For docket see 10-0375

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Supreme Court of Texas.
Atmos Energy Corporation, Centerpoint Energy Resources Corp. and Texas Gas Service Company, A Division of ONEOK, Inc.
v.
The Cities of Allen, et al.
No. 10-0375.

September 15, 2011.

Appearances:

Jose E. de la Fuente, of Lloyd Gosselink Rochelle & Townsend, P.C., for Respondents/Cross-petitioners; David Duggins, of Duggins, Wren, Mann & Romero, LLP, for Petitioner.

Priscilla Hubenak, from the Office of the Attorney General, for Respondent; Ann M. Coffin, of Parsley Coffin Renner LLP, for Petitioner/Cross-Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The court is ready to hear argument in 10- 0375 Atmos Energy Corporation and others v. The Cities of Allen and others.

MARSHAL: May it please the Court, Mr. de la Fuente and Mr. Duggins will present argument for the Petitioner. Mr. de la Fuente will open with the first ten minutes on behalf of the The Cities as Petitioners. Mr. Duggins will then present eight minutes of argument for the Utilities as Petitioners. Petitioners have reserved two minutes for rebuttal to be presented by Mr. de la Fuente.

ORAL ARGUMENT OF JOSE E. DE LA FUENTE ON BEHALF OF THE PETITIONER

ATTORNEY JOSE E. de la FUENTE: May it please the Court, we represent today a coalition of cities in something of a complex matter with the Railroad Commission and certain utilities on one side and the other and the same side and different sides, depending on your questions. But I want to make sure that one of the first things we talk about is the proper verbiage to use in our conversation today. We're going to be talking about the statute and I think it's important for this Court.

JUSTICE DAVID M. MEDINA: Not "the" statute?

ATTORNEY JOSE E. de la FUENTE: The statute, the statute, a statute, but a very important statute and it would be the Gas Utility Regulatory Act, GURA. Some folks may be referring to a part of that statute commonly called, "GRIP," which is an interim rate adjustment mechanism that is within GURA. That's an amendment to GURA. The statute is GURA and we're here to talk about what the statute says, the Railroad Commission can do with regard to its rule-making and what it means for the parties and interested parties and regulators therein. The Court is going to be looking at essentially three options on how to make this GRIP process provided by the amendment work. The first option is the one propounded by The Cities and that is that this is a rate matter and the Court should find that the GRIP amendment allows an adjudicative process and certainly doesn't preclude one as is the case with all rate matters under GURA as to the limited subject matter of GRIP. GRIP has a narrow question that is before the regulatory authority, but it's still a question and still a subject.

JUSTICE EVA M. GUZMAN: How does this interim hearing sort of serve the legislative purpose to provide a speedy process for recovering infrastructure cost? If you have a hearing and quasi litigate the issues, aren't there some real problems with that?

ATTORNEY JOSE E. de la FUENTE: No, Your Honor, there aren't. There are some problems if you want to rubber stamp, but that's not what GRIP provides.

JUSTICE EVA M. GUZMAN: Well, doesn't this statute direct The Cities, the municipalities, to look at very specific factors? It's almost a ministerial review isn't it?

ATTORNEY JOSE E. de la FUENTE: I think the word almost is very important there. To me, I kept thinking of Goldilocks when thinking about this. A full-blown rate case is much too hot for what the Legislature wanted. A ministerial rubber stamp is much too cold, but just like was discussed in the City of Marshall with regards to the water code, a limited subject matter hearing, which is on a limited timeframe, for example, The Cities and the Railroad Commission, for that matter, as the regulatory authorities only have the power of suspension for 45 days and then there must be a decision as opposed to other provisions in GURA where the suspension period is 90 days or 150 days for the Railroad Commission is the just right. It is limited in its subject matter. It is limited, therefore, in--

JUSTICE NATHAN L. HECHT: How is -- what's the limit?

ATTORNEY JOSE E. de la FUENTE: The limits are certain factors, such as rate of depreciation, rate of return, certain tax calculations that go into this and of course, the subject matter of just the infrastructure that is put in the application.

JUSTICE NATHAN L. HECHT: Sounds like a rate case.

ATTORNEY JOSE E. de la FUENTE: It sounds like a case about rates, but a rate case includes much more than one pipeline asset, for example, or one piece of a pipeline asset. A rate case includes examination of all plant and service, of all costs and operating expenses. That doesn't go into the hopper. This is simply a question of one limited--

JUSTICE EVA M. GUZMAN: One minute if you will, how does that impact though the subsequent full-blown rate hearing and the other counsel has raised the issue of res judicata and collateral estoppel? Those appear to be valid concerns when you're talking about your very limited hearing and its impact, if you will.

