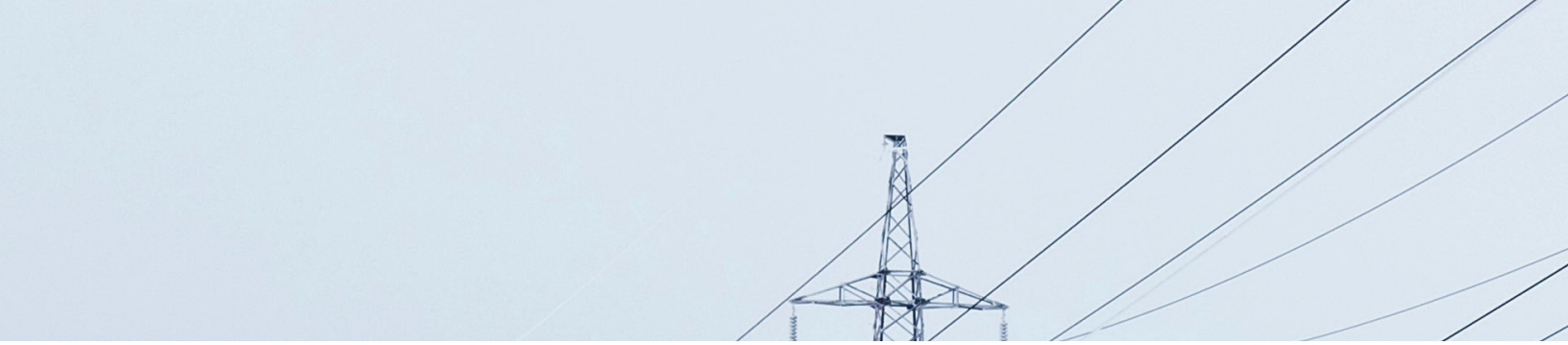

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ENERGY CLIENT ALERT

WINTER STORM URI: SIGNIFICANT CASE UPDATES THROUGH DECEMBER 2023

by Meghan McElvy

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Meghan McElvy, Co-Chair of Energy, has over 14 years of experience representing a wide range of clients in the energy industry. She also worked in the industry for two years at a large fuel storage and terminalling complex in South Florida prior to attending law school. Throughout her career, she has enjoyed learning about all manner of energy and power facilities — be they wells, pipelines, gathering and processing plants, tank farms, refineries or electrical transmission and distribution equipment — and collaborating with the people that keep this vital sector of the U.S. and world economies going and continue to innovate and improve it. No matter the context, Meghan prioritizes delivering business-oriented advice to help her clients achieve their goals.

Meghan's practice focuses on energy litigation and her trial work spans state and federal courts, as well as domestic and international arbitral forums, including AAA, CPR, IADR, ICC and UNCITRAL. She has served as a first or second chair trial lawyer on over a dozen cases or arbitrations during her career, and has been recognized by Chambers USA for "Nationwide Oil and Gas Litigation" since 2020 and by Texas Super Lawyers as a "Rising Star" from 2014-2021.

As part of her national and international energy practice, Meghan has advised energy clients on most aspects of legal and operational issues arising from the development of shale plays and drilling throughout Texas and elsewhere in the United States, including disputes involving oil and gas leases, joint operating and joint development agreements, participation agreements, royalty obligations, surface use rights, mineral title, mineral liens, oilfield services and gas gathering and processing facilities. She also has represented clients with midstream assets, renewable assets and LNG companies. Her energy practice extends offshore where she has litigated disputes arising under the Outer Continental Shelf Lands Act involving decommissioning of assets in the Gulf of Mexico.

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ENERGY CLIENT ALERT

Winter Storm Uri: Significant Case Updates Through December 2023

Client Alert – 01/19/2024
Originally Published by the State Bar of Texas
AUTHOR(S) MEGHAN MCELVY

I. Introduction

Those of us living in Texas in 2021 will never forget Winter Storm Uri. Lasting from February 14–21, 2021, Winter Storm Uri was a severe freezing weather event that, according to the Texas Comptroller, contributed to at least 210 deaths and caused more than two-thirds of Texans to lose power and nearly half to lose water service[1]. These devastating and widespread impacts occurred because, as temperatures dipped into the single digits across much of Texas overnight on February 14, nearly all forms of power generation (gas-fired power plants, coal plants, wind generation, solar generation, etc.) began to experience failures or significant operational declines for a variety of reasons, including the cold weather itself, equipment failure, lack of gas supply, lack of water supply, ice accumulation, and other factors. The Federal Reserve Bank of Dallas estimated that financial losses from Winter Storm Uri were $80—130 billion. A City of Austin and Travis County report pegged the costs of Winter Storm Uri at $195 billion[2]. Regardless of the specific figure, it plainly was the costliest winter storm in Texas history[3].

Hundreds of lawsuits by retail electricity consumers across the state were filed almost immediately against The Electric Reliability Council of Texas ("ERCOT") and hundreds of other defendants—generally in the categories of generators and co-generators, transmission and distribution utilities, publicly owned utilities, retail electric providers, and natural gas producers that supplied fuel to power plants. These lawsuits initially centered on claims involving personal injury and property damage related to the extensive and long-lasting power outages that occurred during the storm. Later, they were expanded to include market manipulation claims related to the price of natural gas, which spiked dramatically during the storm. Other lawsuits were filed related to ERCOT's decision during the storm to set the price of electricity at its maximum ($9,000/KWh) and the duration of that decision, as well as the manner in which ERCOT allocated the costs of certain market participant defaults across the industry following the storm. Some power companies were forced to file for bankruptcy, leading to significant litigation over creditors' claims. Yet further commercial disputes were filed challenging force majeure declarations that various businesses made as a result of the storm's impact on their ability to perform under contracts. All of these disputes have played out over the course of nearly three years now and, in many instances, are still ongoing (some in their infancy) with significant consequences for hundreds of individual power consumers and market participants in Texas still hanging in the balance.

It is not possible in the scope of this article to cover all Winter Storm Uri related case updates, but this article addresses several of the most significant cases that have been litigated, or continue to be litigated, in Texas courts and their status or outcomes through mid-December 2023.

II. Overview of ERCOT and the Texas Electricity Market

Before diving into specific Winter Storm Uri case updates, it is helpful for those who may be less familiar to provide a brief overview of ERCOT and Texas's unique electricity market.

