

Dallas Appeals Court Sides With Haynes Boone Client Panda Power, Strips ERCOT of Sovereign Immunity Defense

February 24, 2022 Ben Mesches, Leslie Thorne, Andrew Guthrie, Chris Knight

PRACTICES Appellate, Energy Litigation, Power and Renewables Litigation, Oil and Gas Litigation, Litigation

A Texas appellate court sided with Panda Power Generation Infrastructure Fund after reversing an earlier decision that granted Electric Reliability Council of Texas (ERCOT) sovereign immunity, applying three recent Texas Supreme Court decisions confirming that sovereign immunity does not extend to private entities like ERCOT. The Fifth Court of Appeals in Dallas also concluded that the Texas Legislature did not grant ERCOT exclusive jurisdiction over Panda Power's common law claims to the Public Utility Commission of Texas (PUC).

In the case, Haynes Boone represented Panda Power, which spent over \$2 billion to build three gas-fired power plants at ERCOT's urging based on alleged misrepresentations ERCOT made about capacity and demand on the Texas electricity grid. The case involves the Texas Supreme Court's immunity doctrine, legislative enactments, and the proper functioning of the Texas electricity market. The question around whether ERCOT is entitled to sovereign immunity is an issue of critical importance to the Texas electric power market, particularly in light of the ongoing litigation against ERCOT following last year's Winter Storm Uri.

ERCOT is a 501(c)(4) nonprofit corporation that receives no taxpayer dollars and serves as the independent system operator for the electricity grid that provides power to 90 percent of Texas. It is the only independent system operator in the nation to have claimed sovereign immunity.

The Haynes Boone team that represented Panda Power in this matter includes [Ben Mesches](#), [Leslie Thorne](#), [Werner Powers](#), [Andrew Guthrie](#) and [Christopher Knight](#).

Below are excerpts from the [Texas Lawbook](#) and [Law360](#):

Lawyers on both sides say the case is now headed to the Texas Supreme Court. The issue of ERCOT's sovereign is critical in more than 200 individual wrongful death, personal injury and property damage lawsuits brought by victims of Winter Storm Uri that name ERCOT among the defendants. Those cases have been consolidated before a judge in Houston.

The Dallas appeals court decision points to the Texas Administrative Code, which states: “ERCOT shall not be liable in damages for any act or event that is beyond its control and which could not be reasonably anticipated and prevented through the use of reasonable measures.”

“ERCOT argues that, if it performed inadequately, then the legislature gave the PUC explicit power to discipline ERCOT for any inadequate performance, thus precluding private causes of action,” Justice Nowell wrote. “When taken to its logical end, this argument would mean ERCOT could never be liable to anyone other than the PUC for its bad acts, no matter how intentional or egregious those acts may be. We do not agree that is the law.”

Ben Mesches, an appellate partner at Haynes Boone and lawyer for Panda, said he is pleased with the appeals court’s decision and “look forward to presenting our case on the merits in the trial court — where Panda’s claims have always belonged.”

“The en banc court’s 50-page opinion correctly applies three recent Texas Supreme Court decisions confirming that sovereign immunity does not extend to private entities like ERCOT,” Mesches said, “and rests on a faithful reading of the plain text of the governing statutes.”

Law360: “ERCOT Can’t Claim Immunity in Power Developer Fight”

The majority also rejected ERCOT's claim that the Public Utility Commission of Texas maintains exclusive jurisdiction over disputes brought against the grid operator.

"We will not conflate heavy regulation with the type of pervasive regulatory scheme required to establish exclusive jurisdiction," Justice Nowell wrote.

The Fifth Court of Appeals opinion is "a scholarly and complete rejection of ERCOT's attempt to avoid the courthouse," Panda Power attorney Ben Mesches of Haynes Boone told *Law360* in a statement Thursday.

"In rejecting ERCOT's unprecedented claim of sovereign immunity and expansive assertion of exclusive agency jurisdiction, the court correctly applied recent Texas Supreme Court precedent and adhered to the plain language of the legislature's enactments," Mesches said.

Mesches noted the ruling will likely be appealed to the Texas Supreme Court.

Note: Other publications that reported on the ruling include:

[*Houston Chronicle*](#)

[*Dallas Morning News*](#)

[*The Texan*](#)

[*Litigation Daily*](#)