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The Trigen Case: Does This Mean Lights Out for Energy Deregulation?

Kate O'Loughlin *

I. Introduction

Many of us come home in the evening to flip on the lights, grab a cool drink from the refrigerator, recharge our cellular phones, and sit down in front of the television. We do not give a second thought to where the power for these functions comes from until the electric bill arrives each month or we attempt to turn something on and nothing happens. Many of us take electricity for granted until it is unavailable or its cost skyrockets.

Recently, the term “energy deregulation” has become a ten-dollar buzzword. Historically, the electricity markets have been highly regulated monopolies run predominantly by state governments.¹ In the wake of federal deregulation initiatives, there is a movement within the states to deregulate or “re-regulate” their electricity markets to foster competition.² To date, twenty-four states have passed electric power deregulation laws. These efforts have been marked by successes like Pennsylvania³ and disasters like California.⁴ Illinois passed legislation deregulating its electricity

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¹ Joseph Kearney & Thomas Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1327 (1998).

² Tammy Williamson, *ComEd Ad Spokeswoman Near the Center of Power; Strobel Puts Human Face on Utility's Promises*, CHI. SUN-TIMES, Dec. 18, 2001, Financial at 43.

³ Ken Zapinski, *Pennsylvania is Ahead of the Game*, available at <http://www.post-gazette.com/energy/states.asp> (last visited Apr. 28, 2002).

⁴ Steven Pearlstein, *How Supply, Demand & Maybe “Market Power” Inflated a \$273 Commodity*, WASH. POST, Aug. 21, 2001, at A09.

market in 1997, and it is being implemented in increments.⁵ The goal of this deregulation movement is to increase efficiency in the production and distribution of electricity, cut costs, and reduce consumer prices.⁶

Electric companies' new found ability to compete in the market for electricity generation has encouraged states across the country to pass what they consider to be "deregulation legislation."⁷ However, deregulation is a misnomer. Deregulation suggests the abolition of federal and state regulations, leaving the determination of supply and demand to independent market forces.⁸ Currently, supply and demand in the electric industry is far from determined solely through independent market forces. Most electric deregulation legislation distinguishes between generation markets⁹ and transmission¹⁰ and distribution markets.¹¹ While many states are beginning to relax regulations and introduce competition for generation, the transmission and distribution markets are still natural monopolies and are highly regulated.¹²

Although electricity generation companies can produce electricity to supply customers across the county, the means of

⁵ Tammy Williamson, *Unplugging from ComEd; With Market Deregulated and Economy Struggling, Companies Analyze Bills*, CHI. SUN-TIMES, Oct. 26, 2001, Financial at 59. Illinois' attempt at deregulation is codified in *The Electric Service Customer Choice and Rate Relief Law of 1997*, 220 ILL. COMP. STAT. 5/16-101 - 5/17-600 (1997).

⁶ Citizen's Utility Board, *Deregulation of the Electric Industry* (Fall 2000), at <http://www.cuboard.org/Electric.html> (last visited Apr. 27, 2002).

⁷ Kearney & Merrill, *supra* note 1, at 1324-25.

⁸ *Id.*

⁹ Jeffery D. Schwartz, *The Use of the Antitrust Doctrine in the Deregulated Electricity Industry*, 48 AM. U.L. REV. 1449, 1466 (1999) ("Generation involves the basic conversion of one energy source - e.g., coal, uranium, solar radiation, etc. - into electrical energy.").

¹⁰ *Id.* at 1467 ("Transmission involves the process of moving electrical energy from the point of generation to a wholesale purchaser located near the ultimate consumer. Transmission is analogous to a 'wholesale' delivery.").

¹¹ *Id.* ("Distribution is the retail delivery of electricity and involves the transportation of electrical energy from the transmission system to the consumer.").

