

ORAL ARGUMENT – 12/6/00
00-0156
PUC V. CITY PUBLIC SERVICE BOARD

MORGAN: This case concerns regulation into high energy electric transmission grid which covers most of the state. I brought with me a diagram of that grid in the event the discussion of the underlying facts might be helpful to the court.

The question presented today is really rather a straightforward matter of the statutory construction. At issue is whether the PUC has statutory authority to adopt a rule establishing the method for determining the rates that electric utilities will charge and pay each other to move power over that grid?

Nothing in that rule actually establishes, sets those rates, but the rule does contemplate that the rates will be set in contested case proceedings. The CA focused on that point when it validated the rule on a single ground, holding that the commission has no authority to set rates for transmission service. And instead read the statute to direct the commission to _____ federal approach to regulating transmission service, which approach the lower court interpreted to consign the commission to the role of an arbitrary of disputes under privately negotiated contracts.

I will address the first point, the lower court's misreading of the commission's statutory authority. Ms. Sterling will address the second, the court's misunderstanding of the federal model.

Perhaps the most telling thing about the opinion published below is that neither respondent defends its central holding. Both briefs admit that it is wrong on that point. Both briefs admit the commission now has and has always had statutory authority to set rates for wholesale transmission service for utilities under its jurisdiction.

HECHT: But not this way they say. Not statewide. Always utility specific. Always in contested case hearings.

MORGAN: The rates are set in contested cases.

HECHT: And in only two cases that you or the PUC can even come up with, one LCRA case and the other case.

MORGAN: The underlying question is not the method by which the court can exercise its authority. The lower court said...

HECHT: You mean the PUC?

MORGAN: The commission, the lower court held that the commission has no statutory authority at all to set rates for wholesale transmission service. That all it could do is set rates for retail rates and the only thing that ch. 35 did was authorize the commission to act as an arbiter of

private disputes over individually negotiated transmission services.

HECHT: But even if the CA said that and assuming it was wrong, how does the PUC have historic authority to set statewide rates?

MORGAN: First of all, the rule does not set statewide rates.

HECHT: But if it says you can only charge this much and you know what A is and you know what B is, doesn't it set the rate?

MORGAN: It sets a statewide methodology. And actually the historical approach of this court has been that statewide rules of general applicability are actually preferred, that can be uniformly applied. As indicated in the case that's cited in our briefs. The rates were actually set in individual contested case proceedings for each transmission service provider using the formula, which does apply statewide. None of the respondents are complaining about what they are allowed to charge for transmission service. They are complaining about what they have to pay as customers of transmission service provided by others.

ENOCH: You said this several times that the commission has always had the authority to set rates in a contested proceeding. The South Texas Electric Cooperative exclusively states this, and I glean it from the commission's brief, but it's not entirely clear to me. The authority to set rates is ch. 36. Is that right?

MORGAN: It depends upon whether or not you agree with the lower court that magic words are needed when that is the question of the agency's authority.

ENOCH: Your argument has never been that ch. 35 is a separate grant of rate authority. Your argument has always been that ch. 36 is the rate-making authority of the PUC and that 35 simply carved out what used to be bundled, which was transmission services, and subjected transmission services rate assessment against municipal utility...

MORGAN: That's not quite right. We argue that actually they both authorized the commission to adopt this rule.

ENOCH: So you really do agree that the rule your rate-making that you have done is pursuant to what you believe to be the authority of 35, and that 36 really is no longer a consideration? We are looking solely at 35...

MORGAN: The reason _____ two steps. The first is it presents this question: Does an agency's statutory authority to adopt a rule setting the method for rate-making, is that a special case of statutory construction requiring magic words in which the normal rules of statutory construction do not apply? Because the traditional interpretation of an agency's statutory authority has at least three principles the lower court refused to apply. The first is that the determinative factor is whether the rule...

ENOCH: I'm not asking what standard gets applied to reading 35. I'm trying to understand what your position is about which of these provisions set the rate-making authority. You argue that 35 has to be read in conjunction with 36. The South Texas Electric Cooperative says explicitly that 36 is where the rate-making authority comes in. Both of you argue all 35 did is subject the municipally owned power companies to the rate-making authority of the PUC, and carves out the transmission services that used to be bundled under 36 and identified them as the thing over which the rate-making authority would be exercised.

