



Reviewing Antitrust Immunity

FEDERAL AND STATE POLICY MAKERS are encouraging investment in CHP projects because they offer one of the most efficient and environmentally friendly alternatives to highly inefficient monopoly utility electricity production. CHP offers immediate reductions in the cost of energy, fossil fuel consumption and harmful emissions.

The Nationwide efforts to introduce competitive energy markets and encourage investment in a broad portfolio of highly efficient technologies demands vigilant enforcement of antitrust laws. The unchecked exercise of monopoly market power will have a devastating impact on the development of competitive energy markets. Trigen and the National Energy Marketers Association (NEMA) are concerned about a case decided by the Tenth Circuit Court of Appeals involving one of Trigen's CHP facilities.

The Supreme Court *should ensure regulated entities cannot unfairly compete in unregulated markets.*

OKLAHOMA CITY FACILITY

Trigen Energy Corporation owns and operates a CHP plant in Oklahoma City. Trigen's plant pipes steam and chilled water through a network of underground pipes to office buildings. The steam is used to heat and the chilled water to cool the buildings. Electric-driven heaters and chillers are bypassed and the need to purchase electricity from the local utility, Oklahoma Gas & Electric (OGE) is displaced.

Faced with the proposition of losing major electric-driven cooling customers, OGE embarked on a "Plan of Action" to exclude Trigen as a competitor in the cooling market in Oklahoma City. The CHP market, like the market for many other energy products and services is unregulated and the utility's conduct in this market is not authorized nor actively supervised by the state.

Consequently, Trigen filed suit in Federal District Court for OGE's predatory and tortious conduct. A Jury in the District Court found OGE: monopolized the market for cooling services in downtown Oklahoma City; violated Federal antitrust laws; violated state antitrust laws; and committed tortious interference with contract and with prospective advantage. The jury awarded Trigen a \$20.6 million judgement.

10th CIRCUIT RATIONALE

On appeal, OGE argued that Trigen's antitrust claims were

barred under the state-action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. The Supreme Court has consistently held that a private party's anticompetitive conduct is not protected by State immunity unless "first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct and second, the State provides active supervision of the anticompetitive conduct." *FTC v. Tior Title Ins. Co.*, 540 U.S. 621, 631 (1992).

The Tenth Circuit took a gross departure from the well-defined and consistently applied two prong "functional" test articulated in *Tior Title* and adopted a "status" test. The court ignored OGE's underlying conduct and failed to address whether OGE's conduct was (1) authorized and (2) supervised by the state. Instead, the court concluded that OGE's conduct is immunized simply by virtue of its status as a regulated utility without an analysis of how or, in fact, whether it met the "two-prong test for state action immunity."

The Tenth Circuit turned well establish Supreme Court precedent on its head and imposed the burden on Trigen to prove that OGE's conduct somehow destroyed an immunity that was proven not to exist. The Tenth Circuit's failure to acknowledge that OGE's anticompetitive conduct was never authorized nor supervised, and its decision to ignore OGE's anticompetitive conduct violates both the origin and purpose of the state action immunity doctrine.

U.S. SUPREME COURT REVIEW

Supreme Court Law is clear that traditionally regulated companies are not permitted to engage in anticompetitive non-price predation simply because they are a regulated. The Tenth Circuit's decision effectively extends antitrust immunity to regulated industries participating in unregulated competitive markets.

If the Tenth Circuit's decision is allowed to stand, it will frustrate both the state's and the federal government's ability to competitively restructure the U.S. markets for energy and related products, services, information and technologies.

CONCLUSION

Trigen appreciates the support of the National Energy Marketers Association and other trade groups who have filed "friends of the Court" briefs in this case. Clearly, the Supreme Court should ensure regulated entities cannot unfairly compete in unregulated markets. ■

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