ORAL ARGUMENT – 12/12/01
01-0547
IN RE TXU ELECTRIC COMPANY

SIDE B.

OWEN: Why can't you give full relief under 262? Why can't that be totally fixed in the true-up if there is any over recovery?

BARRON: Because the commission believes that it has an obligation in the 2002-2004 period as well. Certainly things can be done in 2004.

OWEN: Is there anything that can't be done in 2004 in the true-up to fix this?

LAWYER: Yes. What cannot be done is in the interim period utilities that are shown truly not to have stranded costs, estimated stranded costs based on 2001 update, will be allowed to have the benefit in TXU's case $1.6 billion in over mitigation. Which would be discriminatory treatment during this interim period as against utilities that were put in the box that don't have stranded costs.

OWEN: That's my problem. Didn't the legislature put them in that box? The commission is now saying, well we'd rather use the estimate in 2001. When the legislature said no, we're going with the 1998 estimate knowing that it could result in negative stranded costs.

LAWYER: The legislature we submit did not say you're going with those boxes permanently and flexibly forever in stone. It's similar to the nonstandard true-up for which there was no express statutory authority.

OWEN: Based on the 1998 Ecom you're either in 254 or you're in 255.

LAWYER: With the qualifier that says that those two specific statutory provisions may not be permitted to be - the measures in them may not be permitted to be applied in a manner that results in over-recovery of stranded costs.

OWEN: Which is in the true-up provision, which can be remedied in the true-up.

LAWYER: But there's nothing in the statute that says that 262(a) is confined to 2004.

OWEN: What about the statutory provision that says under 256, that if the utility elects to redirect depreciation that the commission shall (and it sounds mandatory to me) take that and put it and use it in the rates in all future rates. Again, you're not doing that are you?

LAWYER: You can't read that literally. If you did it would flatly nullify 39.262(g), which does expressly authorize the commission in a future proceeding do that true-up. But more importantly than that, the predicate for that provision in 256 is that you have a utility that properly is eligible to mitigate the stranded costs.

OWEN: So basically you're saying 262 gives the commission the authority at any point in time to move utilities in and out of 254 or 255 depending on whether at a moment in time they are projected to have stranded costs or negative stranded costs?

LAWYER: That's not what the commission has claimed or done. What it has done is said when the legislature has directed us to conduct a 2001 stranded cost update based on...

OWEN: For the CTC? We all agree it's for the CTC.

LAWYER: Yes. And when the legislature says that no stranded costs including the mitigation provisions shall permit over recovery. 262(a) that latches on to those provisions. The commission believed that it has the flexibility within the statute to do what is obvious we submit that the legislature intended.

RODRIGUEZ: How do you reconcile 262(a) and your argument there with 201(l) that clearly starts two years after customer choice is introduced?

LAWYER: The (l) provisions address what the commission can do after 2004. They don't say anything, they don't address the time period - 2002 to 2004.

RODRIGUEZ: Didn't they address it by its omissions?

LAWYER: We submit not because of 39.262(a).

OWEN: Let's go back to 262(a). We don't know at this moment in time that there will be either over or under recovery of stranded costs do we?

LAWYER: The only thing we know - we do not know what the final evaluation will be.

OWEN: It's possible that the commission is wrong based on current estimates and that there will be stranded costs. So we don't know that there has been over recovery under the statute. Isn't that the predicate to 262?

LAWYER: No. That's half of the predicate. The other half of the predicate - the statute talks about over recovery of stranded costs. TXU asked you erroneously we believe to limit that to the final true-up provisions. The 254 and 256 mitigation provisions also talk about mitigating stranded costs, which is a concept that necessarily includes estimated stranded costs. Plus if you look underneath 262(a) to (b), that's a provision that's in there that addresses the 2002 - 2004 period. So

the mere fact that 262(a) is placed as part of the other provisions with the final true-up does not mean and there's certainly nothing expressed in the statute to say that the plain language...

