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Supreme Court of Texas.
The State of Texas, by and through the Office of the Attorney General, Consumer Protection and Public Health Division, Public Agency Representation Section, et al., Petitioners,
v.
Public Utility Commission of Texas, Respondent.
No. 08-0421.

October 6, 2009.

Appearances:

Thomas R. Phillips, Baker Botts LLP, Austin, TX, and Gregory S. Coleman, Yetter Warden & Coleman LLP, Austin, TX, for petitioners Centerpoint Energy, Inc. and Texas GenCo LP.

Jonathan Day, Andrews Kurth LLP, Austin, TX, and Alton J. Hall, Jr., Epstein Becker Green Wickliff & Hall PC, Houston, TX, for joint petitioners Texas Industrial Energy Consumers, City of Houston, Coalition of Cities, Houston Council for Health and Education, and Gulf Coast Coalition of Cities.

Elizabeth R. B. Sterling, Office of the Attorney General, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

CONTENTS



CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0421, State of Texas vs. The Public Utility Commission of Texas.

MARSHALL: May it please the Court, Mr. Phillips and Mr. Coleman will present argument for Petitioners CenterPoint Energy, Eastern Electric and Texas GenCo. Petitioners have reserved ten minutes for rebuttal. Mr. Phillips will open with the first 15 minutes.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS R. PHILLIPS: May it please this Honorable Court, in restructuring the electric industry in Texas, the Legislature required the old integrated utilities to break into at least three new entities, a power generation company, a transmission and distribution utility, and a retail electric provider. One of the final steps in this multi-year process were special proceedings known as "true-ups," which were conducted by the PUC in 2004. In this case CenterPoint complains of four errors we believe have been made in these true-ups. If you will turn to Tab 2 of our bench book with the blue cover, you will see the four complaints we have here. The first two relate to the stranded cost true-up, that's the excess mitigation credits and the partial start valuation method, and I will address these two errors. The second two relate to the capacity auction true-up, and Mr. Coleman will address those. The opinion below, while beautifully written, is premised on some flawed assumptions about economics and market operations. Moreover, on several occasions the Court construed the law to make CenterPoint's compliance with the true-up requirements dependent not on anything CenterPoint did or could do, but on the behavior of persons beyond its control. Let me turn now to the first error I want to complain about, which is excess mitigation credits. In 2001 the PUC ordered CenterPoint to pay refund to the retail electric providers on the mistaken belief that CenterPoint had over-mitigated its stranded costs and was not going to have any stranded costs at the time of the true-up. At that time Justice Hecht, and now Chief Justice Jefferson recognized that these EMCs were improvident and they would have granted a mandamus to stop them. Since then the Courts have declared EMCs illegal. At the true-up, when it was apparent that CenterPoint did have substantial stranded costs, the PUC recognized its mistake and ordered that these EMCs be paid back to CenterPoint. That order was affirmed by Judge Dietz. The Court of Appeals reversed in part based on a legal mistake that CenterPoint and Reliant, its affiliated retail electric provider, were, quote "a single unit," unquote for stranded cost recovery. This error came about from a misunderstanding of PURA's sensible requirement that all three of the new unbundled companies file a single true-up application. Each company had certain rights and certain obligations under the true-ups. For instance, the generation company had environmental obligations, the retail provider might have owed a retail (claw) back, but nothing in the statute suggests that these applicants, which at least in CenterPoint's case were Reliant and CenterPoint, were completely separate companies by the time of the true-up, were fungible when it came to awarding stranded costs.

JUSTICE NATHAN L. HECHT: But at a point when you could have negotiated with Reliant, what to do about these excess mitigation credits if they should ever have to be refunded, you were in a position to control, to negotiate that with Reliant.

ATTORNEY THOMAS R. PHILLIPS: Well --

JUSTICE NATHAN L. HECHT: And you knew, at least you had taken the position that these were illegal.

ATTORNEY THOMAS R. PHILLIPS: The EMCs were ordered in 2001 to be paid starting January 1, 2002. After May of 2001, CenterPoint and Reliant separated, and Reliant had 20 percent public shareholders, CenterPoint owned 80 percent. At that point, because of the fiduciary duty to minority shareholders, CenterPoint could have not come in and said, "Well, the government's awarded you hundreds of millions of dollars, why don't you just give them back to us."

JUSTICE NATHAN L. HECHT: Well, but you could have negotiated, you could have negotiated it out. You could have said, "We take the position we don't owe these, but we're going to have to give them to you anyway. We've given up the legal fight. The PUC says they're going to make it all right some day, but just in case, let's have a deal."

ATTORNEY THOMAS R. PHILLIPS: Well, it was not our -- I mean we did not do it, and I don't think it was our thinking that the officers of Reliant would be in very good shape if they went and told their shareholders, "The government may have given our company a bunch of money, but maybe that's going to turn out to be the wrong thing, so we just made a deal to give it back." We did not do that and we believe it's within the PUC's discretion if it made an unwise and as it turned out illegal order to undo that mistake. If Reliant and CenterPoint were really the same company, then the PUC would not have ordered CenterPoint to pay EMCs to Reliant as well as to the new entrants in the retail market in the first place. And such payments would not have increased CenterPoint's net book value, and that was their whole purpose was to get the net book value higher so that there would not be, they would be closer to what the PUC thought the market value was going to be. That's a little clearer if you look at Tab 3.

JUSTICE NATHAN L. HECHT: Were unaffiliated retailers required to pass the EMCs on to the customers?

ATTORNEY THOMAS R. PHILLIPS: No, they were not, and there is nothing in the record about the extent to which they did. It's one of the economic mistakes that the Court of Appeals made. They thought that the 40 percent of the EMCs that did not go to Reliant, that went to the new entrants, were somehow passed on to their customers, and we just don't know that. Similarly, on the pay-back, as the EMCs are reversed and come back to CenterPoint, we don't know if competition will allow some or all of those to be charged to the customers either. All we know for sure is that under this order, the retail electric providers got a hundred percent of the EMCs and now they'll have to pay 40 percent of them back, and as a group, they get to keep 60 percent of these EMCs.

JUSTICE DON R. WILLETT: Can I shift your focus away from the EMC issue to the other sort of stranded cost issue of how to quantify the value --

ATTORNEY THOMAS R. PHILLIPS: Sure.

JUSTICE DON R. WILLETT: -- of the generation assets?

ATTORNEY THOMAS R. PHILLIPS: Absolutely. Let's turn to Tab 15, please. PURA gave CenterPoint and all the utilities four choices of how to value the market value of their generation assets, and it was up to the utility to choose which one. And CenterPoint chose this partial stock valuation method, which says that at least 19 percent but less than 51 percent of the common stock of a company that owns the generation assets is spun off and sold to public investors through a national stock exchange and trades for at least a year. CenterPoint met each of those requirements as a matter of law. It spun off its generation assets into a new company, Texas GenCo. It created that new company. It then been spun off 19.04 percent of the shares of that company, which was over 50 million shares to its shareholders. It then insured that an active transparent market for this stock was made on the New York Stock Exchange, where nearly 38 million shares sold in 14 months of trading. The PUC held that the literal requirements of this language had not been satisfied because 19 percent of the stock was not both spun off and 19 percent of the stock, individual shares, were not sold on the market. The problem with this reading is that it makes it impossible for a utility to ensure that it has complied with the PSV method.

JUSTICE HARRIET O'NEILL: Well, the Court of Appeals said not impossible. It said that you could have spun off more, you could have spun off 50 percent, and in that event it would be more likely 19 percent would have been sold.

ATTORNEY THOMAS R. PHILLIPS: And that's the key word, "more likely." The Court of Appeals' language on page 22 was "attempt to ensure compliance." You can't be sure. There's two problems. One, you can't be sure, no matter what, if you spin off 50 percent, you can't be sure that at least 19 percent of those individual shares will sell. This was, after all, a very rapidly rising stock --

CHIEF JUSTICE WALLACE B. JEFFERSON: So what does "selling through a national stock exchange" mean then?

ATTORNEY THOMAS R. PHILLIPS: It means list --

CHIEF JUSTICE WALLACE B. JEFFERSON: I mean you don't have to make sure it happens?

ATTORNEY THOMAS R. PHILLIPS: It means listed on one of two stock --

CHIEF JUSTICE WALLACE B. JEFFERSON: Um-hm.

ATTORNEY THOMAS R. PHILLIPS: It means listed on the New York Stock Exchange, which has minimum requirements for number of shareholders, number of shares and volume. It requires 100,000 a month.

JUSTICE DALE WAINWRIGHT: So you say "sold" means listed?

ATTORNEY THOMAS R. PHILLIPS: It cannot mean that Center -- yes, we do.

JUSTICE DALE WAINWRIGHT: So I know they were out there for a year, do you know what percentage was actually sold, traded on that market?

ATTORNEY THOMAS R. PHILLIPS: Well, we know that the average share changed hands two and a half times. We don't know each individual share, and indeed you can't know each individual share, because when the brokers hold stock, all CenterPoint can do is go ask the brokers for information about which particular shares have sold, and the brokers have to talk to the owners of the individual stock, who under SEC rules can keep that information private if they want to. So there's truly no way either the PUC or CenterPoint could have complied with finding out if 19 percent had sold.