ATTORNEY JOSE E. de la FUENTE: Well, I think it's an important thing. If you look at a res judicata and collateral estoppel jurisprudence, there's a very important carve-out there. Res judicata and collateral estoppel are triggered when it's a final decision, when there's no authority reserved, when the decision is going to be an abso-

lute final binding decision, that's when res judicata attaches. And I think it's important to note the statute expressly carves out authority for the regulators saying these rates are interim refundable.

CHIEF JUSTICE WALLACE B. JEFFERSON: Didn't the Legislature assume that there may be errors in rates that are approved during this group process that may be too high because the utilities have overstated the amount of reasonable investment that was necessary and therefore, they can get a refund later and that refund is the remedy. So there could be problems. I know that there may or will be problems, but we are going to make, we're going to streamline this process and put on the backend the ability to recover any excess funds or we will permit The Cities themselves to instigate their own rate process if they really feel that strongly about it.

ATTORNEY JOSE E. de la FUENTE: Well, there are three points raised by your question, Your Honor. The first is, yes, Legislature considered that reasonableness will be fully inquired into at the rate case level and I note that in GRIP, a full reasonable inquiry is not on the table. The second is that the refundable nature is not necessarily a remedy at all and I think it's important to talk about these ratepayer protections. It's not necessarily a remedy at all. Marian Midlothian is paying that rate the day it's approved and based on the way the statute's set up, that rate can be in effect for five, seven plus years while Marian Midlothian is writing checks every month and it may or may not be refunded afterwards. Maybe Marian Midlothian got a job in Shreveport in the interim and maybe Marian Midlothian died. It isn't an interim rate to Marian Midlothian. It isn't refundable.

JUSTICE DALE WAINWRIGHT: But if Marian Midlothian can't prove that the rate, contested rate case that those rates were too high, then it's not going to be able to prove them at an adjudicatory hearing during the interim period. So to say it's not a remedy because you have to wait five or seven years and they may never get it means it's not a remedy during the interim period either.

ATTORNEY JOSE E. de la FUENTE: Well, we're talking about the reasonableness. There are certainly other factors that need to go into that that may count on Marian Midlothian's calculus, such as is the calculation of the tax rates that go into the GRIP adjustment is that correct. Are we using the right rate of return? Are we considering depreciation as it was approved in the previous rate case? There's certainly been GRIP filings that have changed calculations of taxes that are not the right way we think that they need to be calculated. And I think the final thing that's important is Marian Midlothian can't trigger any of these rate cases. This idea that The Cities can trigger a rate case in all these circumstances is actually not true. The court will understand from the briefing that there is concurrent jurisdiction over gas rates in Texas, well not concurrent, they're separate pieces. In the pipeline assets in the environs, the Railroad Commission is the adjudicatory authority. Within the city limits, The Cities are the adjudicatory authority, so if Atmos--

JUSTICE NATHAN L. HECHT: Help us with that. Are the rates different in all these cities or are they the same?

ATTORNEY JOSE E. de la FUENTE: I honestly don't know if they're exactly the same in each city. I mean the problem is there are different cities with different utilities applying a rate so I would assume no.

JUSTICE NATHAN L. HECHT: And did the utilities apply to all these cities at the same time for these interim charges?

ATTORNEY JOSE E. de la FUENTE: They can. I think the real overlapping rate cases are the applications for the transmission assets when they build a large pipeline that is in between cities, they go to the Railroad Commission and seek an adjustment on that and then that is pro rata shared in all the cities in the service area. But understanding that if there's a particular distribution adjustment in the City of Midlothian, for example, that just goes for the City of Midlothian. And so in the rate case for the $200 million pipeline between cities that goes to the Railroad Commission, the way that it is set up by the Court of Appeals now, the cities don't have a right to go to the court to the Railroad Commission. The cities can't trigger a rate case. The cities have to sit on their hands and Marian Midlothian has to sit on her hands.

JUSTICE PHIL JOHNSON: You're about out of time. Did you touch anything, but your first proposal?

ATTORNEY JOSE E. de la FUENTE: Nothing, but my first one, but that's the one I want you all to do.

JUSTICE PHIL JOHNSON: What are the other two real quick?

