

**ORAL ARGUMENT – 11-12-03**  
**03-0024**  
**IN RE Entergy CORPORATION**

**WILLIAMS:** I want to focus my presentation on two issues. First, relators will demonstrate that the Beaumont court abused its discretion in failing to dismiss this case, because exclusive jurisdiction over plaintiff's claims, like the PUC of Texas. Second, relators will demonstrate that mandamus relief is required in this case to address the DC's ongoing interference with the PUC's orders and activities.

In 1993, the PUC adopted a settlement agreement, an order approving the merger of Entergy Corp. and Gulf States Utilities Co. The settlement agreement as adopted in the commission's order established a regulatory plan. That plan was for 3 rate cases to be conducted ultimately under the PUC's exclusive jurisdiction. The PUC has continuously exercised jurisdiction over that regulatory plan, and in recent orders has determined that the regulatory plan must be changed to accommodate SB 7, the legislation which has brought about retail competition in the electric industry in Texas.

In the face of the PUC's ongoing assertion of jurisdiction, the plaintiffs purport to bring a suit alleging that relators breached that same 1993 settlement agreement that the PUC adopted as its order. This is not a simple contract case. This is fundamentally a case about whether relator, Entergy Gulf States, should of filed a rate case, and should have changed its rates.

The settlement agreement provided no contract right to the plaintiffs to receive any particular payment of merger savings or any particular payment at all from either Entergy Gulf States or Entergy Corporation.

**O'NEILL:** My understanding is they don't claim that rates should have been changed, but just that the savings percentage should have changed. The tariff would stay the change.

**WILLIAMS:** That's their claim. But if you look at the agreement it's clear that what they are requesting is a change in rates. The claim breached the plaintiff's assert is Entergy Gulf States failure to file a rate case. Their so called damages are the difference between what Entergy Gulf States rates would be without that third rate case, with and without that flow through of merger savings. As the PUC itself agrees in its amicus brief, this is a change in rates. Indeed the agreement they sue on itself is a rate under the definition of a PUC regulatory act.

As the court will recall, the PUC regulatory act defines rates as including any compensation or charge made by the utility, any contract or practice affecting such charges. So clearly under that broad definition, as the PUC itself recognizes, these are rates and changes in rates. And these matters fall under the PUC's exclusive jurisdiction.

The plaintiffs claim their suit on the agreement is for damages, but the agreements, one purpose was to form the basis for a PUC order. It was unenforceable absent PUC adoption. The agreement was to be implemented by PUC orders and rate proceedings exclusively. The agreement by its own terms and the PUC's order call for implementation of a PUC regulatory plan.

It was the PUC that exercised its jurisdiction to cancel, in its own words in the amicus brief, that third rate case in the regulatory plan when it determined that that third rate case was inconsistent with the requirements of SB 7.

SCHNEIDER: How did SB 7, if it did, change any of the rights or obligations under this agreement?

WILLIAMS: First of all, we contend that the rights and obligations under the agreement, the agreement itself was a recommendation for adoption of a PUC order. It could be implemented and enforced only by the PUC and its regulatory plan. So it was essentially an agreement for the PUC to adopt an order and to take jurisdiction over these matters and implement the provisions of the agreement through rate-making.

So in that sense it was a broad based requirement for setting rates. And the law of this state is that those types of agreements are always subject to the state's paramount authority to change them on a prospective basis consistent with the public interest.

To the extent the court is referring to §39.108, that in our view is not really the issue for this case. Section 39.108 would go to the merits of whether the commission's actions were contrary or violated PURA. The commission clearly took those actions. It changed the regulatory plan. That doesn't go to the jurisdictional issue. If someone didn't like the actions the commission took in carrying out the regulatory plan and in cancelling that third rate case, their remedy was a direct appeal to the Travis County DC, on to the 3<sup>rd</sup> CA, and on to this court. What that demonstrates to you is what the plaintiffs are doing here is a collateral attack.

HECHT: In the PUC are you bound by the agreement still?

WILLIAMS: No. First, because the PUC found the agreement, the third rate case had been superceded by SB 7, and the agreement by its terms has expired.