MORGAN: The first question is whether this is a special case of statutory construction? If it is not in the normal rules of statutory construction apply then the language in ch. 35 right now is enough. If the lower court was right and it is a special case requiring magic words...

ENOCH: I'm not articulating very well. Is it your position that 35 grants rate-making authority to the PUC? In the absence of that, does the PUC have rate-making authority for the wholesale transmission of services?

MORGAN: I think my answer is yes. Ch. 35 under the traditional rules of statutory construction...

ENOCH: But arguing the alternative, if we determine that you do have to have this special authority for 35, then you fall back to 36?

MORGAN: That's exactly right. Under the traditional rules of statutory construction, the language the legislature put in ch. 35 in 1995 is enough. In that chapter that directs the commission to implement the first step in deregulating the electric utility business by ensuring that there was competition in wholesale market by preventing the use of monopoly control of transmission service.

ABBOTT: Don't those traditional rules of statutory interpretation allow us to look at the language used in other provisions and compare and contrast?

MORGAN: Yes.

ABBOTT: My problem, I think you've already kind of touched upon this, but maybe you can clarify it again, and that is the difference in language used in §35.006(a) and 36.001. Basically I'm talking about the problem pointed out by the CA in footnote 16.

MORGAN: I don't have in my recollection what that language is.

ABBOTT: In 35.006(a) it says, the commission shall adopt rules relating to wholesale transmission service rates in access. And then in 36, the regulatory authority may establish and regulate rates for the electric utility and may adopt rules for determining, etc., etc. In other words it seems like what you want to achieve is fairly set out in §36 but not in 35.

MORGAN: Under the traditional, as I was indicating to Justice Enoch, our position is under the traditional rules of statutory construction in an agency's authority, the phrasing in ch. 35

which does as you pointed you directs the commission to adopt rules relating of wholesale transmission service rates and access. It described those rules as transmission pricing and access rules. It directed all utilities to file tariffs implementing such rules. And it contemplated that the commission would review those tariffs.

ABBOTT: Here's my point. Applying traditional and standard rules of statutory interpretation, the legislature was clear in §36 how to achieve what it is that you want to have achieved. However, when they had the same opportunity to be that equally clear in §35, they didn't say the same thing in §35 that you want to achieve.

MORGAN: That presents the second part of this dissected approach, and that is, whether or not the authorizing language the legislature has to repeat in each chapter of the statute. The traditional rule gets read as a whole. Chapter 36 authorizes the commission to set rates for anything that a public utility does. Chapter 35 tells the commission what to do with that authority when the legislature sought to deregulate wholesale pricing and it said for this purpose a public utility includes municipal owned utilities.

ENOCH: On that, let's go back to 36. I must not understand your position. The rate-making the PUC is doing here is done according to the terms of 36. Just 35 makes it applicable to municipal. It already applies to the _____ utilities. Ch. 35 just now makes it applicable to - according to your view - applicable to municipally owned and cooperatives.

MORGAN: That's actually our fall back position.

ENOCH: You just again said, you look at 36 because that's the general grant, and then you look to 35 because there's a specific activity that's occurring here. So let's go to 36. Under ch. 36, can the PUC require utility customers to pay subsidies to another utility customer through the rate making process?

MORGAN: I don't believe so.

ENOCH: 36's rate making is limited to assuring that the costs that are being passed on by the utility to their customers are reasonable, should be recouped, and a reasonable return on investment. There's some rules on what is allowed in the rate.

MORGAN: That's right. What this rule does...

ENOCH: Under rule 36, you mentioned contested case hearings in your opening and throughout. Does rule 36 permit the PUC - well there are tariffs that are filed. There can be contests over the tariffs. Does the PUC have the authority to preset the rate that utilities in general across the state...can the PUC sitting in Austin say, We have determined the average cost throughout the state to provide electricity is X. You have maybe 10% return or 14% return on top of those costs. So we now will set the rate that a utility in Texas can charge their consumers to buy electricity. Could they preset that as to each utility across the state?

