CASE LAW UPDATE

KELLIE E. BILLINGS-RAY
AND
SIREESHA V. CHIRALA

Assistant Attorneys General
Environmental Protection Division
Office of the Attorney General
300 W. 15th Street, 10th Floor
Austin, Texas 78701
512.475.4014
Kellie.Billings-Ray@oag.texas.gov
Sireesha.Chirala@oag.texas.gov

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TABLE OF CONTENTS

INTRODUCTION.......... 1

I. UNITED STATES COURTS OF APPEAL.......... 1

*Global Tel*Link v. Fed. Commc'ns Comm'n*, No. 15-1461, 2017 WL 3380543 (D.C. Cir. Aug. 4, 2017).......... 1

II. TEXAS SUPREME COURT.......... 6

Oncor Elec. Delivery Co. L.L.C. v. Pub. Util. Comm'n, 507 S.W.3d 706 (Tex. 2017)..... 6

III. TEXAS COURTS OF APPEAL.......... 12

Jasinski v. Pub. Util. Comm'n, No. 03-16-00725-CV, 2017 WL 2628071 (Tex. App.—Austin June 14, 2017, pet. filed) (mem. op.).......... 12

City of Dallas v. Sabine River Auth., No. 03-15-00371-CV, 2017 WL 2536882 (Tex. App.—Austin June 7, 2017, no pet.).......... 15

Isa v. Pub. Util. Comm'n, No. 06-16-00070-CV, 2017 WL 2299112 (Tex. App.—Texarkana June 6, 2017, pet. denied).......... 18

New Talk, Inc. v. Sw. Bell Tel. Co. d/b/a AT&T Texas, No. 02-15-00199-CV, 2017 WL 1955400 (Tex. App.—Fort Worth May 11, 2017, no pet.).......... 22

Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist., No. 03-16-00214-CV, 2017 WL 2062258 (Tex. App.—Austin May 11, 2017, no pet.) (mem. op.).......... 26

CPS Energy v. Pub. Util. Comm'n, No. 03-14-00340-CV, 2017 WL 744694 (Tex. App.—Austin Feb. 24, 2017, no pet. h.).......... 28

Cura-Cruz v. CenterPoint Energy Houston Elec., L.L.C., No. 14-15-00632-CV, 2017 WL 1251817 (Tex. App.—Houston [14th Dist.] Feb. 16, 2017, pet. filed).......... 36

City of San Antonio v. Pub. Util. Comm'n, 506 S.W.3d 630 (Tex. App.—El Paso 2016, no pet.).......... 39

INTRODUCTION

This update is meant to provide a brief overview of important utility law cases from August 2016 through August 2017. It is not intended to be an in-depth review of all issues in each case, nor does it include all utility decisions by courts during this time period. In addition, this paper emphasizes Texas law decisions.

I. UNITED STATES COURTS OF APPEAL

***Global Tel*Link v. Fed. Commc'ns Comm'n*, No. 15-1461, 2017 WL 3380543 (D.C. Cir. Aug. 4, 2017).**

The D.C. Circuit Court of Appeals considered a final order of the Federal Communications Commission (FCC) that set permanent rate caps and ancillary fee caps for interstate calling service calls. Specifically, the issues in this case focus on inmate calling services (ICS) and fees and rates charged for these calls.

Facts

The Communications Act of 1934 created a statutory scheme for telecommunications that divided authority between states and the FCC over inter- and intrastate telephone services. The FCC regulates interstate telephone communications and has the authority to ensure charges "in connection with" interstate calls are "just and reasonable."[1] In general, the FCC may not interfere with intrastate communication service that is within the states' province.[2]

The 1996 Act fundamentally changed the 1933 Act and restructured the local telephone industry. "While local phone services were once thought to be natural monopolies, '[t]echnological advances ... made competition among multiple providers of local services seem possible, and Congress [in the 1996 Act] ended the longstanding regime of state-sanctioned monopolies.'"[3]

Prior to the 1996 Act, Bell Operating Companies dominated the payphone industry. Congress attempted to address this issue by authorizing the FCC in section 276 to adopt regulations "ensuring that all payphone providers are 'fairly compensated for each and every' interstate and intrastate call."[4]

The aim of section 276 was to "'promote competition among payphone service

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[1] *Global Tel*Link v. Fed. Commc'ns Comm'n*, No. 15-1461, 2017 WL 3380543, at *2 (D.C. Cir. Aug. 4, 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.* at *1 (citing 47 U.S.C. § 276(b)(1)(A)).

providers and promote the widespread deployment of payphone services to the benefit of the general public.'"[5] Payphones in correctional institutions and ancillary services are covered by this provision.[6]

Payphone providers sought to present call services to inmates in jails and prisons nationwide. ICS providers compete with one another through a competitive bidding process to win long-term ICS contracts with correctional facilities. When determining where to award the contract, correctional facilities generally give considerable weight to a provider that offers the highest site commission (a portion of the provider's revenues or profits). These site commissions range from between 20% and 63%. An ICS provider can pay over $460 million annually in site commissions.[7]

After a long-term, exclusive contract bid is awarded to an ICS provider, competition ceases for the remainder of the contract and for subsequent contract renewals. This provides winning ICS providers with a locational monopoly, captive customers, and the need to pay high site commissions. Based on this situation, the FCC determined that inmate calling services "[were] a prime example of market failure."[8]

In 2000, an intervenor filed a class action suit against ICS providers on behalf of inmates and their loved ones to challenge these fees and rates. This suit was stayed by the district court to allow the FCC time to reconsider the reasonableness of rates through a rulemaking. In 2013, the FCC issued an interim order, citing its plenary authority over interstate calls, that imposed a per-minute rate cap for interstate ICS calls.[9]

In 2015, several years later, the FCC set permanent rate caps and ancillary fee caps for interstate ICS calls. The FCC also ordered a cap for intrastate calls (the Order).[10]

In order to determine the cap, the FCC used a ratemaking methodology, based on industry-average cost data, that excluded site commissions as a cost. The Order also imposed reporting requirements on ICS providers for site commissions and video visitation services. Several ICS providers

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5 *Id.* at *3 (quoting 47 U.S.C. § 276(b)(1)).

6 *Global Tel*Link*, 2017 WL 3380543, at *3.

7 *Id.*

8 *Id.*

9 *Id.* at *4.

10 *Id.* at *5.

filed suit.[11]

In January 2017, FCC counsel filed a letter notifying the court it had experienced "significant changes in [its] composition." Three of the five Commissioners who had voted on the Order had since left the FCC. "Because the dissent's position now commanded a majority, counsel for the FCC informed the court that 'a majority of the current Commission does not believe that the agency has the authority to cap intrastate rates under section 276 of the Act.'"[12] FCC counsel notified the court that the FCC was abandoning its former argument that the Commission had authority to cap intrastate rates—a position re-affirmed at oral argument.[13]

<u>Holding and Analysis</u>

The DC Circuit Court of Appeals granted in part and denied in part the petitions for review and remanded the case for further proceedings. The court also dismissed two claims as moot.[14]

The court determined the intrastate rate caps exceeded the FCC's authority, the use of industry-average cost data was arbitrary and capricious, the imposition of video visitation was beyond the FCC's statutory authority, and the proposed wholesale exclusion of site commission payments from the cost calculation was arbitrary and capricious. The court denied the Order's site commission requirements, remanded the imposition of the ancillary fee cap issue, and dismissed as moot preemption and due process claims.[15]

Despite the fact that petitioners had agreed not to oppose the petitioners' two principle challenges, the court explained that "'voluntary cessation of allegedly illegal conduct does not deprive [a judicial] tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'"[16] "'Voluntary cessation' justifies the dismissal of a case on grounds of mootness only when 'the defendants can demonstrate that there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one.'"[17]

While the FCC argued it would not

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[11] *Global Tel*Link*, 2017 WL 3380543, at *5.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *14.

[15] *Id.* at *2.

[16] *Global Tel*Link*, 2017 WL 3380543, at *6 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

[17] *Id.* (quoting *W.T. Grant Co.,* 345 U.S. at 633).

defend portions of the Order, it never acted to revoke, withdraw, or suspend the Order. Therefore, the court determined there had been no voluntary cessation by the FCC that would merit dismissal.[18]

The Order in this case was promulgated by the FCC "carrying the force of law" and would therefore normally be subject to review under *Chevron*.[19] However, because the FCC no longer sought deference for parts of the Order, the court explained it did not make sense to determine whether the disputed agency position warranted deference. Therefore, the court determined it must give the best reading of the statutory provisions at issue in this case.[20]

Because the FCC offered no interpretations in support of the provisions purporting to cap intrastate rates for ICS providers, the court applied the rules of statutory construction. As to the remaining issues, the court applied the *Chevron* framework and section 706(2)(A) of the Administrative Procedure Act.[21]

The court agreed that, on the record, section 276 did not authorize the FCC to impose intrastate rate caps as the FCC had in its Order. Section 152(b) sets out a presumption against the FCC's assertion of regulatory authority over intrastate communications. The Order did not come close to overcoming this presumption.[22]

Further, section 276 does not give the FCC authority to determine "just and reasonable" rates. Rather, it merely directs the FCC to ensure that all ICS providers are fairly compensated for inter- and intrastate calls. In other words, the court explained, the Order impermissibly conflated two distinct grants of authority into "a synthetic 'just, reasonable and fair standard.'"[23]

The court explained it need not determine the precise parameters of the FCC's authority under section 276. Rather, it simply determined the FCC's exercise of authority to set permanent rate and ancillary fee caps for intrastate ICS calls could not stand.[24]

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[18] *Id.*

[19] *Chevron, U.S.C., Inc. v. Nat. Res. Defense Council*, *Inc.,* 467 U.S. 837 (1984).

[20] *Global Tel*Link*, 2017 WL 3380543, at *7.

[21] *Id.*

[22] *Id.* at *8.

[23] *Id.*

[24] *Id.* at *11.

In vacating the exclusion of site commission costs from the Order, the court explained the FCC's exclusion of these costs defied reasoned decisionmaking. Site commissions are costs of doing business incurred by ICS providers. The court found that based on the record, "we simply cannot comprehend the agency's reasoning." "Not only does the FCC's reasoning defy comprehension, the categorical exclusion of site commissions cannot be easily squared with the requirements of [sections] 276 and 201."[25]

The court next considered the FCC's use of industry-wide averages to set rates. The court explained that even if site commissions were disregarded, the caps here were set too low to ensure compensation for each call. The caps were contrary to the record and operated inefficiently. The Order's analysis of the record was not a result of reasoned decisionmaking; therefore, the court vacated the Order on that point.[26]

The court explained that the Order's imposition of ancillary fee caps in connection with interstate calls was justified. But as to intrastate rate caps, the Order failed review. The FCC had no authority to impose ancillary fee caps with respect to intrastate calls. But it was unclear from the record whether those fees could be segregated between interstate and intrastate calls. Based on this analysis, the court remanded the issue for further consideration.[27]

In addressing the imposition of reporting requirements, the court determined that video visitation service reporting requirements were too attenuated to the FCC's statutory authority to justify the requirement. Before the FCC could assert jurisdiction to impose that requirement, the FCC first must explain how its authority extends to video visitation services as a communication by wire or radio falling within section 201(b). The Order offered no such explanation. The court vacated the video visitation reporting requirement as well.[28]

Finally, the court held that the preemption issue and due process claims were moot.[29]

This opinion is the second issued by the court. The court amended its opinion[30]

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[25] *Global Tel*Link*, 2017 WL 3380543, at *12.

[26] *Id.* at *13.

[27] *Id.*

[28] *Id.* at *14.

