IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

VILLAGE OF OLD MILL CREEK, ET AL.,
Plaintiffs-Appellants,
No. 17-2433
v.
ANTHONY M. STAR,
Defendant-Appellee.
and
EXELON GENERATION COMPANY, LLC,
Intervening Defendant-Appellee.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,
Plaintiffs-Appellants,
No. 17-2445
v.
ANTHONY M. STAR, ET AL.
Defendants-Appellees.
and
EXELON GENERATION COMPANY, LLC,
Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
SUPPORTING PLAINTIFFS-APPELLANTS IN PART AND SEEKING REVERSAL

MOTION TO FILE SUPPLEMENTAL MEMORANDUM ON BEHALF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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In response to this Court's January 3, 2018 order (and its January 11, 2018 order extending its due date to January 26, 2018) requiring supplemental memoranda from the parties, amicus curiae the National Association of State Consumer Advocates ("NASUCA") respectfully moves for permission to address the third of the three issues which the Court has required the parties to address:

> 3. Whether the principle of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as applied to everybody other than a participant in the wholesale market, prevents their suits?

As the statutory representatives of retail customers, and as long-recognized participants in proceedings before FERC and the federal courts, NASUCA's members have a particular responsibility pursuant to state statute and on behalf of the public as to these issues. NASUCA has contacted counsel for each of the parties with respect to this motion, who have responded as follows. Counsel for plaintiffs/appellants have advised that they consent to the filing of the requested supplemental memorandum, counsel for defendants/appellees has advised that they will not object to it, and counsel for intervenor/appellee has advised that it takes no position on it.

Respectfully submitted,

By: */s/ Robert Gordon Mork*
Robert Gordon Mork
Counsel of Record for Amicus Curiae
National Association of State Utility
Consumer Advocates

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 26, 2018, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

By: */s/ Robert Gordon Mork*
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ARGUMENT

In its January 3, 2018 Order, the Court directed the parties to file supplemental memoranda addressing three specific topics. Amicus the National Association of State Consumer Advocates ("NASUCA") seeks to address only the third topic:

> Whether the principle of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as applied to everybody other than a participant in the wholesale market, prevents their suits?

The simple answer is, the *Illinois Brick* decision does not apply to suits filed pursuant to the Federal Power Act ("FPA"). The Court's decision in *Illinois Brick* was specific to the Court's interpretation of §4 of the Clayton Act, 15 U.S.C. § 15. Moreover, the harm that the Court sought to prevent—treble damages and unwieldy litigation—is not applicable to actions under the FPA. Therefore, *Illinois Brick* does not preclude distribution customers from raising claims against participants in the wholesale market under the FPA.

As stated in its amicus brief, NASUCA is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts.[1] While the precise statutory authority granted to each NASUCA member in its

[1] NASUCA also has associate and affiliate members who serve utility consumers but are not created by state law or do not have statewide authority.

particular state may vary, all NASUCA member offices are charged with representing the interests of their respective states' retail customers. Because of this statutory authority, NASUCA has an interest in ensuring that its members have standing under the FPA to challenge actions impacting FERC regulated wholesale markets.

In *Illinois Brick*, the Court identified the question before it as "whether the overcharged direct purchaser should be deemed *for purposes of §4* [of the Clayton Act] to have suffered the full injury from the overcharge." *Illinois Brick*, *supra*, 431 U.S. at 726 (emphasis added). The *Illinois Brick* Court was called upon to determine whether the general rule established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)[2] precluded indirect purchasers of concrete from bringing an action against manufacturers and distributers of concrete block under §4 of the Clayton Act. Significantly, the plaintiffs did not purchase concrete directly from the defendants, but rather from third parties who then sold the concrete block at retail to plaintiffs. *See Illinois Brick*, *supra*, 431 U.S. at 726-28. Thus for the *Illinois Brick* plaintiffs to have standing to bring an action under the Clayton Act, the Court needed to first find an exception to the *Hanover Shoe* rule. *Id.* at 736. The Court's ruling was clearly limited to §4 of the Clayton Act, finding that its prior cases "support our reaffirmance of the *Hanover Shoe* construction of §4." *Id.*

[2] In *Hanover Shoe*, the Court ruled that "a direct purchaser suing for treble damages under the Clayton Act is injured within the meaning of §4 by the full amount of the overcharge paid by it and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge." *Illinois Brick* at 724-25, *citing Hanover Shoe*, 392 U.S. at 494.

