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LEGAL UPDATES

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# Texas Supreme Court to Decide if ERCOT Is Immune from Winter Storm Lawsuits

After last month's historic winter storm in Texas knocked out power to millions and left dozens dead, four Texas counties—Harris, Travis, Fort Bend and Hidalgo—are asking the Texas Supreme Court to determine that the officials who manage the state's grid, the Electrical Reliability Council of Texas (ERCOT), are not protected by governmental immunity.

ERCOT is a private nonprofit company that controls 90% of Texas' electricity grid. ERCOT and other utility companies around the state have already been hit with at least 15 lawsuits seeking to hold the companies liable for the rolling blackouts that left millions of Texans in the dark for days as the state experienced a record-breaking cold snap in February of this year.

Currently before the Texas Supreme Court is the issue of whether ERCOT is immune from suit. Dallas-based Panda Power sued ERCOT in 2016, claiming that reports the grid operator put out said the state was woefully short on power generation. Using that prediction, Panda Power spent billions building new plants. However, the report was wrong and at least one of the new plants went bankrupt. ERCOT sought to dismiss Panda Power's suit by arguing immunity, but a Grayson County District Court judge denied the grid operator's bid. The Fifth Court of Appeals in April 2018 reversed that decision, concluding "ERCOT's regulatory responsibilities include ensuring the reliability and adequacy of the regional electrical network" qualified it for immunity. *Elec. Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 552 S.W.3d 297, 319 (Tex. App. –2018, pet. granted). Panda Power appealed to the Texas Supreme Court.

On March 9, 2021, Harris, Travis, Fort Bend and Hidalgo Counties filed amici briefs in the two cases challenging the Dallas appellate court's ruling. Harris

County's brief asked the State Supreme Court to strongly consider the effects its ruling would have on cases related to property damage and lost lives following the Valentine's Day storm. Meanwhile, Travis, Hidalgo and Fort Bend Counties argued in their brief that ERCOT's former CEO Bill Magness (who was fired March 3) directly contradicted ERCOT's legal arguments when he testified about the grid operator's response to the winter storm in front of the Texas Legislature on Feb. 25. While testifying under oath, Magness said ERCOT was not a governmental agency but "a private Texas corporation," according to the brief.

### **What this means to you**

The court could decide by the end of its current term, which ends in June, whether ERCOT is a private entity and not an extension of state government. This could have significant ramifications for multiple pending suits seeking huge damages.

### **Contact us**

If you have questions on the pending decision or litigation as a result of the Texas storms, contact Kate David, Sandy Gomez, Ben Stephens or your Husch Blackwell attorney.