

NO. 08-0727

IN THE SUPREME COURT OF TEXAS

TEXAS INDUSTRIAL ENERGY CONSUMERS

V.

CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, *ET AL.*

**On Petition For Review From the
Third Court of Appeals at Austin, Texas
No. 03-06-00285-CV**

**PETITIONER GULF COAST COALITION OF CITIES'
BRIEF ON THE MERITS**

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STATEMENT OF THE CASE

<i>Nature of the Case</i>	This is a suit for judicial review of the Final Order issued by the Public Utility Commission of Texas (“PUC” or “Commission”) in Docket No. 30706. ¹ The administrative proceeding addressed CenterPoint Energy Houston Electric, LLC’s (“CenterPoint’s” or “Company’s”) application for a competition transition charge to recover portions of its true-up balance.
<i>Trial Court</i>	The Honorable W. Jeanne Meurer, 98 th Judicial District Court, Travis County, Texas.
<i>Trial Court Disposition</i>	The District Court entered an “Order Reversing Final Order Entered by the Public Utility Commission of Texas” ² reversing the Commission’s decision.
<i>Parties in Court of Appeals</i>	State of Texas, Occidental Power Marketing, L.P., Texas Industrial Energy Consumers (“TIEC”), Gulf Coast Coalition of Cities (“GCCC”), ³ PUC, CenterPoint Energy Houston Electric, LLC.
<i>Court of Appeals</i>	Texas Court of Appeals, Third District, at Austin No. 03-06-00285-CV. Justice Pemberton authored the opinion, joined by Justices Patterson and Waldrop.
<i>Disposition of the Court of Appeals</i>	The court of appeals reversed the district court’s decision and affirmed the Commission’s Order. The court’s opinion ⁴ has been published as <i>CenterPoint Energy Houston Electric, LLC v. Gulf Coast Coalition of Cities</i> , 263 S.W.3d 448 (Tex. App.-Austin 2008, pet. filed).

¹ A copy of the Final Order is in the Administrative Record Binder 2, Item 145 (*see also* Petitioner GCCC’s Petition for Review, Tab A)

² *See* Petitioner GCCC’s Petition for Review, Tab B.

³ The Gulf Coast Coalition of Cities is a group of six incorporated municipalities (Friendswood, La Marque, Lake Jackson, League City, Missouri City, and Spring Valley) that are each located within CenterPoint’s service area and are materially affected by the Commission’s Order in Docket No. 30706.

⁴ *See* Petitioner GCCC’s Petition for Review, Tab C.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction over this appeal under TEX. GOV'T CODE ANN. § 22.001(a)(3) because it involves construction of the Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.017 (Vernon 2007 & Supp. 2008) (“PURA”).

This Court also has jurisdiction under TEX. GOV'T CODE ANN. § 22.001(a)(6) because correction of the court of appeals' error is important to the jurisprudence of the State.

ISSUE PRESENTED

Did the Court of Appeals err in affirming the Commission's reliance on P.U.C. SUBST. R. 25.263(1)(3) (the "Rule") in setting the rate for calculating carrying costs on CenterPoint's true-up balance?

STATEMENT OF FACTS

The Court of Appeals correctly states the nature of the case and background information. However, a number of details pertinent to GCCC's issue will be reiterated below. This is an appeal from the Commission's Final Order in Docket No. 30706, CenterPoint's application for a competition transition charge ("CTC") to recover part of its true-up balance as determined in PUC Docket No. 29526.⁵ In PUC Docket No. 30706, CenterPoint sought authority to implement a CTC to recover the portions of its true-up balance not already securitized. GCCC participated in PUC Docket No. 30706 before the Commission in accordance with PURA § 33.025.⁶

Generally speaking, stranded costs are the "portion of the book value of a utility's generation assets that is projected to be unrecovered through rates that are based on market prices."⁷ Stranded costs were considered to be a potential byproduct of Texas' transition to competition.⁸ The idea was that electricity rates would be so low that the incumbent, or pre-existing, utilities would not be able to recover the cost of their generation assets while competing with new market entrants that did not carry such embedded generation costs.⁹ The solution was to "allow utilities with uneconomic generation-related assets and purchased power contracts to recover the reasonable excess

⁵ PUC Docket No. 30706, Order at 2, Admin. R. Binder 2, Item 145.

