No. 97-49

In the Supreme Court of the United States

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

COLUMBIA STEEL CASTING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the court of appeals (i) articulated the proper test for "state action" immunity from the federal antitrust laws and (ii) correctly applied that test to the facts of this case.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Chapter 757 of the Oregon Revised Statutes provides, among other things, that a public utility may not dispose of any material amount of the property used in its public service functions without first obtaining the approval of the Oregon Public Utility Commission (the PUC). Or. Rev. Stat. § 757.480 (1989), *reprinted at* Pet. App. R1-R2. Chapter 758 defines a specific statutory scheme under which two or more utilities may contract with each other, subject to approval by the PUC, "for the purpose of allocating territories and customers between the parties and

designating which territories and customers are to be served by which of said contracting parties." Pet. App. R3 (§ 758.410(1)). If the PUC finds that the contract will advance specified public interests and approves it, the contract becomes "valid and enforceable," and no other utility may provide service in any territory that has been allocated to one of the contracting parties. *Id*. at R4, R7 (§§ 758.415, 758.450(2)). The contract may also provide for the sale or exchange of equipment or facilities in allocated areas, but any such transfer remains subject to the separate approval requirements of Chapter 757. *Id*. at R3-R4 (§ 758.410(2)).

2. Before 1972, petitioner Portland General Electric Company and another utility, Pacific Power & Light (PP&L), competed to provide electricity to customers throughout the city of Portland, Oregon. Pet. App. A6. The two utilities maintained duplicative transmission lines, poles, substations and transformers throughout the city. *Ibid*. In 1972, petitioner and PP&L submitted to the Portland City Council a plan to create exclusive service territories within the city, thereby eliminating both duplication of facilities and competition for customers. *Id*. at A6. The City Council, which had previously opposed efforts to eliminate utility competition, disapproved that plan. *Ibid*. The Council endorsed, however, an exchange of property between the two utilities to reduce or eliminate the duplication of facilities, while reiterating that "both companies operate under non-exclusive franchises and * * * the obligation to supply properties within the City must remain binding upon both companies." *Id*. at A6 & n.3 (court's emphasis omitted).

Petitioner and PP&L thereafter entered into an agreement (the Agreement) to "comply" with the city council's decision and "to provide for the elimination of duplicating electric facilities" within the city. Pet. App. A7. That Agreement "said nothing about exclusive service territories in Portland," but it provided for an exchange of properties and customer accounts that would, in effect, create separate territories, in each of which a single utility owned all the facilities and served all the customers. *Id*. at A7-A9. The utilities then applied for, and received, an order from the PUC approving "the transfer and exchange of property, facilities and customers" covered by the Agreement. *Id*. at J1-J13, J10. Neither the utilities' application to the PUC (Resp. Br. in Opp. App. A1-A27) nor the Commission's 1972 order referred specifically to the creation of exclusive service territories in Portland, or mentioned the provisions of state law providing for PUC approval of agreements for the allocation of exclusive territories. See Pet. App. A10, M7, M14-M17; Resp. Br. in Opp. App. A1. After implementation of the 1972 Agreement, however, petitioner and PP&L ceased competing with each other in Portland. See, *e.g.*, Pet. App. A11, A20-A21, L-2, M21.

3. Respondent Columbia Steel Casting Co. operates a plant in an area of Portland that petitioner began serving exclusively after issuance of the PUC's 1972 order. Pet. App. A11. In 1987, respondent sought to purchase its electricity from PP&L instead, because PP&L's rates were lower than petitioner's. *Ibid*. PP&L refused, on the ground that respondent's plant, although crossed by a PP&L transmission line, was in an area served exclusively by PG&E. *Id*. at A11, D3. In 1989, PP&L agreed to provide electricity to respondent, but petitioner

objected on the ground that the 1972 Agreement gave it the exclusive right to supply electricity to any customer at that location. *Id*. at A11, E8.

Respondent sued petitioner, PP&L, and the PUC, seeking a declaration that petitioner had no exclusive right to provide electricity to respondent's plant, and that any agreement to the contrary violated the Sherman Act, 15 U.S.C. 1-2. Pet. App. A4-A5, E8. Petitioner defended on the ground that the PUC's 1972 order had allocated exclusive territories to it and to PP&L, and that the arrangement was immune from antitrust liability under the state-action doctrine. *Id*. at A5.

