SMU | Dedman School of Law

SMU Law Review

Volume 58
Issue 3 *Annual Survey of Texas Law*

Article 15

January 2005

Energy Regulation

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I. INTRODUCTION

THIS article focuses on the interpretations of, and changes relating to, various aspects of state energy regulation. Since traditional oil and gas regulation matters are covered elsewhere in this Survey, this article is limited primarily to cases concerning the regulation of electric and natural gas utilities. The majority of the significant cases during the Survey period continue to focus on the interpretation and implementation of statutes and rules resulting from the deregulation of the electric utility industry in Texas.

II. ELECTRICITY REGULATION

A. RECOVERY OF CARRYING COSTS ON STRANDED COSTS

In a decision that could have a significant financial impact on both electric utilities and Texas ratepayers, the Texas Supreme Court held that electric utilities are allowed to recover carrying costs on stranded costs

from the first day of deregulation. As a result of the Court's ruling in *CenterPoint Energy, Inc. v. Public Utility Commission of Texas*, electric utilities are "potentially entitled to billions of dollars in interest" that would be collected through higher electricity rates.[1]

As part of the transition to a competitive electric market, electric utilities are allowed to recover their "net, verifiable, nonmitigable stranded costs incurred in purchasing power and providing electric generation service" in accordance with the Public Utility Regulatory Act ("PURA").[2] Although PURA recognizes that there are carrying costs associated with generation assets,[3] it is silent with respect to their recovery in the true-up proceeding.

The sole issue before the Texas Supreme Court was determining the correct date from which carrying costs on a utility's stranded cost true-up balance should be calculated—the first day of deregulation, January 1, 2002, or the date of the Public Utility Commission's ("PUC") final order in the true-up proceeding, some time after January 10, 2004. In adopting PUC substantive rule 25.263(l)(3), the PUC determined that interest should be calculated on stranded costs from the date of the final order of the true-up proceeding.[4] CenterPoint and other utilities appealed this portion of rule 25.263, arguing that interest should be recoverable starting January 1, 2002, the date competition began.

In a five to four decision, the Texas Supreme Court held that rule 25.263(l)(3) is invalid. The majority determined that the rule conflicted with the legislative intent to provide for full recovery of stranded costs because it delayed the accrual of interest for up to two or three years after the beginning of deregulation.[5] In a dissenting opinion written by Justice Brister, the minority disagreed with this conclusion, arguing that it was impossible for the PUC's rule to be inconsistent with PURA's deregulation provisions because there was no mention of interest in the statute.[6] The Court remanded the issue to the PUC for further consideration of whether to address interest in a general administrative rule or in utility-specific contested-case hearings.

B. PUC Jurisdiction over Settlement Agreements

In *In re Entergy Corp.*, the Texas Supreme Court held that the PUC has exclusive jurisdiction over private settlement agreements resolving contested-case proceedings before the agency.[7] In 1992, Entergy purchased Gulf States Utilities Company and filed a "Sales, Transfer, and Merger" application with the PUC for the requisite approval of the transaction. The various parties to the proceeding entered into a settlement agree-

1. 143 S.W.3d 81, 99 (Tex. 2004) (Brister, J., dissenting).
2. Tex. Util. Code Ann. § 39.252(a) (Vernon Supp. 2004).
3. *See id.* § 39.301.
4. 16 Tex. Admin. Code § 25.263(l)(3) (2004).
5. *CenterPoint Energy, Inc.*, 143 S.W.3d at 87.
6. *Id.* at 99.
7. 142 S.W.3d 316 (Tex. 2004).

ment that was filed for approval by the PUC (the "Merger Agreement"). The PUC adopted the Merger Agreement and included it in an order approving Entergy's application.[8]

The Merger Agreement called for certain anticipated merger-related savings to be shared between ratepayers and shareholders. The savings were to be implemented in three post-merger rate cases. The first two rate proceedings contemplated in the Merger Agreement were filed and completed, but the Texas Legislature passed Senate Bill 7, the deregulation statute, before the third case could be filed as anticipated in November 2001. Senate Bill 7 froze electricity rates through December 31, 2001 and mandated that retail competition would start on January 1, 2002. Entergy was not required to file a rate case in November 2001. Entergy requested that the start of retail competition be delayed in its service area, which would allow it to continue to charge its customers the frozen electric rates ordered by Senate Bill 7. An agreement was reached to delay the start of retail competition in the Entergy service area until September 15, 2002 (the "Settlement Agreement"). The PUC issued an order adopting the Settlement Agreement in December 2001.[9]

In February 2002, ratepayers sued Entergy in district court, claiming that the Merger Agreement was breached when Entergy entered into the Settlement Agreement with the PUC. The ratepayers argued that Entergy's action was a violation of the Merger Agreement because the Settlement Agreement conflicted with the third rate case requirement of the Merger Agreement. Arguing that the PUC had exclusive jurisdiction over this dispute, Entergy filed a motion to transfer venue, a motion to dismiss for want of subject matter jurisdiction, and a motion to abate. The district court denied these motions, and Entergy sought a writ of mandamus from the court of appeals. After being denied by the court of appeals, Entergy filed a petition for writ of mandamus with the Texas Supreme Court to determine the primary issue of whether the trial court had subject matter jurisdiction.

The ratepayers argued that the Merger Agreement was merely a private contract and that, because they were not directly challenging a PUC order, the PUC had no jurisdiction over the dispute with Entergy.[10] But the court rejected this line of reasoning, holding that, although the Merger Agreement began as a private contract between the parties, it became the basis for the PUC's regulatory approval of the merger.[11] The Merger Agreement was practically meaningless without the implementing order—the very administrative character that gave the Merger Agreement effect also gave the PUC authority to adjudicate disputes arising from that agreement.[12] The Texas Supreme Court held that the PUC had

8. *Id.* at 319.
9. *Id.*
10. *Id.* at 323.
11. *Id.* at 324.
12. *Id.*

exclusive jurisdiction in this case.[13]

C. Price-to-Beat Rule

During the Survey period, there were several challenges to the PUC's price-to-beat rule. The PUC first promulgated rule 25.41 in 2001 to govern the adjustments to the fuel-factor portion of the price-to-beat rule pursuant to PURA section 39.202(l).[14] In 2003, the PUC amended portions of rule 25.41 concerning the use of an electricity commodity index for adjustment of the fuel factor and the process for adjusting the price-to-beat following true-up proceedings.[15] The first case discussed in this section was a direct appeal of the validity of amended rule 25.41. The case following was a challenge to a fuel-factor adjustment that was calculated pursuant to the 2001 version of rule 25.41. In both cases, rule 25.41 was upheld.

