



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 17, 2021

The Honorable Dan Patrick
Lieutenant Governor of Texas
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0363

Re: Whether under the Utilities Code the Public Utility Commission has the legal authority to issue orders affecting pricing for the wholesale electricity market and ancillary services (RQ-0401-KP)

Dear Lieutenant Governor Patrick:

Due to the circumstances surrounding the electricity market in the State of Texas as a result of Winter Storm Uri (the “2021 Winter Emergency”) and its economic effects, you ask whether the Utilities Code authorizes the Public Utility Commission of Texas (the “Commission”) to issue orders affecting pricing for the wholesale electricity market and ancillary services.¹

In response to the 2021 Winter Emergency, you state that the Texas Senate passed Senate Bill 2142 to correct the pricing of wholesale electricity and ancillary services during the period beginning at 11:55 PM on February 17, 2021, and ending at 9:00 AM on February 19, 2021 (the “Correction Period”). Request Letter at 1. You inquire whether the Commission has the authority to issue orders correcting the pricing of certain aspects of the Texas electricity market during the Correction Period. *Id.* While the question presented generally speaks to authority under the Utilities Code, we note that your specific question relates to the electricity market, thus we limit our opinion to the relevant title of the Utilities Code (Title 2, also known as the Public Utility Regulatory Act (“PURA”), and subtitle B of such Act as it relates to electric utilities) and the constitutional issues presented by your question.²

¹See Letter from Honorable Dan Patrick, Lt. Gov. of the State of Tex., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Mar. 15, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0401KP.pdf> (“Request Letter”).

²We note that the Utilities Code was enacted prior to deregulation of the electricity market in the early 2000s so that many of the legacy provisions contained therein no longer apply. That said, we primarily limit this opinion to consideration of subsection 39.151(d) of the Utilities Code, which was added by the Legislature in 1999 and amended several times thereafter, and which continues to apply to the Commission even after deregulation was completed.

Background

There are three principal components to the electric industry: generation of power, transmission and distribution of power, and sale and marketing of power to the end-user. Historically, the electric industry has been regulated as a monopoly. However, from enactment of the Utilities Code to the deregulation efforts in the early 2000s (and until now), the Texas Legislature has adopted a more deregulated approach to the State's electricity industry. But portions of the market retain vestiges of the older, monopoly-based system with respect to transmission and distribution.

More than two decades after deregulation commenced in Texas, there is now a myriad of players in the Texas electricity market (*i.e.*, market participants), including publicly traded for-profit corporations, municipality-owned utilities,³ cooperative-owned generators and others. In addition to the direct market participants, many parties also trade indirectly on, and in connection with, the Texas electricity market (whether in the form of spot or futures contracts, derivatives, hedging or otherwise) and the public exchanges that foster such trades.

Foundation of the Utilities Code and the Commission's Authority

The Legislature enacted the Utilities Code to authorize the Commission to regulate and oversee the market participants, namely by oversight of the independent system operator, which for the majority of Texans is the Electric Reliability Council of Texas (ERCOT).⁴ In restructuring the electricity markets in favor of competition (for some portions of the market) and retaining monopoly control (to other portions), the Legislature created a hybrid by design, and authorized the Commission to, *inter alia*, ensure that market conditions were met and that consumers were protected. *See* TEX. UTIL. CODE § 39.001.

The Utilities Code vests the Commission with broad authority to oversee and supervise the Texas electricity market. Subsection 39.151(d) requires the Commission to adopt and enforce rules relating to the reliability of the regional electric network in the State of Texas and the accounting for the production and delivery of electricity among generators and all other market participants. *See id.* § 39.151(d). The Commission “may delegate to an independent organization responsibilities for establishing or enforcing such rules ;”⁵ provided, however, that any such actions taken by the independent organization remain “subject to [C]ommission oversight and review.” *Id.*

³For clarity, see section 39.002 of Utilities Code regarding which sections of the chapter apply to municipality-owned utilities and cooperatives.

