



January 2003

Energy Regulation

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Recommended Citation

Gaye White, *Energy Regulation*, 56 SMU L. REV. 1589 (2003)
<https://scholar.smu.edu/smulr/vol56/iss3/18>

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ENERGY REGULATION

Gaye White*

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I. INTRODUCTION

THIS article reviews judicial developments in Texas law relating to the regulation of electric and natural gas utilities from October 1, 2001, through December 31, 2002. The cases examined include decisions of courts of the State of Texas and the Fifth Circuit Court of Appeals, and a majority of the significant cases focus on the effects of deregulation in the electric industry.

II. ELECTRIC UTILITIES

A. DEREGULATION OF THE TEXAS ELECTRICITY MARKET

From 1975 to 1999, the Texas Public Utility Regulatory Act ("PURA") existed to "establish a comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities."¹ Because electric utilities were regional service monopolies, the PURA authorized the Public Utility Commission of Texas ("PUC") to regulate utilities as a substitute for competitive forces. The PUC set rates for electric utilities with

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1. TEX. UTIL. CODE ANN. § 31.001(a) (Vernon 1998).

the objective of giving utilities an opportunity to earn a reasonable rate of return on their investments and recover reasonably incurred expenses, subject to providing just and reasonable rates to retail customers. In 1999, the Texas Legislature amended PURA to deregulate the electricity generation market and to permit certain electricity providers to compete for customers.

On January 1, 2002, the effective date of legislation introducing retail competition, the Texas electric market changed dramatically. The new statutory scheme required the regulated utility industry to be separated, or “unbundled,” into three distinct entities: (1) power generation companies, (2) retail electric providers (“REPs”), and (3) transmission and distribution utilities.² Because it is necessary for the generating companies and retail electric providers to use the existing power lines to move electricity from the plant to the retail customers, the transmission and distribution companies remain monopolies regulated by the PUC.

Today, market forces, instead of government regulation, largely dictate prices for the production and sale of electricity to both wholesale and retail customers. For customers with a peak demand of one megawatt or less, the PUC continues to have a regulated price, called the “price to beat,” available until 2007. The PUC is required to ensure that all customers have access to electricity by designating providers of last resort (“POLR”). All other retail prices are free from PUC regulation or oversight.

B. CHALLENGES TO PUC RULES

1. Price to Beat Rules

In *Reliant Energy, Inc. v. Public Utility Commission of Texas*,³ Reliant challenged the PUC’s authority to promulgate price-to-beat rules that do not ensure an initial fuel factor above market costs. The price-to-beat is the cost at which an affiliated retail electric provider must make electricity available to residential and small commercial customers on a bundled basis. It is comprised of two components, the base rate and the fuel factor rate.⁴

Reliant argued that PUC’s rule 25.41 is void because the PUC failed to include a mechanism to guarantee initial headroom,⁵ and thus failed “to accomplish the legislative goal of promoting competition.”⁶ Section 39.202 of the Texas Utility Code prescribes how the PUC is to determine the price to beat, requiring that it be set at a rate “six percent less than the affiliated electric utility’s corresponding average residential and small

2. *Id.* § 39.051.

3. *Reliant Energy, Inc. v. Pub. Util. Comm’n of Tex.*, 62 S.W.3d 833 (Tex. App.—Austin 2001, no pet.).

4. TEX. UTIL. CODE ANN. § 39.202(a) (Vernon Supp. 2003).

5. Headroom is the margin between the price-to-beat and the new retailer’s costs of providing electricity.

6. *Reliant*, 62 S.W.3d at 837.

commercial rates on a bundled basis that were in effect on January 1, 1999, adjusted to reflect the fuel factor” as determined by the PUC.⁷ Because the statute makes no explicit reference to headroom, it was necessary for the Austin Court of Appeals to examine the entire statutory scheme to determine whether the PUC was required to consider headroom in setting the initial price to beat. The court found that the PUC had the authority to set the initial price to beat and through that authority could ensure adequate headroom. Nothing in the statute, nor in the statutory scheme, *required* the PUC to guarantee new entrants adequate initial headroom to secure a profit.⁸

Reliant also contested the validity of the PUC’s decision to exclude customers served by a POLR from market share calculations when the PUC was determining whether an incumbent utility provider had lost forty percent of its residential and small commercial customers.⁹ Reliant contended that the PURA provides no basis for excluding POLR customers from the target forty percent affiliated REP reduction rate calculation.¹⁰ Reliant argued that rule 25.41 was invalid because the PUC overstepped its authority by exercising an implied power to insert a non-statutory exclusion in the rule. The court reviewed rule 25.41 in conjunction with the general statutory objective of the PURA, which is to facilitate the transition between the regulated and deregulated utility market. The PUC argued that the forty percent provision was intended to be used as an indicator for a functioning competitive market and “that the POLR provision directly serves the legislative purpose of the statute by counting only those customers lost to new REPs through the competitive process.”¹¹ Representative Wolens, one of the sponsors of the 1999 deregulation bill, commented at the House floor discussion on May 20, 1999 that the forty percent provision was to be used as a tool to ascertain market power, stating “[w]e can say that as a matter of market power, if the incumbent loses 40% of their customers, competition begins and then they can lower the price.”¹² The court determined that excluding customers served by a POLR is consistent with the overall legislative scheme of facilitating the competitive market and that the PUC’s action was not incongruent with the legislative purpose of promoting competition.¹³

Reliant also argued that the PUC violated the “reasoned justification” component of the Administrative Procedure Act (“APA”) rulemaking process. One of the stated purposes of the APA is to “provide for public participation in the rulemaking process.”¹⁴ In order to adopt a rule, an agency must provide: (1) public notice, (2) an opportunity for and full

7. TEX. UTIL. CODE ANN. § 39.202 (Vernon Supp. 2003).

8. *Reliant*, 62 S.W.3d at 838.

9. *Id.*

10. *Id.*

11. *Id.* at 839.

12. *Id.*

13. *Id.*

14. TEX. GOV'T CODE ANN. § 2001.001(2) (Vernon 2000).

consideration of comments; and (3) a reasoned justification for the rule enacted.¹⁵ An agency rule not adopted in substantial compliance with the rulemaking provisions of the APA is voidable.¹⁶

Reliant only took issue with the third component of APA rule-making compliance—whether the PUC provided a reasoned justification for rule 25.41.¹⁷ To satisfy the reasoned justification requirement, an agency's order adopting a rule must explain how and why the agency reached its conclusion. "A reasoned justification must include: (1) a summary of comments the agency received from interested parties; (2) a summary of the factual basis for the rule; and (3) the reasons why the agency disagrees with a party's comments."¹⁸ Additionally, "the agency must provide a reasoned justification for the rule as a whole."¹⁹