1. Amended Rule 25.41

In *State of Texas v. Public Utility Commission of Texas*,[16] the Office of Public Utility Council, and other appellants, alleged that a number of provisions of amended rule 25.41 violated PURA, including:

(1) the rule's provision regarding a provider's required showing to obtain an increase of the fuel-factor component of the price-to-beat;
(2) the rule's use of an electricity commodity index to assess the adequacy and adjustment of the fuel-factor component; and
(3) the rule's provision for post-true-up adjustments.[17]

The appellants also contended that the rule's forty-five-day timeline for contested cases violated due process and that the PUC failed to support the amendments to rule 25.41 with reasoned justification as required by the Administrative Procedure Act ("APA").[18]

The PUC contended that the court lacked subject-matter jurisdiction over the challenges to the validity of the unamended portions of rule 25.41. The agency argued that portions of the amended rule, promulgated through the former rule could not be challenged in this proceeding because those provisions were not challenged by direct appeal in 2001.[19] The PUC's position was that the appellants' protests of the use of market prices and the NYMEX method to adjust fuel factors in the amended rule were waived because the methodology was the same as the methodology

13. *Id.*
14. The Third Court of Appeals sustained the validity of the 2001 rule 25.41 against a challenge that the PUC erred by failing to establish sufficient headroom. *See* Reliant Energy, Inc. v. Pub. Util. Comm'n of Tex., 62 S.W.3d 833 (Tex. App.–Austin 2001, no pet.).
15. 16 Tex. Admin. Code § 25.41 (2004).
16. 131 S.W.3d 314 (Tex. App.–Austin 2004, pet. denied).
17. *See id.* at 320; 16 Tex. Admin. Code §§ 25.41(g)(1), 25.41(g)(1)(F), 25.41(g)(3)(B) (2004).
18. *Pub. Util. Comm'n*, 131 S.W.3d at 310; *see* 16 Tex. Admin. Code § 25.41(g)(1)(D) (2004); Tex. Gov't Code Ann. § 2001.033 (Vernon 2000).
19. *Pub. Util. Comm'n*, 131 S.W.3d at 320.

employed in the 2001 rule.[20] Rejecting the PUC's argument, the Austin Court of Appeals held that it had subject-matter jurisdiction over all of the challenges to the amended rule because the PURA direct appeal provision does not distinguish between original and amended rulemakings nor does it limit the direct appeal to "challenges of amended subparts of a rule."[21]

The court also rejected the appellants' argument that amended rule 25.41 did not require an affiliated retail electric provider ("AREP") to provide the proof required under PURA to obtain an increase of the fuel-factor component of the price-to-beat.[22] PURA allows the PUC to adjust the fuel factor up to twice a year if the AREP "demonstrates that the existing fuel factor does not adequately reflect significant changes in the market price of natural gas and purchased energy used to serve retail customers."[23] The PUC's amended rule 25.41 provided that an adjustment to the fuel factor can be made when there is a five-percent change over a twenty-day period in the average of the NYMEX Henry Hub natural gas prices.[24] The appellants contended that the amended rule failed "to implement the PURA requirements that an AREP show that the market price of both natural gas *and* purchased energy used to serve retail customers had significantly increased *and* that the existing fuel factor was inadequate."[25] The appellants claimed that "the formulaic use of the NYMEX natural gas index" did not permit an AREP to obtain an increased fuel factor and price-to-beat—even if the price paid for electricity had not increased and the AREP did not rely on natural gas for generation.[26] But the court disagreed, stating that PURA did not either prescribe "the means by which AREPs must demonstrate the need for an increase in their fuel factor" or prohibit the PUC from "creating a formulaic means for AREPs to demonstrate that a fuel factor does not adequately reflect a significant change in the market price of energy."[27] The court further concluded that allowing an AREP's fuel factor and its resulting price-to-beat to vary with the market was "reasonably consistent" with the legislative intent to encourage and aid market competition.[28]

The Austin Court of Appeals disagreed with all of the appellants' remaining challenges to the validity of amended rule 25.41. It found that the challenge to the portion of rule 25.41 relating to the use of an electricity commodity index to assess the adequacy of the fuel factor was premature because there was "no sufficiently liquid electricity commodity index or hub that can be utilized by the Commission to adjust the fuel-factor

20. *Id.* at 321.
21. *Id.*; *see* TEX. UTIL. CODE ANN. § 39.001(e), (f) (Vernon Supp. 2004).
22. *Pub. Util. Comm'n*, 131 S.W.3d at 325.
23. TEX. UTIL. CODE ANN. § 39.201(l) (Vernon Supp. 2004).
24. 16 TEX. ADMIN. CODE § 25.41(g)(1)(D) (2004).
25. *Pub. Util. Comm'n*, 131 S.W.3d at 322.
26. *Id.*
27. *Id.* at 324-25.
28. *Id.* at 325.

component."[29] The court also rejected the appellants' contention that the PUC exceeded its authority by including the provisions of rule 25.41 that adjusted the price-to-beat after stranded cost true-up proceedings.[30] The court was also not persuaded by the appellants' claims that the time schedule for challenges to fuel-factor adjustments violated due process and that the PUC did not provide a reasoned justification for the amendments to the rule.[31]

2. *Fuel-Factor Adjustment Proceeding*

In *City of Alvin v. Public Utility Commission of Texas*, several Texas cities appealed the PUC's order increasing First Choice Power, Inc.'s fuel factor pursuant to the 2001 version of rule 25.41.[32] The PUC determined that there was a 22.69% difference between the average price of natural gas used to set First Choice's fuel factor and the average price of natural gas on the NYMEX index for the ten business days prior to First Choice's application for a fuel factor adjustment. Based on this finding, the PUC issued an order approving an increase in First Choice's fuel factor. The cities sought judicial review of the PUC's order in district court, which found that most of the cities' claims were validity challenges to rule 25.41 and, thus, the district court lacked subject-matter jurisdiction.