JUSTICE DON R. WILLETT: The CA, the CA noted in their opinion that you could have complied by conducting an IPO, that instead of a dividend distribution, giving away shares to existing shareholders, you could have conducted an IPO, and that would have been a bona fide --

ATTORNEY THOMAS R. PHILLIPS: And that's totally wrong. If you'll turn to Tab 6. An IPO, in fact is even worse than a spin-off because first you have a private sale of the stock to underwriters. Then the underwriters make a book of bids by other private contracts with investors, and only after those, a certain -- only if you've reached a certain level of success can you certify to the New York Stock Exchange to get it listed. None of the purchases from the underwriters are on the exchange. If you go out and you have again, private investors own the stock and they can hold it or they can sell it. And as you can see from Tab 7, this stock was going up very rapidly. There's a lot of good reasons people would not want to sell this stock and take a big short-term capital gain. In essence, the Court of Appeals ignores the traded on a public exchange requirement, which in fact is what gives you a transparent active market so that you can actually value the stock.

JUSTICE HARRIET O'NEILL: Well, the Court of Appeals seemed concern that your argument could lead logically to just one share being sold and that would set a value.

ATTORNEY THOMAS R. PHILLIPS: Well, they ignore the fact that the New York Stock Exchange says if you don't sell 100,000 shares each and every month, you get delisted. The way it was set up, if you're trading on a national exchange, it cannot be a failed stock. You can have a failed IPO, and you can have failed stocks, but not and stay listed on the exchange. So you're guaranteed in that process that a market is made.

JUSTICE HARRIET O'NEILL: But the Court of Appeals seemed to go with the plain-meaning approach, that it was up to the Legislature to set how much needed to be sold and that they intended, rightly or wrongly, or misinformed or misguided, but they set 19 percent as a minimum trade volume.

ATTORNEY THOMAS R. PHILLIPS: And that's why I said that the opinion is flawed by economic misassumptions. If you'll turn to the last tab, Tab 17 --

JUSTICE DALE WAINWRIGHT: Well, isn't that also an argument that the statute is flawed by economic assumptions?

ATTORNEY THOMAS R. PHILLIPS: No.

JUSTICE DALE WAINWRIGHT: Does that mean we take another look at maybe what language should be in the statute rather than applying what's in it?

ATTORNEY THOMAS R. PHILLIPS: If the Legislature had said clearly this, "You've got to make sure each share sold," yes, that would be right. But they didn't. This language is susceptible of several interpretations. Government Code Section 311.021, which is on Tab 17, said that in construing statutes, you are to presume that a result feasible of execution was intended. And that's what you can't do with the Court of Appeals' interpretation.

JUSTICE HARRIET O'NEILL: Well, but what are the parameters of feasibility of execution, because the Court of Appeals seemed to say that, spin off 50 percent, you're going to get 19 percent of sales. It's maybe not very practical, it's maybe not very probable, but it's feasible. But how much leeway do we give the Legislature here?

ATTORNEY THOMAS R. PHILLIPS: Well, this sentence can be read several ways. You could read it to say that however many shares you spin off, each and every one of those has to sell. If you spin off 40 million shares, and 39,999,999 sells, you fail. That can't be right and nobody advocates it. You can also read that you spin off 19 percent and then the shares are sold on a national exchange for a year, and that's a reasonable reading. The intent of these true-ups was not to play some game. It's not like Let's Make A Deal, and there's doors and some of them get a prize and some you don't. And it's not like a rate case, where the PUC has great discretion to, you know, come up with a fair answer. So the one time, one shot deal --

JUSTICE NATHAN L. HECHT: Well, if it's not a game, why not go with the asset sale contract --

ATTORNEY THOMAS R. PHILLIPS: Well, why would the Legislature --

JUSTICE NATHAN L. HECHT: -- as your CEO sort of said he thought was a fair thing when he testified?

ATTORNEY THOMAS R. PHILLIPS: Well, we don't believe the Legislature gave four choices and two of them were bad, that two of them were trashcans or lumps of coal behind the door. We believe that it should be interpreted where each one of the four options they gave can be complied with with certainty, so the you will know the exact answer of your stranded costs and what you're entitled to in the true-up.

JUSTICE DALE WAINWRIGHT: Counsel, then your argument would, looking at 3 -- 39.262(h)(3), mean that if more than 51 percent of stock were traded, then you could still find a way to comply with the statute even though the statute says between 19 and 51?

ATTORNEY THOMAS R. PHILLIPS: Well, my argument is, let's suppose you choose to go with the stock valuation method, and that is give up control of this company, spin off and sell more than 50 percent of it. You can't' be sure you complied with that, because you don't know that 50 percent will actually sell, and that's absolutely stupid. I mean what the Legislature wanted was for you to no longer have control of the company, and it doesn't matter whether those shareholders sold at once or not.

JUSTICE DALE WAINWRIGHT: For centuries we've been trying to figure out what the Legislature wanted, as we are here, but it says 19 to 51. Numbers are numbers.

ATTORNEY THOMAS R. PHILLIPS: And they do have to be spun off. If we had spun off 18.99 percent, we wouldn't be here, but we spun off enough that the Legislature thought, and rightly so, that they could make an accurate market for this stock, and we certainly did. It was the 15th best performing stock of the top 1,000 stocks in America.

JUSTICE DON R. WILLETT: Was the sale of assets method feasible or not feasible?

ATTORNEY THOMAS R. PHILLIPS: Well, it was feasible and eventually was done. But I just can't believe that we would interpret this statute to say there's some Got You's in here. There are methods that are written up, and we're going to diagram the sentence so that you can't be sure you've complied with it. The 19 percent was a very sensible rule. If you, if you own more than 80 percent of the company, you can file consolidated tax returns, which can be a substantial savings to a multi-layered corporate entity. It's in there for a reason. And the Court of Appeals' rationale, that clearly the Legislature didn't want you to be able to do that and even if you did, it might or might not succeed, I think defies common sense, it's unreasonable. The PUC's interpretation is entitled to no deference. Thank you.

ATTORNEY GREGORY S. COLEMAN: Good morning, and may it please the Court. As with its stock valuation analysis, the PUC improperly disregarded legislative dictate and carefully considered policy choices in misinterpreting and misapplying the capacity auction true-up. I'd like to list out and then explain four primary reasons why we believe the PUC and the Third Court erred. First, the Legislature expressly required the PUC to use the prices obtained in the PUC-led transparent public market that was the capacity auctions in calculating the amount of the true-up. Nothing in the legislative text, its structure, or the legislative objectives conditioned true-up eligibility on the nonaffiliated retailers purchasing the full 15 percent of capacity auction or some set lesser amount. Third, the PUC's interpretation irrationally makes compliance uncontrollable because this was an auction and we could not force people to buy what we brought to the auction to sell. And fourth, the remedy that the PUC ultimately chose, which was grafting in private market sales to the affiliated retailer, was the one thing that the Legislature expressly forbade in connection with the legislative -- excuse me -- with the capacity auction true-ups. The capacity auctions had a very distinct purpose. They were set up because the Legislature knew that new entrants were coming in, they were going to compete with the old monopoly retailers who were being spun off, and in this case Reliant. They needed access to capacity, so as they're going out, building a client base, building a customer base, they had to have electricity, these capacity auctions were set up to guarantee that these new reps would have access to that power. Now on Day One, there wasn't an expectation that these entities would already have 15 percent of the market, they would just be starting on January 1st, 2002. Nobody could have expected that they were going to on Day One go in and take 15 percent of all the electricity. But we had to bring it to market so it would be there for them. This was a market that worked. Every retailer who wanted electricity for these new customers was able to go to the public markets and take it. There is no evidence of any retailer ever saying, "I can't secure the electricity that I need for the customers that I have brought on board." These markets worked. Billions of dollars of electricity were sold in connection with the public markets, the capacity auctions. It's not reasonable to say that at the end of the day we don't think you sold enough, you sold everything that anybody wanted, but you didn't sell enough and therefore you're not eligible for the true-up.

JUSTICE NATHAN L. HECHT: But the argument is that the formula is wrong, and you say, "Well, you should have complained about that when the rule was drawn," and maybe so. But if it is wrong and if it were corrected so that revenues and fuel costs were matched, would you get some result like the PUC came up with or not?

ATTORNEY GREGORY S. COLEMAN: Let me address it this way, Justice Hecht. The formula is not wrong, there's not a mismatch of sales and fuel costs. The fuel costs are what the fuel that was used and for power that was actually sold. There's not a mismatch. They're unhappy that the prices from the private auctions ended up being somewhat higher than those in the public auction, and therefore you can get a lower number. Their complaint is really that if you use a different formula, you come out with a lower number and we like a lower number. But the formula is based on a statute that says you must use the prices obtained in this auction and only in this auction. And neither the PUC nor anybody else had authority to come in and say, "But we're unhappy with the way the formula worked out, and therefore we are simply going to disregard what the Legislature told us, and on the backend we're going to Monday morning quarterback it and say we're going to come up with a different formula, one that the Legislature didn't tell us to enact, and come out with a different result because it comes to a different number." I'd like to very briefly touch on the depreciation point. The statute says that we get all of our stranded costs, that's 39.252(a). That means under the statute, 39.201, which this Court addressed in the CenterPoint One case five years ago, and 39.251(7) also addressed in that case, said that stranded costs are determined as of December 31st, 2001, not December 31st, 2003, or some date in 2004. That is the date. What the PUC did here and what the Intervenors are arguing is the same argument that this Court considered and rejected in CenterPoint One, which is, "We don't like the way the stranded costs recovery works and the capacity auction works, and therefore we want you to adopt effectively a different date for determining net book value and therefore stranded costs." There is no authority in the statute to do that. The statute in two separate places and several places in the rules says December 31st, 2001. If you would turn just very briefly to Tab 11, the point of stranded costs was to say: As of December 31st, '01, we're going to give you the difference between your net book value and your market value. In other words, we want to treat you as a hypothetical new market entrant. If somebody came and bought $2 billion worth of assets on December 31st, '01, and started generating power and selling it, all right, we want you, we want to treat you like that entity, in parity with that entity. Well, if somebody had come in and bought those assets on December 31st, '01, and started to operate, any depreciation they would have taken would have come off that market value, they would have depreciated below the line, if you will. What the PUC has done and said, "We are going to ratchet you up so that you're not going to be allowed to come down to this market value because we don't want you to take this depreciation off of what would have been the market value line, we want you to take it out of stranded costs." But that's exactly what the Legislature forbade. It's not incumbent and not appropriate for the PUC to say, "We reject what the Legislature put into the statute, we're going to come up with a different number and a different method of looking at this than what the Legislature allows to arrive at a number that we like better." I see I've run out of my time. I'll answer your questions and I'll reserve for rebuttal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any questions? Thank you, Mr. Coleman. We have several people arguing today, but according to my notes Mr. Day is next for Texas Industrial Consumers.

