

ORAL ARGUMENT — 9/10/98
97-1052
HOUSTON LIGHTING & POWER V. AUCHAN USA

KROGER: The issue today is to determine the standard of review to be applied and employed by a TC in reviewing a limitation of liability provision that is found in a PUC approved tariff.

 Our position is that the standard that the court should employ is that a provision in a tariff that has been approved by the PUC and which limits the liability of a utility for damages caused by a fluctuation or interruption of electricity was valid. And there is a number of reasons why -

HECHT: No matter what?

KROGER: Yes and no. No matter what in the sense that once it has been approved by the PUC, then I believe that THE court should, yes, approve that standard.

GONZALEZ: We don't have the power to review it?

KROGER: That issue has been raised mainly by some of the amicus briefs that have been filed in this case. Where I feel uncomfortable is that I do believe the court does have some power to do some review of frankly everything the PUC does. If the PUC approves of anything in a tariff, be it a rate, or a limitation of liability provision, the PURA says, that a party in that case can appeal that directly to a DC for review. And then there is a standard that the courts employ in reviewing what the PUC did in approving the tariff, including a limitation of liability provision. And that standard is basically that the court will approve what the PUC has done unless the court finds that the PUC has abused its discretion.

 For example, if this court were to find that the PUC violated the Texas Constitution, or in doing something violated public policy of the State of Texas, that the court could change the decision of the PUC.

HECHT: In an administrative appeal or in a court case?

KROGER: Either way. There is not a case that talks about giving the changes that have been created now in the law with the passage of the PUC Regulatory Act what the standard of review should be the PUC is vested with the job of reviewing and approving of tariff provisions, including limitations of liability provisions.

HECHT: What does the PUC mean when it said in *CP&L*, that tariffs are subject to review for reasonableness by the courts in actual damage or tort claims?

KROGER: The way that came up in the *CP&L* case was, that the general counsel with the PUC, which is essentially a public advocacy position at the PUC argued that the PUC had no jurisdiction to approve or review a limitation of liability provision. And they cited the *Reeves* and *Calarco* cases as examples where the judge had done that, the courts have done that. And so the PUC had to make a decision as to whether or not they had jurisdiction in the first place. And they concluded that they did. So the issue that was not an issue before the PUC as to what, if any, role the court should play in reviewing what the PUC does. That was not an issue that was raised in that proceeding. And I also submit that it will probably not be a proper function of the PUC to decide what role that they should play in reviewing these items. Basically we just cited the language in that case. That's dicta.

HECHT: But does it reflect the PUC's understanding that there would be some review in the courts?

KROGER: It does reflect an understanding by them that there would be some review of the court. Interestingly, they don't discuss what that standard of review should be. They don't say for example that the court should review these under the 2-prong test of *Calarco* and *Reeves*. And in fact, if you look at the decision that the PUC gave in the *CP&L* case, I think that decision is wholly at odds with the standard announced in *Reeves* and *Calarco*, insofar as, the PUC said that the primary justification for this type of limitation of liability provision is the magnitude of damages that an electric utility could be subject to in the event of an outage. Under this recent *Calarco* standard, that is the primary way that you raise a fact issue for a jury. And so, to me they are at odds because the *CP&L* case says that's the reason for limitation of liability. And the recent *Calarco* decision said: That's a reason for saying that there's a question of fact as to them without any findings in either of those decisions as to what public policies are being served by having such a standard as that.

OWEN: You point out in your brief that most jurisdictions have upheld exculpatory tariffs, but have put a limit and said that they don't excuse you from liability for gross negligence or intentional torts. How have the courts in those cases reviewed the tariffs? How did it come up to the courts? Was it on administrative side, or was in a tort contest?

KROGER: I think there is both. There are some states where, and mainly I think these are older decisions from other jurisdictions where similar to the State of Texas, it was before there was a PUC or PSC. And in that sense, the courts played the primary role in reviewing what utilities did. In fact, that was what went on in the State of Texas prior to 1975. The courts played the role in reviewing the reasonableness, not just limitation of liability provision, but the rates that a electric utility would charge. And you will see in those decisions in other states where they are saying, "we're not going to extend it for gross negligence." And in fact, the *Rucker* decision, El Paso 1976, is an example of one of those cases. What the El Paso CA said that tariffs have the force and effect of law, which is not really in dispute by any court in Texas, that they are presumed to be valid, and that they will be enforced absent except for gross negligence or intentional conduct. And the basis for saying that exception was noting that again looking at other jurisdictions throughout the United

States and noting that the courts have carved out a _____ to extend the limitations of liability protections to gross negligence claims.