[29] *Id.*

[30] *Global Tel*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39 (D.C. Cir. 2017).

to respond to one petitioner's motion for rehearing en banc. The court explained that its opinion need not, and did not decide, whether the court was required to follow *Chevron* step two. The important point was that even after careful analysis of the Order, the Order could not survive review under either the "best reading"standard or the *Chevron* step two analysis.[31]

Senior Circuit Judge Silberman filed a concurring opinion in which he agreed with the opinion in all respects. In particular, he agreed that *Chevron* deference would be inappropriate. Judge Silberman wrote separately to point out that the analysis would be the same, however, as to the FCC's claimed jurisdiction to set intrastate rate caps even if *Chevron* had been at issue.[32]

Circuit Judge Pillard filed a dissent as to certain sections of the opinion and concurred in part. He argued the opinion scuttles a long-term effort to address calling costs not meaningfully subject to competition and "that profit off of inmates' desperation for connection."[33]

Judge Pillard argued that "[i]f the FCC under new management wishes by notice and comment to change its rule, the statute gives it latitude to do so. [The court] should uphold the rule that is on the books and leave to the agency to decision whether and how to change it."[34]

II. TEXAS SUPREME COURT

***Oncor Elec. Delivery Co. L.L.C. v. Pub. Util. Comm'n*, 507 S.W.3d 706 (Tex. 2017).**

In this case, the Texas Supreme Court considered an appeal of Oncor Electric Delivery Company's (Oncor) application for an increase to its rates. The court considered: 1) whether section 36.351 of the Texas Utilities Code (which requires electric utilities to discount charges for services provided to state colleges and universities) applies to a transmission and distribution utility; 2) whether former section 36.060(a) of the Texas Utilities Code(which requires an electric utility's income taxes to be computed as though it had filed a consolidated return with a group of its affiliates) required a utility to adopt a corporate structure so as to be part of the group; and 3) whether the record evidence established that franchise charges, which were negotiated by the utility with various municipalities, were reasonable

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[31] *Global Tel*Link*, 2017 WL 3380543, at *16.

[32] *Id.*

[33] *Id.* at *17.

[34] *Id.* at *16.

and necessary operating expenses.[35]

Facts

In June 2008, Oncor initiated a ratemaking proceeding at the Public Utility Commission of Texas (the Commission). In its application, Oncor requested a $253 million increase due to a large investment it had made in its system, mounting operation costs, and an anticipated need to make capital expenditures.[36]

The Commission ultimately approved a $115 million increase. The Commission concluded that the Utilities Code does not require Oncor to discount its rates for transmitting and distributing electricity purchased by state colleges and universities. The Utilities Code does not require that Oncor's federal income tax expense be calculated as if Oncor had filed a consolidated return with its affiliates. The Commission determined that Oncor's tax expense should be calculated as if it were a stand-alone corporation. Finally, the Commission found that Oncor failed to show that certain municipal franchise charges were reasonable and necessary.[37]

The district court agreed with the Commission on the federal income tax issue, but reversed the Commission on the university discount and franchise fee issues.[38]

State Universities and Colleges Discount

Section 36.351 of the Utilities Code requires an electric utility to "'discount charges for electric service provided to a facility of a four-year state university, upper-level institution, Texas State Technical College, or college.'"[39] The discount is a 20% reduction of the utility's base rate.[40]

Section 36.251 was enacted in 1995—prior to deregulation. In 1999, after the Legislature passed Senate Bill 7, transmission and distribution utilities remained fully regulated. Senate Bill 7 did not change the text of section 36.351, but it redefined "electric utility" to exclude unbundled power generation companies and retail electric providers. This removed transmission and distribution utilities from the

[35] *Oncor Elec. Delivery Co. L.L.C. v. Pub. Util. Comm'n*, 507 S.W.3d 706, 709 (Tex. 2017).

[36] *Id.*

[37] *Id.* at 710.

[38] *Id.*

[39] *Id.* (quoting Tex. Util. Code § 36.351).

[40] *Oncor Elec. Delivery Co. L.L.C.*, 507 S.W.3d at 711.

provisions of the discount.[41]

Section 63 of Senate Bill 7 suspended this change during the transition to a competitive market and froze total rates that state universities paid for electricity covered under section 36.351 at December 31, 2001 levels until September 1, 2007.[42]

When Oncor initiated its rate case in June 2008, the rate freeze had expired. Oncor argued that the section 36.351 discount no longer applied to it because Oncor did not, under the statutes' words, "charge[ ] for electric service provided to a facility" or any retail customer, including state universities." Oncor argued that only retail electric providers furnish service to retail customers. State Universities opposed this position, and the Commission agreed with Oncor.[43]

The court of appeals deferred to the Commission's interpretation and affirmed the Commission's decision on this issue.[44]

Consolidated Tax Savings

The Commission was required to set rates for Oncor at a level that would allow Oncor a reasonable return on its investment. One expense the Commission considered was Oncor's future tax liability. Oncor argued that this liability should be determined as if Oncor were a separate corporation. Several consumer parties, as well as Cities, argued that Oncor's tax liability should be calculated as if it were included in its parent's tax return. The Commission agreed with Oncor. However, the court of appeals reversed the Commission's decision.[45]

A consolidated federal income tax return allows affiliated companies to share losses and lower collective tax liability. Texas Utilities Code section 36.060 allows ratepayers to benefit from a tax savings that results from filing a consolidated return.[46]

Under federal tax law, a parent corporation and certain subsidiary corporations are considered an affiliated group and are allowed to file consolidated returns. When Oncor filed its rate case in 2008, it was a wholly owned subsidiary of Energy Future Holdings (EFH). In 2007, EFH and its affiliates, which included Oncor, filed a consolidated tax return. Because it was

[41] *Id.* at 714 (citing Tex. Util. Code § 36.351).

[42] *Id.* at 711-12.

[43] *Id.* at 712

[44] *Id.*

[45] *Id.* at 714.

[46] *Oncor Elec. Delivery Co. L.L.C.*, 507 S.W.3d 714-15.

wholly owned by EFH, Oncor was deemed a disregarded entity and treated as a subdivision of EFH. Had Oncor filed separately, its tax liability would have been $151 million. However, EFH's affiliated group shared losses and as a result, Oncor paid no taxes.[47]

In November 2008, while Oncor's rate case was pending at the Commission, EFH sold a 19.96% interest in Oncor. As a result, Oncor was a "partnership" for federal tax purposes and could no longer be regarded as an entity separate from its owner.[48] Even though Oncor was allowed to be treated as a corporation under federal tax law, Oncor did not make that election in its tax return.[49]

The Commission determined that Oncor's tax expense should be based on its tax situation after November 2008; therefore, Oncor was taxed as a partnership. Oncor was no longer a member of a group eligible to file a consolidated tax return as recognized under section 36.060(a), and consequently, the statute did not require a calculation of its tax return as if it were still included in EFH's consolidated return. Finally, the Commission determined that although Oncor would be taxed as a partnership, its tax expense should be calculated as if it were a stand alone corporation.[50]

The court of appeals held that because Oncor could have elected to be taxed as a corporation, it remained a member of an affiliated group that was eligible to file a consolidated tax return. The court of appeals reasoned that the Commission should have used the 2007 test year and applied section 34.060(a).[51]

Franchise Fee Agreements

Municipalities franchise to utilities to use streets, alleys, and other public areas. Senate Bill 7 added Utilities Code section 33.008 to the Utilities Code. This section recognizes that 1) a municipality can impose a reasonable franchise charge on a transmission and distribution utility, 2) a municipality that imposed franchise charges before competition can continue to charge per kilowatt hour of electricity delivered, 3) charges that are reasonable and necessary operating expenses of the utility and may be passed on to retain electric providers; and 4) on the expiration of a franchise agreement existing after September 1, 1999, a different amount of compensation may

[47] *Id.* at 715.

[48] *Id.*

[49] *Id.* at 716.

[50] *Id.*

[51] *Oncor Elec. Delivery Co. L.L.C.*, 507 S.W.3d at 716.

be agreed upon.[52]

Further, section 62(a) of Senate Bill 7 stated, "nothing in this Act shall restrict or limit a municipality's historical right to control and receive reasonable compensation for use of public streets, alleys, rights-of-way, or other public property to convey or provide electricity."[53]

In its application to the Commission, Oncor proposed to include $253,884,976 of municipal franchise charges as a reasonable and necessary operating expense. Of that amount, almost $5.7 million was a 5% increase negotiated by Oncor and the Cities. The Commission rejected Oncor's request and determined that a utility cannot pay more than the charge set out in section 33.008(b).[54]

In the court of appeals, the Commission abandoned that argument, and instead argued that under the language in section 33.008(f), Oncor could include its expenses charged only if it proved the charge was agreed to "on the expiration of a franchise agreement existing on September 1, 1999."

The Commission argued that Oncor failed to meet its burden of proof because less than a scintilla of evidence existed in the record. The court of appeals agreed.[55]

Holding and Analysis

The Texas Supreme Court affirmed the court of appeals in part and reversed in part, and remanding the case to the Commission for further proceedings.[56]

State Universities and Colleges Discount

The court agreed with the Commission that section 36.351 does not apply to transmission and distribution utilities in deregulated areas.[57]

The court determined the language of section 36.351 is clear—in deregulated areas of the state, a transmission and distribution utility "may not sell electricity"—only a retail electric provider can. Transmission and distribution utilities cannot charge consumers for electric service. These utilities charge tariffed rates set by the Commission to retail electric providers. Therefore, it follows a transmission and distribution utility cannot discount rates to consumers, it can only do so for retail

[52] *Id.* at 719.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Oncor Elec. Delivery Co. L.L.C.*, 507 S.W.3d at 720.

[57] *Id.* at 713.

electric providers.[58]

The court explained, if universities continue to receive a discount, it is only through negotiation, not due to section 36.351 provisions. In 1995, when section 36.351 was enacted, it was clearly intended to apply to integrated utilities. Senate Bill 7's change in the definition of "electric utility" made section 36.351 inapplicable to transmission and distribution utilities. Section 63 expired by its own terms in 2007. No change in section 36.351's text was needed to remove its application to transmission and distribution utilities. Section 36.354, however, was not enacted until 2003, and at that point, the limitation of its application to areas outside the Electric Reliability Council of Texas was consistent with section 36.351.[59]

Consolidated Tax Savings

The court disagreed with the court of appeals. Section 36.060(a) plainly applies only to a utility that "is" currently a member of an affiliated group—not a utility that could be. The court explained that the court of appeals' concern (that Oncor could use its change of ownership and federal tax law to give EFH the savings ratepayers had received when Oncor was included) could not be used to read section 36.060(a) contrary to plain text. It is the group itself that must be eligible to file a consolidated return, not the utility alone.[60]

The Court held the Commission's determination to calculate Oncor's tax expense as if it were a corporation was not arbitrary and capricious.[61]

Franchise Fee Agreements

The court reversed the judgment of the court of appeals and remanded the case to the Commission on this point.[62]

The expiration of a franchise agreement existing on September 1, 1999, cannot be read as a condition to agreeing to a different charge. If it were, a municipality, which had no franchise agreement with a transmission and distribution utility on that date could never impose a franchise agreement in the future. That restriction would severely limit a "municipality's historical right to control and receive reasonable compensation" for the use of public property.[63]

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[58] *Id.*

[59] *Id.* at 714.

[60] *Id.* at 717.

[61] *Oncor Elec. Delivery Co. L.L.C.*, 507 S.W.3d at 717.

[62] *Id.* at 720.

[63] *Id.* at 718.