The court determined that the basis for compliance with the reasoned justification requirement is that the four corners of the agency's final notice "must present the agency's justification in a relatively clear, precise, and logical fashion."²⁰ Further, "an agency's order must accomplish the legislative goals underlying the reasoned justification requirement and come fairly within the character and scope of each of the statute's requirements in specific and unambiguous terms."²¹ The essential legislative objectives of the reasoned justification requirement are "to ensure that the agency fully considered the comments submitted by interested parties and to provide the factual basis and rationality of the rule as determined by the agency."²²

A court reviews the reasoned justification requirement under an "arbitrary and capricious" standard, and there is "no presumption that facts exist to support the agency's order."²³ In applying the arbitrary and capricious test to agency rulemaking, the court determines whether the agency's explanation of the facts and policy concerns it relied upon when it adopted the rule demonstrates that the agency has considered all the issues pertinent to the objectives of the agency's rulemaking authority. In addition, the court looks to whether the agency engaged in reasoned decision making. An agency's decision will be deemed arbitrary if it commits any of the following errors: "(1) omits from its consideration a factor that the Legislature intended the agency to consider in the circumstances; (2) includes in its consideration an irrelevant factor; or (3) reaches a com-

15. *Id.* §§ 2001.023, 2001.029, 2001.033.

16. *Id.* § 2001.035(a).

17. *Reliant*, 62 S.W.3d at 839.

18. § 2001.033(1).

19. *Texas Hosp. Ass'n v. Tex. Workers' Comp. Comm'n*, 911 S.W.2d 884, 886 (Tex. App.—Austin 1995, writ denied) (citing *R.R. Comm'n v. Arco Oil & Gas Co.*, 876 S.W.2d 473, 492 (Tex. App.—Austin 1994, writ denied)).

20. *Arco*, 876 S.W.2d at 492.

21. *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996) (citing *Arco*, 876 S.W.2d at 491).

22. *Reliant*, 62 S.W.3d at 841.

23. *Id.*

pletely unreasonable result after weighing only relevant factors.”²⁴

To determine whether the PUC’s order adopting rule 25.41 satisfies the reasoned justification requirement of the APA, the four corners of the PUC’s order must indicate that the PUC “considered and found facts to support its decision that the initial price-to-beat need not include sufficient headroom to ensure that nonaffiliated REPs would realize a profit.”²⁵ Reliant challenged two elements of the reasoned justification requirement: (1) “a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted” and (2) “the reasons why the agency disagrees with party submissions and proposals.”²⁶ Reliant argued that the PUC’s order failed to demonstrate that it adequately considered whether the lack of an initial headroom amount would ensure a profit margin and encourage competition. The court determined that the following language in the PUC’s order expressly states the reasons why the rule was adopted:

[L]ack of headroom demonstrates that the economics of serving [price-to-beat] customers make[s] it unlikely that . . . customers will benefit from competition. It is illogical to remedy this problem by increasing the [price-to-beat] to a level that exceeds the rate that these customers would have paid with continued regulation in order that they can benefit from competition.²⁷

Rule 25.41 also grants the PUC authority to make fuel factor adjustments in three situations:

(1) if the affiliated REP demonstrates that the existing fuel factor does not adequately reflect significant changes in the market price of natural gas and purchased energy; (2) upon a finding by the PUC that the affiliated REP will be unable to maintain its financial integrity; or (3) the PUC may adjust the price to beat under PURA § 39.262, the ‘true-up’ provision.²⁸

The PUC argued that these options justified “its decision not to increase the initial headroom in the price to beat rule because they provide viable alternatives to setting an artificially high price to beat as a means of ensuring competition.”²⁹ The court held that the PUC’s analysis of “whether other measures would adequately ensure competition” and the PUC’s explanation in its order of why “requiring sufficient initial headroom to ensure profitability is unnecessary to the legislative scheme of developing competition and protecting consumers,” satisfied the reasoned justification requirements.³⁰

24. *Id.*

25. *Id.*

26. *Id.* at 842.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

Reliant also attacked the PUC's order on the grounds that it (1) failed to justify the rejection of an electricity commodity index requested by Reliant and other parties, and (2) disregarded the balanced plan the Legislature designed to encourage competition in the period prior to the 2004 "true-up" and protect affiliated REPs from devastating losses. The PUC provided explanations for why it rejected the proposed electric commodity index, stating:

It is not appropriate to move to such an index until the stranded costs of the affiliated PGC are finalized as any stranded cost charges . . . will not be finalized until stranded costs are finalized. At that time, if the price to beat for an affiliated REP is in danger of being below market because of high market prices for generation, the return of any excess mitigation, or negative stranded costs, can be used to address concerns about headroom and thereby mitigate the effects of high market prices on price to beat customers. Subsection (g)(1)(F) has been added to allow for this transition and prescribes these preconditions and the methods by which an affiliated REP must transition to the use of an electricity index.³¹

The court determined that the reasons provided by the PUC were directly responsive to the concerns expressed by Reliant and other parties. Thus, the court held that the PUC had satisfied the reasoned justification requirement.

2. *Direct Appeal Provision of the PURA*

City Public Service Board of San Antonio v. Public Utility Commission of Texas,³² arises from a dispute over the PUC's efforts to deregulate wholesale energy transmission within the Texas power grid. The City Public Service Board of San Antonio challenged a 1999 PUC rule amending its procedure for setting wholesale electricity transmission rates pursuant to the direct appeal provision of the PURA. The Austin Court of Appeals dismissed the appeal for want of subject-matter jurisdiction. The PURA's direct appeal provision only allows the judicial review process to start in the Court of Appeals when the challenging party contests the *validity* of a competition rule. San Antonio challenged the *application* of the PUC's deregulation policy as undertaken in the rate orders it issued for the years 1999 and 2000.³³

In 1999, as part of its amendment of the PURA, the Texas Legislature "extended the [PUC's] tariff-setting jurisdiction to include municipally owned utilities so that the [PUC] could establish a uniform tariff system for the entire state electricity grid."³⁴ The amendment included a provision that allows "a direct appeal of a competition rule, provided the chal-

31. *Id.*

32. *City Pub. Serv. Bd. of San Antonio v. Pub. Util. Comm'n of Tex.*, 96 S.W.3d 355 (Tex. App.—Austin 2002, no pet.).

33. *Id.* at 361.