The Austin Court of Appeals found both impermissible validity challenges to the rule and jurisdictional challenges to application of the rule.[33] The court agreed with the district court's determination that it lacked jurisdiction to consider whether the PUC's use of the NYMEX index in rule 25.41 was permissible.[34] The appropriateness of the PUC's use of the NYMEX index was properly decided in the rulemaking proceeding. It could not be challenged in a ratemaking proceeding.[35]

The court rejected the cities' argument that First Choice's evidence of NYMEX index rates is not by itself sufficient evidence of "the adequacy of the fuel factor to reflect significant changes in the market price of natural gas and purchased energy used to serve retail customers."[36] The cities claimed that "evidence of the NYMEX index alone" did not satisfy the requirements of PURA, but the court found that PURA employed changes in *market* price, not *actual* price, as the standard for determining whether to adjust the fuel factor.[37] The NYMEX index is "conclusive evidence" of the requirements of PURA and rule 25.41.[38]

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29. *Id.*
30. *Id.* at 326-27.
31. *Id.* at 326, 332.
32. 143 S.W.3d 872, 875 (Tex. App.–Austin 2004, no pet.).
33. *Id.* at 880.
34. *Id.* at 885.
35. *Id.* at 884.
36. *Id.* at 885.
37. *Id.*
38. *Id.*

The cities argued unsuccessfully that the fuel-factor adjustment violated the statutory limit on the price-to-beat. PURA section 39.202(p) provides that "in no event shall the price-to-beat exceed the level of rates, on a bundled basis, charged by the affiliated electric utility on September 1, 1999, adjusted for fuel as provided by Subsection (b)."[39] The cities claimed that First Choice's fuel-factor adjustment caused its resulting price-to-beat to exceed its 1999 rate.[40] The PUC responded, and the Austin Court of Appeals agreed, that this subsection applies only when the PUC finds that "the provider is unable to maintain financial integrity" if it acts in accordance with PURA section 39.202(a), which defines the price-to-beat and its period of applicability.[41] The fuel-factor adjustments provided for in section 39.202(l) were not limited by subsection (p).[42]

The cities argued that the forty-five-day timeline for the fuel-factor adjustment process was not long enough and it prevented them from gathering sufficient evidence and conducting a legitimate hearing.[43] Noting that this complaint would have been more appropriately brought in the rulemaking proceeding, the Austin Court of Appeals found that there was no evidence that the cities had been deprived of due process.[44]

In their final argument, the cities contended that the PUC violated PURA by failing to require First Choice to pay the cities' rate-case expenses. Section 33.023(b) of PURA specifies that an "electric utility" is responsible for reasonable rate-case expenses.[45] Although the cities contended that an AREP was an electric utility for the purpose of rate-making proceedings, "retail electric provider" is expressly excluded from the statutory definition of "electric utility."[46] Relying on the plain language of PURA, the Austin Court of Appeals held that an AREP was not an electric utility and was not required to reimburse the rate-case expenses.[47]

D. Unbundled Cost of Service Proceeding

Reliant Energy, Inc. v. Public Utility Commission of Texas concerns an appeal of the PUC's final order in an Unbundled Cost of Service ("UCOS") proceeding that set transmission and distribution rates for Reliant Energy.[48] The district court upheld the order except for a portion of the PUC's decision concerning interest on excess mitigation credits. On appeal, the parties challenged the order regarding four general issues:

39. Tex. Util. Code Ann. § 39.202(p) (Vernon Supp. 2004).
40. *City of Alvin*, 143 S.W.3d at 887.
41. *Id.* at 888.
42. *Id.*
43. *Id.*
44. *Id.* at 888-89.
45. Tex. Util. Code Ann. § 33.023(b) (Vernon 1998).
46. *Id.* § 31.002(6)(H).
47. *City of Alvin*, 143 S.W.3d at 890.
48. 153 S.W.3d 174, 183 (Tex. App.–Austin 2004, pet. filed).

(1) elements of the rate base; (2) rate of return; (3) rate-case expenses; and (4) rate design.

1. Rate Base

The parties had three objections to the PUC's determination of Reliant's rate base in the forecasted 2002 test year: (1) "the propriety of the failure to include an overfunded retirement plan in the rate base," (2) "the inclusion of facilities in use at year's end rather than figuring a year-long average by pro-rating the cost of facilities brought on line during the year," and (3) "the accuracy of the amount of transmission system cost" allocated for the interconnection of a merchant generator, known as Merchant Plant 4.[49] The challenges all concerned PURA's mandate that only property that is "used by and useful to the utility in providing service" might be included in Reliant's rate base.[50] The Austin Court of Appeals upheld the PUC's order on the first two issues but overturned the order regarding the allocation of costs for Merchant Plant 4.[51]

First, Reliant argued that the PUC should have included in Reliant's rate base the amount in its retirement plan exceeding the funds required to satisfy its retirement obligations.[52] Reliant contended that the PUC's decision on the overfunding was not supported by substantial evidence and was inconsistent with the PUC's prior treatment of underfunding of Reliant's retirement fund.[53] The court disagreed with both of these arguments, holding that it is not unreasonable for the PUC to have concluded that excess plan funds are not additionally beneficial and useful in providing electricity and should not be included in the rate base.[54]

Several intervenors next argued that the PUC should not have allowed Reliant "to calculate its rate base using the amount it anticipated investing in transmission facilities by the end of 2002."[55] The PUC should have instead used the amount of investment made as of June 30, 2002 because under the year-end method the rates could be paid for the entire year for a plant that is used only on the last day of the year.[56] But the Austin Court of Appeals found that "PURA does not specify when during the forecasted test year the TDU's investments must occur in order to be included in the utility's rate base."[57] Thus, it was within the PUC's discretion to choose to use the year-end rate base.[58] The court also relied on a Texas Supreme Court holding that a plant does not always have to be *in use* in order to be sufficiently "used and useful" to include in the rate

49. *Id.* at 185.
50. *See* TEX. UTIL. CODE ANN. §§ 36.051, 36.053(a) (Vernon 1998).
51. *Reliant Energy, Inc.*, 153 S.W.3d at 186-92.
52. *Id.* at 185.
53. *Id.*
54. *Id.* at 186.
55. *Id.* at 187.
56. *Id.*
57. *Id.* at 189.
58. *Id.*

base.[59]

