

SUPREME COURT OF TEXAS

CPS Energy v. Electric Reliability Council of Texas, Inc.; Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC

CPS Energy; ERCOT v. Panda · Decided June 23, 2023

SUMMARY

This document is a dissenting opinion in consolidated Texas Supreme Court proceedings involving CPS Energy, the Electric Reliability Council of Texas (ERCOT), and Panda Power entities. The dissent addresses sovereign immunity, ERCOT’s status as a private corporation, the Public Utility Commission’s jurisdiction, and whether ERCOT may claim governmental immunity. The dissenting justices agree that ERCOT qualifies as a governmental unit for purposes of interlocutory appeal and that the Public Utility Commission has exclusive jurisdiction over certain issues, but disagree with extending broad sovereign immunity to ERCOT.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Justice Boyd and Justice Devine; Justice Boyd; Justice Devine; Justice Lehrmann; Justice Busby
JURISDICTION	Texas
DECIDED	June 23, 2023
DISPOSITION	other
PROCEDURAL POSTURE	Consolidated petitions for review from the Fourth and Fifth Courts of Appeals of Texas concerning ERCOT's governmental-unit status, the Public Utility Commission's exclusive jurisdiction, and whether sovereign immunity extends to ERCOT.
STANDARD OF REVIEW	Jurisdictional review of sovereign-immunity and governmental-unit issues; statutory construction and review of the scope of the Public Utility Commission's exclusive jurisdiction.
PRECEDENTIAL VALUE	dissenting
PARTIES	CPS Energy, Electric Reliability Council of Texas, Inc. v. Electric Reliability Council of Texas, Panda Power Generation Infrastructure Fund, LLC d/b/a Panda Power Funds, Panda Sherman Power

Holdings, LLC, Panda Sherman Power Intermediate Holdings I, LLC, Panda Sherman Power Intermediate Holdings II, LLC, Panda Sherman Power, LLC, Panda Temple Power Holdings, LLC, Panda Temple Power Intermediate Holdings I, LLC, Panda Temple Power Intermediate Holdings II, LLC, Panda Temple Power, LLC, Panda Temple Power II Holdings, LLC, Panda Temple Power II Intermediate Holdings I, LLC, Panda Temple Power II Intermediate Holdings II, LLC, Panda Temple Power II, LLC

TOPICS

constitutional law administrative law judicial review of agency action commercial litigation
civil procedure

PRACTICE AREAS

constitutional law administrative law commercial litigation civil procedure

QUESTIONS PRESENTED

1. Whether ERCOT qualifies as a governmental unit under the Texas Tort Claims Act.
2. Whether the Public Utility Commission has exclusive jurisdiction over the issues underlying the parties' claims against ERCOT.
3. Whether sovereign immunity extends to ERCOT, a private corporation that performs statutorily authorized governmental functions but has not been expressly designated as part of the government.
4. Whether ERCOT's statutory regulation, oversight, and accountability to the Public Utility Commission transform it into an arm of the state.
5. Whether extending sovereign immunity to ERCOT would further the political, pecuniary, and pragmatic purposes of sovereign immunity.

HOLDINGS

1. The dissent agrees with the Court that ERCOT qualifies as a governmental unit under the Texas Tort Claims Act and therefore may pursue an interlocutory appeal.
2. The dissent agrees that the Public Utility Commission has exclusive jurisdiction over the issues underlying the parties' claims against ERCOT.
3. The dissent would hold that sovereign immunity does not broadly extend to ERCOT because Texas law has not vested the private corporation with the nature of an arm of the state.
4. The dissent would hold that statutory authority to oversee ERCOT, close supervision, final approval, and appointment influence do not establish sufficient actual control over the complained-of conduct to attribute ERCOT's actions to the government.

5. The dissent would hold that extending sovereign immunity to ERCOT would not promote sovereign immunity's political, pecuniary, and pragmatic purposes.