Texas is the only state in the mainland United States that has its own *intra*state electrical grid that, with few exceptions, is not interconnected to other regional power grids that serve the eastern and western halves of the country, such as those operated by Pennsylvania-New Jersey-Maryland

1. *See* Jess Donald, *Winter Storm Uri 2021–The Economic Impact of the Storm* (Oct. 2021), https://comptroller.texas.gov/economy/fiscal-notes/2021/oct/winter-storm-impact.php (last visited Dec. 12, 2023).

2. *See* City of Austin & Travis County, *2021 Winter Storm Uri After-Action Review Findings Report* (Nov. 2021), https://www.austintexas.gov/sites/default/files/files/HSEM/2021-Winter-Storm-Uri-AAR-Findings-Report.pdf (last visited Dec. 14, 2023).

3. *See* Garrett Golding et al., *Cost of Texas' deep freeze justifies weatherization* (Apr. 2021), https://www.dallasfed.org/research/economics/2021/0415 (last visited Dec. 12, 2023).

(PJM) or Midcontinent Independent System Operator (MISO). The ERCOT power grid covers 75 percent of Texas's acreage, carries about 90 percent of its electrical load, and includes more than 52,700 miles of transmission lines, 1,100 generation units, and 26 million electricity customers. See *CPS Energy v. ERCOT*, 671 S.W.3d 605, 611 (Tex. 2023). The Public Utility Regulatory Act ("PURA") requires the Public Utility Commission of Texas ("PUC") to certify an independent system operator ("ISO") for the Texas power region. The PUC certified ERCOT, a membership-based 501(c)(4) nonprofit corporation. *Id.*

As the Texas Supreme Court recently summarized:

> ERCOT was formed in 1970 by various Texas electric utilities that had interconnected their grids for greater reliability and increased capacity. Membership was available to any electric utility that owned, controlled or operated an electric power system in Texas. In those days, each member utility operated its own control area, and ERCOT served an administrative role that promoted reliable operations of power systems in Texas by providing a means to communicate and coordinate the planning and operation of its members.
>
> In 1999, the Legislature restructured the electric utility industry in Texas. It amended PURA to require the unbundling of vertically integrated electric utility monopolies and established a fully competitive electric power industry. The new structure required an ISO to operate the wholesale electric market and ensure the reliability and adequacy of the Texas power grid. Since 2001, ERCOT has served as that essential organization.

Id. at 611-12 (internal citations and quotations omitted). This background information is important for understanding the context of Winter Storm Uri related disputes.

III. *In re Winter Storm Uri Litigation:* The Texas Multidistrict Litigation Master Case

A. Overview of the Winter Storm Uri MDL Parties

Almost immediately after Winter Storm Uri subsided, hundreds of lawsuits were filed against hundreds of defendants in counties across Texas involving individual electric consumers' claims of personal injury or death and property damage (typically subrogated to insurers). The defendants in those cases generally fall into the following buckets: (i) ERCOT; (ii) generators or co-generators; (iii) transmission and distribution utilities ("TDUs"); (iv) electric cooperatives and municipally owned utilities (the "Public Power Defendants"); (v) retail electric providers ("REPs"); and (vi) natural gas producers that supplied certain power plants with fuel during the storm (the "Natural Gas Producers").

B. General Theories of Liability

In general, the theory of liability against the non-ERCOT defendants in the first wave of cases is that: (i) they had a duty to continuously supply fuel for, or electricity to, the power grid and consumers and failed to winterize (*i.e.,* protect from the effects of freezing temperature) their facilities or equipment in such a manner that they could withstand, and continue to operate during, a severe winter weather storm like Uri, (ii) that such failures proximately caused personal injury and property damage to various consumers of electricity in Texas (individual, commercial, and industrial), and (iii) that those harms were foreseeable (the "First Wave WSU cases"). In turn, the alleged foreseeability of the harms in the First Wave WSU cases stems in significant part from an August 2011 joint report by the Federal Energy Regulatory Commission ("FERC") and the North American Electric Reliability Corporation ("NERC"), which included, among other things, recommendations for improved winterization of power-related facilities in Texas based on an "unusually cold and windy weather" event that occurred in February 2011, and similar prior events that caused widespread customer outages and dramatic increases in the price of electricity and natural gas[4]. Plaintiffs' claims included, among others, negligence, gross negligence, negligent undertaking, nuisance, tortious interference with contract, civil conspiracy, concert of action, and indivisible injury. As to ERCOT, plaintiffs alleged that it failed to learn lessons from past storms and ensure that the power grid remained operational even through a storm like Uri, and asserted claims for negligence, gross negligence, tortious interference with contract, nuisance, civil conspiracy, concert of action, and indivisible injury.

Near the time that the two-year statute of limitations ran in relation to Winter Storm Uri in or near late February 2023, a second wave of cases was filed, which generally allege that the named defendants—consisting of natural gas producers, pipelines, marketers, and traders in Texas—

4. *See* FERC & NERC, *Report on Outages and Curtailments During the Southwest Cold Weather Event of February 1-5, 2011* (Aug. 2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiS5tKxIo-DAxXTk2oFHX1DDuIQFnoECBkQAQ&url=https%3A%2F%2Fwww.ferc.gov%2Fsites%2Fdefault%2Ffiles%2F2020-05%2FReportontheSouthwestColdWeatherEventfromFebruary2011Report.pdf&usg=AOvVaw36gluvznHq39g01_14lmbw&opi=89978449 (last visited Dec. 14, 2023).

manipulated the natural gas market by intentionally restricting supply during the storm in order to inflate prices and create windfall profits at the expense of retail power consumers (the "Second Wave WSU cases"). The Second Wave WSU cases are generally referred to as the "market manipulation" cases.

