IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-35902, 93-35958

COLUMBIA STEEL CASTING CO., INC.,

Plaintiff-Appellee/Cross-Appellant,

v.

PORTLAND GENERAL ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee.

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

# BRIEF AMICUS CURIAE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING

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## STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for enforcing the federal antitrust laws. This case presents an issue concerning the scope of immunity from the antitrust laws for private parties under the state action antitrust doctrine. The resolution of this issue directly affects the government's enforcement responsibilities, as well as enforcement of the antitrust laws by private parties. Accordingly, the United States has a strong interest in the proper determination of this appeal.

## STATEMENT

1. Oregon statutes provide that the Public Utility Commission of Oregon ("PUC") may approve contracts between competing utilities dividing a market into exclusive service territories, Or. Rev. Stat. §§ 758.410 - 758.450, and that once the PUC has by order created such exclusive territories, competition between utilities within those territories is prohibited, id. § 758.465. See Columbia Steel Casting Co. v. Portland General Electric Co., Nos. 93-35902, 93-35958, Slip op. at 8828 (9th Cir., July 20, 1995).

In 1972, two utilities serving the Portland area, Portland General Electric (PGE) and Pacific Power & Light (PP&L), entered into an agreement (the "Agreement") to exchange properties and customer accounts in Portland, thus creating territories in which one utility owned all the facilities and serviced all the customers. Slip op. 8828. The Agreement did not by its terms create exclusive service territories. The utilities first sought and obtained a Portland city ordinance approving the Agreement. They then sought and obtained PUC Order 72-870 (Dec. 15, 1972) ("1972 Order"), which did not by its terms create exclusive service territories. It merely approved the Agreement and made specific orders related to the transfer of customers and facilities. The 1972 Order did not refer to the Oregon statute providing for approval of exclusive service territory agreements.

For many years thereafter, PGE and PP&L did not compete in each other's Portland enclaves. In 1989, however, Columbia Steel Casting ("Columbia"), served by PGE, sought to purchase electricity from PP&L. PP&L agreed to provide the service. PGE then objected that this violated the Agreement and the 1972 Order, and those objections apparently led

PP&L not to provide electric service to Columbia. Pacificorp v. Portland General Elec. Co., 770 F. Supp. 562, 566 (D. Or. 1991).

2. Columbia sued for a declaration that the utilities' division of Portland into exclusive territories was beyond the scope of the Order and violated the Sherman Act. PGE claimed state action immunity, relying on the 1972 Order. Slip op. 8831. The district court, on PGE's motion for partial summary judgment, concluded that the Agreement provided only for certain exchanges and not for the allocation of exclusive territories, and therefore that the 1972 Order "did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party." 770 F. Supp. at 571. Accordingly, it held that the market division was not protected by state action immunity. Id. See also slip op. 8831. The court subsequently ruled that PGE had violated Section 1 of the Sherman Act and awarded damages. Slip op. 8832.

3. A panel of this Court unanimously reversed, concluding that the challenged actions were protected from antitrust challenge by state action immunity. It held that under this Court's precedents, "private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." Id. at 8836.

In applying that standard, the panel agreed with the district court that "'[t]he difficult issue in this case is whether the 1972 Agreement effected a territorial division of customers as contemplated by the Oregon legislature.'" Id., quoting 770 F. Supp. at 570. And it recognized that "the 1972 Order is not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of

facilities and customer accounts." Slip op. at 8836-37. The panel then devoted six pages, id. at 8837-42, to what the 1972 Order might mean in light of the statutory references it includes and does not include, possible PUC intentions regarding the wheeling of electric power, preliminary versions of the Agreement, PUC orders subsequent to the 1972 Order, and the position of the City of Portland on the question of exclusive service territories within the city. Following this analysis, the panel "conclude[d] that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order, especially as clarified by" another order two years later. Id. at 8842. It therefore found the challenged conduct immune from the antitrust laws under the state action doctrine, reversed the judgment for Colombia, and remanded for entry of judgment in favor of PGE.