HECHT: Were you free in the third rate case to argue against the agreement because of SB 7? What was your position?

WILLIAMS: In the circumstances of this case, yes. Because recall when we brought up the third rate case in that June 2000 time frame where the PUC ordered that the case had been canceled, prior to that time the commission had on its own motion in the second rate case under the regulatory plan, had already determined that in fact SB 7 had superceded the requirement for that 2001 rate

case.

You will recall that in that case in 1999 we settled that second rate case. We proposed a settlement agreement to the commission that said, We agree. We will file that third rate case and we will address these two or three issues specifically in that third rate case. The commission did not adopt that part of our settlement. The commission specifically took that agreement and did not put it in its order. Instead it said you're going to address those issues, not in this 2001 rate case, but in the SB 7 proceeding. So as early as 1999 the commission had on its own decided that SB 7 called for a new regulatory plan so to speak that did not include that third rate case.

OWEN: In the real parties in interest brief on page 9 they say that Entergy Corp attempted to insulate itself from any challenge to the merger savings by entering into a purported rate freeze and including a poisoned pill for any party that attempted to recover savings through operation of the agreement. What were they talking about?

WILLIAMS: They are talking about the order by the PUC at the end of 2001 that decided that the transition of competition in Entergy Gulf States service territory would be delayed. Under the Public Utility Regulatory Act §39.103, the PUC has discretion to decide that a particular area of the state is not quite ready for competition, that more things need to be set in place and to delay competition. And in connection with the proceeding to discern whether competition should be delayed for Entergy Gulf States, the parties entered into a settlement agreement. It was however nonunanimous. The commission used that nonunanimous settlement agreement as a basis for its order, and ordered a delay in competition, and continuing the rate freeze that is already in place as a matter of statutory law.

But the poison pill aspect of that, that was not a poison pill. What that was was in order to insure rate stability during this transaction of competition period, the commission agreed and ordered, not simply adopting a settlement, but ordered in the public interest that should a rate case be filed Gulf States would be able to recover expenses it had already incurred in trying to transition the competition. But only to the extent necessary to avoid a rate decrease.

So I think it just highlights even more that the commission is asserting jurisdiction on a continuous basis trying to get the company to move to competition. And what the Beaumont court is doing in conducting this rate case is stepping right in the middle of those efforts. Here, when the commission, this goes to our mandamus issue I think, in June 2000 and again in 2001 ordered twice that no rate case will be conducted except and to the extent we say so. First, it canceled the rate case. And the Beaumont court is trying to conduct the very rate case the commission canceled, then the commission went on and said, no rate case is going to be held until we say so. We're going to concentrate our efforts on carrying out these other proceedings we've got to get done to get Entergy Gulf States service territory to competition.

Right in the midst of that, the Beaumont court is in effect conducting that rate case. As I say, this goes to our mandamus point, because this court has consistently held that

mandamus is available to prevent a court from interfering with another administrative body that has exclusive jurisdiction. And that's as recently as this past summer. And this is a case that I did not cite in my brief because it was decided after we filed the brief, and that is *Re State Bar of Texas*, 113 S.W.3d, 730. It's a unanimous decision of this court authored by J. Schneider. In that case BODA had exclusive jurisdiction over lawyer discipline. It had conducted a proceeding revoking a lawyer's probation and suspending his license. After that the lawyer went to a Beaumont DC and asked that court to in essence set aside, hold for not BODA's judgment. This court granted mandamus relief to prevent the Beaumont court from interfering with BODA's appeal continuing jurisdiction over that license suspension.

We have the same thing here. When the commission in June 2000 entered that order cancelling the rate case, it maintained continuing jurisdiction over that order. As one of the two or three proceedings it had going, moving forward to put Entergy Gulf States service territory in competition. The Beaumont DC's conduct in this rate case is directly interfering with that ongoing jurisdiction of the PUC.

O'NEILL: Who reaped the benefit of the merger savings in the third year?

WILLIAMS: In other words if everything had just stayed status quo?

O'NEILL: No. Now. Sitting here today who reaped the benefit of the merger savings? Who is receiving those benefits?