OWEN: I go back to the basic fundamental premise. She says what gives this commission the authority to override other specific provisions in the statute, including the division of whether the utility with stranded costs goes under 254, or you're not, you go under 255. You say it's because it's triggered when there has been over-recovery of stranded costs. And we don't know sitting here today whether there has actually been over-recovery of stranded costs.

LAWYER: Our interpretation is that when the legislature used stranded costs in 262, as it used it in 254 and 256, that that encompasses also estimated stranded costs.

HECHT: In the order on certified issues the commission drew a distinction. It said that EMC is not a negative CTC and that it will address excess mitigation not excess market value over costs.

LAWYER: That's correct. There will be a different valuation there.

HECHT: But 262(a) only gives you authority over excess stranded costs, not excess mitigation. That's what the commission seems to be saying. The commission seems to be saying, you don't have to worry about whether this is a negative CTC because we're only dealing with mitigation.

LAWYER: That's right.

HECHT: But then the other side of the argument is 262 only says excess stranded costs. It doesn't say excess mitigation.

LAWYER: The excess stranded costs kicks in we say because 254 and 256 which talk about mitigation talk about mitigating stranded costs. A negative CTC is not what the commission did. It would be premised on the idea that there were indeed negative stranded costs. In this case, the estimate showed negative 2.7. A negative CTC would say, utility you need to pay back in a negative CTC that negative stranded costs up to zero. The commission didn't do that. Instead of starting with the premise saying you have negative stranded costs, the commission said our mandated/updated estimate shows you don't have stranded costs to beat mitigated. You are at zero. So you shouldn't be using the tools that are expressly designed only to reduce stranded costs. So that's the important distinction here.

HECHT: But there is no difference practically. The money is the money.

LAWYER: There's a $1.1 billion difference. In fact it's less than that because we're only talking about two years out of seven until the final true-up. The commission's order addresses $1.6 billion in excess mitigation out of a negative $2.7 billion in stranded costs. So this wasn't an attempt

to put in a negative CTC and true things up in blanket fashion. This was keyed specifically to the fact that utilities based on the legislative mandated/updated estimate should not be using tools to mitigate down nonexistent estimated stranded costs. Which is what 254...

HECHT: And I understand that's your position. But if the PUC's power is as broad as it claims under 262(a), it could have done that. It could have taken care of the other 1.1.

LAWYER: I think that's an unanswered question. The commission did not purport to do it. And I think there might be different statutory arguments that doing it all the way like that might indeed run afoul of what the legislature contemplated there.

PHILLIPS: How do you respond to Mr. _____ argument that the policy behind this legislation and this scheme is to err in favor of over-estimation of stranded costs so that you won't snuff out _______ competition after the true-up in 2004 by having a surcharge

LAWYER: If the CTC is eliminated it would actually tend to hurt competition by eliminating the competitive marginal.

PHILLIPS: It would be better to have competition start more slowly - 4 years later rather than have it start at first and then...

LAWYER: Certainly the legislature didn't say that. The legislature said two things. It said in 39.252(a), utility shall be permitted to recover its net verifiable stranded costs. But in 262(a) it said, utilities may not be permitted to over-recover their stranded costs through the application of any of the measures in this section.

PHILLIPS: So you're saying basically the over recovery doesn't mean what happens eventually - 7 years after the end of the final appeal. The over-recovery is month by month.

LAWYER: Not necessarily month by month but within the statutory framework that was provided to the commission. I don't think the commission as a practical matter could begin to do month by month. But that would be pure speculation. But there's certainly no bias in the statute in favor of over-recovery or in favor of going slow in the interim.

OWEN: Let me ask you what happens. Let's say that your estimates are wrong and gas prices stay low or even go lower and other variables converge so that when we get to the true-up in 2004 there is in fact $1 billion in stranded costs. Now you've got this charge that's in effect for 7 years. What does the commission do at that point and does it take away that charge?

LAWYER: Yes it factors that into deciding the commission has expertise in allowing recovery of large amounts over a length...

OWEN: But you agree that under the statute TXU is statutorily - it has to be able to

cover it's stranded costs?

LAWYER: Yes.

