ORAL ARGUMENT – 11/19/03
02-0988
LAKESHORE UTILITY V. TNRCC

DILLAWN: My clients are Lakeshore Utility Co, Century Title Co and Alan and Thelma Whatley. I will refer to them as Lakeshore and the Lakeshore parties as I have in my brief.

I am going to proceed first on the refund issue and whether or not the DC had the jurisdiction to award refunds in this particular case.

I think the posture of this particular issue is somewhat confusing based on the briefs. The commission's brief on the merits basically argue that the commission had a statutory authority to seek an order of refunds at the DC level based on 13.411 of the Texas Water Code.

In Lakeshore's response we argue 1) the commission did not have statutory authority under this particular statute; and 2) that the DC did not have equitable jurisdiction to award refunds under its equity power.

The commission had argued that in its brief on the merits, but as an afterthought it was 3 pages of their 30 page argument.

In the commission's reply to Lakeshore's response, the commission basically abandoned the statutory authority argument and said in effect that this case is not about the commission's statutory authority. It is about the DC's equity jurisdiction, whether or not the DC had the power to fashion an equitable remedy based on the facts of that case.

So the way I see it as it stands now, the commission at least has abandoned the statutory authority argument, and has put all its eggs in one basket into the fact that this is a case that issue is based on strictly whether the DC had the equity jurisdiction to grant an award of refunds.

And that's what I am going to address first. I would seek the court's guidance as far as whether or not the court sees this also as a potential statutory authority argument.

O'NEILL: Aren't those sort of inextricably intertwined? I mean if you have the statutory authority, how far does the equity jurisdiction to enforce that authority go? I don't see them as entirely divorced.

DILLAWN: I agree with that to a certain extent. I think where you're asking the question is, once the equity jurisdiction of the court is invoked by a statutory injunction, what equity power does the court have at that point? I think that originally this case was focused on what the CA

focused on was whether or not this statute itself granted express authority or express from implied authority to the commission to seek refunds through the DC. And I think the CA correctly ruled that this statute, 13.411 of the Texas Water Code did not grant the specific authority, rather expressly applied authority for the commission to seek refunds at the DC level.

O'NEILL: Could you phrase that also as an inability to retroactively require compliance? Your reading is only prospective.

DILLAWN: That's exactly right. And I think if you look at the statute itself, that's exactly - and the CA basically said that the statute, 13.411 was unambiguous. 13.411 basically authorizes the commission to bring two types of actions. The first is an action to enjoin the commencement or continuation of any act that violates ch. 13 of the Water Code or a rule or order of the commission. The other type of action is one to require compliance with ch. 13 of the Water Code or a rule or order of the commission.

The power to bring those two types of action in DC are conditioned on if the commission has reason to believe that _____ is engaged in or about to engage in a violation of the code or a rule or order, or is currently failing to comply with the code or a rule or order. And the CA, again correctly I believe, saw this statute as prospective in nature. It was addressed to current violations of tort - expected current violations, or current noncompliance. It did not address past violations or past noncompliance. Those can be addressed in other enforcement areas of the statute and administratively by the commission. They are not addressed by §13.411 of the Water Code.

And I believe that that's clear. This is a prospective statute. The commission would have it be read very broadly. And to require compliance means that you can go back in time, in this case as far back as almost 20 years, to in their words require compliance and require disgorge of overcharges from many, many years back for past noncompliance.

O'NEILL: So under your reading, a utility would almost be encouraged then to charge rates that exceed the tariff, and as long as the action is pending they can keep those profits until such time as a prospective order is issued. Where is the disincentive to go ahead and go beyond the tariff just until the court gets around to ordering it prospectively?

DILLAWN: I think there are other procedures, there are other remedies that the commission has in its enforcement quiver that they can go after the utility that is overcharging. They can go after them administratively. They can put a trustee in charge. They can take over management for business. There are potential criminal penalties for certain violations. There are other actions that they may take, administratively and through the court, that do not fall under this particular statute.

