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Supreme Court of Texas.
In re Southwestern Bell Telephone Company, L.P., Relator.
No. 05-0951.

January 24, 2007

Appearances:
Charles R. Watson Jr., Locke Liddell & Sapp LLP, Austin, TX, for relator.
Joseph Michael Gourrier, The Gourrier Law Firm, Houston, TX, for real party in interest.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht, Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett, Wallace B. Jefferson, Supreme Court Justices.

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COURT ATTENDANT:- and 05-0951. In re Southwestern Bell Telephone Company, L.P..
JUSTICE: May it please the Court. Mr. Watson will represent argument [inaudible] will reserve five minutes for rebuttal.

ORAL ARGUMENT OF CHARLES R. WATSON JR. ON BEHALF OF THE PETITIONER

MR. WATSON: May it please the Court. This is not just another Mandamus on a South Texas district court. This one actually a suit for money damages. The phone bill charges approved by rule contested erring to set what the charge with the tariff and finally placed in the charge by the Public Utility Commission. We did what the commission told us to do. It is not a complex case. It can be solved by addressing three issues that those issues are extremely important both to the effective administration of justice in the state and the company such as Southwest Bell facing massive company breaking class action suits which this also happens to be. Those three issues quickly are: One, we all know that PUC has exclusive original jurisdiction over everything. Business and property of a utility. You've said that. You've also said, however, that the PUC has exclusive jurisdiction to provide a remedy. That is something new, you said that in. That must be repeated so the point is made that there is no common law or cause of action such as the laws in superloo in boot Nora under the entirely different jurisdiction schemes. Second, universal service fund and universal

service is the reason the Public Utility Commission exist. It is the first policy statement in Bureau. And it is given exclusive original jurisdiction to affect universal service at reasonable rates to all Texas residence. The second issue is, was that sacrifice-- was its jurisdiction sacrifice only offered of a hand full of incentive regulation based on charges. You laid the ground work for answering that "no" when AT and T versus Southwest Bell. It simply needs to be extended to that-- to say the obvious that the commission has jurisdiction to say a rate cap agreement between us and the commission either and or it's not been busted. If not the commission who else? Certainly not the district court of Hidalgo County. Third, because this is a class action, because so much is at stake, because it affects every telephone company in the state and the very guts of what the PUC suppose to do. This Court's analysis that it began back in CSR versus Slint brought forward in AIU Insurance in Dupan and finally prudential of saying that when we looked if whether there's an adequate remedy on appeal obviously, we always have one when there's interference with jurisdiction. That's a given you've always Mandamus that. But here also, we really could use the court addressing not just mass courts in the past but whether class actions themselves in over such a severe hardship that they threatened every reaching appellant review and that's particularly true in this case where the class action itself was brought two months and four days before the effective date of House Bill 4 which means House Bill 4 and the possibility of an interlocutory appeal do not apply to us and plaintiff's counsels will not be paid in coupons as a result. This is for real money and as a result of that, the stakes are enormous. First, exclusive jurisdiction. There's no question that 52-002 gives exclusive original jurisdiction over the entire business and property of the telephone communication industry. The grant is even broader than the grant that was given to the electric utilities in Intergy. Indeed it reaches directly back and says it's to implement the policy in 52-001 which is Universal Service. That's the reason it was created. Second, and this is the real issue here. Thus that grant of exclusive jurisdiction extend as you said it did in Intergy to applying a exclusively administrative remedy for the administrative wrong. The plaintiff say under - . They have a right to run back to district court for common causes of action. They are wrong. And that distinction have to be made and it is a common mistake.

JUSTICE: Does PUC is a little vague of what the remedy would be in this case. What do you-- what's your view of-- if there have been overcharges interstate revenues or some other aspect of this was done improperly. What do you think the, the commission can remand?