The district court rejected petitioner's state-action defense. Pet. App. E1-E18. The court acknowledged (*id*. at E15) that a territorial allocation agreement that was explicitly approved by the PUC under Chapter 758 would be protected by state-action immunity. The court concluded, however, that the 1972 contract between petitioner and PP&L reflected only an agreement "to an exchange of facilities," and "was not a contract whereby the parties allocated territories and customers * * * and limited their rights to operate within the [allocated] parcels in the future." *Id*. at E17. The 1972 PUC order, which was based on the utilities' contract, therefore "did not order the allocation of territories and customers and did not designate which territory was to be served by which contracting party." *Ibid*. Because "[i]t would be contrary to the purpose of the doctrine of state action to allow private parties to claim monopolies that have not been specifically and clearly authorized by relevant statutory process," the court rejected petitioner's reliance on the 1972 order to preclude antitrust liability. *Id*. at E17-E18.

Shortly after Columbia Steel filed this action, petitioner filed an application with the PUC seeking, among other things, a declaration that the 1972 order had created exclusive service territories in Portland. Pet. App. M3. In 1992, after the district court had rejected petitioner's state-action defense, the PUC issued an opinion (*id*. at M1-M35) acknowledging that the 1972 order "perhaps * * * did not unambiguously allocate exclusive service territories" to petitioner and PP&L (*id*. at M23), but concluding that there was "much extrinsic evidence that the Commission and the parties intended a territorial allocation" (*id*. at M20). The Commission accordingly entered an order "correct[ing]" its 1972 order, "nunc pro tunc," by inserting operative language that specifically refers to "separat[ing] service territories" and cites a relevant provision of Chapter 758. *Id*. at M30-M33. At the same time, noting that the effect of events in 1972 was "still being litigated in other forums," and "[t]o resolve any future ambiguity," the PUC specifically approved a 1991 agreement between petitioner and PP&L that explicitly allocated service territories to conform to the areas described in the 1972 Agreement, although with a new provision that allowed Columbia Steel to receive its service from PP&L rather than from petitioner. *Id*. at M27-M30.

The district court declined to alter its judgment on petitioner's state-action defense in light of the PUC's 1992 order. See Pet. App. F15, F17-F18, G1-G3. After resolving various subsidiary issues, the court entered judgment against petitioner under Section 1 of the Sherman Act, and awarded damages and attorney's fees. *Id*. at F22-F23, H1-H5, I1-I3.

4. The court of appeals initially reversed. Pet. App. C1-C19. Although it acknowledged that the 1972

order was "not particularly clear regarding the PUC's intention to permit a permanent division of the Portland market" (*id*. at C12), the court interpreted its prior cases to hold that this Court's "clear articulation" test for state-action immunity was not a "clear statement rule" (*id*. at C9), but rather a "more liberal 'foreseeability' standard" (*id*. at C12), which "require[d] only that the anticompetitive conduct be sufficiently foreseeable to justify the inference that it was intended by the authorizing agency" (*id*. at C18). See *id*. at C7-C11. After an extended analysis of different possible interpretations (*id*. at C11-C18), the court concluded that the 1972 order was "sufficiently clear" (*id*. at C12) to satisfy that standard. See *id*. at C17-C18.

The United States filed a brief as amicus curiae in support of rehearing in the court of appeals. The government emphasized that its "concern [was] with the standard the panel [had] apparently adopted" (U.S. Reh'g Br. 12), which appeared to confuse the foreseeability of anticompetitive effects of authorized conduct with the foreseeability of anticompetitive conduct that had not, in fact, been clearly authorized by the State (see, *e.g.*, *id*. at 6-10). Because the court's opinion could be read to substitute "foreseeability" for "clear articulation" in a way that "dispense[d] with the requirement of express [state] authorization" as a prerequisite to immunity (*id*. at 9), the government urged that the court either amend its opinion to clarify that it "viewed the PUC orders preceding the challenged conduct, separately or taken together, as clearly authorizing de jure exclusive territories," or revisit its interpretation of the appropriate legal standard (*id*. at 12-13).