MORGAN: I doubt it. Because it's my understanding that the costs have to be assessed per utility and the rates that that utility charges is determined by its individual costs.

ENOCH: Let's go to your argument then that ch. 35 is a separate grant of rate-making authority. If it's a separate grant of rate-making authority, you're relying on the language of they can make rules relating to setting rates.

MORGAN: That's part of it. There is other language and it's referenced to pricing rules and so forth.

ENOCH: According to the PUC's argument, that language "rules relating to setting rates" permits them not only to pass through subsidies based on some sort of formula of peak load usage of a grid, but also permits them to preset a uniform statewide rate.

MORGAN: That's not true on either point.

ENOCH: What is in ch. 35 that permits a postage stamp rate charge and also permits the rate to be set outside the usual case specific contest regarding recovery of the costs of the utility from their consumers?

MORGAN: There's nothing in the statute, at least the chapter at issue here, that specifies the methodology that the commission is to use in its rate-making function.

ENOCH: In 35, I accept you say that 35 gives a separate plan for rate-making authority. On that language are we to assume that the PUC is no longer limited in its rate-making authority as it is otherwise limited under ch. 36?

MORGAN: It's limited by the other provisions in ch. 35. And except to that extent, I would say no, it's not. That there is no subsidy here. You keep hearing this word, and it's a completely inadequate description of how their costs may have increased, their expenses have increased simply because they now have to pay more for excess to this grid than they were paying before. That's just the same as increasing the cost of coal. That's just an expense, as in paper clips or trucking, or anything else. It's just an increase in their expenses. That's not a subsidy.

PHILLIPS: If your interpretation of these statutes is correct, what did the legislature gain with its 1991 amendments?

MORGAN: It told the commission to adopt 100% the methodology that these respondents continue to insist cannot be legally adopted at all consistent with the other provisions in the statute.

PHILLIPS: We're not complaining about 1999, at least not in this proceeding.

MORGAN: You're not. But the point is, that the legislature in 1999 said you're using 70% of a postage stamp here for this system. We want you to use at 100%, and drop this other 30%. And incidentally, the legislature did nothing to change the language that it already authorized the

commission to set rates, and it did nothing to change the language in any of the three provisions that the respondents still insist cannot be reconciled with that approach.

ABBOTT: So are you saying that if we rule against you, we would be undermining the intent of the most recent amendments?

MORGAN: I think there is no question.

BAKER: Does that mean the same thing that we're overruling the intent of the legislature when it passed this act in 1995?

MORGAN: Yes. I believe it does.

BAKER: And there's a line of cases that say when they make these kind of changes it presumes that it's changing the law because they added something to it. What's your answer to that?

MORGAN: My answer to that is at least one of the briefs indicated by the Texas New Mexico Power, and the legislative history here from March 1996 when this rule was adopted, in 1996 and 1997 the legislature received three separate reports describing the methodology that the commission was using. And they did nothing to change its authority. And in 1999 they looked at this and said, Well, we kind of like this postage stamp you're using; we want you to use that 100%. They didn't change the existing language that authorized the commission to set rates.

BAKER: And so your argument would be then, this was the interpretation that the PUC put on its authority to set rates for wholesale transmission services that the legislature acquiesced in that when it got the reports. And finally in 1999 ratified the acquiescence by saying not only do we like 70%, but we want you to do it at 100%. Is that your argument?

MORGAN: We think that's very illuminating what the legislature thought this statute meant.

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STERLING: I would like to begin by answering some of the questions that have been raised. The rules that were adopted do not set any rates. All they do is say this is the methodology. Once we find out the numbers in a rate case...

HECHT: Well that can hardly be taken seriously. If you say this is the formula, and then you know all of the factors, don't you know the answer? How can the commission say we're not setting rates when you've got to do it this way, plug in your pieces and there's the answer?

STERLING: I think you might just as well say, Look the statute already tells us how to set rates in any case because it says you've got to figure out what your investment...that it's the return on your investment plus the expenses. That's a little bit of the methodology. This is a more intense methodology. But it's telling you what you do with the numbers. The rate cases come up with the

precise numbers.

