine was apparently rationalized by fear of yellow fever outbreaks. This Court first pointed out that its original jurisdiction was only appropriate where a controversy existed between two states, not where a state was merely trying to vindicate the grievances of particular individuals.

This Court did not take original jurisdiction of the matter, pointing out that states have no special position to vindicate interstate commerce claims when they are not engaged in the commerce. Id. at 19.

If a direct controversy exists over the Oklahoma Act, it is between the State of Oklahoma and the companies which mine coal in Wyoming and sell coal to Oklahoma utilities. The State of Wyoming is not selling coal to Oklahoma utilities and is not a participant in the type of commerce which they allege is being injured by Oklahoma's Act.

THE INDIRECT, DE MINIMIS EFFECT, IF ANY, ON WYOMING'S TAX COLLECTION INTEREST IS NOT SUFFICIENT INJURY TO SUPPORT STANDING.

Even if Wyoming might conceivably lose tax revenues, such an indirect and derivative injury has not been recognized as a sufficient basis for standing by a state. For a true controversy to exist between two or more states it must be apparent that the Plaintiff State is suffering some direct injury from the action of the Defendant State. Maryland v. Louisiana, 451 U.S. 725, 735 (1981); Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976); Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). As the this Court, in Maryland v. Louisiana, 451 U.S. at 736, stated:

> Standing to sue, however, exists for constitutional purposes if the injury alleged "fairly can be traced to the

> challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." [citations omitted.]

The State of Wyoming's theory of standing in this case is based on an asserted economic injury to a handful of its taxpayers. Under Wyoming's theory, any party injuring its taxpayers injures Wyoming because it will collect less taxes.

While no U.S. Supreme Court case has been found directly addressing this theory of standing, lower court decisions directly discussing this theory of standing have rejected it.

In Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976), cert.den. 429 U.S. 977 (1976), the State of Pennsylvania sued the Small Business Administration, challenging that agency's classification of certain hurricane damaged areas as "Class B" disaster areas.

Pennsylvania claimed that its tax revenues and economy were damaged by the mistaken classification. The Court of Appeals rejected this vicarious injury as a basis for standing. The Court first pointed out that the State's asserted injury would be no different from other individuals or businesses that could be hurt by a general injury to businesses and the economy:

> The allegation that tax revenues were reduced embodies a comprehensible harm to the economic interests of the state government. However, it appears to us likely that this is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing. The parallel to the cases imposing very strict limits on taxpayer standing is imperfect, since it can not be said of the state that its economic interest is no different than those of many others.

533 F.2d at 672.

The Court went on to hold that a state must show a direct injury to its status as a tax collector before it may legitimately bring an action for damage to its tax revenues.

> . . . [I]mpairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing. By analogy to the taxpayer standing cases, it seems appropriate to require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged. This would prevent state standing in cases like the present one, where diminution of tax receipts is largely an incidental result of the challenged action. [Emphasis Added]

533 F.2d at 672. In the instant case, Oklahoma's Act does not directly affect the State of Wyoming's power to levy or collect its severance tax. Rather, Wyoming attempts to rely on a derivative injury to its severance tax revenues resulting from

alleged injury to the coal companies which sever the coal. Under the rationale used by the D.C. Circuit Court of Appeals, Wyoming clearly has no standing to bring this action.

The Court of Appeals for the Eighth Circuit relied on the reasoning of the court in Kleppe to find that the State of Iowa had no standing in State of Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985), cert. den. 478 U.S. 1012 (1986). In this case, the State of Iowa along with individual farmers sued the Federal Agriculture Department and its Secretary, asking the court to order the implementation of three federal agricultural disaster relief programs. The state asserted that failure to implement these programs would result in lower tax revenues, higher unemployment and higher welfare costs. The court held as follows:

> From these cases, we conclude that the State's alleged injury is insufficiently proximate to the actions at issue and the remedy to be offered by this action an insufficient guarantee of solvency to warrant state standing in this case.