OWEN: And the commission would have to put in a charge on the T&D rates to recover those stranded costs?

LAWYER: Yes.

OWEN: What would that do to the competition at that point?

LAWYER: We don't know. And in fact that's one of the reasons - what we do know on this limited record is that we have a excess mitigation charge that begins to go into effect on Jan 1 in the amount of approximately for residential customers $2 as compared to an average customer's bill of almost $100. So we're talking about, because the commission spread out the recovery period, a reasonably constrained or limited period of time.

Now your question about what would happen, what the consequences are, I think illustrate in our view, not only that TXU cannot show in this record that it will be irreparably harmed but...

OWEN: I'm not talking about TXU. I'm just talking about the scheme. What does that do to competition if you're wrong in 2004 and there is $1 billion in stranded costs that TXU is statutorily entitled to recover? What does that do to competition?

LAWYER: The commission assess at that time what the appropriate schedule should be for taking that into account and imposing an appropriate CTC or addressing the level of T&D rates.

OWEN: But you're saying $2 is immaterial to competition now?

LAWYER: We submit that the record just doesn't show that at all.

OWEN: If it's not material it's not a competitive ________?

LAWYER: We don't know. And appellate courts do not have the authority to resolve factual disputes like that in mandamus proceedings. Which is why we think that the better factual record, the place to make a factual record on questions like that would be in a temporary injunction hearing ancillary to a regular administrative appeals...

OWEN: But the bottom line is the commission doesn't know what altering the statutory scheme, we don't know what impact it's going to have on competition now or in the future?

LAWYER: The commission has made no findings on that. It couldn't make any findings

out that. We've got this $2 amount for residential customers. TXU doesn't know. It may lose no customers to this $2 charge out of all the other costs variables. It may lose 500 customers. It may lose 1% of the market. But the big picture item I think is that the legislature said in this 3 year period, we think it's appropriate and entirely reasonable for the incumbent to lose 40% of the market within that 3 year time period.

OWEN: Going back to the statutory _____ for all this. In the order the commission says that one of the tools it's going to use is to first transfer TXU out of 254 as a stranded costs utility into a nonstranded costs utility. Move it into 255. And that one of the tools you've said available under 255 is to put in to some sort ______ the refund of excess earnings essentially. But under 255 that stops Dec. 31, 2001. There's no statutory authority even under 255 for refunding excess earnings past 12/31/2001. But now you're saying well close enough. We're going to call it that and we're going to extend it beyond the deadline in §255.

LAWYER: There are two different lenses through which the statute can be viewed. This is a transition to competition that the legislature understood carried with it the inevitability of unforseen consequences. And that's why 39.262(a) is in there to give the commission the necessary flexibility.

OWEN: So the commission was wrong when it said it can rely on 255, because that doesn't really give it the tool it needs does it?

LAWYER: What the commission did was look in good faith to the kinds of things that the legislature said ought to be done when you see that the utility doesn't have estimated stranded costs.

OWEN: But all my point is that 255 doesn't give the legislature authority for what it's done?

LAWYER: There is nothing that specifically says the commission shall do this. 262(a) in conjunction with the commission's obligation to set just and reasonable rates in 2002-2004 in conjunction with having to do the statutory mandated true-up is the basis for the commission's authority.

OWEN: There's something in the order on consolidated issues that I'm not sure I understand. The commission said that a transfer of funds from the unbundled successor generation entity to the TDU would be required to make up the revenue loss by the TDU due to the excess mitigation charge. This means redress would require certainty of funding perhaps through an escrow or fund or similar agreement. What does that mean?

LAWYER: I don't know that that's actually been implemented. I just don't know. But the concept is, that the excess mitigation charge reflects the excess _______, and the excess mitigation credit that the commission has ordered is reflected in that for residential customers $2 less that will be charged by the T&D utility to ________ cost savings to each of the affiliated retail providers,

including TXU, the monopolist.

What the commission is saying there is that TDU is getting that $2 cost break to the retailers. But it shouldn't be held responsible for that because the mitigation, the question of stranded costs lies with the generation company.