MR. WATSON: First, I think that it can do anything necessary to effect-- in effective remedy. That's what this Court said unanimously in Intergy but I haven't examine. One of the claims that was outstanding when the motion to dismiss for one of jurisdiction was denied. One of the-- one of the claims that had not yet been made was a claim that the, the PUC was wrong when it imposed State TUSF surcharges-- charges owned interstate carriers who are already paying Federal Universal Service charges. In other words, the fifth circuit held in a complaint AT&T not seeking damages. Just thing we shouldn't have to pay two Universal Service charge on interstate rates. And he said, "That's right." To that extent state is pre-emptied and you shouldn't have to pay State Universal charges-- Service Charges on cap of federal. What did the PUC do about it? Well, they came right back and initiated docket 29-950 and send out words to all interested parties to answer these questions. Do, does the court decision require

a refund of TUSF assessment of telecommunications providers attributable to interstate and international telecommunication communications receipt. If they're made to the providers, should they be required to refund the amounts of the costumers? How do we threw the short call since the fund runs on a cash-in, cash-out basis. The surcharges go in and they are immediately distributed. So there's a very thin capitalization and even should the companies be allowed to go back and surcharged to prula. The PUC is on top of it from suit to nods-. Docket 29950 is still wide open. Plaintiffs can walk down and file their plaints in 29950 today. Instead, there in Hidalgo County and are attempting to state in Hidalgo County.

JUSTICE: But I do supposed the commission looks on their own as remedial rather than fugitive which you would have with the DTPA or fraud or-- some other sort criminal action.

MR. WATSON: And the question for this Court is exactly that ...

JUSTICE: But I mean, you think that's true? That the PUC looks at it as there was remedy.

MR. WATSON: The PUC would look at their role as-- let me-- let me just put it in, in this Court's words because of the adjudicatory sections that's in the PUC that's not in every other jurisdictional statute and which did not exist in superloo in boot Nora where the statute actually said, you have permission to go to district court and file DTPA claim or a breach of the duty of DTPA claim or breach of contract claim. The statute gave that apart. Here, it's just the opposite. When the statute in Section 17-- excuse me, 14.051 et sec. brought in the ability from the commission to give everything to SOA and have the utility independent judges of the utility division of SOA come in and decide these claims. It did so on the basis that the statutes meaning 14105 (o), et sec. Also, placed in the commission a power to decide as a regulatory matter and to award an administrative remedy to rectify any administrative wrong and any resulting administrative consequences. The point is administrative wrongs and administrative consequences will be threw up by the commission. That doesn't mean your going to get many language damages. It doesn't mean your going to a, a-- perhaps even attorney's fees. Certainly not plaintiff's attorney's fees that the wrong will be righted. That's what you said in Intergy. We desperately need you to clarify it in this case that it means what it said. Now moving on, why with this remarkably broad ramp of jurisdiction be thrown out. The plaintiff say that it will sacrifice only all threw up incentive regulation. There's an easy way and a hard way to do this. The easy way is to look at the purpose of the statute and see what was being done. And you only need to look at three things. First, we know that when incentive regulation for a handful of rates. One of which is access charges which did have Universal Service funding in it by funding access charges. That's the old way of doing it. You said that in AT&T versus Southwest Bell, you were right. When it brought in incentive regulation of that in a handful of other charges. It pull this implicit funding for universal service out of the access charge, took it over, gave it it's own chapter, Chapter 56 sub part B. And in Chapter 56 sub part B. It said, "Let's get the priority straight, not only universal service charges and rights." A right-- incentive right regulation but against everything else in Bureau. And what they said was in 56-002. If this chapter conflicts with any other provision of this title "Bureau", this Chapter prevails then what did they do? Third, finally in chapter 58, the incentive regulation statute. They went in Chapter 58 and said, "This Chapter does not affect a charge permitted after sub chapter B at

