



## Case Summaries December 8, 2023

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### GRANTED CASES

#### ADMINISTRATIVE LAW

##### Public Utility Commission

*Pub. Util. Comm'n of Tex. v. RWE Renewables Ams., LLC*, 669 S.W.3d 566 (Tex. App.—Austin 2023), *pet. granted* (Dec. 8, 2023) [[23-0555](#)]

This case raises questions of administrative law. The first issue is whether the Public Utility Commission's approval of the Electric Reliability Council of Texas's NPRR 1081 protocol constitutes a "competition rule" under Section 39.001(e) of the Public Utility Regulatory Act and a "rule" under Section 2001.003(6)(A) of the Government Code. If the approval is considered a rule, then the second issue is whether it exceeds the Commission's statutory authority under PURA or violates the Administrative Procedure Act's mandatory rulemaking procedures.

In 2021, Winter Storm Uri strained Texas's electrical power grid to an unprecedented degree. Electricity suppliers did not produce enough electricity to meet the abnormally high demand caused by the storm, producing blackouts around Texas. As a result, the Commission struggled to maintain the precise balance between electricity demand and supply needed to prevent catastrophic damage to the power grid. The Commission determined that the electricity deficit was partially due to a failure of its electricity-pricing algorithm to set the price of electricity high enough to adequately incentivize electricity generators to produce more electricity.

In response, the Commission issued two temporary directives to ERCOT to set electricity prices at the statutory maximum of \$9,000/MWh. RWE Renewables Americas intervened in a challenge to the legality of those orders in a separate case pending before the Supreme Court, *Luminant Energy Co. v. Pub. Util. Comm'n of Tex.*, 665 S.W.3d 166 (Tex. App.—Austin 2023), *pets. granted* (Sept. 29, 2023) [[23-0231](#)].

The Commission subsequently approved an ERCOT protocol setting electricity prices at the \$9,000/MWh maximum anytime consumers are cut off from power due to inadequate electricity supply in a maximum emergency-level scenario. RWE appealed the Commission's approval directly to the Third Court of Appeals as authorized by statute. The court held for RWE, determining that (i) the approval constituted a competition rule under PURA and a rule under the APA; (ii) the rule was anti-competitive and so exceeded the Commission's statutory authority under PURA; and (iii) the Commission implemented the rule without complying with the APA's rulemaking procedures.

The Commission filed a petition for review, arguing that the approval is not a competition rule under PURA or a rule under the APA. The Commission argues further that even if the approval does constitute a rule—it does not exceed the statutory authority conferred by PURA or violate the APA’s requirements. The Court granted the petition for review.