C. Significant Procedural Developments

On April 7, 2021, ERCOT filed a Motion to Transfer and Stay seeking to transfer First Wave WSU cases filed against it to a multidistrict litigation ("MDL") pretrial court. Several other defendants followed suit or sought to join ERCOT's motion. By order dated June 10, 2021, the MDL Panel issued an order concluding that "the cases are related and involve one or more common questions of fact, and that the transfer to an MDL pretrial court is for the convenience of the parties and witnesses, and it will promote the just and efficient conduct of the actions." *See* 6/10/2021 MDL Panel Order (citing TEX. R. JUD. ADMIN. 13.).[5]

On June 30, 2021, Chief Justice Nathan Hecht of the Texas Supreme Court authorized the Honorable Sylvia Matthews, former district judge, to serve as the pretrial judge over the Winter Storm Uri MDL. The MDL Panel then transferred to the Pretrial Court: "all cases listed in Appendix A to ERCOT's Motion to Transfer and in Appendix A to the Notices of Related Proceedings and Joinders filed by Luminant, CPS, CenterPoint Energy (and as otherwise described in the Panel's June 10, 2021 Order Granting the Motion to Transfer): and all tag-along cases." This essentially effectuated the transfer of all First Wave WSU cases to the MDL Pretrial Court. The MDL Panel therefore ordered that Cause No. 2021-41903, *In Re Winter Storm Uri Litigation*, pending in the 281st District Court, Harris County, Texas, is the Master File for the cases transferred and tagged in pursuant to the MDL Panel's orders in MDL Docket No. 21-0313. *See* 7/13/2021 MDL Pretrial Court Order.

To procedurally streamline the Winter Storm Uri MDL, by Order dated March 18, 2022, the MDL Pretrial Court designated five "Selected Cases," as defined in Case Management Order No. 1, for the purposes of initial bellwether dispositive motions and pleas, which are:

1. *Randy Turner, Individually and as Personal Representative of the Estate of Terrill Turner a/k/a Terrell Turner, deceased, et al. v. NRG Texas Power, et ux.,* Harris County Cause No. 2021-24797 [MDL Case No. 5.00140] (involving plaintiffs' claims for loss of life, personal injuries, property damage and other losses) (the "Turner case");

2. *All American Insurance Company, et al. v. Electric Reliability Council of Texas, Inc., et al.,* Harris County Cause No. 2022-13706 [MDL Case No. 5.00178] (involving subrogated insurance claims against ERCOT and generators or co-generators) (the "All American case");

3. *Bernadine Edwards, Individually, as Next of Kin of Lauralene Butler Jackson, Deceased, and as Wrongful Death Beneficiary v. Electric Reliability Council of Texas, Inc., et al.,* Harris County Cause No. 2021-84438 [MDL Case No. 5.00036] (involving wrongful death claims) (the "Edwards case");

4. *Valerie Daniels v. CenterPoint Energy, Inc., et al.,* Harris County Cause No. 2021-18513 [MDL Case No. 5.00027] (involving various personal injury claims) (the "Daniels case"); and

5. *Ernest Peterman, Individually and on Behalf of the Estate of Ella Peterman, et al. v. Electric Reliability Council of Texas, Inc., et al.,* Harris County Cause No. 2021-18532 [MDL Case No. 5.00029] (involving plaintiffs' claims for loss of life, personal injuries, property damage and other losses) (the "Peterman case").

The MDL Pretrial Court then gave (1) plaintiffs 30 days to file any amended pleadings, and (2) defendants the opportunity to file Motions to Dismiss under Rule 91a of the Texas Rules of Civil Procedure, which provides for the dismissal of baseless causes of action (*i.e.,* those that have "no basis in law or fact", *see* TEX. R. CIV. P. 91A.1.), or other dispositive, responsive pleas. The defendant groups did file several such dispositive motions and pleas, the rulings on which are discussed below.

5. "Rule 13 of the Texas Rules of Judicial Administration is effective in all cases filed on or after September 1, 2003. Composed of five Judges, the Multi-District Litigation Panel (MDL Panel) is the judicial panel on multi-district litigation, designated pursuant to section 74.161 of the Texas Government Code, including any temporary members designated by the Chief Justice of the Supreme Court of Texas in his or her discretion when regular members are unable to sit for any reason. The Clerk of the Supreme Court of Texas serves as the Multi-District Litigation Panel Clerk." About Texas Courts, Multi-District Litigation Panel, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/#:~:text=Composed%20of%20five%20Judges%2C%20the,his%20or%20her%20discretion%20when (last visited Dec. 12, 2023).

D. Significant Substantive Decisions

Following a hearing on October 11, 2022, the MDL Pretrial Court, on January 26, 2023, issued a series of orders on the various defendant groups' bellwether Rule 91a Motions to Dismiss filed in relation to the First Wave WSU cases. Below is a summary of those orders.

1. In the *Turner* case, the court:
   a. granted the Natural Gas defendants' Rule 91a Motion to Dismiss, resulting in the dismissal of all causes of action against them; and
   b. granted in part and denied in part the Generators', the Co-Generators', the Public Power Defendants', and the TDUs' Rule 91a Motions to Dismiss (granted as to claims of tortious interference with contract and civil conspiracy, concert of action, and indivisible injury; otherwise denied).

2. In the *All American* case, the Court: Denied the Generator Defendants' and Co-Generator Defendants' Rule 91a Motions to Dismiss.

3. In the *Edwards* case, the Court:
   a. granted the Natural Gas defendants' Rule 91a Motion to Dismiss, resulting in the dismissal of all causes of action against them; and
   b. granted in part and denied in part the Generators' and TDUs' Rule 91a Motions to Dismiss (granted as to tortious interference with contract and civil conspiracy, concert of action and indivisible injury; otherwise denied).

4. In the *Daniels* case, the Court:
   a. granted the Natural Gas defendants' Rule 91a Motion to Dismiss, resulting in the dismissal of all causes of action against them; and
   b. granted in part and denied in part the Generators', the Co-Generators', the Public Power Defendants', and the TDUs' Rule 91a Motions to Dismiss (granted as to tortious interference with contract and civil conspiracy and indivisible injury; otherwise denied).

5. In the *Peterman* case, the Court:
   a. granted the Natural Gas defendants' Rule 91a Motion to Dismiss, resulting in the dismissal of all causes of action against them;
   b. granted in part and denied in part the Generators', the Co-Generators', the Public Power Defendants', and the TDUs' Rule 91a Motions to Dismiss (granted as to tortious interference with contract and civil conspiracy and indivisible injury; otherwise denied); and
   c. granted the Retail Electric Providers' Rule 91a Motion to Dismiss as to all claims.