Chapter 56." Sub chapter B at chapter 56 is universal service. I don't know how they could have made it any clear. They removed it from rights and gave it it's own chapter. They say it, "Whatever you do in that chapter doesn't affect the cap under Chapter 58." And they said anything about Chapter 56 must dominate under everything else contrary in this code. This is not a rate. This is a separate animal made into a explicit charge with absolute authority to make that charge. It was brought through by a specific rule by the commission. That commission had a comic period. Plaintiff's didn't appear. The amount was set in the contested case. Plaintiff's didn't appear. It was added and amended err that was a contested case. Plaintiff didn't appear when part of it was wrong and the commission on it's own motion setting in process a refund function-- a refund action. 2995(o) plaintiffs didn't appear. The only question in this case is, thus the district court of Hidalgo County and every other district court in the states have jurisdiction to decide through it self what phone charges are invalid and in doing so what statutes are valid and what rule and actions and order pf the commission are valid. That can not be, it must be within the exclusive jurisdiction of the Public Utility Commission. And when you add on top of that, the - sort of plus action with threats to suit corporate officers, you bring interplayed the third item. And that is even if these were under court reform and under the new statute. You should come in and even if the work conflicting interfering jurisdiction. You should come in and say, the hardship is so great but that your going to be pounded in the submission in this case and not ever reached appeal that we got to intervene and stop it.

JUSTICE: Any further question? Thank you, counsel. The Court is ready to hear argument from the Real Party.

JUSTICE: May it please the Court. Mr. Gourrier will represent argument from the Real Party.

ORAL ARGUMENT OF JOSEPH MICHAEL GOURRIER ON BEHALF OF THE RESPONDENT

MR. GOURRIER: May it please the Court. Southwestern Bell has a heavy burden to this Mandamus proceedings. They are two things that that they have to show. They have to show that the trial court clearly abused it's discretion, that they don't have an adequate remedy by appeal. I want to start with the second prong first because I believe that the sole practicing remedy does apply to this case. In 26.051, the Texas legislator granted Southwestern Bell an interlocutory appeal and a class action from the denial of afflicting the jurisdiction. The only kind of act is, is that Southwestern Bell has to waive until the class is certified in order to take that appeal because the legislator has provided Southwestern Bell with an adequate remedy by appeal. We can not meet the second prong, that's assertion for Mandamus. Counsel for the first time today addressed that particular argument. He indicated that the House Bill 4 does not apply to this case even if it doesn't, under this Court's ruling in Bell Callicapter in 1990. It is previously said that Mandamus is not available for the denial of a plea to the jurisdiction. A party can apply for an appeal and since House Bill 4 provided for a direct appeal of the class certification order to this Court. Southwestern Bell would be able to raise their jurisdictional argument at that time.

JUSTICE: You don't think are Mandamus standard have changed so

much since AIU redemption.

MR. GOURRIER: The In re credential case that the court issue in, in 2004, is that what you referring to?

MR. GOURRIER: JUSTICE: Yes.

I believe that the court reaffirmed the fact that Mandamus would be available if specific things are shown. However, in this case, because Southwestern Bell specifically is granted the ability to raised these arguments as a result to or as a part of, a class certification order directly to this Court in an extraordinary writ like a Mandamus should not be available. That would allow for two interruptions in the litigation to this Court when really to save time in the party's resources, there should be only one. In other words ...

JUSTICE: The argument is made that-- this is a little different because it affects the telecommunications industry through out the state and the allocation of jurisdiction to the BEC. What's your response to that?

MR. GOURRIER: First of all, I want to reassure this Court that Universal Service in state of Texas is, is not in danger. Under the statutes 56.021 and 56.022, Southwestern Bell and the other telecommunication companies are required to pay money into the Universal Service Fund. Whether or not they subsequently recover that money from their costumers in a form of a surcharge is a completely separate issue as to whether or not it affect the other telecommunications companies in the state are allegation except the addition of the surcharge to rate cap basic services is what causes the particular violation of law in this case.

