Opinion issued December 30, 2014

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-00470-CV

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY TEXAS, INC., Appellants

V.

DAVID JENKINS, GEORGE W. STRONG, FRANCIS N. GANS, AND GARY M. GANS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Appellees

---

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Case No. CV20666

DISSENTING OPINION

At what juncture in our Texas jurisprudence did a state tort action for theft and manipulating information, including proprietary software designed to

determine purchasing decisions of electric power,[1] get preempted by a byzantine pervasive Federal regulatory scheme for utility rates?[2] When did the judicial doctrine of federal preemption become the means whereby claims of theft from citizens are exempt from judicial proceedings for no reason other than the industry in which the accused does business is subject to federal regulations?

The majority opinion pegs that date at November 6, 2014. *See Entergy Corp. v. Jenkins*, ---S.W.3d---, 2014 WL 5780638, at *1 (Tex. App.—Houston [1st Dist.] Nov. 6, 2014, no pet. h.) (*Jenkins II*).

More to the point: To how many courts must the same jurisdictional arguments be trotted out and found inadequate before the litigants are accorded a trial on the merits? Prior to our consideration, this case had been reviewed by the trial court in Chambers County, a federal district court for the Southern District of Texas,[3] the Edinburg-Corpus Christi Court of Appeals (*Jenkins I*),[4] the Texas Supreme Court[5] and the United States Supreme Court.[6] Excepting the initial

---

1 During oral argument Entergy conceded that the real-time decisions to purchase power are determined by its proprietary computer software.

2 Appellees' counsel was unequivocally clear that appellees make no claims respecting rates.

3 *Jenkins v. Entergy Corp.*, C.A. No. G-03-746 (S.D. Tex. 2004).

4 *Jenkins v. Entergy Corp.*, 187 S.W.3d 785 (Tex. App.—Corpus Christi 2006, pet. denied), cert. denied 552 U.S. 1224, 128 S. Ct. 1225 (2008) (*Jenkins I*).

5 *Id.*

6 *Id.*

dismissal from the Chambers County court, and the majority opinion of this Court, all were of one mind with respect to the "state-tort-meets-pervasive-utility-regulatory-scheme" jurisdictional issue.

Law of the case

The law of the case doctrine is the legal principle that questions of law decided and resolved on appeal will govern throughout the subsequent stages of the case, including retrials and further appeals. *See Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 595–96 (Tex. 2006). The doctrine only applies to questions of law[7] expressly considered and decided in a prior appeal of the same case. *See id.* at 596; *see also Gantt v. Gantt*, 208 S.W.3d 27, 30 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Furthermore, the doctrine may not be waived by the parties as it was established to protect the appellate court's prior judgment, and it is the appellate court that determines whether the legal principle applies on successive appeals. *See Jones & Gonzalez, P.C. v. Trinh*, 340 S.W.3d 830, 836 (Tex. App.—San Antonio 2011, no pet.).

The doctrine is rooted in public policy and aimed at putting an end to litigation. *See Briscoe v. Goodmark Corp*., 102 S.W. 3d 714, 716–17 (Tex. 2003). By narrowing the issues in subsequent stages of litigation, the doctrine is aimed at

[7] Subject matter jurisdiction is a question of law. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013). As such, the law of the case doctrine applies. *See City of San Antonio v. San Antonio Indep. Sch. Dist.*, 683 S.W.2d 67, 69 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

achieving uniformity and consistency as well as judicial economy and efficiency. *Id.*; *In re Henry*, 388 S.W.3d 719, 727 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). The law of the case assures lower courts that they can rely on the appellate court's disposition of an issue in presiding over the suit and gives an incentive for trial courts to closely follow these decisions. *Duncan v. State*, 151 S.W.3d 564, 566 (Tex. App.—Fort Worth 2004, pet. ref'd) (quoting *Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999)).

An exception to the law of the case doctrine is taken when the original decision was *clearly erroneous. Brown & Brown of Tex. Inc. v Omni Metals, Inc.*, 317 S.W. 3d 361, 373–74 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Briscoe*, 102 S.W.3d 716)). The operative language for deviation being "*clearly erroneous.*"

Where, as here, an intermediate appellate court renders a decision on an interlocutory appeal and both the Texas Supreme Court and the United States Supreme Court decline an opportunity to review it, the decision, for purposes of the law of the case doctrine, is not clearly erroneous. *Caplinger v. Allstate Ins. Co.*, 140 S.W. 3d 927, 930 (Tex. App.—Dallas 2004, pet. denied); *see also Hurd Enterprises, Ltd. v. Bruni*, 828 S.W. 2d 101, 106 (Tex. App.—San Antonio, 1992, writ denied).