## ARGUMENT

### THE PANEL DECISION IS CONTRARY TO SUPREME COURT PRECEDENT AND CONFLICTS WITH THIS COURT'S PRIOR CASES

The panel recognized that the PUC issued a "not particularly clear" order more than two decades ago. Slip op. at 8836. Moreover, the Order's lack of reference to "exclusive territories" or to the statutory provisions authorizing approval of exclusive service territories "tend to create the impression that the PUC did not intend to approve the creation of new exclusive service areas for PGE and PP&L in the City of Portland." Id. at 8837. Nevertheless, the panel concluded that the challenged restraint of trade was immune from the antitrust laws because an inference that the PUC intended to authorize that restraint was "justif[ied]," id. at 8843, although patently not compelled by the circumstances. This conclusion departs from the established rule that state action immunity for private parties depends on express state authorization of the challenged acts. Thus, the panel's result and

reasoning are inconsistent with the principles and policies of state action immunity as articulated by the Supreme Court and this Court.

### A. The Decision Is At Odds With The Supreme Court's Requirement That Private Anticompetitive Conduct Be Expressly Authorized By State Authorities To Qualify For State Action Immunity

The Supreme Court recognized state action immunity from the federal antitrust laws in Parker v. Brown, 317 U.S. 341, 351 (1943), holding that the Sherman Act was not "intended to restrain state action or official action directed by a state." State policy intended to displace competition by regulation frequently leads, and is intended to lead, to anticompetitive conduct by private parties. Yet "[i]f [a plaintiff] always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them." Patrick v. Burget, 486 U.S. 94, 100 (1988). Thus the Court thought it necessary to extend state action immunity to private conduct as well as the conduct of the state and its officials.

But, "to ensure that private parties could claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation," the Court imposed two requirements for the "anticompetitive act of a private party . . . [to be] fairly attributable to the State." Id.: "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 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).[1]

Beyond ensuring that anticompetitive conduct carried out by private parties is fairly attributable to the state, these requirements serve at least three more specific purposes. First, they help limit the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," Ticor, 504 U.S. at 636, thus protecting 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 v. City of Eau Claire, 471 U.S. 34, 45 n.9 (1985).

The Court's cases show that "clear articulation" requires that the challenged restraint be expressly authorized by the appropriate governmental authorities. If the restraint is not so authorized, the immunity inquiry need go no further. 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." 445 U.S. at 105. In Southern Motor Carriers, collective ratemaking by common carriers satisfied the requirement in four states because statutes in those states

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[1]The "active supervision" requirement is not at issue here.

"explicitly permit collective ratemaking by common carriers," 471 U.S. at 63. The requirement was also satisfied in a fifth state, where the legislature adopted an "inherently anticompetitive rate-setting process" that left details to a regulatory commission, and the commission "has exercised its discretion by actively encouraging collective ratemaking among common carriers." Id. at 64. In Town of Hallie, 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. 471 U.S. at 41; see also id. at 44-45 n.8. Similarly, in City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991), the challenged municipal conduct was an ordinance restricting the size, location, and spacing of billboards, id. at 1348. 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 1349.

Express authorization of challenged conduct is, however, only the first step, because not every authorization provides state action immunity for actions so authorized. "Clear articulation" requires as well that the state policy providing the authorization be one intended "'to displace competition with regulation or monopoly public service.'" Town of Hallie, 471 U.S. at 39, quoting City of Lafayette, 435 U.S. at 413. A state may, for example, authorize an entity to enter into contracts, without intending to authorize that entity to enter into contracts that unreasonably restrain trade in violation of the Sherman Act. The Court has rejected the "unrealistic" requirement that the state authority "expressly state . . . that [it] intends for the delegated action to have anticompetitive effects," Town of Hallie, 471 U.S. at