The third challenge to Reliant's rate base concerned the amount of costs allocated for interconnecting the Reliant transmission system to Merchant Plant 4. Reliant's expert witness originally testified that it would cost an estimated $107.3 million for the interconnection of Merchant Plant 4. In his rebuttal testimony, the Reliant witness revised this cost estimate to $50.2 million. But the PUC added $107.3 million, rather than $50.2 million, to Reliant's rate base. After reviewing the record of the ratemaking proceeding, the court concluded that the testimony concerning the revised figure was uncontroverted.[60] It agreed with the challengers that the PUC's inclusion of Reliant's original cost estimate for Merchant Plant 4 was inadvertent and not based on substantial evidence.[61] The Austin Court of Appeals reversed the inclusion of the $107.3 million and remanded this issue to the PUC.[62]

2. Return on Equity

Several intervenors challenged the PUC's determination of the rate of return applicable to Reliant in the ratemaking proceeding. As a part of the restructuring process, the PUC initiated a generic proceeding to resolve issues common to all transmission and distribution utilities. The goal of the generic proceeding was to "streamline" the utility-specific ratemaking proceedings.[63] Return on equity was among the issues considered in the generic proceeding. Intervenors argued (1) that the PUC was not authorized "to conduct a generic proceeding to determine a single issue common to several utilities," (2) that the PUC "acted arbitrarily and capriciously by using the generic return on equity for Reliant," and (3) that the generic return on equity was "not reasonable" because it failed to account for reductions of interest rates during the period between the generic proceeding order and the Reliant order.[64] In this appeal, the court denied all of these arguments and affirmed this portion of the PUC's order.[65]

The intervenors claimed that the generic proceeding was improper because the PUC did not enact a procedural rule for considering an issue common to several utilities in a single generic proceeding. But the court found that the generic proceeding was authorized under PUC rules.[66] A proceeding may be severed if the severance would "serve the interest of efficiency or prevent unwarranted expense or delay."[67] Likewise, proceedings may be consolidated if the proceedings "involve common ques-

59. *Id*; *see* Cities for Fair Util. Rates v. Pub. Util. Comm'n of Tex., 924 S.W.2d 933, 941-42 (Tex. 1996).
60. *Reliant Energy, Inc.*, 153 S.W.3d at 192.
61. *Id.*
62. *Id.*
63. *Id.* at 183.
64. *Id.* at 193-96.
65. *Id.*
66. *Id.* at 194.
67. *Id.*; *see* 16 TEX. ADMIN. CODE § 22.34(b) (2004).

tions of law or fact" and "consolidation would be more time- and cost-efficient."[68] Although intervenors argued that the PUC rules did not expressly identify "issues" in the consolidation proceedings provision, the court concluded that severed issues become "proceedings" that may be consolidated.[69]

The intervenors also argued that the PUC "acted arbitrarily and capriciously by using the generic return on equity for Reliant without considering the utility-specific factors listed in PURA section 36.052."[70] These factors include: "(1) the efforts and achievements of the utility in conserving resources, (2) the quality of the utility's services, (3) the efficiency of the utility's operations, and (4) the quality of the utility's management."[71] The PUC maintained that it did not consider these factors in the UCOS proceeding because they related to "the utility's historical practices" and were not applicable to a newly-unbundled transmission and distribution utility.[72] The Austin Court of Appeals agreed with the PUC that transmission and distribution utilities were created during the transition to a competitive market and thus had no records as stand-alone entities.[73] Therefore, the PUC did not err by not taking into account non-existent factors such as quality of service, management, and conservation efforts.[74]

The intervenors' third complaint was that the PUC should have held another hearing to determine the effect of the Federal Reserve Board's reductions of short-term interest rates between the date of the final order in the generic proceeding and the date of the final order in Reliant's UCOS proceeding on the reasonableness of the rate of return.[75] The Austin Court of Appeals held that the PUC did not abuse its discretion in deciding not to reopen the record to consider the changes in interest rates.[76] The failure of rates to account for interest rate fluctuations was "inherent in the regulatory process."[77]

3. *Rate Case Expenses*

The parties had three complaints regarding the PUC's determination of Reliant's reasonable and necessary rate case expenses. These complaints concerned: (1) the calculation of Reliant's consolidated tax savings, (2) the application of a generic escalator to Reliant's vegetation control costs, and (3) the failure to use surplus insurance funds to reduce Reliant's

68. *Reliant Energy, Inc.*, 153 S.W.3d at 194; *see* 16 TEX. ADMIN. CODE § 22.34(a) (2004).
69. *Reliant Energy, Inc.*, 153 S.W.3d at 194.
70. *Id.* at 195.
71. TEX. UTIL. CODE ANN. § 36.052 (Vernon 1998).
72. *Reliant Energy, Inc.*, 153 S.W.3d at 195.
73. *See id.*
74. *Id.*
75. *Id.* at 196.
76. *Id.* at 197.
77. *Id.*

rates.[78] Once again, the Austin Court of Appeals found no merit to these challenges and affirmed the PUC's order regarding rate case expenses.

Reliant argued that the method used by the PUC to calculate the transmission and distribution utility's share of consolidated tax savings constituted "impermissible retroactive ratemaking" because the tax savings had already been apportioned in prior ratemaking cases.[79] The Austin Court of Appeals previously held that "[a]s long as the Commission is not trying to recoup past savings, but only trying to recover today's benefit from those past savings, its calculation of consolidated tax savings does not constitute retroactive ratemaking."[80] The court declined to overturn this earlier decision and rejected Reliant's claim that the PUC's actions were improper.[81] The court also rejected Reliant's arguments that the PUC's calculation of tax savings erroneously included the losses of companies that would not be eligible to file a consolidated tax return with the transmission and distribution utility and that the PUC's adjustment was arbitrary and capricious because it differed from the treatment of other utilities in other PUC proceedings.[82]

Reliant also claimed that the PUC's decision "not to exempt its vegetation control expenses from the generic cost escalation factor" was not supported by substantial evidence and was arbitrary and capricious.[83] The court found that there was "evidence that increased expense of one type that exceeded the escalator rate could nevertheless be balanced by increases in productivity or decreases in other types of related expense."[84] Accordingly, the court held that the PUC's order was supported by substantial evidence.[85]

Finally, intervenors complained that the PUC failed "to reduce the [Reliant transmission and distribution utility's] rates based on its share of surplus funds from the Nuclear Electric Insurance Limited ("NEIL") funds."[86] Intervenors claimed that the PUC should have credited ratepayers with Reliant's share of the surplus funds because Reliant's NEIL premiums were "paid for and supported by ratepayer-derived funds."[87] The PUC chose to keep the NEIL assets with Reliant's generation company because they were "primarily generation-related" and could be used "to reduce stranded costs in the 2004 true-up proceeding."[88] The PUC maintained that ratepayers "received benefits from the NEIL premiums through reduction of financial risk from catastrophic losses at the

