No. 17-2433 and No. 17-2445 Consolidated

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

SUPPLEMENTAL MEMORANDUM FOR PLAINTIFFS-APPELLANTS VILLAGE OF OLD MILL CREEK, ET AL.

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INTRODUCTION

On January 3, 2018, this Court directed the Plaintiffs-Appellants to submit a Supplemental Memorandum on three issues: *Illinois Brick*, *Ex Parte Young,* and primary jurisdiction. The Consumer Plaintiffs' argument on the three issues is set forth below.

ARGUMENT

I. Consumer Plaintiffs' Suit Is Not Barred By Application Of The Principle Of *Illinois Brick*.

This Court has asked 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 Consumer Plaintiffs' suit. The short answer is that Consumer Plaintiffs can bring their lawsuit even though they are an indirect purchaser of Zero Emission Credits ("ZECs") because direct ZEC purchaser Commonwealth Edison Company ("ComEd") is an affiliate of ZEC seller Exelon Generation Company, LLC ("Exelon Generation").

As extensively discussed in Consumer Plaintiffs' Brief and Reply Brief, Consumer Plaintiffs have suffered an Article III injury in fact and have prudential standing for their preemption claims because they are squarely within the zone of interest of the Federal Power Act. Consumer Plaintiffs' Br. at 12-15 and Reply Br. at 4-7. In fact, Consumer Plaintiffs and other Illinois consumers have been prepaying ZEC charges monthly to ComEd since May 2017. This is so even though ComEd has yet to actually purchase any ZECs from ZEC seller (and its corporate affiliate) Exelon

Generation. A.177-193; Illinois Power Agency ZEC Procurement Schedule (October 27, 2017).

In *Illinois Brick*, the Supreme Court held that only the direct purchaser of bricks, and not indirect purchasers, could bring an antitrust claim for treble damages under Section 4 of the Clayton Act. 431 U.S. at 746. There is indeed a similarity in the posture of the indirect purchasers in *Illinois Brick* and the indirect purchasers in this case, in that neither purchased directly from the original seller of the commodity (whether they be bricks or ZECs).

That, however, is where the similarity ends.

The key fact with respect to the *Illinois Brick* question in the instant case is that the electric utility ComEd and Defendant Exelon Generation are both wholly-owned subsidiaries of Exelon Corp. A. 130. This means that when Consumer Plaintiffs pay ZEC charges to ComEd they are paying charges passed through by a direct purchaser (i.e., ComEd) of ZECs which is purchasing ZECs from its affiliated company (i.e., Exelon Generation).[1]

Simply put, an indirect purchaser is allowed to sue if the direct purchaser is controlled by the seller. *In re Sugar Industry Antitrust Litigation,* 579 F.2d 13, 18-19 (9th Cir. 1978); *see also*, *In re Brand Name Prescription Drugs Litigation,* 123 F.3d 599, 605 (7th Cir. 1997). Moreover, if the seller and direct purchaser are affiliated companies this equates to control. *In re Sugar Antitrust Litigation*, 579 F.2d at 18-19.

[1] All Consumer Plaintiffs are delivery service customers of the electric utility ComEd except Richard Owens, who is a delivery service customer of the electric utility Ameren Illinois Company. A. 133-134.

In allowing an indirect purchaser to sue because the direct purchaser was a sister subsidiary of the seller, the Third Circuit specifically recognized in *In re Sugar Antitrust Litigation* that the Supreme Court anticipated this situation:

> The Supreme Court anticipated this situation in *Illinois Brick's* now famous footnote 16 commenting on exceptions of nonuse of offensive passing on: 'Another situation in which market forces have been surpassed and a pass-on defense might be permitted is where the direct purchaser is owned or controlled, by its customer.' *Illinois Brick*, supra, 431 U.S. at 736, 97 S. Ct. at 2070. *Mirroring that exception to offensive passing on reflects the situation here where the direct seller is owned or controlled by the alleged price-fixer.*

Emphasis Added, 579 F.2d at 18-19.

