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Supreme Court of Texas
Texas Industrial Energy Consumers and Gulf Coast Coalition of Cities, Petitioners,
v.
Centerpoint Energy Houston Electric, LLC and Public Utility Commission of
Texas, Respondents.
No. 08-0727

October 6, 2009

Appearances:
Lino Mendiola, Andrews Kurth LLP, Austin, TX, for petitioners.
Brian A. Prestwood, Office of the Attorney General, Environmental Protection and Administrative Law Division, Austin, TX, for respondent Public Utility Commission of Texas.
Ron H. Moss, Graves Dougherty Hearon & Moody, Austin, TX, for respondent Centerpoint Energy Houston Electric, LLC.

Before:

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

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CHIEF JUSTICE WALLACE B JEFFERSON: The Court is now ready to hear argument in 08-0727, Texas Industrial Energy Consumers vs. Centerpoint Energy Houston Electric, and the Public Utility Commission of Texas.
MARSHAL: May it please the Court, Mr. Mendiola will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF LINO MENDIOLA ON BEHALF OF THE PETITIONER

ATTORNEY LINO MENDIOLA: May it please the Court, my name is Lino Mendiola, and I represent Texas Industrial Energy Consumers, a coalition of many of the largest electric consumers in the state. My argument today is presented on behalf of TIEC and also on behalf of the Gulf Coast Coalition of Cities, which is represented by Mr. Thomas Brocato. The Gulf Coast Coalition of Cities is a group of several cities around Houston. There are three issues before the Court this morning. The first is whether when this Court stated categorically, "We hold," and I quote, "We hold that Rule 25.263(l)(3) is invalid," close

quote, it meant that the entire rule is invalid or whether it meant only part of the rule is invalid? Our position is that the Supreme Court's words mean what they say, and the entirety of Rule 25.263(l)(3) is invalid. The second issue is in the alternative. If only part of the rule is invalid, then can that part be severed from the remainder of the rule? Our position is that applying the test in the Restland Funeral Home case, the invalid part cannot be severed. The third issue concerns the Legislature's directive that a $5.2 million fee shall be paid by a subsidiary of the utility. Our position is that the Court of Appeals erred by allowing the utility to shift those costs to ratepayers. Briefly on the underlying facts, the Commission awarded CenterPoint $2.3 billion dollars of true-up recovery plus interest. That includes approximately $1.3 billion of stranded costs and $966 million of nonstranded costs. The stranded cost balance was promptly securitized, and ratepayers are currently amortizing those bonds. The nonstranded cost balance was not immediately securitized, instead the utility began to recover that amount in the form of a competitive transition charge or a CTC. The proceeding from which this appeal is taken, Docket 30706, the Commission authorized CenterPoint to collect in excess of $1.135 billion dollars through the CTC, a portion of which was offset by deferred taxes. The Commission allowed the utility to collect carrying costs on the CTC balance from December 17, 2004, the date of the final order until August 1, 2006, when the CTC balance was also securitized. One of the major issues in that case was the interest rate or the carrying costs on the CTC balance. In a split decision, the Commission held that the interest rate was governed by Rule 25.263(l)(3), despite this Court's holding that the rule was invalid. Commissioner Parsley dissented, stating that, quote, "The rule was expressly invalidated in its entirety by the Supreme Court of Texas," close quote. The interest of ratepayers is in preserving the applicability of this Court's unambiguous holdings and in preserving the legitimacy of agency rules. At issue in this case is a two-sentence rule. The first sentence is a general description, the second sentence is the subject of this litigation and prescribes the interest rate and the date at which the interest will begin to accrue. These two issues, the date and the rate, are contained in a single sentence. The Court of Appeals held that this Court invalidated only half of a sentence. Ultimately this is a case about the deference that lower courts must give to the plain holdings of the Supreme Court.

JUSTICE NATHAN L. HECHT: Well, we did say in CenterPoint, the only issue before us is the date.

