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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CHUGACH CONSUMERS and RAY KREIG Plaintiffs, vs. CHUGACH ELECTRIC ASSOCIATION, INC. Defendant.	**MOTION TO REMAND** U.S. District No. 3:06-cv-280 (TRB)

Plaintiffs, Chugach Consumers and Ray Kreig (collectively, "Chugach Consumers") move to remand this case to the Alaska Superior Court because this court lacks subject matter jurisdiction, or, alternatively, must abstain from exercising federal jurisdiction. The basis for this motion is as follows:

A. Parties and Regulatory Scheme

Plaintiff Chugach Consumers is a consumer organization representing customers of Chugach Electric Association ("CEA"). Kreig is an individual Member of CEA and Vice-Chairman of Chugach Consumers. Defendant CEA is a member-owned electric cooperative organized under the Alaska Electric and Telephone Cooperative Act. AS § 10.25.020. As provided by the Act, CEA's Articles of Incorporation and its By-Laws, all customers of CEA, including Kreig, are Members of the cooperative. The Members annually elect CEA's Board of Directors, which oversees the

management of the utility on behalf of the Members.

CEA is also a public utility subject to the jurisdiction of the Regulatory Commission of Alaska ("RCA"). The RCA is the successor to the former Alaska Public Utility Commission. The RCA exercises comprehensive regulatory control over public utilities, including CEA, as provided by the Alaska Public Utilities Regulatory Act (AC §§ 42.05.10 - 42.05.995) and implementing regulations. The RCA's regulatory jurisdiction includes the review of rates (AS § 42.05.141(a)(3)), and approval of tariffs (3 AAC §§ 48.200 - 48.430).

In this connection, the RCA requires comprehensive cost and operating information from utilities (3 AAC Ch. 52). Among other things, RCA mandates that any application for a rate change include a complete "cost of service" analysis, covering all elements of the cost of generating and transmitting electrical energy. 3 AAC § 48.540.

Labor expense is a significant part of the cost of generation and distribution of electric power. A recent rate filing by CEA indicates that approximately 25% of revenues went to labor expense in the 2005 "test year." Compare Exhibit A, pp. 10-11 full document pp. 44, 81. Perhaps more significantly, if fixed expenses (interest, depreciation and amortization) are excluded, labor is approximately 50% of CEA's cost of service. Ex. A, pp.10-11, full document pp. 44, 81.

Accordingly, labor expense is an important component of the "just, fair and reasonable" rates which the RCA is charged with ensuring. By statute, RCA has a particular mandate to look into both labor expense and self-dealing transactions. Significantly, the Alaska Legislature chose to codify these two mandates side-by-side, in a separate section of the in the Alaska Public Utilities Regulatory Act, which provides:

> **AS 42.05.511. Unreasonable Management Practices**
>
> (a) The *commission may investigate the management of a public utility, including but not limited to staffing patterns, wage and salary scales and agreements,* investment policies and practices, purchasing and payment arrangements with affiliated interests, for the purpose of determining inefficient or unreasonable practices that adversely affect the cost or quality of service of the public utility.

> (b) Where unreasonable practices are found to exist, *the commission may, after providing reasonable notice and opportunity for hearing, take appropriate action to protect the public from the inefficient or unreasonable practices* and may order the public utility to take the corrective action the commission may require to achieve effective development and regulation of public utility services.
>
> (c) In a rate proceeding the *utility involved has the burden of proving that any written or unwritten contract or arrangement it may have with any of its affiliated interests for the furnishing of any services* or for the purchase, sale, lease, or exchange of any property *is necessary and consistent with the public interest* and that the payment made therefor, or consideration given, is reasonably based, in part, upon the submission of satisfactory proof as to the cost to the affiliated interest of furnishing the service or property and, in part, upon the estimated cost the utility would have incurred if it furnished the service or property with its own personnel and capital.

AS 42.05.511 (emphasis added)

B. Procedural Posture

On September 29, 2006, CEA filed a tariff proceeding with the RCA, subsequently docketed as TA279-8. In supporting its administrative position, CEA took a very different position from the one it takes before this Court. CEA not only submitted the exact cost of many labor items, but, in the process, revealed a number of disturbing statistics. Ex. A, p 12, full document p.154. (CEA is in the highest 1-3% of all US utilities in wages per hour or per consumer; generally #1 in its consumer size class).

This is, apparently, a standard part of cost-of-service reporting in the utility industry generally. *See* 3 AAC 48.540(c). CEA nowhere indicated that the RCA was forbidden to require, review or approve these items of expense. Indeed, it stated (Ex. A, p. 3, full document p. 2) – initially at least -- that it would return to the RCA for its approval before "normalizing" its rates to reflect new collective bargaining concessions: "Chugach expects to request normalizations reflecting known and measurable labor costs under any contract agreed upon before year end 2006."