OWEN: Right now it would be coming out of _______ of the T&D and there's going to have to be some transfer of money. Again where does this statute contemplate?

LAWYER: The statute does not specifically say that. The statute doesn't specifically say that despite the detailed way of allocating revenues for recovery of securitization on securitization bonds, that there can be an adjustment to that. And yet this court recognized the flexibility in the statute to deal with circumstances that clearly in our situation comport with what the legislature obviously intended, which is that utilities that have estimated stranded costs by all means should use the stranded costs mitigation provisions and utilities that don't should not. And that's a judgment that's true to the structure of the statute. It's fair to utilities all the way around to the ratepayers and to the competitors as well.

RODRIGUEZ: Based on your experience this true-up proceeding, which as I understand it can't start until Jan 2004, here we are 1-1/2 year after the 2000-2001 proceeding, how long does the true-up going to last?

LAWYER: I think that that is an excellent question that I don't think anyone here knows the answer to. But there are a lot of things to be done and if the length of time that this proceeding has taken is any measure, we're talking perhaps a better part of the year.

The affiliated retailer must charge only that price, the price to beat for 3 years or until it loses 20% of its market.

RODRIGUEZ: The three years would run out Dec. 31, 2004?

LAWYER: Up to 2005.

RODRIGUEZ: Am I correct in thinking - assume that the true-up we find there are in fact negative stranded costs. We need to drop the T&D rates. The affiliated REP will be able to come down with everybody else, with all the new competitors too right?

LAWYER: Yes. And in fact the affiliated REP can do that right now for everybody except for the large industrials. It's not constrained by the price to beat at all for the large industrial customers.

RODRIGUEZ: So by the time we finish the true-up headroom is not going to be a question. It's not going to be guaranteed to anybody by statute.

LAWYER: That's right. Once the price to beat goes away. The affiliated _______ may depart from that price to beat after three years or when it loses 40% of the market. It must continue to offer that anyway.

RODRIGUEZ: To the people who want to pay more, the price has gone down.

LAWYER: Yes.

OWEN: In both TXU's and Reliance Energy's brief they talk about that in the 1998 Ecom report to the legislature that there was a range of values in there. And that depending on what assumptions that you looked at in the future, what came to pass, it was pointed out to the legislature that there could be as much as $1 billion in stranded costs for utilities or there could be as much as $1 billion in negative stranded costs for utilities. Do you disagree with that?

LAWYER: No, not at all.

OWEN: So the legislature knew when it enacted this legislation that in adopting the 1998 Ecom model there could be negative stranded costs?

LAWYER: It knew that there conceivably could be. It also directed the commission to do that update based on a 10-year for _______ natural gas prices beginning in 2001. If you reach the merits of abuse of discretion under the statute within this case, the question is is the provision for doing the updated stranded costs estimate to be disregarded by the commission and limited only to the CTC and a blind eye be turned to that with respect to the $1.6 billion in mitigation...

OWEN: Just so we're clear now. I thought you said when it comes down to it, 262 is what you hang your hat on. Do you agree that there is no express authority in 201 dealing with the CTC and with T&B charges during the transition. No express authority to use an updated Ecom model?

LAWYER: Absolutely correct. The commission is relying on 39.262(a). It is putting two and two together. It is relying on that, which operates as the express qualifier on these other provisions. It's relying on the fact that it was required by the legislature knowing that it chose a base case estimate in 1998 to do a 2001 estimate...

OWEN: For the CTC?

LAWYER: Yes. And it is relying on its responsibility to set just and reasonable rates for a fully regulated team to utility based on what the appropriate amount of depreciation should be for the 2002 and 2004 period. Those are the three prongs of the basis I think on which the commission reasonably acted and I think the statute provides that flexibility.

JEFFERSON: But if we disagree that 262(a) applies here that it is really meant for a true-up

proceeding in 2004 do you lose?

LAWYER: We don't lose - we lose - I think if you reject that argument, we lose on the question of whether there's been an abuse of discretion. But we do not at all lose on the question of whether or not TXU has an adequate remedy by appeal, or indeed, whether this case - this is a proper case for the exercise of this court's jurisdiction in the first instance.