O'NEILL: So they could require a refund administratively?

DILLAWN: Administratively or they can require...

O'NEILL: So if the commission had ordered the refund back to 1981 that would be enforceable in the DC, which is what the CA said?

DILLAWN: The commission has the power to require a refund. And in fact twice in the 80's they entered an order requiring Lakeshore to make refunds. 13.411 is entitled Action to Enjoin or Require a Compliance. That is the statute that the commission is proceeding under. And that is the statute that we argue and we believe the CA was correct in holding, did not allow the commission to seek an order for refunds.

SMITH: Is there a possibility like a customer class action to get these refunds?

DILLAWN: I think, and that's getting into whether or not there's an equitable remedy, whether the DC could fashion a fashionable remedy. And certainly the customers would have...

SMITH: I mean take the PUC out of it. If the customers brought a private lawsuit against the utility over in Athens that's another enforcement mechanism?

DILLAWN: That's another enforcement mechanism, or I guess what I would term is an adequate remedy of law for the customer to go and sue the water utility in court for any alleged overcharges.

Again, like I say, the Pierce commission is now arguing, and I agree, that these are hard to separate, that the DC has equity jurisdiction to grant the refund. And they ask the court to use as instructive two US SC cases: Porter v Warner v. Warner Holding, which is a 1946 case; and Mitchell v. Robert Demario Jewelry, 1960. In both of those cases a federal agency under a federal injunction statute sought in the case of Porter restitution of rents that were collected in excess of the maximum amount of rents that were allowed under the federal statute. And in Mitchell the secretary of Labor sought reinstatement of wrongfully terminated employees along with back pay and lost wages to those wrongfully terminated employees.

And the US SC in those cases held that once the federal DC's equity jurisdiction was invoked through a statutory injunction it had all its equity powers available to fashion an equitable remedy that was warranted by the facts. And in that case, for example the Mitchell case, it held that the employees were entitled to reinstatement and to back pay, and that those were federal equitable remedies.

Now those cases are distinguishable from the present case. In both the SC when the DC invoked its equitable jurisdiction it balanced the equities for this additional equitable relief. The SC in Porter held that to be sure such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.

In Mitchell the court held that the wrongfully terminated employees effectively had no adequate remedy at law to pursue recovery of their lost wages in these

circumstances. That is different from the case we have today. In this case the commission as the CA held can administratively order refunds. That is an adequate remedy at law. The customers if they feel they are overcharged can pursue a legal remedy in the courts. That is an adequate legal remedy. A statutory injunction does not require a balancing of the equities. Balancing of the equities has no application to a statutory injunction. The statute sets the terms and conditions of the injunction. If there are equities in favor of a utility, in this case we don't balance the equities. The statute controls the injunction.

HECHT: I take it the amount of refunds varies customer by customer as found by the trial judge?

DILLAWN: Yes.

HECHT: What's the range?

DILLAWN: I don't know the answer to that question.

HECHT: It must be around $1,000 apiece just looking at the number.

DILLAWN: Some are more than that, but some I believe are less. This is a different case because there is an adequate legal remedy. There is an adequate remedy for the commission to administratively impose an order for refunds. If there is an adequate legal remedy, equitable remedies have no application. Equitable remedies are imposed when there is not an adequate legal remedy. Statutory injunction is different because the statute controls, whether or not the injunction is imposed or not.

O'NEILL: Would there be any bar to a customer or anyone going before the TNRCC now and seeking a refund of that money? Is there a time limit?

DILLAWN: I don't know the answer. I don't believe that there is any statute of limitations against any administrative agency. However, I believe that there is a case that has come out fairly recently that goes along some type of a latches argument.

O'NEILL: So if we were to determine that all the TC could do in this proceeding was to order the refund from 1989 forward during the pendency of the rate increase request, then there would be nothing to prevent the bringing of an action before the TNRCC for refunds back in 1981?