On November 30 (not, as stated by CEA, November 6), CEA posted notice of a special meeting of its board of directors on its website. Exhibit B. To Plaintiffs' knowledge, this is the only notice provided to CEA Members of the impending adoption of a new collective bargaining

agreement. This notice contained a link to the proposed Outside Plant Personnel contract. Ex. C. It stated that the contract would be voted on by the Directors on December 6.

Chugach Consumers then filed an Emergency Complaint with the RCA based on information contained in sealed exhibits filed with the RCA and the Superior Court. In essence, Chugach Consumers assert that the proposed contract handcuffs CEA Members to "inefficient or unreasonable practices that adversely affect the cost or quality of service of the public utility." Further, based on Kreig's personal knowledge and the sealed exhibits, the proposed contract raises serious questions about the loyalty and/or diligence of the Directors.

To ensure some meaningful consideration of the Emergency Complaint, Chugach Consumers also requested and obtained a temporary restraining order from the Superior Court, based on the same information which it had placed before the RCA. After the TRO was granted, the RCA issued an order (Exhibit D) which requires CEA to respond to the Complaint, but defers the issue of immediate injunctive relief to the courts.

CEA then removed the Superior Court action to this Court, based on asserted complete preemption by federal labor law. Chugach Consumers moves to remand because this case is not within the removal jurisdiction of this Court. Even if it were within this Court's removal jurisdiction, this Court should remand this case because this case falls within the abstention doctrines articulated in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

C. This Case is Not Removable

In order for a case to be removable, it must be within the original jurisdiction of this Court. (28 U.S.C. 1441) This is defined as a case arising under the Constitution, laws or treaties of the United States. (28 U.S.C. 1331)

In this circuit, the presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule. Federal question jurisdiction exists only if the federal question is affirmatively and distinctly presented on the face of the complaint. An exception to this is if the state

claims alleged are completely preempted by federal law. *Westinghouse Electric Corp. vs. Newman & Hotzinger, P.C.*, 992 F.2d 932 (9 Cir. 1993); *Clorox Co. vs. U.S. Dist. Ct. For N.D. of California*, 779 F.2d (9 Cir. 1985); See, generally, *16 Moore's Federal Practice 3rd*, Section 107.14[3][a][iii]

Chugach Electric has argued in its defense that the claims of Chugach Consumers are completely preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. However, a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 6-12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983);

Even if a defendant asserts a defense under a collective bargaining agreement, this provides no basis for removal. A defendant cannot, merely by injecting a federal question into an action that asserts a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claims must be litigated. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399,107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), See generally, *16 Moore's Federal Practice 3rd*, Section 107.14[4][b][vi].

As set forth below, this case does not involve a federal question at all, much less the "complete preemption" doctrine. The case was not removable and must be remanded.

(a) *Machinists* Preemption and Related Doctrines

As an initial matter, it is necessary to remove a substantial amount of legal underbrush. When the obviously inapplicable legal doctrines are cleared out, the jurisdictional issue is straightforward.

First, the jurisdiction of this court necessarily relates only to the Superior Court proceeding. What the RCA may or may not do is immaterial. Thus far, the RCA has taken no action beyond requiring CEA to respond to a complaint. Even if the RCA had acted, the RCA is not a party to this action. Chugach Consumers are not the RCA and surely have a predominant First Amendment right

to request relief from the RCA -- or any other government body, for that matter – whether or not the RCA ultimately has the authority or inclination to act. The relief requested by Chugach Consumers is a review of a particular proposed labor agreements by the RCA, the actions of the management and Chugach Electric Board relating to that labor agreement, and the effect that the labor agreement will have on the rates charged to Chugach Electric Association rate-payers. If Chugach Consumers is correct, then certain excessive labor costs will be excluded from the rate base by the RCA. Chugach Consumers is acting in the interests of the Chugach rate-payers and is seeking this contract review as related to rates for whatever relief may be granted by the RCA under the circumstances. It is clear that Chugach Consumers are not seeking relief within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"), and have filed a motion with the RCA to establish this point and ask it to clarify its jurisdiction. (Exhibit E) Chugach Electric appears to have a concern that the RCA will grant Chugach Consumers the that relief they seek. If that happens, however, Chugach Electric's quarrel will be with the RCA, not with Chugach Consumers.

Second, Chugach Electric invokes federal preemption under *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). *Machinists* preemption is clearly inapplicable. *Machinists* preemption, as Chugach Electric notes, deals with areas intentionally left free of labor regulation. Under *Machinists*, state or local action is preempted if it regulates the use of economic weapons and interferes in "the free play of economic forces."