771 F.2d at 354.

In the case at hand, the tax revenue interest asserted by Wyoming is far less than those involved in Block, which were not found to be sufficient. Wyoming's interest does not involve the general lowering of tax revenues, but rather only the de minimus lowering of one specific tax, which would have far less of an impact on the state than the general lowering of all of its taxes.

In sum, the State of Wyoming lacks a direct-commerce-participant or consumer interest in the commerce alleged to be affected by Oklahoma's Act. The incidental, de minimis tax revenue interests asserted, under the facts in this case, do not constitute sufficient injury to support Wyoming's standing to challenge Oklahoma's Act on Commerce Clause grounds.

PROPOSITION III

OKLAHOMA'S ACT ADVANCES LEGITIMATE LOCAL PURPOSES THAT CAN NOT ADEQUATELY BE SERVED BY REASONABLE NON-DISCRIMINATORY ALTERNATIVES.

GOAL OF ACT

In adopting Oklahoma's Act, Oklahoma sought to lessen its utility companies' reliance on a single source of supply, primarily shipped by one railroad company, and further sought to lessen the potential harm to their consumers caused by energy supply cutoffs. (Wy Exhibit G, Answer to Interrogatory No. 2; OK Appendix, 60a).[4]

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[4] Reliance on two concurrent resolutions -- one adopted the session before Oklahoma's Act, and the other two sessions later -- to interpret Oklahoma's Act is misplaced. In Oklahoma, such a legislative resolutions are merely an expression of opinion and have 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). Neither resolution is part of the Act's legislative history, and one Legislature can not interpret the acts of another. Stephens Produce Co. v. Stephens,

ACT'S REDUCTION OF DANGEROUS RELIANCE ON EXPENSIVE AND LIMITED RAILROAD TRANSPORTATION.

When Oklahoma's Act went into effect, all of Wyoming coal destined for Oklahoma was shipped out of Wyoming on one railroad. (Stipulation, para. 28; WY Appendix, A-18). As noted above, the cost of transporting Wyoming coal to Oklahoma by railroad constitutes between 45% and 76% of the cost of the delivered price of Wyoming coal. While Wyoming emphasizes that Wyoming coal is cheaper to mine than Oklahoma coal, Wyoming fails to recognize that it is not the price of mined coal, nor the free-on-board price at the mines that is the important price to a utility (OK Exhibit G, Affidavit of David Weinstein,

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332 P.2d 674 (Okla. 1958). Additionally, resolutions are ordinarily passed without the consideration required in passing laws. Hawks v. Bland, 9 P.2d 720, 721 (Okla. 1932).

para. 10; OK Appendix, 23a). Rather, the important price criterion for a utility is the delivered price in cents per million BTU's (Id.). As it is the delivered cost of fuel that is important to utilities, and the cost of delivering Wyoming coal to Oklahoma constitutes between 45% and 76% of the cost of delivered Wyoming coal, it was appropriate that the Oklahoma Legislature, in the interest of their utility consumers, was concerned with the high railroad transportation cost of Wyoming coal.

Given the fact that at the time of the Act's passage one railroad delivered all Oklahoma coal, it was also appropriate for the Oklahoma Legislature, in the interest of Oklahoma's consumers, to seek to lessen reliance on a single source of coal, shipped over a single railroad. We need think back but a very few years to the oil embargo, with its fuel shortages, long lines at the gas pump, and stalled industries, to remember the burdens and hardship that dependance on a single source of energy can cause.

ACT'S REDUCTION OF PRESENT AND FUTURE COAL CUTOFFS AND CONSERVATION OF CLEAN-BURNING COAL FOR FUTURE USE.

Though Oklahoma's Act certainly cannot eliminate the State's reliance on coal shipped primarily from one source by one transporter, it can and does reduce such reliance. The Act allowing Oklahoma stock piles of Wyoming coal to last 10% longer, should a catastrophe such as a rail strike occur.

