UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

LAKE REGION ELECTRIC COOPERATIVE, INC., *et al.*,	)	**[Filed July 28, 1995]**
Plaintiffs,	)	
vs.	)	Case No. CIV 94-338-B
TAHLEQUAH PUBLIC WORKS AUTHORITY,	)	
Defendant.	)	

APPLICATION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BE HEARD ORALLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The United States of America respectfully applies for leave to file a brief *amicus curiae* opposing the defendant's pending motion to dismiss insofar as the defendant invokes the state action exemption as a bar to the action. We also request permission to be heard at oral argument on the motion scheduled for August 15, 1995. The brief for which leave is sought accompanies this pleading.

The United States is primarily responsible for enforcing federal antitrust law, including the Sherman Antitrust Act of 1890, *as amended*, 15 U.S.C. §§1 *et seq.* In carrying out that responsibility, it has been investigating the practices and policies of municipally-owned combination utility systems, including the conduct at issue in this private civil action. Although disposition of the motion directly binds only the parties to this action, the Court may rule on purely legal issues in a way that affects the Government's ongoing investigation. The United States accordingly has an interest in making its position on those issues known to the Court. Counsel for the parties have advised the undersigned that they do not oppose participation by the United States as *amicus curiae*.

Wherefore, this application should be granted and the United States given leave to file the accompanying brief and be heard at the oral argument scheduled for August 15, 1995.

Respectfully submitted,

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Defendant.	)	

BRIEF *AMICUS CURIAE* OF THE UNITED STATES OPPOSING THE DEFENDANT'S MOTION TO DISMISS

The United States of America respectfully submits this brief *amicus curiae* in opposition to the defendant's pending motion to dismiss, where the defendant invokes the state action doctrine as a bar to the action. We will show that the defendant has failed to demonstrate that it acted pursuant to clearly expressed state policy such that the challenged tying arrangements are beyond the reach of federal antitrust law. Indeed, Oklahoma's legislature has explicitly authorized incumbent consumer-owned (cooperative) electric suppliers to compete without municipal interference to serve new customers located in areas annexed by the municipality. The defendant eschewed such competition on the merits, instead unlawfully leveraging its market power to suppress consumer choice. The motion should, accordingly, be denied.

The essential facts are neither complex nor disputed. At all relevant times, defendant Tahlequah Public Works Authority (TPWA) has furnished water, collected and treated liquid waste, and supplied electricity in and around the city of Tahlequah, using utility system facilities leased from

the city. The mains operated by TPWA constitute the only water and sewer system in the area. Over the years, Tahlequah has grown by annexing previously unincorporated portions of Cherokee County, where plaintiff Lake Region Electric Cooperative has been selling and distributing electric energy it purchases from plaintiff KAMO. Lake Region has also provided service to premises situated beyond the city's present limits. Pursuant to TPWA policy dating back to at least as early as 1984, customers requesting water or sewer line connections have been turned aside unless they also agreed to take TPWA-supplied electricity.

Defendant urges the Court to find that TPWA is exempt from federal antitrust law as an agency or political subdivision of the State of Oklahoma, invoking the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943). TPWA argues that the Oklahoma statute empowering municipalities to unilaterally acquire facilities used by cooperatives to provide electric service in annexed areas implicitly authorizes them to impair competition by tying arrangements or other anticompetitive means.

ANALYSIS

We will show that TPWA's arguments are fatally flawed, both in their underlying premise and in their logic. More specifically

- Oklahoma law explicitly contemplates and preserves competition between municipally-owned and consumer-owned retail electric suppliers to serve new customers in annexed areas;

- Tahlequah's nascent statutory power to expropriate Lake Region's distribution facilities used by an incumbent cooperative in annexed areas does not authorize the challenged tying arrangements, and
- Lake Region's distribution facilities financed under the Rural Electrification Act ("REAct"), 7 U.S.C. §§901 *et seq.* (1994), are not subject to expropriation by Tahlequah.

Accordingly, TPWA has not established that it is exempt from suit under the state action doctrine.

Cities claiming a state action exemption must demonstrate that they were authorized by an affirmatively expressed and clearly articulated policy to displace competition.

A state's subordinate governmental units and political subdivisions may engage in anti-competitive conduct otherwise outlawed by the Sherman Act only when their actions are authorized by an affirmatively expressed and clearly articulated legislative policy to displace competition. TPWA lays claim to this state action exemption as the cornerstone of its motion to dismiss under FED. R. CIV. P. 12(b)(6). Such an implied exclusion from the antitrust laws is disfavored and will not be presumed or broadly interpreted. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635-36 (1992); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978). Rather, a defendant municipality must demonstrate that the state legislature (1) authorized the challenged conduct and (2) thereby intended to suppress competition. *See Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1506-07 (10th Cir. 1991) (collecting cases), *cert. denied*, 502 U.S. 983 (1992).