The court determined that reading the provisions together as it must 1) confirms that municipalities may continue to impose franchise charges after competition, 2) charges per kilowatt hour equal to the average amount charged must be considered reasonable and necessary, and 3) utilities may continue to renegotiate franchise charges.[64]

III. TEXAS COURTS OF APPEAL

Jasinski v. Pub. Util. Comm'n, No. 03-16-00725-CV, 2017 WL 2628071 (Tex. App.—Austin June 14, 2017, pet. filed) (mem. op.).

The Third Court of Appeals considered an order of the Public Utility Commission of Texas (the Commission), which dismissed a complaint brought by Kenneth M. Jasinski (Jasinski) for failure to state a claim for which relief can be granted.

Facts

After Oncor Electric Delivery Company, LLC (Oncor) trimmed a live oak tree on Jasinski's property, Jasinski filed a complaint with the Commission. In his complaint, Jasinski alleged that Oncor over-trimmed his tree and that the change to the clearance standard in Oncor's 2015 Vegetation Management Report (from 7 to 10 feet in its 2014 Vegetation Management Report to 10 feet in its 2015 Vegetation Management Report) was a violation of the Public Utility Regulatory Act (PURA), the National Electrical Safety Code, Commission's Rules, and "Good Utility Practice" as defined by the Commission. Jasinski requested the following relief: 1) that he be "grandfathered" under the former clearance standard in the 2014 Vegetation Management Report; 2) that the Commission conduct an audit of Oncor's tree-trimming practices; and 3) that the Commission assess an administrative penalty against Oncor.

In response, Oncor filed a motion to dismiss Jasinski's complaint, stating that it had not violated any regulations or rules. Pursuant its own procedural rule, rule 22.181(a)(1)(G), and without holding a hearing, the Commission dismissed Jasinski's complaint for failure to state a claim for which relief can be granted. The Commission concluded that Jasinski's complaint stated no violations by Oncor of its tariff, the Commission's rules, or PURA, and that Jasinski was not entitled to the relief he sought.[65] On appeal, the district court affirmed the Commission's order.

Mr. Jasinski appealed the district court's order, asserting that the Commission's

[64] *Id.* at 719.

[65] *Jasinski v. Pub. Util. Comm'n,* No. 03-16-00725-CV, 2017 WL 2628071, at *4 (Tex. App.—Austin June 14, 2017, pet. filed) (mem. op.).

order was an error of law;[66] that Oncor's clearance standard in its 2015 Vegetation Management Report was unreasonable and excessive; that the change to the clearance standard should have been included as part of a tariff revision; and that Oncor violated PURA, the National Electrical Safety Code, the Commission's rules, and Oncor's tariff. He also complained that the Commission's order failed to rule on each of his proposed findings of fact and conclusions of law.

Holding and Analysis

The court held that the Commission properly concluded Jasinski's complaint did not state a claim for which relief can be granted. The court determined Jasinski's allegations, claiming that Oncor violated statutes, regulations, and its tariff, were unsupported legal conclusions and opinions that need not be taken as true.[67] The court upheld the district court's judgment affirming the Commission's order dismissing Jasinski's complaint.

In its analysis, the court reviewed and outlined the relevant statutes, regulations, and tariff provisions that govern utilities' management of vegetation near transmission and distribution lines.[68] These statutes and rules require utilities to "'furnish service, instrumentalities, and facilities that are safe adequate, efficient, and reasonable;'"[69] to manage "vegetation that may come in contact with and possibly damage a utility's lines;"[70] and to file a Vegetation Management Report annually with the Commission describing the utility's vegetation management practices.[71] Utilities' tariffs allow "access to retail customers' premises to, among other things, perform tree trimming activities and 'tree removal where such trees, in the opinion of [Oncor] constitute a hazard to [Oncor] personnel or facilities, or to the provision of continuous Delivery Service.'"[72]

The court reasoned that "[f]or Jasinski to be correct, there must be some prohibition, statutory or otherwise, against Oncor's vegetation management practice of trimming trees to create a ten-foot clearance between the trees and

66 *Id.*

67 *Id.* at *5.

68 *Id.* at *4.

69 *Id.* (quoting Tex. Util. Code § 38.001).

70 *Jasinski*, 2017 WL 2628071, at *4 (referencing Nat'l Elec. Safety Code § 218.A.1).

71 *Id.* (citing 16 Tex. Admin. Code § 25.96).

72 *Id.* (quoting Oncor Electric Delivery Company LLC Tariff for Retail Delivery Service § 5.4.8).

Oncor's distribution lines."[73] After discussing the regulatory framework, and noting that Jasinski had failed to identify a statute, rule, or practice that imposes a limit on Oncor's discretion to determine the appropriate clearance distances, the court found that the necessary explicit prohibition does not exist in the Utilities Code (PURA), the Commission's rules, or the National Electrical Safety Code. Therefore, Oncor's vegetation management practice of trimming trees to a ten-foot clearance distance is not actionable.[74] As a result, the court agreed with the Commission's assessment that Jasinski's complaint did not state a claim for which relief can be granted.[75]

Because Jasinski failed to include it in his complaint with the Commission, the court did not consider Jasinski's allegation that the change in Oncor's vegetation management practices constituted a change to its currently effective tariff. Even if the claim had been in his complaint, the court stated that these changes were not required to be included in Oncor's tariff. The tariff does not include tree-trimming clearances as one of its prescribed terms.

The Commission's order grating the motion to dismiss states: "'All other motions, requests for entry, specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are denied.'"[76] Despite Jasinski's allegations otherwise, the court concluded that this language was sufficient as "a ruling on the proposed findings of facts and conclusions of law Jasinski submitted."[77]

The court also held that the Commission's rule 22.181,[78] explicitly allows the Commission to dismiss a complaint without an evidentiary hearing if it finds that the complaint fails to state a claim for which relief can be granted. "Even taking his allegations as true, Jasinski's complaint did not allege actionable conduct by Oncor."[79]

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[73] *Id.* at *5.

[74] *Id.*

[75] *Id.*

[76] *Jasinski v. Pub. Util. Comm'n*, 2017 WL 2628071, at *6.

[77] *Id.*

[78] The Commission has revised rule 22.181. The new version of the rule has an effective date of January 5, 2017 and is not the version considered in this case.

[79] *Jasinski*, No. 03-16-00725-CV, 2017 WL 2628071, at *6.

***City of Dallas v. Sabine River Auth.*, No. 03-15-00371-CV, 2017 WL 2536882 (Tex. App.—Austin June 7, 2017, no pet.).**

The Third Court of Appeals considered the trial court's order granting the Sabine River Authority's plea to the jurisdiction in a case regarding the increased rate the Sabine River Authority (SRA) began charging the City of Dallas (the City) for wholesale water.

Facts

SRA, a political subdivision of the State, provides wholesale raw water to the City pursuant to a set of written contracts, which contain a provision for automatic renewal of a forty-year term. Under the contract, the amount of compensation that SRA receives shall be determined by mutual agreement between the City and SRA, considering the price prevailing in the general area at the time for water of similar quantity, quality, and contract time period.[80]

The City and SRA did not reach an agreement as to the amount of compensation, so SRA's board of directors unilaterally approved a new compensation plan for the next forty-year renewal term. The City filed a petition for review with the Public Utility Commission (the Commission) complaining of the renewal rate and requesting interim rates, disagreeing that the rate had been made in accordance with the contract with SRA.[81] The Commission referred the case to the State Office of Administrative Hearings, and, pursuant to Commission Rule 24.141(d), the Administrative Law Judge issued an order abating the proceedings because the parties did not agree that the rate was charged pursuant to a written contract.[82]

Seeking declarations that 1) the renewal rate set by SRA was not set pursuant to a written contract, and 2) SRA's "'legislative act in the nature of an ordinance or statute setting those rates' was invalid," the City filed suit with the district court.[83] SRA filed a plea to the jurisdiction, asserting governmental immunity. The trial court granted SRA's plea, and the City appealed.

Holding and Analysis

The court determined that SRA, as a political subdivision, has "'governmental immunity from suit unless the Legislature has waived that immunity'"

[80] *City of Dallas v. Sabine River Auth.*, No. 03-15-00371-CV, 2017 WL 2536882, at *1 (Tex. App.—Austin June 7, 2017, no pet.).

[81] *Id.* at *2.

[82] *Id.*

[83] *Id.*

clearly and unambiguously.[84] The City alleged that there was a waiver of SRA's governmental immunity under both the Uniform Declaratory Judgment Act (UDJA) and the Texas Water Code. The court handled these bases for waiver separately.

As part of its analysis of the City's claim that SRA's governmental immunity had been waived under the UDJA, the court noted that the UDJA is not a general waiver of sovereign immunity. While it does contain a limited waiver of immunity, the UDJA "'does not waive immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law'"[85] or for suits based on contract disputes.[86] The court explained that the UDJA "does not create or augment a trial court's subject matter jurisdiction."[87]

The City claimed that its request for declaratory relief fell under the UDJA's waiver of immunity for challenges to the validity of "a statute, ordinance, *or other legislative pronouncement*, and that SRA's action was 'ratemaking,' which is legislative in nature."[88]

The court disagreed, stating that the UDJA does not "expressly waive immunity for challenges to the broader category of 'other legislative pronouncements'" as the City suggested.[89] The term "legislative pronouncement" is one used by the Texas Supreme Court merely to refer to the statutes and ordinances being challenged, and not to expand the UDJA's limited waiver of immunity.[90]

Even if the UDJA's waiver of immunity extended to a broader range of challenges like the City alleged, the court determined that "SRA's act of setting a new rate was not a 'ratemaking' or legislative in nature based on the record . . . ."[91] The court then explained the types of actions administrative agencies can carry out. If the agency addresses broad questions of public policy and promulgates rules for future application to all or some of those subject to its power, then the agency may act in a legislative capacity. However, if the

[84] *Id.*

[85] *City of Dallas*, 2017 WL 2536882, at *3 (quoting *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 Tex. 2011).

[86] *Id.*

[87] *Id.*

[88] *Id.* at *4.

[89] *Id.* (citing Tex. Civ. Prac. & Rem Code § 37.006(b)).

[90] *City of Dallas*, 2017 WL 2536882, at *4.

[91] *Id.* at *5.

agency determines facts that concern only the parties immediately affected, then the administrative agency has acted in a judicial capacity. [92]

While ratemaking has been likened to a legislative activity carried out by an administrative agency, the court concluded that in this case, SRA's action was not a ratemaking. SRA's action was an approval of a compensation rate under a contract renewal with the City and only affected the sale of water from SRA to the City, with no impact on other purchasers of wholesale water from SRA.[93]

The City also sought declarations that SRA's unilateral change to the rate, instead of by agreement, was a breach of the contract. However, the court held that the UDJA does not waive immunity for suits for breach of contract or to enforce performance under a contract. [94] Therefore, the court held that the UDJA did not waive SRA's immunity from the City's request for declaratory relief. [95]

The court similarly held that the Texas Water Code provisions, which provide for Commission review of the SRA's rate-setting actions, do not create a waiver of immunity. Under Commission Rule 24.131(d), an Administrative Law Judge "may abate a rate-review proceeding for resolution 'by a court of proper jurisdiction' of a dispute between the buyer and seller as to whether the protested rate is charged pursuant to a written contract."[96] The City argued that the Commission's adoption of Rule 24.131(d) constituted a waiver of SRA's governmental immunity. However, the court pointed out that "only the Legislature can waive sovereign immunity" and must do so in clear and unambiguous language.[97] The court concluded that the City had failed to point to a statutory provision granting or identifying any power to the Commission to waive the governmental immunity of SRA.[98] Therefore, the court upheld the district court's grant of SRA's plea to the jurisdiction.

[92] *Id.* (citing *Marcias v. Rylander*, 995 S.W.2d 829, 833 (Tex. App.—Austin 1999, no pet.)).

[93] *Id.*

[94] *Id.* at *6.

