

ERCOT Winter Storm Uri Repricing Decision from Third Court of Appeals

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PRACTICES Litigation, Energy, Power and Natural Resources, Traditional Power

The Third Court of Appeals issued a ruling on March 17, 2023 in *Luminant Energy Co. LLC v. Public Utility Commission of Texas*, No. 03-21-00098-CV, that may require the resettlement of the Electric Reliability Council of Texas, Inc. (“ERCOT”) market for the majority of hours during Winter Storm Uri. A motion for rehearing *en banc* or petition to the Texas Supreme Court is expected, which will prevent the Third Court’s ruling from going into effect during those further proceedings. The opinion—if upheld—would invalidate the Public Utility Commission of Texas (“PUC”) orders issued during Winter Storm Uri that set the market clearing price for energy and the spot market price at the market cap of \$9,000 per megawatt hour (“MWh”).

PUCT Orders

The appeal places two PUCT orders at issue; the Third Court invalidated both of them. The first PUCT order required that the market cap of \$9,000 MWh be used for price setting because rotating outages had been—and continued to be—used at levels not seen before on the ERCOT system. There was not sufficient generation capacity to meet the needs of the ERCOT system or of the millions of customers relying on the intrastate grid for power. As a result, ERCOT shed load by rotating customers through lengthy outages, which continued for days. The market cap was set to protect consumers from higher prices when inadequate generation existed to meet demands. During Winter Storm Uri, however, the ERCOT automated systems showed that off-line load was being served and the market cap was not reached despite many customers being without power. The PUCT Order included discussion intended to address how to settle the ERCOT grid during outages in light of PUCT rules that required clearing prices to track the cap during rotating outage periods. The Order also required ERCOT to retroactively resettle amounts that had been settled below the cap after load shed had begun. The second PUCT order removed the first order’s retroactive component and required that prices remain at the cap while load shed continued.

Luminant Appeal

Luminant challenged the PUCT Orders as “competition rules.” The Public Utility Regulatory Act (Tex. Util. Code §§ 11.001-66.016 (“PURA”)) permits a party to contest competition rules directly to a Texas Court of Appeals without prior review in a lower court. Luminant lacked enough generation to serve its commitments and had to buy power out of the ERCOT market at the market cap prices in the PUCT orders. Luminant argued that both the market cap and the PUCT orders instituting the cap for periods during Winter Storm Uri contravened PURA’s framework that prices for power generation be set through the normal forces of competition. In Luminant’s view, the section under which PUCT established the market cap—PURA §39.151—related to PUCT’s oversight of ERCOT and the ERCOT system and remained subject to PURA’s basic premise that competitive, not regulatory, means determine prices in the ERCOT market (see PURA 39.001(d)).

Third Court of Appeals Judgment

The Third Court of Appeals opinion determined that the PUCT Orders were, in fact, “competition rules” challengeable directly to a court of appeals. Having found jurisdiction, the Third Court moved on to the substantive issues raised by Luminant. It held that the \$9,000 MWh market cap supplanted competition. The opinion did not discuss the market condition at the time, which was not competitive since no suppliers could compete to provide generation to load because the amount of consumer demand had substantially outstripped any ability to supply power, the situation giving rise to the emergency. The opinion leaves open the possibility that any cap on market prices may be inconsistent with PURA. This would mark a sea change in that the PUCT would lack the authority to—in an Energy-only market—establish any cap, meaning the market could escalate to any level without moderation with consumers having to pay the unmoderated rates.

En Banc Rehearing or Appeal to Texas Supreme Court

From here, the PUCT has two options for challenging the Third Court’s decision. First, the PUCT could petition for rehearing *en banc* with all the justices of the Third Court, rather than just the three-justice panel that issued the opinion. Or, second, the PUCT could choose to file a petition for review in the Texas Supreme Court, without any further proceedings in the Third Court. The PUCT will have to choose which option to pursue within, roughly, the next month and a half (absent any requests for extension of time).

If you have any questions, please contact one of the lawyers listed below.