JUSTICE: But your argument is that they shouldn't be allowed to do it even though the commissioner said they can.

MR. GOURRIER: There are number of problems with commission over it. First of all, the legislator was not cited on this subject. The legislator has specifically-- in 56.107 allow for Universal Service Surcharge. They've also allowed for Universal Service Surcharge at 56.155. What they say is that you add those two together because the legislator had an opportunity to provide for a Universal Surcharge and they determined that they were only going allowed a limited surcharge. The PUC was without jurisdiction to go and allowed the companies to surcharge the amounts for the-- all nine or ten of the Universal Service Programs. The legislator had an opportunity to address the subject, they did address the subject, they allowed limited surcharges and the BUCM as a supporting body was without jurisdiction to go and change and alter what the legislator had determined.

JUSTICE: But it seems to me that even if that argument was regret. If assuming that what you say true. That the most that could happen would be that the-- that the declaratory Judge or some adjudication that the commission acted outside the scope - but you be still back at the commission worrying about how the surcharge gets imposed to pay.

MR. GOURRIER: There's another issue related to the PUC's order. It's our contention that the, the rule itself was void up to initial. The reason for that is is under 53.001(b). The legislator indicated that the rule of the PUC may not inflict with the rule of the federal regulatory but the PUC in this case. It's our contention that in the FCC 1997 Universal Service Order, it indicated that it had jurisdiction to determine whether or not Universal Service Surcharges would be allowed to be collected by ILEC's Southwestern Bell, at that time the FCC determine that it was going to withhold that jurisdiction, that ILEC would required to recover their universal service service contribution from access charges which had been traditionally the

method by which universal service in the state had been funded. Because of that the, the PUC was without jurisdiction in 1998 to adopt it's order indicating that the companies could surcharge their costumers on their service including basic services.

JUSTICE: But even-- but-- again, even so why isn't that something that the commission has to rectify as suppose to the basis of the claim for damages?

MR. GOURRIER: The problem is, is that Southwestern Bell is collecting the rates as such they are existing rates. And now with the statutory schemes, the PUC no longer has jurisdictions to determine whether or not existing rate of an electing company, violate the law or unreasonably. That's 53.151(c). That statute traditionally had given the PUC the authority to determine whether or not rates were unlawful or unreasonable upon complaint by the affected party or on its own motion. However, when the legislator and that incentive regulation. The purpose of which was to take rates from the PUC's jurisdiction. It implemented Section 3 253.151 which is specifically except Chapter 58 company from that jurisdiction by the company or by the PUC.

JUSTICE: As to rights?

MR. GOURRIER: AS to rights. Further more, if you looked at 52.001 which grants the PUC exclusive jurisdiction over the rates of telephone companies in this date. That grant of jurisdiction says and this is subject to limitations. As this Court is recognize in the AT&T versus Southwestern Bell case and all the cities of Austine's case. The PUC no longer has jurisdiction over Southwestern Bell's rates.

JUSTICE: So does your argument turn out whether this is right. This Universal Service Surcharge?

MR. GOURRIER: That is a very important part of the argument. The question of whether or not it is a rate.

JUSTICE WILLET: If it isn't, does that the end of it?

MR. GOURRIER: That might well be the case. However, we know that the legislator has to find what rates are in 11.003 Section 16. A rate is any compensation tariff, charge or other classification that is directly or indirectly demanded by a public utility for a service by collecting the surcharge as a percentage of the cost for basic services. It is our contention that Universal Service Surcharge is in fact a rate.

JUSTICE: It seems that it could be rate because it was once imbedded in the access charge but has the legislator change that by separating out Chapter 56?

