



# Texas Supreme Court Update

## *Opinions Issued June 25 & 30, 2021*

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**Regulatory Pre-Emption, Legislative History, and Statutory Construction:** *A majority looked to a pre-codification statute to determine the Public Utilities Commission’s exclusive jurisdiction to regulate an electric utility’s “rates, operations, and services” was not intended to include deciding questions of legal duty for personal injury claims. Such authority was not part of the PUC’s statutory mandate to assure fair rates and adequate and efficient electrical service.*

As recodified in 1997, the Public Utilities Regulatory Act (“PURA”) grants the PUC “exclusive original jurisdiction over the rates, operations, and services of an electric utility” except in areas where a municipality has not surrendered its regulatory authority to the PUC. [Tex. Util. Code § 32.001\(a\)](#); see also [Tex. Pub. Util. Code § 33.001\(a\)](#) (granting municipalities regulatory authority). Three years ago, the supreme court unanimously held in *Oncor Electric Delivery Co. v. Chaparral Energy, LLC*, the PUC has exclusive jurisdiction to determine the utility’s service obligation when a customer sues it for breaching a contract to provide electricity.

Against this backdrop, on June 25 the court decided [In re Oncor Electric Delivery Co., LLC](#). At issue was whether the trial court should have granted Oncor’s jurisdictional plea to allow the PUC to first decide Oncor’s legal duty in a personal injury suit. The suit arose when Oncor refused to move an electric line or trim overgrowing trees and a customer was severely injured while attempting to trim the trees himself. Whether the customer was required to first obtain a determination of duty from the PUC turned on whether the placement of power lines and tree trimming was within the PUC’s authority to regulate Oncor’s “rates, operations and services.”

A 6:3 majority, under an opinion by Justice Bland, ruled that the determination of Oncor’s duties with respect to personal injury claims based on negligence and misrepresentation under common law and consumer protection statutes were not within the PUC’s *regulatory* authority under PURA. Notwithstanding the seemingly expansive grant in § 32.001 of PUC jurisdiction over electric utilities’ “rates, operations, and services,” the majority looked to legislative history under the version of PURA in effect before the 1997 recodification to identify the Legislature’s objective in granting the PUC’s regulatory power. The pre-code version stated PURA’s objective was “regulating rates and services so . . . rates may be fair, just, and reasonable, and the services adequate and efficient.” The majority read this constraint into the 1997 recodification, even though the recodification expanded the PUC’s jurisdiction to include an electric utility’s “operations” as well as “rates” and “services.” The majority opinion justified doing so because the “putative” recodification should have been non-substantive.<sup>1</sup>

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<sup>1</sup> The recodification was performed by the Texas Legislative Council, a legislative agency. [Tex. Gov’t Code §§ 323.001, 323.007](#). The Texas Legislative Council is not permitted to “alter the sense, meaning, or effect of the statute.” [Tex. Gov’t Code § 323.007\(a\)](#). Implicitly, the majority necessarily reasoned a recodification, no matter its wording, cannot change the meaning of a pre-codified version of the statute. To do so would require passage of a bill through the normal legislative processes. To the extent a recodification attempts to change the effect of a statutory predecessor, the change is apparently *ultra vires* and void.

The majority began by considering the “plain meaning of the enacted text considered in light of the statute as a whole,” beginning with the Legislature’s declaration that PURA gave the PUC “exclusive original jurisdiction over the rates, operations, and services of an electric utility” to “to establish a comprehensive and adequate regulatory system” that would “assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities.” [Tex. Util. Code § 31.001\(a\)](#). The PUC’s authority to resolve disputes is limited to persons “whose utility service or rates are affected by a proceeding before a regulatory authority.” Tex. Util. Code §§ 11.03(1)(b), 15.051(a). According to the majority, expanding the PUC’s authority to personal injury claims does not serve the purpose of exclusive regulatory jurisdiction: achieving “uniformity, check[ing] the utilities’ monopoly power, and harness[ing] the Commission’s “unique expertise.”