WILLIAMS: The shared merger savings was included in Entergy Gulf States as an element of Entergy Gulf States rates in the last case. I would tell you, recall that there is no guarantee, no payment of a particular amount of merger savings to any rate payer. All that happens is, that merger savings are included in rates. They are a cost in rates. The ultimate outcome is whatever it is, including all of Entergy Gulf States costs.

O'NEILL: What's the purpose of the settlement agreement then if that's the case?

WILLIAMS: To allow those to become the basis of a commission's order, which would allow those merger savings to be included in rates. That is the purpose. Our position would be, and we discussed this - again this really goes to the merits more than the jurisdictional issue.

O'NEILL: I guess where I'm confused is in the first two time periods of the settlement agreement the merger savings were allocated 50/50. My understanding is the third time period it was intended under the settlement agreement that all of the savings would go 100% to the plaintiffs here. But now none of it is going to the plaintiffs here. It's all going to Entergy. Is that correct?

WILLIAMS: It is included as an element of Entergy's rates. And again, if the plaintiffs want to make a complaint about that, they can bring that complaint to the PUC. That's the proper jurisdiction.

O'NEILL: So they could seek to enforce that piece of the agreement before the PUC?

WILLIAMS: They can claim that we had violated the PUC's order. It's as simple as that. They could claim that we violated the PUC's order by not filing that rate case and not passing those merger savings on to the rate payers through that vehicle. But the fact is, we've been making filings under SB 7 to show our revenues and costs, including those merger savings. And if this case came to litigation, we would ask for a rate increase. The fact that merger savings are included in rates doesn't automatically mean the rate payers end up with a \$50 million or \$2 million a month payment. It's just an element of rates. The outcome of that rate case, the rate payers could be better off without the rate case being filed.

As I say. Ultimately that is a claim they can bring to the PUC, and the PUC we think would reject it. But they are certainly free to entertain it and act on it within their exclusive jurisdiction.

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REAL PARTY

LAWTON: Next month will be the 10th anniversary of this agreement that's in dispute here today. And there are two important conclusions of law that were stated in the commission's order, that approved an order consistent with that agreement. They didn't approve the agreement. They approved an order consistent with the agreement.

The first conclusion of law is conclusion of law 2. The commission said, we have no jurisdiction over Entergy Corp. Clear as day. The second conclusion of law is conclusion of law 14, which addressed a contract dispute in that litigation. And the commission stated, we have no jurisdiction over this contract dispute. Those two conclusions of law can be found in the record at 5(a)(a), vol. 1.

Ten years later those conclusions of law are still the same. Relator has now conceded in their brief that the PUC does not have jurisdiction over Entergy Corp. And I would also add that case law would suggest that the courts of this state have jurisdiction over implementation of the agreement.

Let's just talk about this agreement for a moment. It was a merger case. That means under PURA - it was PURA 63 at that time.

O'NEILL: Does interpretation or enforcement of the agreement affect rates in any way?

LAWTON: No. In this case when we file for damages, if we're successful at the TC level, it's likely to be Entergy Corp, the sole shareholder who's been getting these benefits and the owner of EGSI, who will pay the damages.

OWEN: Then why did you sue EGSI as well?

LAWTON: They were both signatories to the contract, and they were both involved in what I would best describe as the mischief in terms of not complying with the agreement. What did the commission do in these cases? In the settlement case where we believe the agreement was violated under para 22 of the agreement, relator agreed it would fully support the agreement. When SB 7 came along all these companies were supposed to go to competition. In this case EGSI, it's market wasn't ready for competition. So the PUC staff filed a motion for the commission to investigate whether or not EGSI was ready for competition. That was not a rate case. It was just an investigation on competition.

Once the commission started the case, a lot of issues had to be decided. It was the relator who with other parties entered in to a settlement agreement. Rates were not an issue, but they made it an issue when they put rates in the settlement agreement saying we will raise rates. They submitted that settlement agreement to the PUC of Texas for approval. It was entering that settlement agreement where they said they would freeze rates, that violated the third rate case requirement that they had previously agreed to.

So in that docket we believe relator has...

OWEN: How could they not have frozen rates in light of the legislative action?