Additionally, on January 26, 2023, the MDL Court granted ERCOT's amended plea to the jurisdiction in all of the bellwether cases, which ERCOT filed on the basis that it is immune from suit as an "arm of the State" and that the PUC has exclusive jurisdiction over matters pertaining to ERCOT's discharge of its regulatory functions, resulting in the dismissal of ERCOT from the Winter Storm Uri MDL.

Most recently, on December 14, 2023, the First Court of Appeals in Houston issued an opinion granting the petition for writ of mandamus of the Generator Defendants who argued that the MDL Pretrial Court abused its discretion by denying their Rule 91a Motions to Dismiss as to the First Wave WSU claims. In that decision, the court held that the Generator Defendants had no pre-existing duty in law to provide continuous electricity to the power grid, and declined to create such a duty for the first time. In reaching that conclusion, the court first noted that the Texas Legislature had already addressed some of the plaintiffs' concerns by passing legislation that "requires weatherization of wholesale power generators' assets and giving ERCOT authority to inspect for compliance." The court also found that the burden of placing such a new duty would "upend the carefully-crafted framework that the Legislature has implemented." *Id.* Further, the court found that imposing such a new duty would be "unworkable from a practical and statutory standpoint" because wholesale generators can only produce electricity as and when it is needed. *Id.* The court also found that since extreme weather is a "normal occurrence in Texas," imposing such a duty would have significant, negative consequences that outweighed the potential benefits. The court therefore held that the MDL Pretrial Court abused its discretion in partially denying the Generator Defendants' Rule 91a Motion to Dismiss as to claims for negligence, gross negligence, negligent undertaking, and nuisance. Finally, the court held that mandamus relief was appropriate here to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings."

The TDUs have a similar mandamus petition pending before the Fourteenth Court of Appeals in Houston. TDUs are positioned differently in the electricity market in that they merely deliver electricity that is on the grid to end-use consumers who purchase their electricity from REPs. The reasoning of the First Court of Appeals' decision arguably applies with even greater force to the TDUs.

The First Court of Appeals' December 14 decision will undoubtedly be appealed to the Texas Supreme Court. If affirmed, at a minimum the Generator Defendants will be dismissed from the Winter Storm Uri MDL and, depending on how things play out for the TDUs and other defendant groups, potentially the bulk of the remaining claims. Time will tell.

Additionally, given their success in getting dismissed from the First Wave WSU cases related to personal injury and property damage claims, it is anticipated that the Natural Gas Producers named in the Second Wave WSU cases related to market manipulation claims will file similar Rule 91a Motions to Dismiss. On November 29, 2023, the MDL Panel issued an Order denying the plaintiffs' Joint Motion for Rehearing of motions to remand those "tag along" cases back to their original trial courts (or to a separate MDL). Therefore, the Second Wave WSU cases will remain in the same master case as the first wave, unless the MDL Panel's November 29, 2023 decision is further appealed. The First Court of Appeals' December 14 decision obviously also has major implications for the viability of claims asserted in the Second Wave WSU cases.

E. Other Discovery-Related Developments

Beyond the foregoing substantive decisions, the MDL Pretrial Court, in an order dated November 29, 2023, lifted the discovery stay to allow plaintiffs to pursue certain discovery from ERCOT—*i.e.*, the production of certain documents, including documents ERCOT made public related to the storm, certain reports for the period January 31, 2021-February 20, 2021, documents ERCOT provided confidentially to U.S. Representative Ro Kahan, Chairman of the Subcommittee on Environment for the Committee on Oversight and Reform, and documents ERCOT provided to FERC in response to FERC's information requests related to the storm. This is important information for plaintiffs, but here too its ultimate utility is in question if the Texas Supreme Court affirms that the Generator Defendants (and potentially other defendant groups) owed no duty to plaintiffs as a matter of law in respect of harms arising from Winter Storm Uri.

Other proposed discovery orders remain pending with respect to plaintiffs' fact sheets—sheets that compile certain basic information about the hundreds of plaintiffs and the nature of the claims they are asserting in the Winter Storm Uri MDL—and the timing and implications for sanctions in the absence of such fact sheets being produced.

Participants in the Texas power market, including oil and gas companies, should continue to monitor the Winter Storm Uri MDL (and appeals therefrom) for these important developments.

IV. ERCOT's Sovereign Immunity

A. Background of the Consolidated Cases

As noted above, ERCOT operates the wholesale electric market in Texas. Further, as the ISO for most of Texas, ERCOT schedules power on the grid and performs financial settlement for the competitive wholesale bulk-power market and administers retail. On February 15, 2021, just as Winter Storm Uri hit, ERCOT declared its highest state of emergency—Emergency Energy Alert Level 3—and directed transmission operators to curtail firm load. The PUC then directed ERCOT to set the per-megawatt-hour price of electricity at the highest permissible rate of $9,000 to reflect scarcity of supply. *CPS Energy v. ERCOT*, 671 S.W.3d 605, 612 (Tex. 2023)

In addition, as part of ERCOT's functions, the PUC requires ERCOT to annually publish resource adequacy reports that project, for at least the next five years, the capability of existing electric generation resources to meet projected demand in the Texas power region. ERCOT does so by publishing Capacity, Demand, and Reserves reports ("CDRs"). ERCOT's 2011 and 2012 CDRs projected a likelihood of severe energy shortfalls. Subsequently, however, ERCOT revised its 2011 and 2012 CDRs and forecast a future oversupply of generation capacity. *Id.* at 613.

As a result of its central role in overseeing the bulk of Texas' power grid and actions it took in relation to Winter Storm Uri, ERCOT was sued as a defendant in numerous cases. In defense, ERCOT asserted, among other things, that—although it was a private institution—it had sovereign immunity as an arm of the State and thus could not be held liable for any of the billions of dollars in damages sought.

On June 23, 2023, the Texas Supreme Court delivered its opinion in two consolidated appeals that addressed the issue of ERCOT's sovereign immunity and the PUC's exclusive jurisdiction over certain claims against ERCOT: (1) *Panda Power Generation Infrastructure Funds, LLC v. ERCOT*, 641 S.W.3d 893 (Tex. App.—Dallas 2022, pet. granted) ("*Panda Power II*") and (2) *CPS Energy v. ERCOT*, 648 S.W.3d 520 (Tex. App.—San Antonio 2021, pet. granted) ("*CPS Energy*"). That decision is the one published at *CPS Energy v. ERCOT*, 671 S.W.3d 605 (Tex. 2023).

