

**ORAL ARGUMENT – 03/07/01**  
**00-0625**  
**SOUTHWESTERN ELECTRIC V. GRANT**

CHURCH: As the Texas PUC has pointed out in a brief it submitted last week this case is the sequel to the court's 1999 decision in Auchan. In Auchan, this court recognized the PUC's power to adopt tariff based limitations of liability.

The question presented here is whether the PUC can limit a utility's liability for personal injury damages.

California and Florida, the only states with recorded decisions addressing this precise issue have both held that utility commissions have this power. Texas should join California and Florida in upholding narrowly drawn, carefully reasoned limitations of liability for personal injury damages.

PHILLIPS: Why is this narrowly drawn and carefully?

CHURCH: It is narrowly drawn because the limitation of liability only applies to a unique fact circumstance, which is liability that arises from voltage fluctuations in the delivery of power. It also only applies within the wiring of the customer's home. There are numerous other situations. Most of the situations a utility faces in its day-to-day operations are not limited in any respect.

ABBOTT: But for those other things, if the utility is negligent and causes personal injury to somebody, you're not saying in those other situations that the utility could not be potentially liable?

CHURCH: No. We agree with the PUC that this is a very limited situation in which there is no liability for negligence. The general rule is that the utility remains liable for its negligence.

ABBOTT: Can you be a little bit more clear on exactly where you draw that line for the types of instances for which utility would not be liable for personal injury?

CHURCH: For personal injury to a large extent it is limited to situations where the injury occurs past the point of delivery on the customer's premises. If you look at a house, and this is a residential situation, the point of delivery generally is just past the meter at which the utility ceases to be responsible for the electrical apparatus. Everything past the meter is something that the customer has installed, that the customer has a repair man come repair whenever it needs work. The utility is not responsible for coming into the customer's home inspecting their circuit breakers, their injunction boxes, their outlets. That is all something that every customer in the state calls an electrician to handle for themselves. The utility's responsibility in terms of the services it provides

basically goes up to the point of delivery, which is just outside of the meter box.

HANKINSON: Are we required to review the limitation of liability in this tariff for reasonableness?

CHURCH: No, I don't believe you are. I believe that that's an impermissible collateral attack on a 20-year old rate making decision. This court has the ability to review the reasonableness of tariff provisions, but it does so on direct appeal. And when it does so its standard of review is limited to a deferential standard of arbitrary and capriciousness.

ENOCH: In the hearing it appeared that the hearing examiner was accepting that the utilities agreed that the PUC had jurisdiction at the outset to determine the initial reasonableness of limitation, but with the notion that courts on a case-by-case basis would determine whether or not it was reasonable with respect to the particular facts of the case. And that's how the examiner was looking at it. But is it your position that the examiner and the utilities were wrong at that time, that once the PUC determines that it's reasonable, the only attack can be as a part of that initial determination and there is no case-by-case review of the reasonableness of the tariff with respect to a particular instance that occurred?

CHURCH: Yes, I believe that's accurate. In 1981 when this particular PUC decision was initially made, the PUC was a relatively new body. It had been created in 1975, and I believe it became active in 1977. At that point we had a series of cases that this court addressed and criticized in Auchan, including the Vollmer decision, the Reeves decision and the Colarco decision, all of which held that the PUC decisions as to the reasonableness on tariff terms should be resubmitted on a case-by-case ad hoc basis to the juries for reconsideration. As the cases from other states have recognized, particularly a 2<sup>nd</sup> circuit decision that we've cited, the Wagoland(?) decision, and as this court recognized in Auchan and as the US recently reaffirmed in the Central Office Telephone decision, it is not appropriate to allow these collateral attacks to take place. The filed rate doctrine demands a certain element of finality and certainty as to what the rate is while it's in place.