34. *Id.* at 357.

lenge is limited to contesting the validity of the rule.”³⁵ Following this amendment, the PUC issued what became known as the “1999 Rule.” This rule established standards for transmission tariffs applicable to both privately and municipally owned utilities. The PUC then adopted two rate orders for San Antonio that were effective for the last four months of 1999 and for the 2000 calendar year.³⁶ San Antonio directly appealed the orders to the Austin Court of Appeals, arguing that the 1999 Rule allowed the PUC, acting through its 1999 and 2000 rate orders, to impermissibly carry forward cost of service figures from an earlier, invalidated proceeding.³⁷

The earlier, invalidated proceeding involved San Antonio’s challenge to a rate order issued by the PUC under the “1996 Rule.”³⁸ This rule was adopted by the PUC in response to a 1995 amendment to the PURA granting the PUC “the authority to approve wholesale transmission tariffs with the goal of eventually deregulating the transmission industry.”³⁹ The 1996 Rule created standards for setting wholesale transmission tariffs for both privately and municipally owned utilities. The Austin Court of Appeals declared the 1996 Rule invalid.⁴⁰ The Texas Supreme Court affirmed the decision in part and reversed in part, holding that while the PUC did have jurisdiction to set rates for privately owned utilities, it did not have jurisdiction to set rates for municipally owned utilities.⁴¹ By the time the appeal had run its course, however, the Texas Legislature had already amended the PURA to extend the jurisdiction of the PUC to include tariff-setting for municipally owned utilities before the supreme court’s decision.⁴²

The 1999 and 2000 rate orders entered by the PUC relied on the total cost of service figure originally formulated in 1997 (in accordance with the later invalidated 1996 Rule). San Antonio made two separate arguments in its challenge to these orders: “(1) the transmission tariffs established by the rate orders are invalid because they incorporate a total cost of service calculated in a 1997 contested case proceeding under the authority of an earlier, invalidated rule, and (2) the 1999 Rule, which controlled both rate-making orders, is itself invalid because it does not specifically prohibit rates from being calculated using figures determined in an earlier proceeding that was later declared invalid.”⁴³ The appeal addressed only the second contention.⁴⁴

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *City Pub. Serv. Bd. of San Antonio v. Pub. Util. Comm’n of Tex.*, 9 S.W.3d 868, 872 (Tex. App.—Austin 2000), *rev’d in part aff’d in part*, 53 S.W.3d 310 (Tex. 2001).

41. *Pub. Util. Comm’n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 321 (Tex. 2001).

42. *City Pub. Serv. Bd. of San Antonio II*, 96 S.W.3d at 357.

43. *Id.* at 357-58.

44. San Antonio’s first argument or basis for challenging the 1999 and 2000 rate orders was brought in *City Pub. Servs. Bd. v. Pub. Util. Comm’n*, No. GV0-00116 (201st Dist. Ct.,

San Antonio argued that the 1999 Rule and the two rate orders constituted a single regulatory act designed to circumvent the earlier limits on the PUC's rate-making authority for municipally owned utilities. However, the focus of the court of appeal's discussion was procedural, centering on whether the PURA's direct appeal provision gave the court of appeals the necessary jurisdiction to hear San Antonio's appeal.⁴⁵ Section 39.001(e) of the PURA states that "[j]udicial review of the *validity* of competition rules shall be commenced in the Court of Appeals for the Third Court of Appeals District."⁴⁶ If a challenge does not fall within this narrow limitation, a party must file a petition for review of an agency's decision in Travis County district court. Other challenges to competition rules must be made in accordance with the provisions of the APA.⁴⁷

The court of appeals first distinguished the basis of a validity challenge from the basis for an applicability challenge. A validity challenge tests a rule on procedural and constitutional grounds while an applicability challenge does not question the overall legitimacy of a rule.⁴⁸ Instead, an applicability challenge provides the party challenging the rule the opportunity to obtain a judicial declaration of the implementation of the rule to its particular fact situation.⁴⁹

The court of appeals also objected to San Antonio's attempt to consolidate the 1999 Rule and the two rate orders into a single regulatory action.⁵⁰ The 1999 Rule provides a guideline for the PUC to follow "in setting transmission tariffs in subsequent proceedings."⁵¹ The 1999 and 2000 rate orders "are the products of such proceedings."⁵² Although the three actions occurred in a relatively short time frame and all affect the manner in which municipal utilities can be compensated for their costs of service, they did not constitute a single rule-making action by the PUC.⁵³

San Antonio argued that the 1999 Rule is "facially invalid because of its silence as to whether it is acceptable to use the 1997 cost of service figures to calculate orders for 1999 and 2000."⁵⁴ If a rule omits necessary material, it prevents the proper application of the rule to affected parties. The PUC did not consider the 1997 cost of service figures in the course of

Travis County, Tex.) (pending) and *City Pub. Servs. Bd. v. Pub. Util. Comm'n*, No. GN0-02343 (353rd Dist. Ct., Travis County, Tex.). Cause number GN0-02343 was consolidated with *Texas Municipal Power Agency v. Pub. Util. Comm'n*, No. 99-14787 (200th Dist. Ct., Travis County, Tex. Oct. 9, 2002) (the PUC's final order in Docket No. 20381 was reversed and remanded to conduct further proceedings consistent with the Texas Supreme Court's opinion in *Pub. Util. Comm'n v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310 (Tex. 2001)).

45. *City Pub. Serv. Bd. of San Antonio II*, 96 S.W.3d at 358.

46. TEX. UTIL. CODE ANN. § 39.001(e) (Vernon Supp. 2003) (emphasis added).

47. *City Pub. Serv. Bd. of San Antonio II*, 96 S.W.3d at 359.

48. See *Eldercare Props., Inc. v. Tex. Dep't of Human Servs.*, 63 S.W.3d 551, 558 (Tex. App.—Austin 2001, pet. denied).

49. *Id.* at 558.

50. *City Pub. Serv. Bd. of San Antonio II*, 96 S.W.3d at 360.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

promulgating the 1999 Rule. It did, however, use the 1997 figures when it applied the 1999 Rule during the 1999 and 2000 rate case proceedings. Therefore, the court determined that San Antonio's challenge to the 1999 Rule was an applicability challenge, and as such, should be brought in a contested case proceeding, not by direct appeal to the court of appeals. Consequently, the court of appeals concluded it had no subject matter jurisdiction under section 39.001(e).⁵⁵

The court of appeals also noted that challenges to the PUC's actions, including rate orders, must be brought under the substantial evidence rule.⁵⁶ This rule provides that a court may determine, on the basis of the agency record, whether there was any reasonable basis for the agency's actions.⁵⁷ "The record available on direct appeal would not allow [the court] to undertake the substantial evidence review as required by law."⁵⁸ Because the PURA's direct appeal provision limits the court to reviewing only the PUC's rule-making record, the court may only look to the notice of the proposed 1999 Rule, the comments of all interested parties, any materials relied upon by the PUC in adopting the 1999 Rule, and the order adopting the 1999 Rule. The relevant records for reviewing the 1999 and 2000 rate orders would only be available in an appeal under the provisions of the APA, not in a direct appeal.⁵⁹

3. *Tariff Approval for Electric Cooperatives*

In *Brazos Electric Power Cooperative, Inc. v. Public Utility Commission*,⁶⁰ a group of electric cooperatives, led by Brazos Electric Power Cooperative, Inc., challenged three rules promulgated by the PUC regarding tariff approval of transmission service. The basis of Brazos' challenge was that the rules in question enlarged the powers of the PUC beyond those conferred upon the agency by the PURA.⁶¹

The first two rules challenged by Brazos require electric cooperatives to obtain tariff approval from the PUC. "Rule 25.191(c) pertains to 'transmission service' provided by transmission service providers ("TSP") and requires that [t]ransmission service shall be provided pursuant to . . . commission-approved tariffs. . . ."⁶²

Rule 25.198(a)-(c) directs as follows regarding the use of ERCOT transmission facilities for the sale of electricity:

55. *Id.*

56. TEX. UTIL. CODE ANN. § 15.001 (Vernon 1998).

57. *City Pub. Serv. Bd. of San Antonio II*, 96 S.W.3d at 360.