[95] *City of Dallas*, 2017 WL 2536882, at *6.

[96] *Id.* (quoting 16 Tex. Admin. Code § 24.131(d)).

[97] *Id.* at *6 (citing Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1, 10-11 (Tex. 2000).

[98] *Id.* at *7.

Isa v. Pub. Util. Comm'n, **No. 06-16-00070-CV, 2017 WL 2299112 (Tex. App.—Texarkana June 6, 2017, pet. denied).**

The Texarkana Court of Appeals considered an appeal from a district court's grant of multiple pleas to the jurisdiction, asserting Appellant's failure to exhaust administrative remedies when he failed to file a motion for rehearing with the Public Utility Commission (the Commission).

<u>Facts</u>

In 2013, Nawaid Isa installed sixty-foot-tall concrete poles with high-efficiency flood lights for use at a cricket field he had built. Isa worked with CenterPoint (the designated transmission and distribution utility) to connect the lighting system to CenterPoint's existing electric delivery system. As a result, CenterPoint installed a utility pole with transformers at a cost to Isa of $3,341. After the installation, Isa selected Ambit, a retail electric provider, to provide his electric service and began receiving electric service in August 2013.[99]

In October, the cricket field's electricity consumption exceeded 10 KVA . This triggered a new service classification under CenterPoint's tariff. As a result of the field's high energy usage, CenterPoint charged Ambit additional charges. These demand charges were then billed to Isa by Ambit beginning in October 2013.[100]

Isa disputed the demand charges and refused to pay them. Isa also refused to pay the demand charges in his November bill and refused to pay any of Ambit's final December bill. In December 2013, Ambit received a drop order from Isa who had switched to a new retail electric provider. As of Isa's final bill, he had refused to pay a total of $2,184.56, which included $1,955.74 in demand charges.[101]

In December 2013, Isa filed an informal complaint with the Commission's Consumer Protection Division, alleging that Ambit and CenterPoint had failed to notify him about demand charges his cricket club began to incur.[102]

After the informal complaint was denied, Isa filed a formal complaint with the Commission against Ambit and CenterPoint, disputing the demand charges. In February 2014, the Commission referred the complaint to the State Office of Administrative

[99] *Isa v. Pub. Util. Comm'n*, No. 06-16-00070-CV, 2017 WL 2299112, at *2 (Tex. App.—Texarkana June 6, 2017, pet. denied).

[100] *Id.*

[101] *Id.*

[102] *Id.*

Hearings (SOAH). Isa subsequently complained of CenterPoint's failure to provide him with information regarding alternative construction options and technology when he originally contracted with CenterPoint.[103]

In three orders, the SOAH Administrative Law Judge (ALJ) granted summary decision in favor of Ambit and CenterPoint on all of Isa's claims, except for his claims regarding demand charges. The ALJ also decided that the only remedy for Isa, if he prevailed on his claims, would be a refund or credit of some or all of the demand charges. But during the litigation, Ambit put a hold on collection activities. After a year, Ambit credited $2,184.56 to satisfy the balance owed on Isa's account and notified Mr. Isa in January 2015. Ambit and CenterPoint filed a joint motion to dismiss his claims as moot.[104]

The ALJ determined Ambit had already made Isa whole, and no additional relief could be awarded even if Isa prevailed on the merits. The matter was dismissed with prejudice.[105]

In June 2015, Isa appealed the ALJ's dismissal order to the Commission. When no Commissioner voted to hear his appeal, Isa's appeal was deemed denied by the Commission.[106]

Isa did not file a motion for rehearing with the Commission. He filed a petition for judicial review of the Commission's final order in Travis County District Court. In September 2016, the district court granted pleas to the jurisdiction filed by the Commission, Ambit, and CenterPoint.[107]

Proceedings of the Commission are governed by the Public Utility Regulatory Act, the Administrative Procedure Act, and the Administrative Code. Any party to a proceeding at the Commission who has exhausted his or her administrative remedies is entitled to judicial review. In order to exhaust remedies, the party seeking judicial review of a Commission decision must have filed a motion for rehearing in the underlying proceeding at the Commission.[108]

The purpose of a motion for rehearing is to provide notice to the agency that 1) the moving party is dissatisfied with its final order, and 2) that an appeal will be prosecuted if the ruling is not changed. Until the party seeking judicial review exhausts his or her administrative

[103] *Id.*

[104] *Isa*, 2017 WL 2299112, at *2.

[105] *Id.* at *3.

[106] *Id.*

[107] *Id.*

[108] *Id.* at *4.

remedies, the trial court lacks subject-matter jurisdiction.[109]

Isa does not contest that the only pleading he filed after the dismissal order was his appeal of the order pursuant to Commission Rule 22.123. However, he argued that this pleading should be construed as a motion for rehearing.[110]

Holding and Analysis

The Third Court of Appeals affirmed the district court's order, granting the pleas to the jurisdiction.

The court determined that Isa's appeal of the dismissal order may not be construed as a motion for rehearing.

Former Commission Rule 22.181 provides two paths to arrive at the same destination. First, if the presiding officer determines the proceeding should be dismissed, she may either prepare a proposal for decision or issue an order that dismisses the proceeding.[111]

If the presiding officer prepares a Proposal for Decision, the Commission reviews it and may vacate or modify the order, remanding the case to the ALJ, issue its order adopting findings and conclusions, and issue an order dismissing the proceedings. The Commission's order is then subject to becoming a final order.[112]

Second, under Commission Rule 22.181, the presiding officer may issue the dismissal order. If that is the case, the rule provides an opportunity for review by the Commission through an appeal pursuant to Commission Rule 22.123.[113]

Under Commission Rule 22.123, Commissioners are sent separate ballots to determine whether they will consider the appeal at an open meeting. If no Commissioner votes to consider the appeal within ten days after the appeal is filed, the appeal is deemed denied.[114]

The court explained that an appeal of a dismissal order serves two purposes. It provides a chance for the Commission to review the order, and "it provides a mechanism that an aggrieved party can use to secure an order of the Commission subject to becoming a final order."[115]

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[109] *Isa*, 2017 WL 2299112, at *4.

[110] *Id.*

[111] *Id.* (citing 16 Tex. Admin. Code § 22.181(a)(3)).

[112] *Id.* at *4 (quoting Tex. Gov't Code 2001.141(a)).

[113] *Id.* (citing 16 Tex. Admin. Code 22.181(a)(4)).

[114] *Isa*, 2017 WL 2299112, at *4.

[115] *Id.* at *5.

The purpose of the motion for rehearing is "to provide notice to the agency that the moving party is dissatisfied with its final order and that an appeal will be prosecuted if the ruling is not changed."[116] In addition, "the agency will have the opportunity to correct any error in its decision or to prepare to defend it."[117]

The court additionally found that Isa failed to meet his burden to show that a motion for rehearing would be futile because he did not demonstrate that such a motion would be denied. "Futility is an exception to the requirement that a party seeking judicial review must exhaust his administrative remedies."[118] However, Isa could not avoid actually exhausting his administrative remedies simply because he thought his motion for rehearing would not be successful without providing supporting evidence.[119]

The court also overruled Isa's arguments regarding the deficiency of the dismissal order. The court explained, although Isa is correct that a final order of the Commission must include findings of fact, the lack of findings will not prevent it from becoming a final order subject to a motion for rehearing. This deficiency should have been set out in a motion for rehearing do that the Commission could have an opportunity to correct the error. Since Isa failed to do so, he failed to preserve any error.[120]

The court overruled Isa's final assertion that Rule 22.123(b)(1) prevents the filing of a motion for rehearing after appealing an ALJ's dismissal of the order. Rule 22.123(b) only applies to interim orders. By contrast, section 22.123(a) applies to appeals from an interim order of a presiding officer, as well as appeals of a presiding officer's dismissal order. Unlike section (b), there is no provision in section (a) which states that an appeal from an ALJ order that is treated as a motion for reconsideration is not subject to a motion for rehearing.[121]

The court determined that because Isa failed to exhaust his administrative remedies, the trial court lacked subject-matter jurisdiction.[122]

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[116] *Id.* (quoting *Suburban Util. Corp. v. Pub. Util. Comm'n*, 652 S.W.3d 358, 364 (Tex. 1983)).

[117] *Id.*

[118] *Id.* at *6 (quoting *Ogletree v. Glen Rose Ind. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App.—Waco 2010, pet. denied)).

[119] *Isa*, 2017 WL 2299112, at *6.

[120] *Id.*

[121] *Id.* at *7.

[122] *Id.* at *8.

***New Talk, Inc. v. Sw. Bell Tel. Co. d/b/a AT&T Texas*, No. 02-15-00199-CV, 2017 WL 1955400 (Tex. App.—Fort Worth May 11, 2017, no pet.).**

In this case, the Fort Worth Court of Appeals considered an allegation of overcharges by New Talk against AT&T Texas.

Facts

Southwestern Bell Telephone Company, d/b/a AT&T Texas (AT&T) is a local-exchange carrier (ILEC) under the Federal Telecommunications Act of 1996. Under the Act, an ILEC must provide "interconnection with the [ILECs] network' for 'the facilities and equipment of any requesting telecommunications carrier.'"[123] This interconnection is done through the use of "interconnection agreements" with competitive local-exchange carriers (CLECs) such as New Talk. All interconnection agreements must be approved by the state regulator— in this case—the Public Utility Commission (the Commission).[124]

In 2008, AT&T and New Talk entered into an interconnection agreement where New Talk agreed to pay AT&T for wholesale resale telecommunication services. The agreement stated that if there was any dispute related to it, including a billing dispute, either party could invoke dispute resolution procedures under Commission rules.[125]

In 2010, a billing dispute arose between AT&T and New Talk, and New Talk filed a complaint with the Commission. Specifically, New Talk argued that AT&T had threatened to discontinue service and requested an injunction against AT&T to prevent their disconnection.[126]

New Talk argued that AT&T owed $2.8 million in promotional credits under their interconnection agreement and had improperly assessed $300,000 in late charges and an improper $260,000 security deposit. New Talk requested the Commission to enter an order directing AT&T to credit the promotional credits and late charges. Commission arbitrators entered an order that prohibited AT&T from disconnecting service to New Talk.[127]

[123] *New Talk, Inc. v. Sw. Bell Tel. Co. d/b/a AT&T Texas*, No. 02-15-00199-CV-2017 WL 1955400, *1 (Tex. App.—Fort Worth May 11, 2017, no pet.) (quoting 47 U.S.C. § 251(c)(2)).

[124] *Id.* at *2.

[125] *Id.* at *1.

[126] *Id.*

[127] *Id.*

In August 2010, New Talk and AT&T agreed to a stay of the Commission proceeding. The stay was eventually lifted, and AT&T counterclaimed based on New Talk's failure to pay for services provided from May 2009 through March 2012. New Talk admitted, in response, it had not paid the full amounts but argued the interconnection agreement permitted it to withhold amounts that were in dispute.[128]

Each party moved for summary decision regarding AT&T's promotional credit calculation methodology. Commission arbitrators determined AT&T's methodology was correct and issued an arbitration award. The award recognized that New Talk had unlawfully withheld payments from AT&T, and based on review of AT&T's evidence, found that AT&T should be awarded a past due amount of $12,255,887.53. Additionally, the arbitrators required AT&T to issue credits for late payment charges after the arbitration award was issued. New Talk did not move for reconsideration and did not seek judicial review of the arbitrators' decision.[129]

New Talk did not pay the arbitration award, and in October 2013, AT&T filed a suit against New Talk for breach of contract and attorney's fees. New Talk filed a counterclaim for breach of contract. AT&T filed a motion to dismiss and moved for summary judgment. New Talk sought a continuance of the summary judgment hearing to conduct discovery. New Talk additionally filed a motion to show authority, arguing that AT&T's attorney was employed by AT&T Services, Inc., and not AT&T and therefore did not have authority to represent AT&T.[130]

The district court heard New Talk's motion to show authority and AT&T's amended motion for summary judgment. At that hearing, the court orally denied New Talk's motion to show authority and denied New Talk's continuance request to conduct discovery. [131]

In December 2014, the district court granted AT&T's summary judgment motion and awarded it $12,224,188.53 in damages. AT&T abandoned its claims for attorney's fees and unjust enrichment.[132]

Holding and Analysis

The Fort Worth Court of Appeals affirmed the decision of the district court, awarding summary judgment in AT&T's favor.