The difficulty here is that a brief delay in approving a collective bargaining agreement that already include provisions for retroactive wage increases has no obvious relationship to the "free play of economic forces." Nor is there any reason to believe that the signing or non-signing of a labor contract was an area intentionally left unregulated. Perhaps for this reason, Chugach Electric makes no such argument. Instead, it claims that the *RCA's* actions are likely to intrude on the bargaining process in some unspecified way. As noted, the RCA is not a party to this suit; and it has taken no substantive action.

Third, the Norris-LaGuardia Act has no relevance to the removal jurisdiction of this Court. The Norris-LaGuardia Act says nothing about state courts. "[W]hether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301." *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 247 (1970), quoting *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 63, 315 P.2d 322, 332 (1957), *cert. denied*, 355 U.S. 932 (1958). Norris-LaGuardia restricts the remedial power of this Court, if it would otherwise have jurisdiction. It does not address the powers of state courts, and it cannot be construed as a jurisdictional *grant* of any kind.

(b) *Garmon* preemption

With these obstructions removed, it becomes clear that Chugach Electric's only possible argument for jurisdiction is complete preemption under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). At first blush, *Garmon* seems a powerful weapon. As originally formulated, the *Garmon* doctrine held that any state action which intruded on matters "arguably protected or arguably prohibited" by the National Labor Relations Act was completely preempted.

However, the practical problems of reconciling state and federal spheres of activity have led to a complex set of accommodations. Thus, for example, *Garmon* does not apply where the State is acting as proprietor, rather than regulator because "[w]e have held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor." *Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218 (1993). *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) ("*Sears*") describes the appropriate inquiry.

As an initial matter, "Inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."

Sears, quoting *Farmer v. Carpenters*, 430 U.S. 290, 302 . Preemption depends on the "nature of the particular interests being asserted and the effect upon the administration of national labor policies." *Sears*, quoting *Vaca v. Sipes*, 386 U.S. 171, 180.

Sears described three relevant factors: (1) the presence or absence of a significant state interest in protecting its citizens from particular conduct; (2) whether or not the exercise of state jurisdiction over the particular claim actually involved a risk of interference with the regulatory jurisdiction of the NLRB; and (3) whether the issues in controversy in the state court are "identical to," or "different from" a hypothetical case presented to the NLRB.

In this Circuit, the relative importance of these factors depends on the proper characterization of the underlying dispute. *Chamber of Commerce* v. *Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (*en banc*). Here, the conduct at issue is "arguably," rather than, "actually" subject to NLRB jurisdiction because whether or not Chugach Electric has "agreed" to the contract, for NLRA purposes, depends on a fact-intensive inquiry relating to the discussions and course of dealing between labor and management. *See, e.g., AFSCME Council 71 (Golden Crest)*, 275 NLRB 49 (1985); *Mid-Wilshire Health Care Center.*, 337 NLRB 72 (2001); *Seiler Tank Truck Service*, 307 NLRB 1090 (1992). Accordingly, under *Lockyer*, the most relevant criteria are (1) and (2). However, even if the underlying actions were clearly subject to NLRB jurisdiction, the state court would not be preempted if factor (3) is implicated.

In the present case, none of these nice distinctions need be made, since all three factors unquestionably apply. (1) The state court was acting to preserve the jurisdiction of a state regulatory body with comprehensive powers over the business of electrical utilities, and to protect important state rights of consumers to be heard. (2) The TRO is not likely to interfere materially with the NLRB's jurisdiction. In fact, no party has requested action by the federal agency. (3) The issue put before the state court was the preservation of RCA jurisdiction and the rights of electrical consumers – plainly not matters of interest to the NLRB, nor similar to the proceedings which the Board would hypothetically conduct.

In *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto, Aerospace and Agricultural Workers of America, International Union and Local 787*, 523 U.S. 653, 663-666, 118 S.Ct. 1626, 140 L.Ed.2d 863 (1998), the Court held that a suit claiming that a collective bargaining agreement was voidable because of alleged fraud in inducing the union to sign the contract was not preempted by the National Labor Relations Act. Here, Chugach Consumers merely requested a review of the costs of the labor agreement and the manner it was negotiated, which is also not a preempted activity by analogy to *Textron*.

Accordingly, *Garmon* preemption is absent; and. under no possible analysis would the Superior Court's temporary restraining order be preempted by federal labor law.

D. Abstention is Mandated in this Case.

Finally, even if Chugach Electric could establish complete preemption, or the case were removable in any way (which it is not), the present case presents a compelling case for both *Pullman* and *Burford* abstention. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

(a) *Pullman* Abstension

Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) established an abstention doctrine which as two elements. First, there must be an uncertain question of state law. Second, the state law must be susceptible of a construction that will eliminate the need to decide the federal question (constitutional question in *Pullman*) or materially alter the way that the federal court will view the issue. *Pullman* counsels federal abstention to allow the state courts to resolve the questions that might dispose of the litigation.