⁶ PURA is codified at TEX. UTIL. CODE §§ 11.001-66.017 (Vernon 2007 & Supp. 2008).

⁷ *Cities of Corpus Christi v. Pub. Util. Comm'n of Texas*, 188 S.W.3d 681, 685 (Tex. App.-Austin 2005, pet. denied).

⁸ *Id.*

⁹ *Id.*

costs over market of those assets and purchased power contracts.”¹⁰ The Legislature established a three phase regulatory process to allow recovery of the stranded costs.¹¹ One of the foundational principles of the stranded cost recovery regulatory process was that a utility “**may not be permitted to overrecover stranded costs.**”¹²

In PUC Docket No. 30706, the Commission authorized CenterPoint to collect in excess of \$1.135 billion through a CTC over a 14-year period.¹³ The key disputed issue in the case was the interest rate to be applied to the unamortized CTC balance. The Commission allowed CenterPoint to recover interest far in excess of the amount allowed under the law by applying P.U.C. SUBST. R. 25.263(1)(3).

P.U.C. SUBST. R. 25.263(1)(3) was the subject of a previous decision of this Court in which this Court held that “Rule 25.263(1)(3) is invalid.”¹⁴ In that case, the issue before this Court was whether carrying costs could be recovered starting January 1, 2002, the first day of deregulation, or at the end of the final true-up proceedings, two or more years later.¹⁵ The Commission’s rule, P.U.C. SUBST. R. 25.263(1)(3), established that the date would be the later, in other words sometime after January 10, 2004.¹⁶ This Court held the Rule invalid and remanded the proceeding back to the Commission for further consideration.

¹⁰ PURA § 39.001(b)(2).

¹¹ *Cities of Corpus Christi*, 188 S.W.3d at 686.

¹² PURA § 39.262(a) (emphasis added).

¹³ PUC Docket No. 30706, Order at 38 and 78, Admin. R. Binder 2, Item 145.

¹⁴ *CenterPoint Energy, Inc. v. Pub. Util. Comm’n of Texas*, 143 S.W.3d 81, 84 and 99 (Tex. 2004).

¹⁵ *Id.* at 83.

¹⁶ *Id.*

In PUC Docket No. 30706, however, the Commission non-unanimously found that this Court only intended to invalidate the portion of P.U.C. SUBST. R. 25.263(1)(3) related to the accrual starting point and applied the interest rate portion of the rule.¹⁷ Commissioner Parsley dissented, finding that “the Rule was expressly invalidated in its entirety by the Texas Supreme Court.”¹⁸ Commissioner Parsley also found that even if this court did not invalidate the entirety of P.U.C. SUBST. R. 25.263(1)(3) that the doctrine of severability should be applied and “the entire rule must fall.”¹⁹ She explained that “[w]hen the rule was adopted, the Commission understood that the carrying costs would not begin to accrue until the date of the utility’s final true-up order, and that interest would accrue for a period of months not years.”²⁰

GCCC is adversely affected by the Commission’s Order in Docket No. 30706. Accordingly, GCCC filed an appeal under PURA §§ 15.001 and 33.026 and §§ 2001.171 and 2001.176 of the Administrative Procedure Act (“APA”), TEX. GOV’T CODE ANN., §§ 2001.001-.902 (Vernon 2000 & Supp. 2008) requesting that the district court reverse the Commission’s Order and remand the cause for correction of these errors. On appeal, the district court determined that the Commission acted unlawfully in setting the interest rate and allowing CenterPoint to include the cost of the valuation panel as part of its stranded

¹⁷ PUC Docket No. 30706, Order at 9, Admin. R. Binder 2, Item 145.

¹⁸ *Id.* at Concurrence and Dissent of Commissioner Julie Parsley at 1.

¹⁹ *Id.*

²⁰ *Id.* at 1-2. Commissioner Parsley’s observation proved correct as the Company obtained legislation in 2005 authorizing it to securitize the entirety of its unrecovered CTC balance.

cost recovery. The Court of Appeals reversed the district court's decision and affirmed the Commission.