MARSHALL: May it please the Court, Mr. Day and Mr. Hall will present argument for the Joint Petitioners. The Joint petitioners have reserved ten minutes for rebuttal. Mr. Day will open with the first 15 minutes.

ATTORNEY JONATHAN DAY: May it please the Court, I am Jonathan Day. Our firm represents the Texas Industrial Energy Consumers, sometimes known as TIEC. First a little bit about who is in our group. We are largely composed of ship channel industries like Exxon Mobile and Occidental Chemical, but we also include other manufacturers like Texas Instruments. In this case our firm also represents major hospital systems and private colleges and universities. The cost of electricity including stranded cost recovery has an important effect on the prices of the products and services that are provided by these companies. As the Court is aware, the customer groups have joined in filing briefs in this case, and we are also consolidating our oral argument. Accordingly, the Attorney General, who represents state institutions who are ratepayers in the Houston area is also joined in this submission. The institutions it represents are M.D. Anderson, the University of Houston and other such institutions. In addition, there are two groups of cities involving more than 30 separate municipalities, so the Court should be aware that all ratepayers, large and small, private and public, industrial, residential, commercial, we are all joined in a common position in this case. When the Legislature enacted Senate Bill 7, it explicitly set out two fundamental objectives. First, utilities are entitled to recover their stranded cost, but secondly and explicitly in the statute, stranded costs are not to be over-recovered. These twin legislative objectives set up a fair balance between the interests of the utility and the ratepayers. Stranded costs are in fact an entitlement for the utilities, and rate payers do not contend otherwise, but those stranded costs are not to be over-recovered. Ratepayers respectfully submit that on all four of the claims made by the utility in this case, this Court has been asked to directly violate the second legislative mandate which prohibits an over-recovery of stranded cost. First, regarding market value. The utility is asking the Court to ignore the arm's length sale of its generation assets. The price of this transaction was $253 million more than the amount based on the subjective estimate by a group of investment bankers.

JUSTICE NATHAN L. HECHT: Let me ask you in that connection, if there were 19 -- if they met the partial stock value component of the statutory paragraph, could the utility choose between that valuation method and the actual sale of the assets?

ATTORNEY JONATHAN DAY: Your Honor, if they had met the, that standard, then I suspect at least in this respect we wouldn't be here on this point because they would have complied.

JUSTICE NATHAN L. HECHT: Well, what I'm getting at is, if they complied with that and it was a much higher number and they actually sold the assets and it closed before the true-up was over and that was a much lower number, would they be entitled to the higher number?

ATTORNEY JONATHAN DAY: You know, I think, in other words, I think you're asking, suppose the tables were reversed and --

JUSTICE NATHAN L. HECHT: Well, you said they're not supposed to over-recover, and the CEO seemed to say that same thing, but does the statute allow them to over-recover in that instance?

ATTORNEY JONATHAN DAY: No, Your Honor, I don't think so. I think in this circumstance if we were presented with a situation which was quite unexpected and developed only in the course of the hearing, I don't think they're entitled to over-recover their stranded costs. What was set out by the Legislature was the objective that they would get their full net book value. And it's important, as you have already referred to, the CEO, David McLanahan, of this company said this, and it's in the record and it's attached to our brief: "Was this result the intention of the Legislature?" "You know, I don't think so. They didn't want anybody to have a windfall, and I don't want our company to have a windfall. We are just trying to recover our book value." That's the statement of their own CEO.

JUSTICE NATHAN L. HECHT: The statute says, "The affiliated power generation company shall quantify its stranded costs using one or more of the following methods." But it's just not clear to me whether it gets to pick or whether if two or more of the provisions applied, the PUC could hold them to the lesser?

ATTORNEY JONATHAN DAY: I think the PUC in this case is entitled to effect the legislative intent, which is what they get is their net book value, not a penny more, and that's what should have happened in this case. And inexplicably, at least from ratepayers' perspective, that's not what happened, the company has been allowed to over-recover. And if the tables had been turned, let's assume for a moment that what had happened was that the utility had failed in its methodology and there had been a sale, but the Commission determined by some sort of subjective analysis -- the Legislature intended here to avoid the use of subjective analyses where competing experts tweak their discounted cash-flow models and they come up with a different number. And if there had been a gap there, the utility would surely be here saying, "We should get our full net book value." We don't object to that, that's what they're entitled, that's what they're CEO says they're entitled to.

JUSTICE DON R. WILLETT: In the sale of asset method, is there, or isn't there a deadline by which that sale has to be completed?

ATTORNEY JONATHAN DAY: The deadline is specified in the statute, which is that it has to occur after December 31, of 1999. We clearly meet --

JUSTICE DON R. WILLETT: But anything after that is fair game?

ATTORNEY JONATHAN DAY: Well, honestly, if the true-up hearing had closed and there had not been a transaction, then I think the game is over. But in this particular case for various circumstances, the utility felt compelled to go forward with this sale of assets, and it was announced, the document is in the record, the bidding process is in the record, there is no, there is not a scintilla of evidence on the part of any party to this case that there was anything defective about the process, the bidding process or the agreement. There's no challenge to that. We stipulate --

JUSTICE DON R. WILLETT: Clarify this. Was the sale finalized and that price sort of set forth in the agreement?

ATTORNEY JONATHAN DAY: Yes, it was, it was. Now, it was not finalized, it was finalized in two separate closings. One was in December before the Commission lost jurisdiction to this matter, and the second one relating to its nuclear assets closed in April. But the test here is not whether there has been a passing of the title of the stock. The test is whether have all the terms have been agreed. They were agreed. The Texas cases clearly say that a sale, there is a sale, the asset has been sold when all the terms and conditions have been agreed.

JUSTICE DON R. WILLETT: So you say agreement is sort of the end point, and not so much final or formal execution or every I dotted, every T crossed?

ATTORNEY JONATHAN DAY: Well, in this case, every I was dotted and every T was crossed, the only thing, there were a whole series of regulatory approvals, the SEC approvals, Nuclear Regulatory Commission approvals that had to occur before this transfer could occur. Those were all traditional, natural conditions, but all the terms and agreements of the agreement were specified and were ultimately carried out. There was no variation, and no one contests that. We stipulate that this was a sale of assets that qualified under the statute.

JUSTICE DALE WAINWRIGHT: Is it possible to prove with certainty compliance with the partial stock valuation method, the percentages?

ATTORNEY JONATHAN DAY: We disagree. The analysis that's given, for example, that Judge Phillips gave in connection with an initial public offering, we think that that could have been structured in a way that the underwriters would have had to carry forward and the criteria could have been met. What they offer is an ex post facto explanation and they say, "Well, we just couldn't do it." We don't agree with that at all. We think that there were ways that it could have been accomplished. That's their burden. We think the Legislature specified, and as the Court of Appeals held, that the interpretation is that a certain number of shares had to be traded, and it needed to meet the 19 percent, and they didn't meet it.

JUSTICE NATHAN L. HECHT: But the only two, am I wrong that the only two alternative methods suggested are an IPO and spinning off more shares?

ATTORNEY JONATHAN DAY: Those are the only two suggestions that we had.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY JONATHAN DAY: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And that's the only two the Court of Appeals had. Are you going to talk about excess mitigation credits?

ATTORNEY JONATHAN DAY: Mr. Hall is going to address that, if you don't mind, Your Honor.

JUSTICE NATHAN L. HECHT: No, that's fine.

ATTORNEY JONATHAN DAY: I will talk briefly about the capacity auction true-up because it's a very complicated matter, and I appreciate that there are issues that are pertinent to that. The important thing about this is to begin with what was the objective of the capacity auction true-up. This Court held in the CenterPoint opinion that the capacity auction true-up guarantees consumers and power companies that the power company will receive no more and no less than a margin previously predicted by the ECOM model.

JUSTICE NATHAN L. HECHT: This is to compensate the company for having to make available capacity to the start-ups?

ATTORNEY JONATHAN DAY: It was essentially -- I mean they remained in a guaranteed-return regime for two years. They had an absolute guarantee of the margin that was predicted by the ECOM model. And as the Court has already indicated, the formula didn't work and we were aware of that. The problem was that they didn't sell all the products so that the 15 percent was not a, essentially was not a representative proxy for what the overall sales for that period were. Now, there is no question that they didn't meet the safe harbor requirements of the rule. Now, there's --

JUSTICE NATHAN L. HECHT: Could they have just sold it to like me, the last 21 units or however many were necessary to meet the safe harbor provision? Could they just have sold it to John Doe for $5,000?

ATTORNEY JONATHAN DAY: Well, I mean I don't think an artificial or a sale that was not in the ordinary course in the power market --

JUSTICE NATHAN L. HECHT: Would qualify?