ATTORNEY LINO MENDIOLA: That's true, Your Honor, and that was the issue that was presented to the Court in the briefs by CenterPoint. The Court then went on to provide a 15-page opinion that touched on many issues that went well beyond the date including, as we heard earlier today, the capacity auction true-up and the interplay between the capacity auction true-up and the remainder of the true-up. What the Court seemed to be interested in, and the two times that the Court said "The only issue before us is the date," both of those statements are preceded by discussion about whether the utility would be allowed to recover carrying costs, unstranded costs at all. And the Court seemed to be saying that issue, the issue of whether carrying costs would be allowed at all, has already been addressed by the Court. There's no dispute about that. Therefore the only issue before us is the date. And then the Court went on in discussing the date to discuss the interplay between various issues that seem to address the issue of the total stranded costs that CenterPoint would recover and the carrying costs.

The Court, in fact in four different places, as indicated on my handout at pages 1 and 2, said that the rule is invalid. In fact, the opinion seems to be organized around that very holding. The Court mentioned, for example, in the introduction, the body, and the conclusion of its opinion that the rule was invalid. As noted in the handout in the introduction, at page 84, the Court stated, "We hold that Rule 25.263(l)(3) is inconsistent with the Legislature's intent. In the body of the opinion, the Court said at page 87, "Because the Commission's rule is based on incorrect construction of the Act, in this regard, it is infirm. The pronoun "it" refers to the entire rule without any distinction between the interest rate and the interest date. Finally in a clear unambiguous and categorical statement, the Court concluded in the last paragraph of the majority opinion, quote, "For the reasons considered above, we hold that Rule 25.263(l)(3) is invalid and we remand this proceeding to the Commission for further consideration," close quote. We're here on the appeal of a judgment by the Third Court of Appeals, in which the Court of Appeals took the categorical holding of this Court, a statement that's clearly not dicta, and added to it a limiting phrase, when the Court said, "The rule is invalid," the Court of Appeals interpreted it as saying, "Part of Rule 25.263(3) is invalid." If the Court of Appeals can take a statement by this Court that is plain, clear and unambiguous and apply a limitation to it, where does that end? The Court of Appeals erred in taking an unambiguous and plain statement of this Court and reading into it a limitation that does not exist. Litigants rely on the unambiguous statements and holding of this Court and should not be concerned that such holding will be limited or stretched in an unpredictable manner by a lower court. CenterPoint argues that the holding must be read in light of the context of the opinion as a whole and the issues that were presented to the Court, but there is no precedent for limiting this Court's holding based on how an advocate reads an opinion.

JUSTICE NATHAN L. HECHT: What about severability?

ATTORNEY LINO MENDIOLA: Well, with respect to severability, Your Honor, this case is governed by the Restland Funeral Homes test, which is a test adopted by the Third Court of Appeals. That test sets out two prongs. The first prong, there's no dispute about that, that's a prong that questions whether the overall regulatory framework would be frustrated, there's no debate about that. But the two prongs are in the disjunctive, if either prong is satisfied, then the infirm part will be severed or will not be severed. The second prong is the prong that asks whether there is any indication that the Agency would have adopted the rule but for the infirm part? That's based on the test from the United States Supreme Court in the K-Mart case. In our case, we do have that indication, we have that indication, as indicated on page 3 of my handout, in testimony elicited under cross-examination by the staff's, the PUC Staff's team leader, Mr. Darryl Tietjen, who was responsible for drafting the rule and presenting the rule to the Commission for consideration. Mr. Tietjen said, and his testimony is quoted, in the dissent of Commissioner Parsley, Mr. Tietjen said that no one expected that the interest rate, 11.075, would be used to accrue interest for a number of years, everyone expected it to be for a short period of time. The important part about this statement is that it shows the interconnectedness between the rate and the date. So Mr. Tietjen says the rate and the date are interconnected, and that is at least some indication that the Commission would not have adopted this one-sentence rule that has a date and a rate, if it had known that the date was infirm.

JUSTICE NATHAN L. HECHT: Does this suggest that it would have adopted a rule, just not that rate?

ATTORNEY LINO MENDIOLA: What it suggests, Your Honor, is that the date and the rate are connected in the mind of at least Mr. Tietjen, and also by Commissioner Parsley.

JUSTICE NATHAN L. HECHT: Well, what it also seems to suggest is that it was always thought that there should be some recovery during this period, some interest or carrying charge, or whatever you call it, and it might not be clear how long it was and maybe we should have rethought the rate, but there still should be some recovery.