[128] *New Talk, Inc.*, 2017 WL 1955400, at*2.

[129] *Id.*

[130] *Id.* at *2.

[131] *Id.* at *3.

[132] *Id.*

The court overruled New Talk's assertion that because AT&T's trial counsel was employed by a different AT&T entity, it did not have authority to represent AT&T.[133]

A party is permitted to file motion to challenge an attorney's authority under Texas Rule of Civil Procedure 12. That rule places the burden on the challenged attorney bears the burden "to show sufficient authority to prosecute or defend the suit on behalf of the other party.'"[134] If the challenged attorney fails to meet its burden, the trial court must "strike the pleadings if no person who is authorized to prosecute or defend appears."[135]

New Talk did not argue that AT&T had not authorized its trial counsel to represent it. Rather, it argued "Texas law generally prohibits the corporate practice of law, except an employee-attorney is permitted to represent his employer."[136]

In overruling New Talk's claim, the court determined that an attorney employed by one company is not prohibited from representing an affiliate. Whether AT&T Services, Inc. is engaging in the unauthorized practice is irrelevant to the determination of whether its employees have authority to represent AT&T.[137]

New Talk argued that the arbitration award was not entitled to either res judicata or collateral-estoppel effect. New Talk alleged that the Commission lacked jurisdiction over AT&T's claims because it had no authority to award damages for common law causes of action on the interconnection agreement. AT&T recognized that the Commission cannot award money damages, but argued that by its interpretation of the interconnection agreement, the Commission had awarded monetary damages as a result of a billing dispute between the parties.[138]

The court recognized the Commission's authority to enforce the interconnection agreement when disputes arise about its meaning or effect. Further, the Commission has primary jurisdiction over the validity and enforceability of interconnection agreements between ILECs and CLECs.[139] The court also recognized that the agreement itself stated that either party could invoke

133 *Id.*

134 *New Talk, Inc.*, 2017 WL 1955400, at *3.

135 *Id.* (quoting Tex. R. Civ. P. 12).

136 *Id.*

137 *Id.* at *3-4.

138 *Id.* at *5.

139 *New Talk, Inc.*, 2017 WL 1955400, at *6.

dispute resolution procedures to resolve billing disputes.[140]

The court concluded that because the Commission had authority to interpret and enforce the interconnection agreement, the Commission had concomitant jurisdiction to calculate the amounts due under that agreement.[141]

In overruling New Talk's next argument (that the Commission's award was not final or binding and, therefore, could not have a res-judicata effect) the court explained that when an administrative agency acts in a judicial capacity and resolves disputed facts before it, res judicata bars later lawsuits involving those same facts. Here, the court determined the arbitration award was entitled to res-judicata effect. "[The Commission], acting in a judicial capacity, resolved disputed fact issues properly AT&T and New Talk had an adequate opportunity to-and did-litigate before the [Commission]."[142]

The court also overruled New Talk's argument that it was improperly denied a jury trial. In this case, the Commission did not impose or award damages but rather, interpreted the interconnection agreement and determined the balance due.[143]

The court held res judicata applies —AT&T established as a matter of law, that the Commission's award was a prior, final judgment on the merits by a court of competent jurisdiction. Next, the court found that AT&T had established the essential elements of its breach of contract claim. The court stated that it need not address the trial court's grant of summary judgment on collateral estoppel grounds because summary judgment had been properly granted on AT&T's res judicata grounds.[144]

The court additionally overruled New Talk's defense that claims were time-barred because New Talk had failed to raise a fact issue or prove each element of the limitations defense.[145]

Finally, the court overruled New Talk's discovery issues, determining that freezing discovery was harmless.[146]

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[140] *Id.*

[141] *Id.*

[142] *Id.* at *7.

[143] *Id.* at *8.

[144] *New Talk, Inc.*, 2017 WL 1955400, at *9.

[145] *Id.*

[146] *Id.* at *10.

Chisholm Trail SUD Stakeholders Grp. v. Chisholm Trail Special Util. Dist., **No. 03-16-00214-CV, 2017 WL 2062258 (Tex. App.—Austin May 11, 2017, no pet.) (mem. op.).**

The Third Court of Appeals considered an interlocutory order granting pleas to the jurisdiction of Chisholm Trail Special Utility District, its Directors, the City of Georgetown as well as the Public Utility Commission (the Commission) and its Commissioners, in their official capacities.

Facts

Chisholm Trail Special Utility District (the District) acquired a water supply and distribution utility system that served customers in Burnet, Bell, and Williamson counties. The District and the City of Georgetown (the City) entered into an asset transfer and utility system consolidation agreement. In exchange for the District's agreement to transfer all assets, except $500,000 in cash, the parties agreed to use their best efforts to obtain approval of the transfer of the District's certificate of convenience and necessity (CCN) to the City. Under the terms of that agreement, the parties filed an application for transfer. That application was transferred to the State Office of Administrative Hearings (SOAH).[147]

In September 2014, the City and the District entered into a first amendment to the asset transfer and utility system agreement. In that agreement, the parties agreed it was in the best interest of the parties for the District to maintain the CCN at closing and thereafter. In return, the City agreed to certain responsibilities of operating and maintaining the water utility system.[148]

In July 2015, the contested case hearing for the CCN transfer application occurred. The Stakeholders Group (a nonprofit group of residents and landowners in Bell, Burnet, and Williamson counties) were not a part of the contested case hearing. After the hearing had concluded, but before the Commission issued its final order, the Stakeholders Group filed suit against the District, the District's Directors in their official capacities, the City, and the Commission, challenging the transfer of the District's water utility assets and certified service area. The Stakeholders Group alleged ultra vires conduct and sought declaratory and injunctive relief under the Uniform Declaratory Judgment Act (UDJA).[149]

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[147] *Chisholm Trail SUD Stakeholders Group v. Chisholm Trail Special Utility District*, No. 03-16-00214-CV, 2017 WL 2062258, *1 (Tex. App.—Austin May 11, 2017, no pet.).

[148] *Id.*

[149] *Id.* at *2.

The District and its Directors, the City, and the Commission subsequently filed pleas to the jurisdiction. The district court granted the pleas.[150]

Holding and Analysis

The Third Court of Appeals overruled the Stakeholders Groups' issue and affirmed the district court's order, which granted the pleas to the jurisdiction.[151]

The Stakeholders Group argued that the district court erred in granting the pleas because its pleadings alleged facts that affirmatively showed the trial court had jurisdiction over its claims.[152]

"'A plea to the jurisdiction challenges the court's authority to decide a case.'"[153] Governmental immunity precludes suits against political subdivisions of the State including the City and the District in this case. This deprives the court of subject matter jurisdiction. Without an express waiver, sovereign immunity will normally deprive the court of subject matter jurisdiction over agencies, such as the Commission.[154] The court noted the Stakeholders Groups' claims were brought under the UDJA, but the UDJA does not create or augment a trial court's subject matter jurisdiction. Rather, the UDJA is "'merely a procedural device for deciding cases already within a court's jurisdiction.'"[155]

The Stakeholders Group argued the district court had jurisdiction over its claims under article III, section 52(a) of the Texas Constitution. Section 52(a) provides a right of action against the government for violations of that provision without a need for a waiver of sovereign immunity.[156]

The Stakeholders Group argued the agreements were void and violated section 52(a). It argued when a political subdivision transfers funds, it must be for a public purpose, with a clear public benefit in return. In order to be in compliance with section 52(a), a district court must retain some degree of control over the contract's performance.[157]

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[150] *Id.* at *2-3.

[151] *Id.* at *11.

[152] *Chisholm Trail SUD Stakeholders Group*, 2017 WL 2062258, at *1.

[153] *Id.* at *4 (quoting *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 149 (Tex. 2012)).

[154] *Id.*

[155] *Id.* at *5 (citing *Tex. Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)).

[156] *Id.* at *3.

[157] *Chisholm Trail SUD Stakeholders Group*, 2017

The court agreed with the Stakeholders Group concluded that governmental immunity does not bar claims, which allege constitutional violations and seeking equitable remedies. The court next turned to the Stakeholders Groups' declaration that the District transferred its assets in violation of article III, section 52 of the Texas Constitution.

The court disagreed with the assertion that the District did not receive consideration from the agreements. The court determined that in exchange for the transfer of the District's assets, the City assumed the District's liabilities and obligations to provide water and sewer service.[158]

The agreements between the City and the District were for public purposes. The court found that "the Stakeholders Group failed to allege un-negated facts that would actually constitute a constitutional violation under article III, section 52(a) to establish the trial court's jurisdiction over this claim."[159]

In overruling the Stakeholder Groups' claims against the Commission and its Commissioners, the court concluded, that because the Commission has the express authority to grant, revoke, and amend CCNs, the Commission's final order could not be subject to collateral attack. Further, the Stakeholder Group did not file a motion for rehearing from the final order. Therefore, the final order may not be challenged.[160]

In addition, the court explained, to the extent the Stakeholders Group argued the trial court had jurisdiction because the Stakeholders Group was challenging the Commission's interpretation of the Water Code, the court determined the UDJA does not waive immunity for "bare statutory construction claims," and the retrospective remedy of reversal of the Commission's order is unavailable.[161]

The court additionally overruled the Stakeholder Groups' ultra vires claims against the Directors.[162]

CPS Energy v. Pub. Util. Comm'n, **No. 03-14-00340-CV, 2017 WL 744694 (Tex. App.—Austin Feb. 24, 2017, no pet. h.).**

The Third Court of Appeals considered the rates charged by a municipally owned

WL 2062258, *5.

[158] *Id.* at *6.

[159] *Id.* at *8 (citing *Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (2004)).

[160] *Id.*

[161] *Id.* at *9.

[162] *Chisholm Trail SUD Stakeholders Group*, 2017 WL 2062258, at *10.

utility (MOU), CPS Energy, to telecommunication providers and other entities that attach network facilities to its utility poles.

Facts

This appeal arises from an issue of first impression that addressed the interaction between section 54.204 of the Public Utility Regulatory Act (PURA) and Federal Communication Commission (FCC) rules, federal law, and the scope of jurisdiction of the Public Utility Commission (the Commission) over MOUs.[163]

The dispute in this case arose as a result of legislation that prohibits discrimination by MOUs in favor of or against a certificated telecommunications provider (CTPs).[164] Specifically, section 54.204(c) requires MOUs to charge a rate that does not exceed a maximum-allowable rate and to charge a uniform rate for pole attachments.[165]

CPS Energy is an MOU owned by the City of San Antonio. CPS Energy delivers electricity through the use of distribution lines that are attached to poles it owns in the San Antonio area. Other entities, such as telephone and cable companies (Southwestern Bell Telephone Company, d/b/a AT&T Texas (AT&T) and Time Warner), lease space on CPS Energy's poles to provide service to area-customers.[166]

CPS Energy has agreements (Joint Use Pole Contract Agreement) with both AT&T and Time Warner that govern the use of space on CPS's poles. AT&T's agreement allows AT&T to attach to CPS Energy poles. In exchange for this attachment, AT&T must pay an annual attachment fee of $3.75 per pole. The pole attachment fee could not be adjusted by the agreement, but either party could terminate the agreement with six months notice.[167]

CPS Energy and Time Warner entered into their pole-attachment agreement in 1984. Their agreement allowed Time Warner to provide cable services, and CPS Energy charged Time Warner $3.75 per pole, per year. This rate could be raised with six months notice.[168]

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[163] *CPS Energy v. Pub. Util. Comm'n*, No. 03-14-00340-CV, 2017 WL 744694, at *1 (Tex. App.—Austin Feb. 24, 2017, no pet. h.).