⁴Portions of the Texas market in the eastern and western boundaries of the State (*e.g.*, El Paso, Beaumont, etc.) fall outside of the ERCOT power region, and come under the control of the interstate electricity grids (and under the regulation of the federal government). For purposes of this opinion, we focus solely on the ERCOT power region and the Commission's oversight of ERCOT.

⁵For purposes of this opinion, the “independent organization” refers to ERCOT.

Further, the independent organization certified by the Commission is directly responsible and accountable to it. The Commission has:

complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties.

Id. § 39.151(d) (emphasis added).

In addition, the independent organization “shall fully cooperate with the [C]ommission in the [C]ommission's oversight and investigatory functions.” *Id.* If the independent organization does not (i) adequately perform the organization's functions or duties or (ii) comply with the Commission's directives, the Commission is expressly authorized to take any appropriate action, including decertifying the organization or assessing an administrative penalty against the organization. *Id.*

The only restriction on the Commission's express authority is that it may **not** implement, by order or by rule, a requirement that is contrary to an applicable federal law or rule. *Id.* This opinion analyzes only the constitutional issues and certain federal regulations from the Energy Policy Act of 1992, codified at 106 Stat. 2776, Public Law 102-486.

The Commission's authority over market participants and ERCOT has been challenged in the past, and the Third Court of Appeals has held that the Commission has broad oversight authority regarding its rules relating to reliability and accounting in subsection 39.151(d). *See TXU Generation Co., L.P. v. Pub. Util. Comm'n of Tex.*, 165 S.W.3d 821, 831–32 (Tex. App.—Austin 2005, pet. denied) (determining that Commission rule did not overstep Commission's role of oversight and review or assume powers delegated to ERCOT, and that ERCOT's procedures are to be made consistent with the Commission's rules).⁶

Commission's Authority to Issue Orders affecting the Wholesale Electricity Market and Ancillary Services

We note that the Senate passed Senate Bill 2142 on March 15, 2021, which specifically orders the Commission to direct ERCOT to correct prices for wholesale electricity and ancillary services during the Correction Period. *See* Tex. S.B. 2142, § 3, 87th Leg., R.S. (2021). Upon passage by the House of Representatives and the Governor signing the bill, such authorization would have immediate lawful effect if the requisite two-thirds of each House approve the Bill.⁷ *See id.* § 5.

⁶An amendment to subsection 39.151(d) of the Utilities Code made after this 2005 ruling now expressly allows the Commission to delegate authority to ERCOT.

⁷Senate Bill 2142 includes language whereby the law becomes effective immediately upon the Governor's signature if two-thirds of the members of the Senate and House of Representatives approves the bill.

In short, nothing in the Utilities Code prevents the Commission from acting, nor does anything require such specific action be taken. We note that prior to this proposed legislation, no specific authority required the Commission to take the actions contained in Senate Bill 2142 as they relate to the 2021 Winter Emergency. As discussed above, the Commission has general authority to take actions in furtherance of its statutory authority and as otherwise permitted by law (namely the Utilities Code).

That said, ample prior action illustrates the Commission's use of its general authority to take similar actions as the ones contemplated by Senate Bill 2142.⁸ In the above-mentioned *TXU Generation* case, the Third Court of Appeals stated that the Commission had broad authority to create rules governing the conduct of market participants. Specifically, the court held that subsection 35.004(e) of the Utilities Code empowers the Commission to "ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." *TXU Generation Co., L.P.*, 165 S.W.3d at 834.

The Commission has also exercised its statutory authority to affect prices for both wholesale electricity and ancillary services during the 2021 Winter Emergency on several occasions, including the passing of the following orders: (i) the first Order Directing ERCOT to Take Action and Granting Exception to Commission Rules, dated February 15, 2021 (the "First Order")⁹; (ii) the second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules, dated February 16, 2021 (the "Second Order"); (iii) the third Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols, dated February 21, 2021 (the "Third Order"); and (iv) the Second Order Addressing Ancillary Services, dated March 12, 2021 (the "Second Ancillary Services Order").¹⁰

Because the applicability of the statute as to the above-mentioned Commission orders will depend on the particular facts concerning the compelling public interest and a review of the Commission's actions in meeting said circumstances, we cannot resolve issues requiring the consideration of specific facts. *See* Tex. Att'y Gen. Op. No. KP-0309 (2020) at 4 (stating that the opinion process cannot resolve issues requiring the consideration of specific facts).

