

# **Administrative Case Law Update**

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## I. Introduction

This case law update includes 14 Texas administrative law cases decided in the past year. These were selected to be representative of a range of substantive areas and agencies at issue and is an exhaustive review of all administrative law cases considered. Topics covered include agencies' interpretation of statutes and rules, sovereign immunity determinations, pleas to the jurisdiction, and issues of open government related to the Public Information Act and the Open Meetings Act.

## II. Agency Authority

- i. *GS Texas Ventures, LLC v. Pub. Util. of Tex.*, No. 03-18-00533-CV, 2020 WL 217179 (Tex. App.—Austin Jan. 15, 2020)

GS Texas Ventures, LLC ("GSTV") filed an application with the Public Utility Commission of Texas ("PUCT") to be certified as an eligible telecommunications carrier ("ETC") and as an eligible telecommunications provider ("ETP"). Following a hearing at SOAH, an Administrative Law Judge issued a Proposal for Decision recommending that GSTV's application be approved. However, the PUCT disagreed with the PFD, denying the application, and GSTV sought judicial review.

The State of Texas and the federal government have established "universal service funds" that would subsidize companies that provide telecommunication services to low income and rural, high-cost areas. To be eligible for those subsidies, the carrier must be designated as an ETC or ETP. Federal law requires carriers seeking to be designated as ETCs to provide "services that are supported by Federal universal service support mechanisms . . . , either using its own facilities or a combination of its own facilities and resale of another carrier's services." The Texas Legislature later required the PUCT to adopt the federal rules to govern the Texas Universal Service Fund.

At the SOAH hearing, the primary issue concerned whether GSTV's proposed services would satisfy the "own facilities" requirement. Commission Staff argued that under federal law "voice telephony service" is a service divided between four functionalities and that GSTV must provide all four functionalities through its own equipment or facilities. In contrast, GSTV argued that the four functionalities are separate services and that it "would meet the 'own-facilities' requirement if it provides at least one service through its own facilities."

The PUCT's final order held that GSTV had failed to carry its burden of proof because the descriptions of its service were too "too vague and hypothetical", noting for instance that GSTV did not provide the contract by which it asserted it would obtain emergency services. The PUCT had doubts about the credibility of GSTV's claims regarding the services it proposed to provide given how these claims changed throughout the proceeding, particularly noting changes to its proposal to hardwire wireless receivers into customers' homes. The PUCT also agreed with Commission Staff that an applicant is required to provide all four functionalities through its own facilities. The PUCT outlined these reasons in the findings of fact and conclusions of law of its final order denying GSTV's application for certification as an ETP and ETC. The trial court affirmed the PUCT's order and GSTV appealed.

Texas Utilities Code § 15.001 establishes that a party to an administrative hearing before the PUCT is entitled to judicial review under the substantial evidence standards, in which a court may not substitute its judgment for that of the PUCT "on the weight of the evidence on questions committed to" the PUCT's discretion.<sup>1</sup> Under this standard, the Court of Appeals held that it could not overturn the PUCT's order if there is a "valid factual or legal basis for it." The Court acknowledged that although the parties' arguments at SOAH primarily concerned interpretation of the "own facilities" requirement, the PUCT based its decision in the final order on GSTV's failure to meet its burden of proof to demonstrate that it could provide the services proposed. The PUCT included several findings of fact regarding its concerns with GSTV's failure to adequately show how it would hardwire wireless receivers. The Court held that "We have reviewed the administrative record and cannot conclude that the Commission's decision lacked a valid basis in its concerns over the hardwiring of the receivers in customers' homes." Therefore, the Court concluded that there was sufficient evidence that the PUCT's decision was within the bounds of reasonableness. Furthermore, because the hardwiring issue was a sufficient basis on which to deny the application, the Court stated that it need not reach the issue of interpreting the "own facilities" requirement.

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<sup>1</sup> Tex. Util. Code §§ 15.001; Tex. Gov't Code § 2001.174.