43. Rather, "[i]t is enough . . . if the suppression of competition is the 'foreseeable result' of what the statute authorizes." Omni, 111 S. Ct. at 1350, quoting and citing Town of Hallie, 471 U.S. at 42. Thus, if the conduct is expressly authorized, the next question is whether anticompetitive consequences foreseeably result from that conduct. For example, in Town of Hallie, the Court concluded that it was enough that the state had "delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." 471 U.S. at 43. And in Omni, it was enough that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." 111 S.Ct. at 1350.[2]

Unfortunately, the panel's standard for determining whether the clear articulation requirement was satisfied departs from the Supreme Court's formulation, misconceives the foreseeability test, and fails to achieve the Court's purposes in imposing the requirement. It is clear enough from the panel's opinion that although the PUC, pursuant to Oregon statute, could have expressly authorized creation of permanent exclusive service territories for PGE and PP&L according to an agreement between the two utilities, its 1972 Order did not by its terms do so. Indeed, the panel said that the Order is "not particularly clear," slip op. 8836, and could be described as "ambiguous," id. at 8837, and that the Agreement it approved might even have been made intentionally unclear so as to win the approval of otherwise hostile City officials, id. at 8842-43. Since the express authorization required under Midcal,

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[2]We do not address here the appropriate standard for determining foreseeability of anticompetitive effects, because that standard is not implicated by the panel's decision.

Southern Motor Carriers, Town of Hallie, and Omni is so utterly lacking, that should have been the end of the matter. For the panel, however, it was the beginning.

The first prong of the panel's replacement for the Supreme Court's clear articulation standard is a foreseeability test, but one quite different from the Supreme Court's foreseeability test. While the Supreme Court's test is whether the anticompetitive effects are a foreseeable result of authorized conduct, the panel asked whether the "private conduct . . . is a foreseeable result of state agency action." Slip op. at 8836 (emphasis added).[3] The panel's foreseeability test simply asks the wrong question and thus dispenses with the requirement of express authorization, the necessary predicate for the Supreme Court's foreseeability test.

The second part of the panel's reformulated standard, whether "circumstances justify an inference that the agency intended to authorize the conduct," id., appears to be simply a replacement for the Court's requirement of express authorization. It permits state action immunity to be based on ambiguous state acts, see slip op. at 8832 (PUC recognition of ambiguity of 1972 Order), provided that a court later determines, in light of various circumstances, that it is reasonable to conclude that the state agency intended to authorize what it did not expressly authorize.

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[3]The panel concluded that "the 1972 Order had the foreseeable effect of leading PGE and PP&L to stop competing in the territories created by that Order." Slip op. at 8842. That conclusion is likely correct, but even under the panel's test it seems beside the point. Columbia complained not about the absence of competition foreseeably resulting from the facility and customer swap in 1972, but rather about an alleged agreement not to compete that apparently prevented PP&L from providing service to Columbia even when it was willing to do so. The panel does not explain how this conduct -- an agreement not to compete -- was a foreseeable effect of an order approving a one-time swap of facilities and customers.

Because it does not require express authorization, permitting immunity to be based instead on a reasonable, but perhaps incorrect, inference of agency intent, the panel's reformulation fails to assure that private anticompetitive conduct is "truly the product of state regulation." Patrick, 486 U.S. at 100. It therefore fails to cabin a disfavored immunity, unjustifiably threatening the "overarching and fundamental" national policy favoring competition. City of Lafayette, 435 U.S. at 398-99. It can result in saddling states with antitrust immunities they did not intend to provide. By permitting antitrust immunity to be provided without express authorization, it undermines the principle of political responsibility on which the Court has relied to protect the public when competition is displaced. And where state agencies are unwilling to authorize anticompetitive conduct, the panel's standard may even encourage private parties to hide their anticompetitive designs when seeking state acts, hoping to convince a court later that the agency intended to do what it was unwilling to do. Thus the panel's standard not only departs from the Supreme Court's standard, but also frustrates the policies on which that standard rests.