ATTORNEY JOSE E. de la FUENTE: Well, the other two very quickly are the Court of Appeals' position, which are kind of the you'll-get-nothing-and-like-it position. They decided that GRIP has set up a system where you don't get a review other than this somehow limited ministerial review, which, by the way, is extra statutory and crafted from nowhere in GURA and of course, there are no appellate rights. It looks at GRIP as if it was the statute and it stands alone. The third one is the hybrid that the utilities would like you to do and said, oh absolutely, there's no real review. It's simply a rubber stamp, but if somebody fails a rubber stamp, then we look to GURA so we get our appellate rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you think The Cities should have review, but the Commission has no review of a determination after the review that the municipalities get.

ATTORNEY JOSE E. de la FUENTE: No, no, we absolutely believe. We believe that if you're in for a penny, you're in for a pound with GURA. If you look at GURA, you look at it's a rate case, you get a contested hearing and it is subject to appeal, again, as to the limited subject matter and I see that I'm out of time. I hope I've answered your questions.

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

ATTORNEY DAVID DUGGINS: David Duggins for the Utility Petitioners. What you have just heard will be rebutted by both of these counsel. I want to talk in my brief time about our Petitioner's points and particularly the one of most interest and concern to the industry, which is the trial court's conclusion of Law 4 affirmed by the Court of Appeals that there is no appellate right in the Railroad Commission from a municipal rejection of a GRIP tariff filing. Time permitting, I also want to discuss what ought to be the most important issue to an appellate court, which is the Court of Appeals holding that a party who prevails in the trial court gets every bit of relief they request is required to appeal that favorable judgment in order to contest a conclusion of law as a cross point. I do not intend to discuss our third issue, the Court of Appeals' error in deferring to a litigation position asserted by the Commission because this Court's recent decision in the Railroad Commission v. Texas Citizens for a Safe Future case is dispositive on that. First then, the Commission's appellate jurisdiction. A GRIP tariff is filed with a municipality. It is filed with the municipality because that city is the regulatory authority with exclusive, original jurisdiction over utility operations in its boundaries under the terms of GURA. When a municipality rejects a GRIP tariff filing, they do so in the exercise of that exclusive original jurisdiction and they do so by an order or ordinance because if they don't take formal action, the rejection is ineffective and the tariff goes into effect by operation of law. So then, when they object a tariff by order or ordinance in the exercise of their exclusive original jurisdiction under GURA, the Railroad Commission has exclusive appellate jurisdiction simply because the statute says, so in so many words. Section 102.001 says, the Railroad Commission has exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive original jurisdiction under GURA. Words just don't get much plainer than that and the Court of Appeals' contrary conclusion is inexplicable. It's not only directly contrary to the words of the statute; it's directly contrary to that court's own precedent. It's earlier City of Allen case construing the virtually identical language in the Public Utility Regulatory Act. The court justified its decision by deference to the agency's litigation posture. We know that's wrong because even the Commission acknowledges there's no ambiguity in this statute and deference to a litigation position that's diametrically opposed to the agency's prior absence is inappropriate in any case. And they said, and I quote, "There is no indication that a municipality's denial of a GRIP filing is considered an order or ordinance of a municipality as contemplated by Section 102.001." Frankly, Your Honors, I don't have any clue what that means. The city has to act by order or ordinance. The plaintiff's petition in this very case recites the denial of GRIP tariffs by ordinance for the reason that they're not just and reasonable. The evidence in the case

includes an appeal to the Railroad Commission from numerous municipal ordinances and it's the only way that a city can act.

JUSTICE DEBRA H. LEHRMANN: Haven't our cases that have interpreted Section 102.001 dealt only with full-rate proceedings?

ATTORNEY DAVID DUGGINS: Oh no. I don't know if this Court has had cases other than that, but the statute does not limit it to rate cases. In fact, there's a separate appeal provision for rate cases. Section 102 is a general provision applicable to all of GURA that gives the Commission appellate jurisdiction over any order or ordinance exercise issued under the city's original jurisdiction. That was the City of Allen case from the Court of Appeals. It was an ordinance out of nowhere that required the utility to put all its lines underground and the court held that that was an ordinance affecting utility operations; therefore, illegal to the Railroad Commission. Section 102.001 does not restrict itself to any particular kind of ordinance or order so long as it is one issued under the city's exclusive original jurisdiction. The Court of Appeals is plainly wrong on this issue and its decision should be corrected by this Court because the GRIP statute is worthless to the industry if cities are able to deny the filings with impunity because there is no appeal to the central regulatory authority.