ENOCH: What is the arbitration for?

STERLING: The arbitration was an option that could be used the way that the commission...

ENOCH: What are they going to argue about - the methodology or the numbers that get put into the methodology?

STERLING: The arbitration is once you've already got the tariff on filing you're using it.

ENOCH: But it's preset by the rules and then the amount that will be charged as an access fee is preset by the rule. So how can there be a disagreement among the parties to the contract as to what they are supposed to pay?

STERLING: The amount isn't set by the rule. The rule just says you go through this methodology. You put these numbers in and once you finish - I mean the rule doesn't tell you which numbers. The rule says go have a case, figure out what the numbers are and this is what you do with them to come out with a rate in the contested case proceedings.

ENOCH: What would there be to arbitrate?

STERLING: The PUC cited in their case an AT&T case, which was an example of where there had been a rate case, a rate had been set, and the tariff had been filed and approved, and after that parties came in and said, I think you're misinterpreting this tariff. I think it means something else. I think you owe us a different rate, or we have to pay at a different rate. And there was a dispute about that. What the commission did in its rules is to say those kind of things can be done by dispute and, furthermore, once we've set your rates if you want to change your rates...

ENOCH: The PUC is saying what's going to be paid with the access fee. All that's being discussed is - we take this calculation based on all the usages of all these utilities and we divide it by a certain factor, and that comes up what your assessment is going to be for participating in this grid. That is what you are going to be charged. So that charge gets passed through the customer. The customer says, I disagree with that charge. There is nothing in their arbitration they can change that charge is there?

STERLING: The customer who's important here is the transmission customer. Which would be either probably another utility. So it's not like passed through in the charge. It is the charge to that other utility who's using the transmission services.

HECHT: Is there any dispute about the ERCOT total transmission charges?

STERLING: What they are, they are made up of coming up with what is each transmission...

HECHT: I mean, there is not going to be any litigation over that is there? Isn't that number - don't we know what that number is?

STERLING: No, we don't necessarily know what it is. We have this transmission piece that's been separated out from the rest of the utility, and we have to figure out for this transmission piece just like we would in any rate case, how much did you invest in transmission? what rate of return did you earn on transmission? what are your proper expenses? are they reasonable? are you spending too much? All of those questions you have in any rate case, you would have in the contested cases that the rules provides for where you come up with the numbers.

ENOCH: We're talking about the postage stamp. The postage stamp says regardless of all of that, there's going to be one charge.

STERLING: The numbers that go into the postage stamp come out of that kind of case.

HECHT: I don't see how you can relitigate in case after case after case what the total ERCOT numbers are that you are going to take this utility's percentage of to decide what that utility's charge is for using the system. I don't see how you are going to relitigate in one case, know it really wasn't that total, it was really another. The peak load of the ERCOT is the peak load isn't it? One utility has a contested case, and they prove that the peak load is really only this much, and then another utility has a case and they prove that the peak load is this much.

STERLING: The peak load is not going to change. What's going to change is the numbers that come out. The peak load - the rule says you take the peak load and then you take how much everybody used out of that peak load, but you take that percentage...

HECHT: And none of those are in dispute.

STERLING: Well they weren't even decided in this case. They were decided in another case, but there hasn't been a dispute about that. The thing though is you apply that percentage to a number that was determined in a case where you had to figure out what's the investment? what's the rate of return? what are your expenses? where they reasonable? was it prudent for you to have done these things? All those kinds of issues that are the typical issues you have in any rate case...

ENOCH: That's the assessment that say San Antonio will now have to pay for access to the grid is a function of what its costs are for its _____?

STERLING: No.

ENOCH: One of the critical points that's been raised by the respondents was the fact and the CA that there is no reason for arbitration under ch. 35 if the PUC is going to preset these rates. There is no purpose for the parties to get together and agree that they will pay something else. The PUC is going to dictate what they are going to have pay and that's been a point that was raised by the CA, that's been a point that's been raised here by the respondents and what's been missing in the reply is what you're telling us right now that wait a minute, the assessment isn't set by the PUC, it's not preset, it's done by contested case hearings after there's been a full hearing and the

assessment is based on each particular utility's own costs that are being passed through to its own customers. And I don't understand the postage stamp, the argument of postage stamp was, those costs were never - the reason you used a postage stamp is so that you wouldn't be having to factor in all of the costs of any individual utility. They were all going to pay just one fee regardless of the cost of transmission.