ATTORNEY LINO MENDIOLA: That's correct, Your Honor. There's no question that the statement contemplates that there would be a recovery of carrying costs, and, in fact the recovery of carrying costs for an uncertain time period, from the -- initially, when the rule was adopted, from the date of the final order until some point in the future when securization would occur. But there's no evidence and there's no suggestion that the Commission ever contemplated that the rate that was adopted in the rule would apply not only for some time period into the future, but also for the two years that were retroactive going back to January 1, 2002. What is also interesting is that Mr. Tietjen testified in the hearing in Docket 30706, that an updated weighted average cost of capital would be in the range of 9.75 percent not 11.075 percent. And so that takes me to the question of, what is the harm, what is the harm if the rule is invalidated and if this Court's holding is upheld saying that the rule is invalidated? Well, in that case, the final order in Docket 30706 would go back to the Commission for consideration of a proper interest rate. That proper interest rate could be 11.075, it could be lower, it could be higher, but that's all that we're asking is for consideration by the Commission of a proper interest rate. And from our perspective, the ratepayers of Texas deserve at least that examination, an examination of a proper interest rate. There are three findings of fact in the Commission's final order that address the interest rate. None of them, these Findings of Fact Nos. 19 through 21, none of them discuss or find that 11.075 percent is a proper interest rate or a reasonable rate or properly reflects the way it averaged cost of capital at the time that it was considered. Rather those three findings of fact all are based upon the finding or the holding of the two commissioners that the rule was only partially invalidated. Because the rule said 11.075, the Commission applied 11.075. If the rule is held to be invalid, if the whole sentence rather than half of the sentence is held to be invalid, then the issue goes back to the Commission, which I think is what the Court thought would happen when it remanded the issue, the case back to the Commission, for consideration of a proper interest rate. The ratepayers deserve at least that examination. With respect to the severance, the Respondents would change the test not to whether there is in any indication that whether the Commission would adopt the rule but for the infirm part, but whether the Commission would adopt the rule as it currently stands. And the Respondent's rely on the statement in the final order by two commissioners saying, "Well, we would have adopted the same interest rate, even if we had known that the date was, was different." That's not the test, the test is not whether the Commission would do the same thing, the test is whether there was any indication that the Commission would do something different, and there at least is that in the testimony of Mr. Tietjen, and the dissent of Ms. Parsley. Now, finally, Your Honors, with respect to the issue of the five, approximately $5 million fee that is associated with the

payment to the J.P. Morgan panel of investment bankers, this is the issue in which the legislature in 39.262 says that the fee shall be paid by the transferee corporation. The transferee corporation is a subsidiary of the utility. It's our position that the plain language of the legislature identifying an entity that shall pay the fee should be given effect. The Court of Appeals erred by taking that fee that was initially paid by the utility and transferring that to ratepayers. Now, the utility says, "Well, we were allowed to recover all of our reasonable costs and there is no dispute that there was a reasonable cost associated with this panel of investment bankers." Our position is that the legislature knows how to assign costs that are reasonable to ratepayers. Ratepayers pay billions of dollars of costs every year. Every time the utility buys a wrench, if that wrench is a reasonable and necessary operating expense, the ratepayers pay for it. But in this one instance, the legislature said the transferee corporation shall pay.

JUSTICE DON R. WILLETT: Comparing this case to the one just before it, some of the parties are the same. Some of the lawyers are the same, are any of the legal issues the same? Is there any kind overlap between the two cases in that regard?

ATTORNEY LINO MENDIOLA: Well, frankly, Your Honor, this case, the legal issue is a much, much more narrow legal issue that I don't think overlaps with the case that was argued earlier today. This question, this legal question is a question of whether the Supreme Court's unambiguous holdings mean what they say, and I don't think that that exact issue is presented in the earlier case, except with respect to whether, when this Court identifies the purpose of, for example, the capacity auction or stranded cost recovery, whether those statements by the Court mean what they say.

ATTORNEY LINO MENDIOLA: Your Honors, for these reasons, we respectfully request the judgment of the Court of Appeals be reversed. Thank you.

CHIEF JUSTICE WALLACE B JEFFERSON: Thank you, Mr. Mendiola. The Court is now ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Prestwood and Mr. Moss will present argument for the Respondent, Mr. Prestwood will open with the fist ten minutes.