OWEN: Would you concede that your tariff will not protect you from gross negligence or intentional torts?

KROGER: Yes, this tariff was not intended to extend to gross negligence claims and *HL&P* _____ not apply to gross negligence claims. And in fact if you look at the *CP&L* decision, which is where the genesis of this form of limitations liability provision came from, even the PUC recognized that there was not a record made as to whether or not it was in the public interest to extend the limitation of liability provision to a gross negligence claim. So they essentially passed on making a decision on that issue at that time.

That issue about whether or not a limitation of liability provision that includes gross negligence claims, I don't think that issue is before the court. Because for one thing, we do not have a gross negligence claim in this case. It was nonsuited at the TC level. And the second reason is because our tariff does not include a limitation for gross negligence claims. In fact when we moved for summary judgment in this case, I did not move for summary judgment on the gross negligence claims. The judge granted it only on the negligence claims, and then they subsequently nonsuited the gross negligence claims to perfect the appeal.

I would like to point out what should the role of the courts play in reviewing these limitation of liability provisions. A couple of what I thought were helpful cases that were not cited in our brief, but were cited in one of the amicus briefs that I thought were helpful reading. One is the *Texatell* case, 798 S.W.2d 875. And that was a case where the issue was basically: What is a reasonable electric rate? And there was basically somebody who had lost before the PUC - appealed to the DC saying, "the rate that they are charging me for electricity is unreasonable." And that was the standard before 1975, which is essentially the same standard that is mentioned in *Reeves and Calarco*. And why the *Texatell* case is helpful is because the Austin CA discusses about that being the old standard before 1975, but what with the passage of *PURA*, the role that the courts play in reviewing electric utility tariffs has changed now, because that job is primarily vested with the PUC.

Another helpful case I thought is *AT&T v. PUC*. It's another Austin CA case from 1995. And that again is the same kind of issue. And in that case, the court said that the standards should be that the courts should grant a good deal of judicial deference to decisions made by the PUC, because of their experience and expertise in tariff administration and its statutory responsibility for all aspects of utility regulation, including the duty of assuring rates that are fair, just, reasonable, and free from undue discrimination.

OWEN: Was your tariff adopted as part of the rate case? How did this clause get in your tariff specifically?

KROGER: What happened was that in the very late 70's utilities all had limitation of liability provisions in their tariffs. And the PUC held off on approving of those pending a decision in the *CP&L* case. Then they decided the *CP&L* decision, and found these to be in the public interest and reasonable. And there is a note in there that says basically, if you look at the *CP&L* decision, that utility should file a limitation of liability provisions consistent with the decision in the *CP&L* case, and then they would review those case-by-case as each utility filed their tariffs.

OWEN: So the stand alone filing not parcel to the rate case?

KROGER: That's right. We had a stand alone filing of our tariff and it was approved, and it's been approved actually a number of times, but there is no dispute in this case that the tariff that we concluded was approved by the PUC.

ENOCH: One of the amicus is arguing that the tariff is in integral to the rate-making process because it factors into the rates. But you're saying these tariffs are not a part of the rate process. They are independent filings in a separate ruling by the PUC?

KROGER: They are integral to the rate, and the law is very clear on that too. A tariff is a very thick document, and it's got basically all the rules by which the utility will conduct business with different classes of customers. And one of the items in the tariff is the limitation of liability provision. And the PUC generally reviews them all at the same time and makes comments then as to different provisions within that tariff. Then it has exception with or has questions or comments about it before it approves it.

What I believe the PUC did is, it held off on just approving that part of the tariffs. I think it's in the *CP&L* case. They gave them preliminary approval, but pending a resolution in the *CP&L* case.

ENOCH: If the limitation of liability is independently discussed apart from the rate-making, how does that support the argument that limitations of liability is a factor in rate-making?

KROGER: They aren't independently discussed. The *HL&P* limitation of liability was not independently discussed separate from the rate. It was all approved at the same time. And what's special about the *CP&L* decision is that it was the only time that the PUC had a special hearing just on limitation of liability decisions, because it had never just focused on those provisions in electric utility tariffs before.

ENOCH: I thought *HL&P* had a separate independent filing for the limitation to be added to their tariff. And so I was asking how does this support the argument that was made that actually this is a part of the rate-making function?

