

services. Seventy percent of that charge was an “access fee” calculated by multiplying a utility’s percentage of ERCOT’s peak load by ERCOT’s total transmission costs. Because a utility’s access fee was thus largely unrelated to its own transmission costs or the distance between utilities, the Commission referred to it as a “postage stamp” rate. In 1999, the Legislature amended chapter 35 to “price wholesale transmission services within ERCOT based on the postage stamp method” — entirely, not just seventy percent. The parties concede that this was within the Legislature’s power. The dispute is over whether the Legislature gave the Commission authority to adopt the postage stamp method before the 1999 amendment.

The Court concludes that the Commission had no such authority for two reasons. First, the Court says that the access fee was a rate and the 1995 statute did not empower the Commission to adopt rates. The authority to “adopt rules relating to rates”, the Court says, is not the authority to “adopt rates”, contrasting the explicit “establish and regulate rates” language of chapter 36.⁴ But when the statutory language is read in context, any distinctions disappear. For one thing, no one has yet offered an example of a rule that related to rates without to some extent prescribing rates. Even a rule that said nothing more than the statute — that rates must be reasonable⁵ — limits rates. If a mandate to “adopt rules relating to rates” does not authorize ratemaking, what exactly does it authorize? Neither the Court nor the parties have an answer. Moreover, the 1995 statute expressly authorized the Commission, as the Court

⁴ TEX. UTIL. CODE § 36.001(a).

⁵ TEX. UTIL. CODE § 35.005(a).

acknowledges,⁶ to “require an electric utility to provide transmission service at wholesale” and to “determine whether terms for the transmission service are reasonable.”⁷ Could the Commission say in every case, “No rate other than a postage stamp rate is reasonable”? Of course. Then what is the difference between deciding every case on the same rationale and restating that rationale as a rule? Obviously, there is none. The Court’s eyes-wide-shut approach to reality reduces to this: the Commission could decide, case by case, that a reasonable rate must be based seventy percent on an access fee methodology, but it could not make its *ratio decidendi* a rule.

Second, the Court says that the Commission’s rules conflict with three provisions of the statute. One is that “[t]he commission may require that each party to a dispute concerning prices or terms of wholesale transmission service engage in a nonbinding alternative dispute resolution process before seeking resolution of the dispute by the commission.”⁸ What price disputes are there to resolve, the Court asks, if rates are set by rule? One answer is that the Commission’s determination of wholesale rates has required numerous proceedings involving each utility. These may be what the Legislature had in mind. The other two conflicting statutory provisions, according to the Court, are that wholesale transmission rates be “comparable to the rates and terms of the utility’s own use of its system”,⁹ and that such rates “ensure that

⁶ *Ante* at ____.

⁷ TEX. UTIL. CODE § 35.005(a).

⁸ *Id.* § 35.008.

⁹ *Id.* § 35.004(a).

the utility recovers the utility's reasonable costs."¹⁰ But the facilities charge prescribed by the Commission's rules is comparable enough to a utility's own system use as to be within the "zone of reasonableness" for setting rates,¹¹ and the charge does not deny a utility recovery of reasonable costs.

More importantly, however, by the 1999 amendment the Legislature required that transmission service rates be set *entirely* — not just seventy percent — using the postage stamp method without changing any of the statutory provisions the Court finds to be conflicting. If a prescribed rate methodology conflicts with the availability of alternate dispute resolution, why did the Legislature leave the latter provision untouched when it amended the statute? If postage stamp rates violate chapter 35 because they subsidize less efficient utilities and are unrelated to a utility's costs, how was the Legislature able to prescribe such rates in chapter 35 without doing violence to its own statute? The Court has no answer.

The Court says that we must presume that the Legislature intended by its 1999 amendments to change the law. I do not see how we can possibly tell whether the Legislature intended a change, or a correction, or something else entirely. Neither the Court nor the parties have pointed to any legislative history that could provide an answer. 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.

¹⁰ *Id.* § 35.004(c).

¹¹ *See City of Corpus Christi v. Public Utility Comm'n*, ___ S.W.3d ___, ___ (Tex. 2001).

I would reverse the judgment of the court of appeals and affirm the judgment of the district court upholding the Commission's rules.

Nathan L. Hecht
Justice

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