ORAL ARGUMENT OF BRIAN A. PRESTWOOD ON BEHALF OF THE RESPONDENT

ATTORNEY BRIAN A. PRESTWOOD: May it please the Court. The couple of points I want to emphasize about what the PUC did when confronted with this Court's opinion. We submit to the Court that we took the analytically-rigorous approach by not divorcing any of the Court's specifically-chosen words from its context. They say that they cited four times that we held the rule invalid. Well, if you look at the whole statements surrounding that language, several times the Court uses dependent clauses, such as "in this regard, we find it is infirm." Which begs the question, well, what are they exactly talking about, what is the Court talking about when they say "in this regard"? We submit that "in this regard" means in consistent, consistent with the discussion about the invalid dated date provision. So this Court really stated four times that the only issue before it was the timing provision's validity. It didn't address a single word about the rate provision. There's no mention of the rate provision in the rule -- excuse me -- it wasn't challenged, in this Court's opinion, and the PUC

honored this Court's context when it decided to take up the severability analysis under the Restland Funeral Home test.

JUSTICE NATHAN L. HECHT: When you realized that the time period would be different, did you think about the rate then?

ATTORNEY BRIAN A. PRESTWOOD: The rate, the lingering question to the PUC was, what happened to our rule? Obviously the PUC thought that it had a valid rate, as originally laid out in the original version of the rule.

JUSTICE NATHAN L. HECHT: I mean but does it think that this is a valid rate for all time or for a very short period of time or does it matter? That's what I'm not clear about.

ATTORNEY BRIAN A. PRESTWOOD: Well, a different docket in the --

JUSTICE NATHAN L. HECHT: I mean rates fluctuate.

ATTORNEY BRIAN A. PRESTWOOD: That's correct.

JUSTICE NATHAN L. HECHT: Sometimes sophisticated people have a floating rate because they know that that's what's going to happen, and they don't mind paying the market rate, but they don't want to get trapped in some high or low rate. I just wonder if the PUC thought about all that?

ATTORNEY BRIAN A. PRESTWOOD: Well, I don't think it was lost on the PUC that rates do fluctuate over time, but we have to remember that there is some connection to the earlier true-up docket. And these rates, the rate recovering these particular costs, were for costs that were incurred as a part of the true-up proceeding, and as a part of that whole process, which occurred back in '02 and '03. In an independent finding, which is not before the Court in this case and which was challenged at the district court but not brought before this Court, the PUC, it was challenged that the PUC set, did not have substantial evidence for that rate, but the PUC made an independent finding saying that it did. Yes.

JUSTICE DAVID MEDINA: What weight, if any, do we give to this testimony of Darryl Tietjen's? Do we even look at that?

ATTORNEY BRIAN A. PRESTWOOD: No, you don't need to. All you need to look at are the comments in the rate making, in the rule adopting the rate -- excuse me -- the Texas Register. And the comments in the Texas Register give no indication whatsoever that the PUC thought that these rates were inextricably intertwined, and that's the test. And the PUC was bound by the Restland Funeral Homes second prong, which is the only prong at issue, and they got it right. There's nothing in there like the Restland Funeral Home case where they found strong indications where the Department had said, "Well, you can't have one part of the definition without the other." There's just nothing in there like that in this case.

JUSTICE NATHAN L. HECHT: You say that the rate is based on evidence of the risk of recovering CTCs, and mention changes in legislative and regulatory policy. But it looks to me like CTCs are virtually a sure thing. Is that not true?

ATTORNEY BRIAN A. PRESTWOOD: Well, no, they're not. In the first instance, I'm not going to testify here today about the financial circumstances that can impose risk upon a company, but there are certain risks associated with the recovery of the CTC. And first of all, it wasn't really ever a certainty that the utility needed to go that route in the first place, they had other options available to them. So if we're getting to the connection, if we're getting to the core of what the rate is and why is the rate a bad rate, the testimony, there is testimony in the record by a CenterPoint witness that suggests that there is risk still associated with the CTC recovery.

JUSTICE NATHAN L. HECHT: Well what are they, besides that the legislature might change its mind or the PUC change its mind, but I don't under-- I'm not sure how that would affect the CTCs. It's just not a -- you keep saying that there are risks, and I just don't know what they are.