DILLAWN: Not that I am aware of. Another important point. This court has held that equitable remedies are not as broad basically as what the US SC held in Porter and Mitchell. In the City of Beaumont v. Bullion(?) and O'Bryant v. the City of Midland, this court held that there was not a Bivins(?) type action for violations of the constitution. In other words, there is not a private cause of action for money damages for violations of the constitution. These cases did not prohibit equitable remedies for violations - private cause of action for equitable remedies for violations of

the constitution. But they did prohibit money damages, what they considered to be non equitable remedies.

And in O'Bryant, a very similar case to the Mitchell case, the USSC case in Mitchell, it involved police officers who alleged they were constructively discharged for asserting their right to free speech. And the Austin CA held and it was affirmed by this court that back pay or lost wages of these police officers was not equitable relief that could be sought for a constitutional violation. This court specifically held that reinstatement was an equitable relief that could be sought by the police officers in that case. And that particular case a summary judgment at the TC. District court has said you can't seek money damages - back pay, but you could seek reinstatement. That was affirmed by this court in O'Bryant, 949 S.W.2d 406.

This court has basically held that equitable relief is narrower than what the US SC has held in Porter or Mitchell. This court in Bullion(?) and O'Bryant basically held that equitable relief is limited to non-monetary relief. And applying those holdings to this case, the order for refunds would not be considered equitable relief. It would be considered money damages.

O'NEILL: Is there any way that ordering the refund back to 1981 can affect the tariff?

DILLAWN: Are you talking about effecting today's tariff?

O'NEILL: Yes. If a refund were ordered back to 1981 could it be the basis or subject matter of a new rate case saying that this retroactive refund is going to somehow affect each raise? I guess what I'm getting at is a lot of these cases we get the argument the PUC has exclusive jurisdiction. If anything the DC can do would affect tariff of rate to be charged. And I haven't seen that argument in this case.

DILLAWN: In this particular case a new tariff has already been approved. I believe two tariffs since the 1977 tariff, and the most recent one was 2000-2001. I don't see how that could possibly have an affect on the rates that are approved now.

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RESPONDENT

SECORD: J. O'Neill. I think the answer to the question that you ended Lakeshore's opening with is this. It will affect the tariff if refunds are not ordered. Because what's really going on in this case is retroactive rate making, which is prohibited.

O'NEILL: If it will affect the rate isn't exclusive jurisdiction then with the TNRCC to determine the refund? If it relates to rate setting, then how does the DC have jurisdiction to touch it?

SECORD: I think we're talking just a little bit at cross purposes. I can unravel just a little

bit. The exclusive jurisdiction that I think you're thinking about is the agency's exclusive jurisdiction to set the rate that the utility is allowed to charge. And the effect of no refunds being ordered, whoever orders them, setting aside the question for now, who's going to order them and who has jurisdiction, but if refunds are not ordered, then that 1977 tariff which set them at a total of $800, and which was reaffirmed throughout the 1980's in all of the rate orders that the commission issued will have been modified de facto by the utility giving themselves a self proclaimed rate increase.

O'NEILL: But again doesn't that - since we're talking about defects of actions, if it affects rates isn't that an exclusive utility of the PUC function, or however it affects it?

SECORD: The function that we have exclusive jurisdiction to do, we have done, which is to set the rate. The required compliance from the DC is to get the utility back to that rate. That rate has not changed. That rate remained $800 total from 1977 until the time of trial.

O'NEILL: If the DC orders the refund beyond TNRCC's order back to 1981, is there an argument that somehow future rates will be affected? My understanding is that if rates are any way involved or can be affected, then the TNRCC has exclusive jurisdiction.

SECORD: If I'm understanding your analysis, no. It's that the rate has to be honored and the legislature has given the agency the choice of asking the court to require that compliance. The rate does not change. The legal rate remains the same.