SUMMARY OF THE ARGUMENT

On July 14, 2005, the Commission issued an Order in PUC Docket No. 30706 which inappropriately applied an excessive interest rate to CenterPoint's CTC balance. In doing so, the Commission violated the PURA, failed to appropriately apply the doctrine of severability, and acted arbitrarily and capriciously.

Specifically, the Commission erred when it applied an 11.075% interest rate to the CTC, based on a rule, P.U.C. SUBST. R. 25.263(1)(3), that had been invalidated by the Texas Supreme Court holding in *CenterPoint Energy, Inc. v. Public Util. Comm'n of Texas* ("*CenterPoint*").²¹ In that case, this Court addressed the issue of when the interest rate would begin to accrue and held that the entirety of P.U.C. SUBST. R. 25.263(1)(3) was invalid. The decision to invalidate the entire Rule was appropriate given the fundamental interconnection between interest rates and the time period over which they are collected. Alternatively, if this Court finds that the *CenterPoint* holding invalidated only a portion of the Rule then, under the doctrine of severability, the entire Rule should be invalidated because severance is not justified. Moreover, the use of an 11.075% interest rate is arbitrary and capricious as there was no evidence in the record indicating that it reflects CenterPoint's current weighted average cost of capital ("WACC"). The result of this error is to permit CenterPoint to significantly over-recover stranded costs through the CTC, in violation of PURA § 39.262(a).

²¹ *CenterPoint*, 143 S.W.3d at 99.

GCCC intervened in PUC Docket No. 30706 and has pursued its appeal of this case because it is in the interest of the ratepayers of Texas that the Company be held to the laws of the state and prevented from over-recovering its stranded costs. The Company's outdated data and attempted resurrection of a judicially invalidated rule cannot, and should not, be the basis for the Commission applying an arbitrary and inflated interest rate. Moreover, the adopted interest rate has no analytical support in the evidentiary record, will provide a windfall for the Company, and will have a deleterious impact on ratepayers already facing billions of dollars in additional charges. Such an imposition goes far beyond the statutory prohibition against utilities over-recovering their stranded costs.

ARGUMENT

Issue Restated

Did the Court of Appeals err in affirming the Commission's reliance on P.U.C. SUBST. R. 25.263(l)(3) in setting the rate for calculating carrying costs on CenterPoint's true-up balance?

A. Standard of Review

This case involves the PUC's interpretation of this Court's holding in the *CenterPoint* case, and alternatively, the PUC's interpretation of the doctrine of severability as established by Texas courts. Because these are both questions of law, this Court should review the conclusions of the PUC *de novo*.²² While the Legislature intends an agency, such as the PUC, created to centralize expertise in a certain regulatory area be

²² *USA Waste Servs. of Houston, Inc. v. Strayhorn*, 150 S.W.3d 491, 494 (Tex. App.-Austin 2004, pet. denied); *Continental Casualty Company v. Rivera*, 124 S.W.3d 705, 709 (Tex. App.-Austin 2003, pet. denied); *Double Diamond, Inc. v. Hilco Electric Co-op., Inc.*, 195 S.W.3d 336, 338 (Tex. App.-Waco 2006, pet. denied).

given a large degree of latitude in the methods its uses to accomplish its regulatory function, courts “do not defer to administrative interpretation in regard to questions which do not lie within administrative expertise, or deal with a non-technical question of law.”²³

The PUC does not have ‘expertise’ in the interpretation of judicial decisions; therefore, it is not entitled deference in this case.²⁴ The substantial evidence rule gives deference to an agency only “in its field of expertise.”²⁵ Because this appeal involves questions of law that are not technical matters peculiar to the Commission’s area of expertise, the Court is not required to, and should not give deference to, the PUC’s decision in PUC Docket No. 30706.

B. Argument

1. The PUC incorrectly analyzed this Court’s opinion in *CenterPoint Energy, Inc. v. Pub. Util. Comm’n of Texas*, 143 S.W.3d 81 (Tex. 2004).