58. *Id.*

59. *Id.*

60. *Brazos Elec. Power Coop., Inc. v. Pub. Util. Comm'n*, No. 03-01-00357 (Tex. App.—Austin Dec. 19, 2002, no pet. h.) (not designated for publication), 2002 WL 31833249.

61. *Id.* at 4. The PUC may only possess those powers conferred by clear and express statutory language plus any additional power reasonably necessary to perform a function or duty that the legislature has required of the agency in express terms. *See Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

62. *Brazos*, 2002 WL 31833249, at *1.

(a) Initiating service. Where a transmission service customer uses the transmission facilities in [ERCOT] . . . to make sales of energy to a third party, it shall apply for a transmission service pursuant to . . . commission-approved tariffs.

(b) Conditions precedent for receiving service. Subject to . . . commission-approved tariffs, the TSP will provide transmission service to any transmission service customer [subject to certain provisions].

(c) Procedures for initiating transmission service. A transmission service customer requesting transmission service . . . must comply with . . . commission-approved tariffs.⁶³

Brazos argued that the Texas Supreme Court had already determined in *Public Utility Commission v. City Public Service Board* that Chapter 35 of PURA “contains no explicit grant of ratemaking authority,”⁶⁴ and the specific authority Chapter 35 does confer upon the PUC does not necessarily imply that the PUC has the power to set rates initially.⁶⁵ Thus, according to Brazos, the PUC did not have the power to issue rules 25.191(c) and 25.198(a)-(c). After a thorough review of the Supreme Court’s opinion in *City Public Service Board*, the Austin Court of Appeals rejected Brazos’ interpretation of that decision and came to a different conclusion regarding its application to the challenged rules.⁶⁶

The supreme court in *City Public Service Board* (discussed *supra*) found that the PUC had an “oversight role” regarding the wholesale-transmission service and the agency’s administration of Chapter 35. In addition, it found that the PUC’s role in reviewing rates and tariffs, fixed initially by a utility subject to that chapter, is analogous to that of a court.⁶⁷ The PUC “may not *initially* set a rate or frame a tariff for an electric cooperative[, but it] may review for approval *a tariff prescribed initially by the cooperative* to determine if its contents are reasonable and consistent with the standards prescribed in PURA §§ 35.003-004.”⁶⁸

PURA § 35.007 explicitly requires electric cooperatives to file tariffs with the PUC that must comply with the rules adopted under PURA § 35.006 “relating to wholesale transmission service, rates, and access.”⁶⁹ The Austin Court of Appeals found nothing in PURA that purported “to prescribe the contents of such a tariff beyond what may be inferred from a constitutional provision or Chapter 35.”⁷⁰ The PUC rules merely require agency approval of tariffs and do not dictate any rate or other element of such tariffs. The court, concluding that the challenged rules leave the content of the tariff itself to the discretion of the electric provider, held that rules 25.191(c) and 25.198(a)-(c) do not amount to ratemaking by the PUC and are within the PUC’s delegated power and duty to adopt

63. *Id.* at *1-2.

64. *City Pub. Serv. Bd.*, 53 S.W.3d at 318-19.

65. *Brazos*, 2002 WL 31833249, at *5.

66. *Id.*

67. *Id.* at *7.

68. *Id.* (emphasis added).

69. TEX. UTIL. CODE ANN. § 35.007 (Vernon 1998).

70. *Brazos*, 2002 WL 31833249, at *7.

rules pursuant to PURA §§ 35.002-0081.⁷¹

Brazos also challenged a PUC rule requiring open access to the electric cooperatives' facilities at the distribution level. Rule 25.191(d)(2)(B) provides as follows:

(d) Obligation to provide transmission service. Each TSP in ERCOT shall provide transmission service in accordance with the provisions of Division 1 of this subchapter.

(2) The obligation to provide comparable transmission service applies to a TSP, even if the TSP's interconnection with the transmission service customer is through distribution, rather than transmission facilities. An electric cooperative that has not opted for customer choice . . . shall provide wholesale transmission service at distribution voltage when necessary to serve a wholesale customer.

(A) A TSP . . . that owns facilities for the delivery of electricity to a transmission service customer purchasing electricity at wholesale using facilities rated at less than 60 kilovolts shall provide the customer access to its facilities on a non-discriminatory basis.

(B) A TSP . . . shall provide access to its facilities at the distribution level to a transmission service customer, in order to transmit power to a retail customer in an area in which the transmission service customer has the right to provide retail electric service. Such service shall be provided on a non-discriminatory basis and in accordance with PURA § 39.203(h).⁷²

Brazos argued that rule 25.191(d)(2)(B) extended the PUC's powers beyond its statutory authority by requiring cooperatives to provide open access to their facilities at the distribution level although they may have not opted for customer choice. Brazos and the other electric cooperatives challenged that this rule did not offer customer choice.⁷³

Chapter 41 of PURA governs electric cooperatives not offering customer choice in matters pertaining to competition. Notwithstanding any other provision of the law except PURA § 39.203 and other named sections, Chapter 41 "governs the transition to and the establishment of a fully competitive electric power industry for electric cooperatives."⁷⁴ Further, in regards to the regulation of electric cooperatives, Chapter 41 controls over any other provision of PURA except sections which specifically use the term "electric cooperative."⁷⁵

Among the jurisdictional powers over electric cooperatives conferred upon the PUC by Chapter 41 are: (1) the authority "to establish terms and conditions, but not rates, for open access to distribution facilities for

71. *Id.*

72. *Id.* at *9 (emphasis added).

73. *Id.*

74. TEX. UTIL. CODE ANN. § 41.001 (Vernon Supp. 2003).

75. *Id.*

electric cooperatives providing customer choice, as provided in Section 39.203” and (2) the authority “to regulate wholesale transmission rates and service, *including terms of access*, to the extent provided in Subchapter A, Chapter 35.”⁷⁶ In addition, Chapter 41 expressly provides that an “electric cooperative shall provide nondiscriminatory open access for retail service” if it chooses to participate in customer choice.⁷⁷

The court disagreed with Brazos’ attempt to find in Chapter 41 a general legislative intent that electric cooperatives should be exempt from the provisions of Chapter 39, which governs retail competition, when electric cooperatives do not offer customer choice. Instead, the court supported the PUC’s position that PURA § 39.203(b), when construed with other PURA provisions, empowers the agency to adopt rule 25.191(d)(2)(B).⁷⁸ Section 39.203(b) provides that “[w]hen necessary to serve a wholesale customer an . . . electric cooperative that has not opted for customer choice . . . shall provide wholesale transmission service at distribution voltage.”⁷⁹