OWEN: But you agree that if it's decided by appeal that no court can go back and recreate the situation as of Jan 1, 2001? We can't ever put the statutory scheme back into place?

LAWYER: We don't know how much difference it will make if any. All we have is $2. We may know. We would know better if we were allowed to have a temporary injunction hearing if TXU believed it could present evidence to document what the impact would be. But we have next to nothing.

OWEN: We would all be estimating out in the future. Nobody can say with any certainty what would have happened if the legislature's scheme had been followed verses the scheme the commission has chosen.

LAWYER: We would at least have some kind of idea about what perhaps the likely impact would be on the size of a customer's, whether it's a ______ amount of customers that might be lost due to this piece of the rates, or whether it might be significant. And also some idea about what Reliant calls the need if this excess mitigation credit is invalidated to look at the other side of the coin, to look at all the collateral consequences and see if the price to beat therefore needs to be jacked up, which is the position that Reliance takes.

OWEN: An appellate court at that point couldn't go back and say okay, let's start the race all over again?

LAWYER: That's what temporary injunctions are there for if there is really a record to be made on whether something will happen. But frankly what I heard counsel say when they got up here is not that they are even relying on the fact they may lose some customers in the meantime. It's the fact that this is the statutory scheme and that the legislature has specifically said it must proceed on a day-by-day basis in this matter. We think that the proper focus is lose 40% in three years. And what the commission did is well within what the legislature intended about which utilities truly should be able to apply the mitigation tools.

* * * * * * * * * *

LAWYER: Justice Owen you raised the question about whether an Ecom model would show the same result if it was run right now based on today's gas prices. And as Mr. Barron alluded to, the statute requires a forward looking natural gas price. And so the Ecom model, the gas price that was actually used in the Ecom model was the net present value of a 10-year forward gas price. So

it wasn't just a spot price.

OWEN: My only question would it be different if it were run today? Would it be higher or lower?

LAWYER: It would certainly be different because the net present value of a 10-year forward looking gas price would be different. I don't know if it would be higher or lower. It's impossible to say. It is true that the Ecom model is clearly extremely sensitive to gas prices. But that's not the only input. There are dozens of inputs that's equally important. It's also sensitive to other things like depreciation rates.

Mr. CJ, you and a couple of other justices have asked about the impact on competition in 2004. To some degree that issue is a little bit of a red herring for this reason. Mr. Duggan said that if it turns out that there is going to be positive stranded costs in 2004, and there would be a high CTC set at that point, that could impact headroom. Headroom is a relative concept. It's the difference between the price to beat and all of the non___________ charges including CTC.

So yes if you held the price to beat constant and you increase the CTC, the headroom would diminish and that could have a negative impact on competition clearly. But the legislature contemplated that and in 39.202(k) clearly gave the commission the authority to revisit the price to beat following the 262 true-up proceeding.

HECHT: You mean the 262 broad power and the true-up proceeding?

LAWYER: Everything. That's right. And so to the extent that the price to beat is actually adjusted upward headroom can be maintained. And there wouldn't be necessarily any impact on competition. The price to beat will last at least 36 months.

RODRIGUEZ: The rules for procedures aren't even issued until Jan of 1994. How much price to beat is going to be left when the true-up is over?

LAWYER: I think it's a fair assumption that the true-up proceeding will be hotly contested and will probably take a long time to work it's way through. The price to beat will be offered for 60 months though.

RODRIGUEZ: But everybody believes competition is going to lower the price below price to beat.

LAWYER: I don't think that everybody believes that. If the market price of power after the 36 month period is higher than the price to beat, the reason the price to beat was put in there was to give residential customers price protection. And so that price to beat could still be very relevant after 36 months if the market price of power is too high.

When you talk about the effect on competition, we're really talking only about the effect of competition on price to beat customers, which are mainly residential, small commercial customers. For the large commercial, industrial customers the affiliated rep may charge anything that it wishes and compete equally with all other reps.