In support of the panel majority's position that law of the case doctrine is merely optional and its application discretionary with the subsequent reviewing court, the panel's opinion cites *Briscoe*, *see Jenkins II*, ---S.W.3d---, 2014 WL 5780638, at *3, despite then-Chief Justice Jefferson's concurrence emphasizing that the underlying case was a page from the "bad facts make bad law" book: "We should state the obvious—we are making an exception in this one case because, as everyone acknowledges, Briscoe and Goodmark led the court of appeals into error during the first appeal. It is a holding unsound in principle, but acceptable in equity." *Briscoe*, 102 S.W. 3d at 719 (Jefferson, J., concurring). In other words, the case was one which handily met the "clearly erroneous" measure.

A court should not examine the question of jurisdiction anew after another court has already decided the question of jurisdiction *as a contested issue*. *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 137–38 (1938); *see Durfee v. Duke*, 375 U.S. 106, 113–14, 84 S. Ct. 242, 245–46 (1963). Correspondingly, "[t]he law of the case doctrine is defined as that principle under which questions of law *decided* on appeal . . . will govern the case throughout its subsequent stages." *Ianni*, 210 S.W.3d at 596. It therefore applies only to questions of law expressly considered and decided in a prior appeal. *See United States v. Hatter*, 532 U.S. 557, 565–66, 121 S. Ct. 1782, 1789–90 (2001); *City of San Antonio v. San Antonio Indep. Sch. Dist.*, 683 S.W.2d 67, 69 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). Thus,

in deciding its jurisdiction, a court is not bound by a prior exercise of jurisdiction where it was not questioned, but was passed *sub silentio*. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38, 73 S. Ct. 67, 69 (1952); *see also Gantt*, 208 S.W.3d at 30 n.4.

The majority opinion's cite to *It's the Berry's, LLC v. Edom Corner, LLC*, 271 S.W.3d 765, 771–72 (Tex. App.—Amarillo 2008, no pet.) is also confusing. The panel opinion cites to *It's the Berry's* for the proposition that "the law of the case doctrine does not either confer or limit subject matter jurisdiction and is not a limitation on the power of the courts to act." However, that is not the purpose of the doctrine. *It's the Berry's* was an action for forcible detainer in justice court that was transferred to district court and there tried as though that court possessed original subject matter jurisdiction. *Id.* at 766.

Federal Preemption

The federal preemption issue was determined specifically by the Edinburg-Corpus Christi Court of Appeals, thoughtfully addressed by the United States District Court, and implicitly determined by the Texas Supreme Court and the United States Supreme Court. Nonetheless, flouting the well-established judicial doctrine of law of the case, the majority opinion of this court eschews the careful analysis of the Edinburg–Corpus Christi Court, which adopted the very the three-part test used by FERC itself to determine its jurisdiction over certain tariff

disputes, and decided *Jenkins I* need not be heeded because the majority disagrees with its sister court's holding on federal preemption.

"[P]reemption issues are [often] complex and highly nuanced, involving both federalism and separation of powers—congressional prerogatives, agency competence, and judicial deference—as well as efficiency, equity, victim compensation, and cost-shifting objectives."[8] Legislative intent is the "touchstone" of federal preemption and exclusive jurisdiction analysis.[9] The majority notes that "an agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that Congress intended for the regulatory process to be the exclusive means of remedying *the problem to which the regulation is addressed*." *Jenkins II*, ---S.W.3d---, 2014 WL 5780638, at *4 (emphasis added)(internal quotations omitted). Here, however, the state law claims under the Texas Theft Liability Act for conspiracy and theft are not matters to which the pervasive regulatory scheme governing energy utilities were addressed.

Both in pleadings and during oral argument, appellees have been clear that this case is not about rates but, rather Entergy's power purchasing decisions. As the trial court found, "Entergy may have applied the rate formulas correctly to the

---

8 Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1661 (2009).

9 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 224 (1963)).

costs it incurred, but Entergy's proper application of the rates does not somehow make the purchases Entergy made prior to charging those rates proper purchases."

November 6, 2014 would also be the date on which the majority opinion, in its glancing mention in this appeal of the class certification, voids the trial court's certification for its lack of jurisdiction, citing the plaintiffs' failure to have exhausted their "administrative remedies." Given that FERC is the federal administrative agency tasked with regulating the electric power grid of the nation, a fair question is: What administrative remedies? This case, as the Edinburg-Corpus Christi Court of Appeals determined, "is inherently judicial in nature, in which Jenkins brings state law tort claims based on those interstate purchasing and allocation decisions." *Jenkins I*, 187 S.W3d at 801. As such, the courtroom venue of the judicial branch, not an administrative hearing tribunal of the executive, is the more appropriate adjudicative venue for state tort claims based on theft, conspiracy, software manipulation and accounting sleights of hand.

Was it Congress' intent when enacting the Federal Power Act ("FPA") under the Constitution's Commerce Clause to vest in the Federal Energy Regulatory Commission exclusive jurisdiction to hear and try intentional tort cases like theft?