[164] *Id.* (citing Tex. Util. Code § 54.204(c)).

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *CPS Energy*, 2017 WL 744694, at *2.

In 2005, the Texas Legislature amended section 54.204 of PURA and added a uniform rate provision to section 54.204(c). Under the maximum-allowable-rate provision (section 54.204(c)), MOUs could not charge any entity—regardless of the nature of services—a pole-attachment rate that exceeds the fee the MOU could charge under the rules adopted by the FCC pursuant to 47 U.SC. § 224(e). The uniform rate provision, under subsection (c), requires MOUs to charge a single, uniform pole-attachment rate to all entities, despite the type of service carried over the poles.[169]

The FCC adopted a formula, as required by 47 U.S.C. § 224(e), to calculate the maximum allowable pole-attachment rate—"the Telecom Formula."[170] The Telecom Formula is the product of three calculations: a spacing factor; net pole investment; and the carrying charge.

In September 2006, as required by PURA section 54.204(c), CPS Energy charged Time Warner a pole attachment fee based on CPS Energy's calculation under federal law. Beginning in 2007, CPS Energy charged AT&T and Time Warner the same pole attachment rate. In 2009, CPS Energy back-billed AT&T for additional amounts due for September 1, 2006 through December 31, 2006, to comply with the uniform rate provisions of section 54.204(c).[171]

For Test Years 2004-2008/Billing Years 2005-2009, CPS Energy charged AT&T and Time Warner different pole attachment rates. AT&T did not pay CPS Energy fees over $3.75, but Time Warner paid a range of amounts from $13.52 in 2004, to $15.63 in 2007, to $3.75 in 2008. After learning of this billing disparity, Time Warner filed suit in Bexar County District Court against CPS Energy. A month after Time Warner filed suit, CPS Energy filed an enforcement action against both AT&T and Time Warner with the Commission, and the Bexar County suit was abated. CPS Energy also filed suit against AT&T in Bexar County and that suit was also abated.[172]

CPS Energy filed a petition with the Commission that sought an order confirming that the method CPS Energy used to calculate its pole attachment rates was reasonable and consistent with the statute. Additionally, CPS Energy requested that AT&T and Time Warner be ordered to pay all of their outstanding pole attachment fees.[173]

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[169] *Id.*

[170] Tex. Util. Code § 54.204.

[171] *CPS Energy*, 2017 WL 744694, at *3.

[172] *Id.*

[173] *Id.*

The Commission determined it had jurisdiction to decide whether CPS Energy's pole attachment rates complied with PURA, and that CPS Energy had standing to seek a declaratory order as to whether its pole-attachment rates complied with PURA section 54.204. But the Commission dismissed CPS Energy's claims that requested payment of overdue pole-attachment fees for lack of jurisdiction.[174]

After a lengthy hearing, the Commission issued its final order and determined CPS Energy had charged more than the maximum-allowable pole-attachment rate for two years and, had therefore, violated section 54.204's nondiscrimination and uniform-rate provisions.

In its Final Order, the Commission reiterated it did not decide whether existing pole-attachment agreements were contractually valid and enforceable, whether CPS Energy was owed overdue pole-attachment fees, or whether any rates charged by CPS were reasonable. Further, the Commission did not determine the rate CPS Energy should charge for pole attachments.[175]

The district court affirmed the Commission's order in part and reversed it in part. The district court concluded the Commission lacked jurisdiction to make determinations about the following: 1) the existence of or the statute's effect on disputed private pole-attachment agreements; 2) whether there was a breach of contract; and 3) whether discrimination under PURA necessarily caused harm. None of the parties challenged this part of the district court's order.[176]

The district court also reversed the Commission's decision on two Telecom Formula inputs: 1) the Commission's decision to use an average of three attaching entities in its calculation of the pole attachment rate for Billing Years 2005-2010, rather than the FCC's rebuttable presumption of five attaching entities; and 2) the Commission's decision to adopt a rate of return other than the FCC's 11.25% default rate of return for Billing Year 2005. The district court otherwise affirmed the decision of the Commission.[177]

On appeal, CPS Energy raised five issues: 1) the district court's reversal of the Commission's decision to use an average of three attaching entities; 2) the district court's affirmance of several Commission conclusions—that the Commission does not have authority to review and modify CPS Energy's inputs used to calculate the maximum allowable attachment rate; 3) the FCC's 2011

[174] *Id.* at *4.

[175] *Id.*

[176] *Id.* at *5.

[177] *Id.*

amendments to the rules do not automatically apply to section 54.204(c); 4) the Commission exceeded its authority by imposing a requirement that CPS Energy not only charge a uniform rate but also collect a uniform rate; and 5) section 54.204(b)'s nondiscrimination provision does not apply because CPS Energy's pole attachment agreements did not grant consent to use a right of way.[178]

The Commission challenged the district court's reversal of its decisions to use an average of three attaching entities in its calculation for Billing Years 2005-2010 and adopt a rate of return other than FCC's default rate for Billing Year 2005.

AT&T and Time Warner challenged both the reversal of the Commission's decision on the rate of return and the district court's affirmance of the Commission's determination that PURA does not give it jurisdiction to modify the default rate of return.[179]

<u>Holding and Analysis</u>

The court of appeals affirmed in part, reversed in part, dismissed for want of jurisdiction in part, and remanded the case for further proceedings.

The court first considered whether the Commission has the authority to review and modify CPS Energy's inputs used to calculate the maximum allowable pole attachment rate under the Telecom Formula.

Commission's authority to enforce Section 54.204(c).

The court upheld the portion of the district court's judgment affirming the Commission's conclusion it had jurisdiction to review and modify CPS Energy's inputs to the Telecom formula.

The court explained that whether the Commission exceeded its authority when it modified CPS Energy's inputs to the Telecom Formula is, first, a consideration of whether the Legislature expressly gave the Commission the power to do so.[180]

The court determined that the Legislature expressly afforded the Commission broad authority to enforce subsection (c) of section 54.204. That provision establishes that an MOU "may not charge any entity ... a pole attachment rate ... that exceed[s] the fee [it] would be permitted to charge under rules adopted by the FCC under 47 U.S.C. Section 224(e) if [the MOUs'] rates were regulated under federal law

[178] *Id.*

[179] *Id.* at *6.

[180] *CPS Energy*, 2017 WL 744694, at *8.

and the rules of the FCC."[181] "[W]hen the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express duties."[182]

The determination of the ceiling for the pole attachment rate is not the same as setting the rate. Any rate charged by an MOU at or below the maximum-allowable rate complies with section 54.204(c) as long as that rate is uniform to all attaching entities and is applied in a nondiscriminatory manner.[183]

The court concluded that determining and enforcing a rate ceiling is different than setting an initial rate. While MOUs do have the ability to set their own rates, the Commission's modification of CPS Energy's inputs does not exceed the scope of the Commission's jurisdiction over MOUs.[184]

The court determined that by giving the Commission the jurisdiction it needed to enforce the section, and requiring the Commission's enforcement to be directed by federal law and FCC rules, the Legislature expressly determined the Commission would act with the same authority as the FCC in establishing the maximum allowable rate. Therefore, the court concluded, the Commission, like the FCC, may "estimate such costs, values or amounts it considers reasonable" when it applies the Telecom formula to ensure the "maximum just and reasonable rate" as long as the Commission does so with reference to the FCC's rules, regulations, and orders when it applies the Telecom Formula.[185]

Telecom Formula-average number if attaching entities

The court found that the district court erred by reversing the Commission's determination that CPS Energy's average number of attaching entities for Billing Years 2005-2010 was three.[186]

Substantial evidence supported the Commission's underlying finding that CPS Energy's actual data and its valid statistical survey showed an average of three attaching poles per entity. The underlying finding supported the determination that CPS Energy's poles have an average of three attaching

[181] *Id.* (quoting Tex. Util. Code § 54.204).

[182] *Id.* (quoting *Pub. Util. Comm'n v. City Pub. Ser. Bd.*, 535 S.W.3d 310, 316 (2001)).

[183] *Id.*

[184] *Id.* at *9.

[185] *CPS Energy*, 2017 WL 744694, at *9 (citing 47 C.F.R. § 1.1409(c)).

[186] *Id.* at *16.

entities per pole; and substantial evidence supported the Commission's ultimate conclusion that "[t]he inputs set out in the findings of fact are reasonable for use in the Maximum rate formula for test years 2004 through 2009."[187]

Telecom Formula input: the default rate of return

The court affirmed the Commission's decision to apply the 11.25% default rate of return for billing years 2006-2010. But the court also affirmed the district court's judgment reversing the Commission's finding. The court determined the Commission acted arbitrarily and capriciously and abused its discretion when it determined the FCC's default rate of return was the appropriate input for CPS Energy to use in its Telecom Formula for Billing Year 2005.[188]

Federal law and FCC rules relating to pole-attachment rates apply to investor owned utilities, not MOUs. For an investor-owned utility, the rate of return is often, but not always, set as part of the ratemaking process conducted by the Commission. FCC rules provide the rate of return used in the Telecom Formula is "[t]he rate of return authorized for the utility for intrastate service."[189] The rules additionally provide that where there is no state-authorized rate of return, "the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return."[190] In this case, the default rate of return set by the FCC was 11.25%.[191]

The court determined that based on a plain language reading of the rule and the FCC's statements when it adopted the default rate, if CPS Energy were regulated by federal law and FCC rules, the FCC would apply the default rate of return as the input in the Telecom Formula. Further, under the plain language of FCC rules and the FCC's decision, the FCC would not create a rate of return for CPS Energy where none exists. In the absence of a state authorized rate, it would use the default rate.[192]

The FCC considered the possibility that the default rate could have an inequitable result, but it determined the use of the default rate "is an equitable solution" that serves its "policy of using default

[187] *Id.*

[188] *Id.* at *21.

[189] *CPS Energy*, 2017 WL 744694, at *16.

[190] *Id.* at *11 (quoting 47 C.F.R. § 1.1404(g)(1)(x)).

[191] *Id.* at *16.

[192] *Id.* at *19.

rates to expedite [ ]" the calculation of the Telecom Formula. The court held that requiring the Commission to decide what would be an appropriate substitute for the rate of return for each MOU would be contrary to FCC's rules and stated policy.[193]

Charge v. collect

The court reversed the portion of the district court's order that upheld the Commission's conclusion. The court determined the Commission exceeded its statutory authority when it added a requirement not found in the statute " to make a serious effort to collect a uniform rate."[194]

The requirement to charge a uniform rate is a method to ensure an MOU does not discriminate among attaching entities when it charges pole attachment rates. That requirement is not imposed on each attaching entity to pay the same amount charged. Therefore, it was unnecessary for the Commission to enforce a requirement for MOUs to make "a serious effort to collect a uniform rate."[195]

Application of PURA section 54.204(b)

The court reversed the district court's affirmance of the Commission's conclusion that CPS Energy violated section 54.204(b) by charging different rates–except for the time period from September 1, 2006 through December 31, 2006.