Justice Owen asked about 254 and 255, which clearly set out the treatment of utilities that had stranded costs estimated as a result of 1998 Ecom model and those that didn't. I think that a more general view of those two sections simply reveals a legislative intent to treat utilities without stranded costs, without estimated stranded costs differently than those with estimated stranded costs. And the ones without estimated stranded costs are not allowed to mitigate. And it's quite clear that based on the latest estimate of stranded costs, that the commission conducted pursuant to 201 shows...

OWEN: If they wanted to do that, why didn't they just say well if at any point in time or up until 2001 or up until 2004 it appears that they won't have stranded costs, then they are not required to mitigate. Instead what they said is, based on the 1990 Ecom you go in this category and you are directed not - you don't even have the option - you've got to apply excess earnings in a certain way. And it's not even an option. Given that definitive statutory directive, you use a 1998 Ecom model and you are told how to apply your excess earnings, how can the commission get around that express directive?

LAWYER: I think that what 254 and 255 indicate is that legislative intent to not allow utilities with estimates of no stranded costs to mitigate.

OWEN: If that's true, why did they pick the 1998 Ecom model? Why didn't they just say...

LAWYER: Because frankly I don't think it was contemplated that a utility that had positive Ecom in 1998 that that utility would eventually have negative Ecom as a result of the 2001 model.

OWEN: Well you said it wasn't contemplated. Didn't the 1998 Ecom model show a wide range that could be negative Ecom as high as $1 billion or more?

LAWYER: I'm not familiar at all with that 1998 Ecom model run.

OWEN: So you really don't know why it's contemplated?

LAWYER: No. But I'm saying that it's consistent. It's a consistent way to harmonize 262(a) and 254 and 255 to read into that the legislative intent. And I think that is clear.

OWEN: Even though they said 1998?

LAWYER: Even though they said 1998. That question I think is related to Justice Hecht's

question about couldn't the PUC simply review at anytime and continue to update the Ecom model. I think the answer to that is no because as a practical matter, as a legal matter, on Jan. 1, 2002 the commission does not any longer have jurisdiction over the bundled utility. In fact there is no bundled utility anymore. It's three different companies and the commission only has jurisdiction over the T&D utility.

HECHT: So you disagree with Mr. Barron on that?

LAWYER: I disagree with Mr. Barron to the extent that Mr. Barron said that the commission can look at the integrated utility after 2002.

HECHT: Do you think the hospitals, colleges and universities are correct that §39.262(e) limits the amount of over-recovery of stranded costs that can be ______________?

LAWYER: I frankly don't think that they are correct. I think that relates back to the difference between market price and price to beat, then goes back to the price to beat customers in the form of the retail callback.

HECHT: Mr. Barron is shaking his head. That's the PUC's position, too, Mr. Barron?

BARRON: I think that is the correct interpretation.

* * * * * * * * * *

REBUTTAL

LAWYER: Counsel for the commission has said that there are at least two lenses to look at this statute through. I don't care what lense you look at it through, and no matter how you squint through those lenses, you cannot make a statute that says excess earnings shall be applied to the book value of generation assets. Mean excess earnings shall be delivered to retail electric providers.

RODRIGUEZ: So you read .254 is absolutely the law. So if you sold your nuclear plant in 1999, you could transfer any depreciation and applying excess costs to it?

LAWYER: I don't know if you sold your facilities. I think that is provided...

RODRIGUEZ: If the stranded costs went away by selling the nuclear plant of course you couldn't continue to use 254.

LAWYER: I think I would have to concede that as a matter of practicality.

RODRIGUEZ: So isn't that what the PUC is saying: Your stranded costs may have gone away with the price of natural gas?

LAWYER: They may or they may not. We don't know anymore than the commission does. And the whole point here is that 262 does not say you may not over-recover your projected stranded costs or your estimated stranded costs. It says you can't recover your actual stranded costs. A number that has not and cannot be yet determined. No matter how you look through those lenses you can't make a statute that says the commission shall accept redirected depreciation for rate making purposes mean we're not going to accept it and furthermore we're going to reverse it all right now.