Kansas v. UtiliCorp United, 497 U.S. 199 (1990) is not to the contrary. In *UtiliCorp.*, when the Supreme Court held that retail consumers as indirect purchasers of natural gas could not bring their claim, the direct purchaser utility not only was <u>not</u> an affiliate of the seller but also had already sued the seller. Moreover, the Supreme Court pointed out in *UtiliCorp* that there was no certainty that the direct purchaser had borne no portion of the overcharge and otherwise was not injured. 497 U.S. at 218. That simply is not the situation here because the utility ComEd automatically puts all ZEC charges on consumers' bills and in fact has been doing so even before the ZECs have actually been purchased by the utility. Dist. Ct. Op., at 14; A. 177 – A. 193; Illinois Power Agency ZEC Procurement Schedule (October 27, 2017).

As this Court stated in *In re Brand Name Prescription Drugs Antitrust Litigation*, "*Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself – 'where the direct purchaser is owned or controlled by its customer,' 431 U.S. at 736 n. 16, 97 S. Ct. at 2070 or, we suppose,

vice versa." 123 F.3d at 605. Here, Consumer Plaintiffs fall directly within the footnote 16 exception of *Illinois Brick*, and their claims are not barred by its "indirect purchasers principle."

The primary concerns of the Supreme Court in *Illinois Brick* and the preceding case of *Hanover Shoe*, *Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), were to avoid weighing down antitrust treble damages actions with the massive evidence and complicated theories involved in tracing the effect of an overcharge through each step in the distribution chain and the risk that if both direct purchasers and indirect purchasers were allowed to bring claims there would be a potential double recovery. *Illinois Brick,* 431 U.S. at 731-747; *Hanover Shoe* 391 U.S. at 493. These concerns do not apply here where all ZEC charges are automatically charged to the ultimate consumers and there is no realistic risk that ComEd will bring a suit against its own sister company.

Moreover, even though both Consumer Plaintiffs and the plaintiffs led by the Electric Power Supply Association ("EPSA Plaintiffs") have filed the same basic claims in this case, there is still absolutely no chance for a double recovery because the plaintiffs' requested relief is injunctive rather than damages. As the Supreme Court stated in *Cargill, Inc. v. Monfort of Colorado, Inc.,* 497 U.S. 104 (1986), multiple claims for injunctive relief raise no threat of duplicative recoveries. 497 U.S. at 111, fn.6.

Significantly, the D.C. Circuit Court of Appeals pointed out in *Frontier Pipeline v. FERC*, 452 F.3d 774 (2006), that an exception to the *Illinois Brick* principle "depends on how precisely one can discern the motivations of economic actors." 452

F.3d at 792. In the instant case, there is simply no doubt about the motivations of the direct and indirect purchasers of ZECs.

In this case, far from having the same interest as Consumer Plaintiffs, the interest of the direct ZEC purchaser ComEd is to defeat the lawsuit. Consumer Plaintiffs therefore must be allowed to bring the lawsuit. Otherwise, the indirect purchaser doctrine would simply be used to insulate the improper conduct altogether.

In order to avoid such a result in *Fontana Aviation, Inc. v. Cessna Aircraft Co.,* 617 F.2d 478 (7th Cir. 1980), this Court held that the *Illinois Brick* rule does not bar an indirect purchaser suit in circumstances where manufacturers and direct purchasers are alleged to be conspirators in a common illegal enterprise resulting in the intended injury. 617 F.2d at 481; See also, *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980). Likewise, in *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), the Supreme Court allowed an antitrust suit by subscribers of health care plans even though they were employer purchased health care plans because the subscribers were the ones out of pocket. 457 U.S. at 475; see also, *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic,* 65 F.3d 1406, 1414-1415 (7th Cir. 1995).

Finally, in this Court's case of *Phoenix Bond & Indemnity v. Bridge*, 477 F.3d 928 (7th Cir. 2007), Defendants maintained that losing bidders could not bring a lawsuit against them for an alleged fraud on grounds Cook County was the direct victim of the fraud. In that case, this Court held that the losing bidders could sue because Cook County did not lose even a penny. 477 F.3d at 931. In the instant case, the direct ZEC purchaser ComEd not only did not lose money but its affiliate Exelon

Generation is the one benefitting financially – to the tune of $2.35 billion (with a "B") – from the ZEC program.