ENOCH: So if that is the case, our statement in Auchan that we look at that tariff and we decided that it was reasonable on its face, what do we mean by that? Why did we find it necessary to look at the tariff in Auchan and determined that it was reasonable on its face as a part of the determination of the factor as opposed to simply holding that to attack the reasonableness of a tariff you must do so in the original rate making. It is not to be considered as an issue in any particular case.

CHURCH: I believe that in Auchan it would have been perfectly appropriate for this court to have ruled that that was an impermissible collateral attack on the filed tariff. It was also acceptable for the court to go a step further and say that on its face, the rule appears to be valid and we will not undertake any more of a review of the tariff than that.

HANKINSON: I'm not sure of the second part of the analysis that you just said. What do you mean look at it on its face to determine if it's valid? Why isn't that inconsistent with your position that you cannot undertake a collateral attack? Isn't that a collateral attack?

CHURCH: I believe that it is a certain level of collateral attack. And I believe that the more appropriate treatment would have been to say that we're not going to look at it. A customer as the second circuit recognized in Wagoland(?) really is not permitted to come in and attempt to veto 20 years worth of rate making treatment. As the 2<sup>nd</sup> circuit pointed out, that customer's remedy and the rest of the remedy of all similarly situated rate payers is to participate in the PUC's proceedings. This has come up again. As the PUC pointed out for the past year they have been dealing with this very issue.

As the PUC also points out in its brief, there have been dockets initiated at the PUC solely intended to examine the reasonableness of various tariff provisions. At that point, the PUC will consider the arguments made. There will be participation by a great number of interested parties who aren't here for this collateral attack. The PUC staff, the Office of Public Council, the Consumers Union, the Texas Ratepayers Organization, the Texas Legal Services Center, all of which participated in the recent rule making proceeding.

At that point there will come as there has come now a final order, a new rule, a proforma tariff, which if participants feel is appropriate they will be free to challenge on direct appeal. On direct appeal a very deferential, arbitrary and capriciousness standard will be applied to reviewing the PUC's balancing of the facts and factors leading to its conclusion that the limitation of liability was reasonable.

ENOCH: To reach where you want to go, do we have to explain Auchan and/or correct it in anyway?

CHURCH: I believe that it would be appropriate for the court to clarify that it did not intend to encourage collateral attacks on approved tariffs by suggesting that there is a new standard of facial reasonableness. At the same time, I don't believe that that's necessary in this case. In this case it can just be pointed out that the tariff is facially reasonable and that collateral attack is not permissible.

ENOCH: The CA is not the first court to make reference to the UCC affecting this tariff. In fact in Auchan, we cite to a case that makes reference in particular to the fact that personal injuries were not involved in that case, and, therefore, they didn't have to address the UCC affect on a tariff. Yet, that appeared to be the basis for this CA's opinion. Is there some quick answer on why y'all don't think that's important to even look at?

CHURCH: Yes there is. There is about 50 years of history as to why that analysis is improper. The UCC analysis makes two fundamental assumptions that ignore the difference

between a comprehensively regulated industry and a nonregulated industry. The first is that liability is necessary to encourage safe operation. The other is that there is an inherent inequality or unequal bargaining power between the rate payer and its utility. Those are the two assumptions that this CA has made in articulating its argument that if this were a UCC type situation, the limitation of liability...

ENOCH: No, it doesn't make any sort of assumption. It just says this is - the tariff substitutes as a contract between a customer and the seller. We've said that electricity is good. The UCC says when you're selling a good you can't exculpate yourself from your negligence for personal injuries. It's unconscionable, prima facie and therefore the burden switched. Your argument that because there is a regulatory body that has approved this tariff that therefore the UCC does not apply?

CHURCH: The UCC articulates these two reasons that I've just described as its basis for determining that limitations of personal injury liability are prima facie unconscionable. The US SC in its 1950's decision in *Southwestern Sugar & Molasses* addressed both of those points, and recognized that that sort of analysis is not appropriate in a comprehensively regulated industry for two reasons. The first being that the regulatory agency acts as a complete substitute for normal market powers. Indeed, the Texas Utility Code in §31.001(b) expressly states that the regulation provided under the code is intended to fully substitute for normal market forces. At the commission, we are not dealing with a situation where the utility is negotiating with its customers directly. The utility is debating with its customers - industrial, residential, the PUC staff, the office of public counsel as to the merits of every single tariff term, and then that debate is decided by the commission, which is statutorily charged with protecting ratepayer interests and utility interests.