Section 54.204 does not require the Commission to follow the FCC's guidance when applying subsection (b), but even if it did, the FCC states "it will carefully scrutinize any differences in rates, terms and conditions in any complaint action, and the burden will be on the utility to demonstrate that any differences are nondiscriminatory."[196]

The court found there was a reasonable basis in the record for the Commission's conclusion that the difference in terms between AT&T and Time Warner was discriminatory. The court affirmed, in part, the Commission's conclusion that CPS Energy violated section 54.204(b) by offering different terms.

The court reversed the Commission's conclusions equating charge and collect. There was no evidence in the record to support a finding that CPS Energy violated subsection (b)'s nondiscriminatory provision by charging different rates from 2007 to 2010. The only period where CPS charged a non-

[193] *Id.*

[194] *CPS Energy*, 2017 WL 744694, at *23.

[195] *Id.*

[196] *Id.* at *28.

uniform rate was from September 1, 2006 though December 31, 2006.[197]

2011 FCC amendments

The court held that whether the 2011 FCC amendments applied to a future proceeding should await resolution of such a proceeding. The court found the issue was not ripe, and it did not have jurisdiction to consider CPS Energy's complaint. The court dismissed the issue for lack of jurisdiction and vacated the portion of the district court's decision affirming the Commission's conclusion.[198]

***Cura-Cruz v. CenterPoint Energy Houston Elec., L.L.C.*, No. 14-15-00632-CV, 2017 WL 1251817 (Tex. App.—Houston [14th Dist.] Feb. 16, 2017, pet. filed).**

The Fourteenth Court of Appeals in Houston considered a negligence action brought by property owners against CenterPoint Houston Electric, LLC (CenterPoint), alleging malfunction in the utility's transformer. Specifically, the court considered whether the trial court abused its discretion by excluding expert testimony of the landowner and whether the trial court committed reversible error by granting the electric company's no-evidence motion for summary judgment.

Facts

In 2010, a fire occurred in Houston that destroyed a building, business, as well as the residence of Elidia Cura-Cruz and Jorge Garcia (Appellants). CenterPoint maintained a light pole that had a transformer mounted on it located between the building and residence. After the fire, the Harris County Fire Marshal's Office determined the fire was likely caused by dry vegetation igniting from a fugitive spark or electrical activity that was the result of an unspecified electrical anomaly from the distribution system.[199]

In 2012, Appellants filed a negligence action, alleging the fire was caused by a malfunction in the transformer that was owned, operated, maintained, and under CenterPoint's exclusive control. Appellants argued the fire and damages that resulted were caused by CenterPoint's failure to properly inspect, maintain, repair, and replace the transformer and the causes of the fire that are basis of the lawsuit. Appellants designated an expert witness to testify about the possible causes of the fire.[200]

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[197] *Id.*

[198] *Id.* at *30.

[199] *Cura-Cruz v. CenterPoint Energy Houston Elec.*, L.L.C., No. 14-15-00632-CV, 2017 WL 1251817, at *1 (Tex. App.—Houston [14th Dist.] Feb. 16, 2017, pet. filed).

[200] *Id.*

CenterPoint filed a motion to exclude the expert's testimony and alleged he was not qualified by education or experience to testify as to the cause of the fire, the workings of the utility transformer at issue, or the standards of care applicable to the utility company.[201]

The district court granted CenterPoint's motion to exclude, and granted CenterPoint's no evidence summary judgment.[202]

Holding and Analysis

The Fourteen Court of Appeals reversed the district court's decision and remanded the case for further proceedings.

A public utility generally has a duty to exercise ordinary and reasonable care, but the degree of care is commensurate with the danger. The "'commensurate with the danger' standard does not impose a higher duty of care; rather, it more fully defines what ordinary care is under the facts presented."[203] Courts additionally examine the language of a utility company's tariff to determine if additional duties or limitations of duties are imposed.[204]

CenterPoint's tariff stated "CenterPoint will construct, own, operate, and maintain its Delivery System in accordance with Good Utility Practice for the Delivery of Electric Power and Energy to Retail Customers that are located within the Company's service territory and served by Competitive Retailers."[205]

"Good Utility Practice" is defined by the tariff as being, "Any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, **or** any of the practices, methods, and acts that, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good utility practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others but rather is intended to include acceptable practices,

[201] *Id.*

[202] *Id.* at *2.

[203] *Id.* at *3 (citing *First Assembly of God v. Tex. Util. Elec. Co.*, 52 S.W.3d 482, 481-82 (Tex. App.—Dallas 2001, no pet.)).

[204] *Cura-Cruz*, 2017 WL 1251817, at *3.

[205] *Id.*

methods, and acts generally accepted in the region."[206]

The court disagreed with CenterPoint's assertion that "Good Utility Practice" was the standard of care relevant to this dispute and that this standard is materially different from ordinary negligence. Good Utility Practice is included in the pro forma tariff created pursuant to Commission Rule 25.214—and is not from Texas statute or case law. This Commission Rule was intended to implement Utilities Code section 39.203, involving transmission and distribution service after deregulation. The rule was not in general meant to be contrary to applicable law.[207]

Additionally, in explanatory comments, the Commission expressed interest in the preservation of the status quo as closely as possible as it relates to exposure to potential liability for companies like CenterPoint in their interactions with customers such as Appellants. The Commission has never expressed intent to alter the standard of care that was established by the courts, nor has the Legislature asked it to do so.[208]

Further, CenterPoint's Tariff specifically states that it was not intended to limit CenterPoint's liability for damages, except as expressly provided in the Tariff. The Court explained that a more specific statutory provision will control over a more general one.[209]

The Court found CenterPoint's Tariff did not create a new or additional standard of care contrary to what already existed under Texas common law. Further, "Good Utilities Practice" does not impose a different standard of care. It more clearly defines what ordinary care is under the facts. However, even if the Tariff had created a new standard of care, the Court found that Appellants' expert witness was qualified to testify regarding that standard.[210]

The court held that Appellants' expert witness demonstrated specialized knowledge derived from specialized education, practical experience, a study of technical works, or a combination of these things that could assist the court in understanding the evidence or in determining a fact in issue, and, therefore, satisfied Texas Rule of Evidence 702.[211]

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[206] *Id.* (quoting 16 Tex. Admin. Code § 25.5(56)).

[207] *Id.*

[208] *Id.*

[209] *Cura-Cruz*, 2017 WL 1251817, at *4.

[210] *Id.*

[211] *Id.* at *7.

As to the second issue, the no-evidence summary judgment, the court determined that Appellants presented more than a scintilla of evidence about CenterPoint's breach of the standard of care. Therefore, the Court held the district court erred in granting summary judgment in CenterPoint's favor.[212]

***City of San Antonio v. Pub. Util. Comm'n*, 506 S.W.3d 630 (Tex. App.—El Paso 2016, no pet.).**

The Eighth Court of Appeals in El Paso considered an appeal raised by City Public Service Board a/k/a CPS Energy (CPS Energy) of the district court's judgment affirming the Public Utility Commission's (the Commission) final order. The order found liability and assessed an administrative penalty against CPS Energy for violating the Wholesale Market Oversight Rule (WMO Rule) issued by the Commission.

<u>Facts</u>

After the Legislature deregulated the production and sale of electricity, it carved out an exception for the transmission of energy. Given the complexity of the transmission grid, the Legislature assigned the task of overseeing and regulating this aspect of the industry to the Commission. The Commission has certified independent organizations to conduct various operations "on its behalf to ensure the 'reliability and adequacy of the regional electrical network' within a particular power region."[213] Consequently, the Electric Reliability Council of Texas (ERCOT) manages the flow of electric power to millions of Texans in its region.[214]

Under the Texas Utilities Code, ERCOT is authorized to adopt rules, called "protocols," subject to the Commission's oversight, to ensure the reliability of the electrical grid within its region.[215] CPS Energy is an entity subject to ERCOT's protocols because it is a market participant—opting to participate in the transmission of energy within the ERCOT region.[216]

If a market participant fails to comply with the ERCOT protocols, it may be subject to Commission investigation, an enforcement action, and administrative penalties under the WMO Rule. The WMO Rule, adopted by the Commission, is a global administrative rule that 1) establishes the standards that

[212] *Id.* at *8.

[213] *City of San Antonio v. Pub. Util. Comm'n*, 506 S.W.3d 630, 635 (Tex. App.—El Paso 2016, no pet.).

[214] *Id.*

[215] *Id.* at 635-36 (citing Tex. Util. Code § 25.503(c)(5) and (6)).

[216] *Id.* at 636.

the Commission will use in monitoring market participants' activities; 2) sets out the duties market participants must follow; 3) requires market participants to be knowledgeable about ERCOT's procedures; and 4) requires all market participants comply with ERCOT's procedures and protocols.[217]

Subsection (f) of the WMO Rule provides an "excuse" from compliance with ERCOT protocols and instructions if relevant conditions exist—namely equipment failure beyond the reasonable control of the market participant, or where compliance would risk safety, reliability, or bodily harm. The WMO Rule also provides two affirmative defenses for market participants to avoid liability for engaging in acts prohibited by the Rule if the participant can establish 1) that its '"conduct served a legitimate business purpose . . . and that it did not know, and could not reasonably anticipate, that its actions would . . . adversely affect the reliability of the regional electric network; or 2) that it 'exercised due diligence to prevent the excluded act or practice.'"[218]

In February 2011, the ERCOT region notified market participants' as well as the Qualified Service Entities, who are certified to provide reserve energy to ERCOT to ensure continuing electric service, of an anticipated cold weather event that could impact electric grid demands.[219] ERCOT made arrangements with Qualified Service Entities, including CPS Energy, to provide ancillary, non-spinning reserve services to balance the grid during the cold weather event. CPS Energy agreed to provide 96 megawatts of non-spinning reserve services through two of its combustion turbines.[220]

On the morning of the cold weather event, due to unprecedented demands on the grid, ERCOT provided instructions to the Qualified Service Entities, including CPS Energy, to deploy their non-spinning reserve services. However, one of CPS Energy's turbines failed to deploy within the 30-minute timeframe, and was not deployed until one and half hours after CPS Energy received the instruction from ERCOT.[221] As a result of other generator failures and CPS Energy's failure, ERCOT had to reduce the demand on the grid, leading to rolling blackouts.[222]

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[217] *Id.* (referencing 16 Tex. Admin. Code § 25.503).

[218] *City of San Antonio*, 506 S.W.3d at 637 (quoting 16 Tex. Admin. Code § 25.503(h)).

[219] *Id.*

[220] *Id.* at 637-38.

[221] *Id.* at 638.

[222] *Id.*

After an investigation and referral to Commission Staff, the Commission conducted its own informal investigation and initiated a formal enforcement proceeding against CPS Energy regarding its compliance with ERCOT protocols.

The matter was referred to the State Office of Administrative Hearings where an Administrative Law Judge (ALJ) concluded, after a hearing, that CPS Energy had violated the ERCOT protocols when its turbine unit failed to deploy within the required timeframe.[223]

The ALJ held that CPS Energy was not excused from compliance based on the exceptions under the WMO Rule because of the equipment failure, and CPS Energy had failed to establish that its non-compliance resulted from any health and safety concerns.[224] The ALJ questioned whether CPS Energy had provided adequate staffing given the nature of ERCOT's request and the cold weather event. Because of the serious nature of the violations and failure to provide the reserve services, the ALJ recommended the maximum penalty.

The Commission subsequently imposed the maximum administrative penalty, and found that CPS Energy had not only violated ERCOT protocols, but also failed to meet its burden of proof (by a preponderance of the evidence) that it should have been excused from compliance.[225] CPS Energy sought judicial review, and the Travis County district court affirmed the Commission's final order. CPS Energy appealed, challenging the Commission's order.