ATTORNEY JONATHAN DAY: -- wouldn't qualify. I mean I think that would be a charade. But the capacity auction true-up, what the company essentially argues is there is no relationship between the margin that they in fact earned during that two-year period and what actually happened under this formula. The formula overcompensated them because it grossly overstated the fuel cost, and it was unrepresentative. And they just basically say, "Well, look we got close to implementing the formula, and therefore we ought to get it." That doesn't have anything to do with the objective of the capacity auction true-up which was to put them in a position where they earned what the ECOM model predicted. What the Commission did was entirely reasonable, and they basically looked at all the auctions and they made sure that the margin was accurately portrayed in terms of the actual sales that were made. So our argument here is, they didn't meet the test. I mean there's no question about that. They say "Well, we got awfully close." But they ignore the fact that there wasn't any safe harbor provision in 2002 with which they could have complied, and they also ignore, they just step away from the proposition that this Commission has declared it would be inequitable, it would be a windfall for this company to get the additional $440 million. It would simply be an unfair result. Close, in terms of compliance with the safe harbor rule, doesn't count when the threshold for minimum compliance has been set at an extremely low level, and the result of noncompliance has been determined by the Commission to be an inequitable windfall. One more comment with regard to depreciation. This Court held in the CenterPoint opinion that the results of the capacity auction true-up should be taken into account in determining whether there has been an over-recovery of stranded costs. That's explicit language, it says there's a relationship between stranded costs and the capacity auction true-up. This was a time period when the company had essentially a guaranteed return, and it was entirely appropriate to reduce the stranded cost award by the depreciation cost during that time period. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Counselor.

ATTORNEY ALTON J. HALL: May it please the Court, my name is Alton Hall, and I represent the City of Houston and the Coalition of Cities. The issue I will be addressing is the excess mitigation credit. Contrary to the assertions by CenterPoint in its brief and by Justice Phillips, the issue before this Court is whether or not CenterPoint is permitted under the Public Utility Regulatory Act to recover twice from ratepayers. Specifically --

JUSTICE NATHAN L. HECHT: I don't understand that. Now, it just seems to me like whether they should have to pay once, I don't get the double dip argument.

ATTORNEY ALTON J. HALL: I'll be happy to address that, Justice Hecht. Essentially what you have to understand is that what happened is customers, including price to beat customers, which are primarily in large part low-income customers, paid for years rates that ultimately ended up being higher than the approved return. That's what resulted in the excess earnings. In a normal circumstance those excess earnings would have been returned to ratepayers, either through a credit or a refund of some sort. During the time period that we're talking about, this 2000, 2001 time period -- well, it actually started in the late '90s, the Commission said, "Well, since we're looking at going to deregulation, you may have positive stranded costs," everything was based essentially off a report to the Legislature back in I believe it was 1998, 1999 time frame.

JUSTICE NATHAN L. HECHT: But it was wrong?

ATTORNEY ALTON J. HALL: That's correct.

JUSTICE NATHAN L. HECHT: So the customers didn't pay, actually they underpaid.

ATTORNEY ALTON J. HALL: No, the customers did pay. What happened is the customers, they got these excess earnings, CenterPoint used those excess earnings to mitigate its stranded cost to the tune of about $1.2 to $1.5 billion. They did get that money and they did use it to offset the anticipated stranded costs. So that was the first time, because as I said, were it not for the Commission allowing them to retain those funds for mitigation purposes, they would have been returned to ratepayers but they were not. So that's the first time.

JUSTICE NATHAN L. HECHT: Let me ask you, is it true, as I asked Petitioner, that the unaffiliated retailers were not required to pass on the EMCs to their customers?

ATTORNEY ALTON J. HALL: There was not a specific requirement order, but it was certainly anticipated that they would, and that was the purpose of giving it to the unaffiliated retail electric providers just like the affiliate, however --

JUSTICE NATHAN L. HECHT: But they would only do it if they needed it to compete, I guess?

ATTORNEY ALTON J. HALL: That's absolutely right, and the expectation was that they would do it in order to compete.

JUSTICE NATHAN L. HECHT: But no studies or information show whether they did or they didn't?

ATTORNEY ALTON J. HALL: There's no study that I'm aware of in the record.

JUSTICE NATHAN L. HECHT: Since we don't know whether they did or they didn't, why should we treat Reliant differently from the ones that we don't know what they did?

ATTORNEY ALTON J. HALL: Because with Reliant we do know, and with Reliant we know with absolute certainty that those funds that were paid to Reliant, we know the exact amount, $385 million were not passed through to price to beat customers. They were forbade from doing that by the Commission as it read the Price to Beat Statutes and Regulations which they interpreted as forbidding them from changing that price. So we know with absolute certainty what happened with those funds. That's the reason why when CenterPoint came in, it actually addressed that specifically and said, "We're entitled to that money along with the rest." The Commission looked at that issue specifically because we knew with certainty there, and we knew for a fact that customers in that situation never got the credit. And that's why we're here because we took the position at the Commission, and ultimately the Court of

Appeals looked at the issue and agreed with us, that it would be a double recovery and in fact an over-recovery under Section 39.262(a) to allow CenterPoint to recover those same funds again from those same customers. Because one thing you have to understand is once you get to the second stage, there's no question that the ratepayers are going to pay because it goes into nonbypassable charges, and so it's going straight to the customers. It's not like it's going just to Reliant and Reliant can say, "Well, we won't pass it through." In that instance, it's going to be passed through.

JUSTICE NATHAN L. HECHT: If the PUC had not required EMCs we wouldn't be worrying about this today?

ATTORNEY ALTON J. HALL: If the PUC had not required, that's correct.

JUSTICE NATHAN L. HECHT: So they made a mistake, and now the question is, is CenterPoint going to pay for it or are the customers going to pay for it?

ATTORNEY ALTON J. HALL: That's one way to look at it, and I think if you look at it in that way, you still come to the same result because of several reasons. One, the question is who was in the best position to have anticipated and address this issue, the price to beat customers who have no control and no ability to address this issue or address this situation, or CenterPoint who has made several arguments for why it should not be in this position. One of which is, "We're a separate company." Well, 262(a) doesn't make a distinction. It says you look at them together in determining whether or not the over-recovery, and it specifically references the affiliated retail electric provider. It does not say, "Only if they're one company." CenterPoint chose to separate in the way that it did, it wasn't required by the statute. Secondly, the point that you raised with Mr. Phillips, they knew at the time they were separating that EMCs or some other mechanism would be used to return these excess earnings that they had used to mitigate. They knew that because there was an order that came out on certified questions well before their business separation plan and their final separation was approved. They could have negotiated with Reliant, which at that point was still part of CenterPoint, a way to get this money back from Reliant. They didn't. So essentially what you're being asked to do is approve a circumstance where CenterPoint is requesting where they took money from one hand and put it in another hand, and now they're asking the ratepayers, who paid the first time they had it in their hand, to pay again for this empty hand. That is a violation of Section 39.262(a). But equally as important, I believe that's bad public policy in these economic times to require these low-income ratepayers who have the least ability to affect the circumstance, the least ability to bear the burden of what Justice Hecht called a mistake. It's just wrong.

JUSTICE DALE WAINWRIGHT: Well, Counsel, if you assume the EMCs are a mistake, then either CenterPoint pays or the customers pay, you said that's one way to look at it. What's your other way to look at it?

ATTORNEY ALTON J. HALL: Well, I think one way to look at it is that you could simply look and say that you act as though the EMCs were never there and you just put them in stranded costs, and I guess in essence you're going back to CenterPoint paying. But I guess I was referring more to the question of was it a mistake. I don't know that you could say it was a mistake, it was the circumstances that was before the Commission at the time. I think that they acted based upon the way they interpreted the statute and the circumstances at the time. So that's what I was referring to more so than other options.

JUSTICE NATHAN L. HECHT: Some of us thought it was a mistake.

ATTORNEY ALTON J. HALL: I understand that, Justice Hecht.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Hall. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Ms. Sterling will present argument for the Respondent.

ORAL ARGUMENT OF ELIZABETH R. B. STERLING ON BEHALF OF THE RESPONDENT

ATTORNEY ELIZABETH R.B. STERLING: May it please the Court, although the Commission asked this Court to affirm the Court of Appeals' opinion in all respects except for the EMC issue, I plan to address only the capacity auction issues, market value, and I will try to touch briefly on the depreciation question. A utility must comply with the Capacity Auction Statute in order to use the resulting price in the capacity auction formula, otherwise the legislative purpose is frustrated.

JUSTICE NATHAN L. HECHT: But the statute doesn't clearly tie the 15 percent to the reimbursement, or whatever you call it, and it's hard to think why it should. I mean it could have been 20 percent, it could have 10 percent. I mean there's nothing magical about 15 percent except that that was what the Legislature thought it would take maybe to sort of prime the pump with these new start-ups. Isn't that right?

ATTORNEY ELIZABETH R.B. STERLING: Your Honor, the language in the statute that connects the two is found in -- excuse me, is that the statute requires reconciliation with the price of power obtained through the capacity auctions under Section 39.153, so that's the indication that you have to go back and look at 153. Section 153 has the 15 percent requirement. And also the PUC would --

JUSTICE NATHAN L. HECHT: But the 15 percent isn't a requirement. There's a safe harbor and an alternative safe harbor. I mean it seems to me that all the exceptions to it indicate that it's not a requirement.

ATTORNEY ELIZABETH R.B. STERLING: The statute makes the 15 percent requirement, what the PUC -- what happened --

JUSTICE DALE WAINWRIGHT: I'm sorry, Counsel. Which statute, specific section is referencing 153? Give that cite that you started at the beginning.