HECHT: What's the choice you say? Going to court or doing it yourself?

SECORD: We can keep it in-house.

HECHT: Why wouldn't you do that?

SECORD: A variety of factors go into forming enforcement discretion: the nature of the violation; how long it's been going on; resources. There are lots of factors that go into an agency deciding whether they are going to keep it in-house and send it to SOA, or go to DC. Remember §13.411(a) of the Water Code is the core enforcement provision, and it covers all the different kinds of wrongs that utilities can do.

HECHT: Are there other instances where you've gone to court to get refunds?

SECORD: This is the only one that I am aware of in which it has been necessary to go this far in order to get refunds.

HECHT: I guess we explored with petitioner whether the customers can sue, but I suppose most of their claims will be time barred?

SECORD: I assumed that they would. There are two tables attached to the judgment that show not just the customers and the refunds but the dates. And I think most of them would be time barred. It's a good thing from our perspective that the customers that will get their refunds if that portion of the 3rd court's judgment is reversed. But that isn't why we went to DC.

HECHT: But this sort of does an in run around the statute of limitations. It's an odd thing that customers couldn't get their own money from petitioner, but that the agency can get the money for them.

SECORD: But our core purpose is not to get the money for the customers. Our core purpose is to get the utility back into compliance with the rates that the agency ordered and they exceeded and gave themselves a raise without agency permission. And to have the customers do it themselves is to require individual solutions to what's a general problem. And it's the commission's problem. The legislature has directed us to set the rates and told us to make sure that they are obeyed, and empowered us in §13.181. It says we have all power of the state to ensure that utilities meet their obligations. Then when you go to §411(a), we are specifically, expressly authorized and given the choice to go to DC. It is not correct that we have abandoned our statutory authority argument, and focused on the DC argument. They are inextricably intertwined.

This case isn't really about agency power. It's about DC powers. But there's no question that the agency has been expressly authorized to go to court, to seek an order requiring compliance with the Water Code, an agency rule, or an agency order. And what the CA did was focus only on that third item and say you have to have an order first.

The CA did not say, if I understand counsel's argument in opening, the CA's decision was characterized as saying that the DC does not have jurisdiction to order refunds. That is not my reading of the CA's opinion. What the court says is the DC can't do it absent an agency order commanding refunds. And we say that's backwards. That's backwards from the normal jurisdictional relationship of the agency and the courts. We see that the Water Code gives us a great deal of power and authority but not over the DC.

O'NEILL: Is it a question of primary jurisdiction though that because of the agency's expertise it should first be before the PUC before asking the TC to as an initial matter impose a....

SECORD: In this case it was. That's the other thing that is troubling about the CA's opinion. It acknowledged but failed to appreciate the importance of the 1983 order commanding refunds. We have ordered them once in 1983 to make refunds of all monies collected above that 1977 tariff authorized amount. And they did not do it.

When it was discovered in the course of this case that they have not done it, and that it had been going on for so long, the agency exercised its enforcement discretion and amended the existing petition and sought enforcement of the 1983 order.

O'NEILL: The 1983 order goes back to how far? Do we need to reach the question of whether the TC can only act on a PUC order? If there is one, we don't need to reach the question?

SECORD: There's two arguments to be made as I read the 1983 order. There's an argument in favor of Lakeshore that is time limited. It is only over charges after 1983. I say it doesn't have to be viewed that way, that there is a - until they have obeyed that 1983 order, there is a continuing obligation to make refunds. That the refund number is bigger now than it was in 1983 is the utility's choice to have continued over charging and not have made the refunds.

But that is another way, another ground upon which the 3rd CA's opinion should be reversed, which is that we were seeking enforcement of the 1983 refunds order.

SCHNEIDER: If we were to affirm the TC and in effect go back to 1981, do you see any due process issues as far as notice, the right to contest those particular rates at that time?