The federal court to which the case was removed thought not:

> None of the Texas common law or statutory causes of action cited by Plaintiffs in their Petition require the violation of a federal tariff. Conduct that violates the tariff may also violate the TTLA [Texas Theft Liability Act] or other common law duties, but a violation of the

> tariff is not an essential element to any of Plaintiffs' claims. Plaintiffs can conceivably prove their state law claims by providing evidence that the Defendants used fraudulent accounting techniques to overcharge customers. This type of case would not require Plaintiffs to reference the tariff during the presentation of their case. This is not to say the tariff would never be mentioned in a trial of this controversy . . . but, the fact remains that the federal tariff at issue is not an essential element to any Plaintiffs' claim.

Jenkins I, 187 S.W3d at 807 (quoting district court's order remanding case).

The United States Supreme Court teaches that legislative intent is the "touchstone" of federal preemption analysis. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 224 (1963)); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992). In all preemption cases, in particular those that involve a legal field which the states have traditionally occupied, "we start with the assumption that the historic police powers of the States were not to be superseded by the [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947); *see also Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–15, 105 S. Ct. 2371, 2376 (1985). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Medtronic*, 518 U.S. at 485–86, 116 S. Ct. at 2250–51 (quoting *Cipollone*, 505 U.S. at 530, n.27, 112 S. Ct. at 2624, n.27).

Congress' intent behind the enactment of a federal law may be expressly stated in the statute or impliedly contained in its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977). Absent express language as to congressional intent in the federal statute, state law will be preempted *only if* that law conflicts with federal law, or if the federal law occupies the legislative field "as to make reasonable the inference that Congress left no room for the State to supplement it." *Fid. Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982) (quoting *Rice*, 331 U.S. at 230, 67 S. Ct. at 1152)).

The Federal Power Act and FERC

Federal regulation of electric transmission developed from the need to regulate electric utilities in interstate commercial transactions. *See generally New York v. FERC*, 535 U.S. 1, 5–6, 122 S. Ct. 1012, 1016–17 (2002). As a result, Congress in 1935 enacted the FPA under its commerce clause powers afforded to it in the United States Constitution. *See* 16 U.S.C. § 824; *see also New York v. FERC*, 535 U.S. at 5–6, 122 S. Ct. at 1016–17. In expressly stating its purpose, Congress wrote in the FPA:

> It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation. . . and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the

> public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*

16 U.S.C. § 824(a) (emphasis added). It is from the FPA which FERC derives its power of setting and ensuring that the rates, terms, and conditions of transmission service provided by electric utility companies are just and reasonable in order to give effect to the FPA's public policy interests. *Id.* § 824a, 824d(a).

Congress' intent and purpose for the enactment of the FPA was expressly stated in the language of the act. *Id.* § 824(a). Congress further provided that federal regulation was "to extend only to those matters which are not subject to regulation by the States." *Id.* § 824(a). Thus, guided by both case law and express mandates of the FPA itself, we must begin with the supposition that "Congress does not cavalierly pre-empt state-law causes of action," and with the presumption that Congress did not intend the FPA, and thus FERC, to have exclusive jurisdiction over those areas within the historic police powers of the states, such as the intentional tort of theft. *Medtronic*, 518 U.S. at 485, 116 S. Ct. 2250; *see also Automated Med. Labs.*, 471 U.S. at 714–15, 105 S. Ct. at 2376; *De La Cuesta*, 458 U.S. at 153, 102 S. Ct. at 3022; *Jones*, 430 U.S. at 525, 97 S. Ct. at 1309; *Rice*, 331 U.S. at 230, 67 S. Ct. at 1152.

Appellants maintain that this suit is a dispute over rates and their reasonableness as set in the ESA or tariff filed with FERC. As such, they contend that appellees' suit is really a rate case within the exclusive jurisdiction of FERC

provided for under the FPA, thus preempting the trial court from exercising jurisdiction over the suit. However, as appellees contend and the Edinburg-Corpus Christi Court of Appeals and federal district court ruled, this suit is not a rate case but a cause of action pursuant to the TTLA and Texas common law.

Appellees neither challenge the reasonableness of the rates nor the terms and provisions of the ESA. Rather, they challenge appellants' scheme of omitting particular costs that make Entergy generated power appear less expensive than third-party generated power, allowing Entergy to sell its own generated power, but then adding back in those costs, thus substantially increasing its earnings. Appellees allege this is a manipulative scheme constituting theft under the Texas Penal Code and actionable as an intentional state tort pursuant to the TTLA and the Texas common law. *See* TEX. PENAL CODE ANN. § 31.03 (West 2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 134.001–005 (West 2011).