MR. GOURRIER: I don't believe the fact that the charge appears of the separate charge on the telephone bill has any effect. We know that a universal charge-- yet a Universal Service Surcharge increases the cost for basis service. We know that because the FCC said so in this Universal Service Order in the paragraph 827. We also know that surcharge is an increase the cost of basic services because the third corporate appeals in two cases including one involving Southwestern Bell in 1993 and then another case in 1998 indicated that the the addition of statutory surcharges to basic services result to in an increase in the cost of those basic services in violation of the rate count. Finally, the Supreme Court itself has a lot of cases which indicates that if a company attempts to recover contribution for which their are liable for understate law and that adds to the price of the service. Therefore, I don't believe there really is an issue as to whether or not the Universal Service Surcharges increases the cost of basic services in violation of Southwestern Bell rate count.

JUSTICE: Even if that were true. Even if it is part of the rate.

How do you square Intergy when we said it's up to commission to fashion the remedy for an ease of the violation. How do you get away from that language?

MR. GOURRIER: The first thing out of counsel's amount this morning was that this was a class action for money damages. On the PUC's own complaint form which we've attached. They indicate that they don't have authority to provide money damages. That's what they would have to do and they themselves are saying, they can't do it. Further more, even more of a reason. The PUC was the one that left and do this in the first place. Acting in a clause legislator fashion.

JUSTICE: But doesn't that sort of banking question. I mean if there is exclusive jurisdiction here. That kind of Mandamus the PUC has the fashion the remedy. And even though they can't regulate the rate under incentive regulation. They can fashion the remedy that would rectify the wrong. Although imbedded administrative remedy.

MR. GOURRIER: Well, it's our contention that as far as the recovery of the surcharges is concerned that, that was not something that the legislator left to the PUC as such that would not be a part of their exclusive jurisdiction. The legislator themselves identify the limited surcharges that they wanted the telephone companies to recover. Specifically, as far as the Southwestern Bell is concern, the legislator-- the legislator had a specific scheme in mind to allow them to continue to recover their universal service contributions from their excess charges. As this Court found in AT&T versus Southwestern Bell. The PUC had no jurisdiction to lower Southwestern Bell's access charges below - even though the actual cause for somebody who wants serve. As part of the 1999 regulations that or statutes that the legislators enacted. They heard testimony that for every opinion of access charges that Southwestern Bell was receiving. That was the equivalent of $93, 000,000. At that same time, a bill, House Bill 1701 had been proposed that would have allowed Southwestern Bell to do exactly what their claiming. They're, they're allowed to do any way. They were-- that part of that bill would have allowed them to recover the entire amount of their universal service contribution. There was also a further section in that proposed bill that specifically said that an electing company would be allowed to recover that surcharge on rate cap base services which is the very issue in this case. The legislator did not pass that bill. We submit to the court that, that was evidence of the legislator's intent to deny Southwestern Bell in any other electing companies the ability to increase the cost of basic services through the addition of Universal Service Surcharge.

JUSTICE: We don't usually infer from a bill's failure to pass that the legislator met anything since it hard enough to tell what they may have-- what it does pass. So why should we do it here?

MR. GOURRIER: I think there's other evidence the legislators intent. Again, if you look at 56-021 and 022, that sets out the general rule. The general rule is that the companies are required to fund or in contribute to universal service by allowing the companies to then turn around and recover the entire amount of their Universal Surcharge from their costumers. We submit to the Court that the legislators intent has been forwarded because the costumers are now funding universal service and not the companies. Further more, we go to the fact that the legislator had an opportunity to allow the companies to recover the entire amount of their surcharge. In 56-107 and 56-155 and they specifically rejected that. So if you combine that with the fact that the intent was then made to allow them to recover the entire amount. And the legislator rejected. I think that's consistent with what the

legislator had been saying all along.

JUSTICE: Are there some reference in ours notes or my notes that this, this scheme was modeled after some Illinois scheme. What impact if any does that have of legislative intent?

