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Texas Supreme Court to Rule on Key ERCOT Decisions

By: Haley M. Owen

Max Bayman



**Partner at
Hermes Law**

Haley Owen



**Attorney at
Hermes Law**

On September 2, 2022, the Texas Supreme Court granted CPS Energy's Petition for Review in the CPS Energy v. Electric Reliability Counsel of Texas ("ERCOT") matter (Case No. 22-0056). The case was consolidated with In re ERCOT and William L. Magness (Case No. 21-0834) and set for oral argument on January 9, 2023. The Court also granted ERCOT's Petition for Review in Panda Power Generation Infrastructure Fund, LLC, d/b/a/ Panda Power Funds, et al. v. ERCOT (Case No. 05-18-00611-CV), which is set for oral argument the same day. The Court is expected to rule on several critical issues that will impact all ERCOT litigation, including ongoing litigation resulting from February 2021's Winter Storm Uri. This article discusses what the CPS Energy appeal might mean for insurance companies.

BACKGROUND

In our March 7, 2022, article, *Another Win for Insurers Affected by Winter Storm Uri*, we discussed some of the key lawsuits that have been filed against the Electric Reliability Counsel of Texas (“ERCOT”) as a result of February 2021’s Winter Storm Uri, including the *CPS Energy v. Electric Reliability Counsel of Texas (“ERCOT”)* matter (Case No. 22-0056) and *Panda Power Generation Infrastructure Fund, LLC, d/b/a/ Panda Power Funds, et al. v. ERCOT* (Case No. 05-18-00611-CV). Read the article [here](#).

Although much of the Winter Storm Uri litigation has stalled out over questions regarding whether ERCOT is subject to suit at all, this will likely change as a result of the Texas Supreme Court’s decision on September 2, 2022, to grant CPS Energy’s petition for review in *CPS Energy v. ERCOT*. The case is to be consolidated with *In re ERCOT*, in which ERCOT seeks a writ of mandamus on the same issue. The Court also granted review in *Panda Power* on the same day. To date, it does not appear this case is to be consolidated with *CPS Energy* and *In re ERCOT*.

CPS Energy

In *CPS Energy v. ERCOT* (Case No. 22-0056), CPS Energy sued ERCOT and its current and former executives and board members, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, statutory violations, and violations of the Texas Constitution, relating to ERCOT’s conduct before, during, and after the February 2021 winter storm. ERCOT filed a Plea to the Jurisdiction, arguing that the Public Utilities Commission of Texas (“PUC”) has exclusive jurisdiction; CPS Energy’s claims are barred by sovereign immunity; and CPS failed to join jurisdictionally indispensable parties. On May 26, 2021, the trial court denied ERCOT’s Plea to the Jurisdiction. ERCOT appealed to the Court of Appeals for the Fourth District in San Antonio, who reversed the trial court’s order denying ERCOT’s Plea to the Jurisdiction, holding that ERCOT was a governmental unit and therefore was allowed to pursue an interlocutory appeal. On January 27, 2022, CPS Energy petitioned the Texas Supreme Court for review on January 27, 2022.

In re ERCOT

In *In re Electric Reliability Council Of Texas, Inc., and William L. Magness* (Case No. 21-0834), CPS Energy sued ERCOT and its current and former executives and board members, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of the Texas Constitution related to electricity prices during the February 2021 winter storm. ERCOT filed a jurisdictional plea arguing

that CPS's claims were barred by sovereign immunity and exclusive jurisdiction, as well as a motion to transfer venue. The trial court denied both motions. ERCOT filed both an interlocutory appeal and a mandamus petition challenging the trial court's rulings and asked that they be consolidated for decision. After refusing to consolidate, the Fourth District Court of Appeals summarily denied ERCOT's petition. The same panel summarily denied rehearing. On September 24, 2021, ERCOT sought a writ of mandamus directing the district court to vacate its order denying ERCOT's jurisdictional plea or motion to transfer and ordering the trial court to dismiss this case or transfer it to Travis County.

Panda Power

In the Panda Power cases, discussed at length in our March 7, 2022, article Panda and its related entities sued ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that ERCOT's misrepresentations regarding market conditions entitle Panda to damages. Read the article [here](#).

WHAT'S AT STAKE AND HOW INSURERS WILL BE IMPACTED:

The Court will hear oral argument on the following issues:

1. Whether ERCOT is a governmental unit;

We anticipate that CPS Energy will argue that ERCOT is not a "governmental unit" based on ERCOT's own prior arguments and because it is not an institution, agency, or organ of government with status and authority derived from state law, and that the Courts do not have jurisdiction over ERCOT's interlocutory appeal.

2. Whether the PUC has exclusive jurisdiction over ERCOT;

We anticipate that CPS Energy will argue that the courts, not the PUC, have exclusive jurisdiction over the common law, constitutional, and injunction claims presented in the case because the claims involved do not concern PUC regulatory action and therefore the rare exception to the courts' general jurisdiction is not applicable.

The Court may also consider several additional key, but unbriefed, issues:

3. Whether ERCOT is entitled to sovereign immunity;
4. Whether PUC is a jurisdictionally indispensable party to CPS Energy's claims;
5. Whether venue is mandatory in Travis County in the event the Court determines the trial court has jurisdiction over any of CPS Energy's claims.

If the Court rules against ERCOT, it will clear many of the significant roadblocks facing litigants attempting to recover from ERCOT for its role in the Winter Storm Uri blackouts. However, if the Court rules in favor of ERCOT on these issues, litigants will likely be forced to abandon their claims against ERCOT and look elsewhere for compensation.

The Texas Supreme Court is set to hear oral argument on CPS Energy, In re ERCOT, and Panda Power on January 9, 2023. For insurance companies already involved in litigation against ERCOT, this will likely mean several more months of waiting as trial courts wait for the Supreme Court's ruling before moving forward with the cases on their dockets. This is especially true for the In re Winter Storm Uri Multidistrict Litigation, which is currently under a discovery stay that will likely continue.

Hermes Law is monitoring litigation against ERCOT closely and will continue its efforts to recover damages for its insurance clients against ERCOT and Texas power generating companies while we wait.

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IF YOU PAID CLAIMS CAUSED BY THE BLACKOUTS IN TEXAS AFTER WINTER STORM URI IN FEBRUARY 2021, CONTACT US TODAY AT (214) 749-6800 TO DISCUSS OUR CURRENT LITIGATION EFFORTS AGAINST ERCOT AND POWER GENERATION COMPANIES TO SEE IF YOU CAN BENEFIT.