ENOCH: Suppose that the PUC Act assigns specifically the task the PUC set rates. Suppose that the implication of that is that they can determine sources of liability and limits of liability. But let's suppose the legislature makes a specific pronouncement that in the sale of goods it is prima facie unconscionable to limit the liability from personal injuries. Do we have to confront a specific pronouncement of public policy of the state on the sale of goods verses an implication of a power to the PUC to limit certain liabilities?

CHURCH: I believe that the legislature has essentially answered that question for us. We are not talking about a brand new concept here. The PUC first limited liability for personal injury damages in 1981. Since then the Texas utilities code has been codified as such...

ENOCH: Assuming they have, in *Auchan* we cite a number of cases pro and con on limits of liability. And only one of those cited deal with personal injuries. Virtually all of them dealt with economic damages, which the UCC specifically says you can - \_\_\_\_\_ self for liability for economic damages. But we don't have a lot of law out there talking about personal injury.

CHURCH: I believe that's right. I believe that's because most customers who have read

the tariff and read the cases in Texas addressing the duty that is sought to be created here have recognized that the tariff does effectively bar the claim. There is no such duty and have not proceeded on with litigation resolving that. My point however is that the Texas legislature has had 20 years and several opportunities in which it has considered the \_\_\_\_\_ of utility regulation to address that point if they thought it was a conflict; if they thought that the limitation of liability for personal injury damages where the burden lies, they have not done that. And several of the cases that are cited in the briefing have made exactly that point in confirming that these sorts of limitations of liability are consistent with public policy.

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RESPONDENT

ROSENFELD: The issue that has been brought to your attention this morning on the issue of reasonableness of a tariff and how it should be addressed by this court is an issue of prime importance. And one that I don't believe has been addressed in terms of the issue of personal injury. The issue of reasonableness of the tariff, I believe, can be addressed on a case-by-case basis. I don't believe it's something that needed to be addressed at the hearings before the PUC, and I believe that 20 years ago when the tariff was passed in 1981 in the application of Central Power & Light Co, it was clear at that time in that particular tariff that they provided for consideration of personal injuries.

I believe in the tariff that was presented back in 1981, that said the company will not be liable for damages as part of that tariff - it said it won't be liable for damages beyond its control, but the company in the event of a valid claim shall be liable for injuries to the person death or repair of and replacement of electrical equipment. It was addressed at that time. And it was an issue that I think has over a period of time disappeared in tariffs that have been passed by the PUC.

HANKINSON: If your position is that courts should be reviewing these tariffs for reasonableness on a case-by-case basis, what is the test for reasonableness and how should a court review a tariff on a case-by-case basis for reasonableness?

ROSENFELD: I believe the way that that could happen is that on a case-by-case basis as far as the language of the tariff itself, what it provides for, whether or not it allows for the claims that an individual may have for damages for injuries.

HANKINSON: It's just per se unreasonable if in fact there's any limitation of liability for any type of claim be it economic loss or personal injury? What would make the limitation of liability in a tariff reasonable and what would make one unreasonable? How would we review it?

ROSENFELD: I believe that the court would be obligated to review the tariff in terms of what it provides for, what the terms are of that particular tariff and then to determine whether or not it would allow for a standard that could be interpreted by the court as being reasonable.

HANKINSON: So does that mean if there is a limitation of liability and an individual would be precluded from bringing a personal injury claim, then you would have a court decide that that is unreasonable on its face? So, therefore, what you're asking us to do is not decide on a case-by-case basis, but just make the determination that limitations of liability for personal injuries in rate tariffs are unreasonable?