78. *Id.*
79. *Id.* at 198.
80. *Id.* (quoting Cent. Power & Light Co. v. Pub. Util. Comm'n of Tex., 36 S.W.3d 547, 557 (Tex. App.–Austin 2000, pet. denied)).
81. *Id.*
82. *Id.* at 200-01.
83. *Id.* at 201.
84. *Id.*
85. *Id.*
86. *Id.* at 203.
87. *Id.* at 204.
88. *Id.* at 203-04.

nuclear plant" and through "credits for these rate expenses through NEIL distributions."[89] The Austin Court of Appeals held that the PUC's decision to not include the surplus funds was reasonable and supported by substantial evidence.[90]

4. Rate Design

Intervenors challenged four elements of the rate design: (1) the transmission cost recovery factor; (2) inclusion of an amount in rates for a minimum cost necessary to distribute some electricity to every customer; (3) the rate of escalation for coal fuel cost estimates; and (4) the rate of reduction of the estimated capacity of generators.[91] The Austin Court of Appeals rejected all of these arguments.

Intervenors complained that the PUC approved a transmission cost recovery factor that impermissibly passed through wholesale transmission costs to retail customers.[92] The court held that the transmission cost recovery factor applies only to the transaction between the distribution service provider and the retail electric provider, which does not constitute a retail transaction.[93] Therefore, the transmission cost recovery factor did not apply to retail sales.[94] The court concluded that the PUC was authorized to adopt the transmission cost recovery factor to adjust wholesale rates "to ensure the timely recovery of transmission investments."[95]

The intervenors next argued that the PUC should not have abandoned the recommendation of the Administrative Law Judge ("ALJ") to reject Reliant's "minimum plant" methodology for calculating "the investment needed to connect customers and provide for minimum usage" as part of its costs-of-service allocation.[96] The ALJ rejected Reliant's methodology because no other utility had used it and because the underlying plant study was "questionable."[97] The PUC disagreed with the ALJ's reasons and adopted the "minimum plant" methodology in its final order. The PUC pointed to evidence in the record to support its rejection of the ALJ's recommendation. The court agreed that this portion of the PUC's order was supported by substantial evidence.[98]

Finally, intervenors' third and fourth objections concerned the PUC's application of a three percent escalation rate to the price of coal for a period of years and its adoption of a one-half percent annual reduction in the capacity factor for Reliant's nuclear and coal power plant. Intervenors alleged that there was no evidence to support these PUC decisions.[99]

89. *Id.* at 204.
90. *Id.*
91. *Id.*
92. *Id.* at 205.
93. *Id.*
94. *Id.*
95. *Id.* at 206.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 207.

After reviewing the record, the Austin Court of Appeals rejected these complaints and affirmed these portions of the PUC's final order.[100]

E. PUC Jurisdiction Over Wholesale Transmission Costs

Under PUC rules governing wholesale transmission services, rates, and access, each ERCOT utility was required to pay a "facilities charge" for transmission service provided to other ERCOT utilities.[101] In 2001, the Texas Supreme Court invalidated a portion of these rules and held that PURA gave the PUC only the authority to oversee a municipally-owned utility's wholesale transmission rates, not the power to set the rates.[102] In *Texas Municipal Power Agency v. Public Utility Commission of Texas*, the Austin Court of Appeals held that the PUC was authorized under PURA to determine whether the terms under which wholesale transmission costs are allocated between customers are reasonable.[103] This determination of reasonableness did not constitute the type of ratemaking prohibited by the earlier Texas Supreme Court decision.

In 1976, TMPA, a municipally-owned utility, contracted to sell power at wholesale prices to four cities, including the City of Bryan. PUC wholesale transmission rate orders in 1997 and 1998 imposed greater costs for transmission on the cities of Denton, Garland, and Greenville than on Bryan. As a result of the increased costs, the TMPA board of directors voted to have TMPA reimburse the three affected cities for a portion of the transmission charges. This resolution caused an increase in TMPA's budget and a reallocation of charges to all of the member cities.[104]

The City of Bryan filed a PUC complaint against TMPA alleging that TMPA was requiring it to pay more for transmission service than the PUC transmission orders allowed. The City of Bryan also asked the PUC for a declaration that it could continue to nominate its own load for power supplied by TMPA. The PUC ruled in favor of the City of Bryan in the complaint proceeding and in a 1999 rate-setting proceeding also held that the City of Bryan could nominate its own load and was entitled to unbundled transmission service. TMPA sought judicial review of both the complaint proceeding order and the 1999 rate-setting order. The district court reversed and remanded both proceedings to the PUC in light of the Texas Supreme Court ruling invalidating the PUC's authority to set wholesale transmission rates.[105]

On appeal, TMPA argued that the PUC lacked the authority both "to adjudicate contract rights" between the parties and "to set wholesale transmission rates for a municipally-owned utility."[106] TMPA contended that the district court erred (1) by denying TMPA's request for a declara-

100. *Id.*
101. 16 Tex. Admin. Code §§ 23.67, 23.70 (Vernon 2004).
102. *See* Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd., 53 S.W.3d 310 (Tex. 2001).
103. 150 S.W.3d 579 (Tex. App.—Austin 2004, pet. granted).
104. *Id.* at 583.
105. *Id.* at 584.
106. *Id.*

tion and its motion for partial summary judgment that the PUC lacked subject-matter jurisdiction over the dispute and (2) by granting the City of Bryan's motion for partial summary judgment that as a matter of law PURA conferred jurisdiction upon the PUC to determine whether TMPA's terms of transmission service were reasonable.[107] The Austin Court of Appeals affirmed the district court's grant of partial summary judgment in favor of the City of Bryan and dismissal of TMPA's request for declaratory relief.[108]

Although it acknowledged the PUC's general jurisdiction over wholesale transmission rates, TMPA claimed that the PUC did not have jurisdiction in this instance because TMPA does not provide wholesale transmission service to the City of Bryan.[109] Based upon TMPA's representations in the prior proceedings that the City was a transmission service customer and upon the court's examination of the definitions of "transmission service" in PURA and PUC rules, the court of appeals rejected this argument—the City of Bryan was a wholesale transmission customer of TMPA and the dispute was within the PUC's jurisdiction.[110]