The court of appeals granted rehearing, vacated its prior decision, and affirmed the district court's judgment on liability under the Sherman Act.[1] Agreeing that it had "erred in allowing a foreseeability test to be substituted for the clear articulation test" established by this Court's cases (Pet. App. A27), the court concluded that the 1972 order "fail[ed] to speak with sufficient clarity to satisfy" the correct standard (*id*. at A15). Because the PUC did not, in the court's view, "clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland" (*id*. at A20), either in 1972 or in later orders entered before the present dispute arose (see *id*. at A20-A22), the court "agree[d] with the district court that the elimination of competition between [petitioner] and PP&L in Portland was not cloaked with state-action immunity" (*id*. at A22).[2]

DISCUSSION

This Court has established "a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988). Under the first prong of that test, private anticompetitive conduct must be authorized by the State in a way that is "clearly articulated and affirmatively expressed as state policy." *Ibid*. The

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[1] The court vacated the district court's damage award and remanded for a recalculation of damages over a longer period of time. Pet. App. A35-A36.

[2] The court also rejected several other arguments raised by petitioner, including that the PUC's 1992 order, as affirmed by a state court, was entitled to preclusive effect in this case. Pet. App. A23-A35.

court of appeals' opinion on rehearing in this case properly construes that requirement, correcting the court's initial misunderstanding of established law. See Pet. App. A13, A15 n.8, A26-A29. The only remaining question therefore is whether the court applied the "clear articulation" test correctly to the facts of this case. That fact-bound determination does not, in our judgment, warrant review by this Court.

1. State-action immunity from the prohibitions of the Sherman Act protects not only "state action or official action directed by a state," *Parker* v. *Brown*, 317 U.S. 341, 351 (1943), but also private anticompetitive conduct that is "truly the product of state regulation" and therefore "fairly attributable to the State." *Patrick*, 486 U.S. at 100. As this Court has repeatedly held, however, private conduct cannot be "fairly attributed" to the State for these purposes unless each of two essential conditions is met: "First, the challenged restraint [on competition] 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) (internal quotation marks omitted); see also *FTC* 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); compare *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) (municipality need only establish clear articulation).

As the Court has explained, the nature of state-action immunity dictates that it should not be expansively construed. *Ticor*, 504 U.S. at 635-637 ("state-action immunity is disfavored, much as are ??????? repeals by implication"); see also *City of Lafayette* v. *Louisiana*

Power & Light Co., 435 U.S. 389, 398-399 (1978) (implied exclusions from the antitrust laws are disfavored because those laws embody "overarching and fundamental policies" through which Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country"). Strict observance of the clear articulation and active supervision requirements is necessary to ensure that private anticompetitive conduct will be immunized if, but only if, it may be fairly characterized as a derivative form of action by the State itself. "[I]nsistence on real compliance with both parts of the *Midcal* test" in fact "increase[s] the States' regulatory flexibility," because it permits them to "regulate their economies in many ways not inconsistent with the antitrust laws," without running the risk that they will inadvertently confer antitrust immunities "whenever they enter the realm of economic regulation." *Ticor*, 504 U.S. at 635-637. Similarly, strict application of the requirements for immunity helps to ensure both that "federal law [does not] compel a result that the States do not intend but for which they are held to account" and, conversely, that States "accept political responsibility * * * [when they] do choose to displace the free market with regulation." *Id*. at 636; cf. *Town of Hallie*, 471 U.S. at 45 n.9 (noting check that public scrutiny may provide against anticompetitive conduct by local governments).[3]

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[3] See Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203, 1250-1263 (1997) (interpreting this Court's state-action cases as moving toward a process-oriented test aimed at enhancing political participation in the regulatory process).

In this case, both the district court and the court of appeals properly focused on whether authorization of an agreement between petitioner and PP&L to divide the Portland market had been "clearly articulated and affirmatively expressed as state policy." Pet. App. A13-A22, E14-E18. In its first opinion, the court of appeals concluded that the PUC's 1972 order was "not particularly clear" with respect to whether the Commission intended to authorize a permanent division of the Portland market. Pet. App. C12. The court nonetheless held that petitioner was entitled to immunity, because it read earlier cases as having replaced "the strict 'clear articulation' test" with a "more liberal 'foreseeability' standard," under which petitioner was required to show only that its anticompetitive conduct was a "foreseeable result" of the PUC's actions and that "circumstances justif[ied] an inference that the agency intended to authorize the conduct." *Id*. at C11-C12. That significant relaxation of a "rigorous" test (*Patrick*, 486 U.S. at 100), threatening unjustified expansion of a "disfavored" immunity (*Ticor*, 504 U.S. at 636), was a serious error of federal law, and prompted the government to file a brief supporting rehearing in the court of appeals. See pages 6-7, *supra*.[4]