JUSTICE DALE WAINWRIGHT: What's the scope of the Railroad Commission's review through that exclusive appellate jurisdiction?

ATTORNEY DAVID DUGGINS: It's de novo.

JUSTICE DALE WAINWRIGHT: Is it ministerial? They just look to see whether the interim rate application complies with the statute?

ATTORNEY DAVID DUGGINS: That is correct.

JUSTICE DALE WAINWRIGHT: And not looking at reasonableness and prudence. It's just a rate case.

ATTORNEY DAVID DUGGINS: Pure question of law. This filing comply with the terms of the GRIP statute just like the city is supposed to do. The reason why the Commission changed its stance and stopped accepting appeals from municipal denials is set out in its briefing and it's set out in a letter from the Commission that is Appendix O to the Atmos petition for review. It was advice from the attorney general's office that the Commission was bound by conclusion of Law 4 that there's no appellate jurisdiction and that it could not appeal the judgment because it won. I don't agree with that first reason. I don't think you're bound by a conclusion of law; you're bound by a judgment. A conclusion of law is the trial court's reason for issuing the binding judgment, but the second point is clearly the law. You can't appeal a favorable judgment and that brings me to the second issue I wanted to talk with you all about, this Court of Appeals holding that in order to rate the contested conclusion of law in a cross point on your opponent's appeal, the prevailing party is required to appeal the judgment that he won. [inaudible] directly contrary to the preexisting law exemplified by the Champlain Exploration decision, which flat prohibits the prevailing party from filing an appeal in order to contest a conclusion of law with which he disagrees. It's not required by Rule 25.1(c) of the TRAPs, which only requires a notice of appeal to be filed by a party who seeks to change the judgment. We don't seek to change the judgment. We won. It's not required by this Court's decisions and it is certainly not required by public policy. If that holding is permitted to stand, imagine how many careful appellate counsel are going to be filing appeals from judgments that their clients won everything they asked for because they may not agree with every reason the trial court gave for granting a judgment in their favor. That is bad law, that is bad policy and that holding should be corrected by this Court. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Counsel. The Court is ready to hear argument from the Commission.

MARSHAL: May it please the Court, Mrs. Hubenak and Mrs. Coffin will present argument for the Respondents. Mrs. Hubenak will open with the first ten minutes on behalf of the Railroad Commission. Mrs. Coffin will then present ten minutes of argument for the Utilities as Respondents.

ORAL ARGUMENT OF PRISCILLA HUBENAK ON BEHALF OF THE RESPONDENT

ATTORNEY PRISCILLA HUBENAK: May it please the Court, the Commission's review of a GRIP application is a purely ministerial review. The Legislature was clear when it enacted the GRIP statute, but it wanted to provide incentives for utilities to spend money on infrastructure. The utility has an absolute right to collect interim rates once it has shown the Commission or the regulatory authority that it has met the basic statutory requirements of the GRIP statute. There is no fact dispute. There is no reasonable assessment. There's no prudence review. There is no substantive review that the Commission does on a GRIP application. The review is like a clerk checking off the essentials on a list. There is no --

JUSTICE NATHAN L. HECHT: How long will these rates be in effect? What's the maximum time they can be in effect?

ATTORNEY PRISCILLA HUBENAK: Well, you take the factors, the five factors in the statute, you take the factors from their last rate case and that's on return on investment, depreciation expense, ad valorem and taxes, the revenue-related taxes and federal income taxes. You take the factors from their last rate case and you apply it to the investment that they report having spent. So it's very clerical.

JUSTICE NATHAN L. HECHT: They're requesting an increase, a temporary increase.

ATTORNEY PRISCILLA HUBENAK: That's correct.

JUSTICE NATHAN L. HECHT: How long will that be in effect?

ATTORNEY PRISCILLA HUBENAK: It will be in effect each year they're required to update it. So each year they report additional investments. If they have no additional investments, that interim rate may go up. It they have no more investments, it may go down so it's adjusted on an annual basis.

JUSTICE NATHAN L. HECHT: But say they disagree and they want to take this on on the merits. When do they get to do that?

ATTORNEY PRISCILLA HUBENAK: At any time, that's the balance of power. Utilities able to get this interim rate right away, but when they apply for that interim rate, the city can initiate a rate case.

CHIEF JUSTICE WALLACE B. JEFFERSON: I just heard your opposing counsel say that no we can't.

