Westlaw.

For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Nicholas Traxler, Petitioner
v.
Entergy Gulf States, Inc., Respondent.
No. 10-0970.

November 10, 2011.

Appearances:

Jane S. Leger, Provost Umphrey Law Firm, L.L.P., Beaumont, TX, for the Petitioner.

Jacqueline M. Stroh, The Law Office of Jacqueline M. Stroh, PC, San Antonio, TX, for the Respondent.

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.

CONTENTS

ORAL ARGUMENT OF JANE S. LEGER ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF JACQUELINE M. STROH ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JANE S. LEGER ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0970 Traxler v. Entergy Gulf States.

MARSHAL: May it please the Court, Ms. Leger will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JANE S. LEGER ON BEHALF OF THE PETITIONER

ATTORNEY JANE S. LEGER: [inaudible] and may it please the Court, the question the Court must decide in this case is what the legislature intended back in 1949 when they used the term, transmission line in article 1436a. The Petitioner urges that this Court should adopt an ordinary as opposed to a technical meaning for the term, transmission line just as the Jacobs court did over half a century ago. Since the Jacobs court gave the term, transmission line as ordinary meaning of merely a line that transmits or carries electricity, two other courts of appeals have heard similar cases and reached an identical result. All three of those cases had writ refused by this Court and this Court found that there was no reversible error. Those other two cases were the Holder case in 1964 and the Cockrell case in 1967. More significantly, however, over the last half century, the legislature has three times acted to either amend or codify the 22-foot line height requirement originally set forth in 1436 and failed to supply any meaning different then the ordinary meaning that the courts have given it during judicial interpretation.

JUSTICE EVA M. GUZMAN: Does it matter that the three cases that you cite interpret the term, consistent

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

with earlier versions of the statute? I mean should we attach any significance to that?

ATTORNEY JANE S. LEGER: No, Justice Guzman, I don't believe so because it's clear in the three courts' opinions that consider that issue. The Jacobs, the Holder and the Cockrell court were all interpreting to a certain extent 1436a and the reason I know that and the way the Court can know that when you review those decisions is that if the court uses the term, transmission line, that term did not appear originally in 1436. In 1436, the term, that was used was merely lines. So when a court is referring to transmission lines when they're referring to the statutes, we know it has to be the statute as it was enacted in 1949. I believe that this Court has recognized in the past that in light of judicial interpretations and subsequent action by the legislature where they do nothing to correct or change the judicial interpretations, that that failure to act by the legislature is significant and it speaks volumes. The volumes that it speaks is that the legislature agrees with what the courts have done and that the legislature by not adopting it different or a technical interpretation of the term, transmission lines is presumed to have accepted the judicial interpretations that have been given to that term. As the court said, in Fiese v. State Farm, stare decisis, stare decisis, I'm sorry, has its greatest force in cases construing statutes and that's partly because of the legislature's ability to act, to correct errors that they may perceive on behalf of the court. The Respondent in this case and the other electric utilities that have filed an amicus brief, urge this Court to adopt a technical definition based on voltage. Just as the Court of Appeals did, the Ninth Court's error was in it's assumption that because the Public Utilities Commission provided a definition for transmission line based on voltage in its economic-based regulations, that the term, transmission line has as a result acquired a particular technical meaning. The Ninth Court was wrong in that assumption and I'll give you three reasons that I believe demonstrate why the Ninth Court was wrong. First of all, the Public Utilities Commission was not enacted until 1977; that's when they began their regulations. There is no way that the legislature acting back in 1949 could have intended a technical definition that did not come into existence until 28 years later. Also, back then there was a big difference in how electrical energy was transmitted. Secondly, the second reason that I believe the Beaumont Court of Appeals the Ninth District got it wrong is that the term, transmission line has not, even as of today, acquired one standard or generally accepted technical meaning. That can be demonstrated by more than a half dozen facts and I'll do that for the Court. I think it's important to start where the Ninth Court of Appeals started and that's at the Texas Administration Code Title 16 Chapter 25. In that, in those regulations the Public Utilities Commission specifically limited their definitions for use in that chapter, but more importantly, the Public Utilities Commission included a severability clause. This was not in the brief that I think it's a point that should not go unnoticed by the Court. In Title 16 Rule 25.3, the Public Utilities Commission specifically said, nothing in these regulations should relieve or will relieve duties that currently exit, duties that are owed by electrical utilities under state or US laws. So I think the fact that the Public Utilities Commission made the statement that enacting these regulations, we don't intend to relieve any of our existing duties. They made it very clear that they were acting only for their economic regulation purposes.