1. Panda Power

The first case, *Panda Power II*, involved claims by the Panda Power Companies (a group of private equity backed power companies) (collectively referred to as "Panda") that it suffered damages in excess of $2 billion as a result of ERCOT's subsequent revision of its 2011 and 2012 CDRs, which occurred *after* Panda had decided to invest billions of dollars to build three new power plants in Texas. Panda sued ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty. *CPS Energy*, 617 S.W.3d at 613.

The procedural history of the *Panda Power* case is complex and itself involves the consolidation of multiple disputes. Suffice it to say that the 2023 Texas Supreme Court decision was the second time the issue of ERCOT's sovereign immunity from Panda's claims or, alternatively, the PUC's exclusive jurisdiction over them, had been raised to the Texas Supreme Court, with the first appeal (also called *Panda Power I*) having been dismissed in March 2021 as moot without reaching the merits of that question (much to the chagrin of market participants seeking clarity and numerous attorneys just then venturing into Winter Storm Uri litigation that included ERCOT among the named defendants). *Id.*

2. CPS Energy

The second case, *CPS Energy*, involved CPS Energy's claim that it was underpaid millions of dollars in payments due from ERCOT related to Winter Storm Uri. The factual backdrop for CPS's claim involves complex energy regulatory mechanisms. The Texas Supreme Court's 2023 decision explained it as follows: CPS is a municipally owned utility that serves the San Antonia area. It buys and sells power through ERCOT, so ERCOT both collects money from CPS and pays money to CPS in what are called "settlement" payments. CPS's claim arose from the fact that ERCOT recalled its firm load shed instructions on February 17 but kept prices at the cap rate of $9,000 per megawatt hour for an additional 32 hours through the morning of February 19. CPS therefore alleged that ERCOT should have ended its pricing intervention when it recalled its firm load shed instructions and that its failure to do so resulted in $16 billion in overcharges to market participants. Some market participants defaulted after the storm. Pursuant to its Protocols, ERCOT then implemented its "short-pay" procedure and its "Default Uplift process." These processes spread the impact of the default, allocating the loss among market participants—including CPS—by reducing the amounts they are owed by ERCOT. CPS alleged that it was short-paid at least $18 million through the short-pay process, and sued ERCOT and several of its officers for breach of contract, negligence, breach of fiduciary duty, and violations of the Texas Constitution. *Id.* at 612-13.

As in the *Panda Power* dispute, ERCOT filed a plea to the jurisdiction, which asserted that CPS' claims were barred by sovereign immunity or, alternatively, that the PUC had exclusive jurisdiction over the claims and thus must be dismissed. The trial court denied ERCOT's plea. ERCOT appealed, asserting that it is a governmental unit entitled to an interlocutory appeal. But it also sought review by petition for writ of mandamus in the event it was not entitled to an interlocutory appeal. After one court of appeals panel summarily denied mandamus relief, ERCOT filed its petition for writ of mandamus to the Texas Supreme Court to continue the alternative path to review. A different court of appeals panel then held that ERCOT was a governmental unit entitled to take an interlocutory appeal, that the PUC has exclusive jurisdiction over CPS' claims, and that CPS' claims should be dismissed. The Texas Supreme Court granted review and set the case for oral argument on the same day as the case brought by the Panda Power Companies. *Id.* at 613.

B. The Texas Supreme Court's Decision and Reasoning

In its 2023 decision, the Texas Supreme Court held that: (1) ERCOT is a governmental unit as defined by the Texas Tort Claims Act ("TTCA") and thereby entitled to pursue an interlocutory appeal of its plea to the jurisdiction; (2) the PUC has exclusive jurisdiction over the parties' claims against ERCOT (mandating exhaustion of administrative remedies before judicial review and remedies become available); and (3) ERCOT is entitled to sovereign immunity.

On the first issue, the Court held that ERCOT is a governmental unit because: (i) it performs the uniquely governmental function of operating the state's electric grid under the PUC's oversight and operates as part of the larger governmental system in that capacity; and (ii) although ERCOT is a private, nonprofit entity, its "status and authority" to act as the ISO for the Texas power region is derived from PURA. *Id.* at 617.

On the second issue, the Court held that the PUC has exclusive jurisdiction over the claims in the consolidated cases based on the pervasive regulatory scheme provided in Section 39.151 of the Texas Utilities Code (governing "Essential Organizations"), which grants the PUC extensive and ultimate authority of an ISO such as ERCOT. *Id.* at 618-19.

The Court found that Panda's claims fell within the jurisdictional scope of that regulatory scheme because the proper performance of ERCOT's operations, functions and duties fell within the PUC's "complete" authority over ERCOT and was statutorily authorized to hold ERCOT accountable if it failed to perform them in respect of the 2011 and 2012 CDRs. Although the PUC had no authority to determine whether ERCOT complied with the relevant common-law standards or to provide a remedy, the agency's exclusive jurisdiction did not prevent an aggrieved party from

pursuing damages or other relief in the trial court after it had exhausted its administrative remedies. *Id.* at 619.

Likewise, the Court found that CPS' claims fell within the jurisdictional scope of the PUC's exclusive jurisdiction because, in basing them on ERCOT's own alleged errors in its short-pay and default-uplift procedures, they involved "the very activities the PUC regulates." *Id.*

On the final issue of sovereign immunity, and for only the second time the Texas Supreme Court has ever extended sovereign or governmental immunity to a private entity under its 'arm-of-the-state analysis,' the Court found that ERCOT provides an essential government service and that, although the Legislature has not expressly stated a desire that ERCOT be immune from suit, the Legislature clearly intended to grant ERCOT with the "nature, purposes, and powers" of an "arm of the State government." *Id.* at 623. In reaching this conclusion, the Court emphasized the level of control the PUC has over ERCOT's operations, financials, and governance. *Id.* at 623-24. The Court found that ERCOT's immunity also "satisfies the 'political, pecuniary, and pragmatic policies underlying our immunity doctrine'" because any judgment rendered against ERCOT would, assuming authorized by the PUC, result in higher costs for electricity for consumers in the form of a system administration fee. *Id.* at 626. Finally, the Court justified extending immunity to ERCOT because it would protect taxpayer and ratepayer funds.