SECORD: I do not because Lakeshore was a party to the 1983 proceeding that resulted from that order. And they did not appeal that 1983 order for refunds. They fully participated in the proceeding that led to it, and they did not seek its reversal.

JEFFERSON: Can you answer why it is not an adequate legal remedy for you to pursue those refunds administratively or through some other mechanism than to sue in DC?

SECORD: We would say it isn't a legal remedy at all, but it is an equitable remedy whoever orders it - agency or court. But more important from a practical standpoint, to require as the 3rd court has done to hem us into only one path, which would be to create an order, and then if it's not obeyed seek enforcement would put us in a due loop where there would always be - I know you all do a lot of rate cases and you are used to the concept of regulatory like(?). Well this would be an enforcement like. There would be a due loop. Agency order issues commanding refunds. That order is not obeyed by the utility. Agency has to go to DC and get a judgment of DC. There will inevitably be a time period between the end of the agency order becoming final, and its enforcement, its final judgment enforcement in DC. We will then have to start again and capture that gap. Now hopefully the gap will get ever narrower. But in a situation like this where you have a utility that has persistently refused to obey the tariff rates, the orders to refund, then that enforcement a way of options that the legislature gave us in §411(a) becomes particularly meaningful to the agency. And that's what happened in this case.

OWEN: Time wise there was this original order requiring refunds was signed and issued in 1983. Is there any limit on how long you can wait to go into court?

SECORD: There is no statute of limitations within the Water Code. It does not run against the state, and we are able to do that. But the CA took the agency somewhat to task in its opinion about waiting so long. And I hope that my brief covers this adequately. But if it does not let me say, that the record in this case indicates that there was actually a very short period of time

between the time the agency ordered refunds in Jan. 1983, then 2 months later in March 1983 there was another proceeding in which Lakeshore was a party, because it participated, called the St. Paul order, where the examiner's report said, Lakeshore testified that they are charging more than on their tariff. That's a violation of, and it sets out two sections of PURA that became the two sections of the Water Code.

In 1984 they came back in and on their 1984 application indicated they were charging within the authorized range. Although the statute of limitations does not run against the state, we don't have to rely on that argument. We did not know. We had every reason to think that they were charging within the authorized range.

When those applications come in and it looks like the utility has heard the message of the examiner, the general response is, Good. Good. They are back on the reservation again. They were not. It was not until the mandate from the 3rd court came back down sending back down the enforcement case to the DC, and the agency began getting ready for trial, that the extent of the tap fee overcharges was discovered. The 1989 order that was administratively appealed the proceeding that underlay that order did not involve tap fees.

In 1981 Lakeshore sought an increase in its tap fee and that was denied. That's the Jan. 1983 order that I talked about. They started charging the rate that they had proposed as their new rate and they were told no in the middle of that 1981 proceeding. There is a Dec.1981 interim rate order of the examiner that puts them back to the 1977 tariff amount of $800. They kept charging. They went through the St. Paul order. They kept charging. They kept charging all the way up to the time of trial, not just 1989.

They have appealed the violations occurring during the 1980's, because during that time period the statute required that for a civil penalty to be attached the violation had to be knowing. And so that's why that's what they've appealed. But they overcharged all the way through. And we submit that that is exactly the kind of situation that the legislature intended for us to exercise our enforcement discretion and say, we are tired of this.

HECHT: Is this power shared by other state agencies, or does it depend on the organic statute?

SECORD: I think it has to depend on the organic statute.

HECHT: So the PUC might or might not be able to do it, or can other state agencies go to court and seek enforcement of their order the same way you're doing in this case?

SECORD: If they have in their organic statute something that reads like §411(a), I would say they would be able to. But my understanding is that agency powers and DC powers are mere images of each other. We have what the legislature has given us. The DC has everything unless the legislature has expressly taken it away. So I would say that an agency would need to have

enforcement authority in its statute and it would also have to have within that enforcement authority the kind of language we have that says you may go to court to require compliance.