The court of appeals' opinion on rehearing, by contrast, correctly recognizes (Pet. App. A26-A29) that it would be inappropriate to "appl[y] a foreseeability test as a substitute for the threshold * * * clear articulation test" specified by this Court (*id*. at A29). Returning instead to a straightforward construction

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[4] For the Court's convenience, we have lodged with the Clerk copies of the two amicus curiae briefs filed by the government in the court of appeals.

of the "clearly articulated" requirement (*id*. at A13), the court of appeals agreed with the district court that "the [PUC] did not 'specifically and clearly authorize[] by the relevant statutory process' a division of the Portland market into exclusively served territories" (*id*. at A22). Whatever the merits of that conclusion as a factual matter, the court's final opinion does nothing more than apply the correct legal standard to the particular facts of petitioner's case.[5]

2. Petitioner contends (Pet. 16-23) that the court of appeals departed from this Court's precedents by focusing on whether the PUC, as opposed to the state legislature, clearly authorized the division of the Portland market into exclusive territories. We perceive no error in the court's approach in this case.

Petitioner contends (Pet. 16-18) that the court should have accepted Oregon's statutory scheme for

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[5] The application of any legal test to particular facts will, of course, lead to different results in different cases; and in relatively close cases, such as this case or the *Praxair* case discussed below, it will always be possible to marshal the facts in such a way as to suggest the contrary result. As the government emphasized to the court of appeals (U.S. Reh'g Br. 12), "our concern [in this case was] with the standard * * * apparently adopted" by that court's first opinion. Accordingly, we express no view on whether the courts below were ultimately correct to conclude (see Pet. App. A13-A15, A22, E17), under all the circumstances, that permanent division of the Portland market was not, before 1992, "clearly articulated and affirmatively expressed as state policy." See also U.S. Br. Opposing Second Reh'g 6-7. Both lower courts did, however, reach the same conclusion; and the record supports the court of appeals' observations that the PUC's 1972 order is not "particularly clear" in that regard (Pet. App. C12), and that none of the PUC's pre-1992 orders authorized such a division "forthrightly and clearly" (*id*. at A21).

the allocation of exclusive service territories as a "clearly articulated and affirmatively expressed * * * state policy to displace competition" (Pet. 16), and should have considered the PUC's actions only to determine whether they provided "active supervision" of that policy as it applied to petitioner. As we understand the matter, however, it is undisputed that Oregon law permits (but does not require) the PUC to authorize territorial allocation agreements that would otherwise violate the Sherman Act, and that the PUC's specific approval is required for any such agreement to be valid under state law. See Pet. App. A13-A14. In these circumstances, it was reasonable for the court of appeals to conclude that "the state's clearly articulated policy is *to have the [PUC] decide* whether to sanction anticompetitive conduct" by private utilities, and that therefore a court "must look to the decisions of the [PUC] to determine whether [petitioner's] conduct was part of a clearly articulated state policy." *Id*. at A15 n.8 (emphasis added).

That analysis is consistent with this Court's cases. For anticompetitive conduct to be protected as the product of a "clearly articulated and affirmatively expressed" state policy, it must be expressly authorized by an appropriate governmental authority. See, *e.g.*, *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-373 (1991); *Town of Hallie*, 471 U.S. at 43.[6] In *Southern Motor Carriers*, on which

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[6] Not every express authorization of a type of conduct will suffice to confer antitrust immunity, because the policy the State has "clearly articulated" must be "to displace competition with regulation or monopoly public service." *Town of Hallie*, 471 U.S. at 38-39. The clear articulation requirement is met, however, when the State confers "express authority to

petitioner relies (Pet. 17-18), collective ratemaking by common carriers satisfied that requirement in three States because state statutes "explicitly permit[ted]" it. 471 U.S. at 63. In a fourth State, the legislature had "not specifically addressed" the practice, but it had adopted an "inherently anticompetitive rate-setting process" that left details to a regulatory commission, and the commission had "exercised its discretion by actively encouraging collective ratemaking." *Id.* at 63-64. The Court treated that agency action as a matter of "clear articulation," not "active supervision." *Id*. at 63-66.