The Court's majority rejected the position that its decision on the sovereign immunity issue left ERCOT unaccountable. Rather, it found that the ERCOT was accountable to the state, and noted that its shortfalls were then actively being addressed by the Legislature as follows:

> For example, in direct response to the default of certain ERCOT market participants following Uri, the Legislature passed a bill authorizing the use of $800 million of the Rainy Day Fund for ERCOT to finance part of the default. This helps ensure that short-paid market participants like CPS are repaid faster. After the storm, the Legislature overhauled ERCOT's board of directors, making it more independent from electric-market stakeholders and further increasing governmental oversight. It also passed an omnibus bill that required, among other things, weatherization of generation companies' and electric utilities' assets and gave ERCOT authority to inspect for compliance. And it moved up ERCOT's Sunset date by two years, which ensured a comprehensive review of the organization in the near-term.

Id. at 627-28.

In sum, the Texas Supreme Court's 2023 decision on ERCOT's sovereign immunity was a monumental decision for ERCOT and its future, and provides important preliminary guidance for the path ahead (*i.e.*, to the PUC) for those cases in the Winter Storm Uri MDL involving claims against ERCOT. Just how many litigants opt to pursue administrative remedies against ERCOT before the PUC, and how the "fact issues" that the Texas Supreme Court flagged would be appropriate for the PUC's resolution get resolved, will be important developments to continue monitoring.

V. *Luminant Energy Co. LLC v. PUC*: the ERCOT Repricing Case

One of the most significant pending cases related to Winter Storm Uri relates to the question of whether the PUC exceeded its statutory authority under the Texas Utilities Code when, during Winter Storm Uri, it issued two orders setting the market price for energy at its highest possible clearing price of $9,000/MWh. See *Luminant Energy Co. LLC v. PUC*, 665 S.W.3d 166 (Tex. App.—Austin 2023, pet. granted).

As stated elsewhere in this article, electricity generation in Texas declined dramatically during Winter Storm Uri. At the same time, the price of electricity increased to its maximum as a result of the PUC's orders to ERCOT. The background for the PUC's orders was described by the court of appeals in *Luminant Energy* as follows:

> By statute, the PUC is required to adopt and enforce rules statute, the PUC is required to 'adopt and enforce rules relating to the reliability of the regional electrical network' or 'delegate to an independent organization responsibilities for adopting or enforcing such rules.' In 2006, pursuant to that statutory directive, the Commission by rule established the general outline of a scarcity pricing mechanism ('SPM') for use during periods of high demand. . . .
>
> Scarcity pricing is limited by rule to a system-wide offer cap (frequently abbreviated 'HCAP') of $9,000 per megawatt hour (MWh). . . . To put that figure in perspective, a typical market clearing price for electricity in Texas can be as little as $30/MWh. The reason for the orders-of-magnitude delta has to do with the way the state's wholesale market is structured.
>
> Texas is what is known as an 'energy-only' market, meaning that generators are compensated only for energy actually sold, as contrasted with a so-called 'capacity' market, in which generators are compensated for making capacity available even if it is not ultimately used. A 'base-load' generation utility (that is, one intended to operate continuously for long periods under normal market conditions) may incur significant initial costs investing in capacity, while expecting to

> recoup those costs through daily operations by offering at or below the market clearing price on most days. A so-called 'peaker' generator, however, may invest a comparable amount of capital in generating capacity that it expects to use only during a few peak hours on summer afternoons. To defray the high costs of developing and maintaining such seldom-used capacity, it is necessary for such generators to receive a very high rate of return per megawatt hour on the energy they do sell. Accordingly, the scarcity pricing mechanism is [used.]

Id. at 172 (internal citations omitted). During the early phase of Winter Storm Uri, ERCOT advised the PUC that although it was ordering load shedding (to protect the delicate balance of the power grid, which needs to remain near 60 Hertz), the SPM was only clearing the price of electricity at approximately $1,200/MWh. *Id.* at 175. Understanding the SPM to be erroneously disregarding the lost load, the PUC ordered ERCOT to set the market price for electricity at its maximum during load shed. The PUC's logic, as stated in the first order, was that "[i]f customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest." *Id.* at 176. The next day, the PUC issued a second order (together with the first order, the "Orders") that was substantially identical to the first, except that it rescinded language in the first order that would have required retroactive repricing. *Id.* In accordance with the PUC's Orders, ERCOT subsequently issued settlement statements to market participants reflecting the $9,000/MWh clearing price.

Luminant, a power generation company and market participant subject to ERCOT protocols, challenged the validity of the PUC's Orders as "competition rules," and did so within 15 days after Winter Storm Uri; several other parties intervened. For their part, the PUC and its aligned intervenors argue that: (i) the Orders were not "rules;" (ii) if they are rules, they were adopted in substantial compliance with emergency rulemaking provisions of the APA; (iii) the PUC was expressly authorized by statute to correct the allegedly erroneous pricing by the SPM; and (iv) for a variety of reasons, this court lacks subject-matter jurisdiction. *Id.* at 177.

The court first addressed the question of its subject matter jurisdiction to review the PUC's Orders, as a threshold issue. Although the court's jurisdictional analysis is rather complex, in essence the court concluded that it had jurisdiction to decide the dispute because: (i) it was not moot merely because the Orders had expired on their own terms, but rather had pending implications for settlement statements, which Luminant and others challenged administratively and sought to "reprice" per the market clearing price that existed immediately before ERCOT changed the market clearing price pursuant to the Orders; and (ii) the fact that the Orders are voidable (as opposed to void ab initio) did not prevent the PUC from remedying the situation; (iii) although some allegedly invalid act by an agency may become impracticable to remedy due to the passage of time, Luminant timely filed its challenge to the Orders within 15 days after they had been issued. *Id.* at 179-84.

Having found that it had jurisdiction over the dispute, and that ERCOT was not a necessary yet absent party, the court then analyzed whether the Orders were rules. Relying on precedent that an agency's interpretation of an existing rule that was contradictory to the existing rule was itself a new rule, the court held that the Orders amended the PUC's existing rules and, thus, could be reviewed. *Id.* at 188-89.