B. The Panel's Decision Departs From This Court's Prior Decisions

The panel purported to find support for its novel standard of clear articulation in "existing Ninth Circuit caselaw," slip op. at 8836, citing two cases in which private parties claimed state action immunity based on alleged state agency authorization, Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co., 981 F.2d 429 (9th Cir. 1992), cert. denied, 113 S. Ct. 2336 (1993), and Medic Air Corp. v. Air Ambulance Authority, 843 F.2d 1187 (9th Cir. 1988). Neither Nugget and Medic, however, provides support for the panel's standard.

In Nugget, a would-be private power supplier ("Nugget") had contracts with a utility ("PG&E") that would terminate if it failed to begin providing power within five years, subject to force majeur extension. Nugget, after experiencing permitting delays, sought such an extension, but PG&E at first denied it and subsequently offered a deferral in exchange for certain concessions. 981 F.2d at 432. Nugget eventually brought an antitrust suit challenging PG&E's acts regarding the force majeur extension. Id. at 434. PG&E claimed that its conduct was "plainly authorized by a state statute . . . and state implementing regulations." Id. This Court reviewed the regulations, which disfavored accepting permitting delays as grounds for force majeur extensions, called for the utility to scrutinize force majeur claims closely, and said the utility should negotiate a settlement only when that was in the ratepayers' best interest. Id. That was, of course, what PG&E had done. There remained only the question of the specific decisions respecting Nugget, which, the court said, were "a foreseeable result of state policy." Id. There was thus both authorization and foreseeable anticompetitive results, as the Supreme Court requires.

In Medic, an air ambulance service (Medic) sued a competitor (Air Ambulance), to which local authorities had granted a monopoly of dispatching services and which allegedly used its monopoly position to exclude or destroy Medic. This Court found that the monopoly of dispatching services enjoyed state action immunity because it was both pursuant to a state policy of granting such exclusive franchises and actively supervised. But it also held that the use of the monopoly to injure a competing service was not immune. As the Court observed, "[t]he state and its agencies have not granted Air Ambulance an exclusive [ambulance] franchise. That they might have done so is irrelevant. The state must act if

immunity is to exist." 843 F.2d at 1189. The Court then elaborated: "The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry into the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." Id. Only then did the Court add that "[t]he alleged anticompetitive conduct was not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher.'" Id. (citation omitted).[4]

* * * *

We emphasize that our concern is with the standard the panel has apparently adopted. The panel's opinion might be read to hold that even if the 1972 Order authorized only an exchange of facilities and associated customers, the resulting creation of de facto exclusive territories foreseeably led the utilities to stop competing in one other's enclaves, and that therefore there is immunity from the antitrust laws. There is, however, a difference between approval of a division of territory that predictably results in less competition, and approval of de jure exclusive territories. With a mere de facto division of territories, utilities are free to compete, and might be expected to compete, on or near the borders, or elsewhere where obstacles to providing service are relatively low. Although it may be foreseeable that utilities

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[4]Other circuits have, of course, also followed the Supreme Court. For example, in Yaeger's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1268 (3d Cir. 1994), faced with an antitrust challenge to a utility's promotion of heat pumps, the court properly applied the foreseeability test to authorized conduct: "Permitting companies to grant loans or rebates for energy-saving systems could easily be foreseen to provide one company with a competitive advantage over another, whether the other company provides the same or a competing service. Therefore, it is reasonably foreseeable that rebates, loans and other load management programs utilities are required to consider could have anticompetitive effects."

might refrain from competing even on the borders, the foreseeability of unauthorized anticompetitive conduct is not sufficient to clothe that conduct with state action immunity. If the panel did not intend such a reading of its opinion, but instead viewed the PUC orders preceding the challenged conduct, separately or taken together, as clearly authorizing de jure exclusive territories, we urge the panel to revise its opinion to so indicate. If, on the other hand, the panel did intend such a reading, we urge it to revisit the question of the appropriate standard for determining state action immunity for private conduct.

## CONCLUSION

The Court should grant rehearing.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 16, 1995, I caused copies of the foregoing Brief Amicus Curiae of the United States of America In Support of Petition for Rehearing, to be served by Federal Express overnight delivery upon:

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