IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 93-35902, 93-35958

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COLUMBIA STEEL CASTING CO., INC.,

Plaintiff-Appellee/Cross-Appellant,

v.

PORTLAND GENERAL ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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# BRIEF AMICUS CURIAE OF THE UNITED STATES OF AMERICA IN RESPONSE TO PETITION FOR REHEARING OF PORTLAND GENERAL ELECTRIC COMPANY AND BRIEF AMICUS CURIAE OF EDISON ELECTRIC INSTITUTE

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The United States files this brief amicus curiae at the Court's request.

Order, February 20, 1997.

## ARGUMENT

### I. STATE ACTION IMMUNITY PROTECTS ONLY THAT PRIVATE CONDUCT WHICH THE STATE, BY APPROPRIATE ACTION INCLUDING SUFFICIENTLY CLEAR EXPRESS AUTHORIZATION, HAS MADE ITS OWN

State action immunity shields from the federal antitrust laws private anticompetitive conduct that is "fairly attributable to the State," Patrick v. Burget, 486 U.S. 94, 100 (1988), and is thus "truly the product of state regulation." Id. For private conduct to be so attributable, more is required than a generally favorable state disposition towards conduct of that general kind. "First, the challenged restraint must be `one clearly articulated and affirmatively expressed as state policy'; second, the policy must be `actively supervised' by the State itself.'" California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)); accord Federal Trade Commission v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992); Patrick, 486 U.S. at 100; Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985).

"Clear articulation" requires that the challenged restraint be expressly authorized by the appropriate governmental authorities. Because both prongs of the Midcal test must be satisfied, the immunity inquiry need go no further if the

restraint is not so authorized. Accordingly, the Supreme Court typically satisfies itself that the state has authorized the conduct before considering active supervision, if such consideration is necessary. Thus, in Midcal, the Court found that a "California system for wine pricing satisfie[d] the first standard . . . [because t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. . . . The State . . . authorizes price setting." 445 U.S. at 105. In Southern Motor Carriers, collective ratemaking by common carriers satisfied the requirement in three states because statutes in those states "explicitly permit collective ratemaking by common carriers," 471 U.S. at 63. The requirement was also satisfied in a fourth state, but not by action of the legislature alone, which had "not specificially addressed collective ratemaking." Id. It was enough that the legislature had adopted an "inherently anticompetitive rate-setting process" that left details to a regulatory commission, and the commission "exercised its discretion by actively encouraging collective ratemaking among common carriers." Id. at 64. In Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), the defendant city was alleged to have refused to supply sewage treatment facilities outside its borders except to those who agreed to become annexed to the city. The Court reviewed state statutes that showed the city was authorized to do precisely that. Id. at 41; see also id. at 44 n.8. Similarly, in City of Columbia v. Omni Outdoor Advertising,

Inc., 499 U.S. 365 (1991), the challenged municipal conduct was an ordinance restricting the size, location, and spacing of billboards, id. at 368. The Court found the necessary authorization: "It is undisputed that, as a matter of state law, these statutes authorize the city to regulate the size, location, and spacing of billboards." Id. at 371.[1]

This Court has followed the Supreme Court's teaching. Thus in California CNG, Inc. v. Southern California Gas Co., No. 95-55806, 1997 WL 33956, at *11 (9th Cir. Sept. 19, 1996; amended Jan. 30, 1997), the Court found the clear articulation prong satisfied with respect to some conduct but not other conduct, and then considered the active supervision prong only with respect to the conduct that was pursuant to a clearly articulated state policy.