ATTORNEY BRIAN A. PRESTWOOD: Okay. Well, I think what you just mentioned would be the primary risk, and that is some intervening action by the Legislature that would have diminished their ability to recover, and there's just enough question within that alone, I think, to have recognized the fact that there was some legitimate risks in the CTC recovery. But what they're really trying to say is that it's not appropriate because it's not current. Well, the costs were incurred back in '02 and '03, that's when the true-up occurred, and so the capacity auctions happened at a time when their cost of capital may have been X, but what they want to do is shift the focus and say that you have to look at a more current rate. Well, that asks the Court to do something that's not in the statute, and the PUC was well within its right to determine that its own rule was still applicable, wherein it made that determination that this was the appropriate rate. I'd like to talk a little bit about the PUC's construction of PURA as it relates to the valuation panel. That particular decision, it satisfied the provision's basic requirement that the PUC not be on the hook for those costs. As a state agency, the legislature would probably have had a difficult time to try and justify how an agency would be responsible for the panel costs that it convened. So we submit that what they're really arguing about is not who pays, but who recovers. Their argument entirely hinges upon the fact that you can't recover it from ratepayers. But if we also accept the fact that the transferee corporation had stranded costs and looking at the entirety of the Act, which establishes a process for these companies and these entities to go before the PUC to state and get approved what their costs were, they get rate-case expenses. And their argument is that this is the loan provision where the legislature decided that a legitimate expense mandated by the legislature is not recoverable is just plainly inconsistent with the structure of the Act.

JUSTICE NATHAN L. HECHT: And your argument in the other case is that (h)2 doesn't apply, right?

ATTORNEY BRIAN A. PRESTWOOD: Right.

JUSTICE NATHAN L. HECHT: If (h)2 doesn't apply, why do you need a panel?

ATTORNEY BRIAN A. PRESTWOOD: (h)2, being the sale of assets or partial stock?

JUSTICE NATHAN L. HECHT: Partial sale -- partial stock value.

ATTORNEY BRIAN A. PRESTWOOD: Okay, that's (h)3.

JUSTICE NATHAN L. HECHT: (h)3, sorry.

ATTORNEY BRIAN A. PRESTWOOD: If you didn't need (h)3, does that change the calculation of the panel? Do you need to go through all those steps, and if I understand you correctly, is that really a signal that now we're in some different world we don't necessarily have to have the transferee corporation pay?

JUSTICE NATHAN L. HECHT: Well, no, I'm saying you wouldn't have had a panel under (h)1.

ATTORNEY BRIAN A. PRESTWOOD: Correct.

JUSTICE NATHAN L. HECHT: So and the argument is that, the Commission takes the position that (h)3 doesn't apply.

ATTORNEY BRIAN A. PRESTWOOD: That's correct, but they couldn't have known that going in. As the argument earlier indicated, these

decisions were made years in advance, so that would be sort of the Commission kind of taking a benefit of a hindsight --

JUSTICE NATHAN L. HECHT: Well, but the decision --

ATTORNEY BRIAN A. PRESTWOOD: -- in effect.

JUSTICE NATHAN L. HECHT: -- to constitute the panel was made during the hearing, I take it?

ATTORNEY BRIAN A. PRESTWOOD: That's correct, it was.

JUSTICE NATHAN L. HECHT: So why constitute the panel if (h)3 doesn't apply?

ATTORNEY BRIAN A. PRESTWOOD: As far as the timing of why they decided to convene the panel, if it was imminently clear that there was problems with the partial stock valuation, I think it's consistent that the PUC saw an opportunity to use that potential valuation, whatever came from that, as a alternate, a viable alternative to value stranded costs.

JUSTICE NATHAN L. HECHT: So the PUC might have used the panel even if it had known going in that (h)3 didn't apply.

ATTORNEY BRIAN A. PRESTWOOD: The way the statute reads, the PUC gets the choice to convene the panel, that's correct. And so we submit that our position, it doesn't read anything out of the statute. We say that the transferee corporation is made liable under the (h)3 in the first instance, but that doesn't mean that they can't ask for ask for those costs to be recovered, the statute doesn't address that at all. They could have asked CenterPoint to, for reimbursement, and so what the PUC ultimately did was the efficient thing and not the expedient thing as the Petitioners' argue. We think that this is a good candidate for deference, and we think that the PUC's order should be affirmed. Thank you.