The court also referred to Chapter 35 for guidance in determining whether rule 25.191(d)(2)(B) oversteps the PUC’s rule-making authority.⁸⁰ In Chapter 35, the legislature expressly made electric cooperatives subject to the terms of Subchapter A of the PURA and directed the PUC to adopt rules relating to wholesale transmission access, consistent with the standards set out in the subchapter.⁸¹ Subchapter A includes provisions which prohibit undue preferences, require terms of access to be comparable to a utility’s terms of access to its own system, and mandate the PUC to ensure non-discriminatory access.⁸²

Based on the powers delegated to the PUC in the above-referenced sections of the PURA, the court concluded that the PUC did not exceed its statutory authority in promulgating rule 25.191(d)(2)(B).⁸³

4. *Stranded Costs Recovery*

*In re TXU Electric Co.*⁸⁴ is a mandamus proceeding brought by TXU Electric Company (“TXU”). TXU sought relief from portions of PUC orders which required it to reverse its efforts to mitigate its estimated stranded costs as part of the transition to a competitive retail market for the sale of electricity. Stranded costs are “the portion of the book value of a utility’s generation assets that [are] projected to be unrecovered through rates that are based on market prices.”⁸⁵ Since the majority of

76. *Id.* § 41.004 (emphasis added).

77. *Id.* § 41.053(a).

78. *Brazos*, 2002 WL 31833249, at *9.

79. TEX. UTIL. CODE ANN. § 39.203(b) (Vernon 2003).

80. *Brazos*, 2002 WL 31833249, at *11.

81. TEX. UTIL. CODE ANN. §§ 35.001, 35.006(a)(1) (Vernon 1998 & Supp. 2003).

82. *Id.* §§ 35.003, 35.004 (Vernon 1998 & Supp. 2003).

83. *Brazos*, 2002 WL 31833249, at *11.

84. *In re TXU Elec. Co.*, 67 S.W.3d 130 (Tex. 2001).

85. *City of Corpus Christi v. Pub. Util. Comm’n*, 51 S.W.3d 231, 238-39 (Tex. 2001); *see also* TEX. UTIL. CODE ANN. § 39.251(7) (Vernon Supp. 2003).

these stranded costs are attributable to investments in nuclear power plants, the legislature set up a recovery program as a part of the deregulation of the electric market so that incumbent electric utilities do not have to bear these costs.⁸⁶

Part of this recovery program provides that utilities with stranded costs could mitigate these costs by shifting depreciation from their transmission and delivery assets to their generating assets and keep earnings in excess of the allowed rate of return to reduce book value.⁸⁷ Utilities having potentially stranded costs were identified in an April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring (“1998 ECOM Report”). The PUC estimated in this report that TXU had two billion dollars in stranded costs, primarily as a result of TXU’s investment in the Comanche Peak nuclear plant. However, a 2001 update to the ECOM Report, estimated that TXU’s position had dramatically changed due to a surge in natural gas prices. According to the revised report, TXU now had negative stranded costs in excess of two billion dollars. TXU’s investment in the Comanche Peak nuclear plant had “become profitable because the cost of generating electricity from natural gas plants exceeded that of generating electricity from nuclear plants.”⁸⁸ Based on this revised ECOM Report, the PUC then ordered utilities with substantial negative stranded cost estimates, such as TXU, to stop redirecting depreciation expenses and applying annual excess earnings to reduce stranded generation assets.⁸⁹

TXU petitioned the Supreme Court to mandamus the PUC to rescind a June 5, 2001 order instructing TXU to discontinue mitigation of stranded costs and return \$888 million in excess earnings to ratepayers. TXU also sought similar relief from the Travis County district court. TXU argued that the PUC had no authority under the PURA to revise the 1998 ECOM Report and that by disregarding the statutory scheme the PUC would cause competition to develop in a different manner than intended by the legislature. TXU further contended that this difference would cause irreparable harm to TXU because it would impact the ability of TXU’s affiliated REP to compete during the first years of deregulation.⁹⁰

The Texas Supreme Court held that mandamus relief was unavailable to TXU. Three justices would not exercise mandamus jurisdiction because TXU had an adequate remedy at law. Chief Justice Phillips filed a concurring opinion in which Justice Enoch and Justice Godbey joined. Chief Justice Phillips determined that TXU had not shown that relief was unavailable in the district court, and that TXU would suffer no irreparable harm if the Supreme Court did not act.⁹¹ If TXU could demonstrate immediate, irreparable harm, the district court was authorized to grant an

86. *TXU*, 67 S.W.3d at 132.

87. *TEX. UTIL. CODE ANN.* §§ 39.256, 39.254 (Vernon Supp. 2003).

88. *TXU*, 67 S.W.3d at 134.

89. *Id.* at 133-34.

90. *Id.* at 134.

91. *Id.* at 132-36.

immediate stay in TXU's appeal.⁹²

Justice Baker in a concurring opinion, joined by Justice Rodriguez, held that the relief TXU sought was against the PUC, over which the Supreme Court had no original mandamus jurisdiction. Justice Baker asserted that "the preliminary issue the [supreme] court should consider is whether section 22.002(a) of the Texas Government Code conferred original jurisdiction upon the supreme court to grant mandamus relief against the PUC."⁹³ Section 22.002(a) provides:

The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writ of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of the court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.⁹⁴

Further, it is a well-established principle of Texas jurisprudence that the supreme court does not have jurisdiction to issue mandamus against a board of state officers.⁹⁵ For this reason, Justice Baker disagreed with the findings of the other Justices that the court had jurisdiction in this matter and argued that the petition should be dismissed for want of jurisdiction. Justice Baker concurred "in the supreme court's judgment only to the extent that it determined TXU was not entitled to mandamus relief."⁹⁶

Justice Brister concurred in the judgment and filed an opinion which held that portions of the PUC's orders TXU complained about did not constitute a clear abuse of discretion.⁹⁷ Although the legislature made no specific provision concerning how the PUC is to deal with the over-recovery of stranded costs, Justice Brister argued that "state agencies have never been strictly limited to specific statutory provisions" and that state "agencies have whatever implied powers are reasonably necessary to fulfill their regulatory duties."⁹⁸ Therefore, he concluded that the statutory adjustments adopted by the PUC were necessary if the PUC was to comply with the PURA's "mandatory policies in favor of competition and against over-recovery of stranded costs."⁹⁹

92. TEX. UTIL. CODE ANN. § 15.004 (Vernon 1998).

93. *TXU*, 67 S.W.3d at 137.