ATTORNEY ELIZABETH R.B. STERLING: I'm sorry, the True-Up Statute, 39.252 -- excuse me -- 262(d) is going to send you back to the Capacity Auction Statute --

JUSTICE DALE WAINWRIGHT: Thank you.

ATTORNEY ELIZABETH R.B. STERLING: -- 39.153. And as to why there's 15 percent, 15 percent, as you said, is partly to be sure that there is enough electricity available for sale, but it's also as part of that is it's trying to develop a market, to be sure that we have a real market for this, and from that market we're going to determine the market price to be used in the capacity auction true-up.

JUSTICE NATHAN L. HECHT: And so if that's true, does it matter whether there was 15 percent? Because they weren't close, I think they were just at 65 percent, right?

ATTORNEY ELIZABETH R.B. STERLING: They sold 10 percent total. Total, not what --

JUSTICE NATHAN L. HECHT: All right, two-thirds of what they should have, right.

ATTORNEY ELIZABETH R.B. STERLING: Before you even get to the question of the one particular product that they failed to meet the safe harbor on, they only sold 10 percent.

JUSTICE NATHAN L. HECHT: But there are all these safe harbors and if they had met one of those, then the 15 percent wouldn't have mattered?

ATTORNEY ELIZABETH R.B. STERLING: The safe harbors were adopted, and I think it's important to look at the process in which the safe harbors were adopted. First, they were adopted as the process was going along. Before the auctions began, parties were getting concerned about, well, the rule had set forth the four products you needed to sell and how much of each product you needed to sell for each auction. And the parties came and said, "We've reached an agreement that if they don't sell everything in one auction, they can sell it, they can propose to sell it another time. So that it will all get sold, but it doesn't matter which auction it's sold at." That applied to the first two auctions for 2002 electricity. Then for 2003 power there was an amendment to the rule, and again you had all the parties able to come in and give input in how this should be done, and the language is that if enough is sold in -- "if the required amount is sold in one month, it will be deemed to meet the 15 percent." So we're still tying back to the 15 percent, it's just that we have created first by a settlement that was adopted by the PUC and later by this rule, these safe harbors. But it really doesn't matter because CenterPoint didn't meet those safe harbors. That's why the Commission had to go and come up with some proxy to put in the formula. The formula for the capacity auction, which this Court discussed in the CenterPoint opinion, looked at determining whether or not -- it was designed -- excuse me -- to determine whether or not the utility had recovered the margin that it was expected to recover under the ECOM method, which was a way of saying, "We want to be sure that the utility recovers what it would have recovered if we had regulated rates." And the way that the formula did that was to say, well, first we'll come up with the margin, the ECOM margin, and then we'll compare that to a number, and in that number we will take the total amount of electricity you sold -- it talks about total thus far for 2002, 2003, but what that means is all the electricity you put on the grid -- we'll multiply that by the capacity auction price, and that's because it was assumed that the price from the capacity auction would be most representative of a true market price. But what happened was they didn't sell the required amount, therefore the Commission looked at coming up with some sort of proxy for that, and because they're looking for what really is the market price and because --

JUSTICE NATHAN L. HECHT: Was this just a failure of vision when the statute was written? It looks to me like even in the late '90s if you were sitting around thinking what's going to happen in this capacity auction, it would occur to somebody that maybe not all these products would sell?

ATTORNEY ELIZABETH R.B. STERLING: Obviously the Legislature believed that 15 percent would sell. In fact, the language of the statute is at least 15 percent should be sold in the capacity auctions. So clearly the Legislature intended and expected that this amount would be sold and that once you sold that amount, you would indeed have a number that could be used for the capacity auction true-up. But because we didn't have that number, because there was a failure of the utility to comply with capacity auction, the Commission took evidence from the parties about what to do, and it was suggested by at least one of the witnesses that the most appropriate thing was to look at all their sales. And there was a --

JUSTICE NATHAN L. HECHT: Does the Commission think at this point, after hearing all the evidence and going through the process, that this, the failure to make the sales was CenterPoint's fault or was GenCo's fault or was market conditions, or does it have an explanation for why it ended up the way it did?

ATTORNEY ELIZABETH R.B. STERLING: The Public Utility Commission did not make any finding about whose fault it was. Whatever reason that it happened, we didn't have the 15 percent that was necessary, we didn't have the capacity auction price that would be representative of the market, and therefore -- as I said, we had testimony that said, "Well, the best way to come up with the price to put in there is look at what they really sold their electricity at." And to allay concerns about, "Well, some of that was sold to their affiliated company," you have testimony from CenterPoint's witness, Mr. Teese [Ph.]. He says that it, quote "designed its" -- and it's describing its private auctions -- "it designed its private auction products to the extent permitted by the Commission's rules to attract bidders. And the auctions insured that the related customer, the utility's biggest customer, RRI was paying a market price for the power it received." So you have some assurance that indeed even though some of those sales were to the affiliated company, they were done at a market price, that the way they had structured it created a market. And therefore it was appropriate for the Commission to use this price that included all their sales because that accomplishes the legislative purpose, which is to be sure, as this Court said in the CenterPoint opinion, that the utility receives no more and no less than the margin predicted by the ECOM method, and that's accomplished by what the Commission did even though we didn't have the capacity auction number to plug into the formula, we had to plug in a different number because you didn't have a capacity auction that complied with the statute and with the rules that were adopted pursuant to the statute. I'll turn --

JUSTICE NATHAN L. HECHT: But is it true that if they had just sold those 21 units for $5,000, whatever month it was, that we wouldn't be here worrying about this?

ATTORNEY ELIZABETH R.B. STERLING: I doubt that, Your Honor, for a couple of reasons. For one thing, the Commission found that for 2002, the safe harbor that existed was the one from its earlier orders, and there are findings in the order about that. The testimony that the utility relies upon to say "Oh, we came within the safe harbor," is looking at the safe harbor that was adopted in the rule. That rule was adopted in 2002, but because of the way the auctions were set up, all of the 2002 power had already been auctioned before that rule came into effect. So that rule only affected the sales of the 2003 power, so they didn't meet the safe harbor. There isn't a specific finding to the effect, but there's the finding that the safe harbor only applied to two of the 2002 auctions, and looking at the record it's clear that they didn't come, they didn't meet exactly the amount for the other two auctions in 2002, so you wouldn't even get to the one cent. But there are also problems with the, there are other problems with that one cent argument. It was a last minute proposal that was made. In fact, there is mention in briefing of another proceeding, it's Project 27744, and much of one of the orders about that is quoted in testimony in this case. That was something that the utility filed where they came in and said, in essence, they said, "Well, we didn't sell the 15 percent, but if you look at our private auctions we sold at least 15 percent to people other than our affiliate, so say it's okay that we didn't sell the 15 percent. We didn't meet the safe harbors, but how are we possibly going to do that at this point because we all know the only sales we have left are winter sales and we all know that this particular product, Gas-Intermediate sells best in the summer. And, oh, by the way, we can't sell any more for the summer because we've already sold the rest of the summer power through our private capacity auctions."

JUSTICE DON R. WILLETT: Ms. Sterling, can we shift gears and talk about market value?

ATTORNEY ELIZABETH R.B. STERLING: Yes, Your Honor. When this utility failed to comply with the statutory method to determine the market value, the Commission had to rely on evidence in the record to determine that amount. CenterPoint failed to comply with the partial stock valuation method, which was the one that it chose. And this is question of pure statutory interpretation.

JUSTICE NATHAN L. HECHT: Did it get to pick?

ATTORNEY ELIZABETH R.B. STERLING: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: The statute doesn't seem that clear to me, but the Commission's view is that whichever paragraph the utility picks, that's it?

ATTORNEY ELIZABETH R.B. STERLING: The Commission's view is that the utility gets to pick any one of the H methods. If the H methods don't work for a nuclear product, then they got to the I method for the nuclear.

JUSTICE NATHAN L. HECHT: Even if the values are very different under the different methods?

ATTORNEY ELIZABETH R.B. STERLING: It was, it's the utility's choice, the utility -- as the utility has pointed out, you might not be able, you may have some trouble doing this. It may be hard to have complied with this method.

JUSTICE NATHAN L. HECHT: All right, but say you did. Say you complied with all four of them, and they had very different numbers.

ATTORNEY ELIZABETH R.B. STERLING: It would be difficult to comply with all four of them.

JUSTICE NATHAN L. HECHT: Say you complied with two, PSB and the sale of the assets.

ATTORNEY ELIZABETH R.B. STERLING: It was the utility that got to choose, and if they had complied strictly with what they were required to do, the Commission would look at that number, because they --

JUSTICE DON R. WILLETT: Would the Commission allow them to propose alternative valuations?

ATTORNEY ELIZABETH R.B. STERLING: We do not have the circumstance to know for sure, but I think it's highly likely that had they come in and said, "We told you were in our business preparation plan that we were going to do a partial stock valuation, but the stock market is not doing that well, we don't think all 19 percent are going to get sold. We'd like to change our method and go to something else." In this particular case, I would assume that the Commission would have allowed them to do that. Now there are other --

JUSTICE DAVID MEDINA: Well, why would you assume that?

ATTORNEY ELIZABETH R.B. STERLING: Because we're looking for a valid market value under the statute, and because for example, some of the, some of the times for when we were going to have the true-ups were changed to allow people to comply with the market methods that they were using, to be sure that they completed them. As I said, we don't know, there's no finding by the PUC, it's just that it seems that that would be a reasonable thing, if they had come in and said, "We're sorry, we just can't do it, but we still have all our assets, we could go to H4, and that's what we've decided to do."