Similarly, in *Ticor* (see Pet. 17), state statutes provided explicitly for "negative option" systems under which rates fixed jointly by insurers and filed with state regulators "became effective unless the State rejected them within a specified period." *Ticor*, 504 U.S. at 629. None of the States involved had rejected the jointly fixed rates, and the government therefore "conceded that the first part of the [*Midcal*] test was satisfied." *Id*. at 631. It was only because of that concession, and the clear state authorization on which it rested, that the outcome in *Ticor* "turned upon the proper interpretation and application of *Midcal*'s active supervision requirement." *Ibid*.

The relevance of a state agency's actions to the immunity analysis depends on the facts of each case. Because Oregon's general statutory policy is to allow private division of service territories only after specific approval by the PUC, the court of appeals reasonably analyzed the PUC's orders to determine whether they "clearly articulated" a specific policy

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take action that foreseeably will result in anticompetitive effects." *Id*. at 43; see also *Omni Outdoor Advertising*, 499 U.S. at 373.

expressly authorizing such a division of the Portland market.[7]

3. Petitioner argues (Pet. 23-29) that the decision below conflicts with the decisions of two federal courts of appeals in state-action immunity cases, and with the decision of an Oregon court sustaining the PUC's 1992 amendment of its 1972 order. We perceive no conflict that calls for resolution by this Court.

a. In *Praxair, Inc.* v. *Florida Power & Light Co.*, 64 F.3d 609, 612 (11th Cir. 1995), cert. denied, 116 U.S. 1678 (1996), Florida law authorized the state Public Service Commission to approve territorial allocations, and the Commission had approved such an arrangement between Florida Power & Light (FPL) and another utility many years before the dispute at issue arose. 64 F.3d at 612. The district court held that the market division implemented a clear state policy and received active state supervision, and the Eleventh Circuit agreed. *Id*. at 611-612. The issue before the court of appeals was the district court's denial of summary judgment on the question whether a particular county was included within the scope of the Commission's order allocating exclusive service territories to FPL. See *id*. at 611.

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[7] Petitioner's position that agency action should be analyzed only as a matter of "active supervision" (Pet. 17) would lead to a conundrum if the PUC reviewed and rejected an agreement to establish exclusive territories. If, as petitioner argues (Pet. 16), an overall state policy in favor of market allocation is clearly articulated by statute, then either the rejected allocation would have to fail the "active supervision" test, despite the PUC's careful review, or the parties' conduct would be immune from antitrust challenge, despite the State's explicit refusal to authorize it. Neither alternative is reasonable.

Reviewing the record, the *Praxair* court concluded that maps attached to the relevant agreements and the application for regulatory approval, one of which was incorporated by reference in the Commission's order, strongly suggested that the order had indeed allocated the disputed county to FPL. 64 F.3d at 612-613. The court then looked to "the way the parties and particularly the Commission [had] conducted themselves since" the original order—noting, among other things, that FPL was already serving the disputed county (evidently exclusively) at the time of the allocation order, and that the Commission had, before the dispute in question arose, conducted a "comprehensive review of approved territorial agreements," during which it "developed maps which depicted [the county] in FPL's service area." *Id.* at 613. On the basis of all the evidence before it, the court concluded that FPL was entitled to summary judgment.

Nothing in the decision below is inconsistent with *Praxair*'s approach to the state-action question. Contrary to petitioner's submission (Pet. 23-25), the court of appeals in this case did not refuse to consider evidence of developments after the PUC's 1972 order; it simply found the evidence adduced in this case less persuasive than the Eleventh Circuit found the analogous evidence presented in *Praxair*. See Pet. App. A20-A22. Nor did the Eleventh Circuit apply a more relaxed standard of "clear articulation" (see Pet. 24). Because there was no dispute in *Praxair* that *some* territorial allocation had been clearly authorized and actively supervised by the State, the court addressed only the precise scope of that allocation. But even if (as is probable) the standard of clarity required to determine the inclusion of a particular territory is the same as that required to determine that the State

has authorized an allocation of some sort, the evidence of specific regulatory approval adduced in *Praxair*, such as the maps produced by the Florida commission for the specific purpose of showing approved territorial allocations, was substantially stronger than that advanced by petitioner in this case. Compare Pet. App. A15-A22 with 64 F.3d at 612-613. Thus, unlike petitioner (Pet. 25), we see no firm basis for concluding that the *Praxair* court would have recognized immunity on the facts of this case, or that the court below would have rejected a claim of immunity on the facts of *Praxair*.[8]