KROGER: The limitation of liability provision is not filed separately from the tariff. It's

a part of the tariff. It's all filed at the same time, and it's all approved at the same time. So when the PUC is evaluating what is a fair rate to charge for electric utility service, and they are looking at the bundle of services that the utilities provided, one of those is the limitation of liability provisions. Presumably if there was going to be no limitation of liability provision, the utility would ask for a higher rate to...

ENOCH: I understood that was the argument, but I got lost when you said this limitation was filed separately from the rate-making process. It's part of the tariff document that's included as part of the rate analysis?

KROGER: It's not filed separately from the tariff. That's exactly correct.

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RESPONDENT

GOLLAHER: We agree with counsel for petitioner with regard to the issue before the court, and that is the standard of review of the limitation of liability in a PUC tariff. With regard to that review, we are not concerned with a facial challenge of a tariff, but with the application of a tariff to a specific individual fact situation.

GONZALEZ: So I take it, you also agree that as a general proposition liability could affect the rate structure?

GOLLAHER: Yes.

HECHT: So that's something for the PUC to take into consideration in setting rates?

GOLLAHER: I think so. However, keep in mind that the PUC kept in mind itself the court's review of these type cases at the time of the *Central Power & Light* case, which I will come back to. We believe that the question then is a question of reasonableness and that that is a question of fact under the common law of this state.

The focus is thus with regard to this issue on post-outage conduct, the post-occurrence conduct of the defendant in this case, *HL&P*. We're really not concerned with the issues which reflect upon liability. I believe that's important in that the dissent in the CA seemed to get these two issues mixed up; whereas the majority recognized that they were looking merely at what is necessary to void or set aside the application of a tariff in a particular individual situation.

In the *Central Power & Light* case before the PUC, not only did they take into consideration that they were only approving the tariff facially, that is in a general application, but not as to a specific situation. They also expressly recognized as counsel for petitioner mentioned, that gross negligence was specifically not a consideration. And that's another issue that seems to have

gotten involved somewhat of likely in this case. But in the PUC decision, the examiner stated that neither applicant, there were two applicants in that case, sought a limitation provision requiring gross negligence for liability.

GONZALEZ: But in this case before us, gross negligence is not an issue?

GOLLAHER: That is correct.

GONZALEZ: So why are we talking about it?

GOLLAHER: To show that the dissent, I believe in the court below, is incorrect. The appeal as we are before the court now does not concern liability. It concerns a challenge of the application of the tariff to a specific fact situation, not liability.

OWEN: Under the test that the CA adopted, one of the things you look at is you compare the actual damages of the customer to the recovery that they would get under the tariff. In most cases isn't it going to be a large commercial user or an industrial user that's going to have damages that substantially exceed the tariff recovery?

GOLLAHER: I believe so. And that is why I believe that of that two-prong test, the really important one gets down to the post-loss conduct of the utility in remedying the situation.

OWEN: So basically, we are allowing the residential ratepayers are subsidizing the commercial loss of these commercial industrial users under this tariff. If we are to allow the commercial industrial users to get their full range of damages aren't we really allowing that to be done at the expense of the small residential ratepayers?

GOLLAHER: I wouldn't think so. If there was an accident caused by a public utility that caused property damage to a residential customer, such as fire to a house, I would expect them to be just as fast at making a claim to the utility.

OWEN: My point is, the big damages are going to be from the commercial and industrial users?

GOLLAHER: When we're talking about food spoilage, yes.

OWEN: And those damages come out of pockets - they come out of rates. These damages are paid out of the revenues from rates, isn't that correct?

GOLLAHER: I assume so.

OWEN: So in essence, the smaller ratepayers are subsidizing the losses of the larger

industrial/commercial customers?

GOLLAHER: We don't really think so. We think all of the ratepayers, all of the citizens are sharing in that.

OWEN: What about the argument that large users, such as commercial industrial users are in a better position to get alternative sources of energy in other generator or insurance as they did in this case, and that's a public policy reason not to allow recovery in excess of the tariff?

GOLLAHER: The summary judgment evidence in this case shows that there was no alternative means, and that the only way that *Auchan* could obtain electricity was from Houston Power & Light, and that it had to obtain it under a contract, which included the limitation of liability.

OWEN: But they had insurance. They did get insurance?

GOLLAHER: They did have insurance.

GONZALEZ: Under which you've paid, and you're trying to recoup?

GOLLAHER: What was paid, we're trying to recoup. What was not paid, we're trying to recoup. In other words, the loss was not made whole. And Auchan is attempting to recoup its entire loss.