In 2001, the PUC adopted Substantive Rule 25.263(1)(3) which established the date upon which interest on stranded cost recovery was to commence and determined the interest rate to apply. In 2004, this Court, in the *CenterPoint* case, found that “Rule 25.263(1)(3) is invalid.”²⁶

²³ *Rylander v. Fisher Controls Int’l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.-Austin 2001, no pet.).

²⁴ *Id.*

²⁵ *Railroad Comm’n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995).

²⁶ *CenterPoint*, 143 S.W.3 at 99 (emphasis added). By allowing CenterPoint to accrue interest only on its true-up balance almost three years prior to the date that stranded costs were quantified, the *CenterPoint* decision resulted in almost a billion dollars of additional interest recovery by the Company.

The Rule invalidated by the Supreme Court contained two requirements. It established the *date* upon which interest on stranded cost recovery is to commence and it determined the interest *rate* to apply to the balance. Because this Court invalidated the totality of the Rule in the *CenterPoint* case, the Commission was under no obligation to apply the interest rate adopted in CenterPoint's unbundled cost of service ("UCOS") proceeding to the CTC balance and, indeed, committed error by doing so.²⁷

The Commission concluded that the portion of the Rule relating to the proper interest rate was still valid and binding on its actions. Specifically, the Commission concluded that "the *CenterPoint* court invalidated only the timing of P.U.C. SUBST. R. 25.263(1)(3), and not the portion requiring interest to accrue at the cost of capital established in a utility's UCOS case."²⁸ This conclusion, however, flies in the face of the plain language of the Supreme Court, which made no distinction about invalidating only certain parts of the Rule, but rather invalidated the entire Rule.

The Court of Appeals divided subsection (1)(3) of the Rule into discrete portions and found that the Supreme Court's decision invalidated only the portion of Rule 25.263(1)(3) that had governed the interest accrual date, but not the part prescribing the

²⁷ Significantly, the sole reason the majority of the Commission adopted the 11.075% interest rate is because of its conclusion that "... the portion of P.U.C. SUBST. R. 25.263(1)(3) that requires the accrual of interest on stranded costs at the cost of capital established in a utility's UCOS case is still valid and binding upon the Commission." PUC Docket No. 30706, Order at 11, Admin. R. Binder 2, Item No. 145. Because the Commission's legal conclusion is erroneous the only appropriate remedy as the District Court concluded, is to remand the case to the Commission for consideration of the issue without this constraint.

²⁸ PUC Docket No. 30706, Order at 9, Admin. R. Binder 2, Item No. 145.

rate.²⁹ The Court based its opinion on the fact that the issue before the Court in the *CenterPoint* case was the date from which carrying costs may be recovered once deregulation commenced.³⁰ GCCC does not dispute that the main issue in the *CenterPoint* case was the date interest charges were to commence but, notwithstanding this fact, the Supreme Court clearly invalidated the entire portion of the Rule that is at issue in this appeal.

The plain language of the *CenterPoint* opinion invalidates the entire Rule.³¹ The Court found that “[f]or the reasons considered above, we hold that Rule 25.263(1)(3) is *invalid*.”³² This language does not limit itself to any portion of subsection (1)(3). This Court addressed the issue that was before it, which was the starting date for accrual of carrying costs on true-up balances, and crafted a holding to address that issue. The holding was that the Rule is invalid. This Court could easily have crafted a holding that invalidated only a portion of P.U.C. SUBST. R. 25.263(1)(3), but it did not do so. Therefore, it should be assumed that this Court intended to invalidate the entire rule and not just a portion of the rule. Contrary to *CenterPoint*’s suggestions that the Court erred in its use of explicit language in the *CenterPoint* case, it is entirely reasonable to conclude that the Supreme Court meant exactly what it said. It is not for the Commission

²⁹ *CenterPoint Energy Houston Electric, LLC v. Gulf Coast Coalition of Cities*, 263 S.W.3d 448, 458 (Tex. App.-Austin 2008, pet filed).

³⁰ *Id.* at 457-458.

³¹ *CenterPoint*, 143 S.W.3d at 84 and 99.