94. TEX. GOV'T CODE ANN. § 22.002(a).

95. *Betts v. Johnson*, 73 S.W. 4, 5 (Tex. 1903); *see also* *Superior Oil Co. v. Sadler*, 458 S.W.2d 55, 56 (Tex. 1970); *Givens v. Woodward*, 196 S.W.2d 456, 456 (Tex. 1946); *McLarty v. Bolton*, 191 S.W.2d 850, 850 (Tex. 1946); *McFall v. State Bd. of Educ.*, 110 S.W. 739, 740 (Tex. 1908); *Tex. Liquor Control Bd. v. Cont'l Distilling Sales Co.*, 199 S.W.2d 1009, 1013 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.), *dism'd* *Cont'l Distilling Sales Co. v. Tex. Liquor Control Bd.*, 332 U.S. 747 (Tex. 1947); *Herring v. Houston Nat. Exch. Bank*, 241 S.W. 534, 540 (Tex. Civ. App.—Galveston 1922, no pet.); *but see* *State v. Thomas*, 766 S.W.2d 217, 220 (Tex. 1989).

96. *TXU*, 67 S.W.3d at 145.

97. *Id.* at 145-50.

98. *Id.* at 146.

99. *Id.* at 150.

C. NEGLIGENCE

In *Southwestern Electric Power Co. v. Grant*,¹⁰⁰ the Texas Supreme Court held that a utility's tariff provision limiting the utility's liability for personal injury damages resulting from power outages or service interruptions is reasonable as a matter of law and enforceable against a claim of negligence by the utility's customer. Following the repair of a fluctuating-voltage problem by Southwestern Electric Power Company ("SWEPCO"), Mur Lee Grant suffered an electric shock to her face that she claimed resulted from either an unplugged appliance, an electric wall outlet, or a light switch. Grant sued SWEPCO for personal injuries and property damage on the theory that SWEPCO negligently failed to disconnect her electricity service after it knew the fluctuating voltage had damaged the plaintiff's appliances.¹⁰¹ The trial court granted SWEPCO's motion for summary judgment on Grant's claim. "The court of appeals determined that the Uniform Commercial Code ("UCC") applies to SWEPCO's tariff."¹⁰² Under the UCC, limiting liability for personal injury in a consumer goods transaction is prima facie unconscionable, and the court of appeals held that a material fact issue existed about whether SWEPCO owed Grant a duty. The court of appeals reversed and remanded the personal injury claim to the trial court and affirmed the summary judgment for SWEPCO on the property damage claim.¹⁰³

SWEPCO's tariff contained language that would preclude Grant from recovering on a negligence claim. The PUC approved SWEPCO's tariff, which contained the following provision:

The Company shall not be liable for damages occasioned by interruption, failure to commence delivery, or voltage, wave form, or frequency fluctuation caused by interruption or failure of service or delay in commencing service due to accident to or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; *or, without limitation by the preceding enumeration, any other act or things due to causes beyond its control, to the negligence of the Company, its employees, or contractors, except to the extent that the damages are occasioned by the gross negligence or willful misconduct of the Company.*¹⁰⁴

SWEPCO argued that the tariff required that it had to act with gross negligence or willful misconduct in order for SWEPCO to be held liable for the plaintiff's injuries.

The Texas Supreme Court first considered the question raised by the court of appeals in this case: Does the UCC apply to SWEPCO's tariff?

100. S.W. Elec. Power Co. v. Grant, 73 S.W.3d 211 (Tex. 2002).

101. *Id.* at 214.

102. *Id.* at 215.

103. *Id.*

104. *Id.* at 214-15 (emphasis in original).

After reviewing provisions of the PURA and UCC Article 2, the Texas Supreme Court concluded that the application of Article 2 to SWEPCO's tariff "would impair the comprehensive statutory scheme regulating the sale of electricity" in Texas.¹⁰⁵ The PURA explicitly states that its purpose is to establish "a comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and electric utilities."¹⁰⁶ Because the PUC controls a utility's rates, services, and operations as a substitute for competitive forces that would typically regulate prices, a public utility can only enter into contracts consistent with the PUC's regulatory scheme. The Texas Supreme Court determined that applying the UCC to a utility's tariff would impair the PUC's authority to approve and determine a utility's rates, services, and operations.¹⁰⁷ In addition, in cases such as this, where the PURA regulatory scheme directly conflicts with the UCC's prohibition on limitations on personal injury liability in consumer goods transactions, the comprehensive regulatory scheme must prevail over the UCC's general provision.¹⁰⁸ For these reasons, the Texas Supreme Court held that the UCC does not apply to SWEPCO's tariff.

The Texas Supreme Court also considered the question of whether SWEPCO's tariff provision limiting liability for personal injury is reasonable. Although the Texas Supreme Court had never before addressed this specific question of law, the court had determined in *Houston Lighting & Power Co. v. Auchan USA, Inc.* that a tariff provision limiting liability for economic damages resulting from a utility's negligence was reasonable.¹⁰⁹ In cases where tariff provisions limiting economic damages have been upheld, courts in other jurisdictions have also determined that when administrative agencies regulate utilities to ensure reasonable rates and nondiscriminatory service, such a limitation on liability is presumed reasonable unless a litigant can show otherwise.¹¹⁰ The supreme court also cited California and Florida cases¹¹¹ in which tariff provisions limiting liability for personal-injury damages were upheld "because a regulatory agency comprehensively regulated the utility and approved the tariff so that it had the force and effect of law."¹¹²

105. *Southwestern*, 73 S.W.3d at 218.

106. TEX. UTIL. CODE ANN. § 31.001(a) (Vernon 1998).

107. *Southwestern*, 73 S.W.3d at 218-19.

108. See *Hughes v. Collegedale Distribs.*, 355 So.2d 79, 81 (Miss. 1978); *Gimbel v. Kuntz*, 286 N.W.2d 501, 508 (N.D. 1979).

109. *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668, 671 (Tex. 1999).

110. See *Arkansas La. Gas v. Hall*, 453 U.S. 571, 579 (1981); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 156 (1922).

111. See *Los Angeles Cellular Tel. Co. v. Superior Ct. of Los Angeles County*, 65 Cal. App. 4th 1013, 76 Cal. Rptr. 2d 894, 897-98 (1998) (holding in a personal injury suit that a limitation on liability was valid because "by its terms, [the utility's tariff] applies to negligence actions without regard to the nature of the damages sought."); *Landrum v. Fla. Power & Light Co.*, 505 So.2d 552, 553-54 (Fla. Dist. Ct. App. 1987) (holding in a personal injury and property damage suit that "a tariff validly approved by the Public Service Commission, including a limitation on liability for ordinary negligence . . . is valid.").

112. *Southwestern*, 73 S.W.3d at 220.