JUSTICE DAVID MEDINA: Well, why is it --

ATTORNEY ELIZABETH R.B. STERLING: Or H1, excuse me.

JUSTICE DAVID MEDINA: Why is an attempt to sell 19 percent, or put 19 percent of this on the market a reasonable assumption that they tried to comply?

ATTORNEY ELIZABETH R.B. STERLING: Because what I was talking about is being able to come back in and completely comply with another one, which they did not do. And I'd like to point out a difference here too between what's going on under the market valuation and the capacity auction. This is different from the capacity auction, because with the change from regulation to competition with so much money at stake and with so many customers potentially avoided, the utility must receive permission, it can't wait to ask for forgiveness. For the capacity auction people were coming in saying, "There's a problem selling some of these products, let's make a change." And the Commission first took the settlement and said, "Okay, we're going to do the settlement." All the parties were involved in that, everybody had a chance to talk about it, and it was done before the fact. With the capacity, with the safe harbor rule, you had a rule-making, everybody came in, everybody got to talk about it and give input, and the Commission adopted a rule and said, "Okay, if you do this much, you will be deemed to have sold your 15 percent." Here the utility went through its whole process, it didn't say ahead of time, "Oh, we don't think we can really sell 19 percent." It waited until the true-up and then said, "Well, close enough is good enough," and it's not because this is a question of statutory interpretation and --

JUSTICE NATHAN L. HECHT: Is there any question in the Commission's mind that there was a real transparent market that was establishing price, and the New York Stock Exchange, shares were trading and you could kind of tell what the price was?

ATTORNEY ELIZABETH R.B. STERLING: There was, there was no question raised that there was anything the matter with what was going on on the stock exchange other than the fact that this did not comply with the language.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, then with that said, part of your brief, in your brief you say that a key part of the legislative intent behind that statute is that a sufficiently large share of the company stock be sold in bona fide market transactions so as to provide a reliable market valuation of the general assets. Why wouldn't that be enough? You've got stocks being sold, 37.8, or whatever you said, a million transactions, why wouldn't that establish a market?

ATTORNEY ELIZABETH R.B. STERLING: Because it was the Legislature's choice how much is enough, and the Legislature said you have to sell 19 percent.

JUSTICE NATHAN L. HECHT: Is it possible to know that you did? Is it humanly possible?

ATTORNEY ELIZABETH R.B. STERLING: I believe it is. There is certainly --

JUSTICE NATHAN L. HECHT: How?

ATTORNEY ELIZABETH R.B. STERLING: There is testimony in this record, which is cited in our brief, that shows that they had records to show because of the some of the institutional owners, that they knew -- I am not sure of the exact amount, I believe it's about 16 percent, they knew for sure that that had been sold because of the way that that's traded, which is why if they sold more, they could have known they had 19 percent.

JUSTICE NATHAN L. HECHT: But if somebody's got 500 shares and he wants to keep it in a shoebox, there's nothing anybody can do about that?

ATTORNEY ELIZABETH R.B. STERLING: I would think it's probably possible, but it might be very difficult to do it, however it was the Legislature's call that you needed to sell 19 percent.

JUSTICE DAVID MEDINA: Well, but it called for too much speculation. If you put 51 percent, you're going to lose your company, if you put something less than that you may or may not sell 19 percent? How do you know? Why not start off with the 19 percent and see what happens, and then come back to you like they did? I mean that seems to make complete business sense to me.

ATTORNEY ELIZABETH R.B. STERLING: Well, as I started to say, I think there is, there's an element of risk on any of these. When we're moving, we were moving from regulated to competitive rates, and the Legislature chose that we wanted markets to determine the market value of these assets. Well, when you've got markets involved, there's always a certain amount of risk. They might have tried to sell their assets and not found a buyer.

JUSTICE DAVID MEDINA: As often happens in these type of deals.

ATTORNEY ELIZABETH R.B. STERLING: So there was a risk any way they did it. The Legislature said -- you know, these are sophisticated large companies, they're going to figure out how to do it, whether it's a matter of selling all the assets or selling 19 percent of the stock or 51 percent of the stock, that's part of why they have the option to figure out which method they want to use.

JUSTICE DON R. WILLETT: So it your view, kind of boiled down, that the valuation methodologies in the statute are binding on the utility but maybe not necessarily binding on the Commission?

ATTORNEY ELIZABETH R.B. STERLING: That once the valuation, once there is no valuation method that's complied by by the utility, that then the Commission has authority to figure out what to do to come up with one.

JUSTICE DON R. WILLETT: You say it's just implied, just sort of ethereal.

ATTORNEY ELIZABETH R.B. STERLING: Yes, it is implied. I beg your pardon?

JUSTICE DON R. WILLETT: That if they kind of fall short on their chosen valuation method, the Commission can then sort of ad lib and sort of devise an alternative methodology that's not prescribed in the statute, but that you think kind of gets to the heart of it?

ATTORNEY ELIZABETH R.B. STERLING: Trying to come as close as possible. In fact, when the PUC came up with this, it tried to figure out what you would have, what the utility would have sold the stock at had it followed the partial stock valuation method that it chose.

JUSTICE DALE WAINWRIGHT: Well, Counsel, do you have any reason not to believe that a sale of 15.2 million -- or a distribution of 15.2 million shares to 55,000 stockholders on the New York Stock Exchange where those shared traded for 14 months does not give you a reasonable market value for the shares? Can you say that it does not?

ATTORNEY ELIZABETH R.B. STERLING: Well, Your Honor, the question once they didn't comply with the statute was to look at all --

JUSTICE DALE WAINWRIGHT: Well, let me get you to answer my question and then you can change the question.

ATTORNEY ELIZABETH R.B. STERLING: I'm sorry, could you ask it again, I'm afraid I didn't --

JUSTICE DALE WAINWRIGHT: Does the process by which the shares were traded on the New York Stock Exchange and the number of shares involved, the number of shareholders involved over 14 months give you any basis to say that the valuation from those transactions is not a reasonable market value?

ATTORNEY ELIZABETH R.B. STERLING: Well, first of all, Your Honor, there would have been a necessary to apply the control panel to it.

JUSTICE DALE WAINWRIGHT: The control premium?

ATTORNEY ELIZABETH R.B. STERLING: The control premium, because the statute said if you sell the 19 percent, we have to apply the control premium. And you will remember that the control panel came back and reported a large amount of difference. The statute, had they followed the statute, you would have a limited amount you would stop at. They didn't follow the statute, so if you're just looking at the factual evidence and not, you know, you've failed to comply with the statutory method, you're looking at the evidence in the record, then it would seem that it would be very reasonable from the record to say, "Well, it's the share price adjusted as much as it would have been adjusted under the control panel, to come up with a fair, what the fair value is." But the Commission looked at all of the evidence in the record and decided that this was the best way to come, to meet what was designed by the Legislature for how much the market value should be when the --

JUSTICE NATHAN L. HECHT: Why did you think that when there was a pending contract for the sale of DSS?

ATTORNEY ELIZABETH R.B. STERLING: There are several problems with the pending contract. First of all, it happened too late. There was a contract, but there wasn't a sale. And the statute talks about, "the assets shall be sold." The nuclear assets --

JUSTICE DON R. WILLETT: Sold by when?

ATTORNEY ELIZABETH R.B. STERLING: Sold before you're doing the true-up. And the nuclear assets under this contract were not sold until April, the order on rehearing in this case was in December.

JUSTICE NATHAN L. HECHT: It seems kind of technical.

ATTORNEY ELIZABETH R.B. STERLING: Well, as --

JUSTICE NATHAN L. HECHT: When you've got a binding contract and say, "Oops, it's not closed yet."

ATTORNEY ELIZABETH R.B. STERLING: As was pointed out earlier, there were regulatory approvals that had to be received and you don't know whether they're going to be received or not, and we know that the nuclear assets are the largest amount of what causes stranded costs. In addition to that, it's not the method chosen by the utility, and the utility is the one --

JUSTICE NATHAN L. HECHT: Well, they didn't choose yours either, but that's the problem. That's why we're here because they don't like yours either.

ATTORNEY ELIZABETH R.B. STERLING: Well, yes, what we do have here is the Commission didn't take the failed partial stock valuation that the company did which would have given the largest amount of stranded costs, nor did the Commission take the contract which had not been accomplished yet which would have given the lowest amount of stranded costs under this record. Instead the Commission looked at everything and said, "Based on all the evidence we've got in the record, the best value that we can come up with is this one that's kind of in the middle, that happens to be the same that the control panel came up with, that that's the best number based on this record for market value that we can use."

JUSTICE DON R. WILLETT: Do you know how long after the true-up proceeding was the sale finalized?

ATTORNEY ELIZABETH R.B. STERLING: In April, and the true-up proceeding, as I said, the order on rehearing was in December.

JUSTICE DON R. WILLETT: And but the sale was finalized, as your co-counsel, at the exact price set forth in the agreement?

ATTORNEY ELIZABETH R.B. STERLING: I don't personally know for that for sure, but I have every reason to trust that Counsel who told you that is telling you the truth on that. I'd like to go back also just briefly to the language of the statute and why the Commission said you have to sell 19 percent. When you look at the language of the statute, to interpret it the way the utility does, you have to turn much of the wording of the statute into surplusage. If you want to look at it, it's under Tab 15 of the handout that the utility gave you. There are -- the wording here has a subject and a pair of verbs. And the subject is, "At least 19 percent, but less than 51 percent, and it has to be spun off and sold." And what the utility tries to do is to divorce the subject from the verb, from the second verb "sold." So they said, "Oh, you're right, we have to spin off 19 percent, but less that 51 percent." But that doesn't apply with the second verb there, "and sold," and you just, you can't pull the statute that way. They say --

JUSTICE NATHAN L. HECHT: The trouble I have with the argument, though, is that it sounds kind of like a bizarre game of hop-scotch. That because they didn't meet this very technical interpretation of Paragraph 3, we get to make up something that's not in the statute topside or bottom. Now why would you strain over an interpretation of the statutory language and then go totally outside the statute to come up with the bottom-line answer?

