

# Bond Case Briefs

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## **POLITICAL SUBDIVISIONS - TEXAS**

### **CPS Energy v. Electric Reliability Council of Texas**

**Supreme Court of Texas - June 23, 2023 - S.W.3d - 2023 WL 4140460**

Municipally owned electric utility brought action against Electric Reliability Council of Texas (ERCOT) and ERCOT's former chief executive officer, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of Texas Constitution.

The 285th District Court denied ERCOT's plea to the jurisdiction. ERCOT and former chief executive officer appealed, and the San Antonio Court of Appeals reversed. Utility petitioned for review, which was granted.

In second proceeding, power company brought action against ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that ERCOT's electricity capacity, demand, and reserves reports misled power company to invest \$2.2 billion in building new power plants. ERCOT filed plea to the jurisdiction.

The 15th District Court denied plea. ERCOT filed interlocutory appeal and alternatively filed petition for writ of mandamus. The Dallas Court of Appeals consolidated cases, dismissed interlocutory appeal for want of jurisdiction, and granted mandamus petition.

Power company filed petition for writ of mandamus in the Supreme Court, and ERCOT filed conditional petition for review, both challenging the Court of Appeals' decision.

The Supreme Court dismissed petitions as moot. On remand, the District Court granted ERCOT's plea to the jurisdiction based on sovereign immunity. Power company appealed, and the Court of Appeals reversed and remanded. ERCOT filed petition for review, which was granted.

The Supreme Court held that:

- ERCOT was an "organ of government" within the meaning of the definition of "governmental unit" under the Texas Tort Claims Act;
- ERCOT derived its status and authority from statute, as required to fall within the definition of "governmental unit" under the Texas Tort Claims Act;
- Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over ERCOT;
- Company's contention that ERCOT failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs fell within the PUC's exclusive jurisdiction;
- Allegations ERCOT failed to properly implement protocols to ensure the integrity of its system during winter storm and failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity came with PUC's exclusive jurisdiction; and
- ERCOT has sovereign immunity as an arm of the State.

A private, non-governmental entity can qualify as a “governmental unit” under the Texas Tort Claims Act, but only if (1) it is an institution, agency, or organ of government; and (2) it derives its status and authority as such from the Texas Constitution or statutes.

An “organ of government,” which qualifies as a “governmental unit” under the Texas Tort Claims Act, is an entity that operates as part of a larger governmental system and performs a uniquely governmental function.

Electric Reliability Council of Texas (ERCOT) was an “organ of government” within the meaning of the definition of “governmental unit” under the Texas Tort Claims Act; ERCOT was part of the state’s broader electricity-regulation system under Public Utility Regulatory Act (PURA), ERCOT performed the uniquely governmental function of utilities regulation under the direct oversight of the Public Utilities Commission (PUC) and was directly responsible and accountable to the PUC, and ERCOT exercised delegated authority from the PUC to adopt and enforce rules relating to the reliability of the regional electrical network, and enforced operating standards and established and oversaw payment procedures for transactions by market participants within the electrical network.

Electric Reliability Council of Texas (ERCOT) derived its status and authority from statute, as required to fall within the definition of “governmental unit” under the Texas Tort Claims Act, even though it was a private, nonprofit corporation; ERCOT was the independent service operator (ISO) established by the Public Utilities Commission (PUC) as required under the Public Utility Regulatory Act (PURA), such that its “status” as the ISO for the Texas power region and its “authority” to act in that capacity derived directly from PURA.

Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over the Electric Reliability Council of Texas (ERCOT), as the independent system operator (ISO) certified for the Texas power region; Code granted PUC extensive and ultimate authority over an ISO which was directly responsible and accountable to the PUC, the PUC had complete authority to oversee and investigate ERCOT’s finances, budget, and operations to ensure adequate performance of ERCOT’s functions and duties, PUC had authority over ERCOT’s board makeup, its bylaws and protocols, and its ability to charge fees to its members, and PUC had adjudicatory power over ERCOT as well, and had the power to take appropriate action for ERCOT’s failure to adequately perform its functions or duties.

Power company’s contention that Electric Reliability Council of Texas (ERCOT) failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs that inaccurately reported the capability of existing electric generation resources to meet projected demand in the Texas power region fell within the exclusive jurisdiction of the Public Utilities Commission (PUC), even if PUC lacked authority to determine whether ERCOT complied with the relevant common-law standards or to provide a remedy; the proper performance of ERCOT’s operations, functions, and duties was within PUC’s “complete” authority over ERCOT, and PUC was statutorily authorized to hold ERCOT accountable if ERCOT failed to properly perform.

Electric utility’s allegations that Electric Reliability Council of Texas (ERCOT) failed to properly implement protocols to ensure the integrity of its system during winter storm, failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity, and failed to correct “an acknowledged \$16 billion error,” and electric utility’s requests for exemption from ERCOT’s short-pay and default-uplift procedures, came with exclusive jurisdiction of the Public Utilities Commission (PUC); issues implicated ERCOT’s operations and billing, which fell under the PUC’s “complete authority,” PUC had delegated authority to ERCOT to oversee transaction settlement payment procedures, and PUC was responsible under statute for

ensuring that ERCOT “adequately performs [its] functions and duties.”

Fact that electric utility alleged an unconstitutional taking claim against Electric Reliability Council of Texas (ERCOT) based on short-pay and default-uplift procedures for charges relating to winter storm default did not exempt claim from exhaustion of administrative remedies doctrine, as a decision from the Public Utilities Commission (PUC) on the underlying issues could moot the constitutional claims; if the PUC ordered adjustment of the alleged overcharge pricing or resettlement of ERCOT’s payments to utility, it would cure the alleged violations and obviate the need to assert the constitutional claims in court, and, even if it did not, utility was not precluded from pursuing its constitutional claims after exhaustion or from seeking judicial review of any PUC rulings on issues underlying those claims.

Public Utility Regulatory Act (PURA) evinced a clear legislative intent to vest Electric Reliability Council of Texas (ERCOT) with the nature, purposes, and powers of an arm of the State government such that ERCOT had sovereign immunity; Public Utilities Commission (PUC) certified ERCOT as the independent service operator (ISO) required by PURA, and had authority over ERCOT’s operations, governance, finances, and budget, ERCOT was directly responsible to the PUC, which could decertify ERCOT if ERCOT failed to adequately perform, ERCOT was subject to requirements typically reserved for state entities, including review under the Texas Sunset Act and open meetings requirements, and ERCOT’s regulatory role over electric utilities was uniquely governmental.

Political, pecuniary, and pragmatic policies underlying immunity doctrines supported conclusion that Electric Reliability Council of Texas (ERCOT) had sovereign immunity; even though ERCOT was not funded with tax dollars, any damages payments would nevertheless come from the state and the public, the Public Utilities Commission (PUC) had authority over ERCOT’s finances, including its ability to raise money and how it spent money, statute required ERCOT transfer its assets to a successor organization if PUC decertified ERCOT, and judicial imposition of a damages award against ERCOT would run afoul of the Legislature’s determination that the PUC alone had “complete authority” over ERCOT’s finances.