Liebmann and Pitts Discuss Impact of New Texas Supreme Court Decisions in The Texas Lawbook

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The Texas Supreme Court decided two highly publicized and high-stakes cases this summer that arose out of deadly Winter Storm Uri: *Public Utility Commission v. Luminant Energy Co.* and *Public Utility Commission v. RWE Renewables Americas.*

Haynes Boone Partner Diana Liebmann and Associate Ryan Pitts authored an article in *The Texas Lawbook* looking at the impact those cases will have on the Texas electricity industry and rulemaking in the state.

Read an excerpt below.

Both opinions began with the threshold issue of the Third Court's direct jurisdiction, where RWE was felled. In RWE, the PUC's mere "approval" of ERCOT's protocol did not amount to a "competition rule adopted by the [C]ommission" subject to direct judicial review. PURA has long recognized distinct processes as between PUC "rules" and ERCOT "protocols," with separate pathways for review. By legislative design, this "approval" did not amount to a separate rulemaking by the PUC. It amounted to more of a ratification, even though the ERCOT protocol would not enter effect without the PUC's approval. The Court therefore held that there is no direct review of the PUC's approval of ERCOT protocols. These protocols can be challenged by different means. Accordingly, the Court dismissed RWE for want of jurisdiction and did not reach the merits. That dismissal vacated the Third Court's opinion invalidating the protocol. Thus the protocol remains in force today.

The Texas Supreme Court held that Luminant survived the jurisdictional hurdles. First, the Court made quick work of the mootness and standing arguments. It reasoned that Luminant's alleged financial harm (paying the price set by the ad hoc orders) could "potentially" be remedied for overpricing by "ERCOT protocols authorizing invoice repricing and market-wide resettlements." It was unconvinced that "the egg cannot be unscrambled," despite that egg's enormity. Second, the PUC's ad hoc orders amounted to "competition rules" because they ordered ERCOT to implement a statewide policy, however temporarily, on prices for all occurring market transactions. While the Court declined to "delineate the precise contours of [a] competition rule," it read that term based on the effect of the policy embodied by the emergency pricing orders — despite that these orders did not go through the ordinary rulemaking processes to become formal "rules."

To read the full article, click here.

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