Finally, reaching the merits of Luminant's challenge, the court first observed that Section 39.001 of the Utilities Code "makes clear that 'competitive rather than regulatory methods' are preferred 'to the greatest extent feasible,' and with 'the least impact on competition.'" *Id.* at 191. With that in mind, the court held that it could not find that the Orders could not have used "'competitive rather than regulatory methods' to any greater extent than they did as issued." Accordingly, the court reversed the Orders, and remanded the case for further proceedings.

The implications for a potential repricing of electricity sold during Winter Storm Uri—transactions that amounted to billions of dollars among various market participants—are obviously huge. The Commission and its aligned intervenors appealed the court of appeals' decision, and the Texas Supreme Court has granted review (see Case No. 23-0231). The petitioner's, respondents', and intervenors' briefs have been filed, as well as an amicus brief, and the case is currently set for oral argument on January 30, 2024.

VI. NAESB Force Majeure Cases

Outside of the Winter Storm Uri MDL, the ERCOT Sovereign Immunity cases, and the ERCOT Repricing Case, several significant commercial cases involving Winter Storm Uri and force majeure claims have made their way through Texas courts (both state and federal), which have important implications for the energy sector. It is beyond the scope of this paper to address all of them. Given their importance to the natural gas industry, however, this section addresses select decisions that have been issued regarding the proper interpretation and application of the force majeure clause in the North American Energy Standards Board ("NAESB") standard form base contract for the same and purchase of natural gas.

A. NAESB Base Contract Force Majeure Disputes

1. *Mieco LLC v. Pioneer Nat. Res. USA, Inc.,* No. 3:21-CV-1781-B, 2023 WL 2064723 (N.D. Tex. Feb. 15, 2023), reh'g denied, No. 3:21-CV-1781-B, 2023 WL 3259492 (N.D. Tex. May 4, 2023).

In *Mieco*, a federal court in the Northern District of Texas (Dallas Division), granted defendant Pioneer Natural Resources USA, Inc's ("Pioneer") motion for summary judgment in a breach of contract claim in favor of Pioneer arising from a NAESB base form contract and associated transaction confirmation. *Mieco*, 2023 WL 2064732, at *1.

In that case, Pioneer had contracted to sell natural gas to the plaintiff, Mieco LLC ("Mieco"), an energy trading firm that buys and sells natural gas. *Id.* Specifically, Mieco agreed to purchase 20,000 MMBtu/day of natural gas from Pioneer. *Id.* However, from February 14, 2021, to February 19, 2021 (during Winter Storm Uri), Pioneer failed to deliver the full amount of gas. *Id.* at *2. During the first two days of Pioneer's shortage, Mieco reallocated some natural gas that it had contracted to purchase for other purposes to cover the short fall and bought gas on the spot market. *Id.* Pioneer sent a notice of force majeure to Mieco on February 16, 2021, asserting that its nonperformance was due to Winter Storm Uri and, thus, was excused by the force majeure provision in the parties' contract. Pioneer ultimately resumed production and issued an invoice to Mieco for March 2021. *Id.* Mieco disputed the invoice and filed suit for breach of the parties' contract. *Id.* Pioneer also asserted a counterclaim for breach of contract relating to Mieco's underpayment of its invoice. *Id.*

In resolving the dispute, the court analyzed Section 11 (force majeure) of the parties' NAESB base contract (a form contract used ubiquitously throughout the U.S. natural gas industry), which includes the following language:

> 11.1. ...the term 'Force Majeure' as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in Section 11.2.
>
> 11.2. Force Majeure shall include, but not be limited to, the following: ... (ii) weather-related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines...
>
> 11.3. Neither party shall be entitled to the benefit of the provisions of Force Majeure to the extent performance is affected by any or all of the following circumstances: ... (v) the loss or failure of Seller's gas supply or depletion of reserves, except, in either case, as provided in Section 11.2. ...
>
> 11.5. The party whose performance is prevented by Force Majeure must provide Notice to the other party.... Upon providing written Notice of Force Majeure to the other party, the affected party will be relieved of its obligation, from the onset of the Force Majeure event, to make or accept delivery of Gas, as applicable, to the extent and for the duration of Force Majeure, and neither party shall be deemed to have failed in such obligations to the other during such occurrence or event.

Id. at *5. Analyzing this language, the court found that the force majeure language included a loss or failure of Pioneer's gas supply caused by low temperatures that affected an entire region, causing freezing or failure of wells or lines of pipe. *Id.* at *6. Applying the parties' selected New York choice of law while also taking instruction from factually similar Texas cases, the court therefore held that Pioneer was excused from performing because it lost its gas supply due to the low temperatures caused by Winter Strom Uri, which impacted an entire geographic region.

The court rejected Mieco's argument that a performance must be literally impossible to evoke the defense of force majeure, finding that such a construction would render portions of the force majeure provision superfluous and essentially duplicative of the common law defense of impossibility. In other words, it rejected an interpretation that would mean a seller would never be able to evoke force majeure so long as there was some gas anywhere at any price. *Id.* at *7. The availability of other supplies did not bar the defense and Pioneer's non-performance was excused.

Mieco's motion for reconsideration was denied, and the case is now pending on appeal before the United States Court of Appeals for the Fifth Circuit.

2. *LNG Americas, Inc. v. Chevron Nat. Gas,* No. CV H-21-2226, 2023 WL 2920940 (S.D. Tex. Apr. 12, 2023).

In *LNG* Americas, a federal court in the Southern District of Texas (Houston Division), granted a motion for summary judgement in favor of Chevron Natural Gas, a division of Chevron U.S.A., Inc. ("Chevron"). *LNG Americas*, 2023 WL 2920940, at *1.