³² *Id.* at 99 (emphasis added).

or the parties to speculate on what the Supreme Court really meant, or what it did or did not take into account in crafting a very clearly described remedy.

The decision to invalidate the entire Rule was appropriate given the fundamental interconnection between interest rates and the time period over which they are collected. There is an obvious relationship between the length of a loan and the interest rate on that loan. For example, it is common for the rates on long-term mortgages to be higher than on short-term mortgages as the associated risk changes over time. This Court was acting prudently and in line with accepted financial standards when it invalidated the entire P.U.C. SUBST. R. 25.263(1)(3).

2. Doctrine of Severability

If this Court determines that it did not invalidate the entire P.U.C. SUBST. R. 25.263(1)(3) in the *CenterPoint* case, it must nonetheless reverse the Third Court of Appeals opinion because under the doctrine of severability, the entire rule should be invalidated because severance is not justified.

Texas courts use the following test to determine whether a partially invalidated rule survives according to the doctrine of severability:

If a part [of an agency rule] only is invalid, the severance decision depends on the court's determination of two issues: (1) will the function of the regulatory statute as a whole be impaired without the invalid part of the rule; and (2) is there *any indication* that the agency would *not* have adopted the

rule but for the invalid part? If the answer to either query is “yes,” in the court’s view, then severance is not justified and the entire rule must fall.³³

The Commission violated state law when it failed to properly apply the appropriate legal test to determine whether a partially invalidated rule survives according to the doctrine of severability.

The Commission’s error occurred when it applied the second prong of the test. In fact, the Commission apparently misunderstood the law on this point or at the very least misstated it. The Commission stated that “Texas courts hold that the remainder of a partially invalidated administrative rule is still valid if ... the *agency would have adopted the rule originally even without the invalidated portion.*”³⁴ That statement of the law is completely erroneous. The law, in pertinent part, is whether “there is *any indication* that the agency would *not* have adopted the rule but for the invalid part” and if the answer is yes then the entire rule must fall.³⁵ The Commission relied on the fact that there was some indication that the rule would have been adopted even without the invalidated portion.³⁶ In doing so, the Commission followed its misstated or misinterpreted version of the Texas Doctrine of Severability, but it did not follow the actual law. The test is not whether there is *some* indication that the PUC would have adopted the rule without the

³³ *Texas Dept. of Banking v. Restland Funeral Home, Inc.*, 847 S.W.2d 680, 683 (Tex. App.-Austin 1993, no writ) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 295 (1988)) (emphasis added). See also *Southwestern Bell Telephone Co. v. Pub. Util. Comm’n of Texas.*, 888 S.W.2d 921, 929 (Tex. App.-Austin, 1994).

³⁴ PUC Docket No. 30706, Order at 10, Admin. R. Binder 2, Item 45 (citing *Texas Dept. of Banking v. Restland Funeral Home, Inc.*, 847 S.W.2d 680, 682-683 (Tex. App.-Austin 1993, no writ)) (emphasis added).

³⁵ *Texas Dept. of Banking*, 847 S.W.2d at 683 (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 295 (1988)) (emphasis added).

³⁶ PUC Docket No. 30706, Order at 10, Admin. R. Binder 2, Item 145.

invalid portion. The test is whether there is *any* indication that the PUC would *not* have adopted the rule but for the invalid portion, and there is clearly such evidence.

For example, the testimony of Commission Staff witness Mr. Tietjen, provided an indication that the PUC would not have adopted the rule without the invalidated portion. Mr. Tietjen testified that in authoring the rule, he believed that “everybody expected that the Final Order would be issued, a few months later the bonds would be issued, and even if the UCOS rate was applied, it would only be for a very short period of time.”³⁷ Mr. Tietjen offered multiple alternative rates, all of which were lower than the one the Commission adopted and explained that the rate authorized in the UCOS case was inappropriate and had become “stale.”³⁸ As a long-time experienced senior PUC employee in charge of the true-up rulemaking project, Mr. Tietjen’s testimony is clearly some indication that the PUC would not have adopted the rule without the invalid portion.