JUSTICE DON R. WILLETT: And separately there's the TxDOT definition, which is broad also.

ATTORNEY JANE S. LEGER: Yes, Justice Willett, the TxDOT regulation says, power lines or I believe its electric lines have to be at a 22-foot height when it comes to vertical clearance. So I believe that TxDOT who does have a safety function and is responsible for a totally different area of regulation than the Public Utilities Commission, when they interpret the statute, they interpret it as a 22-foot requirement for all lines that carry electricity and the reason for that is because they're dangerous.

JUSTICE DEBRA H. LEHRMANN: Can I ask you is there anything in the record about the standard industry practice in a state with regard to heights? In other words, is this, is this decision going to make these lines have to be heightened or was there any could you expound on that?

ATTORNEY JANE S. LEGER: That's a very good point because there was one expert in the area of power transmission who testified and that was Dr. Russell from A&M. His testimony was not contradicted in the trial court and what he said, is that most utilities recognize the 22-foot for all lines. In fact, I think the jury was probably persuaded not only by his testimony, but by Entergy's own internal document, which is in the record as

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

plaintiff's Exhibit 45, which shows that as for certain distribution lines, they adopt the Texas Utilities Code 22-foot requirement. So I think the jury questioned or had a reason to doubt Entergy's argument in this case that the reason between the 22 foot didn't apply to this line is because they characterize it as a distribution line, yet in their own clearances they say it would apply to a distribution line. So I think Exhibit [inaudible]--

JUSTICE NATHAN L. HECHT: Does the National Electrical Safety Code distinguish between distribution and transmission?

ATTORNEY JANE S. LEGER: It does not.

JUSTICE NATHAN L. HECHT: Why does it have a lower standard?

ATTORNEY JANE S. LEGER: It's a minimum standard and most states and you can, when you look at Plaintiff's Exhibit 45, you'll see that they address the standards in Arkansas, Louisiana and Texas and Mississippi, I believe as well, and that most states adopt a higher vertical clearance requirement.

JUSTICE DON R. WILLETT: Did you hit your third point as to why the Ninth Court of Appeals was off base?

ATTORNEY JANE S. LEGER: A little bit in response to Justice Lehrmann's question in that is that the Ninth Court recognized that when you want to assign specific technical meanings to these terms that one of the important places to look to see if the term, has acquired a technical meaning are experts in the field. Dr. Russell teaches electrical power transmission at A&M. He's worked for Entergy in the past. He testifies in front of Congress. He is on the committee that puts out the National Electrical Safety Code and he says that, there is no one meaning to the word, that it is different from utility to utility and that they all adopt their own meaning. So I find it odd that the Ninth Court of Appeals would say that if experts use a word, it shall have that meaning but then the court completely and without explanation ignored all of Dr. Russell's testimony.

JUSTICE EVA M. GUZMAN: Did you want to touch on the duty issue at this point?
ATTORNEY JANE S. LEGER: I want to talk, are you referring Justice to Chapter 752? I do want to touch on that because I think it's important and goes to how the jury was charged in this case. Entergy believes very firmly, as they've stated on page 33 of their brief, that they have no duty under Chapter 752 of the Texas Health and Safety Code. I dispute that and believe that the cases, such as the Ringo case and the Sisson case that are cited in the briefs say that it is a mutual duty. It is hard for me to imagine how a company that may have workers that would have to be in close proximity to power lines, how that company could unilaterally reach a mutual agreement about how the hazard of power lines would be handled.