ATTORNEY PRISCILLA HUBENAK: He was talking about environs area not within the municipality. It's true that outside in the environs area, the city can initiate a rate in the environs, but the Commission can't. The statute is very clear that the Commission's power under 104.151 is not eradicated by the GRIP statute so at any time the Commission can initiate a rate case. So it comes to the Commission's attention that rates seem to be unreasonable or imprudent. But the prudence review and the reasonable review, the Legislature dictated that that review would be at the next rate case. That is why there's no contested case proceeding that it's necessary. The legislative statutory scheme was to avoid any sort of regulatory lag for utilities. Prior to the GRIP statute, if a utility spent money on investments, it did not get to put into their rates until they went to their next rate case. So utilities were deterred from replacing aging infrastructure or putting in new infrastructure that was needed in new communities. So a Legislature saw a need to do away with that regulatory statute. They've put out two options in the statute. They get the interim rate as a matter of right and if a city doesn't like that, the city can request a full rate hearing and then they go to a rate hearing. That is the remedy.

JUSTICE DALE WAINWRIGHT: So a municipality could file a rate case the week after an interim rate adjustment is filed.

ATTORNEY PRISCILLA HUBENAK: That's correct. They have that remedy. That's their two options and what the cities keep wanting is that something in between that the Legislature did not provide. I think my opposing counsel mentioned hot and cold and warm. They keep wanting warm and what their Legislature provided is you can get your interim rate or you can go to a full-rate case.

JUSTICE DEBRA H. LEHRMANN: When you say two options--

ATTORNEY PRISCILLA HUBENAK: Two options. That's what's in the statute.

JUSTICE DEBRA H. LEHRMANN: And you're talking the interim and just take it.

ATTORNEY PRISCILLA HUBENAK: Right.

JUSTICE DEBRA H. LEHRMANN: Or then your appeal would be filing for the full rate.

ATTORNEY PRISCILLA HUBENAK: That's correct. Now what really the statute - the statutory scheme's very clear because it says, in the statute that that reasonableness review and the refund, if necessary, is all deferred to the late, the next rate case. That's where the substantive decisions are done.

JUSTICE EVA M. GUZMAN: When the Commission was exercising appellate jurisdiction in these GRIP cases, exactly what were the parameters of that jurisdiction that you were executing?

ATTORNEY PRISCILLA HUBENAK: We did exactly what we did with applications that came to us through our original jurisdiction. A utility analyst looked at it, saw that it met the statutory requirements, prepared an order that confirmed it met the statutory requirements and gave it the interim rate.

JUSTICE EVA M. GUZMAN: So that seemed to address the scenario where a city arbitrarily, I mean municipality arbitrarily denied on that because what happens when there's an interim rate application and it's just denied and there's no sort of interim process, you have to go to a full rate hearing, which may take years, right?

ATTORNEY PRISCILLA HUBENAK: That's correct.

JUSTICE EVA M. GUZMAN: So how do you address the legislative intent, which was to provide for the infrastructure and to speed the process up--

ATTORNEY PRISCILLA HUBENAK: If the Commission doesn't have a pellet authority is that your question?

JUSTICE EVA M. GUZMAN: Well, if the city arbitrarily denies and denies and denies, then what?

ATTORNEY PRISCILLA HUBENAK: What we have argued before at different, not only in this Court, but previously is utilities could have sought a mandamus because it's clear from the statute that what the cities should be doing is what the Commission has been doing and that is checking to make sure that an application meets the statutory requirements. If it meets the statutory requirements, then that rate goes into effect. The cities or the Commission can initiate a rate case and then there's annual that the Legislature put in other ratepayer protections. There's an annual report that they have to file. There's an annual earnings statement and if the earnings statement shows that their earnings this year are 75 basis points higher than last year, they have to explain why their rates are not unreasonable at that point. So there's red flags that can come up.

JUSTICE EVA M. GUZMAN: To be clear, your position is that 102.001(b) under no circumstances confers this sort of interim appellate jurisdiction on the Commission now; that's your position now?

ATTORNEY PRISCILLA HUBENAK: Our position is that the GRIP statute has no appellate authority for the Commission.

JUSTICE EVA M. GUZMAN: But I'm not asking you about the GRIP statute.

ATTORNEY PRISCILLA HUBENAK: 102.001(b) if you take the literal words, if a city is denying a GRIP application by an ordinance or an order, it appears to apply. But we said, the Commission does not need appellate authority because these are ministerial and should be being granted.