TMPA also argued that, once the PUC determined that the City of Bryan could nominate its own load, it was engaged in unauthorized rate setting.[111] After reviewing the provisions of Chapters 35 and 40 of PURA, the Austin Court of Appeals found that PURA gives the PUC the specific power to determine whether wholesale transmission rates are reasonable.[112] The PUC has additional authority to ensure nondiscriminatory access to transmission service and to resolve disputes between utilities by arriving at a reasonable wholesale transmission rate.[113]

F. Fuel Reconciliation Proceedings

In *Cities of Abilene v. Public Utility Commission of Texas*, the Austin Court of Appeals affirmed the PUC's final order in a fuel reconciliation proceeding.[114] The court disagreed with the cities of Abilene, San Angelo, and Vernon and held that the fuel costs and purchased power costs requested by AEP Texas North Company (formerly West Texas Utilities) could be properly recovered in a fuel reconciliation proceeding.[115]

The cities contested the recovery of purchased power costs "incurred before the commencement of commercial operations of the Southwest Mesa Wind Farm."[116] In 1998, the PUC approved a settlement agreement that included a mechanism for recovering costs associated with

107. *Id.*
108. *Id.* at 592.
109. *Id.* at 586-88.
110. *Id.* at 589.
111. *Id.*
112. *Id.* at 591.
113. *Id.* at 590.
114. 146 S.W.3d 742 (Tex. App.–Austin 2004, no pet.).
115. *Id.* at 752.
116. *Id.* at 745.

AEP's purchased-power contract with Southwest *after* commercial operations began (the "Settlement Order").[117] The cities argued that, as a result of the Settlement Order, AEP "agreed to relinquish the right to recover the pre-commercial costs" associated with the Southwest contract and was precluded from recovery of those costs in the fuel reconciliation proceeding.[118] Disregarding the recommendation of the ALJ in the contested hearing, the PUC found that the Settlement Order was ambiguous with respect to recovery of the pre-commercial costs and ordered that these costs could be recovered by AEP.[119] The court of appeals agreed with the PUC's conclusion that the Settlement Order was ambiguous with respect to the recovery of the pre-commercial costs associated with the Southwest contract and found that the PUC's order that the costs were recoverable in the fuel reconciliation proceeding was supported by substantial evidence.[120]

The cities also protested the efficiency standard used by the PUC in the fuel-reconciliation proceeding to determine the costs associated with AEP's Oklaunion coal-fired power plant. The cities contended that the PUC was required to use a standard set forth in a preliminary order to calculate the efficiency of the Oklaunion plant.[121] The cities' efficiency standard measured the plant's efficiency by comparing it to other coal plants in Texas. AEP argued for an efficiency standard that compared the Oklaunion plant to similar coal plants throughout the United States.[122] The PUC disregarded its preliminary order and adopted the AEP efficiency standard in the fuel-reconciliation proceeding. The PUC found that the AEP efficiency standard was more representative of the efficiency of plants like Oklaunion. The court of appeals found nothing in the preliminary order that limited the PUC to a comparison of Texas plants only.[123] Finding that the evidence in the proceeding was such that reasonable minds could have reached the PUC's conclusion, the court of appeals held that the order allowing recovery of AEP's requested costs for the Oklaunion plant was supported by substantial evidence.[124]

G. Penalties on Delinquent Bills

In *Volcanic Gardens Management Co. v. El Paso Electric Co.*, the El Paso Court of Appeals held that a utility's five percent late payment charge was not "interest" but rather a penalty the utility was authorized to assess under PURA.[125] This case involved a dispute between El Paso

117. *Id.*
118. *Id.* at 746.
119. *Id.* at 747.
120. *Id.* at 750.
121. *Id.* at 746.
122. *Id.*
123. *Id.* at 752.
124. *Id.*
125. Volcanic Gardens Mgmt. Co., Inc. v. El Paso Elec. Co., No. 08-03-00208-CV, 2004 WL 1695890 (Tex. App.—El Paso July 29, 2004, pet. denied).

Electric Company ("EPEC"), a municipal electric utility, and one of its customers, Wet 'N' Wild.

Wet 'N' Wild sued EPEC, alleging that a five percent late payment penalty on EPEC's invoices was illegal because:

(1) the late charge constituted a usurious interest that violated the Texas Finance Code;[126]
(2) the PUC had no statutory authority to issue rule 25.28(b), relating to delinquent payment;[127]
(3) the PUC had no power to delegate to EPEC the authority to assess a late charge against customers;[128] and
(4) EPEC had no authority to compose its own standards for determining whether to impose the late charge, and it applied the late charge in an "arbitrary and discriminatory manner."[129]

The trial court granted EPEC's motions for partial summary judgment on all of Wet 'N' Wild's claims.

In Wet 'N' Wild's appeal of the first issue, it argued that the late charge violated the Texas Finance Code because the charge constituted "'interest' which exceeded the maximum rate allowed under the statute."[130] EPEC contended that the late penalty was not "interest" subject to the statute.[131] Under the usury law, there is no basis for usury if there is no interest.[132] The PUC's rule 25.28(b) states: "A one-time penalty not to exceed 5.0% may be charged on a delinquent commercial or industrial bill. The 5.0% penalty on delinquent bills may not be applied to any balance to which the penalty has already been applied."[133] The court of appeals found that "[a] plain reading of the rule shows that the charge applied did not accrue nor continue to accrue against the principal balance in exchange for the detaining of a lender's money."[134] The late payment charge was simply a one-time penalty, not a "usurious interest."[135]

The second issue addressed by the court was Wet 'N' Wild's argument that the PUC exceeded its statutory authority by promulgating rule 25.28(b). Wet 'N' Wild contended that the late payment charge was "illegal and invalid because section 36.003 [of PURA] explicitly prohibits any rate discrimination between classes and prohibits an electric utility from establishing or maintaining an unreasonable difference concerning rates between classes of service."[136] The court of appeals disagreed with Wet 'N' Wild's interpretation of section 36.003. It found that PURA grants the PUC "discretionary authority to establish rates for classes of custom-