JUSTICE EVA M. GUZMAN: On whom does the statute impose the duty if you will to make that contact and begin the process of that mutual--

ATTORNEY JANE S. LEGER: I think there are two duties under that statute. I think initially there's a duty to notify and that would be on the employer. And I think that that is why the jury assigned the majority of the fault for what happened to Mr. Traxler to his employer. The employer without dispute has the obligation and there are cases that have interpreted that and say that that they have the duty to make the call. But once that's done, then the duty is a mutual one and the duty is for the electric utility provider and the company that's going to have to work in close proximity to their lines reach an agreement to do one of three things and that's very clear in the statute and it's clear in the Ringo case and the Sisson case that you must either deenergize the line, which that is not something my client's employer could have done. You must temporally move, relocate or raise the line or finally, you must provide mechanical barriers that will provide separation so that contact cannot be made.

JUSTICE DON R. WILLETT: Would the Court even reach the duty question if we adopt your definition of transmission line?

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY JANE S. LEGER: No, sir. I do not believe so. One of the reasons that I think it's important for the Court to recognize that there is a duty under chapter 752 on the electric utility provider is that the legislature in its infinite wisdom has realized that it's not enough to tell people who are going to be working around power lines to be careful, to beware, to watch out. The legislature has recognized by virtue of an act in chapter 752, that 600 volts and above is dangerous and dangerous to an extent that special precautions are mandated and those precautions involve necessarily the involvement of the utility and their agreement as to how, or which one of the three ways will be employed to minimize the danger of electrical contact.

JUSTICE NATHAN L. HECHT: I was a little unclear about the voltage in this line. Some reference seven to eight thousand, is that right or?

ATTORNEY JANE S. LEGER: Yes, Your Honor. In fact, the same voltage that the Jacobs court held was a transmission line. I think the confusion that could be created here is that a distribution line is not a transmission line and I think the cases have made it very clear that that is not the case. That if you were to think of this in terms of a logic diagram, you would have a big circle that would include the category transmission lines and within that circle, you would have a smaller circle totally consumed by the larger circle, the smaller circle would be distribution lines. So that under the judicial interpretations, a distribution line is always a transmission line just by virtue of the fact that based on an ordinary meaning, it carries or transmits.

JUSTICE DEBRA H. LEHRMANN: Let me just ask you real quickly if we do get to the duty issue and let's say the call is made by the company to let the utility company know that we have this issue going on and then are you saying, what are you saying that they should do at that point in time because for them to reach an agreement, a lot of what you're suggesting it sounds like it would really be beyond what the company could do, right, the moving company I'm referring to.

ATTORNEY JANE S. LEGER: Yes, Justice Lehrmann, what the obligation is once contact is made and what was testified to by two people who have done that job for Entergy in the past is that Entergy would then go and look at the location where the work is going to be done near the line. Evaluate it in terms of what does the line look like, what does the equipment look like, what does the roadway look like, what does the foliage surrounding the area look like and then decide out of the three ways a statute provides that you can address that hazard, which one are we going to employ. Are we going to de-energize, move it or provide mechanical barriers? I see that I'm almost out of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: You're out of time, but are there any other questions? Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court Ms. Stroh will present argument for the Respondent.

ORAL ARGUMENT OF JACQUELINE M. STROH ON BEHALF OF THE RESPONDENT

ATTORNEY JACQUELINE M. STROH: Thank you. May it please the Court, Petitioner is incorrect in his assertion that section 181.045(b)(2) and its additional 22- foot height requirement applies to the line in question, which was without dispute a distribution line that crossed over a municipal street. [inaudible]

JUSTICE EVA M. GUZMAN: Did the functional differences between the lines is that what makes a distribution line not always a transmission line?