WAINWRIGHT: You've characterized your remedy of refunds that you're seeking as equitable remedy irrespective of which entity ______. Address Lakeshore's argument that you have therefore abandoned the argument that you have legal recourse under the statute, and that you're only seeking equitable recourse under the statute?

SECORD: I don't think I understand Lakeshore's argument. Because legal remedy, I think as they are using it, is a sort of catchword for the dividing line between what a court can order at law on money damages, and what a court can order at equity which will sometimes include money if it's money that has to be restored. So we have not abandoned our argument that we can go to court and seek equity. But our argument is that we have the legal authorization from the legislature to make that request.

WAINWRIGHT: Under 13.411, as I understood part of Lakeshore's argument, it was contended that the commission was seeking its recourse based on the inherent equitable authority of the court, not based on a specific legal right under the statute. Are you seeking your remedy under either one or both?

SECORD: I don't know if I've got your question quite right, but I think I know where it's going. Porter is our case, and Porter talks about and parses out the idea that there are common law cause of action for injunctions and statutory. And I think that's where the dots get connected I hope for your question. Our position is that we have that statutory kind of injunctive relief request.

O'NEILL: But would you say that the statutory language "require compliance" gives you the legal remedy in court and that if you're seeking disgorgement of profits, that's the equitable remedy you seek for legal violation?

SECORD: We would say that the entire thing was an equitable remedy, because "require compliance" is going to require an order of the court in equity. It's going to have to be a writ of injunction that runs against a real person. When courts of equity seek to see whether there's an adequate legal remedy they are looking to see whether there are money damages available. And that is not something that's applicable in this kind of case.

WAINWRIGHT: Well the statute reads in part that there's authority to enjoin the commencement or continuation being ____ under required compliance with this chapter. I think in part relator is arguing that language means that you only have authority on refunds going forward prospectively. Where is the authority? Is it from the statute or from the apparent authority of the court in your opinion to seek refunds going backwards in time as opposed to prospectively?

SECORD: It comes from both places. The required compliance language, the metaphysics of this to my way of thinking have to be that the required compliance language looks

backward to past things that the utility has done wrong, which of course have to be corrected in the future. But it also encompasses the inherent authority, all of the inherent equitable jurisdiction of the court. But required compliance is going to have to look backwards.

There is a great case that comes out of Texas...

WAINWRIGHT: So the language that we're talking about is 13.411(a) regarding enjoining the commencement or continuation of the act. Do you agree that that's important language here?

SECORD: Yes I do.

WAINWRIGHT: Do you think that language does not necessarily suggest there's only authority for these matters going forward. You don't think the language is limited to that when it says commencement or continuation?

SECORD: Yes, and it's in the nature of a prohibitory injunction, which stops somebody who is doing something right now, which Lakeshore was.

WAINWRIGHT: So then is equitable authority necessary for you to then seek refunds going backwards in time?

SECORD: Yes.

WAINWRIGHT: That's why you say your action provides both?

SECORD: Yes. And the required compliance language is the retrospective language. There are two things...

PHILLIPS: Without the statutory authorization, would you concede that petitioner is right under Gloriano(?) and O'Bryant that the courts would not have this power?

SECORD: We do not see those cases as being applicable, because those are cases that look to the whole line of cases where this court has said there is no constitutional tort. But, yes, we've got to have .411(a) to go to court.

SMITH: These so called refunds, these are going to the state general fund? They are not going to in anyway make their way back to the customers?

SECORD: They are going to the customers. They do not go to the commission. They go back to the customers. What the commission gets out of this is that our rate is honored, the tariff now will become effective. The statute says that they cannot charge, collect or receive any amounts beyond what we have authorized. Those amounts have to be under collected from them. But the amounts go to the customers. We do not get that money. The general fund does not get that money.

What we get is our regulatory authority is honored, and the utility is brought back into compliance with that rate.