Another indication that the PUC would not have adopted the Rule without the time period provision comes from Commissioner Parsley’s dissent in which she states:

“When the rule was adopted, the Commission understood that the carrying costs would not begin to accrue until the date of the utility’s final true-up order, and that interest would accrue for a period of months, not years. This is demonstrated by the order adopting the rule, which states that the rule ‘provides for carrying costs on both positive and negative true-up

³⁷ PUC Docket No. 30706, Tr. at 705 (Apr. 8, 2005), Admin. R. Binder 6.

³⁸ Direct Testimony of Darryl Tietjen, Staff Ex. 1 at 7-12, Admin. R. Binder 6.

balances, but only from the date of the final true-up order forward.”³⁹

Commissioner Parsley’s statement of the Commissions understanding at the time it adopted the Rule, that the interest rate portion of the Rule was closely tied to the time period portion of the Rule, is clearly some indication that the PUC would not have adopted Rule 25.263(1)(3) but for the time period portion therein. The Order adopting the Rule also states that “a utility’s true-up balance becomes due upon the issuance of a final order in that utility’s true-up proceeding and that carrying charges should only accrue from that date forward.”⁴⁰

Once again, the test is not whether the agency’s official decision indicates that the rule would not have been adopted without the invalidated portion, or whether the *current* Commission would not have adopted the rule but for the invalidated portion; rather the test is whether there is *any* indication that the rule would not have been adopted without the invalidated portion. That test has clearly been met in this case.

Therefore, even if this Court finds that it did not invalidate the entire Rule 25.263(1)(3) in the *CenterPoint* case, it should nonetheless hold the Rule invalid under the doctrine of severability because it meets the second prong of the test, and so, severance is not justified and the entire rule must fail.

³⁹ PUC Docket No. 30706, Order at Concurrence and Dissent of Commissioner Julie Parsley at 1-2, Admin. R. Binder 2, Item 145.

⁴⁰ Tex. Pub. Util. Comm’n, *Rulemaking Concerning True-Up Proceeding Under PURA § 39.262*, PUC Docket No. 23571, Order at 98 (Dec. 4, 2001).

3. The PUC's decision is arbitrary and capricious because the evidence does not support the 11.075% interest rate.

If this Court finds that the entire Rule 25.263(1)(3) was not invalidated by its decision in the *CenterPoint* case, and that the rule was properly severable, it must still rule in favor of GCCC and find that use of the UCOS rate of 11.075% is arbitrary and capricious because it is not supported by substantial evidence. In fact, there was absolutely no evidence supporting the conclusion that the 11.075% interest rate appropriately reflected CenterPoint's WACC at the time Docket No. 30706 was decided or the level of risk to CenterPoint associated with their recovery of the CTC. Furthermore, because this Court invalidated the entire subsection in the *CenterPoint* case, the Commission was under no obligation to apply the interest rate adopted in CenterPoint's 2001 UCOS case to the CTC balance, and committed error by doing so.

CenterPoint has asserted that the rebuttal testimony of its witness, Frank Huntowski, provided evidence that the 11.075% interest rate was reasonable in light of the risk involved in collecting the CTC.⁴¹ However, Mr. Huntowski's rebuttal testimony is merely evidence of the Company's preference for the excessive 11.075% interest rate from its 2001 UCOS case. It does not constitute substantial evidence as to the appropriate interest rate to be applied to the CTC balance. Mr. Huntowski's rebuttal testimony presented no evidence supporting the conclusion that the 11.075% interest rate appropriately reflected the level of risk to CenterPoint associated with their recovery of the CTC.

⁴¹ CenterPoint's Response to GCCC's Petition for Review at 12 (Oct. 8, 2008).

As a matter of fact, CenterPoint's WACC was well below 11.075% at the time this case was heard by the Commission. Every intervenor witness who testified on this subject conducted an updated WACC analysis. Each of them calculated CenterPoint's WACC to be far below the level set in the UCOS proceedings. For example, Commission Staff witness, Mr. Tietjen, testified that "an alternative interest rate of 9.75%.... is an updated estimate of CenterPoint's overall pretax WACC."⁴² Significantly, the Company did not present any up-to-date rate of return analysis. Consequently, the record is void of evidence supporting the 11.075% interest rate. Therefore, it was unreasonable to rely upon an 11.075% interest rate.