LAWTON: Because the legislative action says that under 39.103 if you delay competition commission, then the rates will be regulated pursuant to ch. 36. In other words we go to the old method of regulation. Just like we never had deregulation. And that's what everybody would have expected. And had they followed that, and you're under ch. 36 of PURA, then any rate case can occur. They could have filed their third rate case and the savings that J. O'Neill was asking about would have flowed...

OWEN: Then why don't you file an enforcement action at the PUC?

LAWTON: We could have filed a complaint case, but it was the poison pill that you asked about a moment ago. The poison pill consisted of if anybody files a rate case, then all these past expenses associated with getting ready for competition will be included in this new rate case up to the amount of keeping the rates the same. So if my clients challenge those rates, they would have had enormous amounts of expenses to throw in. These expenses are not ordinarily thrown in to...

OWEN: The PUC did that.

LAWTON: No. That was done in the settlement.

OWEN: But it couldn't have been implemented without the PUC. So whatever you want to call it that's a PUC order. And you are bound by that.

LAWTON: Yes we are. And that's why we have...

OWEN: But you're trying to make an end run around that by not going to the PUC.

LAWTON: No. There's another reason. And that is, we don't have a remedy at the PUC. Remember this case was supposed to be filed and the savings were supposed to be shared starting on...

OWEN: Why don't you go to the PUC to enforce your agreement and make them file a rate case?

LAWTON: I just said, the poison pill wouldn't have done us any good. And second, there is no remedy because we couldn't ask the PUC to retroactively get these dollars or savings that flow to the company and give them back to the plaintiffs.

O'NEILL: If these dollars are awarded in damages won't that affect rates?

LAWTON: No. The reason is, the PUC is the only one that's going to change rates. And let's assume we're successful at the TC, we're awarded damages. Entergy Corp pays a judgment. EGSI's rates are unaffected. They can charge the same rate they charge today. So any judgment will not affect the EGSI rate. Entergy Corp is not under the PUC's jurisdiction. Entergy Corp is a New Orleans company that's the shareholder, that's the one that been getting all of these benefits for all this time.

OWEN: So if EGSI was publically held, you would be suing the individual shareholders of EGSI?

LAWTON: There's only one shareholder.

OWEN: That's not my question. If they were publically held, you would be suing the individual shareholders of EGSI?

LAWTON: In that hypothetical, yes. I guess we would. But that's not the situation before us today.

OWEN: What difference does it make whether it's individual shareholders or one corporation?

LAWTON: I think the power of the one corporation in this case, to exert its influence over EGSI and how this agreement was to be implemented, and the benefits this one shareholder gets.

OWEN: How are you going to prove in the TC that it was Entergy and not the PUC? How do you take the PUC's complicity in this out of the equation?

LAWTON: I don't know that I would define it as PUC complicity. But I would say that Entergy Corp. - the PUC approved an order. No question about it. I concede that. And that's the order. But would they have approved that order? It was Entergy or EGSI that brought them that settlement. EGSI could still file a case today even with that order. The president of the company of EGSI, I deposed. And it's in the record that he said he could file a case today.

OWEN: And you could go to the commission and force them to file a case.

LAWTON: I could and I could not get my back damages. I could not ask the commission to retroactively go back and get those savings.

OWEN: But you could have filed this much sooner is my point. You had a remedy at the commission.

LAWTON: I had a remedy. I could have filed it. I couldn't have gotten retroactive damages.

OWEN: My specific question is when you go to try the jury case how do you factor out what the PUC has done? How can you prove that they would have done something different had Entergy filed something?

LAWTON: I think I would go by the statute. Under 39.103 it says you shall regulate rates under the old method, which is ch. 36. Under ch. 36 there is no power of the PUC to freeze rates.

OWEN: So you're asking a jury to find what the PUC would have done but for Entergy's filing?

LAWTON: No. I am not going to ask them what the PUC would have done. I think that would be speculation. I don't think we would be able to do that. But what we have is an equity problem. We have a problem where EGSI didn't file the case.

OWEN: How do you prove what the PUC would have done had Entergy filed it?

LAWTON: Had they filed it, I think we could look at the public filings. Mr. Williams said a moment ago that this is a public utility. It does public filings. We have all the information in terms of their costs. We also have all the information of what their merger savings are.