Chevron contracted to deliver 90,000 MMBtu of natural gas per day to LNG Americas, Inc., formerly Cailip Gas Marketing, LLC ("LNG Americas") pursuant to a NAESB form base contract and two transaction confirmations. *Id.* During Winter Storm Uri, Chevron reduced production,

which led to a natural gas shortage from February 14, 2021 to February 22, 2021. *Id.* at *2. Chevron notified LNG Americas that it had declared force majeure on February 15, 2021. *Id.* The court noted that LNG Americas declined some available gas on February 21, and subsequently notified Chevron that it disputed the force majeure declaration. *Id.*

In resolving the parties' dispute, the court's analysis centered around special conditions 2 and 3 of the parties' contract, which provided as follows:

> **Special Condition Number 2:** Notwithstanding anything to the contrary in the Base Contract or elsewhere, and for avoidance of doubt, Seller's delivery obligations under this Transaction Confirmation shall not be excused by a loss of, or fluctuations in, production from any particular Seller's gas producing region or wellhead.
>
> **Special Condition Number 3:** [The Force Majeure definition] of the Base Contract is hereby amended ... by inserting the following language immediately following the phrase 'having jurisdiction': '; provided, however, that any of the previously described events or circumstances shall only constitute Force Majeure if and to the extent that such event or circumstance directly prevents or restricts delivery by Seller or receipt by Buyer of Gas at the applicable Delivery Point.'

LNG Americas conceded that Winter Storm Uri qualified as a force majeure event under the base contract, but argued that the special conditions prevented Chevron from invoking force majeure. *Id.* at *4. Chevron cited to the dictionary definition of "particular" to argue that Special Condition 2 only excluded loss of production events confined to a single gas producing region, and the court agreed. *Id.* at *5. The court also noted that extrinsic evidence provided by Chevron showed Chevron had rejected terms proposed by LNG Americas that would have explicitly prohibited any force majeure declaration based on loss of production. *Id.*

Next, the court examined special condition number three. Based on the dictionary definitions of "delivery" and "direct," the court reasoned Winter Storm Uri prevented or restricted delivery in that Chevron produced less gas to send on the specific pipeline and ultimately to deliver at the specified delivery point. *Id.* at *6. The court further held that Special Condition 3 did not define force majeure to exclude loss of production events, but rather, excluded events with only an indirect or attenuated impact on delivery. *Id.* at 6-7.

LNG Americas also argued that Special Condition 3 prevented Chevron's nonperformance from being excused by force majeure because Chevron was not prevented from purchasing and delivering replacement gas at the delivery point in Katy, Texas. The court, however, disagreed and reasoned, citing Mieco, that the contract hinged on practicability instead of possibility. *Id.* at *7-8. Under this analysis, the court found no genuine dispute of material fact on the practicability of delivering more gas during Winter Storm Uri and held that Chevron had proved its force majeure defense.

To date, there have been no appeals filed.

3. *Arkansas Oklahoma Gas Corp. v. BP Energy Co.,* No. 2:21-CV-02073, 2023 WL 3620746 (W.D. Ark. May 24, 2023).

In *Arkansas Oklahoma*, a federal court in the Western District of Arkansas applied Texas law and held BP Energy Company's ("BP") performance was not fully excused by force majeure arising from Winter Storm Uri.

In that case, BP had entered into a firm contract to provide Arkansas Oklahoma Gas Corporation ("AOG")—a regulated natural gas utility company—up to 30,000 MMBtu of gas per day, on demand, to a point of delivery on the Ozark Pipeline with no advance notice required. *Ark. Okla. Gas Corp.,* 2023 WL 3620746, at *1. On February 15, 2021, however, BP failed to deliver enough gas to meet AOG's needs despite making other arrangements in an attempt to bridge the gap. The on-system producers it had contracted with, Merit Energy Company, LLC and Wells Fargo Commodities, LLC, gave BP notices of force majeure dated February 12, 2021, citing the ongoing severe winter weather as the cause. *Id.* at *4. As for off-system sources, BP contracted with the Enable Oklahoma Intrastate Transmission ("EOIT") pipeline and Koch Energy Services, LLC ("Koch") for gas to be delivered to AOG on the Ozark Pipeline during the week of February 15–19, 2021. *Id.* at *5. However, on February 15, EOIT Pipeline issued an operational order anticipating it would not be able to provide any supply outside of firm agreements. *Id.* Since BP had contracted for the highest interruptible transportation service, not firm, the gas was not permitted to flow during Winter Storm Uri. *Id.*

On these facts, the court rejected BP's force majeure defense. In doing so, the court observed that BP had "failed, for many years, to enter sufficiently firm, redundant, or contingent contractual relationships with pipelines and suppliers to guarantee this amount of gas would always be available to AOG on short or no notice." *Id.* at *8. It found that BP's business decisions and Winter Storm Uri were equal causes of BP's inability to arrange for delivery full amount of gas to AOG during Winter Storm Uri, and thus, BP was not excused from performance. *Id.* at *9.

4. *Unit Petroleum Co. v. Koch Energy Services, LLC,* No. 4:21-CV-01260, 2023 WL 4828375 (S.D. Tex. July 27, 2023).

In *Unit Petroleum*, a federal court in the Southern District of Texas (Houston Division), denied Plaintiff Unit Petroleum Company's ("Unit") motion for summary judgement based on force majeure under a NAESB form base contract and transaction confirmation. *Unit Petroleum*, 2023 WL 3828375, at *1.

In January 2021, Unit informed Koch that in February 2021 it would sell 25,000 MMBtu/day as a base load and up to 6,500 as a swing option. *Id.* On February 12, 2021, Unit verbally alerted Koch that it was declaring force majeure and would not be able to deliver the contracted natural gas. On February 14, 2021, Unit sent Koch a letter to the same effect. Koch rejected Unit's force majeure declaration, insisting that Unit perform by either "buying back" its contract obligation or buying gas on the spot market for Koch. *Id.* Unit did neither, maintaining that force majeure excused Unit's performance, but did deliver gas to two other purchasers with whom it had interruptible contract obligations. *Id.* Koch thus bought natural gas from the spot market, where prices were dramatically higher. *Id.* at *2.

The court reviewed the relevant contract language, which stated: "Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of force majeure and to resolve the event or occurrence once it has occurred in order to resume performance." The court reasoned that, because a reasonable jury could disagree both as to whether Unit's gas allocation was fair and reasonable and whether Unit exerted reasonable efforts to avoid the effects of the force majeure event, Unit's motion for summary judgment should be denied. *Id.* at *3.

In sum, these cases generally reflect a consensus that Winter Storm Uri was an extreme weather event and that, depending on the specific terms of the contracts in issue, could constitute force majeure.

VII. Conclusion

Numerous significant cases have been filed, and have been or are in the process of being decided, related to Winter Storm Uri. Many of those decisions will have long-lasting impacts for participants in the electricity and natural gas markets in Texas and it is vital to continue monitoring them for future developments.