126. *Id.* at *2.
127. *Id.* at *5.
128. *Id.*
129. *Id.*
130. *Id.* at *2; *see* TEX. FIN. CODE ANN. § 302.001(b) (Vernon 1998).
131. *El Paso Elec. Co.*, 2004 WL 1695890, at *3.
132. *Id.*
133. 16 TEX. ADMIN. CODE § 25.28(b) (Vernon 2004).
134. *El Paso Elec. Co.*, 2004 WL 1695890, at *5.
135. *Id.*
136. *Id.* at *6; *see* TEX. UTIL. CODE ANN. § 36.003 (Vernon 1998).

ers that are literally discriminatory if the rates are not unreasonably discriminatory as to that class of customers."[137] Section 36.003 prohibits only "unreasonable" rate differences between classes of customers.[138] The court upheld the validity of the PUC's rule 25.28(b).[139]

In its third complaint, Wet 'N' Wild asserted that the PUC illegally delegated to EPEC the discretion to assess a late payment charge. Wet 'N' Wild argued that EPEC was engaged in "rate making," which is a function that the Legislature granted only to the agency.[140] EPEC countered that its PUC-approved tariff established that the late payment charge was "not left to its discretion, but rather the Commission specifically authorized EPEC to charge the penalty in the uniform rate schedule of the tariff."[141] Section 32.101 of PURA requires a utility to file a tariff that includes each rule that relates to or affects the rate of the service, product, or commodity furnished by the utility.[142] The court of appeals found that EPEC's tariff rule was approved by the PUC and was not contrary to rule 25.28(b).[143] The court held that the PUC did not illegally delegate its rate-making authority to EPEC.[144]

In its final argument, Wet 'N' Wild alleged that EPEC "acted arbitrarily" and violated PURA by charging late penalties to some customers and waiving the late penalties for others.[145] EPEC argued that its PUC-approved tariff provided that "EPEC *may* assess a one-time 5 percent penalty on a delinquent commercial or industrial bill."[146] The court agreed with EPEC. Referring to section 36.003(e) of PURA, the court of appeals found that EPEC was allowed to charge less than five percent without being discriminatory.[147] Section 36.003(e) provides that "[a] charge to an individual customer for retail or wholesale electric service that is less than the rate approved by the regulatory authority does not constitute an impermissible difference, preference, or advantage."[148]

H. Service Extension Agreements

Double Diamond, Inc. v. Hilco Electric Cooperative, Inc. involved a dispute between a developer, Double Diamond, and an electric-cooperative, Hilco, over charges for distribution line extensions and facilities under Hilco's tariff and an independent extension agreement.[149] Siding

137. *El Paso Elec. Co.*, 2004 WL 1695890, at *6; *see* Pub. Util. Comm'n of Tex. v. AT&T Comms. of the S.W., 777 S.W.2d 363, 366 (Tex. 1989).
138. *El Paso Elec. Co.*, 2004 WL 1695890, at *6.
139. *Id.*
140. *Id.* at *7.
141. *Id.*
142. Tex. Util. Code Ann. § 32.101 (Vernon 1998).
143. *El Paso Elec. Co.*, 2004 WL 1695890, at *7.
144. *Id.*
145. *Id.*
146. *Id.* at *8.
147. *Id.*
148. Tex. Util. Code Ann. § 36.003(e) (Vernon 1998).
149. 127 S.W.3d 260 (Tex. App.—Waco 2003, no pet.).

with the customer, the Waco Court of Appeals reversed the trial court's grant of summary judgment in favor of Hilco.[150]

In August 1996, the parties signed a written agreement that gave Double Diamond a substantial discount to the construction charges prescribed in Hilco's tariff for distribution line extensions. The agreement provided that "upon termination [of the agreement], [Hilco's] approved tariffs will be in effect."[151] The agreement expired in August 1997, but the parties agreed to extend it in November 1997. The extended agreement terminated in August 1998, but from the expiration of the agreement in 1998 until August 23, 2000, the parties continued to do business under the terms of the 1996 agreement.

Following a change in management in 2000, Hilco demanded payment from Double Diamond for the construction work done between August 2, 1998 and August 23, 2000 under the rates of Hilco's tariff. Hilco refused to construct any new electrical lines or facilities until the disputed charges were paid. Refusing to pay the additional charges, Double Diamond filed a complaint with the PUC. The PUC took no corrective action against Hilco, so Double Diamond filed for judicial relief in district court. Double Diamond requested an injunction to require Hilco to resume construction of new lines and facilities and a declaratory judgment that it owed Hilco nothing for the past extensions. The developer also alleged tortious interference. Hilco counterclaimed for the unpaid construction charges. The trial court granted Hilco's motion for summary judgment for the amount of the unpaid charges and attorneys' fees.[152]

In Double Diamond's appeal, the issue before the court was whether questions concerning the existence of an implied agreement between the parties created a genuine issue of material fact under the summary judgment standard. Double Diamond argued that the parties had an implied agreement to extend their original agreement following the termination of the actual written agreement in August 1998. Double Diamond contended that the rates and charges in the unregulated service extension agreement, rather than the tariff provisions, controlled.[153] Hilco argued that the provisions in its tariff regarding extension of service should be used to calculate the disputed construction charges.[154]

The court disagreed with Hilco's argument that the tariff, standing alone, is a contract.[155] The court instead found that the tariff was a unilateral document and the agreement of another party was required to create a binding contract.[156] Typically, such agreement is found in an electric service agreement. The court of appeals determined that in the absence of any such written agreement, an implied agreement would exist

150. *Id.* at 269.
151. *Id.* at 262.
152. *Id.* at 263-64.
153. *Id.* at 264.
154. *Id.* at 265.
155. *Id.*
156. *Id.*

between Hilco and any customer to which it began furnishing service under the tariff.[157] Further, the court found no authority prohibiting parties from impliedly extending an agreement or entering into a new agreement after a written agreement expires.[158] Holding that a fact question existed concerning the existence of an implied contract, the court overturned the trial court's grant of summary judgment in favor of Hilco.[159] The court also concluded that summary judgment for Hilco based on theories of suit on a sworn account and quantum meruit was improper.[160]

III. NATURAL GAS REGULATION

In *Southern Union Co. v. City of Edinburg*, the Texas Supreme Court held that natural gas purchased by city customers from affiliates of the franchisee was not subject to a franchise tax.[161] The court found that the City of Edinburg was not entitled to any franchise fees under its alleged claims and reversed the trial court's award for damages.[162]