GSTV asserted that the PUCT did not provide “evidence, reason, or legal authority” to support the finding that GSTV’s hardwiring proposal changed over the course of the proceeding and accordingly weighed against its credibility. The Court disagreed, holding that the PUCT has broad authority to make such determinations “because of the complexity of the issues presented and the agency’s specialized judgement, knowledge, and experience.”

Finally, GSTV argued that the PUCT did not adequately justify its divergences from the ALJ’s PFD, but the Court noted precedent from the Texas Supreme Court that there is “no precise form for an agency’s articulation of underlying facts.”<sup>2</sup> The Court accordingly held that the PUCT is not required to provide “line-by-line explanations in changing or deleting an ALJ’s findings” and that the final order’s broad explanations for its disagreement with the PFD were sufficient.

In finding that the PUCT had sufficiently shown grounds for denying GSTV’s application to be designated as an ETC and ETP, the court affirmed the trial court’s order and upheld the Commission’s final order.

### **III. Agency Interpretation of Statutes and Rules**

#### **i. *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639 (Tex. 2020)**

The Lone Oak Bayou (the “Bayou”) is a navigable body of water near the Gulf of Mexico. The Lone Oak Club (the “Club”) owns a large tract of land along the Bayou, including the land submerged under the Bayou. The Club acquired the Bayou to establish an area where people can go fishing and hunting. Members of the public began to fish in the areas of the Bayou owned by the Club – the Bayou’s submerged bed—and the Club claimed that these people were trespassing.

After the Club excluded a person who was hunting in the area at issue, the General Land Office (“GLO”) conducted an inspection and noted that the tide was “coming in and rising.” The GLO concluded that: “[T]he disputed areas are ‘State owned submerged lands,’ the ‘waters are tidally influenced, public, waterways,’ and the ‘boundary between the State and private ownership is the line of [mean high water].”

In 1929, the Texas Legislature passed the Small Bill to validate property conveyances that included “the beds . . . of watercourses or navigable streams.”<sup>3</sup> Responding to the Club’s suit at district court, the GLO argued that the Small Bill did not validate conveyances of tidally influenced waterways and, therefore, the land submerged under the Bayou did not belong to the Club. However, both the district court and the Third Court of Appeals agreed with the Club and the GLO appealed.

The issue at the Supreme Court of Texas was “whether the Small Bill validated patents of land submerged under tidally influenced water courses and navigable streams.” The Court first settled the preliminary issue of where the line between state and private ownership exists. It held that under English common law, the line lies at the “mean high tide”; therefore, the issue the Court analyzed was whether, for purposes of determining what land was validated under the Small Bill, a “navigable stream” existed only above the tide line.

The Court agreed with the Club and held that the Small Bill validates conveyances of submerged beds of navigable streams, not just lands above the tide line. The Court referred to the Navigable Stream Statute passed by the Republic of Texas in 1837 to interpret whether the term “navigable stream” includes the submerged beds.<sup>4</sup> Because the Small Bill and the Navigable Stream Statute deal with the same subject matter, the Court held that a “navigable stream,” as it is used in the Navigable Stream Statute, informs understanding of the term in the Small Bill. The Republic of Texas followed the civil law of Mexico at the time of the enactment of the Navigable Stream Statute and such civil law did not distinguish between land above or below the tidal line. The Navigable Stream Statute included a definition of “navigable stream” based on width, but did not address tide lines. The Court held that the Navigable Stream Act’s definition did not override the civil law’s lack of distinction between lands above and below the tide line and therefore a navigable stream under the Small Bill exists both above and below the tide line.

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<sup>2</sup> *Goeke v. Houston Lighting & Power Co.*, 797 S.W.2d 12, 15 (Tex. 1990).

<sup>3</sup> Tex. Rev. Civ. Stat. Ann. art. 5414a.

<sup>4</sup> See Act of Dec. 14, 1837 2d Cong., R.S., §§ 21,42, 1837 Repub. Tex. Laws 62, 70, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822-1987*, at 1412 (Austin, Gammel Book Co. 1898).

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