In short, Consumer Plaintiffs and other Illinois utility consumers are the only entities in the ZEC supply chain with an interest in a lawsuit regarding the ZEC program prevailing against the Defendants. Therefore, this Court should conclude that *Illinois Brick* and its progeny do not bar Consumer Plaintiffs' preemption and dormant Commerce Clause claims on grounds the claims fall under the "direct purchaser is controlled by the seller" exception to the *Illinois Brick* principle.

II. *EX PARTE YOUNG* IS AVAILABLE AS THE BASIS FOR EQUITABLE RELIEF IN THIS CASE

Consumer Plaintiffs adopt and incorporate EPSA Plaintiffs' argument on equitable relief under *Ex parte Young*, 209 U.S. 123 (1908), but also submit this supplemental argument in order to apply the principles asserted there specifically to Consumer Plaintiffs.

As EPSA Plaintiffs properly point out, equitable relief under *Ex Parte Young,* 209 U.S. 123 (1908), is available if (1) the complaint alleges an ongoing violation of federal law; and (2) plaintiffs seek relief properly characterized as prospective. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *accord, Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997).

The second element is undisputed because Consumer Plaintiffs unquestionably seek prospective injunctive relief.

Consumer Plaintiffs also meet the first element because they allege ongoing violations of the Federal Power Act. The District Court correctly ruled that Consumer Plaintiffs have Article III standing for their Federal Power Act preemption claims (Op. at 14) and neither of the Defendants have challenged that conclusion. As EPSA Plaintiffs correctly point out on page 13 of their supplemental memorandum, once a plaintiff has established Article III standing, "there is no warrant in [the Supreme Court's] cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." *Virginia Office of Protection & Advocacy v. Stewart*, 563 U.S. 247, 256 (2011).

By meeting these two "straightforward" elements, Consumer Plaintiffs establish that their claims fall within this Court's *Ex Parte Young* jurisdiction.

Consumer Plaintiffs also urge this Court to not accept Defendants' invitation to conflate the scope of this Court's equity jurisdiction with arguments that Consumer Plaintiffs do not have prudential standing for their preemption claims on grounds they do not fall within the Federal Power Act's zone of interests. As both Judge Easterbrook and Judge Sykes made clear during oral argument, the expressed concern is the scope of the court's equity jurisdiction, not the plaintiffs' standing. Oral Arg. at 5:19 ("I am not questioning standing; I am questioning the scope of the *Ex Parte Young* claim") (Sykes, J.); Oral Arg. at 21:00, 21:17 ("Forget about concepts like 'prudential standing' . . . please don't talk about standing . . . ") (Easterbrook, J.).

Finally, the Court should also consider that Consumer Plaintiffs are not "bystanders" because they are directly affected by the monthly ZEC charges on their

electricity bills. As Consumer Plaintiffs pointed out in their Reply Brief, under *Ex Parte Young* federal courts have frequently upheld Federal Power Act preemption causes of action brought by "non-bystanders." Consumer Plaintiffs' Reply Brief at 7-9; See, e.g., *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993); *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898 (4th Cir. 1987). Therefore, the argument of Defendants that there is no equitable cause of action for bystanders under *Ex Parte Young* does not apply in any respect to the preemption claims of Consumer Plaintiffs.

III. This Court Should Not Defer To The Federal Energy Regulatory Commission On Grounds Of Primary Jurisdiction

Consumer Plaintiffs adopt the argument of the EPSA Plaintiffs on the primary jurisdiction issue.

CONCLUSION

Consumer Plaintiffs respectfully request this Court to reverse the District Court's dismissal of their causes of action in Counts I, II, and III and to remand this case with instructions to the district court to give full and proper consideration to Consumer Plaintiffs' motion for a preliminary injunction and request for a permanent injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This supplemental memorandum is in 12 pt. Century font and therefore complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this brief contains 2,744 words.

Dated: January 26, 2018

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CERTIFICATE OF SERVICE

I certify that on January 26, 2018, I caused a copy of the foregoing supplemental memorandum to be served upon all counsel of record by filing it electronically via the Court's CM/ECF system.

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