The Rio Grande Valley Gas Company ("RGVG") and its successor, Southern Union Gas Company, have supplied natural gas to customers in the City of Edinburg under a series of franchise agreements since the 1920s (Ordinance No. 1129).[163] As a result of changes in the Texas natural gas industry that occurred following the energy crisis in the 1970s, RGVG in 1985 began buying some of the gas it provided to the City customers from a special marketing program ("SMP").[164] RGVG also filed new tariffs with the Railroad Commission that allowed it to transport gas for customers who chose to buy gas from other suppliers. These tariffs were approved by both the Railroad Commission and the City, which passed additional ordinances authorizing RGVG to provide this transportation service.[165] Under the later ordinances, the City was entitled to receive fees for transportation of natural gas.[166]

The City of Edinburg asserted that all natural gas "sold by any company to consumers within the City was subject to the 4% franchise fee under Ordinance No. 1129" if the gas was delivered by RGVG's system, and subsequently filed suit to recover the lost franchise fees.[167] The City also claimed that RGVG had transferred ownership of the gas transmission system to an affiliated company in 1987 without the City's consent.[168] The City further contended that the operation of the

157. *Id.*
158. *Id.* at 267.
159. *Id.*
160. *Id.* at 268.
161. 129 S.W.3d 74 (Tex. 2003).
162. *Id.* at 76.
163. *Id.* In 1993, Southern Union assumed all of RGVG's rights and obligations under the franchise ordinance.
164. *Id.*; *see* R.R. Comm'n v. Lone Star Gas Co., 844 S.W.2d 679 (Tex. 1992).
165. *S. Union Co.*, 129 S.W.3d at 77.
166. *Id.*
167. *Id.* at 78.
168. *Id.*

transmission system by RGVG's affiliate "constituted a purpresture in public property."[169]

In a lengthy and complicated judgment, the trial court awarded actual damages for breach of contract and tortious interference against RGVG and Southern Union, as well as their various affiliates and parent companies.[170] The trial court declared that "certain pipelines and facilities located within the City constituted a purpresture in public property in the City's rights-of-way and an encroachment on the City's property without its permission."[171] The trial court also ruled that RGVG's parent company, Valero Energy Corporation, was vicariously liable for RGVG's conduct from 1985 to 1993, and that Southern Union was liable for any liabilities of RGVG from 1985 to the date of judgment.[172] The trial court disregarded the jury's award of damages for "RGVG's transfer of rights or privileges under Ordinance No. 1129 without the City's consent."[173]

The City of Edinburg claimed that RGVG and Southern Union were obligated to pay franchise taxes on "all gas sold within the City that passed through RGVG's or Southern Union's pipeline system, regardless of which entity, affiliated or not, actually sold the gas to consumers within the City."[174] The City based its position on the language in Ordinance No. 1129 designating a franchise fee to be imposed on "four (4%) percent of [RGVG's] gross income *derived from* all gas sales within the City."[175] The City contended that "income derived from transportation that was provided by RGVG or Southern Union in connection with gas sales within the City" were subject to the franchise fee provision.[176] The Texas Supreme Court was not persuaded by this argument. Looking at the language of the ordinance in its proper context, "[t]he reference to 'all gas sales within the City' . . . means 'its [the Grantee's] gross income derived from all gas sales [by the Grantee] within the City.'"[177] Further, although RGVG, for a two-year period from 1986 to 1988, provided transportation services to customers within the City based on its rights under Ordinance No. 1129, the City subsequently passed additional ordinances which approved tariff rate schedules that expressly authorized RGVG to transport third-party gas within the city. The Texas Supreme Court held that the City could not recover under Ordinance No. 1129 franchise fees on revenue either from gas sales within the City by third-party suppliers or from transportation services provided to third-party suppliers.[178]

The City of Edinberg next asserted that sales of natural gas made by affiliates of RGVG or Southern Union to customers within the City

169. *Id.*
170. *Id.* at 78-79.
171. *Id.* at 80.
172. *Id.*
173. *Id.*
174. *Id.* at 83.
175. *Id.*
176. *Id.*
177. *Id.* at 84.
178. *Id.* at 84-85.

should be subject to Ordinance No. 1129's franchise fee under a theory of "single business enterprise."[179] Alleging that RGVG and the other Valero companies were operated as a single business enterprise, the City claimed that "any sales of gas made by any Valero-related entity within the City should be subject to the 4% franchise tax."[180] The City further argued that the manner in which the Valero companies were operated was a "sham" intended "to defraud the City."[181] The Valero entities asserted that the Texas Supreme Court has never recognized the single business enterprise theory and that "there is no need for an additional theory either for piercing a corporate veil or imposing joint and several liability."[182] The Valero entities also contended that the single business enterprise theory was misused in this case because it went "beyond piercing a corporate veil and imposing joint and several liability" and was "used to transform the separate contracts of affiliated companies into contractual undertakings by all affiliated companies as if they were a single entity."[183] The Valero entities further contended that article 2.21 of the Texas Business Corporation Act governs liability under any theory of single business enterprise and that the court of appeals improperly ignored the statute.[184]

Although the Texas Supreme Court acknowledged that it had never considered the single business enterprise theory in any detail, it declined to consider whether the concept was a necessary addition to Texas law.[185] Instead, the court found that article 2.21 of the Texas Business Corporation Act was the controlling authority and that the questions submitted to the jury were intended to embody the requirements of the statute.[186]

The Court also found no evidence that the distinct corporate identities of the Valero entities should be disregarded or that sales by RGVG's affiliates to customers within the City should be considered sales subject to RGVG's franchise agreement with the City.[187] Further, there was no evidence of fraud or intent to deceive by the Valero entities.[188] To the contrary, the transportation services provided by RGVG to its affiliates was not only known by the City but approved by the City under the transportation tariffs and ordinances.[189]

The Texas Supreme Court found no merit in the City of Edinburg's claims regarding (1) RGVG's transfer of its rights under the franchise ordinance without the City's consent, (2) tortious interference, (3) fraudulent inducement, and (4) purpresture. The court reversed the trial

179. *Id.* at 85.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 85-86.
185. *Id.* at 87.
186. *Id.*
187. *Id.* at 89.
188. *Id.* at 88.
189. *Id.*

court's award of damages under these various claims.[190]

IV. CONCLUSION

The cases included in this Survey should provide attorneys with a guide to significant developments in Texas law concerning electric and natural gas utilities. As most of these cases demonstrate, Texas courts are continuing to interpret and implement the statutes and rules that are a necessary part of the transition from a regulated market to a competitive electricity market in Texas.

190. *Id.* at 90-93.