¹² See Ray S. Bolze, *Utility Restructuring Drawing Back the Regulatory Curtain: Antitrust Issues and Hypothetical Problems*, 1274 PRACTISING L. INST. CORP. 23, 31 (Oct. 22-23, 2001).

distribution is controlled by few.¹³ Electricity transmission grids, the means of transmitting and distributing electricity, are expensive to build and each geographic area needs only one.¹⁴ Thus, states that have passed electric deregulation laws have not deregulated electricity distribution, they have re-regulated it by requiring state-sponsored utilities that have energy distribution monopolies to open their distribution grids to competitors for the same price they charge their affiliate generators.¹⁵

As with any legislation reform, the success of these country-wide state plans is inevitably affected by several different variables. One suggested variable is the highly publicized *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.* case decided in April 2001.¹⁶ In *Trigen*, the court extended the State Action Immunity Doctrine¹⁷ (“state action doctrine”) to include a state regulated electric utility company, thus exempting it from federal antitrust prosecution under the Sherman Antitrust Act.¹⁸

This article will give a short history of the electric industry and efforts to deregulate or “re-regulate” it. Then it will briefly discuss the Sherman Act and the state action doctrine. The article will then analyze *Trigen* and its potential effect on Illinois’ attempt to deregulate its electricity markets. Lastly, it will address what effect, if any, *Trigen* will have on consumer electricity prices.

II. Background

A. Monopolies in the Electric Power Industry

Historically, the electric power industry has been dominated by vertically integrated monopolies.¹⁹ The country was divided into service territories and each territory was regarded as a “natural

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Citizen’s Utility Board, *supra* note 6.

¹⁶ 244 F.3d 1220, 1225 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 459 (2001).

¹⁷ See *Parker v. Brown*, 317 U.S. 341 (1943).

¹⁸ *Trigen*, 244 F.3d at 1223.

¹⁹ States’ utility companies were vertical monopolies because they controlled the entire chain of supply for electricity beginning with its generation and ending with the distribution of that electricity into consumers’ homes. See Bolze, *supra* note 12, at 31.

monopoly' because it was not economically practical to invest in more than one distribution system in each service territory or to construct more generators than necessary to provide full capacity and reliability to that territory."²⁰ Both state and federal governments regulated these monopolies.²¹ The state government regulated company operations and retail prices, and the federal government, through the Federal Energy Regulatory Commission ("FERC"), regulated wholesale transactions and interstate electricity transmission.²² In the monopoly, one state-regulated company, known as a "utility," provided customers in a specific geographic area with all of their electricity needs.²³ This was known as the "bundling" of services.²⁴ The utility generated and distributed electricity on its own distribution grid.²⁵ Since one company monopolized the market for energy generation and distribution in a specific area, the state set the price the company could charge in order to protect consumers.²⁶ Electricity suppliers were required to file a tariff²⁷ with the state regulatory commission showing that their consumer rates were fair, reasonable, and non-discriminatory.²⁸ If the state regulatory commission approved the proposed tariff, it became the price utilities charged consumers for electricity.²⁹

Gradually, advances in technology made it possible to transmit electric energy over much longer distances.³⁰ This paved the way for interconnection among utility transmission networks, thus creating increased reliability and improved economy of service for

²⁰ Bolze, *supra* note 12, at 31.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 32.

²⁴ *Id.*

²⁵ A distribution grid is the physical structure through which electricity is transmitted. *Id.*

²⁶ Kearney & Merrill, *supra* note 1, at 1330-31.

²⁷ Tariffs are price proposals created by utilities outlining the rates the utilities would like to charge consumers based on their costs and a set profit margin. *See* Citizen's Utility Board, *supra* note 6.

²⁸ Kearney & Merrill, *supra* note 1, at 1330-31.

²⁹ *Id.* at 1331.

³⁰ Bolze, *supra* note 12, at 32.

consumers.³¹ Also, this ultimately allowed electricity transmission networks to span multiple states. Today, energy generated in Ohio can travel across a multi-state transmission network and be used in Illinois, thus opening up the local electricity generation market to competition.