ATTORNEY JACQUELINE M. STROH: Did you say functional distinction? Yes, that's certainly one basis on which to distinguish between transmission and distribution lines. It is a distinction that Dr. Russell recognized in his testimony. He did not testify. His Petitioner represented that there is this mush between distribution and transmission lines. While voltage has certainly changed over the years, the functional distinction between lines

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

that transmit electricity over long distances and high-voltage lines for ultimate distribution to the ultimate consumer, that functional distinction has existed since at least the 1890's, has been recognized in Texas cases since the 1930's, was introduced in the legislature at least by 1949 when article 14.36(a) was enacted. So yes, that's certainly one distinction. Another distinction, of course, is the voltage-based distinction which the PUC administrative provisions make, but certainly a clear line can always be drawn between transmission and distribution lines based on their function. Moreover, the PUC definitions and whether you give any meaning at this point or what meaning you give to transmission and distribution lines is a red herring. Section 181.045(a) and (b), in fact, throughout Chapter 181, in other provisions of the Texas Legislature, including most significantly section 38.004 of the Texas Utilities Code, which we cited and also the Amicus brief cites, there are distinct references to transmission and distribution functions. Distinct references particularly in section 38.004, which pertains to clearance requirements for utility, electric utility lines. Distinct references are made to distribution and transmission lines and then you have what stands in stark contrast to that distinction, the singular use of the phrase transmission lines in section 181.045(b)(2). It simply cannot be said that, the legislature intended to refer to distribution lines in that provision where elsewhere when it intended to refer to both transmission and distribution lines, for example, in subsection (a) when it sets forth the generally applicable height requirement, it referred to both. It simply cannot be said that, the legislature intended to refer to all lines in that exception when elsewhere when it intended to refer to all lines, it used the phrase all lines. For example in section 181.042 when it gives the authority to construct lines generally. For example in section 181.045(c) when it requires all lines to be 22 feet above railroad tracks and railroad site.

JUSTICE DON R. WILLETT: What about the TxDOT definition, which is a bit more generic and inclusive?

ATTORNEY JANE S. LEGER: The TxDOT definition is a function definition, which is what Justice Guzman and I were discussing and if you look at those specific definitions, distribution line is defined as that part of a utility system connecting a transmission line to a service line. If you look at the definition of transmission line, it's defined as that part of a utility system connecting a main energy or material source with a distribution system. So there again is a clear functional line between the two. But I would just like to. Oh sorry.

JUSTICE DEBRA H. LEHRMANN: but let me ask you. Excuse me. If the statute's intended purpose is to protect public safety, then why wouldn't a higher standard better meet that purpose?

ATTORNEY JANE S. LEGER: Well, I don't know that I can ever know why the legislature did what it did or we can know why the legislature did what it did. We can know only by looking at the plain language certainly that it did limit the height requirement to transmission lines that cross over state highways and county roads, but there certainly is a logic to it. For example, it makes sense with respect to distinguishing between transmission and distribution lines. The height, transmission lines are more often found in rural areas, areas that you will more often see bigger equipment, larger vehicles on the road than you would see in municipal areas, which are where you would find more distribution lines. In fact, the Jacobs case noted that very fact when it said, explaining with respect to the road in question that it was a rural road in an agricultural and oil field area of which trucks, machinery, etc., would be used requiring greater clearances. That's certainly one basis, but again, you know as the Court has said, must look to the plain language of the statute. And when you've got utilities that are relying on that plain language of the statute in determining how to construct tens of thousands of miles of distribution and transmission lines, certainly it is reasonable to hold them only to look to the plain language of the statute and when the plain language refers to transmission lines only and not only transmission lines, but to transmission lines that cross only state highways and county roads as opposed to those that cross over municipal streets. It's certainly entirely reasonable and wholly appropriate to allow those utilities to rely on the plain language of that text.

JUSTICE DON R. WILLETT: What about opposing counsel's point that we're looking at language trying to divine the intent of lawmakers in 1949, over a half century ago. PUC came along 20-plus years later so why are we looking at how to interpret a 60-plus-year-old statute through the lens of an agency that came along three decades later?

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

ATTORNEY JACQUELINE M. STROH: Again, the PUC definitions are red herring. All this Court need determine is that the statute, Chapter 181, makes a distinction between distribution and transmission lines period. The Court doesn't have to, at this point, assign any specific meaning to transmission or distribution lines because in the trial court, Dr. Russell testified unequivocally that the line in question is, a distribution line under any and all definitions that exist now and that existed in 1949 when article 14.36(a) was enacted. And he testified to that as to both the functional meaning or the functional distinction between transmission and distribution lines and also with respect to the voltage-based distinction.