ROSENFELD: Unreasonable per se and I believe...

HANKINSON: In all cases?

ROSENFELD: In all cases...

HANKINSON: That's a little bit different than coming in and saying on a case-by-case basis, the court should make a determination whether the tariff was unreasonable as to that particular case.

ROSENFELD: And if in fact the court is not willing to take that position, and I understand that it's unreasonable per se, then I think the law that's been in effect since 1981 would allow a court to take the issue of reasonableness on a case-by-case basis.

HANKINSON: And that's my question. How do we review it for reasonableness? What is the test? A broad public consideration? I'm not sure as a judge what you're asking me to do.

ROSENFELD: I believe the court would have to consider the broad public policy consideration of whether it's unconscionable or unconscionable, a proposition that's being presented to the court.

HANKINSON: What would make it unconscionable? Because it's a large claim verses a small claim? Because of the particular conduct at issue? What is it that would make it unreasonable?

ROSENFELD: The ability of the individual to recover the amount based upon what would be prohibited from them from recovering under the statute.

HANKINSON: So now we're back to the per se unreasonableness if there's a limitation of liability.

ROSENFELD: Correct.

HANKINSON: So there really is no case-by-case way of reviewing this. You're asking us just to say per se, unreasonable when a limitation of liability is contained in a tariff?

ROSENFELD: Of course, I would ask that the court consider it on a unreasonable basis per se. If the court is unwilling to do that, then I think there's an option there for it to be considered on a case-by-case basis.

HANKINSON: And that's what I'm asking you. I don't understand your option. I'm trying to get with you on the same page so that I can understand what you mean when you say case-by-case basis. Every time we talk about it you take me back to per se unreasonable. And I'm not quite sure as a judge what you're asking me to do on a case-by-case basis in judging whether a tariff is reasonable or not.

ROSENFELD: If in fact the amount that an individual can recover, if the remedy that an individual has on a situation when they are faced with the enforcement of a tariff, if in fact they are in a situation where they have to defend themselves against the terms of the tariff, I believe that the court can look at the tariff itself and determine based upon that that it may be unreasonable based upon the amount of recovery that an individual may have in accordance of the terms of the tariff; based upon the ability of the individual to be able to defend themselves to presume that they could defend themselves against the terms of that tariff, and as to the amount of damages and the responsibility of the company in terms of the tariff. If the tariff itself precludes liability it doesn't put any responsibility upon the utility company to take any action to prevent an injury from occurring. The utility company can simply rely upon the terms of the tariff. And it's my position that on a case-by-case basis a court has to look at what those issues are in order to make a determination.

O'NEILL: How do you make \_\_\_\_\_ determination? \_\_\_\_\_ and how does the court decide what becomes small, what large, how do we make that determination? It seems like that leads you down the road that could give you an absurd result.

ROSENFELD: This is completely different than the issue of Auchan. Auchan, I think this court considered and concerned itself with the fact of what happens when we have a large power outage, and it affects maybe hundreds or thousands of people. Who is going to bear that responsibility.

O'NEILL: Where do you draw that line? How do we make that qualitative decision?

ROSENFELD: Of course one of the main ways to look at is look at how the claim was brought. If the claim is brought by the individual as opposed to a group of people on behalf of other people that may have been similar situated. But in any event, in a situation as far as personal injuries are concerned, I believe it was discussed in the \_\_\_\_\_ opinion that the ability of trying to determine one of the reasonableness standards, the reasonableness standard of being able to insure yourself against such a loss. When you're talking about property damage an individual may be in a better position to understand what may happen as far as the property loss is concerned. In a personal injury case, the individual is probably not in the same position as a company may be for economic

damages. And I think it's very clear that there's a difference between the two. And as far as the amount of the damages are concerned, of course the suit may have been for a large amount of money as you have indicated, but as far as a recovery under those situations, the actual recovery may be somewhat different than that.