Appellees do not directly challenge the ESA, its terms or provisions, the rates that are set under it, or whether it is reasonable and just. Their claims arise from appellants' decisions to omit particular costs for the purpose of making internally generated power appear more economical and with the alleged intent to commit, and conspiracy to commit, the unlawful appropriation of its customers' money. Whether or not these actions constitute the intentional tort of theft as

prescribed under Texas law and actionable under the TTLA is within the subject-matter jurisdiction of Texas state courts, not FERC.[10]

Based upon the express language of the FPA and rules promulgated by the United States Supreme Court, there can be made "[no] reasonable [] inference that Congress left no room for the State to supplement [the legal field]." *De La Cuesta*, 458 U.S. at 153, 102 S. Ct. at 3022 (quoting Rice, 331 U.S. at 230, 67 S. Ct. at 1152); *see also* 16 U.S.C. § 824(a) (stating "such Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the States."). "[N]ot all discretionary decisions [of the Entergy Operating Companies] are

---

[10] The trial court's language in its findings of fact and conclusions of law correctly identifies those issues that are within the FERC's and the PUCT's jurisdiction—none of which are raised by the appellees' in this suit:

> This is not a case implicating FERC's authority to resolve hydropower licensing issues. This is not a case involving a conflict to determine FERC's primacy over other federal agencies, or between FERC and a state agency, to decide cost of service or tariff issues. This is not a case where concerns of primary jurisdiction to decide a matter that is already pending before FERC are in play. This is not a case in which the trier of fact must determine "just and reasonable" rates or terms of conditions of service. This is not a case in which the trier of fact is required to promulgate rules and regulations or to pass on the adequacy of adhering to federally-mandated or to state-agency mandated rules, regulations or practices, much less to "make an assessment of the broad public interests involved in determining interstate rates" as claimed by Entergy. This is not a case where the trier of fact must resolve a dispute involving interpretation of pooling agreements. *This case does not raise any of those issues. Rather, this is a case about a violation of the Texas Penal Code and the Texas Theft Liability Act. The law to be applied is the Texas Penal Code and the Texas Theft Liability Act. . . .*

(Footnotes omitted).

subject to FERC's exclusive jurisdiction." *Jenkins I*, 187 S.W.3d at 803. Appellees' suit is not within the exclusive jurisdiction of FERC as it raises state-law tort claims.

PUC Jurisdiction

When the Texas legislature grants a state administrative agency the sole authority to make an initial determination in a dispute, the agency has exclusive jurisdiction over the matter. *Houston Mun. Employees Pension System v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *see also In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (orig. proceeding); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). Under Texas law, an agency is granted exclusive jurisdiction either when the statutory language expressly states, or when the pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. *Emps. Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908–09 (Tex. 2009).

The powers and duties afforded to the PUC regarding electric utility services come from the Public Utility Regulatory Act ("PURA"). *See* TEX. UTIL. CODE ANN. § 11.002(c) (West 2007) ("It is the purpose of this title to grant the Public Utility Commission of Texas authority to make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the

public interest."). Under PURA, the PUC "has exclusive jurisdiction over the rates, operations, and services of an electric utility. . . ." *Id.* § 32.001(a). Thus, it is clearly expressed from the statutory language of PURA that the PUC has exclusive jurisdiction over disputes of the rates that a Texas electric utility company charges its customers.

However, appellees' suit alleges theft and conspiracy to commit theft under the TTLA and the Texas common law and make no challenge to the reasonableness of the rates or provisions of the ESA. Rather, the suit challenges the decisions by Entergy to omit costs so internally generated power appears more economically beneficial to its customers in an alleged attempt to commit theft. Whether or not Entergy conspired to and committed theft under the Texas Penal Code subjecting it to liability under the TTLA is within the province of the Texas state courts to decide, not the PUC. As the trial court found, "There is no immunity afforded to utilities when the misconduct in which they engage *also* happens to violate their tariff if that misconduct also sounds in other claims for which remedies are available."

Conclusion

Jenkins I resolved appellants' jurisdictional plea, finding that the trial court has subject-matter jurisdiction over appellees' suit. Since *Jenkins I*, there has been no change in the governing law rendering the Edinburg-Corpus Christi Court's

holding *clearly erroneous*. Additionally, appellants have failed to adequately show how the facts and issues currently presented by the appellees in the suit are *substantially different* from those presented in *Jenkins I*. Thus, in keeping with the law of the case doctrine, I find no reason to reverse *Jenkins I* and overrule the trial court's order granting appellees' motion to certify based on a lack of jurisdiction. Moreover, appellants' argument that appellees' suit is within the exclusive jurisdiction of FERC and the PUC is unavailing as appellees' cause of action is for the intentional tort of theft and based on liability pursuant to the TTLA and common law. Therefore, I would overrule appellants' first point of error and affirm the trial court's denial of appellant's second motion to dismiss for want of jurisdiction.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Huddle.

Justice Sharp, dissenting.