While technology opened the electricity generation market to the possibility of competition, the electricity transmission and distribution markets retained their monopolistic characteristics because a given geographic area only needed one distribution grid.³² Local utilities owned and operated the grids, and therefore, the only means of transmitting and distributing electricity.³³ In order to succeed in opening the generation market to competition, private generating companies had to obtain access to the monopolized distribution grids.³⁴

The federal government began the deregulation process in 1996 when FERC issued Order No. 888.³⁵ This order required utilities with monopolies over electricity transmission systems to permit third parties to transmit electricity over their lines, a process known as “wheeling,”³⁶ under terms and conditions no less favorable than those offered to the utilities’ own generating affiliates.³⁷ The purpose of the order was “to ensure that customers had the benefits of competitively priced generation.”³⁸ Although its aim was pro-competitive, this order only affected the wholesale market for electric power,³⁹ because electricity generation and distribution was historically regulated by the state. The federal government could ensure the independent generators’ electricity was

³¹ *Id.* at 31.

³² Kearney & Merrill, *supra* note 1, at 1354.

³³ *Id.*

³⁴ *Id.* at 1353-54.

³⁵ Fed. Energy Regulatory Comm’n, Order No. 888, FERC Stats. & Regs. ¶ 31,652, 61 Fed. Reg. 21540-01 (1996).

³⁶ The Wheeling provision required utilities to allow independent electricity generators to transmit their electricity over the utilities’ distribution grids. *See* Kearney & Merrill, *supra* note 1, at 1354.

³⁷ Fed. Energy Regulatory Comm’n, Order No. 888, 61 Fed. Reg. at 21540-01; Kearney & Merrill, *supra* note 1, at 1354.

³⁸ Fed. Energy Regulatory Comm’n, Order No. 888, 61 Fed. Reg. at 21540-01.

³⁹ *Id.*

transmitted within and across states, but could not ensure its distribution to end consumers.⁴⁰ Ensuring the provision of service to end-users was left to the individual states.⁴¹

By 1996, twelve states had expanded on the federal government's attempt to deregulate the transmission market by introducing retail-wheeling provisions for local distribution markets.⁴² Additionally, forty-one states were actively involved in restructuring their electricity markets.⁴³ Today, twenty-four states have passed deregulation legislation, including Illinois, which has a retail-wheeling provision.⁴⁴

B. Illinois Deregulation Legislation as a Model

Illinois deregulation legislation illustrates the differences between the electric generation, transmission, and distribution markets.⁴⁵ These statutes are drafted well and are representative of what other states have enacted. Illinois passed this deregulating legislation in 1997, creating a gradual reform in the Illinois electric industry.⁴⁶ The reform is gradual because Illinois electric utilities are required to continue offering all of their current services for the near future.⁴⁷ One important element of the law is the introduction of progressive rate cuts until the cost of electricity in Illinois is at or below the Midwest average.⁴⁸ At the same time, the law progressively opens the electricity generation market to competition,⁴⁹ beginning with large customers⁵⁰ in October 1999,

⁴⁰ Fed. Energy Regulatory Comm'n, Order No. 888, 61 Fed. Reg. at 21540-01.

⁴¹ Kearney & Merrill, *supra* note 1, at 1354.

⁴² Williamson, *supra* note 2, at 43. A retail-wheeling provision requires utilities to allow independent electricity generators to distribute their electricity to consumers over the utilities' distribution grids under terms and conditions no less favorable than those offered to the distributor's own generating affiliates.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See generally 220 ILL. COMP. STAT. 5/16-101 *et seq.* (1997).

⁴⁶ See *id.*

⁴⁷ *Id.* at 5/16-104.

⁴⁸ *Id.* at 5/16-111.

⁴⁹ *Id.* at 5/16-104.

⁵⁰ Large consumers are industrial and commercial customers with a demand of

other non-residential customers in December 2000, and residential customers in May 2002.⁵¹ The legislation requires utilities to generate electricity for customers who do not choose to purchase it from other suppliers until at least 2007.⁵² At that point, they must continue until the state declares the electricity generation market competitive.⁵³ This legislation may be considered deregulatory with respect to the electricity generation market because it removes a number of state regulations, leaving independent market forces to determine supply and demand.