O'NEILL: Are we to wait until the jury has decided the amount of the suffering and then \_\_\_\_\_?

ROSENFELD: Oh, no.

O'NEILL: I don't understand how we evaluate reasonableness under the damages scenario that you \_\_\_\_\_?

ROSENFELD: As far as the damage issue is concerned in a personal injury situation it appears to me that this court would be able to establish whether or not a tariff would be reasonable and therefore an individual would be able to pursue their claim for damages at the time that the case was filed. And the amount of damages that you are talking about, how do you make that determination. I believe it's a different answer to the type of \_\_\_\_\_.

O'NEILL: You said in your brief that you think that the question of reasonableness should be a factual determination. And I think I'm hearing you say now that it's something the court could decide as a matter of law.

ROSENFELD: Again, as I have spoke over here, sure I believe that per se it should be declared unreasonable. This court should be able to determine the reasonableness of the tariff per se. If you can't do that, if you're unwilling to do that, then I believe the law allows you in the cases that have proceeded over the last 20 years allow you to proceed on a case-by-case basis.

O'NEILL: When you say case-by-case basis it sounds like what you're talking about is a legal determination \_\_\_\_\_ this particular case. Is that what you mean?

ROSENFELD: Yes.

O'NEILL: So then it's not a factual determination as you stated in your brief, because we can't determine facts.

ROSENFELD: That's correct. It would be a legal issue that will have to be determined.

HANKINSON: Would you respond to Mr. Church's argument that we shouldn't be looking at reasonableness at all. That in fact it's a collateral attack and this was a matter that should have been raised on direct appeal off the PUC's original rate determination.

ROSENFELD: My first statement would be the fact that the individual being able to appear before the PUC and to bring that issue to the forefront. Well the individual probably is not in a position to do that. But more importantly than that from a legal basis it appears that the issue of reasonableness is an issue that should be able to be attacked on a case-by-case basis, and not something that was a direct attack on the PUC ruling when the tariff was first established.

OWEN: \_\_\_\_\_ attack the reasonableness of the tariff and said as a matter of law when you limit liability of personal injuries this is unreasonable, and had taken that up through a CA and the court had said generically no, we don't find this tariff to be unreasonable. Would that bind subsequent customers?

ROSENFELD: I think that it would. I believe so. I believe that if the CA indicated that it wasn't reasonable based upon the law...

OWEN: But it was reasonable. In the appeal of the tariff itself, when the tariff was approved, let's assume a consumer group had said we don't think limitations of liability for personal injury are \_\_\_\_\_ against public policy. They are unreasonable. And that had been appealed to a CA and the court had said no we approve this tariff. It's not unreasonable. What would be the effect of that determination?

ROSENFELD: The effect of that determination would probably prevent the individual from...

OWEN: The individual was not a party.

ROSENFELD: I understand that. It would prevent the individual from being able to have a claim in court. And I don't believe that that would be the intent of the law, and I believe that the individual should be able to pursue their claim. And if at the beginning if they determined that it was a reasonable tariff, the issue or the ability of the individual to address that issue to get a reprieve for any injuries that he received wouldn't be allowed. My position is that the individual ought to be able to pursue their cause of action based upon the unreasonableness of that provision.

And how would anybody ever be able to attack that provision? Twenty years ago at a meeting...

OWEN: That's my hypothetical. Let's suppose it was attacked 20 years ago and took it all the way up through the court system and the court said it's not unreasonable, it's not against public policy. What would be the effect of those determinations?

ROSENFELD: I believe if they determine that it was not unreasonable it would prevent the individual from being able to pursue their \_\_\_\_\_. Except, I believe, it takes us back to whether or not the courts \_\_\_\_\_ out the attack on the reasonableness of that tariff on a case-by-case basis.