You can't make a statute that says as 254 does, each electric utility that was reported by the commission to have positive Ecom denoted as the base case in their 1998 update must mitigate their stranded costs mean that they must mitigate those stranded costs unless the commission deems otherwise. This is not a case like the securitization cases in which the statute expressly provided for interim true-ups and true-ups that had to occur at least once every year under 39.307 to avoid the death spiral problem. This is a case in which the commission is not given that statutory authority. But to the contrary is given express authority to do specified action at a specified time. That time has not come. The predicate for that authority has not yet occurred and can't be known by anybody until the true-up is done.

HECHT: Was there any effort in this extensive record to calculate what the headroom is likely to be in January of next year?

LAWYER: At the time this record was made, the price to beat had not yet been set. So, no, there was no such calculation. The price to beat has now been set. It's still within the commission's jurisdiction. Motions for rehearing are pending.

HECHT: If we decide that the PUC acted within its authority, then that's it for this case. If we decide the opposite what would happen? A remand I suppose would be necessary to the commission.

LAWYER: I don't think so. These are very discrete portions of the commission's rate order. I think we could file new tariffs within 5 days after an order from this court.

HECHT: Is it mostly a mathematical calculation?

LAWYER: It's only a mathematical calculation. If the excess mitigation credit is gone and the reversal of redirection is gone it's a mathematical calculation we could do within 5 days and file new tariffs.

OWEN: Doesn't that affect your rate somehow? Does the commission have the authority if we were to decide the commission erred and they can't do what they did can they take into account now the depreciation and all of that in setting your T&D rates?

LAWYER: I think that would follow as a matter of law. If these orders were vacated then that depreciation would be in the rate base and the excess mitigation credit would not be there and

a mathematical calculation could be done as to what the rates would be.

OWEN: And you say it's mathematical. The commission says in its brief that it can't calculate just and reasonable rates if a utility has over mitigated. What's your response to that?

LAWYER: Just and reasonable is not carte blanche. Just and reasonable is circumscribed by the statutes passed by the legislature. A rate that is promulgated in express violation of the statutes is not by definition just and reasonable.

OWEN: Why wouldn't we have to remand to allow them to reset your T&D rates in light of all...

LAWYER: Because they have made those determinations already in the order. They have made the determinations of what rate base is and what a reasonable return is. And the fact that they _________ on top of that these illegal orders does not mean that what they did in the other parts of the rate are incorrect.

ENOCH: Can we assume the PUC would not reconsider other parts of its order if they are told they cannot impose these particular items?

LAWYER: I think you should make that assumption. The opposite assumption is that the commission is making end result reasoning to reach its rate orders, which it is not suppose to do. It is suppose to follow the statute, exercise its discretion and do a rate that follows the statute. These are not areas in which the commission has any discretion. These are areas in which the statute says what is going to happen.

ENOCH: You said that this has nothing to do with rates. Whether the issue _____ stranded costs has nothing to do with rates. That's a separate deal.

LAWYER: No. What I said was that the 1998 estimate had nothing to do with rates. That is what was incorporated in the statute to determine which utilities were subject to the mitigation provisions. The estimate that they have done now has a big impact on rates because of what they have done with it - this extra statutory credit.

ENOCH: If we simply say they can't do that, then we need to send it back to the PUC for them to reconsider their rates.

LAWYER: Not necessarily because the commission has made those other determinations that go into a rate case. It is determined rate base. It is determinated a reasonable rate of return. It is determined the utility's operating expenses. Those determinations are not dependent upon the excess mitigation credit or upon the reversal of redirected depreciation.

ENOCH: But you're required to refund something somewhere aren't you?

LAWYER: Yes. And that is what we are asking the court to order the commissioners to vacate. So that credit would go away.

ENOCH: It would affect what ratepayers will be paying in the future but we should make that determination, not the PUC?

LAWYER: No. It has no impact upon our price to beat. That is set in a separate proceeding. What it has an impact on is the costs that competitive retail electric providers will have to pay for distribution service.