The majority pointed to several similar personal injury cases where the court did not abate or dismiss the case pending a PUC determination of the duty question. Instead, the court decided the case based on the tariff, which defines terms of service because it had been unable to identify “any statute ousting courts of jurisdiction” in such cases. It distinguished the more recent *Chaparral* decision because it involved a claim for a breach of contract to provide electric service which the majority considered to be within the scope of the PUC’s authority because it directly involved a failure to provide promised electrical service. The underlying suit, on the other hand, involved duties of the occupier of a premises which were only incidental to the provision of electrical services.

The majority confirmed its interpretation by noting the PUC had “no authority to afford . . . recompense for personal injuries,” unlike the failure to honor a promise to provide electrical service at issue in *Chaparral*. The majority was unpersuaded by Oncor’s concern that case-by-case adjudication by the judiciary could lead to conflicting interpretations of the tariff. The majority pointed out that Oncor always had the right to raise inconsistency as a way of attacking the underlying judgment on appeal. Finally, the majority observed that referring personal injury disputes to the PUC would result in delays and inefficiencies in achieving timely adjudications and refused to require adding this step to the resolution of personal injury cases against electric utilities.

Chief Justice Hecht joined by Justices Boyd and Blacklock [dissented](#). They reasoned the underlying suit alleged negligence in the maintenance and placement of the power lines, such allegations involved Oncor’s operations and provision of services over which Utility Code § 32.001 gave the PUC the exclusive jurisdiction to assess Oncor’s duties, if any. That the PUC could not award damages did not, in the dissenter’s view, undermine the PUC’s authority to decide duty. Nothing in requiring the plaintiff to first exhaust its administrative remedies with the PUC would abrogate the litigant’s common-law rights regardless of whether the action sounded in contract or in tort.

In the dissenters’ view, if the PUC decided a duty existed, the courts could then decide the amount of any damages resulting from any breach of that duty. They perceived no meaningful difference between the failure to honor an agreement to provide electric service by a specific date, as in *Chaparral*, and the failure to provide a safe, dependable service line. Both involved rules and regulations “squarely within” the authority the Legislature granted the PUC to implement a pervasive regulatory scheme. According to the dissenters, the judicial follow-up to the PUC decision is merely an adjunct to the PUC’s control over a utility’s practices. Accordingly, the dissent would have granted Oncor’s plea to the jurisdiction.

It is of interest, at least to this writer, that the majority did not reason the PUC’s exclusive jurisdiction was created to comprehensively regulate utilities *as a whole*, not to fashion granular, case-by-case rules. The former strikes this writer as a legislative or executive function; the latter, uniquely judicial. Applying broader laws and regulations to particular circumstances is an undertaking the judiciary was designed to perform.

The fissure between *Oncor*’s majority and dissent manifests the ongoing struggle over the limits of textualism as a means of statutory interpretation. The majority was willing to look past the wording of the current statute by considering its original version as best expressing legislative intent. Perhaps one impetus for doing so was to preserve the judiciary’s traditional role as arbiter of legal duties.

The stricter textualists – Chief Justice Hecht, Justice Blaylock and, to a lesser extent, Justice Boyd – were unwilling to venture so far. They limited their consideration to the wording of the recodified version of the statute

alone. The difference between these approaches reflects the dispute that surfaced most recently in June 4's *Hogan v. Zoanni* decision.

Practitioners should consider how their statutory construction questions fit into these competing paradigms and how to fashion their arguments in a way that, when possible, bridges this divide. Or at least circumnavigates it.

**Regulatory Pre-Emption:** *The PUC did not have exclusive original jurisdiction to decide an electric utility's duty of care for activities not directly involved in providing electric power and in which businesses other than electric utilities routinely engage.*

[\*In re Texas-New Mexico Power Co.\*](#), on the other hand, involved an issue for which the conflicting perspectives in *Oncor* did not prevent a unanimous decision that PURA's delegation of regulatory authority did not give the PUC original and exclusive jurisdiction to determine a utility's duty of reasonable care for activities that were not unique to providing electrical service.