OWEN: But you're also here on the subrogation claim?

GOLLAHER: Yes.

PHILLIPS: Do you agree with opposing counsel and some of the amicus briefs that the majority rule in the US is that these tariff restrictions are respected unless there is gross negligence or intentional conduct?

GOLLAHER: No. We believe the cases throughout the US go in all directions. We have not attempted to analyze those cases because they are all involved in individual fact situations. In reviewing those cases, we found that some states do not even have degrees of negligence, do not have gross negligence obviously. They don't apply that standard. It seems that the test is different throughout, so we have tried to keep our focus upon the common law of the state of Texas.

PHILLIPS: Did you find a treatise or a law review article that discussed this issue from a national perspective?

GOLLAHER: No. As I say, from the review of the cases throughout the country, it seemed to us that the cases went in all these directions, and that there did not really seem to be any

uniformity.

HECHT: You're satisfied with the CA's standard in this case?

GOLLAHER: Yes.

HECHT: How do you apply it? How can you tell what damages are high enough, or not high enough, and what response is too long, or short enough?

GOLLAHER: I assume that it fits into the question of reasonableness for the jury to determine.

HECHT: How do you apply reasonableness to the amount of damages?

GOLLAHER: I think that it is one of the elements, and then the finder of fact has to determine - make a finding as to whether the tariff is reasonable as applied with these facts. And all we know from the prior cases, three of them plus the instant case, is that before you get a jury to determine the reasonableness, you must have evidence that shows this disparity in the amount as allowed by the tariff, and that the utility could have eliminated the condition in a short period of time and that they did not.

ENOCH: In that regard let's assume that somehow a grid goes down, a whole section of a city goes down. Now under your standard, it would seem to me if the amount of consequential damages determines what's reasonable, then if a whole grid goes down in the middle of a heat wave, then it seem to me this standard would require the utility to fix the industrial customers first before the residential customers, because what determines what's reasonable is the amount of damages. Industrial customers as you concede would generally speaking have the better damages. So in the middle of a heat wave, the electricity goes down, there is no air-conditioning, and the meat packers, the manufacturing shopping centers must get repaired before the individual homes and apartment dwellings, because failure to do so would be tantamount to being unreasonable and they would be exposed to these consequential damages.

GOLLAHER: That's the argument that the other side makes. We do not agree with that argument, because it has taken out the element of reasonableness.

ENOCH: I thought reasonableness was dependent on the size of damages?

GOLLAHER: I don't think that's the only criteria. I believe when an entire grid goes out, that then, the utility is faced with a different situation than when a mere transformer goes out that could have been put back on line merely by cooling it down. We're talking about two completely different things. And we believe that the court in determining the reasonableness of the application of the tariff has to consider all of those surrounding facts and circumstances.

As I started to say, in the *Central Power & Light* case before the PUC, that was what the PUC was concerned with. They talked about the New York outage and the exposure of multitude of claims to *Consolidated Edison*. They were looking at a general outage situation. We believe that if there was a general outage, then the court in determining an individual damage case has got to look at those facts in deciding whether the utility's attempt to alleviate the problem was reasonable or not

ENOCH: In this case, this transformer that went out served only the grocery store?

GOLLAHER: That is correct.

ENOCH: And so if it only serves one person, then reasonableness depends on how massive the damages are as opposed to if the transformer served not only the grocery store but half a block of that neighborhood?

GOLLAHER: I am not proud of the amount of damage test that the courts below and before have established. I believe that of the 2-prong test that they have established, the important element is the conduct of the utility in alleviating the outage. They have merely said, that however, to get your case into court, you've got to show this disparity in the amount of loss under the tariff in which you've actually had. But that's only one prong. The real prong, we believe, the real crux is was the conduct of the utility reasonable in alleviating in the hazard. And we believe the facts in this individual case cry out for showing that they were unreasonable.

OWEN: What's the point of having this part of the tariff then?

GOLLAHER: One, I suspect, I don't know this because there aren't any cases that tell us this, it establishes the tariff in the first instance, which is what the examiner wrote on in the PUC decision. And probably except for a direct attack in Mr. Kroger's argument sort of hit this, and that is, whether it had to be an appeal from the regulatory proceeding or whether it could be in a damage action. But we suspect that it probably establishes in the first instance, the tariff as being valid, and therefore, a facial challenge would be inappropriate except in a direct attack. So it establishes it first. It also sets up a number of limitations on any recovery unless the court in the individual case determines that the tariff is unreasonable in the individual case.