ATTORNEY ELIZABETH R.B. STERLING: Well, Your Honor, with respect, we don't think that the Commission was straining to come up with this, this was the plain language the Legislature has adopted. It says, "19 percent, but less than 51 percent has to be sold." It doesn't say, "listed," it doesn't say "offered." And furthermore, if you think about it, to say that it has to be listed creates another problem with the statute, because when you list stock, you don't just list a portion of your stock, you list the whole issue, all the common stock had to be listed. They were sure it wasn't going to be sold because they were holding onto 80 percent of it, but all of the stock is listed, so if listing it is enough, then when they listed it, they violated it the other way because they sold more than 51 percent if it's just listing. The statutory language requires that 19 percent, at least 19 percent and less than 51 percent be spun off and sold. And this transaction did not comply with that. We may come up with ways that we think it would have been more reasonable for the Legislature to have drafted this, but we don't draft the legislation, the Court doesn't draft the legislation, we have to deal with the language of the statute, and it requires that that subject, "At least 19 percent, but less than 51 percent" attach to both of the verbs, "spun off and sold."

JUSTICE NATHAN L. HECHT: The problem I have, just to return to the problem I have, you say you have to come up with a reasonable way, but you read the statute where it doesn't apply, and then when none of the statute applies, you go totally outside, the Commission goes totally outside the statute to come up with its own evaluation method. I don't understand why that makes sense.

ATTORNEY ELIZABETH R.B. STERLING: It makes sense because the statute clearly required -- okay. There is no dispute that utilities were supposed to recover stranded costs. If you go all the way back to the first section of this, stranded costs are supposed to be recovered. In order to recover stranded costs, you need two numbers, net value and market value. We didn't have a market value that complied with the statute. The Commission had to do something, and it looked at the statutory language about what can it do, and we have the requirement in 39.262 (c) and (g) that says the Commission is supposed to finalize stranded costs, the Commission is supposed to adjust the nonbypassable fees to collect them. So you've got authority, they're supposed to come up with a number, and then when you look at the definition, 39.251(4), it says, "'Market value' means the value the assets would have if bought and sold in a bona fide third party transaction or transactions on the open market under 39.262(h)." So the Commission says, "Okay, we don't have one that does comply, we've got a big record here, we can look at the evidence and try to figure out what it would have sold at if it had been done in compliance with the statute."

JUSTICE NATHAN L. HECHT: There's an argument that if there's a question about the applicability of one, the case should be returned to the Commission. Do you have a position on that?

ATTORNEY ELIZABETH R.B. STERLING: I'm sorry, the applicability of one?

JUSTICE NATHAN L. HECHT: Sale of assets.

ATTORNEY ELIZABETH R.B. STERLING: Oh. If there are changes, if this needs to be changed, then, yes, this case has to be sent back to the Commission to decide how to change it.

JUSTICE NATHAN L. HECHT: But you don't want it again?

ATTORNEY ELIZABETH R.B. STERLING: I'm sure we want it again as much as the Court wants it again. Obviously if changes are made, it has to go back because you can't just affect one piece of the order. For example, if stranded costs change, interest changes, it changes a lot of other numbers. If changes need to be made, it needs to go back to the Commission, and in fact under the Court of Appeals order, it goes back to the Commission. And I see my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you. The Court is ready to hear rebuttal. Mr. Coleman.

JUSTICE DAVID MEDINA: Mr. Coleman, I know there are things you want to respond to, but somewhere along the line could you please respond to Mr. Hall's argument that the burden of all this is being passed onto consumers, and specifically low-income consumers or customers.

REBUTTAL ARGUMENT OF GREGORY S. COLEMAN ON BEHALF OF PETITIONER

ATTORNEY GREGORY S. COLEMAN: Yes, Justice Medina, let me start with the EMCs, and then I'll come back to some of the other points I'd like to make.

JUSTICE DAVID MEDINA: Okay.

ATTORNEY GREGORY S. COLEMAN: What gets lost in this entire argument about whether we should get reimbursement for the EMCs that were paid to the affiliated rep is that the reason for the EMCs in the first place was to require us to mitigate or to reverse the mitigation that we had already done because the PUC wrongfully believed or wrongly believed that we would not have stranded costs. It ordered us to pay those amounts to Reliant. When we did, the purpose of doing that was to reverse mitigation, it was to increase our stranded costs, and every dollar of EMCs that we paid increased our stranded costs by one dollar.

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One dollar is one dollar. Nobody said, "Oh, by the way, the money you're paying to Reliant, we just want you to pay that, we don't want that to increase your stranded costs." When that was made, those reversals were made on an accounting basis, no matter who we paid them to, one dollar of EMCs is one dollar of stranded costs. The statute says that we are entitled to recover our stranded costs. Mr. Hall made the comment that we should not recover again from the same customers. And I want to make it clear that that is not an accurate description of how these payments are to be made. The EMCs were sent out to all of the retail, retailers, and when they are recovered they are recovered from all of the retailers. So there's $385 million that we're talking about. It's not being recovered solely -- it's about money that went to Reliant, but it's not being recovered solely from Reliant customers. These are nonbypassable charges that go across the entire customer base. It's not former Reliant customers who by now have scattered to the winds with a variety of different retailers, it goes across the entire customer base. There's no sense of unfairness or impropriety that's directed towards people who were Reliant customers at the time. This is a red herring. All right, we were ordered to pay these, they increased our stranded cost, we're entitled to receive our stranded costs dollar for dollar. That is the statutory mandate, and there is no justification, no justification at all for saying, "We're just not going to give you back part of that because we have this after-the-fact distinction that nobody made, that nobody thought of, and would have been laughed at if they had thought of it when we were ordered to pay the EMCs in the first place. I'd like to turn back to some of the other arguments, and with respect to the partial stock valuation and ultimately with capacity auction." There's a fundamental issue that I think is not being accurately represented here. Ten years ago, ten and a half years ago when the Legislature finally decided that we are going to enact this deregulation, these statutes were put in place not as a lark, but as a blueprint for a very complicated unbundling of an age-old industry that had been heavily regulated and was now being moved to a deregulated industry. These companies were being forced to break themselves apart, and they had to have a plan for doing that. And so with respect to the capacity auctions and the partial stock valuation, this market valuation that had to take place, we needed the ability to plan, and we did that. We had a business separation plan, we had a series of hearings in which this was approved. From the first day we said -- or from the second amended business plan, "Here is how we are going to do this." That was approved and we went forward and did it, and the position that the PUC now takes is, that notwithstanding the years and years of planning and the millions and millions of dollars that went into this, at the end of the day, you know, "Too bad, too bad so sad, and it's not based on anything you did, it's based on something that some third party did." So whether it's an IPO or a spin-off, for instance, you know, if unbeknownst to all of us, Justice Wainwright had thousands of shares of stock and decided that he would keep them, we would be simply denied that recovery under the PUC's interpretation. I mean if you think about it, if you have two identical companies who are unbundling using the same process, going through every step the same, spinning off all the same stock, and one of those companies happens to spin off the stock to shareholders who all of them rush to the market and sell it on the market, and the other company has, you know, one or two shareholders who hold onto half a percent or one percent, one of those companies is denied the recovery under the PUC's interpretation and the other one isn't.

JUSTICE PAUL W. GREEN: But don't you account for that by maybe going to a 40 percent spin off? Does that matter?

ATTORNEY GREGORY S. COLEMAN: It doesn't really matter. At the end of the day, while it is possible that it's more likely, it is also certainly possible if you did a 40 percent IPO and some rater rushed off to the underwriter and said, "I want 22 percent of that company," you wouldn't know that, and then you would be denied. There's no way to be sure that these years and years of planning are going to be given effect. And there is a textual basis for our argument. We're not relying solely on the fact that there is nothing there. "Spun off and sold," the PUC wants to just treat those words as a slurred word, "spunoffandsold." Okay, that's not the way to read it, it's "spun off and sold to public investors through a national stock exchange." The "through a national stock exchange" does not textually suggest that all of 19 percent are individually sold, and you can't spin off two investors through a national stock exchange. There is some textual separation of those terms that give it a natural reading that you need to spin off, and that then the shares are sold "or to public investors through a national stock exchange." The word "through" does suggest the natural process of having them being listed and being active. And the PUC acknowledges that it's a fair market price.

JUSTICE DAVID MEDINA: Under that reading, what's the purpose of the 19 percent and not some other number?

ATTORNEY GREGORY S. COLEMAN: The 19 percent -- 20 percent is the cut off for being able to file a consolidated tax return, and so there was some movement there to pick a number that was lower, that would allow you to have a consolidated tax return, but close to that number. That was the number that was used, that was the number that we planned for, and that was the number that we put into effect over a very long period of time only to be told that at the end of the day, "Based on the actions of third parties, we're reinterpreting the statute now and we're going to deny you this recovery and give you a number that is more of a feel-good number for us, that we think is more fair." Which brings me again now to the capacity auction.

JUSTICE DON R. WILLETT: Quick question. Even if we agree about the textual separation in that phrase, the 19 percent applies to each part, to the sold off, to the "spun off and sold"?

ATTORNEY GREGORY S. COLEMAN: The 19 percent was available to be sold --

JUSTICE DON R. WILLETT: Sold.