MR. GOURRIER: Although this was case of first impression here in the state of Texas. Other states have enacted similar statutory scheme to the incentive regulation which was enacted here. Further more the the Illinois-- or the Texas scheme was actually based upon the Illinois scheme which had been enacted earlier. This very issue whether or not the PUC or the State Commission has continue an authority to allow refunds to an electing company was considered by an Illinois court of appeals. And they, similar to the trial courts and the court of appeals in this case denied that motion. They deny the motion to dismiss based on the fact that under the new statutory scheme that the commission no longer had exclusive jurisdiction to determine whether or not an electing company was settled to refund claim.

JUSTICE: Does that contrary to what this Court's said in the Intergy case but exclusive jurisdiction for that utility?

MR. GOURRIER: I think the, the Court's decision in Intergy is distinguishable based on the fact that; one, it involved the completely different statutory scheme with regards to electric utilities. The utility-- the scheme left with regarding the electric utilities as this Court's opinion pointed out indicated that it was comprehensive scheme designed to allow the PUC to regulate electrical utilities. However, in the statutes regarding a regulating of the telephone companies. We know that the legislator has set forth specific statutes in addition to 53.151. We know that the legislator in 58.025 has specifically pointed out that under in no circumstances, can the commission hear a complaint and make the determination or conduct a hearing regarding the reasonableness of an electric companies rates. Therefore, based on that particular scheme. It is expressly depriving the PUC of exclusive jurisdiction to the side of here a refund claim.

JUSTICE: What did the Illinois Supreme Court do in that case that you talked about?

MR. GOURRIER: That particular case was not appealed to the Illinois Supreme Court and in my knowledge, no other state appeal that the court's have issued the type of published opinion regarding this. So as far as-- you know, some assistance in trying to come up with this Court's ruling all we have is the cap opinion from Illinois.

JUSTICE: So Illinois could point to the thirteenth court - court - .

MR. GOURRIER: The opinion issued by the thirteenth court upheld were just a - opinion. It didn't really discuss the issues on the case. I believe the - case sets forth both the statutes in there, If you compare that statutes in Illinois to the statute that we've cited and relied upon here in Texas. The court concedes that the language in those two statutes is almost identical. And we will submit to the court that the-- that there's no reason to construes similar statutory language in that different matter.

JUSTICE: That [inaudible] is , is a critical issue in this particular case. You filed the case and get out of the county. You could have filed in - county even in Austine county. And you might get different results. [inaudible].

MR. GOURRIER: That was one of the reasons why we made the decision to file it as a client section. We were aware that eventually it was going to come to this Court as the court of - similar amount of this state to construe this statute and ultimately determine what they mean.

It terms of whether or not this is actually is a rate. We believe that, that is a question of law. We believe that questions of law is a further exceptions to the exclusive jurisdiction doctrine. We believe that a district in powered by the Texas constitution to hear claims would be able to construed the statute which, you know, as far as we're concern to be a relatively simple matter to determine whether or not these surcharges is actually a rate. And ultimately make a, a uniform decision that this Court would hear. Further more, because of the fact that this Court now appears direct appeals of class certification orders. It wouldn't be in an issue as to whether or not there would be a typed of uniform order issue. This Court would be able to make a binding determination at that time because I'm sure Southwestern Bell, if they choose to or chose to we're be able to continue to press their jurisdictional point at that time. One of the other issues that I briefly wanted to address was this question regarding the election of the TUSF surcharges on interstate services. We know that the fifth circuit is already determined that, that was unlawful. The question becomes, how did the costumers get this money back that a court of law has determined was unlawful. When the fifth circuit issue their opinion in 2004, we amended our petition to add that claim to this class action law suit because we fell like it was consistent with the other claims or refunds claims that were already in the case. As part of this Mandamus proceedings, Southwestern Bell included that in this appeal. Although the trial court had not at that time heard afflicted the jurisdiction on that particular claim. It's our contention that because the trial court had not had an opportunity to rule on a plea to the jurisdiction that this Court with the Mandamus jurisdiction to issue a ruling regarding that one because the, the trial court had not abuse it's discretion because no ruling had been made.