CHIEF JUSTICE WALLACE B JEFFERSON: Any further questions? Thank you, Mr. Prestwood. We will hear from Mr. Moss.

ATTORNEY RON H. MOSS: May it please the Court. On both of the issues in this case, the Petitioners are asking this Court to find that the PUC was required to focus on one sentence in isolation and to ignore the context in which that sentence occurs. On the interest rate issue, for example, they claim the PUC could not look behind the statement of the CenterPoint Energy opinion at Rule 25.263(l)(3) was invalid. What this Court has said on more than one occasion, that the holding in a prior case must be construed in the light of the issues that were before the Court in that case. Tab 3 of the Benchbook contains an excerpt from this Court's opinion in Dresser Industries vs. Lee, a 1993 opinion written by Justice Hecht. What that opinion said was the Court's language must be read in the context of the issues decided, the context of the way Lee precludes Lee's convex reading of one phrase from the opinion. That's exactly what they're trying to do in this case, is read one phrase from the CenterPoint Energy opinion.

JUSTICE NATHAN L. HECHT: Well, can you help me with what the risks are with recovering only three CTCs?

ATTORNEY RON H. MOSS: I can, Your Honor. First of all, it was our position that we didn't need to have any evidence because there was a rule, but let me go through the risks. CenterPoint witness Frank Huntowski testified that in the true-up case -- well, let me go back down to the risks. Mr. Brian, who is the Chief Accounting Officer for Centerpoint, and Mr. Huntowski testified that the 11.075 percent rate reflected the risk that they would be unable to recover the stranded costs because of the legislative risk. Mr. Brian testified that there was regulatory risk. Both TIC and City of Houston's witnesses testified in this case that the CTC could be significantly affected by changes in

regulatory and legislative policy. In fact, TIC was so concerned about the riskiness of the CTC, it asked the Commission to order CenterPoint to post a bond for the amounts that CenterPoint owed the ratepayers. The Intervenors have repeatedly said they didn't want the CTC to be securitized because that would prevent them from coming in later and asking it be reduced. In fact, Jeffrey Pollock, the witness for TIEC, argued there should be no CTC recovery because he said that CenterPoint was over-earning in this case, presumably that they were over-earning on their transmission of distribution utility rates. Presumably they would raise that in every rate case that you don't get your CTC because you're over-earning on your transmission and distribution of utility rates. So there was a lot of evidence before the Commission that there was risks involved in the CTC recovery. Now, let me go, let me finish on the first issue. The rate issue was not raised in CenterPoint Energy One case. There's 15 pages in the South West and Third Reporter majority opinion and it is not, the rate is not mentioned there.

JUSTICE: [Inaudible].

ATTORNEY RON H. MOSS: They did. No party raised it, no party raised it in the Court of Appeals, no party raised it at the Commission and no party raised it at this Court. This Court does not overturn part of an older judgment that are not being challenged by a party in the absence of fundamental error. Let me go to severability. First of all, even if you use the Restland test, there is absolutely nothing in the rule-making order that adopted this rule that said the start date and the rate are interconnected. If you look at Tab 4 of the benchbook, that is the entirety of the PUC's discussion down on the left in that box there. They didn't say anything about the rate, much less find the start date and the rate were interconnecting. Also I want to point out on that time line, what you see is that the PUC adopted this rule in December of 2001. Mr. Tietjen didn't testify until March of 2005 about the Commission's intent three and a half years earlier. But just a few months ago in Entergy Gulf States vs. Summers, this Court said that legislatures after the fact explanations of legislative intent are entitled to little weight. You can imagine, a legislative aide's opinion about the legislature's intent would be entitled to even less weight. But here you have an after-the-fact testimony by a staff member about what the Commission must have meant several years ago, and the Petitioners are saying that is elevated to controlling authority. That's an absurd result. In fact, this construction that they're urging leads to other absurd results as well. Under their argument, someone who started working at the Commission last week can speculate about the Commission's intent ten years ago, and that would presumably override the Commission's intent even if it said, "We don't believe that staff member." Under their argument, you would still have to believe that staff member. It wouldn't even have to be a Commission employee, it could be anyone, a utility employee or anyone else.

