IN THE SUPREME COURT OF TEXAS

═══════════

NO. 04-0751

═══════════

TEXAS MUNICIPAL POWER AGENCY, CITY OF DENTON, CITY OF GARLAND, AND GEUS F/K/A GREENVILLE ELECTRIC UTILITY SYSTEM, PETITIONERS,

v.

PUBLIC UTILITY COMMISSION OF TEXAS AND CITY OF BRYAN, TEXAS, RESPONDENTS

- consolidated with -

═══════════

NO. 04-0752

═══════════

TEXAS MUNICIPAL POWER AGENCY, CITY OF DENTON, TEXAS, CITY OF GARLAND, TEXAS AND CITY OF GREENVILLE, TEXAS, PETITIONERS,

v.

PUBLIC UTILITY COMMISSION OF TEXAS AND CITY OF BRYAN, TEXAS, RESPONDENTS

═══

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

═══

Argued October 18, 2005

JUSTICE BRISTER, joined by JUSTICE WILLETT, dissenting.

The Public Utility Commission "has jurisdiction over municipally owned utilities . . . to regulate wholesale transmission rates."[1] Yet the Court holds it cannot regulate those rates when the parties have a private contract, even if that contract itself recognizes that it is subject to governmental rates and regulations.[2] Requiring the Commission to act but denying it the power to act is, as James Madison wrote more than two centuries ago, contrary to both law and reason:

> No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.[3]

Because the Legislature has ordered the Commission to set these rates but the Court holds it cannot, I respectfully dissent.

We answered the precise question here in our 2001 opinion *Public Utility Commission of Texas v. City Public Service Board of San Antonio*.[4] There, we held the Commission could not set transmission rates by rule, but "[o]nce confronted with a dispute between utilities, the Commission can arrive at a reasonable rate to resolve that dispute."[5] This was just such a case, confronting the

---

[1] TEX. UTIL. CODE § 40.004(1).

[2] The parties' contract provided:

> **Section 28: Governmental Rates, Regulations and Laws.** The Contract shall be subject to all valid rules, regulations and laws applicable thereto, as promulgated by the United States of America, the State of Texas, or any other governmental body or agency having lawful jurisdiction or any authorized representative or agency of any of them.

[3] THE FEDERALIST No. 44, at 74 (James Madison) (J. and A. M'Lean ed. 1788).

[4] 53 S.W.3d 310 (Tex. 2001).

[5] *Id*. at 320.

Commission with a dispute between utilities about whether one was being overcharged for transmission.

The Court decides the Commission did not have jurisdiction here (despite what we said in 2001) because Chapter 35 of the Texas Utilities Code applies only when the Commission orders new transmission service after a provider has refused it. Nothing in Chapter 35 says so. To the contrary, section 35.004 requires the Commission to ensure that transmission rates are reasonable and nondiscriminatory, whether the Commission has ordered service or not.[6] Yet the Court holds the Commission can do no such thing.

Here, the Commission ordered only two things, both of which fall well within the powers the Legislature has granted to it. First, the Commission authorized Bryan "to nominate its own load" — that is, to report to the Commission its anticipated demand for transmission of electricity. Chapter 35 specifically authorizes the Commission to "adopt rules relating to wholesale transmission service, rates, and access,"[7] one example of which (as we said in 2001) is the power to order utilities "to make filings with the Commission."[8] As such reports are part and parcel of the Commission's

---

[6] *See* TEX. UTIL. CODE § 35.004(b) ("The commission shall ensure that an electric utility or transmission and distribution utility provides nondiscriminatory access to wholesale transmission service . . . ."); *id.* § 35.004(c) ("When an electric utility . . . provides wholesale transmission service within ERCOT at the request of a third party, the commission shall ensure that the utility recovers the utility's reasonable costs . . . so that the utility's other customers do not bear the costs of the service.").

[7] *Id.* § 35.006(a).

[8] *San Antonio*, 53 S.W.3d at 319 (citing 16 TEX. ADMIN. CODE § 23.67(o)).

administrative process and absolutely necessary for it to fulfill several statutory duties,[9] it is up to the Commission to decide who should make them. "When an administrative agency is created to centralize expertise in a certain regulatory area, it is to be given a large degree of latitude in the methods it uses to accomplish its regulatory function."[10] Moreover, this order can have no effect on the parties' contract; TMPA acknowledges in its brief that allowing Bryan to nominate its own load (as it did in 1997) neither amended nor modified their contract. Plainly, this administrative designation is one in which the courts have little interest and less expertise.

Second, the Commission's order changed TMPA's transmission charges alone — not its charges for generation, administration, or all charges when added together. The Court incorrectly says the Commission ordered more, requiring TMPA to reduce (1) transmission charges, *and* (2) the parties' contractual uniform sales rate.[11] The first is fact, the second is fiction. The Commission's last legal conclusion was that "Bryan is obligated to pay only those transmission charges established by the Commission." There was no legal conclusion setting aside the parties' total sales price, which is why the Court does not quote one.