ENOCH: One of the arguments also raised by Southwestern Electric is that there is no duty here that the duty is established by the tariff and consequently plays into the ratemaking. And I'm not talking about the limitation on liability. I'm talking about the duty. The duty here is to provide a steady supply of uninterrupted electricity, which has been met here. The court seems to imply that there is a fact issue as to about whether there is some other duty out there with respect to the condition of the premises to which the electricity is supplied. The argument of SWEPCO is that if they provide the uninterrupted supply of electricity to the premises that is the end of the duty required by the tariff. And if the court were to impose a requirement or a liability for an electric surge that surges throughout the house and shocks somebody from an appliance on the inside of the house, they actually are affecting the nature of the tariff duty and as a result affecting the nature of the ratemaking. How do you respond to that?

ROSENFELD: I believe based upon the law as it is in existence at this time, that the utility has a duty and the duty is to exercise proper precaution to prevent and to anticipate and to prevent injuries to its customers. And if you consider that to be the duty...

ENOCH: Is the duty then to - the duty is not to provide an uninterrupted supply of electricity, but the duty is to not provide electricity in the event the premises to which they are being provided are no longer safe?

ROSENFELD: That's exactly right, and they also have the ability and they have the ability should they had wanted to do so which was in the briefs provided to the court, they could have cut off the electricity to the property. They could have been terminated the electricity to the property until such time as it would have been safe. It would have prevented any kind of injuries.

ENOCH: And that's set forth in the tariff an obligation to disconnect electricity from a customer if they determine by - there is some sort of obligation on the tariff to disconnect customers that they think don't deserve electricity?

ROSENFELD: I believe that they have that ability to do so. Yes.

ABBOTT: Based on what?

ROSENFELD: The tariff itself of SWEPCO says in a like manner to the customers premises be rendered wholly unfit for the continued operation of the customer's plant or business due to any other cause - and then it continues to say, there upon the service can be suspended.

ABBOTT: The reason I ask is because you know as well as I do that the moment they terminate service they will then be hit with a claim. So what you're suggesting is they can either cut it off and have a claim or not cut it off and have a claim.

ROSENFELD: That's right.

ABBOTT: I'm very curious about exactly how this happened. Where did this bolt come from?

ROSENFELD: What happened based upon the facts as I understand in the case...

ABBOTT: What do you mean as you understand them?

ROSENFELD: The actual facts of the case itself.

ABBOTT: You were the lawyer representing the plaintiffs?

ROSENFELD: Yes.

ABBOTT: So what does the evidence show about exactly how this person got hit with the bolt?

ROSENFELD: We have an electrical problem: lights going from bright to dim; smelling of smoke of the appliance; calling the power company to come out and check it out. The power company checks the voltage and says there is not a problem; ask my client to call her electrician, which she does; she calls the electrician and he comes and he checks the wires of the house...

ABBOTT: I'm talking about the exact incident.

ROSENFELD: The exact incident was the following Monday, two days after the power problem, she had problems with her appliances. She contacts the power company who indicates they will send someone to fix the appliances. At 5:00 that day they didn't send anybody. She calls them and they said you need to take your appliances to be fixed. She disconnects - she says she doesn't want to because she's afraid of being injured. But she disconnects the appliances. She takes them one at a time and puts them on a table in her kitchen. And at some time as she is walking by those appliances, either from an electrical appliance, from a plug on the wall at face height, or from an electrical switch on the wall a streak of some kind of electricity comes and strikes her in the face and causes the injuries she suffered. So that's how she was actually injured. Two days after the problem with the electrical wire hadn't been fixed.

ABBOTT: And that would be an injury resulting - if it came from the TV, you would concede you would have no claim against SWEPCO?

ROSENFELD: That's probably true unless there was any connection or tie-in between the damage to the appliance and the \_\_\_\_\_.

ABBOTT: So if it came through the light switch or the electrical plug, that would be the basis of your claim?

ROSENFELD: Absolutely.

ABBOTT: Would that not be a claim that clearly falls within the parameters of the tariff, because it would relate to a voltage?