In addition to immediately reducing Oklahoma reliance on a single coal source, Oklahoma's Act also conserves Wyoming's clean-burning coal for the future. If Oklahoma's utilities were to exclusively use clean-burning, low-sulfur Wyoming coal, that supply of needed energy would be much more quickly dissipated and made unavailable. Oklahoma's Act, by requiring that 10% of Oklahoma coal - coal which, with its much higher sulfur content, could not be a primary source of supply - conserves the cleaner coal for future use by Oklahoma utilities. This requirement, like burning 10% alcohol with gasoline, conserves the primary fuel reserves for future generations. Conserving primary fuel sources for future use and limiting reliance on one source of fuel are legitimate local concerns.

THE ACT FOSTERS LEGITIMATE STATE PURPOSES THAT CANNOT BE ADEQUATELY SERVED BY A REASONABLE NON-DISCRIMINATORY ALTERNATIVE.

The Commerce Clause, in granting Congress the right to regulate commerce among the states, also places limitations on the states' ability to burden or interfere with interstate commerce. Maine v. Taylor, 477 U.S. 131 (1986). This limitation on the states' power, however, does 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).

As noted by amicus curiae, this Court held in New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274, that "[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstratively justified by a valid factor unrelated to economic protectionism." In the instant case, Oklahoma must demonstrate that its Act advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. Id. at 278.

In the case at hand, there is a reason for treating Oklahoma coal in a different manner from Wyoming coal. As noted above, the stipulated facts clearly demonstrate that there is a marked difference between the physical characteristics of Wyoming and Oklahoma coal. While Wyoming coal is low in sulfur and clean-burning, Oklahoma coal is high in sulfur and less clean-burning. On the other hand, Oklahoma coal has a high BTU rating, while Wyoming coal has a much lower BTU rating. On average, it takes a ton-and-a-half of Wyoming coal to equal the BTU ratings of but one ton of Oklahoma coal.

Given environmental considerations, Oklahoma coal could not be used as a primary utility fuel, because of its high sulfur content, since the burning of high sulfur coal in high percentages would pollute the environment. Thus, given today's technology, the primary coal sources must be clean-burning, low sulfur coal, such as Wyoming's coal.

Given the necessary reliance on clean-burning coal, the state has a legitimate interest in seeing that clean-burning coal is conserved so as to be available for future use. Oklahoma's Act accomplishes that very purpose.

Because of the high cost of transporting Wyoming coal, and the differing sulfur content of Wyoming and Oklahoma coal, there is no other viable means of extending the available life of Wyoming's clean-burning coal than to use local coal. Use of local coal to supplement Wyoming coal eliminates unnecessary costly transportation, and takes advantage of the high sulfur physical characteristic of the local coal.

Oklahoma respectfully submits that its challenged Act should be upheld, as it advances legitimate local purposes that cannot be adequately served by reasonable alternatives.

PROPOSITION IV

THE REQUIREMENTS OF OKLAHOMA'S ACT ARE WITHIN THE "LAWFUL AUTHORITY" OF A STATE TO REGULATE INTERSTATE UTILITY RATES, AND ACCORDINGLY DOES NOT VIOLATE THE COMMERCE CLAUSE.

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 to 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)(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 that case this 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, this 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 retail 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.

Another case demonstrating this Court's deference to the State's control over its domestic utility companies is Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983). California had passed a statute which forbid the construction of new nuclear power plants until one of its agencies made a finding that there were adequate storage facilities for nuclear waste. Federal law clearly vested nuclear safety concerns with the federal government. California asserted that it was not trying to regulate nuclear power but was simply concerned that without adequate storage facilities its ratepayers would ultimately bear the burden of increased costs of disposing of the waste. This Court found that California's statute was not preempted by federal law and found that California's action was justified by the states' long-recognized regulation over its own utilities.

In discussing the legislative history of the Federal Power Act, the Court observed the following:

> Early on, it was decided that the States would continue their traditional role in the regulation of electricity production.

461 U.S. at 194. This Court went on to point out that states historically

regulated utility companies closely and had clear authority to decide the economic feasibility of the operations of these utilities and control over their rates and services. Quoting from its previous opinions this Court stated as follows:

> "The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body." [citations omitted] ("The State's concern that rates be fair and efficient represents a clear and substantial government interest"). . . [T]hese economic aspects of electrical generation have been regulated for many years and in great detail by the States.