OWEN: So you're going to ask the experts basically to reconstruct what the PUC would have done?

LAWTON: That's possibly a way. That's not necessarily the way that we will go forward on this. I think there's an equity argument that we could say that you got this amount of savings during this period, you come here with unclean hands, you caused this problem - Entergy. Maybe



in equity we should get some amount of money. And that amount of money is the amount of merger related savings that you kept for yourself by not following the agreement.

JEFFERSON: A couple of times you've said that you wouldn't file an enforcement action because you are concerned about your ability to recover damages retroactively. Why should this court be concerned? This is a jurisdictional case. We're trying to determine whether PUC has exclusive jurisdiction. So why should we be concerned whether you would get those damages or not by going to the PUC?

LAWTON: I think you should be concerned because the plaintiffs in this case ought to have a remedy somewhere.

JEFFERSON: But just in terms of jurisdiction where does exclusive jurisdiction lie?

LAWTON: I don't think it addresses the exclusive jurisdiction. I believe that the jurisdiction belongs at the TC. That is not the only reason why we're at the TC, because we couldn't get a retroactive remedy. I believe the TC can address this contract problem. The relator has admitted in their briefs that Entergy Corp. is not regulated by the PUC. If I brought Entergy Corp to the PUC what would the PUC do with them?

O'NEILL: If EGSI had filed this third rate case, gone ahead and filed it, then you wouldn't have a breach of contract claim?

LAWTON: That's correct.

O'NEILL: And if they had filed it and the PUC had said just what it said in its order, that SB 7 undoes the agreement, therefore we dismiss the rate case, you would not have a case?

LAWTON: That's absolutely correct.

O'NEILL: So the PUC order saying there is no case here and rates are frozen, the only breach then is that they didn't perform a feudal act by filing the rate case?

LAWTON: Yes. They made an agreement that they would file a rate case. They violated that agreement when they told the PUC, hey, here's a settlement. We'll freeze our rates. Accept this.

O'NEILL: But you didn't want them to file a rate case did you? Didn't you just say if a rate case had been filed all these expenses would have been recaptured? That's the poison pill.

LAWTON: No. If they had filed a case, they withdrew to file a case in Nov. 2001. Along comes Nov. 2001. We didn't have this poison pill. We didn't have any of those issues. They would have just filed an ordinary rate case. And in the context of that ordinary rate case, the commission would have set rates. But the key provision in that rate setting process, they would have taken out

those merger related savings that were considered hypothetical costs going to the shareholder - Entergy Corp. And they would have set rates. And we believe those rates would have been lower, and we would have been getting our savings back.

But what happened instead was they entered into a settlement agreement to freeze their rates, and in addition to that, in that settlement agreement they entered the poison pill.

O'NEILL: But my understanding is SB 7 did that.

LAWTON: No. That is not correct.

O'NEILL: This letter from H.P. Wright, dated May 19, 1999, SB 7 undoes the agreement. It freezes rates.

LAWTON: Mr. Wright did write that letter. I concede that, but it is not a correct portrayal of what SB 7 does. What would happen if SB 7 were implemented? If SB 7 were implemented and they would have gone to competition, those merger savings would have been pulled out and those competitive rates we have under SB 7 would have excluded the competitive rates. The relator admits they would have done that. But that case got abated. They didn't go to competition.

Now what does SB 7 do? SB 7 tells us that if you delay competition, then you go back to the old way of regulation - Ch. 36. And that's not what was done here. They entered into a settlement with the commission to freeze their rates. Moreover, I would point out to the court, that if you look at §31.002(8) of PURA, it's a definition of rate freeze. The legislature defined a rate freeze as the period Jan 1, 1999 through 12-31-01. The legislature in SB 7 made a rate freeze a defined term. The PUC, I would think is without a authority to create a new freeze. The legislature didn't give them that authority. The legislature said you will go back to ch. 36 regulation. But now we have, the PUC through this agreement, extending what the definition of a rate freeze is.

OWEN: Why didn't you appeal that?