JUSTICE EVA M. GUZMAN: But if it operates I guess to the detriment of ultimately the citizens that would be better served by that infrastructure not to have that interim process in the event a city arbitrarily denies, it doesn't follow the statute's mandate.

ATTORNEY PRISCILLA HUBENAK: That's correct and if you know from the history. The Commission did initially exercise appellate jurisdiction. When you look at the adoption of the rule, particularly the adoption of the permanent rule not the proposed rule, there's references to people invoking the Commission's appellate jurisdiction and the Commission exercised appellate jurisdiction. The Commission in this case was faced with the conclusion of law that it could not appeal and it chose to honor that conclusion of law. Under these circumstances, the Commission honored the conclusion of law and declined appellate authority, so--

JUSTICE DALE WAINWRIGHT: Even though the case was going up the ladder on appeal?

ATTORNEY PRISCILLA HUBENAK: Because we couldn't appeal, when I have a case in district court and I lose and I'm appealing, I ignore that judgment as long, unless someone takes an action against me. And I ignore a judgment all the way up to this Court until I get an order from this Court that I'm wrong. In this case, we didn't have a method for appeal and it is consistent with the statute for the Commission not to have appellate authority since it's so ministerial. Cities should be granting these. There should not be that many applications coming, that many appeals coming to the Commission.

JUSTICE NATHAN L. HECHT: But if the district court were denying the Commission's appellate jurisdiction when it thought it had it, they would be, the Commission would be here complaining.

ATTORNEY PRISCILLA HUBENAK: That's right; if we had asked for that as part of a declaration and the court had ruled against us, but we had a favorable judgment in the trial court below. Our, really the effort below by the cities was to void the Commission's rule because it didn't have contested case proceedings. And the district court rightfully found our rule is valid. There's no contested proceedings that are required under a GRIP application. So when the conclusion of law was entered, we were faced with the conclusion of law different from what the Commission had been doing. The Commission chose to honor the conclusion of law particularly since under the statute, there should be very few appeals. And as we've said, in our briefing before, if the utilities are faced with cities denying their applications on a regular basis, they should seek mandamus against them.

JUSTICE DALE WAINWRIGHT: And so to be clear, the Commission agrees, it has jurisdiction to review these interim rate denials by cities under 102.001(b)?

ATTORNEY PRISCILLA HUBENAK: I think the literal words apply. The only other thing I want to add is that the legislative history is very clear about what the Legislature was intending to do. Any contested case proceeding would defeat the purpose of the GRIP statute. Whether it be one issue or five issues, there's timing deadlines that come in with a contested case. There would be notice. There would be a hearing. There would be a process that takes a lot of time. It would defeat the statute. We ask this Court to affirm the Court of Appeals

and find that no contested case proceedings are required under the GRIP statute; it's purely a ministerial review.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ATTORNEY ANN M. COFFIN: May it please the Court, I'm Anne Coffin and I will be providing the response the gas utilities. Your Honors, you heard Mr. de la Fuente admit to you that GURA is a body of law promulgated by the Legislature. What the cities refuse to acknowledge, however, is that the Legislature holds the absolute power to modify, eliminate or dictate the processes that the cities and the Commission must follow in order to exercise that power. The Legislature exercised this power when it enacted the GRIP statute. There is no dispute that the prescriptive process in the GRIP statute was intended to function very differently than a rate case. As you know, in a traditional rate case or rate-setting proceeding, the regulator conducts a substantive review and hearing before the rates go into effect. Under the GRIP process, the Legislature flipped the timing of this substantive review in order to facilitate the rapid implementation of rates so that utilities could begin recovering costs of investment. Eight years ago, the city stood in front of the Legislature and told them that the prescriptive GRIP process that they had developed was flawed because it didn't allow for substantive review and hearing prior to the rates going into effect. The Legislature declined to act on those concerns. Instead, it included provisions in the GRIP statute that protected ratepayers and the regulator by making very clear that GRIP rates were interim in nature, subject to refund and subject to full regulatory review and scrutiny in a subsequent rate case.

JUSTICE DALE WAINWRIGHT: Ms. Coffin, if there is a refund after the rate case, is that with interest?

ATTORNEY ANN M. COFFIN: It is, Your Honor.

JUSTICE DALE WAINWRIGHT: So your position is there's not an argument that they're not being made whole.

