

Utilities Question Texas Regulator's Energy-Pricing Authority

By **Katie Buehler**

Law360 (April 27, 2022, 7:06 PM EDT) -- A Texas appellate court on Wednesday considered whether the Public Utility Commission of Texas overstepped its authority when it decided in February 2021 to max out energy prices in an effort to encourage more electricity production as the state dealt with the aftermath of a deadly winter storm.

In a direct appeal of those decisions, Dallas-based Luminant Energy Co. LLC has asked a three-justice panel of the Third Court of Appeals in Austin to invalidate two emergency orders issued in the wake of the storm that instructed the Electric Reliability Council of Texas Inc. to set electricity prices at their maximum wholesale cap of \$9,000 per megawatt hour for roughly five days.

Luminant argues the two orders, issued Feb. 15 and 16, 2021, violated the state Administrative Procedure Act and exceeded the PUC's statutory authority by disrupting "the normal forces of competition" in the energy market, according to the company's June appellate brief. Luminant is one of several energy companies challenging large storm-related invoices through the PUC's administrative process.

The "PUC is setting out a recipe for unreviewable agency action and this court should reject it," Luminant's attorney, Allyson Ho of Gibson Dunn & Crutcher LLP, told the panel Wednesday.

"We have pending proceedings and if this court, as it should, declares the price-setting rule invalid, that would simply — but crucially — allow Luminant and other challengers to have lawful rules applied in their proceedings," she added.

The PUC has defended its decisions, arguing they were made in accordance with the commission's authority and can't now be second-guessed "with the benefit of hindsight," according to a brief the commission filed in September.

The commission also argues the Third Court of Appeals has no jurisdiction over the dispute because the orders have expired and are now moot, and because Texas law mandates any rate-related dispute is subject to the commission's sole jurisdiction.

Lisa Bennett of the Texas Attorney General's Office, representing the PUC, said the emergency orders are equivalent to internal statements directing ERCOT how to react to emergency situations. If the PUC had to follow the APA's rulemaking guidelines during the winter storm, she added, the agency wouldn't have been able to properly respond to the emergency.

"If all rules had to be done in the straitjacket of rulemaking, it would restrict the commission's powers," Bennett said.

February 2021's winter storm, unofficially named Winter Storm Uri, hit the state on Valentine's Day and plunged millions of Texans into darkness for days during a record-breaking cold snap. The storm killed more than 150 people and caused billions in property damage.

During the storm, ERCOT, which controls 90% of Texas' electricity grid, **implemented rolling blackouts** to shed load from the grid and avoid a catastrophic black start, an event during which the electricity grid's frequency drops so low that generators are automatically kicked off the system for their own safety and the entire grid loses power.

The grid operator also, at the order of the PUC, set electricity prices at their maximum wholesale cap and maintained that pricing for 32 hours after the last widespread outages, **overcharging market participants** by \$16 billion, according to an independent market monitor.

The overcharges caused companies and utilities to rack up billions of dollars of debt as they provided electricity to their customers — and forced some into bankruptcy.

Luminant filed its direct appeal with the Third Court of Appeals in June. It has since been joined by 12 energy company intervenors in its challenge of the emergency orders, according to court documents.

Luminant and most of the intervenors argue the PUC was required to file its emergency orders with the Texas secretary of state to properly publish them and that the failure to do so means the commission didn't meet APA requirements.

But two intervenors, DGSP2 LLC and Distributed Generation Solutions LLC, told the panel Wednesday they are only challenging the second emergency order, which amended the first one to direct ERCOT not to apply the price cap retroactively. The commission didn't establish a new emergency requiring the issuance of the second order, the pair's attorney, Chrysta Castañeda of The Castañeda Firm, said.

Two other energy companies — Calpine Corp. and Talen Energy Corp. — have intervened in the appeal on the PUC's side.

Macey Reasoner Stokes of Baker Botts LLP, representing Calpine and Talen Energy, argued Wednesday the rules were valid and that any attempt to retroactively correct the pricing would be "an administrative nightmare."

"Those transactions are final and nothing this court can do will relieve them," she said.

Additionally, JSW Steel (USA) Inc., which operates a steel mill in Baytown, Texas, and a group of seven businesses led by Missouri-based B&B Theatres Operating Co. Inc., which manages a movie theater in Wylie, Texas, have filed amici briefs in support of Luminant. The companies claim they received astronomical electricity invoices for February 2021 because of the PUC's unlawful price-setting.

Chief Justice Darlene Byrne and Justices Melissa Goodwin and Edward Smith sat on the panel for the Third Court of Appeals.

Luminant is represented by Melissa A. Lorber, William A. Moore and Amy Saberian Prueger of Enoch Keever PLLC, Stephanie Zapata Moore and Daniel Jude Kelly of Vistra Corp. and Allyson N. Ho, Michael Raiff, Elizabeth A. Kiernan, Joseph E. Barakat and Katherine L. Montoya of Gibson Dunn & Crutcher LLP.

DGSP2 and Distributed Generation Solutions are represented by Chrysta L. Castañeda and Nicole Michael of The Castañeda Firm.

The additional appellant intervenors are represented collectively by Lino Mendiola III and Michael Boldt of Eversheds Sutherland, James E. Guy and Eric B. Storm of The AL Law Group PLLC, Michael J. Jewell of Jewell & Associates PLLC, Kurt Kuhn and Lisa Bowlin Hobbs of Kuhn Hobbs PLLC and Mark Oakes, James Hughes and Warren Huang of Norton Rose Fulbright.

The Public Utility Commission of Texas is represented by Lisa A. Bennett and A. Lee Czocher of the Texas Attorney General's Office.

Calpine and Talen Energy are represented by Andrea Moore Stover, Patrick Leahy, Macey Reasoner Stokes, George Fibbe and J. Mark Little of Baker Botts LLP.

The B&B Theatres amici are represented by Matthew E. Price of Jenner & Block LLP and Mark Foster of FosterDanowsky LLP.

JSW Steel is represented by Joseph A. Garnett of Sheehy Ware Pappas & Grubbs.

The case is Luminant Energy Co. LLC v. Public Utility Commission of Texas, case number 03-21-00098-CV, in the Texas Court of Appeals for the Third District.

--Editing by Orlando Lorenzo.