However, with respect to the distribution market, the new legislation is anything but deregulatory. Illinois is requiring its utilities, which had monopolies on the distribution market, to open their distribution grid to carry electricity generated by competing companies.⁵⁴ The utilities must provide distribution services to all customers at cost-based rates approved by the Illinois Commerce Commission (“ICC”), regardless of who generates their electricity.⁵⁵ The rates for delivery services will be established in tariffs filed by the utilities and approved by the Commissioner, who is the head of the ICC.⁵⁶ Moreover, as an aid to consumers, but a regulatory hindrance to utilities, both delivery and generation fees will appear on one bill, which the utility must provide.⁵⁷

The law also requires that any utility that owns or controls transmission facilities must establish or join an Independent System Operator (“ISO”).⁵⁸ An ISO will “manage and control transmission facilities, ensure that buyers and sellers of power have equal access to

at least 4 megawatts, commercial customers with businesses at ten or more sites with an aggregate coincidental peak demand of 9.5 megawatts or greater, and non-residential customers accounting for one-third of the remaining electricity use of their customer class. *Id.*

⁵¹ *Id.*

⁵² *Id.* at 5/15-103.

⁵³ *Id.* A service is competitive if: (1) it is being offered by a provider other than the utility to a defined customer group or geographic area at a comparable price; (2) the utility is likely to lose or has lost business to the competitor; or (3) is adequate transmission system capacity to deliver electricity to customers. *Id.* at 5/15-113.

⁵⁴ *Id.* at 5/15-118.

⁵⁵ *Id.* at 5/15-111.

⁵⁶ *Id.*

⁵⁷ *Id.* at 5/15-118.

⁵⁸ *Id.* at 5/15-126.

the grid, direct transmission activities, and ensure that needed transmission maintenance and upgrades are implemented.”⁵⁹ The ISO will also “establish a competitive exchange auction for power in the event that a spot market or other real-time market-based exchanges do not develop for electricity.”⁶⁰

Lastly, the legislation provides Illinois utilities with the means to compete in the generation market, by permitting them to conduct billing and pricing experiments for groups of customers with common attributes.⁶¹ These experiments may include consolidated billing for customers under common ownership, real-time pricing, or other billing or pricing experiments.⁶²

C. Federal Antitrust Law: The Sherman Act

As with many changes in legislation, state energy deregulation bills are generating concerns about what legal avenues are available to protect consumers against corporate abuse. One source of protection against anticompetitive action is the Sherman Act of 1890 (“Sherman Act”).⁶³ Specifically, § 1 of the Act protects consumers from contracts or conspiracies that unreasonably restrain trade or commerce,⁶⁴ and § 2 protects against monopolization and attempted monopolization.⁶⁵ The Sherman Act is intended to promote

⁵⁹ Citizen’s Utility Board, *supra* note 6. See also 220 ILL. COMP. STAT. 5/15-126 (1997).

⁶⁰ Citizen’s Utility Board, *supra* note 6. See also 220 ILL. COMP. STAT. 5/15-126 (1997).

⁶¹ 220 ILL. COMP. STAT. 5/15-106, 107.

⁶² *Id.*

⁶³ 15 U.S.C. §§ 1-2 (1994).

⁶⁴ *Id.* § 1. Section 1 of the Sherman Act states in pertinent part:

Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

⁶⁵ *Id.* § 2. Section 2 of the Sherman Act states in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

and protect competition by imposing criminal sanctions for violations, including fines and imprisonment.⁶⁶ As with many antitrust violations, fines imposed under the Sherman Act are subject to treble damages, and thus, often pose a substantial monetary deterrent to anticompetitive behavior. As enacted, the Sherman Act was very broad in its language and reach.⁶⁷ However, subsequent statutory provisions, the jurisdiction of administrative agencies, and Supreme Court decisions have carved out exceptions to the Sherman Act.⁶⁸

D. The State Action Doctrine

The Supreme Court first established the state action doctrine in *Parker v. Brown*.⁶⁹ In an attempt to resolve a conflict between the federal antitrust laws and state economic regulation, the Court in *Parker* narrowly construed the Sherman Act⁷⁰ to exclude anticompetitive state actions from antitrust prosecution.⁷¹ California had enacted legislation that restricted the manner in which producers could market their crops “to restrict competition among growers and maintain prices in the distribution of their commodities,” a clearly anticompetitive purpose.⁷² The Court “relied on the principles of federalism and state sovereignty to hold that the Sherman Act was not intended to prohibit states from imposing restraints on competition.”⁷³ The Court reasoned that principals of federalism required considerable deference to states because they played an important role in economic regulation, and because states should have the authority to establish and implement their own individual economic policies.⁷⁴ The Court also looked to the language of the

⁶⁶ Candice Jones, David Lee & Adrian Shin, *Antitrust Violations*, 38 AM. CRIM. L. REV. 431, 432 (2001).