The state action doctrine had its genesis in *Parker, supra,* where the Court rejected an antitrust attack on a program regulating the marketing of raisins produced in the state. Relying on principles of federalism, *Parker* declined to construe the Sherman Act to proscribe anticompetitive conduct mandated by a state's legislature—

> [N]othing in the language of the Sherman Act or in its history … suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government, in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-51. Federal antitrust laws thus do not apply where the state, "as sovereign, imposed the restraint as an act of government." *Id.* at 352. Cases following *Parker* have rejected claims that a state agencies and political subdivisions are *ipso facto* exempt, since they do not occupy a sovereign status in our federal system comparable that to the state itself. Those cases, which we discuss below, hold that a municipality shares in the state's *Parker* immunity only when it implements policies authorized by the legislature.

City of Lafayette, supra, marked the Supreme Court's first opportunity to consider *Parker* in the local government context. It arose out of allegations of violation and injury quite similar to those raised in this action. Antitrust counterclaims were asserted by Louisiana Power & Light (LP&L), an investor-owned electric utility, alleging

> that the city of Plaquemine contracted to provide LP&L's electric customers outside its city limits gas and water service only on condition that the customers purchase electricity from the city and not from LP&L. The effect of such a tie-in is twofold. First, the tying contract might injure former LP&L customers …. Second, the practice would necessarily have an impact on the regulated public utility whose service is displaced. The elimination of customers in an established service area would likely reduce revenues, and possibly require abandonment or loss of existing equipment the effect of which would be to reduce its rate base and possibly affect its capital structure.

> The surviving customers and the investor-owners would bear the brunt of these consequences.

435 U.S. at 403-04 (footnotes omitted).

In denying direct immunity, *City of Lafayette* pointed out that *Parker* had been predicated on the dual system of government in our federal system — where the states retain a degree of sovereignty, but cities and other political subdivisions are not equivalent to the state itself. *See* 435 U.S. at 412-13. The *Parker* exemption was accordingly limited to "anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. The plurality opinion framed the appropriate inquiry in terms of whether "an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units … is found 'from the authority given a governmental entity to operate in a particular area, [such] that the legislature contemplated the kind of action complained of.'" *Id.* at 415 (citation omitted).

The principles announced by the plurality in *City of Lafayette* were adopted and reiterated by a unanimous Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

> It is therefore clear from our cases that before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.

Id. at 40. *Town of Hallie* rejected the suggestion that a clearly articulated state policy requires the legislature to expressly recite its intention for the delegated action to have anticompetitive effects; it will suffice if anticompetitive conduct is a foreseeable or logical result of the authority conferred on the municipality, such that the legislature contemplated the kind of action involved. *See id.* at 42-43. As the Court subsequently phrased it, the challenged conduct is exempt "if suppression of competition

is the 'foreseeable result' of what the state authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). The holdings of these precedents have been synthesized by the Tenth Circuit in a two-part test, which asks whether the state legislature (1) authorized the challenged action and (2) intended to displace competition. *Allright Colorado, supra*.[1] State action immunity will not be available to local governments unless both inquiries are answered in the affirmative. We accordingly trace the development of relevant Oklahoma law, to ascertain whether the legislature has authorized and contemplated municipal suppression of retail electric service competition.

Oklahoma law reflects a legislative policy of preserving competition to provide retail electric service in growth areas.

Oklahoma policy dating back more than three decades preserves competition to serve consumers in rural and annexed areas. When a municipality extends its boundaries into previously unincorporated areas served by a cooperative, the incumbent cooperative may freely maintain its distribution system in the area, build new facilities and continue and expand its retail operations. The defendant's state action exemption claim thus squarely contradicts legislative authorization and intent.