Although the supreme court agreed with the decisions made by the California and Florida courts, it also examined a number of other factors before determining that the SWEPSCO tariff provision was reasonable. First, it examined the scope of SWEPSCO's limitation on liability and found the provision reasonable because it was "narrowly drawn and provided a remedy for SWEPSCO's gross negligence and willful misconduct."¹¹³ In addition, the tariff specifically stated that SWEPSCO was not liable for damages caused by particular acts, such as "interruption, failure to commence delivery, or voltage, wave, form, or frequency fluctuation caused by interruption or failure of service or delay in commencing service . . ."¹¹⁴ The provision did not exclude personal injury claims that arise from negligence in other contexts, such as injuries resulting from an automobile accident that occurs during the performance of an employee's duties on a job site. Because SWEPSCO's tariff provision does not claim to relieve SWEPSCO of liability under any and all circumstances, it does not violate public policy.¹¹⁵

The court also applied several of the factors from its *Auchan* decision. A regulated utility must provide non-discriminatory service at uniform rates, and if certain customers are more likely to suffer personal injury damages due to fluctuations in electric service, a utility may not raise rates or deny service to compensate for these potential losses without approval from the PUC.¹¹⁶ Therefore, a tariff provision limiting liability for personal injuries resulting from a utility's negligence under certain circumstances protects the utility's ability to provide effective, consistent, and nondiscriminatory service. Further, the customers of utilities in a highly regulated industry have protection because utilities are subject to strict administrative review and control. The PUC rules provide remedies to customers and penalize utilities for unsafe or inadequate service.¹¹⁷

The Texas Supreme Court distinguished the facts in SWEPSCO from those in its decision in *Crowell v. Housing Authority of Dallas*.¹¹⁸ In *Crowell*, the plaintiff sued the Dallas Housing Authority after a defective gas heater caused the plaintiff's father to die from carbon monoxide poisoning. The trial court granted, and the court of appeals affirmed, the defendant's summary judgment motion based on a lease provision limiting liability for personal injury and property damage. In deciding whether the lease provision violated public policy, the Texas Supreme

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 221.

117. See 16 TEX. ADMIN. CODE § 22.241(a) (allowing the PUC to institute a formal investigation against a utility on its own initiative or upon a customer's complaint); § 22.242(a) (allowing a customer to complain to the PUC about a utility's acts or omissions that violate the PURA or PUC rules); Tex. Pub. Util. Comm'n, *Entergy Gulf States, Inc. Service Quality Issues (Severed from Docket No. 16705)*, Docket No. 18249 (Apr. 22, 1998) (order on rehearing); Tex. Pub. Util. Comm'n, *Application of Houston Power and Light Co.*, Docket No. 4540, 1982 WL 213186 (Dec. 6, 1982) (final order).

118. *Crowell v. Housing Auth. of Dallas*, 495 S.W.2d 887 (Tex. 1973).

Court declared that generally an agreement exempting a party from liability for negligent injury is void as against public policy. In its decision, the court noted in *dicta* that this rule applies to public utilities.¹¹⁹ However, the supreme court, considering the SWEPCO facts, made a distinction between the *Crowell* lease provision and the SWEPCO tariff provision. The lease in *Crowell* was merely a contract between the Dallas Housing Authority and its customers, whereas the SWEPCO tariff was filed with and approved by the PUC. Because SWEPCO must comply with the PUC regulations and would be subject to penalties if it provided inadequate or unsafe service, customers were afforded certain important protections. None of these protections existed for the customer in *Crowell*.¹²⁰

In a concurring opinion, joined by Justice Jefferson, Justice Enoch stated that although he agreed with the supreme court's judgment in the SWEPCO case, he was unwilling to decide that a utility may disclaim liability for personal injuries through its tariff when there is no precedent to support such a decision.¹²¹ Instead, Justice Enoch declined to impose a legal duty upon SWEPCO because SWEPCO had no actual knowledge of any dangerous condition on Grant's property. Because no duty existed, he concluded that it was unnecessary to consider the question of whether the provision of SWEPCO's tariff limiting liability for personal injury damages is enforceable.¹²²

III. GAS UTILITIES

A. CONTRACTS

*Lone Star Gas Co. v. EFP Corp.*¹²³ involved a contractual dispute between a gas utility and one of its customers. EFP, a plastic molding manufacturing plant, purchased natural gas from Lone Star Gas. Prior to March 1995, EFP was a commercial customer paying rates set by Lone Star's franchise with the city of Marlin, Texas. Beginning March 6, 1995, EFP purchased gas from Lone Star under an industrial contract. In August 1997, Lone Star discovered that it had mistakenly read only the first five of six dials on EFP's meter. Lone Star corrected its mistake and sued EFP for the underpayment of 10 percent of EFP's actual consumption.¹²⁴ Although EFP conceded that it had consumed the volumes of gas as alleged by Lone Star, EFP moved for summary judgment on two grounds: first, that the claim was barred by both the UCC Statute of Frauds¹²⁵ and second, that a provision in the industrial contract stated that "[m]eter measurements computed by [Lone Star] according to its standard operat-

119. *Id.* at 889.

120. *Southwestern*, 73 S.W.3d at 222.

121. *Id.* at 225.

122. *Id.* at 224.

123. *Lone Star Gas Co. v. EFP Corp.*, 92 S.W.3d 417 (Tex. 2001).

124. *Id.* at 417.

125. TEX. BUS. & COM. CODE ANN. § 2.201(a) (Vernon 1994).

ing practices shall be conclusive.”¹²⁶ The Waco Court of Appeals affirmed the District Court’s grant of EFP’s motion for summary judgment.

Upon review, the Texas Supreme Court determined that, although the sale of gas is subject to the UCC Statute of Frauds, Lone Star’s claim was not barred. EFP asserted that Lone Star’s invoices to EFP constituted the entire contract between them for the sale of gas, but Lone Star argued that the applicable contract was Lone Star’s franchise agreement with the city of Marlin. The Waco Court of Appeals determined that existence of the franchise agreement did not “affect the issue of whether there is a gas-purchase agreement with Lone Star.”¹²⁷ The Texas Utility Code authorizes the City of Marlin to set rates for gas utilities, such as Lone Star.¹²⁸ On EFP’s commercial account, Lone Star was not authorized to charge rates other than those set by the city.¹²⁹ Therefore, the invoices cannot have been the entire agreement, and EFP failed to show as a matter of law that the Statute of Frauds barred the claim on its commercial account.¹³⁰

The Texas Supreme Court also disagreed with EFP’s argument that Lone Star was estopped from asserting its claim by the industrial contract. The industrial contract stated:

Meter measurements computed by [Lone Star] according to its standard operating practices shall be conclusive except where meter is found to be inaccurate by as much as 1 per cent fast or slow or failed to register, in either of which cases [Lone Star] shall repair or replace the meter. The quantity of gas delivered while the meter was inaccurate or failed to register shall be determined by correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation.¹³¹

Lone Star proved “that the undercharge was not due to any defect in EFP’s gas meter or any erroneous readings taken from it or any deviation from the procedures used to report those readings for billing purposes.”¹³² Instead, evidence showed that Lone Star’s billing mistake resulted from its setting up EFP’s account as a “five-dial” account rather than a “six-dial” account. This error could be corrected mathematically. The supreme court concluded that EFP did not prove as a matter of law that the under billing was due to “meter measurements computed by [Lone Star] according to its standard operating practices,” which the contract made conclusive. The Texas Supreme Court reversed the judgment

126. *Lone Star*, 92 S.W.3d at 418.