⁶⁷ 15 U.S.C. §§ 1-2.

⁶⁸ Schwartz, *supra* note 9, at 1455.

⁶⁹ 317 U.S. 341, 346 (1943).

⁷⁰ 15 U.S.C. § 1.

⁷¹ Melissa K. Stull, J.D., Annotation, *What Constitutes “State Action” Rendering Public Official’s Participation in Private Antitrust Activity Immune from Application of Federal Antitrust Laws*, 109 A.L.R. FED. 758 (1992).

⁷² *Parker*, 317 U.S. at 346; Schwartz, *supra* note 9, at 1457-58.

⁷³ *Trigen*, 244 F.3d at 1225.

⁷⁴ Schwartz, *supra* note 9, at 1457.

Sherman Act and noted that it referred to individual agreements and conspiracies, not the actions of state legislatures.⁷⁵ The state action doctrine has been extended by subsequent cases to provide immunization for three general categories of conduct: (1) action by a state itself;⁷⁶ (2) action by a subdivision of the state like a state agency or local government;⁷⁷ and (3) conduct of a private party acting at the behest of and with the supervision of a state or its instrumentality.⁷⁸

In *California Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, the Supreme Court set forth a two-prong test to determine whether the state action doctrine applied to an action by an instrumentality of the state.⁷⁹ The first prong required that the restraint on competition be "one clearly articulated and affirmatively expressed as state policy."⁸⁰ The second prong required that "the policy must be 'actively supervised' by the State itself."⁸¹

In *Southern Motor Carriers Rate Conference, Inc. v. United States*, the Court expanded the scope of the state action doctrine to include protection of private parties' conduct, provided that the parties' conduct satisfied the *Midcal* two-prong test.⁸² In *Southern Motor Carriers*, trucking companies were organizing rate bureaus to jointly set their prices before they submitted them to the states' public service commissions for approval.⁸³ The state governments involved allowed and monitored this action because they believed that it would

⁷⁵ *Parker*, 317 U.S. at 350-51; Schwartz, *supra* note 9, at 1457-58.

⁷⁶ Schwartz, *supra* note 9, at 1459; *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

⁷⁷ Schwartz, *supra* note 9, at 1459. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (recognizing that the state action doctrine applies to the actions of a state agency, but does not apply to the facts of the case). See also *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (holding that the state action doctrine applies to the actions of municipalities).

⁷⁸ Schwartz, *supra* note 9, at 1459. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976). See also *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 66 (1985).

⁷⁹ 445 U.S. 97, 105 (1980).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *S. Motor Carriers*, 471 U.S. at 50-51.

⁸³ *Id.*; Schwartz, *supra* note 9, at 1462.

lessen their regulatory burden.⁸⁴ The Supreme Court found that this rational satisfied the *Midcal* test.⁸⁵ This article will analyze a recent application of the state action doctrine to a private party, an electric utility company, and its possible ramifications for newly enacted state energy deregulation legislation.