ATTORNEY GREGORY S. COLEMAN: -- and so any market is based not only on people who sell, but people who hold, because the price is ultimately decided not merely on supply but also on demand. You have to have both. You have to people who are saying, "I'm not willing to sell at that price." Now if somebody comes and offers a thousand dollars a share, more people will sell, but the market is decided based both on supply and demand and not only on one of them. With respect to the capacity auction true-up, you have the same problem. All right. Again, we've had this comment made about, "Well, what is the textual connection?" There is a reference back to the sales in 153, but it doesn't say "Conditioned on satisfaction," or anything, it just says it identifies the sales that are to be used to calculate the true-up. You calculate the true-up based on the sales under 153. That's what the PUC should have done. There is no basis to say we're going to use other sales. Even their own rule, the formula that they put in place based on the statute, doesn't allow them to do that. And to have the PUC stand up today and say, "Well, we didn't like the results, we thought that

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their sales in their private auctions in the private market represented the market price, and so it was reasonable for us to do that." If you ignore the statute and the rule, maybe there's some reason to it, but if the Legislature has said "Use these sales and these sales only," it's not, as a matter of law it's not reasonable to say, "We are going to use other sales as well." There's no justification for doing that. And again, the finger seems to being pointing at CenterPoint saying, "Well, we failed to sell the 15 percent." We sold everything that people wanted to purchase. Justice Hecht, you --

JUSTICE DAVID MEDINA: Well, what if you had only sold 5 percent or 10 percent or some number significantly lower, what would have been the --

ATTORNEY GREGORY S. COLEMAN: Well, I think the argument, Justice Medina, is that we did sell 10 percent, but it's again undisputed, we sold everything that those new reps wanted to purchase, so we provided that market. It was a fair and transparent market, and as Justice Hecht pointed out, you know, could you come in and buy? Well, maybe not, but TXU could have come in and purchased that at a low-bid rate. It wouldn't have affected -- you know, if we had bid at TXU's auctions and you had bid at ours, it wouldn't have affected the capacity auction true-up. At the end, it simply would have said, "We're doing the 15 percent just to do the 15 percent," and it doesn't achieve the legislative objective of making sure that the capacity is available for these new entities.

CHIEF JUSTICE WALLACE B. JEFFERSON: I see that your time has expired. Are there any further questions? Thank you, Mr. Coleman.

ATTORNEY JONATHAN DAY: May it please the Court, I want to address the market value issue first, and I want to refer back to the CenterPoint opinion of this Court in which the Court began with the proposition that the statute was designed to assure that utilities would recover their stranded costs. The statute also says they're not entitled to over-recover their stranded costs. And what Mr. McLanahan said was, "We want our book value." That's what the statute, that's the controlling purpose of this statute is to assure that they get their total book value. What has happened here is this utility is urging through it's assertion that the partial stock valuation methodology was successfully employed, they want $511 million more than they actually got in the sale, the sale that was simultaneously with the true-up proceeding. They want more than their stranded costs, they want more than their book value. That's what they are urging this Court. So let's start with what's the objective of the statute. The statute says you get your stranded costs, you get your net book value. That's what Mr. McLanahan said. So how do we work with this? Our view is that the Legislature may have improvidently designed the partial stock valuation methodology. It may be difficult to apply and make workable, but the Commission determined that it had not been complied with. It's clearly supported by substantial evidence. But taking Justice Hecht's proposition, well, let's assume for a moment that there were two methodologies that were complied with. One was the fair market transaction and one was the partial stock valuation methodology. The Commission under those circumstances under the statute is required to select the choice that assures that there is no over-recovery of stranded costs, and that they get only their net book value. That's the whole purpose of this stranded cost exercise, is to put the utilities where they get the full value of their assets. Now let's talk for a moment --

JUSTICE DALE WAINWRIGHT: Counsel.

ATTORNEY JONATHAN DAY: Excuse me.

JUSTICE DALE WAINWRIGHT: Let me ask you about the valuation methods in the structure of that statute. I'm not entirely clear about the state's position on this. If none of the five valuation methods were complied with, what would PUC do then?

ATTORNEY JONATHAN DAY: Well, our position is, this was I think raised in an earlier question, our position is that when all methodologies fail, the Act nevertheless contemplates the use of real market transactions. The Commission went outside and said, "We're going to use discounted cash flow and various data points and we're going to come up with an estimate." That's not what the Commission should have done. The question in this case is when the utility's methodology fails, then isn't the Commission constrained to select a methodology which is provided for in the statute and which meets the objective of the Legislature to use real market transactions. The Legislature understood that when you start using expert testimony to evaluate anything, you just invite a bunch of controversy about who's right. The way to settle that is to have an actual market transaction, and that's what the Commission should have adopted in this case.

JUSTICE DALE WAINWRIGHT: So would you view as inappropriate if the failure on partial stock valuation method was that it didn't comply with the 19 percent, it wasn't proven to comply with that? As I understand it, your argument is that CenterPoint didn't carry its burden to prove 19 percent, but we don't know it wasn't 19 percent. Just that CenterPoint didn't carry its burden.

ATTORNEY JONATHAN DAY: That's correct.

JUSTICE DALE WAINWRIGHT: So if CenterPoint failed to carry that obligation to prove up that approach under the statute, you're saying that the PUC should look at actual market valuations? Couldn't the PUC then go back and say, "Well, 16 percent is a pretty good valuation of 15 million shares over 14 months. We're going to use that since there was a failure to comply with any of the five methods"?

ATTORNEY JONATHAN DAY: There was not a failure to comply. There was one that was complied with, we have a real market deal. There was a sale.

JUSTICE DON R. WILLETT: She says that it happened too late.

ATTORNEY JONATHAN DAY: Your Honor, the cases say, to have a sale, you don't have to have a closing where the title to the stock certificates passes, you've got all the terms and conditions. Why would you not accept a sale where the terms and conditions have been written down in a hundred-page document and say, "Well, it didn't close, part of it didn't close until after the Commission" --

JUSTICE DALE WAINWRIGHT: Counsel, have you ever had a transaction where it was written up in a hundred-page document with the closing four weeks later, and the dollars changed?

ATTORNEY JONATHAN DAY: I have, but here is the point. When you have a choice between data point and discounted cash flow methodologies, and you've got a sale where parties have had a meeting of the minds and written it down, this is the better indication of a real market transaction, and you ought to pick that because that is what will -- well, in this case, the company has never said that we haven't gotten our full book value, what they're arguing here is we want more, we didn't get enough.

JUSTICE DON R. WILLETT: If we agree with you that that arm's-length real actual transaction is the better barometer, what should we do?

ATTORNEY JONATHAN DAY: What you ought to do is to tell the

Commission that they are constrained when the methodologies selected by the companies fail, to select a methodology that qualifies as a real market transaction under the statute, that should be their preference, and remand it back to them for further consideration. They rejected this, and if you read that very superficial conclusive finding of fact, they didn't like the date and they said, "Well, we, you know, we don't think it's closed yet," when the cases say clearly you can treat it as a sale when there's been an agreement on all the terms and conditions.

JUSTICE NATHAN L. HECHT: Was there a deadline on completing the true-up?

ATTORNEY JONATHAN DAY: No. And they filed and certainly the Commission had constraints about proceeding to get this case resolved, but there were -- no.

JUSTICE NATHAN L. HECHT: You mean they could have left it open another couple of months?

ATTORNEY JONATHAN DAY: Absolutely. Now let me talk for a moment about the capacity auction true-up. I listened carefully to Mr. Coleman's closing, and there's some important points. The statute says that 15 percent is a requirement, it says, "You shall sell it." It's mandatory, the language is mandatory. The Commission adopted a safe harbor rule that established a very low boundary for substantial compliance. They didn't meet it. It's uncontested, they didn't meet it. How close did they get? They didn't do it in 2002. That's not material, the Commission defined "substantial compliance," they didn't meet it. So what do you do? We're not here arguing they shouldn't get any capacity auction true-up, that's not the purpose of the statute. The fundamental objective of the statute was they should get the margins that they were supposed to get under the ECOM model for the time period. Not once has the company stood up today and said, "We didn't get our margins." No, what they're saying is, "Give us the formula because it's an over-recovery, and we know it is and we want it. We want $440 million more." They don't say the fundamental objective has not been accomplished. They have to admit they got their margins, they got what this Court said the purpose of the capacity auction true-up was. They've gotten the full compliance. The way to look at this case is what were the overriding objectives of the Legislature. Look, this statute is messy in a lot of different ways, and I know the Court appreciates that, and it was very -- it's a very complicated area.. The Legislature was in many ways poking around in the dark, no one had ever done this before. But the way to look at it is to take the first principles, and the last principle is this. There is no question that the statute says that the joint applicants are to be treated together, and that their recovery is to be regarded as a unit. That's a matter of plain statutory meaning. When these EMCs were paid, as Mr. Hall indicated, the money was taken from one pocket and put in another. And that's all that happened. And what they're -- Justice Hecht's question is exactly right, well, who bears the burden? Yeah, these were excess earnings, yes, ratepayers had already paid excess earnings. Now they say, "Well, we want it again." Why? Because they adopted a structure of business separation and then failed to anticipate this problem apparently. I don't know whether there's any cause of action between CenterPoint and Reliant at this point, I'm not sure. But the point is it was their burden. Why should ratepayers pay twice? And that's all that is at issue here. Because under the statute they are a unit, they are to be regarded as a unit, and the Court of Appeals got that dead right. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, all Counsel. The cause is submitted, and the Court will take a brief recess.

[End of Audio Recording.]

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