JUSTICE DON R. WILLETT: So you're not hanging your hat on how the CA on their analysis where they adopted this technical PUC definition.

ATTORNEY JACQUELINE M. STROH: No. I think it's reasonable, but I think the court could, number one, not assign any specific meaning at all and simply limit itself to finding a distinction. Clearly, the legislature intended a distinction between distribution and transmission lines in Chapter 181. Or if the Court wants to assign a specific meaning, it could look with reference to what text dot has done and there is case law saying that, of course, statutes can borrow from one another from administrative provisions, from other statutory provisions when attempting to assign meaning to a particular term. But certainly the Court could look to the function based distinction which is a very clear-cut line or the Court could look to the PUC and its voltage-based distinction and definition and give meaning to transmission and distribution lines based on that. We acknowledge that transmission and distribution line voltage has changed over time. I mean since electricity was invented, of course, the voltages have increased as technology has developed, but it's incorrect to say that Article 14.36(a) in its terms transmission and distribution lines is frozen in some sort of statutory time capsule and is so inflexible as to not allow for technological developments to inform its meaning. Of course, they do.

JUSTICE NATHAN L. HECHT: You refer to Dr. Russell and the Petitioner says, he testified that most utilities adopt the 22-foot standard for all lines. Do you agree with that?

ATTORNEY JACQUELINE M. STROH: I don't recall that testimony, but if he did, it doesn't matter because by virtue of Chapter 181, the important industry reference is the National Electrical Safety Code and the IEEE, which is the board or the body that set forth the NESC requirements. Moreover, I think that the technical meaning that you're giving to the terms transmission and distribution lines are clearly understood by utilities. I mean the statute's directed to the utilities themselves. They know what transmission and distribution functions are and they know the difference between transmission and distribution lines.

JUSTICE NATHAN L. HECHT: Let me make this argument to you and get your response.

ATTORNEY JACQUELINE M. STROH: Sure.

JUSTICE NATHAN L. HECHT: In 1911, the legislature said, all lines had to be 22 feet high. In 1949, they seem to say that only about transmission lines. Then two courts come along and say well, regardless of use of the word transmission, they meant all lines. So in 1967, the legislature comes along and repeals the 1911 statute because--

ATTORNEY JACQUELINE M. STROH: It didn't repeal it at that point; it just removed the 22-foot high requirement.

JUSTICE NATHAN L. HECHT: Right, because it didn't make any difference anymore. The court had already interpreted transmission as meaning all lines so that's why it should mean all lines.

ATTORNEY JACQUELINE M. STROH: I disagree with that because first of all, if you look at again the plain language, it refers solely to transmission lines and as this Court has explained, people attempting to interpret a

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

statutory provision and decide what it means need not go back into the legislative history in order to determine whether their initial impression of what the meaning of the statute is is correct.

JUSTICE NATHAN L. HECHT: No, but the legislature is presumed to know the law and when they repeal, when they took out the provision of the 1911 statute in 1967 knowing how the Tyler Court and the Waco Court had interpreted the other provision, how could they not think that in the future unless those courts were overturned it was going to be 22 feet for all lines.

ATTORNEY JACQUELINE M. STROH: I think it's more reasonable to look at the legislature's act in 1967 in this light. You have the 14.36 provision, which applies to all lines and applies a general 22-foot height requirement. You have Holder and Jacobs, which come along and say 14.36(a) did not expressly repeal 14.36, but that's contrary to what actually 14.36(a) said. 14.36(a) while not naming 14.36 by name says that, all statutes that conflict with the provisions of 14.36 are expressly repealed. I think it's just as reasonable to assume that the legislature in omitting the 22-foot height requirement from 14.36 was reacting to that decision or that comment in Holder and Jacobs saying, no, 14.36(a) was not expressly repealed and the legislature said, well, okay, then we will expressly repeal the 22-foot height requirement that's contained in 46.

JUSTICE NATHAN L. HECHT: Well but how could how is it reasonable to think they reacted in that way and not to the other part of the holdings, which was the transmission is not a distinction?