Lake Region is a distribution cooperative organized and existing under the Oklahoma Rural Electric Cooperative Act, *as amended*, OKLA. STAT. ANN., tit. 18, §§437 *et seq*. (West 1986 & Supp. 1995). As such, it has been authorized "to distribute, sell, supply and dispose of electric energy in

1. Tahlequah's establishment of a public trust vehicle to provide electric service does not alter the analysis. *See Buckley Construction, Inc. v. Shawnee Civic & Cultural Development Authority*, 933 F.2d 853, 854-55 (10th Cir. 1991) (Oklahoma public trust entitled to the same immunity as its beneficiary). Although TPWA may be treated as a state agency for some purposes, it remains a subordinate governmental unit not entitled to direct *Parker* immunity. *See Porter Testing Laboratory v. Board of Regents*, 993 F.2d 768, 770 (10th Cir.), *cert. denied*, 114 S.Ct 344 (1993).

rural areas to its members [and designated others]." *Id.*, §437.2(d) (West Supp. 1995).[2] It has also been empowered "[t]o construct, maintain and operate electric transmission lines along, upon, under and across all public thoroughfares," subject to requirements generally applicable to investor-owned utilities. *Id.*, §437.2(k) (West Supp. 1995). In 1961, the legislature amended Section 437.2(k) to deal with urbanization. *See* 1961 Okla. Sess. Laws 199-202, House Bill No. 769.[3] Specifically, the following proviso was added:

> [I]n case an area has been or shall be included, as a result of incorporation, annexation, population growth, or otherwise, within the boundaries of a city, town, or village, a cooperative which was furnishing electric energy, or was constructing or operating electric facilities, in such area, prior to such inclusion, shall be entitled to construct, maintain and operate electric transmission and distribution lines and related facilities along, upon, under and across all existing and future public thoroughfares, and to continue and extend the furnishing of electric energy or the construction and operation of electric facilities ***without obtaining the consent, franchise, license, permit or other authority of such city, town, or village***, subject to compliance with lawful [local safety requirements and payment of local taxes].

(emphasis added). This proviso thus preserved the incumbent cooperative as a competitive alternative to a utility owned or franchised by the annexing municipality.

The 1961 amendments were upheld in two cases arising out of a city's annexation of a large cooperatively-served area. *See Oklahoma Gas & Electric Co. v. Oklahoma Electric Coop.*, 517 P.2d

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2. "Rural areas" are defined as situated outside "the boundaries of any incorporated or unincorporated city, town or village, having a population in excess of one thousand five hundred (1,500) persons," as well as any areas included inside such boundaries as a result of annexation where a cooperative had operated a distribution system or furnished electric energy prior to annexation." *Id.*, §437.28 (West 1986).

3. The legislature concurrently enacted the Extension of Electric Service Act — 1961 Okla. Sess. Laws 194-95, House Bill No. 770, *formerly codified at* OKLA. STAT. ANN., tit. 17, §§158.1 *et. seq.* — to govern retail electric service by investor-owned and consumer-owned utilities in rural areas. That statutory scheme was replaced by the Retail Electric Supplier Certified Territory Act ("RESCTA") (effective September 10, 1971), OKLA. STAT. ANN., tit. 17, §§158.21 *et seq.* (West 1986 & Supp. 1995). RESCTA explicitly preserved Section 473.2. *See id.*, §158.32 (West 1986).

1127 (Okla. 1973); *Resh, Inc. v. Oklahoma Electric Coop.*, 516 P.2d 803 (Okla. 1973). Both the investor-owned utility distributing electric energy inside city limits (pursuant to the only franchise granted for that purpose by the city) and the cooperative thereafter extended their respective lines and services within the annexed area. *See* 517 P.2d at 1129. Among other things, the Court rejected the franchised utility's claim that the legislature had infringed upon its legally protected right to be free from competition by the cooperative.

> Whether competition between utilities shall be prohibited, regulated, or forbidden is a matter of state policy, and that policy is subject to alteration at the will of the Legislature. …. If the 1961 amendments to [Sections] 437.2(k) and 437.28, which in our view are valid, aggrieve the plaintiff, the remedy lies with the Legislature.

Id. at 1132-33.

The right to continue and extend service in growth areas without municipal interference, expressly conferred on cooperatives in Section 437.2(k), is fatal to TPWA's motion. Having specifically protected retail electric service competition in annexed areas against muncipal interference, the Oklahoma legislature can hardly be said to have contemplated municipal suppression of competition in such areas. *Compare with Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961, 962 (10th Cir. 1987) (Colorado law contemplates single natural gas supplier inside city); *Rural Electric Company v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847, 849 (10th Cir. 1985) (Wyoming Constitution bars construction of electric lines inside municipal limits without consent of municipality). *Sterling Beef*, touted by TPWA for its "startling" factual similarity, arose under distinctly different state law. Indeed, the pivotal question before the panel in *Sterling Beef* was whether the Sherman Act outlawed an ordinance which forbade the construction and operation of a gas pipeline inside city limits without a franchise. *See* 810 F.2d at 962. Here, in contrast, Section

437.2(k) unambiguously frees Lake Region from having to obtain Tahlequah's "consent, franchise, license, permit or other authority" as a prerequisite for continuing and extending electric service in annexed areas.