b. In *Lease Lights, Inc.* v. *Public Service Co. of Okla.*, 849 F.2d 1330 (1988), cert. denied, 488 U.S. 1019 (1989), the Tenth Circuit held in part that a claim to immunity may rest on clear authorization of anticompetitive conduct in a state administrative order that is later held to be invalid. Compare *Omni Outdoor Advertising*, 499 U.S. at 371-372. Nothing in the decision below conflicts with that proposition. The court of appeals held that there was no "clearly articulated" state authorization of petitioner's conduct, not because of some technical defect in the 1972 order, nor because the [PUC] lacked the power under state law to authorize conduct that it purported to authorize, but rather because "the [PUC] failed altogether to exercise its [unquestioned] authority to approve exclusive service territories with any clarity whatsoever." Pet. App. A19-A20.

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[8] We note that petitioner presumably could have sought a clarifying ruling from the PUC before, rather than after, definitively relying on an overtly anticompetitive agreement, as the utilities in *Praxair* apparently did (see 64 F.3d at 613).

c. In 1990, after respondent had filed the present suit, petitioner asked the PUC to resolve the issue of exclusive service territories in Portland. See Pet. App. A11-A12, M3. In 1992, the Commission issued an order (*id*. at M1-M35) in which it found that it had intended to allocate territories in 1972, amended its 1972 order to reflect that intention, and prospectively settled the allocation of territory and customers between petitioner and PP&L. See *id*. at M27, M30-M33; page 5, *supra*. Petitioner contends (Pet. 26-29) that the decision below conflicts with decisions of the Oregon courts (Pet. App. O1-Q2) affirming that order.

According to the PUC's 1992 order, petitioner's application did ask the Commission to issue, among other things, "a declaratory order affirming that [the Commission's 1972 order] allocated exclusive territory to" petitioner in Portland. Pet. App. M3. As we read the 1992 order, however, what the Commission actually did was something rather different. After extensively reviewing the evidence (*id*. at M13-M22), the PUC concluded that, because the 1972 order did not refer to the State's territorial allocation statutes or say that it was creating exclusive territories, "perhaps it did not unambiguously allocate exclusive service territories" (*id*. at M23). Thus, rather than "affirming" that the 1972 order had clearly divided the Portland market, the Commission concluded that the order was "not a complete and accurate memorial" of what it had intended to accomplish. *Ibid*. The Commission therefore *amended* the 1972 order "nunc pro tunc, to conform to the actual decision intended and followed." *Ibid*.

The court of appeals considered the PUC's 1992 order (Pet. App. A23-A26), but it concluded that the order, as affirmed by the state courts, had no preclu-

sive effect in this case, because it resolved a fundamentally different issue. *Id*. at A25. We agree with that analysis. Even if the PUC had declared the meaning of the 1972 order as a matter of state law, whether that meaning had been sufficiently "clearly articulated and affirmatively expressed" to satisfy the *Midcal* test would have remained a separate question of federal antitrust law, on which the state judgment would have had no preclusive effect. See *Town of Hallie*, 471 U.S. at 44 n.7; cf. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (existence of contract is a federal question for Contracts Clause purposes). In this case, however, the PUC's 1992 order expressly recognized the same ambiguity that the courts below found in the 1972 order; rather than declaring the 1972 order "clear," the Commission "amend[ed]" it, and then dismissed petitioner's request for a declaration as "moot." Pet. App. M27. If anything, then, the PUC's 1992 decision tends to reinforce the court of appeals' conclusion that the Commission had not previously "clearly articulated" permission for petitioner's anticompetitive conduct.[8]

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[8] See also *American Can Co.* v. *Davis*, 559 P.2d 898 (Or. Ct. App.), rev. denied, 278 Or. 393 (1977). In 1974, the PUC adjusted PP&L Portland rates because, it said, there was no longer competition between utilities in the city. See Pet. App. A21-A22. In appealing that order, Portland argued that the PUC had ignored contrary evidence concerning the 1972 order and the existence of competition. 559 P.2d at 910. PP&L had also opposed the 1974 order, contending that "competition may potentially exist within Portland if there is a disparity between [PP&L's and petitioner's] rates." *Ibid*. Although it affirmed the PUC's order, the court noted that PP&L's Vice President had been unable to tell the PUC categorically "whether Portland was still a competitive area," and had recognized that, because the utilities' city franchises permitted "each to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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service any Portland customer, disparate rates could engender competitive pressure upon them." *Ibid*.