ROSENFELD: It would fall within the - yes it would fall within the parameters of the tariff. And then again that takes us back to whether that tariff was reasonable or unreasonable, and how do you attack the reasonableness of the tariff. And then how it applies to a claim for personal injuries, which this court didn't address in the Auchan decision. And in fact, Mr. Church is correct, what's going on with the deregulation of the utility industry is we're unregulating part of the industry, which will then bring us back to the issue of reasonableness and whether or not the tariff should be enforced.

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#### REBUTTAL

ENOCH: Mr. Church, Mr. Rosenfield in answer to my question about the duty issue says that the tariff permits the electric company to discontinue electricity service to a \_\_\_\_\_ deems unfit. Your argument is that they don't have a duty to inspect premises to make that determination. But isn't there an implication in the tariff that there is some sort of obligation on their part not to provide electricity to a premises that's obviously \_\_\_\_\_ incapable of receiving it?

CHURCH: I think there is a difference between a premises that's incapable of receiving it and the utility having the right under the tariff to decide whether a particular structure, business, apartment is unsafe and it's inappropriate for them to deliver electricity to that. There are numerous cases that have been decided not based on limitation of liability, but based on this duty issue holding that there is no such duty under the tariff to inspect or to not deliver electricity if there is some reason to suspect that there may be a broken piece of equipment and exposed wire or something on the customer premises. You've got the Romero decision, the Texaco decision, this Cisneros decision, and the \_\_\_\_\_ Texas New Mexico decision all basically recognizing that the utility has no liability, has no responsibility, has no ability to go in and inspect each customer's premises, make some sort of determination that it is either safe or unsafe, and then decide not to provide power.

PHILLIPS: You mentioned at the start of your opening argument that this was a narrow \_\_\_\_\_ exception. What if the tariff completely cut off any liability of the utility company for anything it did, would that be any different?

CHURCH: What that would effect is the enforceability of the PUC's decision when it came up on direct appeal.

PHILLIPS: So it really doesn't matter whether it's narrow or broad, that's just

something...

CHURCH: I will say that under my reading of the US SC's filed rate decisions and under the federal CA and the various state decisions applying the filed rate doctrine, yes, I believe unfortunately your hands are tied until somebody takes that back, works it back through the process and brings a direct appeal.

HECHT: When you say take it back, you mean institutes a new agency procedure?

CHURCH: Exactly. There are several ways that that could happen. I have to differ with my adversary. Individuals do frequently participate in proceedings at the PUC, and often they are very effective advocates for their position. They do institute dockets to question utility rate making rules and tariffs. That's the appropriate posture here. This isn't a situation where the PUC has made a blanket limitation of liability. The PUC carefully considered at least 10 factors that we discuss in our brief as to why this was an appropriate and narrow situation in which to limit liability for personal injury damages.

ABBOTT: Are there very many personal injury claims like this?

CHURCH: I think the \_\_\_\_\_ reported decisions establishes that either they are not doing many of them, or most customers and lawyers who read the tariff believes that it means what it says. So I can't answer that question. I suspect that there are not that many.

As we noted the utility is only responsible for getting the electricity from point of delivery. The homebuilder, the homeowner then constructs everything that happens after the meter: the circuit breakers; the wiring inside the house; they install the appliances; they maintain the appliances. And what's notably missing from his discussion of the record is that she did call out an electrician to come to her house and determine whether the problem was on her side of the wiring or not. That electrician determined that there was a voltage fluctuation caused by the tree limb on SWEPCO's power line, the limb was removed, the constant flow of electricity was restored. The question that's unanswered is why that electrician when he was there didn't secure these appliances, evaluate her wiring as \_\_\_\_\_, so she had the duty.

BAKER: So it's your view then any duty for SWEPCO stops at the meter?

CHURCH: That's the way \_\_\_\_\_.

BAKER: They had to show something that happened from the meter going away from the home that caused either property or personal injury?

CHURCH: That's is the tariff's definition. It's also the definition of the duties in those Texas CA decisions.