The Court's decision in *Illinois Brick* explicitly interprets §4 of the Clayton Act, and its analysis is limited to that specific Act. The decision is a classic example of legislative interpretation of a specific statute. The Court's reasoning in that matter is inapplicable to the FPA. Indeed, no case interpreting the FPA relies upon *Illinois Brick*.

Moreover, the primary concern in *Illinois Brick* was to avoid adding to the complexity of treble damage suits or undermining the effectiveness of claims under the Clayton Act. *Id.* at 737. Under the Clayton Act, a private citizen can file an antitrust suit, seeking treble damages. The Court feared that allowing indirect purchasers to pursue an antitrust claim would result in litigation involving many large classes of consumers remote from the defendant. Apportioning the damages among relevant wholesalers, retailers, middlemen, and consumers would be challenging. *Id.* at 740-41. That issue does not arise under the FPA, where a party does not seek damages. Rather, the FPA provides the district court with jurisdiction over "suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, [the FPA.]" 16 U.S.C. § 825p. The FPA does not provide for damages. Indeed, the suit in the present matter seeks to enjoin a subsidy, asserting that it is violation of the FPA because it interferes with FERC regulated energy markets. Such a declaration will not implicate any of the concerns raised by the Court in *Illinois Brick*.

Likewise, the Court in *Illinois Brick* was concerned with "vigorous private enforcement of the antitrust laws." *Id.* at 745. The Court feared a "reduction in the

effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge." *Id.* Specifically, the Court held, "until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust law under §4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Id.* at 746 (citations omitted).

Again, this issue is specific to the Clayton Act and does not exist under the FPA. The FPA does not create "private attorneys general" seeking to enforce the laws in return for a bounty. Rather, the FPA requires that a utility's rates be just and reasonable and not interfere with federal wholesale energy markets producing just and reasonable rates. The Court can find that the subsidy does interfere with the federal wholesale market and enjoin further payment of the subsidy. No damages will be awarded by this action.

Importantly, the FPA has a much more expansive scope as to who may bring an action. Specifically, 16 U.S.C. § 825e provides that "any person, electric utility, State, municipality or State Commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act" may apply to the Commission for relief. "Person" is defined in 16 U.S.C. § 796(4) as "an individual or a corporation." Similarly, 16 U.S.C. § 825l provides that "[a]ny person, electric utility, State, municipality, or State commission aggrieved by an

order issued by the Commission in a proceeding under this Act" may seek rehearing and ultimately judicial review of that order. *See also*, 18 CFR 385.206(a)("Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction."); 18 CFR 385.102(d) (broadly defining "person"); *IMO American Elec. Power Serv. Corp.*, Docket No ER07-1069-006, 153 FERC ¶61,167, 2015 FERC LEXIS 2158 (2015)(finding that retail customers have the right to file complaints pursuant to the FPA even though the FPA limits the jurisdiction of the Commission to matters involving wholesale rates). Thus, the FPA, unlike the Clayton Act, is specifically drafted to permit any person to challenge a wholesale rate in a FERC jurisdictional market.

The Court's decision in *Illinois Brick* is inapplicable to the FPA. The decision was specific to the Clayton Act, and it addressed concerns that are not present in an action under the FPA. The Clayton Act provides a mechanism for private citizens to enforce antitrust laws, and to be awarded treble damages for any violations. The FPA seeks to ensure just and reasonable rates for utility service and does not provide for damages or treble damages for successful enforcement. Finally, while the *Illinois Brick* Court interpreted the language of the Clayton Act to preclude actions by indirect consumers, the FPA explicitly permits "any person" to bring an action, and FERC, the administrative agency tasked with implementing the FPA, has agreed that retail customers may bring an action under the FPA. Therefore, the principle of

Illinois Brick does not preclude the suits by parties other than a participant in the wholesale market under the FPA.

Respectfully submitted,

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