OWEN: But all factual determinations we make by the TC is to whether there's compliance or not, not by the commission. Is that correct? In other words, you will litigate in DC whether the tariff in fact has been complied with?

SECORD: That is correct. And that is the nature of a statutory injunction brought by the government, and this whole business of no equity jurisdiction is incorrect as we set out in our brief. What we have to do in that kind of injunctive request is, we prove the facts that show that they are violating the statutory standard that the legislature set. And that the court is still doing equity and has its inherent equity powers. It's just that as they make knowing and controlling in a Texas ethics(?) state, there are no equities to balance in a situation which the legislature has already established the standard.

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REBUTTAL

DILLAWN: I believe that one point that I would clarify the issue on the statute is if Lakeshore's alleged violations of ________ had continued to say 1995 estopped, then there are continuing violations, there are not current relations, there are no potential violations under which the commission could have gone to court under §13.411. They could not have used 13.411 to address past violations, and past non compliance. They could only do it when it's current, current violations.

It's a very skewed read of this statute. It takes a long stretch to say that this statute could be used to address past violations.

Another point is, we've talked a lot about tariffs and tariff rates. The rates that the commission is referring to are in a portion of tariff. It's called the Scheduled Rates. It would have a sewer tap and a water tap. That is not the only piece of the tariff. The tariff also includes rules, extension, policies and service rates that are basically boiler plate language that the commission requires to be in tariffs. For example, the extension policies in the tariffs specifically states, individual residential customers who place a unique or nonstandard service demand on the system may be charged the actual cost of any additional collection or pumping facility is required over and beyond the standard requirements.

O'NEILL: Where does it say they can do that outside the tariff?

DILLAWN: That is inside the tariff. That is contained within the tariff.

PHILLIPS: But you have to go the commission to get the permission for that, not just make your own decision and hope it never comes up for review.

DILLAWN: I don't believe that's correct. The commission's rules in tap fee in 1989 basically gave a definition of tap fee and ended with other charges such as extension fees, or contributions in aide of construction are not to be included in the tap fee.

O'NEILL: But those fees still have to be approved. The utility can't just decide sue sponte we're going to charge this fee outside the tariff. All fees the utility charge have to be within or expressed or proven _______.

DILLAWN: Not according to this. The tariff would have a scheduled rates for a general tap fee. But there has to be some flexibility. You can't have - if there are ten different size of pumps and ten different charges that could be charged to customers, there has to be some flexibility in the system and there was the tariffs at that time, and continues to be to this day.

PHILLIPS: Haven't you known for almost 20 years the commission doesn't agree with that?

DILLAWN: Lakeshore has known since 1989 that the commission does not agree with its interpretation that these pressure affluent systems were not nonstandard systems. Ninety-five percent of the systems in Texas are gravity force systems. Less than 5% are the pressure affluent systems. All of Lakeshores are pressure affluent because of its proximity to a lake, and there is even pump up to the stations. In 1989 the commission came finally for the first time and said, these are standard within the Lakeshore system. So they are standard systems, and, therefore, you cannot charge additional fees in addition, because it was nonstandard. That's the first time Lakeshore is aware of it. That was upheld by the CA in 1984 saying that this interpretation was not an unreasonable interpretation.

HECHT: If the commission has the authority to seek refunds under this statute, if we think that, because of fashioning equitable remedy in these circumstances, do you still argue that that remedy should not include prejudgment interest and attorney fees? Or do you think that once they can get there to get refunds, they can get those things as well?

DILLAWN: I have a hard time seeing how they could get to the refunds. And I would argue that no, they can't seek prejudgment interest and attorneys fees. Part of the prejudgment interest would be there is a time frame. Why have they taken so long? And the fact that they had argued that Lakeshore had been basically lying to us, I believe is certainly untrue. The tap fees on their rate applications all say, the tap fees are the average of the standard residential connection. Lakeshores considered these to be nonstandard residential tap fees.