The requirements of clear articulation and active supervision, separately and together, serve at least three specific purposes beyond ensuring that anticompetitive conduct carried out by private parties is fairly attributable to the state. First, they help limit the spread of an immunity that is "disfavored, much as

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[1]Our previous brief went on to explain that not every express authorization satisfies the clear articulation requirement, because the state must also have intended, in authorizing the challenged conduct, to displace competition by regulation. Brief Amicus Curiae of the United States of America in Support of Petition for Rehearing ("U.S. Brief in Support") at 7-8. The questions now before the Court do not require us to repeat that explanation.

are repeals [of the antitrust laws] by implication," Ticor, 504 U.S. at 636, and so protect the "overarching and fundamental policies" favoring competitive markets that Congress sought to establish. City of Lafayette, 435 U.S. at 398-99. Second, they permit states to "regulate their economies in many ways not inconsistent with the antitrust laws," Ticor, 504 U.S. at 635-36, without inadvertently providing an antitrust immunity, id. at 636-37. Third, they assure that "[s]tates . . . accept political responsibility for actions they intend to undertake," id. at 636, and thus permit the corrective forces of the political process to serve as at least a partial substitute for the corrective forces of the competitive marketplace. Cf. Town of Hallie, 471 U.S. at 45 n.9.

From the requirement of express authorization and the purposes served by the requirements the Supreme Court has established for application of the state action immunity doctrine, it follows that there is no state action immunity for private conduct unless that private conduct has been authorized with sufficient clarity to serve those purposes.

## II. STATE ACTION IMMUNITY IN THIS CASE DEPENDS ON EXPRESS AUTHORIZATION BY THE PUBLIC UTILITY COMMISSION OF OREGON

As we understand this case, no one seriously contends that Oregon statutes authorized Portland General Electric (PGE) and Pacific Power & Light (PPL), by their own joint actions alone, to divide the city of Portland into exclusive service enclaves and thus eliminate competition between them there. Instead, the statutes condition authorization on approval by the Oregon Public Utility Commission (OPUC). Slip op. at 16268 n.2. Mere failure of the OPUC to disapprove the arrangement is not enough. Thus, if the division of territory in Portland was not authorized by the OPUC, the Oregon statutes cannot save it from the antitrust laws, for the conduct was not pursuant to state policy. As amicus Edison Electric Institute (EEI) properly recognizes, the issue is "[w]hether a state agency [here, specifically the OPUC] has authorized private anticompetitive conduct." Brief Amicus Curiae of Edison Electric Institute ("EEI Brief") at 6.

The panel concluded that "the OPUC did not 'specifically and clearly authorize[] by the relevant statutory process' a division of the Portland market into exclusively served territories. Pacificorp [v. Portland General Electric Co.], 770 F. Supp. [562,] 571 [(D. Or. 1991)]." Slip op. at 16286. Here, as in our prior brief (U.S. Brief in Support at 12-13), we take no position respecting the correctness of

that conclusion. But assuming that conclusion to be correct, the utilities' conduct was not pursuant to a clearly articulated and affirmatively expressed state policy to displace competition by regulation -- and therefore not protected by state action immunity.

We think the panel's opinion makes amply clear that, if the OPUC did not authorize the two utilities to divide Portland territorially between them, there is no state action immunity for that division. This is surely right. It is obviously unacceptable to argue that private conduct not authorized by the state is nevertheless fairly attributable to the state and thus entitled to state action immunity. Accordingly, where, as here, a state statute authorizes anticompetitive private conduct only if the conduct is specifically authorized by a state administrative agency, such private conduct is not pursuant to a clearly articulated and affirmatively expressed state policy to displace competition by regulation if the state agency has not authorized the conduct with sufficient clarity to serve the purposes of the clear articulation requirement. Under these circumstances, "a state administrative order implementing a state statute is required to satisfy the clear articulation requirement of the state action immunity doctrine," Order at 2.

## III. ACTIVE SUPERVISION DOES NOT IMMUNIZE PRIVATE CONDUCT THAT IS NOT UNDERTAKEN PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY TO DISPLACE COMPETITION BY REGULATION

PGE and EEI contend, as we understand them, that the "clear articulation" test is satisfied by the Oregon statutes, even if the OPUC never authorized a territorial division in Portland. Petition at 5; EEI Brief at 2. OPUC approval, EEI says, is only an issue of active supervision. EEI Brief at 3; see also Petition at 5. This analysis makes little sense and is not supported by the authority, Ticor, on which it relies.