ATTORNEY ANN M. COFFIN: That's absolutely correct there is no harm. The Legislature also clearly protected the cities' regulatory powers when it in acted the GRIP statute by making it abundantly clear as Ms. Hubenak indicated that a regulator whether it be the city or the Commission could call a rate case any time it wanted. A utility could make a GRIP filing on one day and the city could initiate a rate case that same day. Those powers are reserved to the regulator that has original jurisdiction over the rates. So when you heard Mr. de la Fuente tell you that the cities can't do anything, the reason for that is because they don't have original jurisdiction over transmission rates. The Railroad Commission does. They do have original jurisdiction over distribution rates throughout the state of Texas and they have the ability to initiate a rate case any time they want. So eight years later, they're still insisting that they should be able to adjudicate issues before GRIP rates take effect and in particular, the cities have said, if you recognize the general appellate powers of the Commission under GURA, you must also recognize our general right to an adjudicatory hearing. Well, the statute just simply doesn't support those. In one instance, you have a statute of general applicability. The statute generally conveys appellate powers to the Commissions as Mr. Duggins indicated over any municipal ordnance or resolution that affects gas utility rights. In contrast, the statute that requires a hearing does not apply to every filing made before the Commission--

JUSTICE EVA M. GUZMAN: Is that 103.024 the GURA subsection 103.024?

ATTORNEY ANN M. COFFIN: The appellate previsions are under 102.001. The contested rate proceedings are also in the 102 provisions.

JUSTICE EVA M. GUZMAN: I guess they're arguing that you read everything as a whole and that that should confer some meaningful judicial review of the Commission's decisions on rate cases and then sort of apply that to these interim rate cases.

ATTORNEY ANN M. COFFIN: Your Honor, I don't disagree that you've got to read GURA as a whole. My

disagreement is that the provisions that they cite in terms of contested cases do not convey a general right to hearing in each and every case filed before the Commission. It is specifically limited to a contested case. And the government code defines contested case as a determination of party's legal rights and obligations by a state agency after the opportunity for an adjudicated hearing. Black's Law Dictionary defines adjudicate as to finally determine and by definition, a GRIP filing does not finally determine anything. It merely implements rates that are interim, not final in nature, and that will be subject to a subsequent final determination in a later rate case.

JUSTICE EVA M. GUZMAN: And in the event that interim rate was outlandish or not in proportion to anything that relates to the cost what then for the cities and those citizens that are impacted by that?

ATTORNEY ANN M. COFFIN: They may initiate a full-blown rate case under the provisions of 104.151.

JUSTICE EVA M. GUZMAN: But be subject to that interim rate until a decision probably years later in that full-blown rate case?

ATTORNEY ANN M. COFFIN: Yes, ma'am. However, when they initiate that rate case, it puts into play the GRIP investment that is being recovered through interim rates and the regulator could then, as part of its final decision in that rate case, order refunds with interest.

JUSTICE DEBRA H. LEHRMANN: About how long does that usually take?

ATTORNEY ANN M. COFFIN: A full-blown rate case?

JUSTICE DEBRA H. LEHRMANN: Mm-hm.

ATTORNEY ANN M. COFFIN: It could, statutorily it is required to take 185 days. The cities have, if it goes on appeal, let me back up. A municipality has, at most, 125 days to render a final determination in a rate case. On appeal and under the Commission's original jurisdiction, the Commission has 185 days. So if you have a situation where the city has initiated a rate case or a utility has filed a rate case at the city and it goes up on appeal, you're looking at a minimum of six months, six months to a year.

JUSTICE NATHAN L. HECHT: The Commission says, it shouldn't have appellate jurisdiction because there's nothing to appeal. What's the answer to that?

ATTORNEY ANN M. COFFIN: Your Honor, my answer is that the Commission's position thwarts the statutory framework implemented by the Legislature.

JUSTICE NATHAN L. HECHT: They say you have a remedy by mandamus.

ATTORNEY ANN M. COFFIN: GURA tells us that our remedy is at the Commission.

JUSTICE NATHAN L. HECHT: Do you have a remedy by mandamus?

ATTORNEY ANN M. COFFIN: I don't believe we do because we have another means of relief through the administrative agency pursuant --

JUSTICE NATHAN L. HECHT: But if you didn't, I guess you'd think you'd have a remedy by mandamus?

ATTORNEY ANN M. COFFIN: Yes, sir. If 102.001 was not applicable generally to any municipal ordinance or right affecting rights, we would have relief of the courts. We don't.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are refunds rare or do they occur frequently? Is it full blown or

is it only a portion or what happens? What's the anecdotal evidence of when these interim rates are challenged?