LAWTON: That case is being appealed at the PUC by a number of parties. It's still in the appellate process. I believe it's at the DC of Travis county. I don't believe that case has yet to be heard. But that case has been appealed.

WAINWRIGHT: If the settlement were completed by all the parties, and the almost \$600 million in savings from the merger were allocated per the settlement agreement, and there had been no SB 7, no change, how would the savings allocated to the customers have been distributed to the customers?

LAWTON: Under the whole \$600 million, that number you saw in the brief, that was an estimate of how much savings that were in the first 8-10 years. The way it would have been

distributed would have been 50/50. That was the split that was agreed upon.

WAINWRIGHT: Let me be more specific about my question. How would the 50% of the savings for the customers have reached the customers? Would there have been a check written? Would there have been an electronic transfer to their bank? Would the rates have changed? How would that have been distributed to the customers?

LAWTON: Their rates would change. The way the regulation works is, the cost actually incurred by the utility gets passed on to the customers. In this case, the \$600 million, what was done in the agreement a \$300 million expense was put into cost. Expenses actually went down \$600 million assuming the calculations were correct. But \$300 million expense was put in there. A factitious expense. So now out of the \$600 the one shareholder gets \$300 million and the customers get \$300 million.

WAINWRIGHT: Now that rate change would have been a rate reduction to the customers?

LAWTON: That's correct.

WAINWRIGHT: But you're arguing that because of a breach of the contract, that reduction is not going to happen now?

LAWTON: That's right. In the last case, if you look at the record you will find finding of fact 141, which indicates the biggest benefit of this merger is that after the 8<sup>th</sup> year 100% of the savings go to customers. The commission itself recognized the biggest benefit happens after the 8<sup>th</sup> year. I think that's an important factor in considering all this.

WAINWRIGHT: Do you agree that regulation of electric utility rates in Texas is a pervasive regulatory scheme?

LAWTON: Yes I do with regard to rates, operations and services.

WAINWRIGHT: And the PUC has exclusive jurisdiction over setting rates and services in that industry?

LAWTON: Yes they do.

WAINWRIGHT: And because of the breach of contract, you've said the rate reduction is not going to happen. Why does this case not then involve the exclusive regulation of rates?

LAWTON: I think tangentially it does. Had the company gone forward, as we just discussed a moment ago, the rate benefit would have been there. The relator didn't, and so I'm looking for a place to seek redress for the plaintiffs. And I believe it's a contract claim because they breach an agreement in the first place. And the PUC has no jurisdiction over Entergy Corp. They

are the big economic engine in this case. They run and control it.

HECHT: But they say if there had been a rate proceeding they would have asked for imprints.

LAWTON: That's what they said. I would say that too if I would - all of the utilities asked for increase.

HECHT: So you're getting a deal.

LAWTON: If I take them at their word. Let me point out to you. There were three rate cases. The first case they came in and asked the commission for \$25 million increase. The commission gave them \$111 million decrease. On top of that they gave \$28 million of the merger savings to their shareholder, Entergy Corp. In the second case they came in and asked for \$101 million increase. They agreed to a \$4 million decrease and their shareholder got a positive \$22 million in that case. Now they come in the third case and they say, well we're going to ask for an increase yet again. Or they say they can justify it. I would contend that is why they entered into a settlement to freeze their rates. They knew what was going to happen. They saw the first two cases, enormous amounts of money going the other way, when the commission was invoking its regulatory authority and jurisdiction. I would contend that was their motive for not filing that third case.

They can say they need a rate increase all day long, and they can say that at the courthouse. They have that defense. And nobody is going to stop them from raising those issues.

The relator keeps indicating that this wasn't a private contract. It took on a public interest type of gloss. The case they rely upon is Cajun Electric. In that case, the court held that any time a contract must be approved, must be filed and approved by the agency, then it takes on a public interest gloss. Those types of contracts are contracts like we have at the gas utilities under the gas utility regulatory act where a utility negotiates with its customers and enters into a contract, that must be approved by the RR commission, because that becomes a filed tariff. That is a kind of contract that takes on a public interest gloss.

This contract, I would contend, is a plain vanilla contract.

HECHT: If the PUC has exclusive jurisdiction here, is mandamus relief appropriate?