JUSTICE NATHAN L. HECHT: Just out of curiosity, is it ordinary for staff to testify about a Commission matter? Is this the usual thing that happens?

ATTORNEY RON H. MOSS: I have not seen it happen before, Your Honor. It's unusual for the staff member to testify about what the Commission intent. The cases in Texas are that the agency speaks through its orders, it does not speak through its staff members. That's City of Frisco, that's State v. PUC, both of those have said the agency speaks through its orders. The other thing I want to point out is this Court is not obligated to follow Restland. Restland is a no writ case from the Austin Court of Appeals. If you look at Tab 7 of the

benchbook, what you see is the Restland test, and right below it is the United States Supreme Court case that Restland purported to follow. And what you see is that the U.S. Supreme Court said there's no indication that the regulation would not have passed but for its inclusion. In other words, the U.S. Supreme Court said, "We don't see any evidence that the agency felt these were inseparable." Restland turned that around and said if there is any evidence, then you must find them to be inseparable. That leads to the absurd results we're talking about, when anyone can walk in and say, "Well, I don't believe they would have done that" and that becomes any indication. This Court need not and should not follow Restland. One other thing I want to say, because there was a lot of talk in their briefs, particularly in the reply briefs about a windfall. The actual rate that CenterPoint is getting here is 8.65 percent after taxes. That's what they'll get, it's not the 11.075 because they have to pay taxes, and it's 8.65. It's also very curious that they talk about a windfall, because just weeks before this case, in another case, the securitization case, they were arguing that CenterPoint's weighted average cost of capital was 11.075. If you look at Tab 8 of the benchbook, what you will see is on the very same day that the Commission accepted their argument, that 11.075 was the rate of return, was CenterPoint's weighted average of cost of capital, in the case that benefited them, they filed testimony in this case saying it was stale. Now, during the hearing, Chairman -- or then Commissioner now Chairman Smitherman, asked him several times, "How you can say the rate is not 11.075 when you told us a few weeks ago it was?" He never got a straight answer to that.

JUSTICE: It was a different day.

ATTORNEY RON H. MOSS: Different day, but it's only a few weeks. What they've said was this was several years ago, and that brings me to one other issue. Mr. Tietjen, if you look at the testimony that it has, he says they never envisioned there would be a long period of time between the implementation of the final order and the issuance of the bonds. Well, in fact there wasn't. The rate that's in effect here in this case is from the date of the final order until August 1st, 2006, which is exactly what Tietjen said that the Commission intended when it adopted this. What he's talking about is the rate that went all the way back to January 1, 2002, but that rate is over in the other case. It's not here in this case, so Mr. Tietjen's testimony proves nothing. He was actually talking about a different time period. Finally, in the little bit of time I have left, let me talk about the Valuation Panel Fee. There's a statute right on point here, Section 36.061 says the Commission may allow as a cost or expense the reasonable cost of participating in a proceeding under PURA. There's no doubt this was a proceeding under PURA. There's no doubt the Valuation Panel fees were reasonable, the Commission harmonized these two statutes by saying that the Valuation Panel Fee had to pay it in the first instance, but then it could get reimbursed if the Commission so chose. The Commission did choose, and it was reasonable to do it because it had explicit statutory authority to do so. I see my time is up.

CHIEF JUSTICE WALLACE B JEFFERSON: Are there any questions? Thank you, Counsel.

ATTORNEY RON H. MOSS: Thank you.

REBUTTAL ARGUMENT OF LINO MENDIOLA ON BEHALF OF PETITIONER

ATTORNEY LINO MENDIOLA: Your Honors, I would like to begin by

talking about the risk associated with the CTC recovery. Under the statute, the CTC is what's called the non-bypassable charge, which means that every electric customer in the CenterPoint service area has to pay it. If they don't' pay it, they get their electricity cut off. There is no evidence that CenterPoint has forgone even a single dollar of the CTC recovery, and the reason is because that rate is a regulated rate that electric customers have to pay and there are more than 4 million electric customers that pay it. If one drops off, the rest pick it up. Furthermore, what wasn't mentioned is that on August 1st, 2006 this balance, the CTC balance, was fully securitized, and so that has been fully recovered by CenterPoint. There is now no longer any risk associated with recovery whatsoever. Ultimately we're here to discuss the plain language of the Court's holdings, and the statement that when the Court says, we hold something, that lower courts will defer to the Supreme Court's unambiguous statements and not read into it limitations or potentially expansive language.