<u>Holding and Analysis</u>

CPS Energy claimed that the Commission 1) misinterpreted or misapplied the WMO Rule in a manner inconsistent with a prior Austin Court of Appeals' decision; 2) formulated a new interpretation of the WMO Rule and applied it without giving CPS Energy "fair notice;" and 3) applied the WMO Rule in a manner that was unreasonable, arbitrary, and capricious. CPS Energy also argued that the Commission's order was not supported by substantial evidence.

The first issue the court discussed was whether the Commission's application and interpretation of the WMO Rule violated CPS Energy's due process right to fair notice. The court disagreed with CPS Energy and found that it was on notice that its conduct in February could subject it to liability. After discussing the Third Court of Appeals' decision in *TXU Generation*, the court held that the Commission interpreted the WMO Rule in a manner consistent with the *TXU*

[223] *Id.* at 643.

[224] *Id.* at 643-44.

[225] *City of San Antonio*, 506 S.W.3d at 644-45.

Generation case and the plain language of the rule itself.[226] The *TXU Generation* case dealt with the interpretation of subsection (g) of the WMO Rule, but also discussed subsection (h), which provides market participants with two affirmative defenses for a violation of subsection (g).[227] Here, CPS Energy was charged with a violation of subsection (f), not subsection (g), as discussed in *TXU Generation*. The court held that subsection (f) "clearly and in plain language informs a market participant that it must 'comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the Commission.'"[228]

The court stated that the real issue in this case was whether CPS Energy was on notice of what type of situation would cause it to be excused from its duty under the ERCOT protocols.[229] The two provisions of the WMO Rule that CPS Energy could have relied on to seek excuse are 1) the two affirmative defenses in subsection (h), addressed in the *TXU Generation* opinion—which may excuse a violation if the market participant can show that it used "due diligence" to avoid the violation; and 2) the excuse provisions in subsection (f), which provide for excuses based on equipment failure beyond the reasonable control of the market participant and the other excuses for health, safety, and environmental concerns.[230]

CPS Energy did not focus on the affirmative defenses in subsection (h), but instead argued for the application of the excuses set forth in subsection (f). The court pointed out that the *TXU Generation* case focused on affirmative defenses in subsection (h), and therefore, contrary to CPS Energy's arguments, the analysis in the case was distinct from that in *TXU Generation*.

Turning to whether CPS Energy's equipment failure was "foreseeable," the court held that CPS Energy's argument was too narrow and was contrary to the WMO Rule. The focus was not on whether a piece of equipment might fail, but rather, "whether the market participant could have 'reasonably anticipate[d] that its actions would . . . adversely affect the reliability of the regional electric network[.]'"[231] The

[226] *Id.* at 647(referencing *TXU Generation Co., L.P. v. Pub. Util. Comm'n*, 165 S.W.3d 821 (Tex. App.—Austin 2005, pet. denied).

[227] *Id.* at 648 (citing *TXU Generation Co., L.P.*, 165 S.W.3d at 840)).

[228] *Id.* at 649 (quoting 16 Tex. Admin. Code § 25.503(f)).

[229] *Id.*

[230] *Id.*

[231] *City of San Antonio*, 506 S.W.3d at 650 (quoting 16 Tex. Admin. Code § 25.503 (h)).

court concluded that was the real question in analyzing CPS Energy's actions, and under this analysis, the Commission had presented substantial evidence that CPS Energy could have "reasonably anticipated" that its actions in staffing its plant prior to the cold weather event could have adversely affected the grid.[232] The court discussed testimony at the administrative hearing that more staff was required at the plant during the cold weather event and noted that there was no dispute among the witnesses at the administrative hearing that CPS Energy could have reasonably anticipated that it would encounter equipment failures because its plant was not rated for the projected cold-weather temperatures.[233] Most importantly, CPS Energy promised ERCOT that it would provide the reserve services during the cold weather event.[234] CPS Energy knew that if it did not provide the non-spinning reserve services, that the grid could be adversely affected.

In evaluating whether CPS Energy exercised due diligence under the excuse in subsection (h), the court held that the Commission was "entitled to consider not only whether CPS Energy took reasonable steps to prepare its equipment for the cold weather event, but also whether it took reasonable steps to ensure that its plant was adequately staffed for that event."[235] The court once again pointed out that CPS Energy voluntarily promised to provide the reserve services to the ERCOT at the specified time and date, therefore it was "incumbent upon CPS Energy to use due diligence to ensure that it would have an adequate staff to meet its obligations, and [ ] avoid an ERCOT protocol violation."[236] Even though CPS Energy argued that its equipment was maintained soundly, the court held that the provider must be held accountable for its lack of staffing. Given that the present case involved abnormal operating conditions, and that CPS Energy was aware days in advance of the unprecedented weather conditions, the court held that CPS Energy did not meet the standard needed. The Commission was within its authority (given to it by the Legislature in the WMO Rule) when it made the determination regarding the sufficiency of CPS Energy's staffing, and this interpretation of the rule did not impose a "strict liability" standard on market participants, as CPS Energy argued.[237]

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[232] *Id.* at 650-51.

[233] *Id.*

[234] *Id.*

[235] *Id.* at 651.

[236] *Id.*

[237] *City of San Antonio,* 506 S.W.3d at 652-53.

The second issue the court considered in this case was whether the equipment failure was beyond CPS Energy's reasonable control and if this excused CPS Energy from complying with the ERCOT protocol.[238] While the Commission has the initial burden of demonstrating the market participant's violation of the WMO Rule, CPS Energy has the burden of establishing an excuse under subsection (f) or any other type of affirmative defense under subsection (h) of the Rule.[239] The court held that CPS Energy's duties did not end with taking precautions and adequately maintaining its equipment—the Commission was entitled to look at the steps CPS Energy took once the plant began experiencing freeze issues and startup failures.[240] CPS Energy could have taken additional steps to ensure the timely deployment of its turbine units, including calling for additional staff once freeze issues began, or it could have assigned an employee to inspect the malfunctioning units before the ERCOT instruction was given.[241]

The court pointed out the "continuing nature of CPS Energy's duties" during the cold weather event, and while CPS Energy may have been entitled to an excuse for compliance when the equipment failure initially occurred, subsection (f) states that "the excuse does not last forever."[242] The excuse only continues for the duration of time that the equipment failure is beyond the reasonable control of the market participant.

The Commission was allowed to make a factual determination regarding the exact time that the equipment failure was no longer beyond CPS's Energy's reasonable control and the steps that CPS Energy was required to take to address failure at that point—including having adequate staff on hand, a matter clearly within CPS Energy's control.[243] CPS Energy did not meet its burden of proof in demonstrating that it staffed its plant in accordance with industry standards during the cold weather event.[244] The court concluded that the record, including witness testimony at the hearing, raised questions of whether CPS Energy took all of the steps that were within its reasonable control to prevent and address the startup failure. Therefore, the court held that the Commission properly determined that CPS Energy was not excused from

238 *Id.* at 653.

239 *Id.*

240 *Id.* at 655.

241 *Id.*

242 *City of San Antonio,* 506 S.W.3d. at 656.

243 *Id.*

244 *Id.* at 657.

compliance with the ERCOT protocols under subsection (f) of the WMO Rule.[245]

The third issue the court discussed was whether CPS Energy was excused from complying with the ERCOT protocols because of a health, safety, and environmental excuse under the WMO Rule. CPS Energy contended that if it had attempted to operate the turbine unit with the malfunctioning part, that it would have risked an explosion, destruction of the unit, and health and safety.[246]

However, the Commission expressly found that there was no risk because CPS Energy's unit contained a built-in safety system that would automatically shut down the unit when a safety risk was detected.[247] The court determined that there was no evidence in the record to show that ERCOT or CPS Energy's operators ever suggested an overriding of the safety system was necessary—there were in fact, no safety concerns at the time ERCOT gave its deploy instruction. "[O]verriding the safety mechanism was not CPS Energy's only option to avoid an ERCOT protocol violation"—it could have tested or inspected the unit prior to the anticipated deployment time.[248] Because of insufficient staffing, "CPS Energy was unable or unwilling to take any steps to determine the cause of that failure until hours later."[249]

The court held that the Commission's interpretation of its own rule was reasonable—the Commission has the ability to make a policy determination regarding a market participant's obligation to exercise due diligence in ERCOT protocol compliance before an excuse based on health, safety, or environmental concerns can be raised.[250] CPS Energy could have avoided safety issues if it had used due diligence by testing or inspecting prior to the initial startup. It had a continuing duty to ERCOT that did not end with the first interruption by the safety unit, and it was obligated to exercise due diligence in addressing any problems as quickly as possible, but did not do so.[251]

Concluding that these obligations were clearly within the plain language of the WMO Rule, the court upheld the Commission's interpretation of its WMO Rule and rejection of CPS

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *City of San Antonio*, 506 S.W.3d at 659-60.

[249] *Id.* at 660.

[250] *Id.*

[251] *Id.* at 661-62.

Energy's claim that its noncompliance was excused because of health, safety, or environmental concerns.

The fourth issue concerned whether CPS Energy was excused from compliance with ERCOT protocols based on the exemptions in the protocols themselves. The court held that CPS Energy was not entitled to relief under these ERCOT protocols regarding operating limits because they were not applicable here.[252]

One of the ERCOT protocols that CPS Energy sought exemption under relates to restrictions the market participant has placed on its own equipment to ensure its safety and provides a list of limits that relate to the unit's operating capabilities.[253] The market participant must notify ERCOT of any limitations on the participant's system that may affect ERCOT Dispatch Instructions.[254]

The court, in keeping with the Commission's conclusion, found that CPS Energy had not placed any "restrictions" on its equipment that were contemplated in the ERCOT protocol it cited, and it did not notify the Commission of any "equipment operating limits" described in the protocols.[255] Therefore, the court rejected CPS Energy's claim that its noncompliance was excused under this protocol.

Citing to another protocol, CPS Energy stated that its noncompliant actions were excused because deploying the unit without it being fully functional would have caused undue bodily harm or undue damage to the equipment.[256] However, the Commission pointed out that this protocol "applies only when the market participant makes a decision based on its 'sole and reasonable judgement' that compliance with an ERCOT instruction would cause a risk of that nature."[257]

In this case, the court held that CPS Energy did not make this sort of judgment in refusing to comply with ERCOT's deployment instruction—the turbine unit had automatically shut down because of an equipment failure.[258] CPS Energy did not use "sole and reasonable judgment" because it continued to try starting the unit up, "with no apparent

[252] *Id.* at 662.

[253] *City of San Antonio*, 506 S.W.3d at 662.

[254] *Id.* at 663.

[255] *Id.*

[256] *Id.*

[257] *Id.* (quoting ERCOT Protocol 6.5.7.9(1)).

[258] *City of San Antonio*, 506 S.W.3d at 663.

concern that it might need to investigate any safety issues before doing so."[259]

The court noted that CPS Energy "failed to notify ERCOT that it was relying on this provision, which is a requirement under the protocol. The notice that CPS Energy cites to giving ERCOT (a conversation between its control room operator and the ERCOT operator) did not qualify under the protocol because CPS Energy "had not made such a judgment" regarding the safety issue. "Instead, the undisputed evidence demonstrated that CPS Energy . . . continue[d] trying to start the unit, [ ] expressed no concern to the ERCOT operator that doing so might cause any type of safety or health risk," and did not address the root cause of the startup failure over an hour later.[260] These facts weakened "any contention that CPS Energy believed, in its reasonable judgment, that continuing" to start the unit would have created an undue safety risk.[261] As a result, CPS Energy was entitled to rely on the provision of the ERCOT protocol exempting liability for violating the WMO Rule.

[259] *Id.*

[260] *Id.* at 664-65.

[261] *Id.* at 665.