STERLING: Before the rule you had vertically integrated utilities, where one company owned all of its own generation. It owns transmission to get generation to its retail customers. One of the things the rule did that isn't disputed and that in fact everybody agrees was proper, was to do what they called functional unbundling, which is to say you have to take these and treat them like they are different companies, because the whole problem is that you are trying to sell generation and your own transmission, and so you're messing up the rates that way.

When you separate them into separate companies, then this company, the one that's providing the retail service, has to buy transmission service from this one. It also has to buy transmission service from every other company in the grid because the way the grid works, when power is put in it goes everywhere. It doesn't just go on a preset line. Electricity doesn't work that way. So the rule says that these rates are going to be paid by everybody. And one of the things the rule had to decide was, well how much do you pay here? because they weren't treated as separate companies before. There were all one. So once you separate them you have to figure out how much do you pay. The rule sets up a procedure so that this same rate is charged by this transmission company to this retail company and every other transmission customer in ERCOT. The same rate. But this retail company is not just paying this transmission company. It's paying every transmission company in the state.

ENOCH: You said the PUC wants to make sure that the transmission company charges the same rate across the grid. What is there to be arbitrated over that rate by the parties to a particular contract using that transmission?

STERLING: The question is, what is that rate? And that's based on...

ENOCH: But the parties can't arbitrate that rate because the PUC sets the rate.

STERLING: The parties can arbitrate things like, oh there's a provision in here for losses, what are we going to do about that? did I really have spot sales? There are more intricacies to the rule than what we have talked about, what we focused on on here. And certainly they can arbitrate that and the rule...

ENOCH: You're saying there are some other charges that the transmission company can charge other than the access fee and that's what the arbitration provision is for?

STERLING: But the arbitration provision in the rule, in 23.67(m) says that if this transmission company says I have to change - my costs have gone up and I want to change the rates - that before it files a new rate case it is supposed to get to its customers and talk to its customers about wanting to change that rate. That's in 23.67 of the (m) of the rule, which is in our reply brief.

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RESPONDENTS

WAGNER: I am going to speak to the statutory construction issues, and Mr. Schenkkan is going to speak to the illegal subsidy that's been created by this rule.

Judge Enoch I want to try to address your question of this ch. 36 and 35 jurisdiction. Because that is the background that we all need to understand here, the starting point, and that is the distinction that is though historical and current of the PUC's regulation of MOUs and IOUs. The ch. 36 jurisdiction was and is the historical jurisdiction that the PUC has had since 1975 when it was created. Over IOUs, you have to look at the definition there in 36, because it excludes municipals. And clearly under ch. 36, the PUC has had and continues to have broad-rate making jurisdiction over IOUs, including the power to set rates for wholesale transmission. Nobody has questioned that. Not us. But ch. 36 jurisdiction has never included municipals. We are not subject to that broad regulation. Our cities regulate our rates.

The first time, other than some limited appellate jurisdiction that the PUC got any kind of jurisdiction over the municipals, more than 95 PURA amendments on wholesale transmission, but that jurisdiction was not rate-making jurisdiction.

Now the PUC's rule as you've heard some of the discussion goes up and picks up all of these numbers, aggregates it. It sets my municipal rates and aggregates them. Now to do that they've got to have that rate-making power. It can't come from ch. 36. That says, We specifically exclude municipals from there. So we come over, and that's why the CA focused on ch. 35, which is the 205.6 and 205.7, the PURA95 amendments. So we're going to look right there. This is the logical progression we must have to follow this argument through. And what is the best argument that the petitioners have come up with. It is language that says the PUC has the power to make rules "relating to rates".

OWEN: In 35.004(c) it says that if an electric utility provides transmission service to a third-party, the commission shall ensure that it recovers its reasonable costs. How do you do that if you don't have rate-making?