⁸The enactment of the ERCOT protocols and the contested decision administrative process provided by the Commission, and the direct appeal of the Commission's competition rules, are evidence that the Commission has (and has exercised its) broad authority as it relates to the entirety of the Texas electricity market. Specific examples include the recently concluded proceedings between Aspire Commodities LLC and ERCOT regarding a short price fluctuation due to a market participant's employee error – for which the Commission dismissed the action, but did not raise any threshold jurisdictional objections to its ability to reprice the past errors if it so desired. *See* Order of Commission, *Aspire Commodities LLC v. ERCOT*, dated September 11, 2020.

⁹This first Commission order was incorrectly dated as February 15, 2020 upon its publication and was later rescinded by the second Commission order a day later. However, this first Commission order contained retroactive language, which was superseded by the second Commission order (with a dissent as to that portion of the second order by then-Commissioner Shelly Botkin).

¹⁰The first Order Addressing Ancillary Services, dated March 3, 2021, was withdrawn by the Commission by its Second Ancillary Order.

In consideration of the foregoing, we conclude that the Commission has the general authority to act under the Utilities Code to take the actions set out in the above-mentioned orders during the 2021 Winter Emergency for the reasons stated above and, additionally, on the basis that (i) the 2021 Winter Emergency conditions presented a “compelling public interest” to so act; (ii) the Governor declared a disaster under Chapter 418 of the Texas Government Code with respect to the 2021 Winter Emergency; and (iii) PUC directed ERCOT to ensure that firm load that was being shed was accounted for in ERCOT’s pricing signals during the 2021 Winter Emergency (as a result of the scarcity conditions in the market for the applicable period thereto).

Constitutional Law Concerns of the Commission Taking Action

In addition to the statutory analysis of the Commission’s authority to issue orders affecting pricing, a constitutional analysis is required. The takings clause encapsulated in article 1, section 17 of the Texas Constitution applies when the State acts in its sovereign capacity—that is, when it uses its eminent-domain or police powers. *See Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). “However, the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute.” *Id.* at 598–99. Here, if the Commission (through ERCOT) was acting as a price regulator, any repricing might be found by a Court to be an exercise of the police power. To the extent ERCOT set prices when acting as a counterparty during clearance or in the course of providing settlement services, including with respect to a market participant agreement, a court may find that ERCOT is repricing under the terms of a contract. A detailed analysis of the facts of specific contracts would need to be considered further and exceeds the scope of this expedited opinion process. Tex. Att’y Gen. Op. No. KP-0309 (2020) at 4.

We have considered one potential issue as it relates to subsection 17(b) of the Texas Constitution: “‘public use’ does not include the taking of property under subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.” TEX. CONST. art. I, § 17(b). There is little caselaw respecting this provision. In one case, however, a colorable argument was made that a requirement that a generator return money to a counterparty to undo economic harm would constitute a transfer to a private entity for economic-development purposes. *See Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 195 (Tex. 2012) (“The overarching constitutional rule controls: no taking of property for private use.”).

That case has limited applicability, however, because of the antecedent issue—whether the generators’ right to the proceeds from the energy sales is sufficiently vested to constitute “property” within the meaning of the Takings Clause. *See City of Austin v. Whittington*, 384 S.W.3d 766, 790 (Tex. 2012) (“[V]ested rights . . . are property rights that the Constitution protects like any other property.”). It is likely that they are not. “A ‘vested right’ implies an immediate right or entitlement—it is not an expectation or a contingency. When the authority granting the right has the power and discretion to take that right away – as the Commission does, per the authorities cited above, it cannot be said to be a vested right. “Engrained in the concept of vested rights is the idea of certainty. When a lawmaking power can declare that a right does not exist, the right is not ‘fixed or vested.’” *Houston Indep. Sch. Dist. v. Houston Chronicle Pub. Co.*,

798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied). The rights here are not vested. *See* TEX. CONST. art. I, § 16.