This Circuit has articulated three criteria for *Pullman* abstention. First, the complaint must touch a sensitive area of social policy into which the federal courts should not enter unless there is

no alternative to federal adjudication. Second, a definite ruling on the state issues by the state court must potentially obviate the need for adjudication by the federal court. Third, the proper resolution of the possibly determinative state law issue must be uncertain. e.g., *Richardson v. Koshiba, 693 F.2d 911, 915 (9 Cir. 1982)*

All of these factors are present here. The regulation of electric utilities and rates by the State of Alaska clearly touches a sensitive issue of social policy, and there are many alternatives here to federal adjudication at this time. The RCA has not previously interpreted AS 42.05.511. The statute does not obviously conflict with federal law, and the RCA ought reasonably to have the first opportunity to interpret the provision before any court, state or federal, addresses its constitutionality. In fact, a motion is presently pending before the RCA which will provide at least p partial interpretation. If the RCA interprets AS 42.05.511 in a manner consistent with federal law, as Chugach Consumers anticipates that it will, there will be no need for federal action. These conditions require abstention under *Pullman.*

Further, AS 42.05.511 is part of a comprehensive state scheme of regulation – one that Chugach Electric has never before contested. Excising 50% of the variable costs of power generation and distribution from administrative rate review by a state utility commission – effectively removing 50% of its rate-setting power – is a drastic measure. Accordingly, the Court should not act unless the threat of interference with federal interests is considerably more concrete, *i.e.* when the RCA has taken some particular action.

At a minimum, Plaintiffs should have a meaningful chance to speak with the utility regulators about the cost of electricity in their homes. That, ultimately, is all the Superior Court's TRO seeks to protect. That is no threat to the National Labor Relations Act or the supremacy of federal law. The TRO is, perhaps, a threat to inefficient, unreasonable, and self-interested utility management; and perhaps this explains Chugach Electric's haste to petrify the agreement before the Board is required to respond to Chugach Consumers' complaint before the RCA. Exhibit F. But the NLRA

was not intended to protect such parties, and they make implausible defenders of the rights of the working man.

(a) *Burford* Abstension

Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) recognizes that federal abstention is appropriate to defer to comprehensive state administrative procedures. The question itself need not be determinative of state policy. It is enough that exercise of federal review of the question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 595-596, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 60, 64 S.Ct. 873, 88 L.Ed.1121 (1944)

This Circuit has a three part test for *Burford* abstention. First, the state has chosen to concentrate suits involving the agency in a particular court. Second, the federal issues cannot be separated easily from the state law issues of which the sate courts have special competence, Third, federal review might disrupt state efforts to establish a coherent policy. *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1133 (9 Cir. 2002); *U.S. v. Morros*, 268 F.3d 695, 705 (9 Cir. 2001)

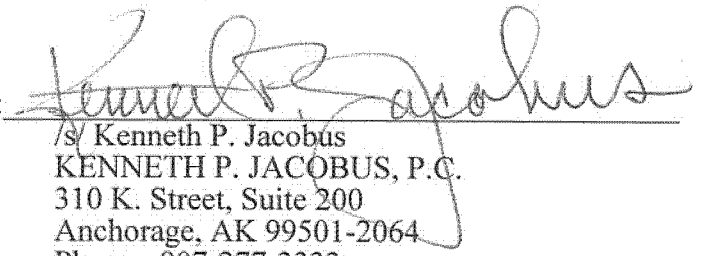
Here, all three criteria are satisfied. Appeals from decisions of the RCA must go to the superior court. AS 42.05.551 In addition, a direct action against the RCA involving rate-making must be brought in the superior court. AS 22.10.020 This case involves state rate-determination, which is vested in the RCA. Whatever federal issues that might exist in this case are not severable from the state rate-making issues. Finally, federal review at this point will disrupt state efforts to determine how labor costs are to be included in the rate-making process.

CONCLUSION

For the reasons set forth in this memorandum, this Court should remand this case to the

Superior Court of the State of Alaska

Dated this 17th day of December, 2006.

By: 

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document and proposed order were served electronically on the persons named below on this 17th day of December, 2006.

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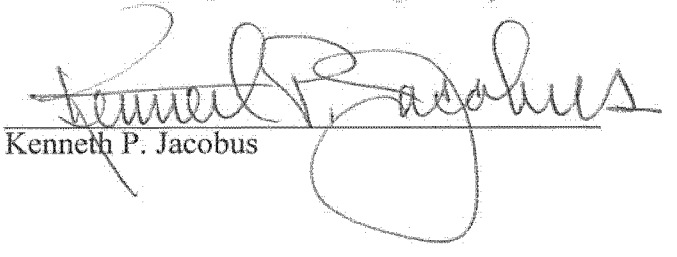

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