---

[9] *See, e.g.*, TEX. UTIL. CODE § 35.004(d) ("The commission shall price wholesale transmission services within ERCOT based on the postage stamp method of pricing under which a transmission-owning utility's rate is based on the ERCOT utilities' combined annual costs of transmission divided by the total demand placed on the combined transmission systems of all such transmission-owning utilities within a power region."); *id.* § 35.007(a) ("Except as provided by Subsection (b), an electric utility that owns or operates a transmission facility shall file a tariff in compliance with commission rules adopted under Section 35.006."); *id.* § 40.004(7) (granting Commission jurisdiction "to require reports of municipally owned utility operations only to the extent necessary to: (A) enable the commission to determine the aggregate load and energy requirements of the state and the resources available to serve that load").

[10] *State v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 190, 197 (Tex. 1994).

[11] __ S.W.3d at ___.

Chapter 35 authorizes the Commission to oversee transmission service by or for municipal utilities like TMPA and Bryan, and to determine whether the terms of that service are reasonable.[12] One of the most important of those terms, of course, is price. Here, the Commission found that Bryan's transmission rates were unreasonable because they were the same rates as its sister cities, who were much farther from the generating plant. The statute clearly makes transmission rates the Commission's business, not ours.

TMPA says this order effectively requires it to unbundle its services. But at most, the Commission's orders require it to unbundle its bills, not its business. TMPA knows perfectly well what the transmission charges are for each city, as electricity for Bryan is transmitted over its own lines, and electricity for the remaining cities is transmitted over TXU lines at Commission-established rates. As TMPA reports in its own brief, since 1997 "transmitting utilities have made filings showing these costs without having to unbundle any existing sales contract." While the Commission's order in the Complaint Proceeding limited TMPA's transmission charges, it did not require TMPA to separate generation and transmission services or even bill them separately.

The order in the Rate Proceeding three months later arguably went further by stating that "Bryan is entitled to nominate its own load and take unbundled transmission service." But the parties' contract was never admitted in that proceeding or mentioned in the order, and the decision was based on the result in the earlier Complaint Proceeding which did *not* require separate services. The only issue in the Rate Proceeding was who should nominate the load, and the Commission

[12] TEX. UTIL. CODE § 35.005(a) ("The commission may require an electric utility to provide transmission service at wholesale to another electric utility . . . and may determine whether terms for the transmission service are reasonable."); *id.* § 35.001 ("In this subchapter, 'electric utility' includes a municipally owned utility . . . .").

promises that it intended to adjudicate nothing more when it ordered transmission service "unbundled." Based on this judicial admission,[13] this Court has no basis to presume otherwise. Thus, TMPA need not unbundle its services structurally or functionally to comply with the Commission's order — it can simply charge each city the rates that already appear in its own books.

Seizing on this ambiguity about unbundling, TMPA argues the Commission has abrogated the parties' contract. But while the Commission ordered that *transmission* rates had to be lower for Bryan than its sister cities, it never said anything about the *total* rate TMPA could charge. To the contrary, the Commission expressly denied exercising any authority over TMPA's power generation rates or the parties' contract. Thus, for example, if the Commission's transmission rate for Bryan was 5¢/kwh and for the other cities 10¢/kwh, nothing in the order here said TMPA could no longer charge each city a bundled price of 50¢/kwh — offsetting Bryan's lower transmission rates with higher generation rates. Whether doing so would violate the parties' power contracts is a question pending in the Grimes County litigation, and thus is not before us. All the Commission said here (and the sole ground for the trial court's summary judgment against TMPA) was that the Commission had jurisdiction to determine TMPA's transmission rates.

Accordingly, we need not decide today whether chapter 40 (effective September 1, 1999) applies retroactively. Even if it does, it still allows the Commission to regulate TMPA's

[13] *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) ("A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact.").

transmission rates,[14] which is all the Commission purports to do. While it expressly prohibits the Commission from ordering municipally owned utilities to unbundle services, for the reasons noted above that is not what the Commission's orders require.[15]

This dispute concerns electricity rates charged ten years ago. Those rates have yet to be recalculated based on our 2001 decision in *San Antonio*. After eight years, the parties' contract litigation in Grimes County has yet to begin in earnest, pending the outcome of this administrative appeal. And as the contract at issue here expires in 2011, the parties' litigation will probably last longer than their relationship. Meanwhile, the rest of the world has moved on, the Legislature having abrogated the result we reached in *San Antonio* two years before we wrote it.[16]

All this serves as a reminder why courts should think long and hard before getting involved in administrative rate-setting proceedings. In my view, it is past time to let the Commission get about its business. I would affirm the judgments of the courts below and remand these proceedings to the Commission.

Scott Brister
Justice

OPINION DELIVERED: December 14, 2007

[14] TEX. UTIL. CODE § 40.004(1) ("Except as specifically otherwise provided in this chapter, the commission has jurisdiction over municipally owned utilities only for the following purposes: (1) to regulate wholesale transmission rates and service, including terms of access, to the extent provided by Subchapter A, Chapter 35 . . . .").

[15] *Id.* § 40.054(e); *see also id.* § 40.055(a)(2) (vesting exclusive jurisdiction regarding unbundling to body vested with the power to manage and operate a municipally owned utility).

[16] *See Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio,* 53 S.W.3d 310, 327 (Tex. 2001) (Hecht, J., dissenting) ("What can be said with absolute certainty, however, is that the Legislature determined in 1999 that the Commission's postage stamp rate was consistent with the overall scheme of chapter 35 and the best way to achieve its purposes. In light of that determination, I do not understand how it is possible to conclude, as the Court does, that the exact same statute in 1995, minus the provision added in 1999, prohibited the Commission's postage stamp rate methodology.").