In her dissent, Commissioner Parsley stated that:

"Under either theory [the entire Rule 25.263(1)(3) was invalidated by the *CenterPoint* case or the Rule was not properly severable], then, we are not required by any rule to apply the UCOS weighted average cost of capital interest rate to the CTC amounts in this proceeding, and I would, instead, *adopt an interest rate supported by the evidence in this case.*"⁴³

In other words, Commissioner Parsley accurately points out that there is no evidence in the record that supports the 11.075% interest rate. Accordingly, there is no substantial evidence in the record as to the *appropriate* interest rate to be applied to the CTC balance. In order to constitute substantial evidence, the Company would have had to present evidence supporting a finding of fact that the 11.075% interest rate reflects the Company's current WACC and the Company did not.

⁴² Direct Testimony of Darryl Tietjen, Staff Ex. at 11, Admin. R. Binder 6.

⁴³ PUC Docket No. 30706, Order at Concurrence and Dissent of Commissioner Julie Parsley at 2, Admin. R. Binder 2, Item 145.

The Commission did not address nor did it make a finding of fact or conclusion of law regarding whether the 11.075% interest rate was reasonable or supported by any evidence.⁴⁴ The Commission merely relied on its erroneous conclusion that the interest rate provision of Rule 25.263(1)(3) survived both this Court's decision in the *CenterPoint* case and the doctrine of severability.⁴⁵ Therefore, Commissioner Parsley was the only Commissioner that commented on the evidence supporting the reasonableness of the 11.075% interest rate, and, as stated above, she found that the evidence did not support the reasonableness of such a high interest rate.⁴⁶

Furthermore, the application of an 11.075% return to the CTC balance will result in an enormous windfall to the Company, and cause customers the burden of massive additional costs. The PUC has recognized that this result is inequitable, and it conducted a rulemaking in order to avoid this result in the future.⁴⁷ At its June 29, 2006 Open Meeting, the PUC adopted an amendment to P.U.C. SUBST. R. 25.263 that lowered the interest rates applicable in this type of case. Therefore, it is only reasonable that this Court confirm that the 11.075% interest rate is arbitrary and capricious. The fact that the rule change only applies prospectively does not preclude this Court from using it as an indication that the PUC itself decided that an interest rate calculation conducted in this manner is unreasonable.

⁴⁴ *Id.* at 8-11, 36, and 45-46.

⁴⁵ *Id.* at 8-11.

⁴⁶ *Id.* at Concurrence and Dissent of Commissioner Julie Parsley at 2, Admin. R. Binder 2, Item 145.

⁴⁷ Tex. Pub. Util. Comm'n, *Rulemaking Proceeding to Amend Subst. R. § 25.263 Relating to True-Up Proceeding*, Project No. 32008, Order Adopting Amendment to § 25.263 As Approved at the June 29, 2006, Open Meeting at 1 (June 30, 2006).

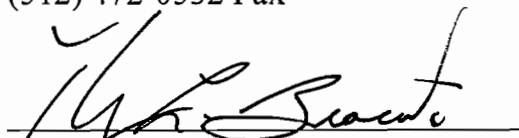
PRAYER

Pursuant to the Commission's Order and the Third Court of Appeals' Opinion and Judgment, Texas ratepayers will be forced to pay for an enormous windfall to the Company which is not supported by statutory or case law. Specifically, GCCC requests that this Court clarify and confirm its intention to invalidate the entirety of P.U.C. SUBST. R. 25.263(1)(3) in *CenterPoint Energy, Inc. v. Pub. Util. Comm'n of Texas*, 143 S.W. 3d 81 (Tex. 2004). GCCC further requests that this Court reverse the Court of Appeals' judgment and remand to the Commission with directions to correct such errors. Finally, GCCC requests costs and any other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of March, 2009, a true and correct copy of the foregoing document was served upon on all parties of record by certified mail, return receipt requested.

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