JUSTICE: What kept the, the PUC grant to the-- that kind of relief as identicated with the other independent docket 29-950.

MR. GOURRIER: The reason for that is because if the PUC is the entity that allow the company recover the charge in the first place. The PUC can not then turn around and act in a quasi judicial role and say, "well, you know what? We made a mistake. We shouldn't allow you to collect that charge." They can not retroactively change the rates by allowing a refund claim because that would be a due process violation. The Supreme Court said that in the Arizona - case that if a state commission acting in a - legislative role allows a company to collect a rate based on it's determination that, that rate is just unreasonable. They can not then acting to a - judicial role and turn around and say that, that was a mistake for the purposes of allowing refund claims.

JUSTICE: All right, further questions? Thank you, counsel.

REBUTTAL ARGUMENT OF CHARLES R. WATSON JR. ON BEHALF OF PETITIONER

MR. WATSON: May it please the Court. Let's threw a few-- threw a few things carefully. First, further there's adequate remedy of appeal because of 26-001. Let's be very clear.

JUSTICE: 051 or ...

MR. WATSON: Yeah. This case was filed on June 27, 2003. The historical notes to Section 26, make it crystal clear that it applies only two cases filed after September 1, 2003. That is not available. This Court has already held essentially the same in %Long versus Thomas

in one of the-- one of the early tort reform cases coming up. Document A in the verified record is the original petition file stamped, June 27, 2003. Historical notes say, that doesn't count. But even if it did interlocutory appeal isn't enough when it's a class action causing this kind of damage. That's why we ask for the instruction to go in the direction that this Court could give to go beyond this case and show that it is not going to be tolerated. Getting void orders, doing void discovery, suing company officials, carrying the bloods and down, a depot type settlement when if fact that's wrong and it's going to ultimately denies the-- any type of an effective right on appeal. You cited in the pot the, the wrong-- I can't even say it-- the Blood case out of the seventh circuit that Judge Posner or he talked about the, the problem of class action and he used the quoted Judge Frinilince not my words of class action black mail were there is so much on the line. When void orders are being entered, the company can't recover. Now you started getting into it in AIU, the POT, CSR, in mass arts. It's respectfully badly needed in the area of plus actions

JUSTICE: What are the differences about interlocutory appeal that make it inadequate? How's it different from a Mandamus?

MR. WATSON: Because the plaintiff controls when the interlocutory appeal is heard by controlling when the class certification occurs. We still haven't had one. It can go on forever. It is not adequate. Second, they're saying that the rule itself is void -. Well, if that's the case, they need to in Travis County district court under 38.001 same just that not in Hidalgo County. But what they're saying-- the FCC declaring it void at the-- ab initio-- it's just flat wrong. Judge Garry Smith of this circuit and office of public utility can mapped that counsel versus the FCC held that, that provision of the FCC orders saying that the states must charge via switch access charges being raised up. If that's the way they must pass it through is unlawful, it was voided. Two or three months later the joint counsel. Between the states and federal state is trying to reconcile these things meant and say it, thus the statutory in demonstrate that the state are encourage come partners with the commission in insurance sufficient support mechanism and the state may prescribe additional supplemental mechanism incumbent LEC's options for recovering there universal service contributions were expanded to include in users charges. That is a non issue. And we would refer you to our letter reply of July 26, 2006 were that is mailed. Next, they're saying that in fact only two provisions were authorized and then that excludes the others but again, in their reply to the - briefs. They give the reason for the two statutes authorizing charges. And that was the federal law came in and said, "We don't care if you do past user charges on these others. You've got to serve charge these two." So we complied, consistent with trying to consistent with federal law. That doesn't the others weren't authorized. It does need these words. In the end, who decides this case is either the Travis County district court or it's the public utility commission under Intergy is not in Hidalgo county.

JUSTICE: Thank you, Mr. Watson. If there no further question. The prong is submitted and that construed arguments ...

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