In sum, state policy dating back to 1961 preserves competition in annexed areas. When a municipality extends its boundaries into previously unincorporated areas served by a cooperative, the incumbent cooperative is explicitly authorized by Section 437.2(k) to build and maintain distribution facilities in public spaces and to "continue and extend the furnishing of electric energy" in the area, all "without obtaining the [annexing municipality's] consent, franchise, permit or other authority." This legislative judgment to allow incumbent cooperatives to compete with municipally-owned or municipally-franchised utilities is antithetical to an affirmatively expressed and clearly articulated state policy to suppress such competition.

The defendant's nascent statutory power to expropriate a rival's distribution facilities does not immunize the challenged tying arrangements.

The Oklahoma legislature neither authorized the challenged tying arrangements nor broadly intended to suppress retail electric service competition in annexed areas. The defendant's reliance on unexercised statutory provisions empowering municipalities to unilaterally take over a cooperative's distribution facilities is misplaced.

Under Section 437.2(k), if the annexing city, town or village "owns and operates a system for the furnishing of electric energy to its inhabitants," the incumbent cooperative may be required to "transfer to such city, town or village, upon its request, the cooperative's electric distribution facilities

used in furnishing electric energy in said area …." [4] The state thus put a cooperative competing with public power in annexed areas at risk of divestiture by expropriation. The motion to dismiss relies heavily on the statutory power there purportedly conferred on Tahlequah to expropriate the Lake Region's distribution facilities.[5]

The defendant stumbles at the threshold by grossly exceeding the geographic scope of Tahlequah's authority under state law. Section 437.2(k) nowhere grants Tahlequah the power to act beyond its municipal borders, permitting expropriation only where the city has annexed areas into its boundaries. However, the challenged tying arrangements are not so confined, TPWA having engaged in tying in and around Tahlequah. And, although the defendant denied in court filings and discovery that its policy applied beyond city limits, by correspondence dated June 27, 1995, defense counsel advised opposing parties and this Court that TPWA board meeting minutes and recordings dating back to late 1989 contradict this denial.

The legislative authority at the heart of defendant's arguments does not empower Tahlequah to act outside city limits. No exemption arguably attaches to TPWA's extraterritorial conduct. Nor has the state granted Tahlequah the power to preclude consumers inside city limits from supplying their own electric energy needs from self-generation or cogeneration projects constructed and

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4. Section 437.2(k) carves out an exception to the general rule precluding the taking of property for the same purpose as a private party had been using it. *See City of Pryor Creek v. Public Service Co.*, 536 P.2d 343, 346 (Okla. 1975) (setting aside condemnation of an investor-owned utility's distribution system in annexed area).

5. Although Section 437.2(k) authorizes expropriation of a cooperative's distribution facilities only where the annexing municipality "owns ***and*** operates a system for the furnishing of electric energy to its inhabitants" (emphasis added), the defendant's motion papers acknowledge that "Tahlequah retains ownership of all of the utility systems and facilities," which TPWA operates as lessee. Unless the statute is extended beyond its words, the city has no authority to expropriate Lake Region assets.

operated on their property. *See Oklahoma Gas & Electric Co. v. Total Energy, Inc.*, 499 P.2d 917, 922 (1972). Denying them water/sewer service if they do so, however, deprives them of that competitive choice. In short, the defendant expansively claims exemption from the Sherman Act to injure competition that the legislature nowhere authorized municipalities to displace.[6]

Even when confined to their proper sphere, the defendant's arguments grounded on Tahlequah's taking powers under Section 437.2(k) are misplaced. This action challenges TPWA's tying arrangements — not Tahlequah's expropriation — as outlawed by the Sherman Act.[7] Nowhere does Section 437.2(k) arguably authorize municipal electric systems to foreclose competition by tying arrangements or to otherwise engage in anticompetitive conduct. "[E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *City of Lafayette*, supra at 417 (citation omitted).

Nor can Section 437.2(k) be construed as blanket state authorization for TPWA's suppression of competition. Rather, Section 437.2(k) categorically curtails Tahlequah's regulatory power, explicitly barring the city from imposing any requirement for municipal "consent, franchise, license, permit or other authority" on Lake Region's continuation and extension of service. The only means

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6. At page 21 of its initial supporting memorandum, defendant contends that "TPWA is, by statute, 'the only game in town,'" so that consumers never had a choice to be interfered with. The discussion in the text demonstrates the falsity of this sweeping contention. Moreover, if that were truly the case, the policy formally promulgated by TPWA's board and enforced by its management appears superfluous at best. Why insist that consumers agree to buy electricity from you when no one else may lawfully supply them? The defendant's alternative argument that its practices are competitively neutral because all of its utility services collectively constitute a single product cannot be sustained at the pleading stage. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992).