III. The Trigen Case

In *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.*, the state action doctrine was applied to immunize an electric utility company from the Sherman Act for the first time.⁸⁶ Trigen-Oklahoma City Energy Corp. ("Trigen"), a private company that owned and operated heating-and-cooling plants in Oklahoma, sued Oklahoma Gas & Electric ("OG&E"), a regulated electric utility that served communities in Oklahoma and Arkansas.⁸⁷ Trigen produced steam and chilled water, which it pumped from a central station through its underground pipeline to its customers.⁸⁸ OG&E attempted to persuade Trigen's customers to purchase cooling equipment ("chillers") from a third party for installation in the customers' buildings.⁸⁹ Buildings that use electric chillers consume more electricity for cooling than buildings served by Trigen.⁹⁰

At trial, Trigen sought twenty years of lost profits from OG&E, alleging monopolization and attempted monopolization in violation of § 2 of the Sherman Act, unreasonable restraint of trade, and discrimination in violation of Oklahoma law.⁹¹ Trigen alleged three anticompetitive incidents.⁹² First, Trigen & OG&E competed for Oklahoma County buildings' heating contracts, and in 1989, the County signed a one-year renewable contract with Trigen.⁹³ Four years later, the County Board began investigating installing onsite

⁸⁴ *S. Motor Carriers*, 471 U.S. at 50-51; Schwartz, *supra* note 9, at 1462.

⁸⁵ *S. Motor Carriers*, 471 U.S. at 50-51.

⁸⁶ 244 F.3d at 1223.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1223-24.

⁹³ *Id.* at 1223.

chillers.⁹⁴ OG&E conducted a study for the county and concluded that they could save a significant amount of money by installing onsite chillers.⁹⁵ The county decided to buy the chillers, thus increasing their OG&E electricity consumption and terminating their contract with Trigen.⁹⁶

Second, Trigen and OG&E competed to win the contract to serve the Myriad Convention Center, a city building.⁹⁷ After OG&E offered to include the city in an experimental real-time pricing tariff that would save significant amounts of money, the city chose OG&E.⁹⁸

Third, Trigen and OG&E competed for Corporate Tower's business.⁹⁹ Previously, Trigen and Corporate Tower, a large private Oklahoma City building, had a ten-year contract with two five-year renewal options.¹⁰⁰ When the ten-year contract was near expiration, OG&E provided the Corporate Tower building manager with information about how to evaluate on-site cooling, offered to pay for a feasibility study, sponsored an informational breakfast and energy conference, and had its lawyers evaluate the contract with Trigen for termination options.¹⁰¹ Corporate Tower terminated its contract with Trigen after the first ten years and installed an onsite cooling system.¹⁰² A jury found for Trigen on all counts, except attempted monopolization. In January 2000, the trial court awarded treble damages, entering a judgment against OG&E for \$20,641,548.¹⁰³

On appeal to the Tenth Circuit Court of Appeals, OG&E argued that the state action doctrine immunized its conduct from federal antitrust scrutiny because the state had made the decision to regulate them.¹⁰⁴ The Tenth Circuit reversed the trial court and applied the *Midcal* test, finding that Oklahoma (1) had clearly

⁹⁴ *Trigen*, 244 F.3d at 1223.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1224.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1225.

articulated a policy to displace competition within the electric utility market; and (2) actively supervises any alleged anticompetitive conduct.¹⁰⁵ As a result, the court held that the case satisfied the *Midcal* test and the state action doctrine immunized OG&E's electricity-related business activity from federal antitrust scrutiny.¹⁰⁶

The court reasoned that in order to meet the "clearly articulated and affirmatively expressed" prong of the test, a private party need not "point to specific detailed legislative authorization" for the challenged conduct, but needs only to show that the state made clear its intent to replace competition with a regulatory program in a particular field.¹⁰⁷ The fact that the Oklahoma Constitution clearly manifested the state's intent to displace competition with regulation over electric utilities was sufficient to satisfy this prong.¹⁰⁸ The "actively supervised" prong was fulfilled because the Oklahoma Corporation Commission had the power to fix all of OG&E's rates for electricity and promulgate all rules and regulations that affected OG&E's services, operation, and management.¹⁰⁹ Because the "heart of Trigen's complaint was mainly that OG&E's rates were too low and that Trigen had to lower its rates or lose business," the action was not enough to warrant Sherman Act intervention.¹¹⁰ The Court also reiterated that there was no conspiracy or bribery exception to state action immunity.¹¹¹ The Supreme Court denied Trigen's writ of certiorari without comment,¹¹² leaving this case as the sole appellate court precedent expanding the state action doctrine to an electric utility company.