WAGNER: Here's the process. And let me explain to you what the fair reading of the statute did. And it's based in part on the federal models, so I might as well get there and jump ahead. The federal model set up where the utilities went in and pulled apart the transmission costs, and said you put some of these costs in this bucket and you set up your rates. So it was left. And if you read all of 205.7 and you read what the utilities were supposed to do, the PUC can come in and say put these costs in this bucket, do this, do that, then you, transmission utility, set up your rate and you file it as a tariff. And then 205.6 and 205.7 says, those rates must be reasonable. And it gives the PUC the power to judge reasonableness, which under Definbach, we know is not the same as the power to set a rate. And we know under your opinion in Phillips v. Beaver, about 1 year ago, that the legislature is also deemed to know of the prior court precedent in drafting its language of 205.6 and 205.7. And that would include Definbach, which says, When I give you the power to judge the reasonableness, that doesn't mean I'm giving you the power to judge and set a rate. All you can say

is, yes or no.

OWEN: It says ensure that they recover their reasonable costs for providing transmission services.

WAGNER: And that is actually a protection for the utility to make sure that it doesn't under-recover.

ABBOTT: But how do they go about ensuring it?

WAGNER: The rate would be established and calculated by each utility. And it might say, for example, I'm going to take my transmission costs and I'm going to say...

ABBOTT: So that's the utilities insuring it, not the PUC?

WAGNER: And if you read the statute under 205.6, the utility in the first instance does make that determination. It doesn't say that the commission goes in and does that. And it says, you utility then file that 5¢.

OWEN: But if that's inadequate, then how does the commission insure that it must be a different rates so that the utility will recover its reasonable costs?

WAGNER: Well the utility in the first instance, I'm going to submit to you is not going to file a deficient rate.

OWEN: But my question is the same one Judge Abbott asked. That's the utilities standpoint. How does the commission, as it's directed by the legislature, how does it ensure?

WAGNER: It could go in and say, Your rates are not reasonable...

OWEN: Sua sponte.

WAGNER: Well, they have an opportunity to review a tariff when it's filed. And they could go in and look at the tariff.

OWEN: And they just say, that's not it, keep coming, then we'll tell you when it's a reasonable...

WAGNER: Well they could come in and say, You have used the wrong kind of rate analysis to come up with your rate of return, for example. Where does the commission get the power to set a rate in these 95 amendments? And you're trying to focus on the words 'ensure' and I appreciate that. But that doesn't say, You shall go in and fix and establish the rates. As you pointed out Justice Abbott in footnote 16, the legislature knows how to do that. They've known how to do it for 60 years, since the Humble Oil case. The Humble Oil case is on all fours here. And it says, rate-making jurisdiction - it says two things: it cannot be inferred. Now take any of the language

you're reading me or that we have relating to rates and tell me does it say shall fix or establish or shall regulate the rates. It doesn't say that. The only way you can find it is to infer it.

HECHT: The 99 changes indicate that the legislature intended the PUC to make rates.

WAGNER: Absolutely. If you look at 35.004, the new long sentence as I call it, it says you shall price them; and it literally reads the formula they want to use. Then if you go back to section 40.004, it says the PUC shall have the power to regulate rates. They had to say that, and you have to presume they meant to change something. And they did.

HECHT: Why? Why wouldn't you presume that they really thought what they did in 1995 was fine, a dispute arose between postage stamp approach or some other approach, and they decided this way?

WAGNER: I think the presumption works the other way. That is, to say when you enact something you are presume to be making a change. And so I think the way the operation of a presumption works here is when they do something and add some new language it's presumed to be a change, not trying to really state the same thing stated back in 1995.

HECHT: Have there been challenges to the 99 amendments?

WAGNER: No. In terms of the same challenges we are making here, they are not. I think one of the other points I need to make is the 99 legislature can't come back in my opinion and tell us what the 95 legislature meant. I don't think we can do that. I don't think that's ever been a rule of statutory construction. Certainly your legislative acceptance doctrine, we don't go back and retroact and tell one legislature to tell another legislature what you meant.

ABBOTT: What about petitioner's contention and that is, that the 99 amendment would in some respects be for naught if we construe this particular provision in your favor?