461 U.S. at 205-206.

A state has every right to regulate the fuel source of its domestic utilities. As this Court noted in <u>Pacific Gas & Electric Company v. The State Energy Resources Conservation and Development Commission</u>, 461 U.S. 190, at 202, quoting from Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980), a regulation of domestic utilities and the rates charged to its citizens ". . . represent a clear and substantial governmental interest."

A state does not have to sit idly by and watch utility companies become too dependent on a fuel source, or a single transporter of the fuel. Nor is a state prohibited from insuring that needed fuel supplies are conserved. It is the Oklahoma ratepayer who will pay for the over-dependence and non-conservation. Just as California did in Pacific Gas & Electric Company, Oklahoma has passed a statute to protect its utility ratepayers.

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. Federal Power Commission v. Conway Corp., 426 U.S. 271, 276 (1976). All other matters in the regulation of electric utilities are left to the states.

In order to regulate the retail rates charged by domestic utility companies to its citizens, the State of Oklahoma must insure that its utility companies do not become overly dependent on a source of supply or on a fuel transporter. Reliance on coal from distant supply sources, shipped by one rail company, could eventually lead to an uncomfortable reliance on the prices charged by those companies. This very legitimate concern about supplies being cut off 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, 333-334 (1951).

The regulation of domestic public utilities and the rates they charge consumers is unlike other forms of state regulation because utilities are really regulated monopolies. The Oklahoma consumers do not have a choice as to 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., 341 U.S. 329 (1951), this Court upheld the State of Michigan's action in preventing an out of state pipeline company from directly selling to its consumers without a certificate of need. This 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.

This Court also recognized that the absence of regulation in the public utility arena can ultimately result in higher cost to ratepayers. The holding in New England Power Company v. New Hampshire, 455 U.S. 331 (1982) does not dictate a contrary finding. In that case, New Hampshire tried to argue that Congress had expressly authorized states to ban completely the exportation of hydroelectric power because part of the Federal Power Act provides that it "shall not . . . deprive a State or

State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

That phrase limits its operation to the existing "lawful authority" of the state. When the Federal Power Act was passed in 1935 a complete ban of hydroelectric power was almost assuredly unlawful. Id. at 342, 343. As recognized in Pacific Gas & Electric Company, however, the states' regulation over the operations of its utilities and the rates they charged was pervasive when the Federal Power Act was passed. Id. at 194.

In Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329, 336-337 (1951), this Court upheld a state regulatory scheme under which an interstate natural gas was required to obtain a certificate of necessity to sell gas in state. There, this Court held that such registration was not precluded by Federal statute and the requirement, though it could have resulted in a total denial of the certificate, was well within the state's power to regulate. In short, this Court held such potentially prohibitory regulation was within the lawful authority of the state. Being within the lawful authority of the State, it was not be found to be violative of the Commerce Clause.

The State of Oklahoma has determined that effective and helpful ways of ensuring lower local utility rates include 1) reducing over-dependence on a single source of supply, a single fuel transporter, and 2) conserving needed low-sulfur coal for the future. To accomplish these goals Oklahoma requires Oklahoma based utilities to burn a small percentage of Oklahoma coal but only if it is cost effective. This minimal requirement is well within Oklahoma's authority to regulate retail rates of electric utilities. Oklahoma's Act is not violative of the Commerce Clause.

PROPOSITION V

EVEN IF OKLAHOMA'S ACT WERE FOUND TO DISCRIMINATE IMPROPERLY AGAINST INTERSTATE COMMERCE, THE ACT WOULD STILL BE CONSTITUTIONALLY APPLIED TO THE GRAND RIVER DAM AUTHORITY, A STATE OWNED PUBLIC UTILITY, UNDER THE MARKET PARTICIPANT DOCTRINE.

The jurisdiction of FERC does not generally extend to the states' authorities or instrumentalities of states, unless a specific provision brings them under FERC jurisdiction. 16 U.S.C. § 824(f) (1982).