Public opinion about the decision abounds. OG&E and its supporters contend that the Tenth Circuit, in its opinion, and the Supreme Court, in denying certiorari, made the correct decisions, while Trigen and its supporters feel that the courts erred.¹¹³ The

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1226.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1229.

¹¹¹ *Id.* at 1227.

¹¹² *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 122 S. Ct. 459 (2001).

¹¹³ *Users, Others Seek High Court Review of Utility Antitrust Immunity*

Electricity Consumers Resource Council, the National Energy Marketers Association, and the Independent Petroleum Association of America submitted an amicus curiae brief to the Supreme Court in support of Trigen's position, arguing that "if anticompetitive actions are given antitrust immunity under the so-called 'state action doctrine' for state-regulated utilities, market participation would be chilled and consumers and businesses would not realize the benefits of competition."¹¹⁴ The brief also noted that "as the electricity industry is restructuring under mandates by the federal and state governments, incumbent utilities want to preserve their monopoly benefits, making vigilant enforcement of antitrust laws vital."¹¹⁵ Finally, the group argued that "OG&E's anti-competitive conduct is a direct response to competition from Trigen" and "[c]lothing such responses in antitrust immunity will thus frustrate federal and state efforts to restructure the electricity industry."¹¹⁶

The United States Combined Heat and Power Association, American Gas Cooling Center, the International District Energy Association, and Distributed Power Coalition of America also submitted an amicus curiae brief to the Supreme Court in favor of Trigen's position.¹¹⁷ That brief predicted that market evolution and public policy would "be frustrated if state action immunity is extended as it would [be] by the [Tenth] Circuit" decision.¹¹⁸ According to the energy services groups, the Tenth circuit "wholly failed to consider the adequacy of the state's supervision of OG&E's anticompetitive actions," and "[a]s a result, this case presents an issue of critical importance to the competitive strength of the national market for energy services."¹¹⁹ Other groups also filed amici curiae briefs on behalf of OG&E, supporting the Tenth Circuit and arguing that its decision was not an extension of the state action doctrine, but

Decision, ELECTRIC UTIL. WEEK, Oct. 8, 2001, Litigation at 10.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting Brief of Amici Curiae Electricity Consumers Resource Council et al., *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 122 S. Ct. 459 (2001)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting Brief of Amici Curiae United States Combined Heat and Power Association et al., *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 122 S. Ct. 459 (2001)).

¹¹⁹ *Id.*

merely followed well-established precedent.¹²⁰

IV. Analysis

This author posits that the Tenth Circuit correctly applied established precedent and did not extend the state action immunity doctrine in *Trigen*. Previous Supreme Court cases have already extended the doctrine to the actions of private parties, using the *Midcal* test.¹²¹ Under the sound reasoning of the Tenth Circuit, OG&E satisfied the *Midcal* test, thus immunizing it from federal antitrust prosecution.¹²² While the legal reasoning in this case is sound, its practical application to state deregulation attempts could be devastating. The policy arguments made in the amicus briefs supporting Trigen's position are persuasive and should be explored. Expanding the state action doctrine to immunize state utilities could greatly stifle state attempts to introduce competition into the electricity market.

Under *Trigen*, state utilities in the electric distribution market are immune from antitrust violation prosecution under the state action doctrine because state "deregulation" laws maintain monopoly power and state regulatory control over electricity distribution. Moreover, in states with gradual deregulation, state utilities are also immune from prosecution in the generation market until the market is declared competitive. This immunization window can give state utilities the opportunity to take anticompetitive actions to preserve their market share and prevent competitors from entering the generation market. This scenario may be illustrated using the Illinois deregulation law as an example.

In Illinois, electricity distribution will remain a state-regulated monopoly. Thus, Illinois utilities' actions in relation to that market will be immune from federal antitrust violations under *Trigen*.¹²³ The electric generation market will not be declared competitive until at least 2007.¹²⁴ Until the market is declared competitive, utility companies will be generating electricity and selling it at state-regulated prices, thus exempting them from antitrust violations in the

¹²⁰ *Id.*

¹²¹ *S. Motor Carriers*, 471 U.S. at 50-51.