*In re Texas-New Mexico Power Co.*, arose out of an underlying suit by a group of homeowners for damages from flooding allegedly caused when wooden mats the utility's contractor used to move heavy equipment were left unsecured as Hurricane Harvey approached. The storm surge allegedly caused these wooden mats to block storm sewers and caused the flooding of plaintiff's homes. The utility was allegedly negligent for "not requiring its contractor to secure the mats." The trial court denied Texas-New Mexico Power's (TMN) plea to the jurisdiction that the duty issue must first be decided by the PUC under Texas Utilities Code § 32.001's grant of exclusive original jurisdiction over rates, operations, and services "as a utility."

The court concluded that plaintiff's claims were not. It acknowledged the mats were used in connection with the utility's operations in the broadest sense. However, it concluded that the connection with TMN "operations" was merely coincidental, not integral, to TMN's operations *as an electric utility*. "The mats could have been used on any kind of construction project and left unsecured by any kind of contractor." TMN's alleged liability did not arise from its operations as a utility and, therefore, the PUC did not have jurisdiction to decide TMN's duty concerning the use of the wooden mats. The court's brief opinion suggests that the PUC's jurisdiction does not extend to every incidental operation of a utility.

Even TMN conceded the PUC would not have jurisdiction if the claim had arisen from a traffic accident. That the operations of the utility furnished the circumstances out of which the incident occurred was not enough to make those circumstances an operation *as a utility*. This observation suggests that PUC jurisdiction does not apply to claims arising from things for which anyone – utility or not – might be deemed to have a duty. This approach is certainly consistent with the supreme court's well-established views on causation: only creating the circumstances under which another's misconduct causes injury does not make that misconduct a substantial factor in causing the injury. For the conduct to be from operations "as a utility" apparently requires a more direct connection to activities unique to providing electrical services.

**Adjudicatory Pre-Emption:** *The PUC did not have exclusive original jurisdiction to decide an electric utility's duty of care when the personal injury suit involved a complaint by one whose electric rates or electric service was not affected by the utility's alleged act or omission.*

[\*In re Centerpoint Energy Houston Electric, LLC\*](#) decided five days after *Oncor* and *Texas New-Mexico* closed out the court's 2020-21 term. Unlike *Oncor* and *Texas-New Mexico Power* which involved the PUC's regulatory authority, *Centerpoint Energy* concerned the scope of its *adjudicatory* power.

The underlying suit arose out of a wrongful death and survival action in a statutory probate court. The decedent was attempting to aid the victims of an auto accident when he was electrocuted by a power line downed in the accident. His family claimed CenterPoint was negligent because it was fitted with an inappropriately sized fuse that allowed it to remain energized. CenterPoint challenged the probate court's subject-matter jurisdiction, claiming the PUC had exclusive jurisdiction to determine CenterPoint's duty. CenterPoint petitioned for writ of mandamus after the trial court denied its jurisdictional plea.

The supreme court in a 4:1:2 decision denied the writ. As in *Oncor*, the jurisdictional plea precipitated a disagreement over whether the PUC had exclusive jurisdiction to decide the utility's duty.<sup>2</sup> The analytical focus in *Centerpoint Energy* differed, however, from that in *Oncor*. In *Oncor*, the court divided over whether the PUC's exclusive authority to *regulate* an electric utility's "rates, operations, and services" included deciding legal duties in personal injury claims and whether claims based on location and maintenance of electrical lines involved regulated activities.

In *Centerpoint Energy*, the question was PUC's power to *adjudicate* the question of duty, which turned on whether the alleged negligence was in the course of the utility's "services." The resolution of this question depended on whether the decedent's claim arose out of his status as a consumer and, if so, whether that status was essential to confer exclusive jurisdiction on the PUC. On this question, however, the fault lines among the Justices were substantially the same as in *Oncor*. Justice Huddle, part of the *Oncor* majority, did not participate in *Centerpoint Energy*. Justice Boyd, dissented in *Oncor*, concurred in the *Centerpoint Energy* order denying the writ but did so only in recognition of *Oncor* as precedent. As a result, *Centerpoint Energy* yielded no majority opinion and no binding precedent.