We believe that the PUC serves a very laudable purpose in establishing the tariff in the first instance.

OWEN: So you're basically saying the tariff shouldn't apply when the utility is negligent and your damages exceed any damage to your equipment?

GOLLAHER: No. Justice Gonzalez didn't want me to get to liability issues as not being before it. The issue of negligence in the outage is not an issue upon which the petitioner moved for summary judgment. There, summary judgment is based solely on this post-appearance finding.

OWEN: My point is, under your construction of these kinds of tariffs, you get a lawsuit, a jury trial essentially in every case where the utility was arguably negligent and there was some consequential damage?

GOLLAHER: No. You get a jury trial only in those situations where you can pass muster on the liability issues which you are addressing your attention to. But also if the utility placed a tariff limitation, then you must raise a fact issue on the unreasonableness of the tariff.

OWEN: And to raise a fact issue, you allege negligence and consequential damages?

GOLLAHER: What is negligent and this two-prong test on the unreasonableness of the tariff. In other words, you've got to show not only were they negligent or whatever you're basis of liability is in the incident itself, the outage, but you have a much greater burden because you have to also show that the utility failed to correct or eliminate the outage in a reasonable length of time.

OWEN: But that's negligence essentially.

GOLLAHER: But it's two point entirely. You can't just say that every case of negligence in the utility would be liable.

HANKINSON: Aren't you then saying though that every time there's a power outage, that there can be litigation or maybe litigation over the utility company's conduct, and the damages that it allegedly caused?

GOLLAHER: I don't think so.

HANKINSON: Why not?

GOLLAHER: In the *CP&L* case, findings of fact were made by the examiner, which were adopted by the commission which found that in 1979, *CP&L* had an average of .89 outages per customer with an average length of 52.62 minutes. Now an outage of 52.62 minutes or even as the record in this case shows a 4 or 5 hour outage is not going to create a damage case. Only a 14 or 15 hour outage.

HANKINSON: But under your test though if we have to check the reasonableness of the company's conduct at the time of the outage or before the outage and after the outage in every case and look at the amount of damage, then the limitation of liability provision in the tariff has been rendered meaningless if part of the purpose of the tariffs is to avoid this kind of litigation to keep costs down?

GOLLAHER: Only in those situations where the utility fails to correct the situation in a reasonable length of time.

HANKINSON: Was it your view the tariff doesn't cover those situations? When you talk about the application of the tariff are you saying that the limitation of liability provision is not directed towards the failure to remedy the outage; so therefore, that can be litigated or, that too, is

covered within this tariff?

GOLLAHER: What I am saying is that the prior cases established that the tariff as applied to a particular fact situation is void where the damages are large and the utility fails to correct the situation in a reasonable length of time.

In conclusion, we believe that the court here is concerned strictly with the review aspects of the tariff in a given fact situation that that review which should be upheld is that which is declared in the *Reeves* decision, the *Nash* and the *Calarco* case, which we ask the court to now accept as the law of this state.

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REBUTTAL

PHILLIPS: If the tariff insulates a utility from liability for ordinary negligence what market pressures currently exist that would encourage the utility to act promptly to restore service to customers?

KROGER: It would be the PUC. I believe that the tariffs regularly come up for review before the PUC. At the PUC proceeding, the PUC will hear evidence from customers. There is actually two representatives of the PUC who have responsibilities for looking out for the interests. One, is for the residential public, and the other is for small businesses. And they will evaluate the service as provided by an electric utility. And then that's part of what is factored into when they decide what will be a fair price for that electric utility to charge for its services.

PHILLIPS: If a utility is doing a poor job of responding to customer service interruption complaints what might the PUC do?

KROGER: Lower the rate that the electric utility can charge for its services.

OWEN: The rate of return to the utility?

KROGER: Yes. I would like to point out just a few things that might be helpful to this court. One, is that if you look at the back of the *CP&L* decision, there are the findings of fact and also the conclusions of law by the examiner. And there is a difference between the examiner who wrote that opinion, and the PUC which is approving up of the order finding that the limitation of liability provision is reasonable. And nowhere in the findings of fact or the conclusions of law does the examiner state that the courts have responsibility to review these for reasonableness. I am just pointing that out to further highlight the fact that that comment in there is really dicta by the examiner and was not something that the PUC when they approved the *CP&L* decision was essentially decided.