WAGNER: That is not at all true. We have a locked-in period here of about 2 years and 8 months. Under the 99 S.B. 7, they have new statutory authority, which we believe and they are not even contesting, grants them the right for the first time to set a municipally owned utility rate and to set it using this statewide aggregation subsidy.

ABBOTT: Let me repeat that for clarification of my understanding and that is the authority the legislature invested to the PUC in 1999 is authorized with regard to municipalities under a 1997 amendment?

WAGNER: No. Not under 97 amendment.

ABBOTT: What is the...

WAGNER: S.B.7. I'm sorry.

ABBOTT: What's the authorizing legislation that allows the PUC to set rates for municipalities?

WAGNER: It is §40.004, which we've cited in our brief, which talks about the PUC and it says in (1i) shall have the power to (1i) to regulate the rates of municipals. It's that simple. It's straightforward.

OWEN: The legislature may have said, Well it's not as clear as it could have been in 1995 what we wrote, so we are going to use different language in 1999. Why do we have to presume that they meant something different rather than a clarification?

WAGNER: I'm not going to tell you you can't presume it. I don't think that is an appropriate way to approach the statutory construction. But even if you want to do that, what happens in this instance, we have the Humble Oil case that has been here for 60 years that says, to grant rate-making power you must grant it in language that is free from doubt and admits of no other reasonable construction. The minute you tell me it is ambiguous, I say the PUC and the petitioners have lost. We don't grant rate-making.

* * *

SCHENKKAN: The difference between what happened in 1999 and what happened in 1996 is that in 1999 the legislature adopted a subsidy. The legislature's power to adopt subsidy requirements...

BAKER: On the structure of this entire rate system, do I understand that the postage stamp methodology basically says regardless of the distance that you're buying this electricity from, how far it comes to get to you, this methodology makes that charge the same statewide. Is that correct?

SCHENKKAN: It averages out everybody's cost statewide. It takes my client, Houston Lighting & Power over here and Rio Grande Electric Co-Op over here and says we are going to pretend that all of your costs are in one big pot and spread them out based on this load ratio. Even though you haven't asked for anything _____.

BAKER: So whatever that is is the facet of the final transmission rate. Is that correct?

SCHENKKAN: Yes.

BAKER: And that's what you are complaining about?

SCHENKKAN: Yes.

BAKER: Is it true then that before the actual rate is set that the utilities involved put together their package of what's going to be stacked on top of this subsidy and they come to the PUC and say, Here's the rate we want because it includes the postage stamp thing, plus our costs, etc. and

expenses, and this is the rate we want. So there's parts to all of this before you finally get to the rate that's ultimately charged. Is that right?

SCHENKKAN: If I'm understanding the question right, no. It's not added on to the postage stamp. It's part of it. But what the PUC said in the order adopting the rule is under a statewide postage stamp pricing method, or a hybrid method, each utility would pay a facility's charge, this excess fee, that includes costs of other utility's transmission operations. Likely a grant. So to do that, the PUC says here is the formula, and then we have to add up everybody's costs of transmission operations and put them in the pot and _____.

BAKER: But that figure doesn't include return on capital investment?

SCHENKKAN: It does.

BAKER: Because it's been unbundled, is that right?

SCHENKKAN: That's right. Unbundling as Mr. Sterling talking about is though the legislation in 1995 _____ three different companies. It did not. It said we're going to separate the costs out...

BAKER: Of each company's three parts?

SCHENKKAN: Of its transmission so that we can enforce the statute that said, The commission will ensure that the cost of the transmission service are recovered from whoever is requesting the transmission service. To do that, we need to make sure each utility, their accountants, have gone through and separated out those transmission costs from those other ones. So that if there is a dispute is your transmission rate properly reflecting your costs of transmission service to the party requesting it? No more, no less. Well you look at it and see.

ABBOTT: And what if it's not? What do they do? And more importantly, what statutory authority authorizes them to do whatever they need to do?

Schenkkan: It depends on whether you're an investor owned utility, or a municipally owned utility. If you're an investor owned utility, then under ch. 36...

SIDE 2 - BAD TAPE