ATTORNEY JACQUELINE M. STROH: Becuase, well, for one thing, the court in Holder, whenever it didn't, and the court did not refuse writs. It refused the writs in no reversible error. In Holder, I think the legislature perhaps was justified in believing that the Supreme Court recognized, in fact, that there was a distinction between the terms of 14.36(a) and the terms of 14.36.

JUSTICE NATHAN L. HECHT: Because of the NRE statement?

ATTORNEY JACQUELINE M. STROH: That's exactly right because of the NRE statement saying that lines that they did not agree with the dictum stated by the Court of Appeals in the lower court, the Holder's lower court opinion that lines along highways were required to be 22 feet. Because 14.36(a), as the court had already held in Webster, applied the 22-foot requirement across the board to all lines. And so clearly, the court itself has said, no, we think there is a difference between 14.36(a) and 14.36 and we are going to look, of course the court didn't say this. We are going to look to the different terms used by the legislature in 14.36(a) that are wholly different from those used in 14.36. And Your Honors, I would like to speak just briefly to the other issue we ask the Court to consider pursuant to Texas Rule of Appellate Procedure 53.4, which is also the statutory interpretation issue that assuming the Court were to find that the statute applies to both transmission and distribution lines, the statute being section 181.045(b)(2), which, of course, is an exception to subsection (a) and must be construed strictly as a result, that the Court find that it was limited to lines that cross over state highways and county roads and not lines that cross over a municipal street and again, the evidence was undisputed that the street in question was a municipal street. Opposing counsel relies on the singular reference to roads without the modifier county in section 181.045(b)(2) to support her argument, but I think it's clear that the reference to roads in that provision is a shorthand reference to the general phrase county roads, which appears elsewhere in the provision just as the word highways is a shorthand reference to the phrase state highways used elsewhere in the provision. Moreover, not only does the statute recognize the distinct entities that give consent for construction on or along state highways, on or along county roads and on or along municipal streets, but the entire scheme of Chapter 181 is sensitive to municipal control over line heights within a municipality. With respect to the Chapter 752 argument, I think it's clear if you look at the language of Chapter 752. There is no mandate upon a utility whatsoever. All of that language reads in terms of a prohibition on a company preparing to do work near a utility to refrain from conducting any activity unless and until it contacts an electric utility and then unless and until it obtains a mutually satisfactory agreement with that utility. There is no obligation whatsoever on the utility to act in response to the call by virtue of the statute. There is no obligation whatsoever on the part of the utility by virtue of the statute in its language to do anything in response to the call like the three things

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

that Petitioner cited, de-energizing, moving a line or installing a mechanical barrier.

JUSTICE DON R. WILLETT: Going back - I'm sorry. Go ahead.

JUSTICE DEBRA H. LEHRMANN: So how is the situation going to be made safe?

ATTORNEY JACQUELINE M. STROH: Well, I didn't say that no utility has any duty whatsoever. I said that, simply by virtue of the terms of Chapter 752, they don't have a duty to respond to anything that the employees request, but as a practical matter, they generally do and I think that the testimony at the time of trial indicates that Entergy was more than willing to respond and said that, it would be willing to respond to any such request. I'm simply saying that for purposes of duty, for purposes of a theory of liability under Chapter 752 and 752 alone that the plain terms of Chapter 752 impose the duty upon the company intending to do the work. And the way that the situation is made safe is that the company doesn't get to do the work unless and until the utility responds and they come to a mutually satisfactory agreement and that's it. And in fact, contrary to what Petitioner has asserted, the Ringo case did not say that the burden was mutually on an employer and the utility. It clearly said that, all duties fall on the company preparing to do the work.

JUSTICE DON R. WILLETT: Going back to your prior point, so as you interpret the utility code and the minimum height requirement, you say it has no application whatsoever to municipal streets.