ATTORNEY ANN M. COFFIN: Well, Your Honor, I'll tell you, in the last two rate cases that I've been involved in probably over the last two years, the Commission has indeed ordered a refund of GRIP rates or GRIP investment. They are not full-blown refunds. Instead, what occurs is that the Commission or the city conducts a substantive review of rather the individual investments made were reasonable and prudent and useful in the provision of the utility service to the extent that they determined that a particular investment was not used in useful or prudent, they order a refund of that under the revenues recovered as a result of that investment with interest.

JUSTICE DALE WAINWRIGHT: Ms. Coffin, what's at stake in this case? What's the amount at stake? Of course, you could look at that from two perspectives. Municipalities would say we're paying too much, this amount over several years and utilities are saying we've invested this and we need to recover this amount. How much is at stake in this case?

ATTORNEY ANN M. COFFIN: Your Honor, typically what you will see is in a GRIP filing, the utilities have made annual investments in the tens of millions of dollars. The GRIP rate, the interim rates that they are seeking once you flow that over on a system-wide basis to the customers that it's applicable are mere cents, potentially low dollars.

JUSTICE DALE WAINWRIGHT: Per customer.

ATTORNEY ANN M. COFFIN: Per customer. Your Honor, I'm running out of time so let me just sum up by saying neither, that the Commission's rule is completely consistent with the GRIP statute and GURA as a whole. The Commission's rule facilitates a streamlined, ministerial review of the requirements prescribed by the Legislature and it preserves parties' rights to adjudicate issues involving the filing at a later date. It also preserves regulators' rights to initiate a rate case at any time. We ask this Court to recognize the Commission's appellate authority and to affirm the Commission's rule in its entirety. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF JOSE E. DE LA FUENTE ON BEHALF OF PETITIONER

ATTORNEY JOSE E. de la FUENTE: We're talking about more than a penny and we're talking about more than one bill. We're talking about this bill that Mary pays every month for five years and decides whether to pay that bill or something else maybe. So this idea that we're talking about pennies with no harm no foul is absolutely not correct.

JUSTICE DEBRA H. LEHRMANN: What do you say in answer to the issue that the policy behind having a really speedy hearing does not comport with your argument?

ATTORNEY JOSE E. de la FUENTE: Your Honor, again, there's something in between having a speedy hearing and having nothing, which is essentially the argument here. I mean what you've been hearing is essentially that the cities have no right to even deny, there's nobody who even can say that the cities have a right to deny a GRIP application. They must approve it.

JUSTICE DEBRA H. LEHRMANN: Well, but they can file a rate case.

ATTORNEY JOSE E. de la FUENTE: First they can only file a rate case for those that are within their regulatory jurisdiction. If they are an affected person, then it's a matter before the Railroad Commission. They nor any other affected person can necessarily trigger a rate case and even as to the cities' regulatory authority. Mary can't trigger that rate case. So you are counting on the regulators to do the job of the affected person for you, but

the affected person is now taken out of the mix.

JUSTICE DALE WAINWRIGHT: I'm not sure I understand that. It makes sense that the regulatory authority, in your case the municipality, will have the ability to bring a contested rate case. You don't want some other city to have the authority to bring the case for you. You want to be able to bring your own case for yourself. So shouldn't the affected jurisdiction be able to bring the case, not someone else?

ATTORNEY JOSE E. de la FUENTE: The affected jurisdiction should be able to bring a case within its regulatory authority, but it's bringing it as a regulator not as an affected person. So again, when the Railroad Commission's considering those environs cases, the $200 million per gas pipeline that runs between cities, the cities don't even get to show up and present a case. They can file a letter and comment or something and call their representative, but they can't appear as an affected party and it kind of blips the statute on its head. I see I've run out of time, may I?

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Guzman.

JUSTICE EVA M. GUZMAN: What if the Railroad Commission did have this hearing, what authority does it have to take any action on this GRIP filing anyway under the statute? Let's say you didn't have this hearing.

ATTORNEY JOSE E. de la FUENTE: Well, I think it's very important to read that part of the statute. It's subpart D of the statute. It says that, the utility may only adjust the utilities' rates under the tariff with regard to certain items. May only means and nothing else. So what if a utility, you know there's been this talk of cities as a bad act or deny for no reason, what if utility has included things expressly excluded by the statute? Does this mean that the Commission can't do anything? Of course not, it means the Commission can do what it is allowed to do by GURA, which is exactly what we've pointed to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise.

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