JUSTICE DAVID MEDINA: How does Justice Hecht's 1993 opinion square into that?

ATTORNEY LINO MENDIOLA: Well, that's interesting, that's the Dresser opinion and that's an opinion that is new in this case in the benchbook, but in my quick research, my understanding is that what happened in that case is that the Court held, and I quote, "We hold that under applicable statutes, the employer's negligence may not be considered." What the Court of Appeals did was to read out of the Court's opinion "under applicable statutes,' and to simply rely on the holding that the employer's negligence may not be considered. And what this Court said essentially was, "We meant what we said, and we said under applicable statutes." So in that sense, the Dresser Court stands for the proposition that I'm supporting, which is when the Court uses plain, categorical unambiguous language, it means what it says. Now, with respect to the severance issue and the testimony of Darryl Tietjen, first of all it's completely inapposite analogy to say that some new PUC staff member could come along and testify about what the Commission meant ten years ago. That's not what happened in this case.

JUSTICE PHIL JOHNSON: Well, we hear that sometimes that lobbyists draft statutes over at the legislature, that some of the staff members of a particular legislator will draft language. Would it be appropriate then, for example, in the Entergy case, for that person to be called and to be testifying about the intent of what the legislature passed?

ATTORNEY LINO MENDIOLA: No, Your Honor, I don't believe that --

JUSTICE PHIL JOHNSON: Well, if it would not, then how is that different from this where we have a staff member who drafted but did not vote on adopting the rule testifying about the intent?

ATTORNEY LINO MENDIOLA: Well, what's different is that this staff member was vested with the authority by the Commissioners and delegated the specific responsibility to, to examine the comments and then to present the rule to the Commissioners for consideration. And all he testified to and all we're trying to get across with his testimony is that the date and the rate are interconnected. That's all.

JUSTICE PHIL JOHNSON: Well, it doesn't matter what you're trying to get across, the question is the status of a staff member, a drafter, someone who drafts a rule or legislation, coming in five years later and testifying about what the Commission or what the legislature intended when they adopted that rule or adopted that statute. It seems to me like we may be talking about the same thing, quite frankly, in substance.

ATTORNEY LINO MENDIOLA: Well, I think there's a distinction

between a staff member that's been delegated the authority to be a team leader, and for example, a lobbyist or something like that.

JUSTICE PHIL JOHNSON: Or a staff member on a senator's staff.

ATTORNEY LINO MENDIOLA: Or a staff member on an individual senator's staff, yes.

JUSTICE NATHAN L. HECHT: Or a law clerk.

ATTORNEY LINO MENDIOLA: Or, yes, yes, sir, a law clerk. So the important thing about what Mr. Tietjen testified to was that he testified about, about what was important at the time that the rule was implemented. And that's simply the interconnection between date and rate, which frankly is an interconnection of concepts that's common. Rate, interest rates are commonly connected to dates. I want to address the issue also that Mr. Moss said that the Court never addressed rates or the issue of rates in the CenterPoint case. What the Court did address several times was the issue of carrying costs, and it said explicitly, "Remand this issue for the Commission to consider the issue of carrying costs." Carrying costs is a much more general term that includes both concepts of interest rate and the time period over which that interest rate will accrue. So the issue of carrying costs was definitely addressed, that implies the issue of rates. Finally, with respect to the issue of the J.P. Morgan fee, the PUC said that the purpose of that was to make sure that the Commission didn't pay but the legislature could have said, the Commission didn't pay. In fact, what the legislature said was, "The transferee corporation shall pay." That's what we are asking this Court to give effect to. Thank you very much.

CHIEF JUSTICE WALLACE B JEFFERSON: Thank you, Counsel. That concludes this argument and all arguments for this morning. The Marshal will now adjourn the Court.

[End of recording.]

2009 WL 3426174 (Tex.)