KEY QUOTATIONS

“But the public’s trust is undermined when the judiciary extends sovereign immunity, contrary to history and tradition, to what is undeniably not sovereign: purely private entities.” (at 5)

“Because Texas law has not vested the private corporation ERCOT with the nature of an arm of the state, we respectfully disagree that sovereign immunity should broadly prohibit courts from exercising jurisdiction over claims against it.” (at 7)

“To answer the sovereign-immunity question, we must focus on ERCOT’s nature as an entity and not just the nature of its functions.” (at 24)

“Although “immunity is inherent to sovereignty, unfairness is inherent to immunity,” especially when it is extended to what is not inherently sovereign: purely private entities.” (at 52)

FACTUAL BACKGROUND

ERCOT is an industry-created, privately incorporated nonprofit corporation that operates as the Public Utility Commission-certified independent system operator for the Texas electric grid. It performs statutory governmental functions, including coordinating the wholesale electricity market, overseeing transmission and reliability, and exercising rulemaking authority, but it was not created or expressly designated as a governmental entity by statute. The underlying claims arose from ERCOT's conduct during Winter Storm Uri, including electricity outages and allegedly excessive wholesale electricity prices.

PROCEDURAL HISTORY

CPS Energy petitioned for review from the Fourth Court of Appeals, while ERCOT petitioned for review from the Fifth Court of Appeals in related litigation arising from Winter Storm Uri. The dissent joined Parts I, II, and III of the Court's opinion insofar as the Court held that ERCOT qualifies as a governmental unit under the Texas Tort Claims Act and that the Public Utility Commission has exclusive jurisdiction over issues underlying the claims. The dissent disagreed with the Court's extension of sovereign immunity to ERCOT as a private corporation.

DISPOSITION

other

REMAND INSTRUCTIONS

The dissent would defer any control-based sovereign-immunity determination until after the Public Utility Commission exercises its exclusive jurisdiction, develops a factual record, and makes relevant findings concerning whether it actually controlled the complained-of conduct.

CASES CITED

- Phillips v. McNeill, 635 S.W.3d 620, 627-28 (Tex. 2021)
- Marbury v. Madison, 5 U.S. 137, 163 (1803)
- University of the Incarnate Word v. Redus, 602 S.W.3d 398, 401, 405-13 (Tex. 2020)
- Rosenberg Development Corporation v. Imperial Performing Arts, Inc., Rosenberg Development Corp. v. Imperial Performing Arts, Inc., 571 S.W.3d 738, 740-52 (Tex. 2019)
- Brown & Gay Engineering, Inc. v. Olivares, 461 S.W.3d 117, 121-26, 130 n.6 (Tex. 2015)
- Nettles v. GTECH Corp., 606 S.W.3d 726, 731-37 (Tex. 2020)
- El Paso Education Initiative, Inc. v. Amex Properties, LLC, 602 S.W.3d 521, 524, 528-31 (Tex. 2020)
- Ben Bolt-Palito Blanco Consolidated Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund, 212 S.W.3d 320, 324-26 (Tex. 2006)
- Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427, 431-35 (Tex. 2016)
- Hall v. McRaven, 508 S.W.3d 232, 238, 253 (Tex. 2017)
- Tooke v. City of Mexia, 197 S.W.3d 325, 331-32 (Tex. 2006)
- Clint Independent School District v. Marquez, 487 S.W.3d 538, 544 (Tex. 2016)
- Hughes v. Tom Green County, 573 S.W.3d 212, 218-20 (Tex. 2019)
- Hillman v. Nueces County, 579 S.W.3d 354, 361 (Tex. 2019)
- Hays Street Bridge Restoration Group v. City of San Antonio, 570 S.W.3d 697, 704 (Tex. 2019)
- City of Galveston v. State, 217 S.W.3d 466, 480 n.38 (Tex. 2007)
- Springboards to Education, Inc. v. McAllen Independent School District, 62 F.4th 174, 191-99 (5th Cir. 2023) (Oldham, J., concurring)
- Alden v. Maine, 527 U.S. 706, 715-16 (1999)
- Tex. Municipal Power Agency v. Public Utility Commission of Texas, 253 S.W.3d 184, 186 (Tex. 2007)
- Public Utility Commission of Texas v. City Public Service Board of San Antonio, 53 S.W.3d 310, 312 (Tex. 2001)
- Oncor Electric Delivery Co. v. Public Utility Commission of Texas, 507 S.W.3d 706, 711-12 (Tex. 2017)