The [plurality](#), in an opinion by Justice Busby, agreed the PUC did not have exclusive jurisdiction to decide the utility's legal duty. Although the PUC enjoys exclusive authority over matters within its jurisdiction, the plurality determined the duty issues in the personal injury suit were not within the scope of that authority. Drawing a distinction between an agency's authority to regulate by rule making and adjudicating disputes, the plurality concluded the scope of the PURA's delegation of authority to regulate was not the same as its authority to adjudicate. The former is comprehensive with respect to "rates, operations, and services" of an electric utility, but limited its adjudicatory authority to, among other things, "investigat[ing] and resolv[ing] a complaint by an 'affected person' alleging 'a[ ] . . . violation of a law, order, ordinance, or rule.'" Tex. Util. Code § 15.051(a).

According to the plurality, those who could be an "affected person" for purposes of PURA's delegation of adjudicatory authority to the PUC were limited to those whose electric service or rates were impacted by the utility's alleged acts or omissions. Decedent's consumer status was unrelated to his electrocution. As such, the decedent was not a member of the statutory class entitled to complain to the PUC in its adjudicatory capacity. The court reasoned it was for the courts, not the regulatory agency, to decide whether a regulatory scheme displaced the common-law's negligence standard of reasonable care. Thus, the PUC had neither inherent authority nor an express grant of statutory authority to adjudicate the utility's legal duty to the decedent.

Justice Boyd agreed the mandamus petition should be denied, but he declined to join the plurality opinion because it relied on *In re Oncor Electric Delivery Co.* decided the previous week. In *Oncor*, the court decided the Public Utility Regulatory Act gave the PUC exclusive jurisdiction only over "customer-utility disputes regarding Commission-regulated activity," including complaints "about the utility's rates or . . . electrical service." Justice Boyd disagreed with that decision but, recognizing its precedential value, [concurred](#) with the plurality that the holding in *Oncor* obliged the court to deny the petition for writ of mandamus. Although no opinion garnered the support of a majority, Justice Boyd's concurrence in the outcome was enough to refuse to issue a writ of mandamus to the probate court. Justice Huddle did not participate.

Chief Justice Hecht, joined by Justice Blacklock, [dissented](#). They considered "nonsensical" limiting PURA's delegation of adjudicatory power to ratepayers. The dissent pointed to PURA's charge to the PUC to protect the public interest and asserted that it was broad enough to oblige the plaintiffs to first exhaust their administrative remedies with the PUC concerning the issue of the utility's duty. They deemed it "nonsensical" to say that the statute could limit to consumers the ability to complain about a matter that threatened consumers and non-consumers alike. They charged

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<sup>2</sup> The jurisdictional plea also presented the threshold question of whether the probate court had jurisdiction exclusive of any jurisdiction the PUC might otherwise have. That question was only addressed by the plurality opinion. And it did so in short order, ruling the probate court's jurisdiction under Estates Code §§ 32.001(a), 32.005(a) was only concurrent with the district court as to matters that were "related to" but were not themselves "probate proceedings." Just as the PUC can have jurisdiction to determine certain questions of legal duty that is exclusive of the district court, in an appropriate court the PUC's jurisdiction would similarly be exclusive of a probate court's jurisdiction.

the plurality with amending PURA by reading into the PUC's jurisdictional grant the unwritten additional limitation its authority was limited to "rates, operations and services" that "affect[ed] customers."

The dissent considered "strained" the distinction between *Oncor's* holding the placement of a power line is not about operations and services, and the plurality's decision here that the *design* of a powerline was. The dissent also rejected the notion that a statute or regulation must meet the rigorous standards of *negligence per se* for the PUC to be given jurisdiction under PURA. To allow the PUC to set these standards was, according to the dissenters, the very reason the PUC should have exclusive original jurisdiction to decide such matters. According to the dissent, the requirements of *Oncor* could never be met because the plurality created a dilemma in which the PUC had no authority if it had or if it had not previously decided the issue.