7. Tahlequah did not invoke Section 437.2(k) to acquire Lake Region's distribution facilities before suit had been brought, exercising its purported expropriation authority only after an antitrust challenge to tying arrangements that had been in place for a decade or more.

legislatively contemplated for Tahlequah to oust Lake Region from growth areas — expropriation in accordance with specified procedures — carries with it substantial financial, political and other obligations. In this way, the legislature sought to assure that a city undertaking to displace competition in annexed areas has weighed those obligations in the balance and made the decision to accept responsibility for them.[8] TPWA's suppression of competition without the city's assumption of those weighty responsibilities is not a logical or foreseeable result of granting Tahlequah the power to expropriate Lake Region's facilities. The challenged tying arrangements in no sense implement state policy embodied in the statute. By empowering cities to force acquisition of an incumbent cooperative's facilities (concomitantly requiring them to pay just compensation for the acquired assets), the legislature manifestly did not contemplate that they could simply take business away from the cooperative (without any compensation) by violating the Sherman Act.

Section 437.2(k) clearly distinguishes between permitted and unauthorized municipal action; antitrust violations fall outside the permissible side of that line. Indeed, Oklahoma's Attorney General has opined that, "absent a sufficient legal reason to tie one municipal utility service to another service, a municipality may not lawfully condition the receipt of one utility service on the customer's acceptance and payment for other utility services which the city may offer." Opinion No. 82-50, 14 Okla. Op. A.G. 125, 130 (1982).

Recognizing that Section 437.2(k) confers no explicit legislative authorization for its tying arrangements, TPWA has invited this Court to read the specific statutory expropriation authority as implying a sweeping legislative mandate for municipal electric systems to suppress competition by

8. Tahlequah apparently remains free to walk away from the acquisition if the price ultimately fixed for the assets exceeds what it is willing to pay.

other means. Defendant has painted with an overly broad brush, for the interests of federalism underlying the state action doctrine are "not well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ticor Title, supra* at 636.

REAct bars municipalities from forcing federally-financed cooperatives to transfer their distribution facilities.

Parker and its progeny are grounded in principles of federalism — the state action doctrine is premised on our "dual system of government in which, under our Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker,* 317 U.S. at 351. To the extent that Congress subtracted from Oklahoma's authority to grant its subdivisions power to expropriate REAct-financed property, the defendant is not exempt.

Even if this Court were to accept the defendant's extravagant reading of Section 437.2(k), the authority there granted to municipalities is subject to federal law, including 7 U.S.C. §907 (1994), which provides:

> No borrower of funds under [REAct] shall, without the approval of the Secretary [of Agriculture], sell or dispose of its property, rights, or franchises, acquired under the provisions of this chapter, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

The statute applies to involuntary takings, preempting expropriation under state law. *See City of Stilwell v. Ozarks Rural Electric Cooperative Corp.*, 870 F. Supp. 1025 (W.D. Okla. 1994) (appeal pending). *Accord, City of Morgan City v. South Louisiana Electric Cooperative Ass'n,* 837 F. Supp. 194 (W.D. La. 1993), *aff'd*, 31 F.3d 319 (5th Cir. 1994), *rehearing denied*, 49 F.3d 1074 (1995); *Public Utility District No. 1 v. Big Bend Electric Cooperative*, 618 F.2d 601 (9th Cir. 1980).

TPWA's motion papers nowhere aver that Tahlequah even attempted to secure the Secretary's approval pursuant to Section 907, much less that the city has obtained a favorable administrative

determination. There is, at this point, no reason to believe that the Secretary would approve Tahlequah's takeover as a matter of course. Unless and until REAct requirements are satisfied, Lake Region cannot be ousted from annexed areas. The defendant may not evade those requirements by diverting sales from Lake Region through tying arrangements outlawed by the Sherman Act.

CONCLUSION

Oklahoma law preserves competition between municipal and cooperative suppliers to provide electric service to consumers in annexed areas. The legislature neither authorized combination municipal utility systems to leverage their economic muscle in one market into a distinct market nor contemplated that they would so exercise the expropriation authority granted to them. Their tying arrangements accordingly remain open to suit under the antitrust laws. The defendant's motion to dismiss must therefore be denied.

Respectfully submitted,

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