The Grand River Dam Authority is a state owned and operated agency. Okla. Stat. tit. 82, § 861; (Stipulation, para. 30; WY Appendix, A-19). One of the coal fired electric plants affected by Oklahoma's Act is the state owned utility, the Grand River Dam Authority.

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 favor Oklahoma producers in making such purchases. In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), this Court dealt with a case in which 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. [Emphasis Added]

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).

Thus, even if Oklahoma's Act may not be constitutionally applied to privately owned utilities, it is certainly constitutional as applied to coal purchases of the Grand River Dam Authority, as a market-participant. Accordingly, even if Oklahoma's Act were found to be unconstitutional, it could, because of the presence of a severability clause, be applied to the Grand River Dam Authority, under the market-participation exception.

Oklahoma jurisprudence has long recognized that legislation, while invalid and inapplicable to one class, may be constitutional as applied to another:

> Partial invalidity of an act does not necessarily destroy the entire act. It is a familiar rule of law that an act of the Legislature, while invalid and inoperative as to one set of facts, may be constitutional and valid as to another and different state of facts.

State v. Waterfield, 29 P.2d 24, 27 (Okla. 1934).

More recently, in Attorney General Opinion No. 83-235; 15 Okla. Atty. Gen. Op. 446, 452 (1983), the Attorney General stated:

> Where a statute on its face is applicable to several classes of persons or cases, the constitutionality of the statute as applied to one class may be upheld at the same time as its applicability to other classes is stricken down as unconstitutional. When such a situation arises the statute is only entirely void where it is clear that the statute would

> not have been passed at all except in its entirety or if the legislative intent would be defeated by including some classes and excluding others. Sands, Sutherland Statutory Construction, § 44.18 (4th ed. 1973); Keniston v. Board of Assessor's of Boston, 407 N.E. 2d 1275, 1295 (1980); Farmer's Loan & Trust Co. v. New York Cent R.R., 236 N.Y.S. 250, 254 (1928).

In adopting Oklahoma's Act, the Legislature made it clear that it intended the Act's application to be severable:

> "The provisions of this Act are severably and if any part provision shall be held void the decision of the Court so holding shall not effect or impair any of the remaining parts or provisions of this Act." 1986 Okla. Sess. Law, Ch. 43, § 3, 74.

As demonstrated above, even if Oklahoma's Act is unconstitutionally applied to private utility companies, it may still lawfully be applied to GRDA as a market participant. Given 1) the presence of a severability clause in Oklahoma's Act 2) Oklahoma's adherence to the rule of law that a statute as applied to one class may be upheld at the same time that its applicability to other classes is stricken down as unconstitutional, 3) the Act may clearly be applied to GRDA, as a market participant, and 4) application of the Act to GRDA furthers the purpose of the Act, Oklahoma's Act is applicable to GRDA, even if, under the Commerce Clause, it can not be applied to privately owned utilities.

CONCLUSION

The State of Oklahoma prays that this Court not accept or adopt any recommendations or conclusions of the Special Master inconsistent with the views expressed herein, and that this Court dismiss this case on the grounds that the case presented, under the facts developed, does not warrant continued exercise of this Court's original jurisdiction.

Alternatively, the State of Oklahoma asks that this Court dismiss this case on the grounds that the indirect, de minimis impairment, if any, of Wyoming's coal severance tax revenues, does not constitute sufficient injury to support standing in this case.

If the case is not dismissed, and is instead addressed on the merits, Oklahoma asks that the Court find that Oklahoma's Act is within the State's lawful authority, and not violative of the Commerce Clause.

Finally, should this Court find that the application of Oklahoma's Act to private utilities violates the Commerce Clause, Oklahoma asks that this Court find that Oklahoma's Act may nevertheless be applied to State owned utilities under the market participant doctrine, as such application is consistent with the severability clause contained in Oklahoma's Act, and with long recognized Oklahoma law that a statute applicable to several classes may be upheld at the same time as its applicability to another class is stricken down as unconstitutional.

Respectfully submitted,

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