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# Case Law Update

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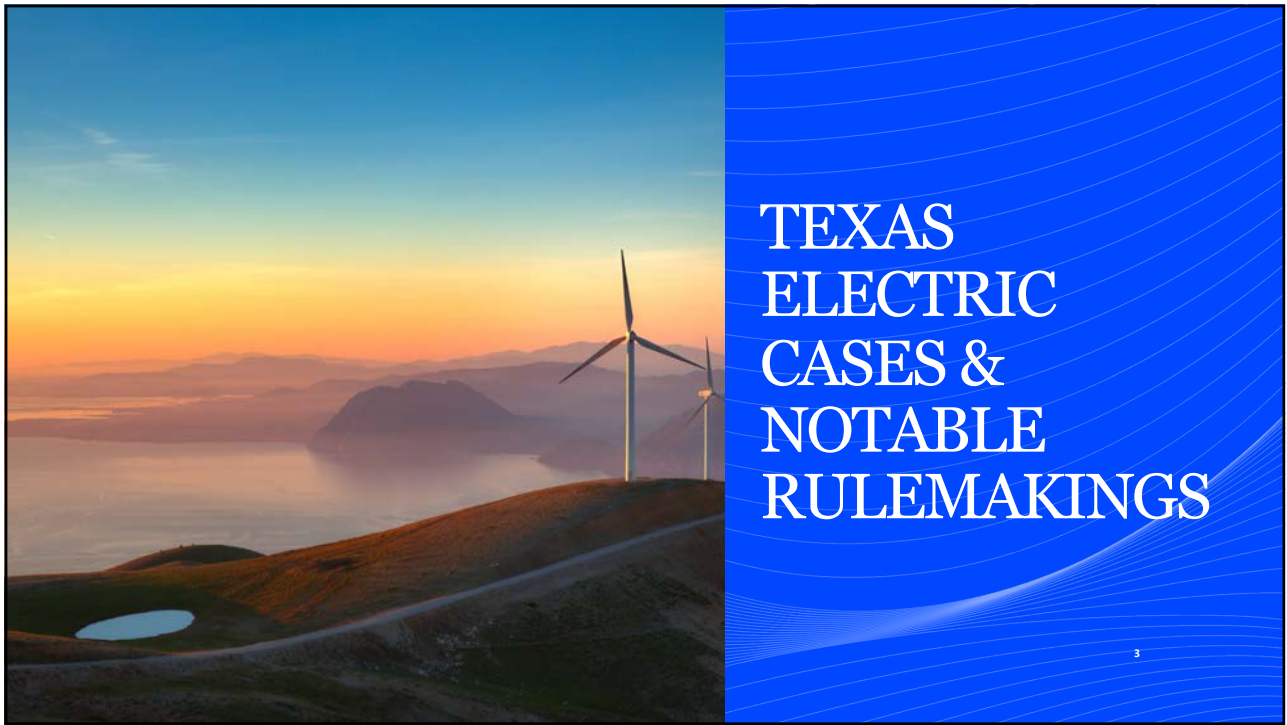
## Overview

- Texas Electric Cases & Key Rulemakings
- Texas Oil & Gas Cases

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## *CPS Energy v. ERCOT*, 671 S.W.3d 605 (Tex. 2023).

In *CPS Energy*, the Texas Supreme Court issued a single opinion concerning two cases against ERCOT:

- *Panda Power* (2016), originating from Panda's claims that ERCOT's load growth forecasts amounted to misrepresentations.
- *CPS Energy* (2021), originating from a challenge to the PUC's pricing order issued during Winter Storm Uri in 2021.

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## *CPS Energy v. ERCOT, 671 S.W.3d 605 (Tex. 2023).*

### **Background Facts**

- *Panda Power*:
  - Panda Power, a group of private equity investors, alleged that it relied on projections of energy shortfalls in ERCOT's 2011 and 2012 "Capacity, Demand, and Reserves" reports ("CDRs") when deciding to invest in construction of new power plants in the ERCOT region. Panda also alleged that ERCOT confirmed its findings in meetings and presentations.
  - The CDR is a report that ERCOT publishes to provide forecasted Planning Reserve margins for ERCOT summer and winter Peak Load Seasons (June-Sept. and Dec.-Feb.).
  - Panda alleged that after construction began, ERCOT revised the CDRs and forecast a future oversupply of generation capacity.
  - Panda sued ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty. Panda alleged that ERCOT's reports caused it substantial financial harm and it sought damages of more than \$2 billion.

## *CPS Energy v. ERCOT, 671 S.W.3d 605 (Tex. 2023).*

### **Background Facts**

- *CPS*:
  - CPS sued ERCOT for setting the per MWh price of electricity at \$9k to reflect scarcity of supply during Winter Storm Uri. CPS alleged that ERCOT and its officers committed breach of contract, negligence, breach of fiduciary duty, and violations of the Texas Constitution.
  - ERCOT filed a plea to the jurisdiction ("PTJ"), arguing that CPS's claims were barred by sovereign immunity and, alternatively, that the PUC had exclusive jurisdiction over the claims. The trial court denied the PTJ.
  - ERCOT appealed and asserted that it is a governmental unit entitled to an interlocutory appeal from the denial of a PTJ.
  - The Texas Supreme Court granted review and set the case for oral argument on the same day as a case brought against ERCOT by Panda Power.

*CPS Energy v. ERCOT, 671 S.W.3d 605 (Tex. 2023).*

- 1. Is ERCOT a governmental unit as defined in the Texas Tort Claims Act (“TTCA”) and thereby entitled to pursue an interlocutory appeal from the denial of a PTJ? Yes.**
- 2. Does the Public Utility Commission of Texas (“PUC”) have exclusive jurisdiction over the parties’ claims against ERCOT? Yes.**
- 3. Is ERCOT entitled to sovereign immunity? Yes.**

*CPS Energy v. ERCOT, 671 S.W.3d 605 (Tex. 2023).*

**Is ERCOT a governmental unit as defined in the TTCA and thereby entitled to pursue an interlocutory appeal from the denial of a PTJ?**

Yes. According to the Court:

- A private entity can qualify as a governmental unit under state law if (1) it is an institution, agency, or organ of government; and (2) it derives its status as such from the Texas Constitution or statutes.
- ERCOT, as the grid operator, performs a uniquely governmental function.
- ERCOT’s role is established in PURA and ERCOT performs its obligations under direct PUC oversight.
- Regulation of utilities is uniquely governmental.
- Therefore, ERCOT is an organ of government that is entitled to take an interlocutory appeal from a PTJ denial.

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