For similar reasons, a price correction would not be the kind of retroactive law prohibited by article 1, section 16 of the Texas Constitution. *See* TEX. CONST. art. I § 16. That is because “[t]he constitutional prohibition against retroactive laws” only “protects settled expectations.” *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010). Thus, if generators were aware prices were subject to future modification, the generators cannot be said to have a settled expectation in those prices. *Cf. id.* at 140 (noting “that permit holders could reasonably expect enforcement of the conditions inherently attached to their permit, and that a permit included no right to be forever free of a remedy to enforce those conditions” (quotation marks omitted)). Additionally, and irrespective of the settled nature of the generators’ expectations, “[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive.” *Id.* at 144. That includes instances where the retroactive legislation contained legislative findings that the law was “vital to the general economy and welfare of this state.” *Id.* at 144–45.

ERCOT has thirty days to alter prices (after notifying market participants) if they are in need of a correction. *See* ERCOT Protocol 6.3(6). To the extent that ERCOT’s thirty-two-hour long mis-pricing violated Commission rules or ERCOT protocols, language within the ERCOT Protocols appears to allow certain violations to be corrected within the thirty-day window (and possibly in some cases even after the thirty-day window has expired under the ERCOT Protocols), accompanied by a good-cause exception to the surge pricing caps. *See* 16 TEX. ADMIN. CODE § 25.3(b). In other words, until at least the close of the thirty-day window, the Commission and ERCOT retain the power to alter prices. Until that window closes, there is only an expectation of receiving the full cleared price, not a settled expectation or immediate entitlement.

Federal government (through FERC) Does Not Have Rate-setting Jurisdiction over the Texas ERCOT Market

Finally, as subsection 39.151(d) prevents the Commission from implementing an action contrary to applicable federal law or rule, we are not aware of any federal requirements that would prevent the Commission from correcting prices under the Commission’s rate-setting jurisdiction. The federal government has historically maintained that Texas’s operation of the wholly-intrastate ERCOT power region is not overseen by the Federal Energy Regulatory Commission (“FERC”) – except for reliability issues and other limited areas that do not apply here. Specifically, through the Energy Policy Act of 1992 (“EPA”), FERC does not exercise jurisdiction as to rate-setting in the ERCOT region and effectively concedes jurisdiction over rate-setting to the Commission.¹¹ The EPA (and corresponding regulations) expressly provide that:

any order.... requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which

¹¹*See* Fleisher, Jared, *ERCOT’s Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OIL GAS & ENERGY L. 4 (describing the history of federal jurisdiction over the Texas electricity market).

are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a), on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

16 U.S.C § 824k(k)(1).

S U M M A R Y

The Utilities Code gives “complete authority” to the Public Utility Commission to adopt and enforce rules relating to reliability and accounting for the production and delivery of electricity among market participants. Specifically, subsection 39.151(d) of the Utilities Code authorizes the Public Utility Commission to oversee and investigate the independent organization (ERCOT) as necessary to ensure ERCOT’s accountability and to ensure that it adequately performs its functions and duties. Within the regulatory timelines, ERCOT can also revise pricing on the wholesale electricity market if certain events occur.

Under the plain language of subsection 39.151(d), the Public Utility Commission has complete authority to act to ensure that ERCOT has accurately accounted for electricity production and delivery among market participants in the region. Such authority likely could be interpreted to allow the Public Utility Commission to order ERCOT to correct prices for wholesale electricity and ancillary services during a specific timeframe.

A court would likely find that such corrective action by the Public Utility Commission under subsection 39.151(d) does not raise constitutional concerns, namely under article 1, sections 16 and 17 of the Texas Constitution, provided that such regulatory action furthers a compelling public interest.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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