127. *Lone Star Gas Co. v. EFP Corp.*, 63 S.W.3d 463, 467 (Tex. App.—Waco 2000), *rev’d and rem’d*, 92 S.W.3d 417 (Tex. 2001).

128. TEX. UTIL. CODE ANN. § 103.001 (Vernon Supp. 2003) (“[t]he governing body of a municipality has exclusive original jurisdiction over the rates, operations, and services of a gas utility within the municipality . . .”).

129. *Id.*

130. *Lone Star*, 92 S.W.3d at 418.

131. *Id.*

132. *Id.*

of the court of appeals and remanded the case to the trial court.¹³³

B. NEGLIGENCE

*Entex v. Gonzalez*¹³⁴ is a personal injury case in which the court found that a gas utility had no duty to warn of the dangerous condition of a water heater. The Gonzalez family filed this suit against Entex after their daughter was injured in a fire caused by gasoline vapors coming in contact with the pilot light of their gas-fired water heater which was not elevated off the floor. The jury found that Entex was thirty-five per cent responsible for causing the fire, and Entex appealed the \$1,270,139.73 judgment.¹³⁵

Entex contended that it had no duty to warn the Gonzalez family of any dangerous condition regarding the water heater because:

(1) it had no duty to inspect the Gonzalez property; (2) it had no actual knowledge of any dangerous condition; (3) Entex's policies, practices, and procedures did not create a duty to inspect or warn the Gonzalez family about the condition of their water heater; and (4) in the alternative, any common-law duty Entex had was satisfied by the preventative measures that Entex had already taken.¹³⁶

Three years before the fire, Entex sent its serviceman to the Gonzalez home to replace the gas meter, and the Gonzalezes contended that the serviceman had a duty to (1) inspect the condition of the water heater; (2) warn them of the danger posed by the water heater being unelevated in a utility room where materials with flammable vapors were, or were likely to be, stored; and/or (3) refuse gas service to the water heater until it was elevated.¹³⁷

The court quickly dismissed the Gonzalezes' argument that Entex had a duty to inspect the water heater because under established Texas jurisprudence, "a utility has no duty to inspect a customer's wiring or appliances, which the utility did not install and does not own or control, for defects before supplying electricity or gas to the customer."¹³⁸ The court declined to hold that Entex's right to withhold gas service to the water heater effectively gave it control over the water heater which would create an affirmative duty to inspect the water heater.

The court also declined to impose a duty on Entex based solely on the unelevated condition of a water heater that it neither installed or controlled. It reasoned that if a duty to assure that water heaters are ele-

133. *Id.*

134. *Entex v. Gonzalez*, 94 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

135. *Id.* at 4.

136. *Id.*

137. *Id.* at 5.

138. *Id.* at 2; see *Cent. Power & Light Co. v. Romero*, 948 S.W.2d 764, 766-67 (Tex. App.—San Antonio 1996, writ denied); *Beans v. Entex, Inc.*, 744 S.W.2d 323, 325 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Huddleston v. Dallas Power & Light Co.*, 93 S.W.2d 199, 200 (Tex. Civ. App.—Fort Worth 1936, writ dism'd).

vated should be imposed, it should be imposed on those who specify, sell, or install them.¹³⁹ Similarly, if a duty is to be imposed to prevent flammable vapors from being placed near gas-fired appliances, it should be imposed, if at all, on appliance sellers and installers. Therefore, "a gas provider can be subject to liability for failing to prevent flammable vapors from being ignited by a gas-fired appliance only where the provider has knowledge that flammable vapors actually are being, or will be, stored near the appliance."¹⁴⁰

The Gonzalezes argued that Entex had a duty to warn of, or refuse gas service to, their water heater under a Texas statute and a Railroad Commission regulation that authorizes, but does not require, a gas utility to disconnect gas service where there is a violation of the gas utility's rules for the operation of nonstandard equipment or a known dangerous condition.¹⁴¹ When civil liability is based upon a statute, however, "the standard of conduct must be clearly defined in the statute and the injury must grow directly out of a breach of that standard."¹⁴² The statute and regulation relied upon by the plaintiffs do not prohibit or require any specific conduct, and the court found that there was no adequate basis under the statute or regulation for imposition of a negligence or negligence per se duty.¹⁴³

The Gonzalezes also argued that Entex voluntarily assumed a duty to inspect their unsafe appliances because: (1) Entex generally requires its customers to correct hazardous conditions before it will provide gas service; (2) Entex has a legal right of access to customers' premises; and (3) in this case, Entex's serviceman turned the gas supply to the house back on and relit the pilot light on the unelevated water heater after replacing the gas meter.¹⁴⁴ The Gonzalez family further contended that Entex's serviceman increased the risk of harm when he turned the gas back on and relit the pilot light. To establish the assumption of a negligence duty, there must be evidence of: "(1) an undertaking by Entex to render services to the Gonzalezes which Entex should have recognized as necessary for their protection; and (2) either that (a) Entex's negligence increased the risk of harm to the Gonzalezes; or (b) their harm was suffered because of their reliance on the undertaking."¹⁴⁵ There was no evidence that a request was made to the serviceman to inspect the water heater or advise the Gonzalezes of its condition. The court concluded that internal procedures of Entex, which have voluntarily been put in place for the benefit of Entex's customers (such as Entex's policy that requires service-

139. *Entex*, 94 S.W.3d at 7.

140. *Id.*

141. TEX. UTIL. CODE ANN. § 104.251 (Vernon 1998) ("[a] gas utility shall furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable."); 16 Tex. Admin. Code § 7.45(4)(D) (2002).

142. *Praesel v. Johnson*, 967 S.W.2d 391, 395-96 (Tex. 1998).

143. *Entex*, 94 S.W.3d at 9.

144. *Id.*

145. *Id.*; see *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

men to correct hazardous conditions before it will provide gas service) do not create a negligence duty where none would otherwise exist. Additionally, the court found that there was no evidence that there was an increased risk of harm as a result of the service call.¹⁴⁶

Finally, the Gonzalezes contended that Entex had a negligence duty resulting from Entex's contractual relationship with them and the public duty imposed by Entex's tariff.¹⁴⁷ The court distinguished this case from other decisions that recognize that a contract to make repairs creates a duty of care for the person making the repairs.¹⁴⁸ Under the facts of the Gonzalez case, Entex would only be liable for negligence in changing the gas meter. The court concluded that there was no evidence that Entex had any contractual duty to inspect, repair, or warn about the water heater.¹⁴⁹

IV. CONCLUSION

The cases surveyed in this article should provide attorneys with a guide to significant developments primarily in the area of deregulation of the electric utility market as well as regulation of gas utilities. The foregoing cases demonstrate that the courts are currently in the process of interpreting the statutes and rules that are a necessary part of the transition from a regulated market to a competitive electricity market in Texas.

146. *Entex*, 94 S.W.3d at 10.

147. *Id.*

148. *See* *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (1947).

149. *Entex*, 94 S.W.3d at 11.