EEI says: "Ticor confirms that agency approval is part of the active supervision prong. In that case, state legislation clearly authorized title insurance companies to fix their fees for title searches and title examinations, so Midcal's clear articulation prong was concededly met." EEI Brief at 7.

The reality, however, is more complex. Ticor concerned rate-fixing by insurers. Under "negative option" systems in the four states at issue in Ticor, the rates fixed by the insurers "became effective unless the State rejected them within a specified period." Ticor, 504 U.S. at 629. That is, state law authorized the insurers to charge jointly-fixed rates if the insurers filed those rates with the state and the

state failed to reject them within the time specified. Id. Since none of the states had rejected the proposed rates, the Federal Trade Commission sensibly conceded that the states had articulated clear and affirmative policies to allow the conduct. Id. at 631. But the Supreme Court concluded that in two of the states active supervision was lacking because the state review of the proposed fixed rates was too perfunctory; the state was not a substantial participant in the ratesetting process. Id. at 639.

Ticor does not suggest that the clear articulation prong would have been satisfied no matter what action the state regulatory agencies took. If the state agencies in Ticor had closely examined the proposed fixed rates and rejected them, the Supreme Court almost surely would have found active state supervision. But if the rates had been disapproved, the insurers could hardly claim state action immunity from prosecution for charging those fixed rates. The insurers' unauthorized conduct would not in that event have been pursuant to a clearly articulated and affirmatively expressed state policy to displace competition by regulation, although the states had actively supervised them.

Because conduct may be actively supervised by state agencies even when not undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition by regulation, approval or authorization, when

required, is more sensibly viewed as bearing upon the first prong of the Midcal test. This Court has properly taken that view not just in this case, but also in California CNG. See 1997 WL at *5 ("we must look to the CPUC's position to determine whether SoCalGas's conduct is part of a 'clearly articulated and affirmatively . . . expressed state policy'").

In any event, petitioner's largely semantic argument about which branch of the Midcal test is implicated here is of no consequence. The panel concluded that the utilities failed to demonstrate that the state had authorized a territorial division. That conclusion means there can be no state action immunity, whichever branch of Midcal is implicated.[2] We fail to understand what about that conclusion and the court's route to it would justify the extraordinary relief of a third hearing of this case by the Court. The dispute is by now in essence over facts already twice addressed.

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[2]We see no reason why authorization should be any easier to find under one branch of Midcal than under the other. In particular, we do not believe that treating authorization as part of the active supervision branch provides any warrant for reasoning that there must have been authorization because, after all, utilities are pervasively regulated and surely the OPUC would have noticed and complained about unauthorized conduct if there had been any. That comes too close to the untenable contention that there is state action immunity for all conduct by regulated utilities that is not affirmatively disapproved by the regulators.

## CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted.

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CERTIFICATE OF OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e), I certify that the foregoing brief has double-spaced text and single-spaced headings and footnotes, is proportionally spaced, uses CG Times 14 point type for those portions of the brief not exempt from the 14 point typeface requirement, and contains, in the components of the brief not excluded by rule from the word count computation, 2077 words as calculated by the word processing system used to prepare the brief. I also certify that the foregoing brief contains 11 pages not excluded by rule from the page count computation.

_____

David Seidman

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 1997, I caused two copies of the foregoing BRIEF AMICUS CURIAE OF THE UNITED STATES OF AMERICA IN RESPONSE TO PETITION FOR REHEARING OF PORTLAND GENERAL ELECTRIC COMPANY AND BRIEF AMICUS CURIAE OF EDISON ELECTRIC INSTITUTE to be served by Federal Express on each of the following:

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