¹²² *Trigen*, 244 F.3d at 1226.

¹²³ 220 ILL. COMP. STAT. 5/15-110 (1997).

¹²⁴ *Id.* at 5/16-103.

generation market, as well.¹²⁵ Additionally, Illinois deregulation laws provide Illinois utilities with the ability to conduct billing and pricing “experiments” for groups of consumers with common attributes.¹²⁶ Permissible experiments may include consolidated billing for customers under common ownership, real-time pricing, or other billing experiments.¹²⁷ Since Illinois utilities have a monopoly on the electricity distribution markets, they could use that advantage to create incentives, through real-time pricing or other billing experiments, in order to entice companies to use them for electricity generation as well. These are some of the very same tactics OG&E used to obtain Trigen contracts and virtually drive Trigen out of the Oklahoma market.¹²⁸ It is very possible that Illinois utilities could engage in such “approved” anticompetitive practices to maintain their electric generation market share and drive out competitors.

V. Impact

Illinois utility companies have begun to lose market share in the generation market and are poised to regain the ground they have lost.¹²⁹ Their competition in that market is growing quickly.¹³⁰ While deregulation in the Illinois electricity generation market has been slow to catch on,¹³¹ the 2001 economic downturn has prompted companies to closely analyze their energy bills.¹³² There are currently eighteen companies approved to sell electricity in Illinois.¹³³ Since October 1, 1999, more than 15,300 Illinois companies have left Commonwealth Edison Co. (“ComEd”), the primary supplier of electricity, either completely or partially.¹³⁴ That amounts to 2.9 percent of all businesses in Illinois, the vast majority of which are

¹²⁵ 220 ILL. COMP. STAT. 5/15-103.

¹²⁶ *Id.* at 5/15-106, 107.

¹²⁷ *Id.*

¹²⁸ *See generally Trigen*, 244 F.3d at 1220.

¹²⁹ Williamson, *supra* note 5, Financial at 59.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

large power-users.¹³⁵ This increase in competition is a good sign for consumers, as competition in markets usually leads to lower retail prices.

Local utilities will not sit idly by while their customers leave. One fear is that they will use their monopoly power on the distribution market to drive out competition. The price for distribution will be established by state-regulated tariffs, which had not yet been decided at the time of printing. ComEd has asked for permission to increase what it charges businesses for distribution by an average of 26 percent.¹³⁶ This should be worrisome for consumers because if distribution prices are too high, electricity from a non-ComEd supplier would be too expensive to sell in Illinois because out-of-state suppliers rely on ComEd's distribution channels, and would be "priced out" of the Illinois market.¹³⁷

Competition in the generation market poses the best chance for consumers to see a decrease in energy prices. If the utilities are allowed to drive out competitors under this exception before competition in the generation market is fully integrated, it may never become integrated. Without competitive generation markets, states will revert back to government-regulated monopolies with fixed prices that may be artificially high. State utilities do not want to see a decrease and may take anticompetitive steps to prevent this, the worst of all worlds.

Even with immunity from federal antitrust prosecution, utilities are open to state antitrust and tort suits. However, many states place the jurisdiction for these claims with state agencies such as the Illinois Commerce Commission and the Oklahoma Commerce Commission. Suits before such agencies do not carry the same deterrent effect as a highly publicized federal lawsuit. Additionally, the punishments in federal court are often more substantial than those imposed by a state agency.

VI. Conclusion

It is too soon to tell whether the speculation about the effects of the *Trigen* decision will turn the lights out on state energy deregulation attempts, or whether the light will continue to shine brightly. If the actions of OG&E are any indication, state utility

¹³⁵ *Id.*

¹³⁶ Williamson, *supra* note 2, Financial at 43.

¹³⁷ *Id.*

markets will not open to competition. State utilities will use every weapon in their arsenals to protect their market share, limiting competition, thus artificially inflating electricity prices and harming consumers. Under *Trigen*, the utilities may be taking these anticompetitive actions under a cloak of immunity provided by the state action immunity doctrine. This, in the end, will be detrimental to consumers, who would have little redress.