LAWTON: Yes, as to EGSI. No, as to Entergy Corp.

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#### REBUTTAL

WILLIAMS: In reality there is no distinction regarding the subject matter jurisdiction in this case. As to both relators, exclusive subject matter jurisdiction lies with the PUC. All the provisions

of that agreement and the PUC's regulatory plan oblige Entergy Gulf States to file rate proceedings and change its rates. That is all they do. They do not have any other obligation on Entergy Corp regarding making payment. Simply provide that Entergy Gulf States will change rates.

HECHT: How does the PUC have jurisdiction over Entergy?

WILLIAMS: In the circumstances of this case it does, because Entergy Corp quite literally submitted to the PUC's jurisdiction.

HECHT: Well you can't though. You can't give them subject matter jurisdiction they don't have.

WILLIAMS: But in the sense that they are a party, was requesting approval of action from the commission. They were requesting approval of their merger. They agreed to take certain steps - in the settlement agreement and in the commission's order as the quid pro quo obtaining approval of the merger. The commission's order in the merger case orders both Entergy Corp and Entergy Gulf States to comply with their respective obligations under that settlement agreement, under that regulatory plan. Under Pura §15.051 the PUC can enforce its orders against any person. It does not say utility. It says any person who is alleged to have violated them.

So they do in fact have a remedy against Entergy Corp at the PUC. And therefore they could get the relief they are talking about, although we believe that the PUC would not look favorably on the claims on the merits.

The customers have at no time paid anything to Entergy Corp. They have solely paid rates to EGSI. The only way that agreement on its own face was to be carried out was to by rate changes, by rate cases under PURA. Those are within the PUC's exclusive jurisdiction.

I want to talk about plaintiff's claim that some how in the proceedings to delay competition, we breached the agreement. That is incorrect. By the time that proceeding went forward, the commission had already canceled the third rate case in to the plan.

Recall in June 2000, the commission expressly addressed this issue. As it said in its order in docket 22356, that rate proceeding should not go forward. It's been canceled. By the time we get to the end of 2001, and the commission is wondering about whether they should go immediately to competition in Gulf States service territory, it had already canceled that third rate case. That was over with.

When the commission delayed competition and decided to continue the rate freeze at the end of 2001, it had nothing to do with the regulatory plan. It was exercising its independent, statutory authority under PURA §39.103.

I disagree with Mr. Lawton's characterization that that provision says the

commission has to set rates consistent with the old fashion way of doing things. It does not. It says the commission may consider whether to change rates if it determines to delay competition. The commission expressly considered that consistent with its independent statutory authority and determined that it would not change rates. That's where that comes from.

HECHT: Has the status of the PUC proceedings changed?

WILLIAMS: The commission is still conducting ongoing proceedings with a goal of bringing into Gulf States service territory competition. It's conducting two different proceedings right now that are trying to lay the groundwork for a competitive market. Currently I believe it has set a goal to conclude those proceedings in 2004.

O'NEILL: How do you counter the argument that by failing to file the third rate case, EGSI enjoyed a windfall?

WILLIAMS: Again, I think that's speculation. I think you don't know whether EGSI enjoyed a windfall. If in fact the outcome of that case would have been a rate increase, then rate payers are better off. I think what it highlights though is throughout this time the only way these merger savings has been considered has been through EGSI's rate proceedings.

O'NEILL: If you were to have none of the merger savings in this time period, and you received 100% instead, that would seem to be a windfall.

WILLIAMS: Again, we're here on jurisdiction. There was no windfall. If in fact we were entitled to a rate increase, then the customers are better off. But if the plaintiffs as they say we would have gotten a big rate reduction and we were keeping money that we shouldn't have, then why haven't they filed a complaint? Why haven't they filed a rate case? They certain can do it. Mr. Lawton says they could have done it. The reason they haven't as he indicated is they don't think they are going to like the way that the PUC would handle it. They said they are worried about the cost the PUC is going to allow us to recover if they file a rate case.

Well the outcome you might receive in a case does not determine the jurisdiction. The fact that you might get a bad outcome doesn't mean that you can avoid exclusive jurisdiction of the PUC.