ATTORNEY JACQUELINE M. STROH: To lines that cross municipal streets, yes that's right. Instead it's governed by section 181.045(a) in its generally applicable height requirement, which references the NEC, the National Electrical Safety Code. And under that code, the line height requirement for this line was 18-1/2 feet and the evidence at trial indicates that, or established, that at the very least at the point of contact, the line exceeded that requirement by over two feet. I would just like to make one more point with respect to the Chapter 752 issue and I think it was you, Justice Willett, who asked if you had to address 752 if you found for the Petitioner on the transmission line issue. And Petitioner said, no you don't and that's not entirely true. I suppose it doesn't have to be this Court that addresses the issue. I suppose it could remand it back to the Ninth Court of Appeals, but certainly some court has to address the viability of the Chapter 752 point because we have raised a Casteel point. We have raised a point that at the very least Petitioner asserted one improper theory of liability which caused a Casteel problem in terms of the jury issue that was submitted.

JUSTICE NATHAN L. HECHT: What's your reaction to the argument, Petitioner's argument that if the 18'6" standard governs, most trucks are in violation of Chapter 752?

ATTORNEY JACQUELINE M. STROH: And I think that that is not a reasonable read of Chapter 752 in its terms. I think we saw it at the, I think it's the Rocha case in our brief in which the court had addressed the AEP case, in which court had addressed a similar argument and while it wasn't necessary for that court to address the argument directly, it did sort of say that such an argument would be an absurd construction of the statute. And of course, the courts are to avoid absurd constructions of statute. It would be absurd to construe Chapter 752 to apply to everyday normal vehicular traffic down streets. That's not what it was intended to cover.

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

REBUTTAL ARGUMENT OF JANE S. LEGER ON BEHALF OF PETITIONER

ATTORNEY JANE S. LEGER: I would like to begin where that statement just left off with Justice Hecht's comment on that because I think it's important to realize that before an 18-wheeler can even get to the power lines, there are lower hanging TV and cable lines. So that saying that argument in our brief doesn't make good sense, when you have a high load like that traveling down a roadway, they're not going to be engaged in the ordinary course of travel. They're going to necessarily have to be doing work because the cable and the TV lines will have to be raised and by virtue of raising those lines, the workers would come within the six feet prohibited

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

by Chapter 752. I'd like to address what I believe was a mischaracterization of what Dr. Russell said, at trial and why this Court should not adopt a technical definition of transmission or distribution line based on function is that Dr. Russell clearly testified that even today there are distribution lines that carry more voltage than some transmission lines. It depends on the utility and what type of service they are providing and where they are providing it. You have to think about how dramatically different it is for utility provider to provide in a city like Austin or Houston versus a rural area so that it would lead to a very inconsistent result if this Court adopted or any court adopted a definition based on function because it changes from utility to utility and it is a function that is defined solely by the utility and how they use the line.

JUSTICE DON R. WILLETT: What do you make of, is somebody else trying to jump in? I'm sorry. What do you make of the argument that when it says, a line crossing a road or a highway, that road doesn't include municipal road. The road is county road?

ATTORNEY JANE S. LEGER: Well, first of all, Justice Willett, that very issue has been judicially interpreted before and by virtue of the legislature's failure to do anything different in the three times they've acted on this statute, they're presumed to have adopted that judicial interpretation, but I also think you can look at the plain language of the statute, but Counsel referred several times to 181.045. The Court must remember that the jury was, in fact, charged on 14.36(a) specifically at Entergy's request. And when you read 14.36(a), it says, very clearly except as modified or changed by ordinance or regulation in incorporated cities and towns and then it goes on to talk about the 22-foot requirement. So I think that that is very clear as well. I think that referring to the addition of the word distribution, in 1949 the act originally read all lines for the transmission of electric energy and then it went on and talked about transmission lines. It went to the senate committee and came out with the addition of and distribution. So to me, the fact it was and and not or in the case that those two things can be the same thing just as Petitioner has urged. We would urge that this Court do exactly what courts have done for half a century. I do want to address the Casteel point very quickly because I think it's important. That error was not preserved at the trial court. The party that requested the additional, in addition to just a regular negligence charge to include negligence as to Entergy also means that charge was requested by Entergy. So they never made an objection at the trial court that there may be some inconsistency in the outcome of a jury verdict and as a result of that failure, Casteel error has not been properly preserved and I believe that this Court should reverse and render for Mr. Traxler. If there are no other questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: There are no further questions. Thank you. Counsel. I want to thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

END OF DOCUMENT

© 2011 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE