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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 18-_____

In the Supreme Court of Texas

IN RE PANDA POWER INFRASTRUCTURE FUND, LLC, D/B/A PANDA POWER FUNDS, ET AL.,

Relators.

PETITION FOR WRIT OF MANDAMUS

Original Proceeding from the
Court of Appeals for the Fifth District of Texas – Dallas
Cause No. 05-17-00872-CV

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ABBREVIATIONS

PARTIES AND KEY TERMS:

"Panda" refers collectively to Relators 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; and Panda Temple Power II, LLC.

"ERCOT" refers to Real Party in Interest Electric Reliability Council of Texas, Inc.

"PUC" refers to the Public Utility Commission of Texas.

"PURA" refers to the Public Utility Regulatory Act (TEX. UTIL. CODE § 11.001 *et seq.*).

RECORD REFERENCES:

References to the court of appeals' opinion shall be in the form of (Op. [pg#]), corresponding to the page numbers in the Westlaw citation attached as App. A.

Relators have contemporaneously filed 19 volumes comprising the Mandamus Record for this matter, which includes all documents filed in the Clerk's Record and Reporter's Record for the consolidated mandamus/interlocutory appeal below. References to the Mandamus Record shall be in the form of ([vol#]MR:[pg#]).

Relators have also filed one volume comprising the Sealed Mandamus Record, which includes the documents filed in the Sealed Clerk's Record below. References to the Sealed Mandamus Record shall be in the form of (SMR:[pg#]).

References to the attached Appendix shall be in the form of (App. [tab#]).

STATEMENT OF THE CASE

Nature of the Case:	This original proceeding turns on whether ERCOT—a private corporation that the court of appeals held is not a governmental unit—is entitled to blanket sovereign immunity from Panda's fraud claims merely because the PUC certified, and regulates, ERCOT as the independent system operator of Texas's electricity grid.
Trial Court:	15th Judicial District Court of Grayson County, Texas; Honorable James P. Fallon, presiding.
Trial Court Proceedings:	The trial court denied ERCOT's jurisdictional pleas, in which ERCOT argued both exclusive jurisdiction and later sovereign immunity. (13MR4417; 17MR:5966.)
Court of Appeals Proceedings:	ERCOT filed an interlocutory appeal and a petition for writ of mandamus on July 24, 2017. The Fifth District Court of Appeals in Dallas dismissed the interlocutory appeal, in an opinion authored by Justice Douglas Lang and joined by Justices Molly Francis and David Evans, because ERCOT is not a governmental unit. (App. A, Op. *8.) *Elec. Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, No. 05-17-00872-CV, 2018 WL 1790082 (Tex. App.—Dallas Apr. 16, 2018). But the court of appeals nevertheless granted mandamus on the theory that ERCOT is entitled to sovereign immunity. (Op. *18; App. B.) The court did not reach ERCOT's exclusive-jurisdiction argument. (Op. *1.) Panda sought *en banc* reconsideration, which the court denied without comment on July 10, 2018. (19MR:7821.) In this Court, ERCOT has moved for an extension of time to file its own petition for review in Case No. 18-0781.

STATEMENT OF JURISDICTION

This case presents important questions about Texas immunity law that have the potential to transform Texas's competitive energy regime. The court of appeals held that ERCOT is entitled to sovereign immunity in the broadest possible terms—despite correctly concluding ERCOT is *not* a governmental unit—by disregarding controlling authority from this Court, distorting the nature and purposes of immunity, and importing an inapposite federal absolute-immunity doctrine.

These deeply-flawed legal rulings must be corrected for the good of the state's jurisprudence. *See* TEX. GOV'T CODE § 22.001. At the outset, the court of appeals' immunity holding cannot be squared with its own conclusion that ERCOT—a membership-based, private corporation that receives no government funding—is not part of the government. To justify this misguided result, the court of appeals cast aside this Court's 2015 decision in *Brown & Gay Engineering, Inc. v. Olivares*, which carefully defines when a private entity like ERCOT can share in the state's immunity. ERCOT has never claimed that the false representations in this case were controlled or directed by the state—and it is therefore not immune under *Brown & Gay*.

The court of appeals next reimagined immunity's public-fisc standard, holding that the fiscal justifications for immunity were satisfied even though

ERCOT receives no tax or government funding. And, with no footing in Texas law, the court searched elsewhere and improperly imported a federal *absolute*-immunity doctrine that has no place in Texas sovereign-immunity law—and then misapplied it to ERCOT.

For these reasons, the court of appeals' ruling distorts this Court's immunity precedents and creates an expansive pathway for regulated private entities to claim the state's immunity. It also ensures that energy market participants will have no remedy for ERCOT's misconduct, even when the misconduct amounts to fraud or gross neglect, thus destabilizing the Legislature's competitive market design.

This Court has jurisdiction to issue writs of mandamus where a court of appeals abuses its discretion by misinterpreting the law. *See* TEX. GOV'T CODE § 22.001, 22.002; *see also, e.g.*, *In re State*, __ S.W.3d __, 2018 WL 1974361, at *8 (Tex. Apr. 27, 2018). The Court should exercise that jurisdiction here and resolve the jurisprudentially-significant issues presented in this case.

ISSUES PRESENTED

1. Did the court of appeals err by holding that ERCOT—a private corporation—is entitled to sovereign immunity for acts that are not controlled or directed by the state?

    a. Did the court of appeals have the freedom to disregard this Court's analysis in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), for when a private entity is entitled to sovereign immunity?

    b. Did the court of appeals misconstrue the "nature and purposes" of sovereign immunity by holding that a judgment against ERCOT would implicate the public fisc, even though it is undisputed that ERCOT receives no government or taxpayer funding?

    c. Did the court of appeals inappropriately import (and misapply) a federal immunity doctrine, the roots of which this Court has already rejected as "irrelevant" to Texas sovereign-immunity law?

2. Is mandamus appropriate to correct the court of appeals' improper immunity ruling?

3. Should Panda be permitted the opportunity to amend its petition to address the court of appeals' newly-fashioned immunity rule? (*unbriefed issue*)

REASONS TO GRANT REVIEW AND SUMMARY OF THE ARGUMENT

Sovereign immunity protects the government. ERCOT is not part of the government; it is a private corporation that receives no government funding. Under this Court's decision in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), a private entity like ERCOT shares in the state's immunity only if the state directs and controls the complained-of conduct. Though ERCOT is regulated by the state (like many other private entities), the state did not direct ERCOT to make false statements in the public reports and private-investment meetings that fraudulently induced Panda to spend billions of dollars on new power generation. Thus, immunity does not protect ERCOT.

The court of appeals recognized that ERCOT is *not* a governmental unit but nevertheless afforded ERCOT a broad grant of sovereign immunity. It reached this result by discarding *Brown & Gay*, borrowing from federal absolute-immunity concepts applicable to securities regulators, and then scotch-taping those concepts to a distorted version of Texas sovereign immunity. The result is a doctrinal Frankenstein that deeply confuses Texas law. And it damages the Legislature's competitive energy regime by ensuring ERCOT will not be accountable for fraudulent misconduct.

More specifically, the opinion:

Conflicts with *Brown & Gay*'s test for private-entity immunity. The court of appeals disregarded this Court's opinion in *Brown & Gay*, holding that its requirements for immunity are "inapplicable" to ERCOT because ERCOT is not a government contractor. (Op. *12.) But this narrow interpretation conflicts with the language and the reasoning of *Brown & Gay* and with other decisions that have read *Brown & Gay* more broadly. Review is necessary to ensure that Texas courts adhere to *Brown & Gay*'s narrow test when any private entity claims sovereign immunity. And reversal is required because ERCOT does not even *argue* it is immune under this standard.

Misconstrues the "nature and purposes" of immunity. The court of appeals created a new category of immunity based on a distorted interpretation of the "nature and purposes" of sovereign immunity, and specifically, of the doctrine's fiscal justifications. (Op. *13.) Although it is undisputed that ERCOT receives no tax funding—and thus neither suit nor judgment against ERCOT will affect the allocation of tax resources—the court of appeals concluded suits against ERCOT implicate the fiscal justifications for immunity. This conclusion cannot be squared with this Court's longtime understanding of the public-fisc rationale, which is focused on protecting the *state's* money (i.e., tax resources). *E.g.*, *Brown & Gay*, 461 S.W.3d at 121. By stretching that rationale to protect *ERCOT's*

money, the opinion below throws open the doors of immunity to a host of private entities—and further undermines the inherently sovereign nature of immunity.

Imports a federal absolute-immunity doctrine that further conflicts with *Brown & Gay*. With no footing in Texas law, the court of appeals imported a federal *absolute*-immunity doctrine that ordinarily protects securities regulators (called self-regulatory organizations, or SROs) and then likened ERCOT to an SRO. (Op. *14-16.) This doctrine has no place in Texas sovereign-immunity law, and the court of appeals misapplied it: ERCOT's investment-stoking representations and market reports do not regulate anyone, as required by these absolute-immunity authorities. Adopting this doctrine also conflicts with *Brown & Gay*, where this Court rejected qualified immunity (which, like absolute immunity, derives from official immunity) as "irrelevant" to Texas sovereign immunity. 461 S.W.3d at 121.

Grants ERCOT more immunity than the state. Review is further warranted because the court of appeals granted ERCOT more immunity than any other entity under Texas law, including the state itself. Because ERCOT is not a governmental unit or political subdivision, it is not subject to the waivers of immunity under the Tort Claims Act or the common-law governmental/proprietary dichotomy. This anomaly warrants review.

Destabilizes the Legislature's competitive market design. Texas's competitive market design depends on ERCOT providing accurate information to the market and being held accountable. The PUC thus limited ERCOT's liability for some, but not all, categories of damages—even though ERCOT asked for complete exoneration in the rule-making process. Bestowing blanket immunity on ERCOT overrides this considered regulatory framework and ensures that no market participant will have a remedy for ERCOT's misconduct.

This decision will transform Texas's competitive energy market. The Texas market now stands alone as the only energy market in the country where the independent system operator (ISO), an entity with which every market participant must deal, is immune from suit. Contrary to the Legislature's competitive market design, immunity for ERCOT will shift the risk of loss from ERCOT to the injured party and discourage new investment in Texas's energy market. Granting ERCOT immunity empowers ERCOT to pick winners and losers in this ostensibly competitive market. This is not what the Legislature intended.

This Court should grant review.

STATEMENT OF FACTS

A. ERCOT is a private, non-governmental entity certified by the PUC as the independent system operator of Texas's electricity grid.

For seventy years, ERCOT has existed in some form as a private membership organization designed to coordinate electricity operations in Texas.

(19MR:7245-48.) Today, ERCOT is a private, 501(c)(4) non-profit corporation made up of its members—energy market participants that generate, transmit, buy, and sell power. (19MR:7251, 7255.) ERCOT is managed by a board of directors, consisting of representatives from various market segments (selected by market participants), and run by a traditional corporate leadership team. (19MR:7260.) Although the PUC Chair sits on the board, she has no voting rights. (*Id.*)

ERCOT's private character did not change with the unbundling of the Texas energy market in 1999. *See* TEX. UTIL. CODE § 39.001-.916.[1] To promote this competitive regime, the Legislature charged the PUC with certifying an "independent organization" (or independent system operator) that would be responsible for ensuring a reliable electric grid and non-discriminatory grid access, proper accounting of competitive electricity transactions, and dissemination of information related to customer choices. TEX. UTIL. CODE § 39.151(a)-(c). ERCOT performed many of these market-facing functions for years before the 1999 market overhaul, and the PUC certified ERCOT for that role. Docket No. 22061, *Application of ERCOT ISO for Certification as Independent Organization*, at 3, (Jan. 27, 2000).

[1] *See also* App. D (ERCOT's Brief in *HWY 3 MHP, LLC v. ERCOT*, No. 03-14-00303-CV) at 22 (describing itself as a "private 501(c)(4) non-profit corporation whose original incorporation preceded the legislation authorizing its public functions").

The Legislature did not classify ERCOT as a governmental unit or assign its functions to a state agency. By ERCOT's own admission, it is not part of the government "under any conventional understanding of that term." (App. D at 25.) Rather, ERCOT is a private, regulated entity subject to PUC oversight. *See HWY 3 MHP, LLC v. ERCOT*, 462 S.W.3d 204, 209-12 (Tex. App.—Austin 2015, no pet.). So although "ERCOT has been delegated great authority and powers by the legislature," courts have rightly held—at ERCOT's urging—that it is *not* a governmental unit. *Id.*

B. ERCOT misrepresented the demand for power in Texas and induced Panda to make significant—and disastrous—investments in new power plants.

Long before the 1999 changes, one of ERCOT's functions was to provide market reports to guide the needs of Texas's energy market. Among the reports ERCOT issues are those on "Capacity, Demand and Reserves," known as CDRs. (App. C, 3MR:1165-67.) CDRs represent ERCOT's expert assessment of power capacity and demand in the region, so they play an important role for market participants in determining the need for additional sources of power—and thus the financial viability of investment. (3MR:1165-66.)

ERCOT understands this dynamic. So when ERCOT wanted additional investment in power generation, it falsely represented (and assured investors of) a looming energy-supply shortage. (3MR:1156, 1167-68.) ERCOT publicly

projected serious and long-term scarcity of power supply, which would have resulted in investment returns high enough to justify the substantial cost of new power plants. (3MR:1167.) But ERCOT knew no such scarcity was on the horizon. One ERCOT employee went to the Board and CEO seeking permission to correct the false reports, but ERCOT refused to provide permission. (*See* 15MR:5252-53; 17MR:6108-09.) Then, to cover up its lie, ERCOT fired another employee and forced him to sign a nondisclosure agreement. (3MR:1172-73.)

The Panda entities are investors and project companies who relied on ERCOT's misrepresentations. (3MR:1157.) Despite knowing new power generation would create a significant surplus, ERCOT assured Panda (publicly and privately) that new generation was desperately needed. (3MR:1168.) Panda relied on those representations and invested billions of dollars to build three new power plants. (3MR:1157, 1167-68.)

ERCOT later released new CDRs, which revealed ample supply to meet demand—thus driving down prices and making new investment cost-prohibitive. (3MR:1157, 1168-69.) For Panda, it was too late. (3MR:1157.) Having sunk billions into these power plants, Panda was forced to sell power into the grid for far less than ERCOT had represented—with devastating financial consequences. (3MR:1157.) Panda therefore sued ERCOT for fraud. (3MR:1169-70.)

C. The trial court denied ERCOT's jurisdictional pleas, but the Dallas Court of Appeals held ERCOT is entitled to sovereign immunity.

After litigating the merits of the case for almost a year, ERCOT argued for the first time in January 2017 that the case should be dismissed based on exclusive jurisdiction. (8MR:3015.) The trial court properly denied that plea because PURA does not grant the PUC any jurisdiction—much less exclusive jurisdiction—over Panda's claims. (11MR:3756.) Six weeks later, ERCOT filed a motion for reconsideration to argue, again for the first time, that it is immune from suit. (13MR:4417.) Again, the trial court disagreed. (17MR:5966-67.)

But the Dallas Court of Appeals reversed. It held that ERCOT is entitled to sovereign immunity—despite also holding that ERCOT is not a "governmental unit." (Op. *8, 13.)[2] Panda sought *en banc* reconsideration of this immunity holding, but the court denied review without comment. (19MR:7756.)

ARGUMENT

I. This Court should grant review to rein in the court of appeals' unwarranted expansion of sovereign immunity for private entities.

The court of appeals paved a new path to immunity for private entities by holding that non-governmental-units like ERCOT can share in the state's immunity

[2] The order directed the trial court to dismiss Panda's case for lack of jurisdiction, which it did just eight days later. (17MR:5976; 19MR:7543.) ERCOT has previously asserted that this dismissal moots this proceeding. (19MR:7565.) Although that is wrong, Panda has filed a protective appeal to preserve all rights. (19MR:7448.)

even when they do not satisfy the test for private-entity immunity articulated in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015). In doing so, the court distorted the fiscal justifications for immunity, adopted an inapposite federal doctrine, created an unprecedented category of super-immunity, and overrode the PUC's choice not to free ERCOT from all liability—all so ERCOT need not answer for its fraud. This Court should grant review to restore order to Texas sovereign-immunity law.

A. The court of appeals created a new species of sovereign immunity for ERCOT even while holding it is not a governmental unit.

1. Sovereign immunity protects the government—and ERCOT is not the government.

Sovereign immunity generally "precludes suit against a governmental entity." (Op. *8.) *See also Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 835 (Tex. 2018). Immunity is inherent in the nature of sovereignty, which in Texas is vested in its people, and by extension, its government. *See Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 431-33 (Tex. 2016). Yet, even for the government, this Court has confined immunity to conduct rooted in that sovereignty. *Id.*

ERCOT is undisputedly not part of the government. It is a private corporation that—by its own admission—receives no funding from the state, does not fulfill the same role as a government agency, and has not been statutorily

defined as part of the government. (App. D at 21-25.) The court of appeals therefore properly held that ERCOT is not a "governmental unit." (Op. *8.) So by its nature, ERCOT is disconnected from the root of sovereign immunity—and is presumptively not immune. *See Wasson*, 489 S.W.3d at 432-33; *Brown & Gay*, 461 S.W.3d at 129 (Hecht, C.J., concurring) ("Immunity protects the government. An independent contractor is not the government. Therefore, immunity does not protect an independent contractor.").

2. The court of appeals improperly disregarded *Brown & Gay*'s requirements for when private entities are entitled to sovereign immunity.

Although it is possible for a private entity to share in the state's immunity, that pathway is narrow and rooted in the nature of immunity. *Cf. Wasson*, 489 S.W.3d at 433. This Court held in *Brown & Gay* that a private party working for the government is immune only for acts done "as the government," i.e., subject to the government's control and without independent discretion. 461 S.W.3d at 125-26. ERCOT cannot satisfy *Brown & Gay* and has never argued otherwise.

That should have been the end of the analysis, yet the court of appeals dismissed *Brown & Gay* as "inapplicable" because ERCOT is not a government contractor. (Op. *12.) The court ignored that *Brown & Gay* speaks in broader terms about when "private entities" may share in the state's immunity. *See* 461

S.W.3d at 122, 123, 124, 127 (using a variety of terms like "private companies" and "private parties," in addition to "private contractors").

This is not just semantics. The narrow reading below conflicts with the reasoning of *Brown & Gay* and the exceptional nature of sovereign immunity. Private entities have no sovereignty of their own. *See Wasson*, 489 S.W.3d at 433. Their actions tap into the root of sovereign immunity only where the government controls them, such that the action is effectively "taken by the government *through* the [entity]." *Brown & Gay*, 461 S.W.3d at 125 (emphasis in original); *see also id.* at 129 (Hecht, C.J., concurring). If the entity retains independent discretion in the performance of its duties, its acts are "separated . . . from the [government] and thus from the [government's] immunity." *Id.* at 130-31 (Hecht, C.J., concurring).

The court of appeals believed ERCOT is somehow different than a contractor because the PUC regulates ERCOT. (*See* Op. *12.) But this regulatory arrangement does not undercut the rationale of *Brown & Gay*, because all private entities working "for the government" derive their power in some way from legislative authorization. *See Brown & Gay*, 461 S.W.3d at 127 (rejecting immunity even though toll authority "was statutorily authorized to engage Brown & Gay's services"); *HWY 3 MHP, LLC v. ERCOT*, 462 S.W.3d 204, 209 (Tex. App.—Austin 2015, no pet.) (citing statute "requiring electric utility to obtain certificate from [the PUC] before providing service").

Regardless of any regulatory overlay, immunity must be rooted in the sovereign will: Was the private entity acting "as the government" for the complained-of acts? If not, there is no immunity. Here, ERCOT exercised discretion in publishing (and misrepresenting) the existence of capacity shortage—a point ERCOT does not contest. Thus, ERCOT was not acting as the government and is not immune under *Brown & Gay*.

Finally, other courts of appeals have read *Brown & Gay* more broadly to articulate "what is required for a private entity to benefit from sovereign immunity." *Lenoir v. UT Physicians*, 491 S.W.3d 68, 82 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also Orion Real Estate v. Sarro*, __ S.W.3d __, 2018 WL 3264939, at *6 (Tex. App.—San Antonio July 5, 2018, no pet. h.); *Brown v. Waco Transit Sys.*, No. 07-16-00258-CV, 2017 WL 4872801, at *4 (Tex. App.—Amarillo Oct. 27, 2017, no pet.); *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 WL 3097627, at *4-5 (Tex. App.—Dallas July 21, 2017, pet. filed). This conflict with the "contractor-only" holding below warrants review.

B. The court of appeals distorted the fiscal justifications for sovereign immunity by holding that the public fisc is implicated even when no government funds are at issue.

Having cast *Brown & Gay* aside, the court of appeals concluded in a single paragraph that immunity is warranted because a judgment against ERCOT "implicat[es]" the fiscal justifications for immunity. (Op. *13.) But ERCOT

neither receives tax funds nor spends any governmental money. (*Id.*) The court of appeals' public-fisc analysis therefore misconstrues this Court's precedents.

This Court's public-fisc writings have always focused on the sovereign's prerogative to allocate tax resources. *E.g.*, *Brown & Gay*, 461 S.W.3d at 121 (citing cases). Immunity serves pragmatic purposes and preserves separation of powers by "preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars" and leaving to the Legislature "the determination of when to allow tax resources to be shifted 'away from their intended purposes toward defending lawsuits and paying judgments.'" *Id.*

These concerns are not implicated here because ERCOT receives no tax dollars or other money that flows through government coffers. ERCOT is funded instead by a fee it collects from market participants as compensation for the services ERCOT provides. (App. D at 24.) ERCOT has previously described its funding as "more akin to that of private electric utilities" than tax-funded entities like charter schools. (*Id.*) So, as with any case against a private electric utility, no tax funds will be implicated by a judgment (or suit) against ERCOT. And like other private entities, ERCOT has insurance for cases like this. (*E.g.*, SMR:0285-87.) "[W]hen there is no concern that the state will be required to divert funds in the face of litigation, the fiscal rationale for immunity is not implicated." *Lenoir*, 491 S.W.3d at 87.

The court of appeals nevertheless concluded that ERCOT's funding is *public-enough* because ERCOT's fee is "authorized by statute, set by the PUC, collected pursuant to the State's power, and intended to further a function for the benefit of the public." (Op. *13.) This stunning expansion of the fiscal rationale is not supported by any authority. Under this analysis, a whole host of other private entities that set rates or charge fees under state law—like electric utilities, telecommunications providers, and insurance companies—arguably have a path to immunity. No court has ever interpreted the public fisc so broadly.

C. The court of appeals imported (and misapplied) an inapposite federal *absolute*-immunity doctrine to create a new *sovereign*-immunity rule just for ERCOT.

The cornerstone of the court of appeals' novel immunity holding is an inapposite federal absolute-immunity doctrine. (Op. *14-16.) Pointing to federal authorities that grant such immunity to securities exchanges exercising their regulatory function, the court of appeals compared ERCOT to these exchanges and then concluded—incorrectly—that ERCOT's communications in market reports and private investment meetings are part of a similar regulatory role.

Several aspects of this analysis warrant review.

Initially, *Brown & Gay* already rejected the use of federal official-immunity doctrines to justify sovereign immunity in yet another aspect of that opinion ignored by the court of appeals. There, the private party seeking immunity argued

"it [was] entitled to the same immunity the government itself enjoys" based on federal qualified immunity. *Brown & Gay*, 461 S.W.3d at 128-29. The Court declined to apply that doctrine to justify sovereign immunity because "the policies underlying official and qualified immunity are *simply irrelevant* to" whether the private entity was entitled to sovereign immunity. *Id.* (emphasis added).

So too here. Like qualified immunity, absolute immunity is a creature of official immunity; it protects certain public officials (e.g., judges and prosecutors) from suits based on the need for independence in the performance of their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982). Sovereign immunity is different: it protects the sovereign will and "the government's tax-funded coffers from lawsuits and money judgments." *Brown & Gay*, 461 S.W.3d at 128.

Instead of engaging these doctrinal issues, the court below brushed aside *Brown & Gay* on the theory that a "lack of pleading and proof" prompted this Court's conclusion that official immunity doctrines are "irrelevan[t]" to sovereign immunity. (Op. *15.) But *Brown & Gay* does not say that, and regardless, ERCOT similarly did not plead any kind of immunity here. (1MR:0184-88.)

Doctrinal misfit aside, the court of appeals misapplied absolute immunity. That doctrine does not attach simply because an SRO performs some function consistent with its delegated authority. *Weissman v. NASD, Inc.*, 500 F.3d 1293, 1297 (11th Cir. 2007) (en banc). Rather, it protects only the *regulator* in fulfilling

its role of *regulating* the market—that is, when the SRO exercises its regulatory power or discharges its regulatory responsibilities, not when it acts as a regulated entity. *City of Providence v. Bats Global Mkts., Inc.*, 878 F.3d 36, 46-48 (2d Cir. 2017) ("In all of these situations [applying SRO immunity], the SRO is fulfilling its regulatory role and is not acting as a regulated entity.").

Even under this standard, ERCOT would not be immune for the complained-of conduct here. In publishing the CDRs and meeting with investors, ERCOT did not "regulate" anyone or anything. It did not discipline, police, or monitor market participants. It did not set or enforce standards of conduct. It simply disseminated market information as a regulated entity. The court of appeals thus misconstrued the very absolute-immunity doctrine on which it relies—all the more reason to reject this misguided attempt to graft a federal doctrine onto Texas sovereign immunity.[3]

D. The court of appeals granted ERCOT more robust immunity than any other entity under Texas law, including the state itself.

The court of appeals' novel immunity analysis results in a kind of super-immunity that grants ERCOT more protections than any other entity under Texas law. Nothing supports this special treatment.

[3] Further, a far better federal analogy exists. ERCOT is one of a number of entities (called ISOs and RTOs) that, like ERCOT, ensure electricity-market reliability within their specified geographic region. *See* ISO/RTO Council, https://isorto.org/. These ISOs are not immune but instead must seek regulatory limitations of liability. *See* PJM Interconnection, L.L.C., 139 FERC ¶ 61183, 62280 (FERC 2012).

Immunity has limits, for even the government and especially for private entities. *Wasson*, 489 S.W.3d at 431-33. Governmental units are subject to waivers of immunity in the Tort Claims Act. *E.g.*, TEX. CIV. PRAC. & REM. CODE 101.021. Political subdivisions (like cities) are further subject to the governmental/proprietary dichotomy—immunity for "governmental," but not "proprietary" acts. *Wasson*, 489 S.W.3d at 433-34. And, under *Brown & Gay*, private entities share in the state's immunity only when their complained-of acts are directed by the state and performed without independent discretion. 461 S.W.3d at 125-26.

But ERCOT is apparently subject to *none* of these limitations. It is not subject to the Tort Claims Act or the governmental/proprietary dichotomy because it is not a governmental unit or political subdivision. (*See* Op. *8.) But neither is it subject to the limitations of *Brown & Gay* (according to the opinion below) because it is not a government contractor. (Op. *12.) So ERCOT apparently receives the state's full, inherent immunity—unmitigated by the limitations that apply to everyone else. "[I]t would seem odd for lawmakers to imbue [ERCOT] with greater tort immunity than cities, counties, school districts, and other purely governmental entities." *Cf. LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 78 n.44 (Tex. 2011). But the court of appeals did just that.

II. Immunity for ERCOT contradicts Texas's competitive-market design and flouts regulations authorizing ERCOT's liability for misconduct.

The court of appeals' immunity holding disrupts a competitive-energy-market regime that explicitly anticipates ERCOT's potential liability for its misdeeds, even those connected to its regulatory acts. These carefully considered legislative and regulatory choices should not be so casually discarded.

The Texas energy regime contemplates that competitive market participants will produce and sell all power necessary for consumer needs. These participants must deal with ERCOT, so they must rely on ERCOT to provide accurate market information. Given ERCOT's important role in this market, several PUC regulations narrowly limit its liability for defined mishaps, like those caused by an act of God or even by ERCOT's negligence when exercising important (and defined) regulatory functions—but none totally exonerates ERCOT from liability:

- 16 TAC § 25.200(d) limits ERCOT's liability for certain regulatory functions but provides that "ERCOT . . . may be liable for its gross negligence or intentional misconduct."
- 16 TAC § 25.361(c) states that "ERCOT shall not be liable in damages for any damages for" defined *force majeure* events.
- 16 TAC § 25.43(o)(2) provides that "[i]n no event shall ERCOT . . . be liable for damages to any [retail electric provider] . . . for transitioning or attempting to transition a customer from such REP to the [provider of last resort] to carry out this section . . . ."

These liability limitations are intentionally narrow. ERCOT asked the PUC for near-total limitations on its liability, but the PUC declined.[4] Rather, it has decided that ERCOT should sometimes be liable when performing its regulatory responsibilities. Until now, ERCOT shared this understanding (as reflected in its standard market-participation agreements, e.g., 1MR:0130), and has also secured insurance to cover liability for these very responsibilities. (SMR:0285-87.)

The opinion below renders these tailored regulations meaningless and overrules years of considered legislative and regulatory judgment about Texas's competitive energy market.

III. Mandamus relief is available and appropriate.

A writ of mandamus is the appropriate remedy for the court of appeals' improper immunity rulings. This Court reviews granted mandamus petitions to determine if the court of appeals abused its discretion. *In re State*, __ S.W.3d __, 2018 WL 1974361, at *4 (Tex. 2018). But the focus remains on the trial court's order—if the trial court did not abuse its discretion in the first place, the issuance of mandamus by the court of appeals was an abuse of discretion. *Id.* at *4-5; *Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439, 440 (Tex. 1992).

[4] When the PUC considered § 25.200(d), ERCOT asked for a provision permitting it to "cause the interruption of transmission service without liability . . . ." ERCOT Comments, Project No. 23157, http://interchange.puc.texas.gov/Search/Documents?controlNumber=23157&itemNumber=53. The PUC rejected ERCOT's proposal, concluding "*ERCOT's behavior should at all times be guided by good utility practice and a degree of reasonableness . . . .*" 26 TEX. REG. 4461, 4457 (June 15, 2001) (emphasis added).

Sovereign immunity is a question of law, and neither the trial court nor the court of appeals has discretion to misapply the law. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). ERCOT is not entitled to sovereign immunity. Thus, the trial court did not abuse its discretion in denying ERCOT's plea to the jurisdiction on these grounds, and the court of appeals did, in granting mandamus. *See In re Lazy W Dist. No. 1*, 493 S.W.3d 538, 544 (Tex. 2016); *see also In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004).

PRAYER

Panda requests that the Court grant review, reverse the court of appeals' judgment, direct the court of appeals to set aside its order mandating dismissal of Panda's claims, reinstate the denial of the plea to the jurisdiction, and remand for further proceedings. Panda also requests all further relief to which it is entitled.

Respectfully submitted,

/s/ Ben L. Mesches

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RULE 52.3(j) CERTIFICATION

I hereby certify that I have reviewed the foregoing Petition for Writ of Mandamus and concluded that every factual statement in the Petition for Writ of Mandamus is supported by competent evidence included in the Appendix or Mandamus Records and that all documents in the Mandamus Records and Appendix are true and correct copies.

/s/ *Ben L. Mesches*
Ben L. Mesches

CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e), (i)

1. This petition complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because, according to the Microsoft Word 2010 word count function, it contains 4,494 words on pages 1-20 excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(e)(i)(1).

2. This petition complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Andrew W. Guthrie
Andrew W. Guthrie

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on the 24th day of August 2018.

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APPENDIX INDEX

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Ben L. Mesches, who, being by me first duly sworn, stated on his oath the following:

I hereby certify that the document at Tab B is a true and correct copy of an order entered by the Court of Appeals, which was retrieved from the Court of Appeals' website. The document at Tab C is a true and correct copy of a document filed in the trial court and included in the Clerk's Record for the consolidated mandamus/interlocutory appeal below. The document at Tab D is a true and correct copy of ERCOT's Brief of Appellee on file with Court of Appeals for the Third District of Texas in Austin in No. 03-14-00303-CV, which was retrieved from the Court's website.

Ben L. Mesches

SWORN TO AND SUBSCRIBED before me on this 14 day of August, 2018, to certify which witness my hand and seal of office.

BRENDA L. STACKS
Notary Public, State of Texas
Comm. Expires 04-02-2020
Notary ID 10486878

Brenda L. Stacks
Notary Public for the State of Texas

App. A

2018 WL 1790082
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Appellant
v.
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; and Panda Temple Power II, LLC, Appellees
and
In re Electric Reliability Council of Texas, Inc., Relator

No. 05-17-00872-CV
|
Opinion Filed April 16, 2018

Synopsis

Background: Power companies brought action against Electric Reliability Council of Texas, Inc. (ERCOT) for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that they built three power plants in reliance on ERCOT's false representations of market data. ERCOT filed two pleas to the jurisdiction on the basis of sovereign immunity and the exclusive jurisdiction of the Public Utility Commission of Texas (PUC). The 15th Judicial District Court, Grayson County, James P. Fallon, J., denied both challenges. ERCOT filed interlocutory appeal, and in the alternative, sought mandamus relief.

Holdings: The Court of Appeals, Lang, J., held that:

[1] ERCOT was not a governmental unit under interlocutory appeal statute;

[2] ERCOT was entitled to sovereign immunity from private damages suits in general;

[3] ERCOT's sovereign immunity precluded jurisdiction; and

[4] ERCOT was entitled to mandamus review.

Vacated.

West Headnotes (23)

[1] **Courts** Jurisdiction of Cause of Action
Courts Determination of questions of jurisdiction in general
Subject matter jurisdiction is essential to a court's power to decide a case and presents a question of law.

Cases that cite this headnote

[2] **Courts** Determination of questions of jurisdiction in general
All courts bear the affirmative obligation to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.

Cases that cite this headnote

[3] **Appeal and Error** Necessity of final determination
Unless a statute authorizes an interlocutory appeal, appellate courts generally only have jurisdiction over final judgments.

Cases that cite this headnote

[4] **Statutes** Language and intent, will, purpose, or policy
Statutes Plain Language;Plain, Ordinary, or Common Meaning
In construing a statute, a court's primary objective is to determine the legislature's intent which, when possible, a court discerns from the plain meaning of the words chosen.

Cases that cite this headnote

[5] **Appeal and Error** Necessity of final determination
Appeal and Error Interlocutory and Intermediate Decisions
Texas courts strictly construe the state's interlocutory appeal statute as a narrow exception to the general rule that only final judgments are appealable. Tex. Civ. Prac. & Rem. Code Ann. § 51.014.

Cases that cite this headnote

[6] **Appeal and Error** On motions relating to pleadings
Electric Reliability Council of Texas (ERCOT) was not a "governmental unit" within the meaning of Texas interlocutory appeal statute, and thus Court of Appeals did not have jurisdiction over ERCOT's appeal from denial of ERCOT's plea to the jurisdiction, which alleged that it had sovereign immunity from fraud action by power companies that built three power plants in reliance on allegedly false market data provided by ERCOT; the legislature did not classify or intend to classify ERCOT as a "governmental unit," ERCOT received no state funding, and ERCOT was subject to the same limited oversight as other non-governmental units in the state. Tex. Civ. Prac. & Rem. Code Ann. § 51.014, § 101.001(3.

Cases that cite this headnote

[7] **Mandamus** Nature and scope of remedy in general
Mandamus Discretion as to grant of writ

Mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court.

Cases that cite this headnote

[8] **Mandamus** Remedy by Appeal or Writ of Error

When an interlocutory appeal is available, mandamus relief is generally not appropriate.

Cases that cite this headnote

[9] **Mandamus** Remedy by Appeal or Writ of Error
Mandamus Matters of discretion

To be entitled to mandamus relief, a relator must show both that the trial court clearly abused its discretion and that relator has no adequate appellate remedy.

Cases that cite this headnote

[10] **Mandamus** Matters of discretion

A trial court abuses its discretion, as required for mandamus relief, when it fails to analyze or apply the law correctly.

Cases that cite this headnote

[11] **Mandamus** Matters of discretion

A trial court can be held to have abused its discretion, as required to obtain mandamus relief, even when the applicable law is unsettled.

Cases that cite this headnote

[12] **Pleading** Plea to the Jurisdiction

A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action.

Cases that cite this headnote

[13] **Appeal and Error** Subject-matter jurisdiction
Appeal and Error Pleadings and Evidence

Whether a trial court has subject matter jurisdiction is a question of law and is reviewed de novo; in performing this review, an appellate court does not look to the merits of the case, but considers only the pleadings and evidence relevant to the jurisdictional inquiry.

Cases that cite this headnote

[14] **States** Liability and Consent of State to Be Sued in General

Sovereign immunity implicates a trial court's jurisdiction, and, when it applies, precludes suit against a governmental entity.

Cases that cite this headnote

[15] **States** Liability and Consent of State to Be Sued in General

Sovereign immunity is a common-law creation and it remains the judiciary's responsibility to define the boundaries of the doctrine and to determine under what circumstances sovereign immunity exists in the first instance.

Cases that cite this headnote

[16] **Appeal and Error** Interlocutory and Intermediate Decisions

Municipal Corporations Capacity to sue or be sued in general

Whether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate questions with separate analytical frameworks.

Cases that cite this headnote

[17] **States** What are suits against state or state officers

To determine whether an entity is entitled to sovereign immunity, Texas courts should not rely on the state civil practice statute's definition of "governmental unit," but on the nature and purposes of sovereign immunity. Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3).

Cases that cite this headnote

[18] **Electricity** Regulation in general;statutes and ordinances

Electric Reliability Council of Texas (ERCOT), a private corporation certified by Public Utility Commission of Texas (PUC) as an independent system operator to ensure reliability of regional electrical network, was generally entitled to sovereign immunity from private damages suits in connection with the discharge of its regulatory responsibilities; ERCOT exclusively performed functions assigned by the Texas Legislature and PUC and was a necessary component of the legislature's utility industry regulatory scheme. Tex. Util. Code Ann. § 39.151(e).

Cases that cite this headnote

[19] **Securities Regulation** Exchange registration and regulation

Self-regulatory organizations are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions.

Cases that cite this headnote

[20] **Electricity** Regulation in general;statutes and ordinances

Electric Reliability Council of Texas (ERCOT), a private corporation certified by the Public Utilities Commission of Texas (PUC) as an independent system operator to ensure reliability of regional electrical network, was shielded by sovereign immunity from claims of fraud, negligent misrepresentation, and breach of fiduciary duty brought by power companies that built three power plants in reliance on ERCOT's

false representations of market data; alleged misconduct occurred in the discharge of ERCOT's regulatory responsibilities. Tex. Util. Code Ann. § 39.151.

Cases that cite this headnote

[21] **Mandamus** Modification or vacation of judgment or order

Incidental district court rulings, which include pleas to the jurisdiction, generally will not be reviewed by mandamus because an adequate appellate remedy exists.

Cases that cite this headnote

[22] **Mandamus** Remedy by Appeal or Writ of Error

Whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.

Cases that cite this headnote

[23] **Mandamus** Modification or vacation of judgment or order

Mandamus Pleading

Electric Reliability Council of Texas (ERCOT), a private corporation certified by the Public Utility Commission of Texas (PUC) as an independent system operator to ensure reliability of regional electrical network, was entitled to mandamus review of trial court's denial of plea to jurisdiction based on sovereign immunity, in action by power companies that built three power plants in reliance on ERCOT's false representations of market data; ERCOT was entitled to sovereign immunity, as the alleged misconduct occurred in the discharge of its regulatory responsibilities, resources implicated included revenue from fees authorized and established by the government respecting an essential service, and ERCOT lacked an adequate appellate remedy. Tex. Util. Code Ann. § 39.151.

Cases that cite this headnote

On Appeal from the 15th Judicial District Court, Grayson County, Texas, Trial Court Cause No. CV-16-0401, Judge James P. Fallon

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Before Justices Francis, Lang, and Evans

OPINION

Opinion by Justice Lang

***1** In this consolidated interlocutory appeal and mandamus proceeding, we must decide whether appellees/real parties in interest, a group of limited liability companies [1] (collectively, "Panda"), are barred from proceeding with claims of fraud, negligent misrepresentation, and breach of fiduciary duty against appellant/relator Electric Reliability Council of Texas, Inc. ("ERCOT") based on representations by ERCOT respecting future demand for electric power in Texas. In the trial court, ERCOT filed two pleas to the jurisdiction, asserting Panda's claims are barred because (1) the State's sovereign immunity extends to ERCOT as to this lawsuit and (2) alternatively, the Public Utility Commission of Texas ("PUC") has exclusive jurisdiction over Panda's claims. The trial court denied those jurisdictional pleas.

1 Specifically, appellees/real parties in interest are 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; and Panda Temple Power II, LLC.

In this Court, ERCOT asserts in two issues that the trial court erred by denying its pleas to the jurisdiction. Further, ERCOT contends this Court has appellate jurisdiction over this case pursuant to section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2017), or, alternatively, mandamus jurisdiction pursuant to Texas Government Code section 22.221(b), *see* TEX. GOV'T CODE ANN. § 22.221(b) (West Supp. 2017).

We conclude this Court lacks jurisdiction as to ERCOT's interlocutory appeal, but has mandamus jurisdiction over this case. Additionally, we decide in favor of ERCOT as to the trial court's denial of its plea to the jurisdiction based on sovereign immunity. We need not reach ERCOT's issue respecting its plea to the jurisdiction based on exclusive jurisdiction.

We dismiss ERCOT's interlocutory appeal for lack of jurisdiction. Further, we conditionally grant ERCOT's petition for writ of mandamus and direct the trial court to vacate its order denying ERCOT's plea to the jurisdiction based on sovereign immunity and dismiss this case for lack of jurisdiction.

I. FACTUAL AND PROCEDURAL CONTEXT

In 1999, the Texas Legislature enacted Chapter 39 of the Texas Public Utility Regulatory Act ("PURA") to restructure the electric utility industry in Texas. *See* TEX. UTIL. CODE ANN. §§ 39.001–.916 (West 2016). Pursuant to PURA section 39.151, the PUC was required to certify an "independent system operator" ("ISO") to, among other functions, "ensure the reliability and adequacy of the regional electrical network." *See id.* § 39.151(a)–(c). In 2001, the PUC certified ERCOT, a Texas non-profit corporation, as the ISO.

***2** We quote Panda's live petition at length because it clearly identifies Panda's position. Panda contended in part (1) "[a]s part of its responsibilities as an ISO, ERCOT publishes market data for use by those who participate in the ERCOT market"; (2) in approximately 2011 and 2012, ERCOT "sponsored false and misleading market reports describing capacity, demand, and reserves in the ERCOT region" (the "CDRs") and "broadcast[ ] the false market information throughout the state" via ERCOT's website, ERCOT press releases, and "ERCOT sponsored interviews with the press"; (3) additionally, ERCOT representatives "confirmed" the "CDR results" at presentations and meetings in Texas; (4) within the ERCOT region, "the CDRs or similar reports form the basis of investment analysis and drive the investment" as to construction of new power plants; (5) Panda "relied on [ERCOT's] representations to build three power plants at a cost of $2.2 billion"; (6) "[a]fter the investments were irrevocably committed and after the power plants were under construction, [ERCOT] admitted that its earlier representations were false"; and (7) the consequences to Panda were "devastating," as the Panda entities "now sell power into the grid ... at a fraction of the price they would have enjoyed had the false market data been accurate." As described above, Panda asserted claims for fraud, negligent misrepresentation, and breach of fiduciary duty. Specifically, according to Panda, (1) "[t]he ERCOT publications were made negligently or fraudulently" and/or ERCOT "negligently or fraudulently failed to disclose the falsity sooner than it did," and (2) ERCOT owed and breached "formal" and "informal" fiduciary duties to Panda "to act independently and competently in the performance of its responsibilities as an ISO." [2]

[2] Panda contends its damages are "ongoing" and have not yet been calculated. In a "preliminary response" to ERCOT's requests for disclosure during discovery in this case, Panda described alleged losses and damages totaling more than $1 billion.

ERCOT filed a general denial answer. Additionally, approximately one year later, ERCOT filed its jurisdictional plea based on exclusive jurisdiction described above. Following a response by Panda and a hearing, that plea to the jurisdiction was denied by the trial court.

Several months later, ERCOT filed a "Motion for Reconsideration of ERCOT's First Plea to the Jurisdiction and Alternative Amended Jurisdictional Plea." Therein, ERCOT contended in part that sovereign immunity bars Panda's claims because "an entity exercising the government's regulatory powers shares its immunity with respect to that exercise." In support of its arguments, ERCOT cited, *inter alia*, federal cases involving federal "self-regulatory organizations" ("SROs").

Panda filed a response in which it asserted in part "the law is clear that ERCOT is not the type of entity entitled to the protections of immunity because: (1) ERCOT is not a state agency or political subdivision of the state; (2) ERCOT does not perform state governmental functions; and (3) even if ERCOT was deemed to perform a governmental function, ERCOT has the sole discretion to determine the content in the CDRs and other representations." Further, Panda contended (1) because "ERCOT's CDR preparation and other representations do not involve quasi-judicial activities and are not regulatory," the SRO cases cited by ERCOT do not support immunity, and (2) "[e]ven if preparing CDRs is a 'regulatory' activity," it is "not the sort of regulation at issue" in those SRO cases.

At the hearing on the motion, ERCOT argued in part that it is designated to perform only "governmental functions," "performs no private functions," and is "not in any business other than doing what the PUC tells ERCOT to do." Further, ERCOT stated its plea to the jurisdiction on sovereign immunity is based "solely on the pleadings." The trial court denied ERCOT's motion for reconsideration and alternative plea to the jurisdiction. This consolidated interlocutory appeal and mandamus proceeding timely followed. [3]

[3] In an order dated July 28, 2017, this Court granted a motion by ERCOT for emergency temporary relief and stayed all trial court proceedings pending resolution of this consolidated proceeding.

II. ERCOT'S ISSUES

A. Applicable PURA Provisions and PUC Rules

Section 39.151 requires the PUC to "certify an independent organization or organizations" to perform the following functions:

> (1) ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms;
>
> (2) ensure the reliability and adequacy of the regional electrical network;
>
> (3) ensure that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and
>
> ***3** (4) ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region.

UTIL. § 39.151(a), (c). "Independent organization" means "an independent system operator or other person that is sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller." *Id.* § 39.151(b). Further, the PUC "shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules." *Id.* § 39.151(d). Pursuant to section 39.151(d),

> Any such rules adopted by an independent organization and any enforcement actions taken by the organization are subject to commission oversight and review. An independent organization certified by the commission is directly responsible and accountable to the commission. 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.... The commission may take appropriate action against an organization that does not adequately perform the organization's functions or duties or does not comply with this section, including decertifying the organization or assessing an administrative penalty against the organization.

Id.

After approving the budget of the certified ISO,[4] the commission shall "authorize the organization to charge to wholesale buyers and sellers a system administration fee, within a range determined by the commission, that is reasonable and competitively neutral to fund the independent organization's approved budget" and "require the organization to closely match actual revenues generated by the fee and other sources of revenue with revenue necessary to fund the budget, taking into account the effect of a fee change on market participants and consumers, to ensure that the budget year does not end with surplus or insufficient funds." *Id.* § 39.151(e).

4 Specifically, section 39.151 includes the following provisions respecting the budget and operations of the certified ISO:
(d-1) The commission shall require an independent organization certified by the commission under this section to submit to the commission the organization's entire proposed annual budget. The commission shall review the proposed budgets either annually or biennially and may approve, disapprove, or modify any item included in a proposed budget. The commission by rule shall establish the type of information or documents needed to effectively evaluate the proposed budget and reasonable dates for the submission of that information or those documents. The commission shall establish a procedure to provide public notice of and public participation in the budget review process.

(d-2) Except as otherwise agreed to by the commission and an independent organization certified by the commission under this section, the organization must submit to the commission for review and approval proposals for obtaining debt financing or for refinancing existing debt. The commission may approve, disapprove, or modify a proposal.

(d-3) An independent organization certified by the commission under this section shall develop proposed performance measures to track the organization's operations. The independent organization must submit the proposed performance measures to the commission for review and approval. The commission shall review the organization's performance as part of the budget review process under Subsection (d-1). The commission shall prepare a report at the time the commission approves the organization's budget detailing the organization's performance and submit the report to the lieutenant governor, the speaker of the house of representatives, and each house and senate standing committee that has jurisdiction over electric utility issues.

(d-4) The commission may:

(1) require an independent organization to provide reports and information relating to the independent organization's performance of the functions prescribed by this section and relating to the organization's revenues, expenses, and other financial matters;

(2) prescribe a system of accounts for an independent organization;

(3) conduct audits of an independent organization's performance of the functions prescribed by this section or relating to its revenues, expenses, and other financial matters and may require an independent organization to conduct such an audit;

(4) inspect an independent organization's facilities, records, and accounts during reasonable hours and after reasonable notice to the independent organization;

(5) assess administrative penalties against an independent organization that violates this title or a rule or order adopted by the commission ... and

(6) resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes.

Id. § 39.151(d-1)–(d-4).

***4** Additionally, (1) to maintain certification under section 39.151, the ISO's governing body must be composed of persons specified by that section [5] and selected in accordance with formal bylaws or protocols of the organization that are approved by the PUC and "reflect the input of the commission," *id.* § 39.151(g); (2) the certified ISO "is subject to review under Chapter 325, Government Code (Texas Sunset Act), but is not abolished under that chapter," *id.* § 39.151(n); and (3) with limited exceptions, [6] meetings of the ISO's governing body or a subcommittee that includes a member of the governing body must be open to the public, *see id.* § 39.1511.

[5] Pursuant to section 39.151(g), the ISO's governing body must be composed of

(1) the chairman of the commission as an ex officio nonvoting member;

(2) the counsellor as an ex officio voting member representing residential and small commercial consumer interests;

(3) the chief executive officer of the independent organization as an ex officio voting member;

(4) six market participants elected by their respective market segments to serve one-year terms, with:

(A) one representing independent generators;

(B) one representing investor-owned utilities;

(C) one representing power marketers;

(D) one representing retail electric providers;

(E) one representing municipally owned utilities; and

(F) one representing electric cooperatives;

(5) one member representing industrial consumer interests and elected by the industrial consumer market segment to serve a one-year term;

(6) one member representing large commercial consumer interests selected in accordance with the bylaws to serve a one-year term; and

(7) five members unaffiliated with any market segment and selected by the other members of the governing body to serve three-year terms.

Id. § 39.151(g). The presiding officer of the governing body must be one of the members described by subsection (g)(7). *Id.* § 39.151(g-1).

6 Specifically, the bylaws of the ISO and the rules of the PUC "may provide for the governing body or subcommittee to enter into executive session closed to the public to address sensitive matters such as confidential personnel information, contracts, lawsuits, competitively sensitive information, or other information related to the security of the regional electrical network." *Id.* § 39.1511.

Among the rules adopted by the PUC regarding ERCOT's operations is section 25.505 of title 16 of the Texas Administrative Code, titled "Resource Adequacy in the Electric Reliability Council of Texas Power Region." 16 TEX. ADMIN. CODE § 25.505 (West, Westlaw through April 16, 2018). That section's stated purpose is "to prescribe mechanisms that [ERCOT] shall establish to provide for resource adequacy in the energy-only market design that applies to the ERCOT power region." [7] *Id.* § 25.505(a). Those mechanisms "are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region." *Id.* The provisions of section 25.505 require ERCOT to publish certain specified information. [8] *Id.* § 25.505(c)–(g). Further, administrative code section 25.362(i)(2) requires ERCOT to file an annual "operations report and plan" that contains, among other things, (1) "[a] summary of transmission planning and generation interconnection activities and the most recent report on capacity, demand and reserves"; (2) "[i]dentification of existing and potential transmission constraints, and the need for additional transmission, generation or demand response resources within the ERCOT region"; and (3) "projections of changes in demand, the capability of generation, energy storage, and demand response resources, projected reserve margins, alternatives for meeting system needs, and recommendations for meeting system needs." *Id.* § 25.362(i)(2). "The commission may initiate a review of the plan, at its discretion." *Id.* Additionally, section 25.361(b) of the administrative code states ERCOT shall, among other functions, (1) "administer, on a daily basis, the operational and market functions of the ERCOT system"; (2) "maintain the reliability and security of the ERCOT region's electrical network, including the instantaneous balancing of ERCOT generation and load and monitoring the adequacy of resources to meet demand"; and (3) "disseminate information relating to market operations, market prices, and the availability of services, in accordance with this chapter, [PUC] orders, and the ERCOT rules." *Id.* § 25.361(b).

7 ERCOT asserts in its reply brief in this Court that an "energy-only" market design "means that prices paid compensate only the energy sold at that moment; they do not include capacity payments that compensate generators for building plants and keeping them in operation." According to ERCOT, "Under this market design, increased generation capacity is built by private investors when they believe that future demand will be sufficiently high compared with future generation capacity."

8 Among the provisions of administrative code section 25.505 is the following:

> (c) Statement of opportunities (SOO). ERCOT shall publish a SOO that provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities to reliably meet ERCOT's projected needs.... ERCOT shall prescribe reporting requirements for generation entities and transmission service providers (TSPs) to report to ERCOT their plans for adding new facilities, upgrading existing facilities, and mothballing or retiring existing facilities....

Id. § 25.505(c).

B. This Court's Jurisdiction

1. Applicable Law

***5** **[1]** **[2]** Subject matter jurisdiction "is essential to a court's power to decide a case" and "presents a question of law." *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013). All courts bear the affirmative obligation "to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." *Id.*

[3] **[4]** **[5]** "Unless a statute authorizes an interlocutory appeal, appellate courts generally only have jurisdiction over final judgments." *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011). Section 51.014(a)(8) of the civil practice and remedies code authorizes an appeal from an order that "grants or denies a plea to the jurisdiction by a governmental

unit as that term is defined in Section 101.001." CIV. PRAC. & REM. § 51.014(a)(8). In construing a statute, "[o]ur primary objective is to determine the Legislature's intent which, when possible, we discern from the plain meaning of the words chosen." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Further, we strictly construe section 51.014(a) as "a narrow exception to the general rule that only final judgments are appealable." *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007).

Section 101.001(3) of the civil practice and remedies code defines "governmental unit" as "(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts; (B) a political subdivision of this state ...; (C) an emergency service organization; and (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." CIV. PRAC. & REM. § 101.001(3).

2. Application of Law to Facts

[6] As a threshold matter, we begin by addressing this Court's jurisdiction. ERCOT asserts that "because it implicates this Court's jurisdiction, the question of whether ERCOT is a governmental unit—and may thus take an interlocutory appeal—is one that this Court could—and perhaps must—examine on its own." ERCOT acknowledges that in a prior case in the Third District Court of Appeals in Austin, it specifically argued, and the court of appeals concluded, that it is not a governmental unit for purposes of an interlocutory appeal pursuant to section 51.014(a)(8). *See HWY 3 MHP, LLC v. Elec. Reliability Council of Tex.*, 462 S.W.3d 204, 212 (Tex. App.—Austin 2015, no pet.). However, ERCOT asserts that in a more recent case, *University of the Incarnate Word v. Redus*, 518 S.W.3d 905, 911 (Tex. 2017) (hereinafter "*UIW*"), the supreme court "held that an unambiguously private entity that performed a traditionally governmental function was a 'governmental unit' as to that function." According to ERCOT, "[*UIW*'s] novel functional approach to governmental-unit status may bear on how this Court views ERCOT, given its arguments that it performs a uniquely governmental function in regulating the electric grid and aspects of the electricity market."

Panda asserts that because ERCOT "is not" and "does not claim to be" a governmental unit for purposes of section 51.014(a)(8), this Court "should dismiss ERCOT's appeal and assess the issues presented under traditional mandamus standards alone."[9] Further, Panda argues *UIW* "did not change the law on how determinations [respecting section 101.001(3)] are to be made," but rather "analyzed this issue just like the Austin Court did in *HWY 3* ... and reached a different result on the specific facts of the entity before it."

9 In addition to the arguments in its consolidated brief in this Court, Panda has filed in this Court a motion to dismiss ERCOT's interlocutory appeal for lack of jurisdiction. We consider the arguments in that motion in this proceeding.

***6** In *HWY 3*, ERCOT sued an electricity provider, HWY 3, for breach of contract. *See* 462 S.W.3d at 206. HWY 3 filed a breach of contract counterclaim against ERCOT. *Id.* In response, ERCOT filed a plea to the jurisdiction asserting the PUC had exclusive jurisdiction as to HWY 3's claim and HWY 3 had failed to exhaust its administrative remedies. *Id.* The trial court granted ERCOT's plea to the jurisdiction and HWY 3 filed an interlocutory appeal pursuant to section 51.014(a)(8). *Id.* On appeal, ERCOT argued in part that the court of appeals lacked jurisdiction because ERCOT is not a "governmental unit" pursuant to section 101.001(3). *Id.* at 207.

In its analysis, the court of appeals cited *LTTS Charter School, Inc. v. C2 Construction, Inc.*, 342 S.W.3d 73 (Tex. 2011) (concluding open-enrollment charter school is "governmental unit" for purposes of section 51.014(a)(8)). Specifically, the court of appeals stated in part,

> Unquestionably, the statutory provisions relied on by HWY 3 demonstrate ERCOT has been delegated great authority and powers by the legislature and that it is a highly regulated entity.

> However, there are other circumstances in which the legislature exercises great regulatory oversight over organizations and also bestows power on them, but those organizations do not necessarily qualify as governmental units. Accordingly, when deciding whether ERCOT should be considered a governmental unit, we must also consider the other factors addressed by the supreme court in its analysis in *LTTS Charter School*.

HWY 3, 462 S.W.3d at 209 (citations omitted). Then, the court of appeals reasoned as follows: (1) "the legislature's decision to designate an entity like ERCOT as an 'independent organization' rather than as an agency or by a similar title is some support for the idea that the legislature did not intend for ERCOT to be a governmental unit"; (2) while "charter schools operate parallel to and alternatively to governmental units," ERCOT "is not fulfilling the same role that a government agency is performing and has not been statutorily defined as being a part of a governmental unit"; (3) unlike a charter school, ERCOT "is not statutorily entitled to any services or benefits that a typical governmental unit might receive" and "does not receive funding from the State"; (4) although the PUC has "oversight over" ERCOT's budget, "this type of regulatory control is not dissimilar from the financial oversight that the legislature has exerted over utilities that are not considered governmental units"; (5) while various statutes "expressly equate[ ]" open-enrollment charter schools with governmental entities, a statutory provision allowing ERCOT to take advantage of computer-network security of a government agency "expressly states that the service is being offered to entities that are not state agencies, which is some indication that the legislature did not intend for ERCOT to qualify as a governmental unit"; and (6) although a provision of PURA requires ERCOT's meetings to "be open to the public," that provision "does not explicitly state that ERCOT is obligated to make its meetings public because it is a part of the government or expressly subject ERCOT to all of the requirements of the Open Meetings Act," nor does the Open Meetings Act "include independent organizations like ERCOT within its purview." *Id.* at 209–11. The court of appeals concluded "[f]or all of these reasons, particularly in light of the analysis from *LTTS Charter School*," ERCOT is not a "governmental unit" for purposes of an interlocutory appeal under section 51.014(a)(8). *Id.* at 212.

***7** *UIW* involved a lawsuit by the parents of a deceased student against a private university, UIW, arising out of the use of deadly force by the university's state-authorized police department. *See* 518 S.W.3d at 906. UIW asserted a plea to the jurisdiction based on governmental immunity, which was denied by the trial court. *Id.* UIW filed an interlocutory appeal pursuant to section 51.014(a)(8) in which it contended in part that although it "does not claim to be a governmental unit generally," it "is a governmental unit when defending the actions of its police department" because its "status and authority" to "create a law enforcement agency or police department" arise from laws passed by the legislature that allow private universities to commission and deploy peace officers to enforce criminal laws. *Id.* at 906–07. The court of appeals disagreed and dismissed the appeal. *Id.* However, the supreme court reversed the court of appeals.

In the supreme court, UIW complained that the court of appeals "missed the mark" because it "focused on whether UIW is part of the public-education system instead of on whether UIW's police department is part of Texas's law-enforcement system." *Id.* at 908. The supreme court stated in part,

> Our case law confirms that the question here is whether UIW's campus police department is part of a larger governmental system and provides a framework for answering that question. In *LTTS Charter School*, we concluded that a private charter school was an "institution, agency or organ of government" based on a legislative scheme that made private charter schools part of the Texas public-education system. Many of the same indicators of governmental-unit status present in *LTTS Charter School* are present here.

Id. at 910 (citations omitted). The supreme court reasoned (1) the legislature "granted charter schools all of the powers and privileges of public schools" and "here it has given UIW the power to operate a police department like that of any city"; (2) like a charter school, "UIW must follow the same state-promulgated rules its public counterparts follow"; (3) "like state and local law-enforcement agencies, UIW must make certain records available for public review because UIW's police department is a governmental entity under the Public Information Act"; and (4) although the legislature "has not granted private universities immunity from liability generally, as they did charter schools," the legislature "has

granted limited immunity to private universities when their officers act pursuant to mutual assistance agreements with local police departments." *Id.* However, the supreme court observed, "the indicators of governmental-unit status present in *LTTS Charter School* do not precisely match those present here" because (1) unlike charter schools, "UIW lacks public funding"; (2) "the Legislature does not consider UIW a governmental entity under the Government Code and Local Government Code provisions relating to property held in trust and competitive bidding"; and (3) "the Legislature's intended role for private universities in public law enforcement is less clear than its express inclusion of open-enrollment charter schools in the public-school system." *Id.* Then, the supreme court concluded,

> Nevertheless, the Legislature has authorized UIW to enforce state and local law using the same resource municipalities and the State use to enforce law: commissioned peace officers. UIW's officers have the same powers, privileges, and immunities as other peace officers. Because law enforcement is uniquely governmental, the function the Legislature has authorized UIW to perform and the way the Legislature has authorized UIW to perform it strongly indicate that UIW is a governmental unit as to that function.

Id. at 911 (citations omitted). [10]

10 In light of the supreme court's conclusion that UIW "is a governmental unit for purposes of law enforcement" and therefore "entitled to pursue an interlocutory appeal under section 51.014(a)(8)," that case was remanded to the Fourth District Court of Appeals in San Antonio for determination of whether UIW's police department was entitled to immunity. *See id.* Subsequently, that court of appeals affirmed the trial court's denial of UIW's plea to the jurisdiction. *Univ. of Incarnate Word v. Redus*, No. 04-15-00120-CV, —— S.W.3d ——, ——, 2018 WL 1176652, at *1 (Tex. App.—San Antonio Mar. 7, 2018, no pet. h.) (concluding that "based on the record in this appeal," UIW "is not a governmental unit for purposes of the common law doctrine of sovereign immunity").

***8** In the case before us, ERCOT does not explain or describe how the analytical framework applied in *UIW* differs from that in *HWY 3* or would effect a different outcome than in *HWY 3.* Further, as described above, the analyses in *UIW* and *HWY 3* were based on the same authority, i.e., *LTTS Charter School*, and show similar factors were considered in each case, including the "function" of the private entities in question. *See HWY 3*, 462 S.W.3d at 210 (contrasting ERCOT with private entities in *LTTS Charter School* that "operate parallel to and alternatively to governmental units"). Based on the reasoning of *HWY 3*, we conclude ERCOT is not a "governmental unit" for purposes of an interlocutory appeal pursuant to section 51.014(a)(8). *See HWY 3*, 462 S.W.3d at 209–12; *see also* CIV. PRAC. & REM. § 51.014(a)(8). Consequently, this Court does not have jurisdiction over ERCOT's interlocutory appeal. *See CMH Homes*, 340 S.W.3d at 447. We dismiss ERCOT's interlocutory appeal for lack of jurisdiction.

C. Mandamus Review of ERCOT's Plea to the Jurisdiction

1. Standard of Review

[7] **[8]** Mandamus is "an extraordinary remedy, not issued as a matter of right, but at the discretion of the court." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding). Intermediate appellate courts in Texas have authority to issue writs of mandamus "agreeable to the principles of law regulating those writs" against district court judges in the appellate courts' respective districts. GOV'T § 22.221(b). In cases where an interlocutory appeal is available, mandamus relief is generally not appropriate. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 474 (Tex. 2008) (orig. proceeding).

[9] **[10]** **[11]** To be entitled to mandamus relief, a relator must show both that the trial court clearly abused its discretion and that relator has no adequate appellate remedy. *Prudential*, 148 S.W.3d at 135–36. A trial court abuses its discretion when it fails to analyze or apply the law correctly. *See, e.g.*, *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246,

248 (Tex. 2010) (orig. proceeding). "This principle applies even when the law is unsettled." *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 294 (Tex. 2016) (orig. proceeding).

[12] **[13]** A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Whether a trial court has subject matter jurisdiction is a question of law and is reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In performing this review, an appellate court does not look to the merits of the case, but considers only the pleadings and evidence relevant to the jurisdictional inquiry. *Blue*, 34 S.W.3d at 554–55.

2. Applicable Law

[14] "Sovereign immunity implicates a trial court's jurisdiction, and, when it applies, precludes suit against a governmental entity." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 75 (Tex. 2015). The justification for the doctrine of sovereign immunity has evolved from the "feudal fiction that [t]he King can do no wrong" to "accord[ing] States the dignity that is consistent with their status as sovereign entities" to "protect[ing] the public treasury." *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 431–32 (Tex. 2016). "Regardless of which justification is most compelling, however, it is firmly established that 'an important purpose [of sovereign immunity] is pragmatic: to shield the public from the costs and consequences of improvident actions of their governments.' " *Id.* at 432 (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)); *see also Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015) (doctrine of sovereign immunity "protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation" and "preserves separation-of-powers principles" by "recogniz[ing] that the Legislature has the responsibility to determine how these public funds will be spent").

***9** **[15]** **[16]** **[17]** "Sovereign immunity is a common-law creation and 'it remains the judiciary's responsibility to define the boundaries of the ... doctrine and to determine under what circumstances sovereign immunity exists in the first instance.' " *Brown & Gay*, 461 S.W.3d at 122 (quoting *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)). "To determine whether an entity is immune, courts should rely not on [civil practice and remedies code section 101.001(3)'s] definition of governmental unit, ... but on the 'nature and purposes' of sovereign immunity." *UIW*, 518 S.W.3d at 911 (citing *Wasson*, 489 S.W.3d at 432). "In short, whether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate questions with separate analytical frameworks." *Id.*

3. Application of Law to Facts

[18] We begin with ERCOT's second issue, in which it contends the trial court abused its discretion by denying ERCOT's alternative amended plea to the jurisdiction because "ERCOT, which oversees the operation of the electric transmission network and administers the wholesale electricity market pursuant to grants of power from the Legislature and PUC, [has] sovereign immunity from suits when it exercises those delegated powers." According to ERCOT, (1) it is "a quasi-governmental regulator, performing an essential public service"; (2) "[i]n highly analogous circumstances, federal courts have confirmed the immunity of quasi-governmental regulatory authorities"; (3) "sovereign immunity's justifications apply to ERCOT"; and (4) although the supreme court held in *Brown & Gay* that "independent contractors generally lack sovereign immunity where they exercise discretion over the work they perform," that rule does not apply to ERCOT because it is not an independent contractor.

Panda responds in part that "a non-governmental, non-profit corporation that receives no taxpayer dollars and retains discretion over its day-to-day operations" should not enjoy sovereign immunity. Specifically, according to Panda, (1) *Brown & Gay* established "the controlling standard" for "the limited circumstances in which the State's immunity

extends to a private company like ERCOT"; (2) pursuant to *Brown & Gay*, "the State's immunity does not extend to private companies exercising independent discretion"; (3) because "there is no dispute here that ERCOT was exercising discretion when it misrepresented the state of electricity markets," the trial court properly rejected ERCOT's immunity position; (4) "ERCOT's doctrinal arguments do not justify extending immunity here," but rather "point the other way"; (5) the SRO cases cited by ERCOT are "irrelevant and inapposite" because those cases "arise from the uniquely federal 'absolute immunity' doctrine, which has no bearing on sovereign immunity under Texas law"; and (6) even if federal absolute immunity were relevant, this case "does not arise from the exercise of a function that would be protected by absolute immunity."

In its reply brief in this Court, ERCOT asserts in part (1) the Texas Legislature "created the ISO role as a key regulatory component of the restructured electrical market"; (2) "ERCOT underwent a number of financial, organizational, structural, and functional changes because of its appointment as ISO"; (3) "unlike any other corporation in Texas, [ERCOT] exclusively performs statutory functions," among which are "mak[ing] binding rules that have the force of statute"; (4) *Brown & Gay*'s holding does not govern this case because ERCOT is not an independent contractor, but rather "acts *as* the government" (emphasis original); (5) "ERCOT's analogy to SRO immunity is apt because the logic, legal principles, and governmental purposes favoring protection of federal SROs apply equally to ERCOT"; and (6) ERCOT's publication of the CDRs furthers ERCOT's "regulatory mission" and therefore is protected by SRO immunity.

***10** Following oral submission before this Court, both sides filed post-submission letter briefs. Therein, ERCOT contends in part (1) "ERCOT's role is defined not by a contract with the State of Texas, but by a *statute* that lays out, in meticulous detail, ERCOT's responsibilities and powers" (emphasis original); (2) "[a]s Panda's counsel admitted at argument, ERCOT is authorized to perform no functions other than those given it by the Legislature and PUC"; and (3) ERCOT "*exclusively* performs governmental, regulatory functions" (emphasis original). Panda asserts in part (1) "*HWY 3* forecloses any suggestion that ERCOT is entitled to the immunity that is sometimes enjoyed by governmental units—because it is not even that"; (2) "[a]s a result, the immunity inquiry is controlled by *Brown & Gay*"; and (3) "[t]hat ERCOT's general responsibilities arise from a statute does not the change the analysis."

In *Brown & Gay*, a private engineering firm, Brown & Gay, contracted with a governmental unit, the Fort Bend County Toll Road Authority, to design and construct a roadway. *See* 461 S.W.3d at 119. Under the contract, the Authority delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority's board of directors. *Id.* Brown & Gay was contractually responsible for furnishing the necessary equipment and personnel to perform its duties and was required to maintain insurance for the project. *Id.* Subsequently, relatives of a motorist killed while driving on the roadway sued Brown & Gay for negligence in carrying out its responsibilities in the design and installation of signs and other traffic-control devices. *Id.* Brown & Gay filed a plea to the jurisdiction seeking the same sovereign immunity protection the governmental unit would enjoy had it performed the work itself. *Id.* The trial court granted the plea, but the court of appeals reversed, holding the firm was not immune from suit. *Id.* The supreme court affirmed the court of appeals's judgment. *Id.*

In its analysis, the supreme court observed that the benefits of sovereign immunity come with "a significant cost," i.e., "in shield[ing] the public from the costs and consequences of improvident actions of their governments, sovereign immunity places the burden of shouldering those costs and consequences on injured individuals." *Id.* at 121–22. Then, that court addressed the parties' arguments in light of the doctrine's underlying purposes. *Id.* at 123–30.

First, as to "the general purpose of protecting the public fisc," Brown & Gay argued that while its exposure to defense costs and a money judgment would not affect the project's cost to the government, "the increased costs generally associated with contractors' litigation exposure will be passed on to the government, resulting in higher contract prices and government expense." *Id.* at 123. In rejecting that argument, the supreme court stated that Brown & Gay "ignores the many factors at play within the highly competitive world of government-contract bidding" and "disregards the fact

that private companies can and do manage their risk exposure by obtaining insurance, as Brown & Gay did in this case." *Id.* Further, that court reasoned in part,

> Sovereign immunity has never been defended as a mechanism to avoid any and all increases in public expenditures. Rather, it was designed to guard against the "unforeseen expenditures" associated with the governments defending lawsuits and paying judgments "that could hamper government functions" by diverting funds from their allocated purposes. Immunizing a private contractor in no way furthers this rationale. Even if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price. This allows the government to plan spending on the project with reasonable accuracy.
>
> ***11** By contrast, ... the costs associated with a potential lawsuit cannot be anticipated at the project's outset. Litigation against the government therefore disrupts the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose. It is this diversion—and the associated risk of disrupting government services—that sovereign immunity addresses.

Id. at 123–24 (citations omitted).

Next, the supreme court addressed the "government's right to control" as a factor in the extension of immunity to private companies. *Id.* at 124. That court observed that in a prior case involving a private company that contracted with a Kansas governmental entity, it stated,

> While sovereign immunity protects the activities of government entities, no sovereign is entitled to extend that protection ad infinitum through nothing more than private contracts. [The private entity] is not entitled to sovereign immunity unless it can demonstrate its actions were actions of the Kansas government, executed subject to the control of [the system].

Id. (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994)). Further, the supreme court stated that "[i]n turn, we held that another private company that 'operate[d] solely upon the direction of [the system]' and 'exercise[d] no discretion in its activities' was indistinguishable from the system, such that 'a lawsuit against one [wa]s a lawsuit against the other.' " *Id.* (quoting *K.D.F.*, 878 S.W.2d at 597). Then, the supreme court observed that as to Brown & Gay, the government's "right to control" is "utterly absent here." That court concluded, "We need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative." *Id.* at 126.

Additionally, the supreme court rejected arguments by Brown & Gay that (1) "justifications for qualified and official immunity" support the extension of sovereign immunity to government contractors and (2) "declining to extend sovereign immunity to contractors like Brown & Gay will make it difficult for the government to engage talented private parties fearful of personal liability." *Id.* at 128–29. As to the first of those arguments, the supreme court stated (1) qualified immunity is a federal doctrine that is similar to the Texas common-law defense of official immunity; (2) official immunity is an affirmative defense that must be pled and proved by the party asserting it; (3) Brown & Gay has not "pled or argued that the elements of the defense are satisfied here," but rather "[i]nstead argues it is entitled to the same immunity the government itself enjoys"; and (4) "the policies underlying official and qualified immunity are simply irrelevant to that contention." *Id.* Further, the supreme court stated Brown & Gay's second argument "ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay." *Id.* at 129. Then, the supreme court concluded, "We decline to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so." [11] *Id.*

11 In a concurring opinion in which Justice Willett and Justice Guzman joined, Chief Justice Hecht stated in part, "An independent contractor may act *as* the government, in effect becoming the government for limited purposes, and when it does, it should be entitled to the government's immunity." *Id.* at 129 (Hecht, C.J., concurring) (emphasis original).

***12** In the case before us, Panda argues *Brown & Gay* "establishes the analytical framework for assessing a private entity's immunity claims," regardless of whether the private entity is a government contractor. According to Panda, (1) there is no basis for restricting the holding in *Brown & Gay* to private contractors and (2) the opinion "speaks in far broader terms."

ERCOT asserts *Brown & Gay* is inapplicable in this case because (1) unlike this case, *Brown & Gay* "was concerned with a contractual relationship between a company and the government"; (2) the supreme court "never held that its rule regarding discretion applied outside the context of independent contractors"; and (3) unlike an independent contractor, ERCOT conducts no business other than the functions it performs "at the legislature's and PUC's behest" and does not market its services to any other use.

Although the supreme court's opinion in *Brown & Gay* is silent as to whether it is limited to independent contractors, the analysis and rationale of the opinion are based primarily on the specific context of government contracting. For example, as described above, the supreme court stated (1) Brown & Gay's argument respecting the "public fisc" "ignores the many factors at play within the highly competitive world of government-contract bidding" and (2) "[e]ven if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price," which "allows the government to plan spending on the project with reasonable accuracy." *Id.* at 123. Further, the statements from *K.D.F.* relied upon by the supreme court pertained to the question of whether a sovereign is entitled to extend immunity protection "ad infinitum through nothing more than private contracts." *Id.* at 124 (quoting *K.D.F.*, 878 S.W.2d at 597). Additionally, (1) as to Brown & Gay's argument that declining to extend sovereign immunity would make it difficult for the government to engage talented private parties, the supreme court stated that argument "ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay," and (2) the supreme court's conclusion was stated as follows: "We decline to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so." *Id.* at 129.

By contrast, in the case before us, considerations respecting competitive government-contract bidding, negotiation of a contract price, and the financial appeal of contracting with the government versus a private entity are not relevant. Further, rather than involving "nothing more than private contracts," the case before us involves an entity that exclusively performs functions assigned by the legislature and the PUC and does not market its services to any other use. Because the considerations underlying the analysis and rationale of *Brown & Gay* are inapplicable to ERCOT, we conclude *Brown & Gay* does not preclude immunity in this case.

As described above, to determine whether an entity is immune, courts should rely on "the 'nature and purposes' of sovereign immunity." *UIW*, 518 S.W.3d at 911 (citing *Wasson*, 489 S.W.3d at 432); *see also id.* (whether an entity is entitled to sovereign immunity and whether an entity is a "governmental unit" for purposes of an interlocutory appeal "are separate questions with separate analytical frameworks"). In its consolidated brief in this Court, ERCOT asserts in part,

> ***13** The Supreme Court has recognized three bases for sovereign immunity, each of which applies to ERCOT. First, immunity protects the public fisc. ERCOT is funded by a Fee that is authorized by the Legislature pursuant to its police power and paid, ultimately, by electricity consumers. Second, separation-of-powers requires ERCOT's immunity. The Legislature has decreed that the PUC, not the courts, decides when and how much money ERCOT spends, how it operates, and whether it has underperformed or abused its power. Third, immunity would protect critical

> government services. Public policy and economic necessity demand that the Texas electric grid continue to function; the PUC appointed ERCOT as the operator of this grid. Money that has been designated for these essential regulatory purposes, if diverted to pay private litigants, would defeat the Legislature's mission to protect the electric market and its consumers.

Panda contends the nature and purposes of immunity "do not justify creating a new exception for ERCOT." Specifically, according to Panda, (1) ERCOT "does not receive any funding from the State" and therefore "state funds *are not implicated* by this lawsuit" (emphasis original); (2) "ERCOT's separation of powers argument fails for the same reasons" because "[t]o the extent this principle is relevant to immunity, the focus is on 'the Legislature's prerogative to allocate tax dollars' " (quoting *Brown & Gay*, 461 S.W.3d at 121); and (3) "a judgment against ERCOT will not hamper any government function" because "ERCOT would simply have an obligation to pay whatever amount is not covered by insurance, like any other judgment debtor," and "in the most extreme scenario, the PUC would simply decertify ERCOT, appoint a new ISO, and oversee the efficient transfer of responsibilities."

As stated by the supreme court, the doctrine of sovereign immunity "protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation" and "preserves separation-of-powers principles" by "recogniz[ing] that the Legislature has the responsibility to determine how these public funds will be spent." *Brown & Gay*, 461 S.W.3d at 121. Section 39.151(e) requires the PUC to "authorize the organization to charge to wholesale buyers and sellers a system administration fee, within a range determined by the commission, that is reasonable and competitively neutral to fund the independent organization's approved budget." UTIL. § 39.151(e). Although not a "tax," the system administration fee is authorized by statute, set by the PUC, collected pursuant to the State's power, and intended to further a function for the benefit of the public. *See id.* Therefore, to the extent Panda contends this case does not present fiscal implications pertinent to the sovereign immunity analysis, we disagree. *See id.*; *see also Tooke*, 197 S.W.3d at 332 (stating sovereign immunity's purpose is "to shield the public from the costs and consequences of improvident actions of their governments"). Additionally, as to separation-of-powers principles, section 39.151 shows the legislature intended that determinations respecting system administration fees and ERCOT's fiscal matters, as well as any potential disciplinary matters or decertification, should be made by the PUC rather than the courts. UTIL. § 39.151(d)–(e). Further, as the certified ISO provided for in section 39.151, ERCOT is a necessary component of the legislature's electric utility industry regulatory scheme. *See id.* § 39.151(a). A substantial judgment in this case could necessitate a potentially disruptive diversion of ERCOT's resources or a decertification of ERCOT not otherwise intended by the PUC. *See Brown & Gay*, 461 S.W.3d at 124 (sovereign immunity is intended to address diversion of funds allocated by government "and the associated risk of disrupting government services"). Therefore, extending sovereign immunity to ERCOT in this case would serve that doctrine's nature and purposes. *See UIW*, 518 S.W.3d at 911.

***14** Additionally, the extension of sovereign immunity in this case is consistent with the underlying principles and reasoning of federal cases involving SROs. Under federal law, SROs are certain private organizations authorized by Congress to "promulgate and enforce rules" governing their members. *See DL Capital Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 95 (2d Cir. 2005); *see also S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n*, 762 F.3d 41, 51 (D.C. Cir. 2014) (describing North American Electric Reliability Corporation as "the [electric] industry's self-regulatory organization" pursuant to the Federal Power Act). SROs have been described as "quasi-governmental" authorities. *DL Capital*, 409 F.3d at 95.

[19] Since the 1930s, U.S. securities dealers have been subject to regulation by SROs registered with the U.S. Securities Exchange Commission, including, among others, the New York Stock Exchange, Inc. ("NYSE"), the National Association of Securities Dealers, Inc. ("NASD"), and the NASDAQ Stock Market, Inc. ("NASDAQ"). *See Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 114 (2d Cir. 2011); *DL Capital*, 409 F.3d at 95. Such SROs have been described as "a key part of the interrelated and comprehensive mechanism for regulating securities markets, including market participants." *Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F.Supp.2d 1063, 1065 (N.D.

Cal. 2012). "Because they perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions." *Weissman v. NASD*, 500 F.3d 1293, 1296 (11th Cir. 2007). "This immunity extends both to affirmative acts as well as to an SRO's omissions or failure to act." *Standard Inv.*, 637 F.3d at 115. The SEC has "extensive involvement with, and broad oversight of," the SROs registered with it. *DL Capital*, 409 F.3d at 95 (citing 15 U.S.C. § 78s). "[I]f an SRO has violated, or is unable to comply with, *inter alia*, the provisions of the [Securities Exchange Act], its own rules, or the rules of the SEC, the SEC is authorized to suspend or even revoke an SRO's registration." *Id.*

Federal courts have reasoned that because securities-industry SROs "perform[ ] a variety of functions that would, in other circumstances, be performed by a government agency," yet do not "share in the SEC's sovereign immunity," affording those SROs absolute immunity is appropriate when the relevant conduct constitutes a delegated quasi-governmental prosecutorial, regulatory, or disciplinary function. *See D'Alessio v. NYSE*, 258 F.3d 93, 105 (2d Cir. 2001); *see also Barbara v. NYSE*, 99 F.3d 49, 59 (2d Cir. 1996) (stating that allowing plaintiff's lawsuit against SRO "would clearly stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress"), *abrogated in part on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, —— U.S. ——, 136 S.Ct. 1562, 194 L.Ed.2d 671 (2016). Further, the Second Circuit has stated, "There is no question that an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities." *Standard Inv.*, 637 F.3d at 115. Specifically, in *Standard Investment*, the Second Circuit concluded SRO immunity barred a lawsuit based on alleged misstatements by NASD in a proxy solicitation pertaining to amendments to its bylaws required pursuant to its consolidation with another SRO. *Id.* That court stated in part (1) the proxy solicitation, which was the only vehicle available to NASD for amending its bylaws, was "incident to the exercise of regulatory power," i.e., the consolidation, and "therefore an activity to which immunity attached," *id.* at 116, and (2) "[t]he statutory and regulatory framework highlights to us the extent to which an SRO's bylaws are intimately intertwined with the regulatory powers delegated to SROs by the SEC and underscore our conviction that immunity attaches to the proxy solicitation here," *id.* at 116–17.

***15** Similarly, in *DL Capital*, an investor sued NASDAQ based on the timing of NASDAQ's announcement of its decision to cancel certain stock market trades. *See* 409 F.3d at 98. The investor contended SRO immunity was inapplicable because it was "challenging not NASDAQ's regulatory decisions ..., but rather the manner in which NASDAQ publicly announced those decisions." *Id.* The Second Circuit rejected that position, reasoning in part that "[w]ithout the capacity to make announcements, defendants would be stripped of a critical and necessary part of their regulatory powers." *Id.*; *see also In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 100 (2d Cir. 2007) (affording SRO immunity where, "[w]hile these actions may not appear to form the heart of the regulatory functions delegated to the NYSE as an SRO, they are nonetheless central to effectuating the NYSE's regulatory decision making").

Additionally, the Second Circuit has specifically declined to carve out a fraud exception to SRO immunity. *See DL Capital*, 409 F.3d at 99 ("rejecting a fraud exception is a matter not simply of logic but of intense practicality since [otherwise] the [SRO's] exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits"). That court has observed that alternative means of redressing a security-industry SRO's wrongful conduct include "the formidable oversight power" of the SEC granted by Congress. *NYSE Specialists*, 503 F.3d at 101.

In the case before us, ERCOT asserts (1) "[SROs'] functions parallel ERCOT's very closely" and therefore the SRO immunity cases are "highly persuasive"; (2) any "doctrinal distinction" between sovereign immunity and SRO immunity should matter less than the SRO cases' "logical underpinnings"; (3) although most cases respecting SRO immunity arise in the context of the securities industry, those cases "are based not on securities principles of limited applicability, but on the fact that Congress has chosen to use a corporation certified by an agency, rather than that agency directly, to perform its regulatory mission"; and (4) "ERCOT's CDRs—the subject of Panda's suit—are more than incidentally connected to the performance of its regulatory duties."

Panda contends (1) "[b]ecause of the differing policies underlying these doctrines, absolute immunity cases provide no justification for extending Texas's sovereign immunity"; (2) the supreme court stated in *Brown & Gay* that "the policies underlying official and qualified immunity" were "irrelevant" to the private contractor's contention that it was entitled to sovereign immunity; (3) like the supreme court in *Brown & Gay*, this Court should "decline to apply an inapposite federal immunity doctrine to a state-law sovereign immunity problem"; (4) this Court "should not engraft a federal law exception onto settled Texas immunity law because ERCOT's cited authorities have only ever been applied to federal securities regulators"; (5) even if federal absolute immunity were relevant, "the CDRs do not 'regulate' the activities of market participants," but rather "simply disseminate information on supply and demand," and therefore "are not the kind of regulatory conduct that triggers absolute immunity"; and (6) "in any event, the allegations in this case are broader than just the CDRs" and include "misrepresentations made by ERCOT in public reports, presentations, and direct conversations."

To the extent Panda contends *Brown & Gay* precludes this Court's consideration of SRO immunity cases, we disagree. As described above, the supreme court's statement in *Brown & Gay* that the "policies underlying official and qualified immunity" were "irrelevant" to the private contractor's contention that it was entitled to sovereign immunity was immediately preceded by that court's observation that the contractor had not pled the affirmative defense of official immunity or argued the elements were satisfied, thus suggesting lack of pleading and proof as a basis for the irrelevance of the defense's underlying policies. *See* 461 S.W.3d at 128–29. Moreover, as also described above, the analysis and rationale of *Brown & Gay* were based primarily on considerations relevant to independent contractors that are not implicated in the case before us. *See id.* at 123–29.

***16** Further, we do not agree with Panda's position that the SRO immunity cases described above are "inapposite." Regardless of whether absolute immunity developed from the same doctrinal roots underlying official and qualified immunity, the Second Circuit's application of SRO immunity in *Barbara* described one of the same purposes considered by Texas courts in determining sovereign immunity. *See Barbara*, 99 F.3d at 59 (stating that allowing plaintiff's lawsuit against SRO "would clearly stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress"). Also, while federal case law dealing with SRO immunity appears to be limited to cases involving federal securities regulators, (1) the term "self-regulatory organization" is not limited to that context, *see S.C. Pub. Serv. Auth.*, 762 F.3d at 51 (describing North American Electric Reliability Corporation as "the [electric] industry's self-regulatory organization"), and (2) the securities SRO cases described above are analogous to the case before us in that they involve a legislative scheme under which private corporations are certified by an agency to perform its regulatory mission. Like the SROs in those cases, (1) ERCOT is a private corporation exercising power delegated to it by an administrative agency pursuant to legislation; (2) ERCOT's power includes rulemaking authority that is binding on market participants; and (3) ERCOT is subject to broad oversight by the PUC, which can decertify it. Based on the reasoning of the SRO immunity cases described above and the "nature and purposes" of sovereign immunity, we conclude ERCOT is entitled to sovereign immunity from private damages suits in connection with the discharge of its regulatory responsibilities. *See UIW*, 518 S.W.3d at 911; *Standard Inv.*, 637 F.3d at 115; *see also Brown & Gay*, 461 S.W.3d at 129 (Hecht, C.J., concurring) ("An independent contractor may act *as* the government, in effect becoming the government for limited purposes, and when it does, it should be entitled to the government's immunity.").

[20] In light of that conclusion, we turn to the parties' arguments respecting whether the sovereign immunity extended to ERCOT bars this particular lawsuit. First, as described above, Panda contends "the allegations in this case are broader than just the CDRs" and include "misrepresentations made by ERCOT in public reports, presentations, and direct conversations." However, Panda cites no portion of its live pleading, and we have found none, complaining of alleged "misrepresentations made by ERCOT in public reports, presentations, and direct conversations" pertaining to matters other than the CDRs and the market data contained therein. Next, Panda argues the CDRs "simply disseminate information on supply and demand" and therefore "are not the kind of regulatory conduct that triggers absolute immunity." In support of that argument, Panda cites two SRO cases in which immunity was afforded as to the

conducting of disciplinary proceedings. *See Barbara*, 99 F.3d at 58–59; *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 688 (5th Cir. 1985). However, nothing in those cases limits immunity solely to such functions. Moreover, in *Standard Investment*, the Second Circuit (1) stated "an SRO and its officers are entitled to absolute immunity from private damages suits *in connection with the discharge of their regulatory responsibilities*" and (2) afforded SRO immunity for a proxy solicitation "*incident to the exercise of regulatory power*." *Standard Inv.*, 637 F.3d at 116–17 (emphasis added); *see also NYSE Specialists*, 503 F.3d at 100 (affording SRO immunity where, "[w]hile these actions may not appear to form the heart of the regulatory functions delegated to the NYSE as an SRO, they are nonetheless central to effectuating the NYSE's regulatory decision making"); *DL Capital*, 409 F.3d at 98 (affording SRO immunity for suit based on timing of NASDAQ's announcement of its decision to cancel certain trades because "[w]ithout the capacity to make announcements, defendants would be stripped of a critical and necessary part of their regulatory powers").

In its reply brief in this Court, ERCOT asserts in part,

> [T]he CDRs need not directly "regulate" a market participant to be regulatory. Among ERCOT's regulatory functions is ensuring grid adequacy and reliability. Because of Texas's energy-only market, ensuring sufficient generation capacity through investment is essential to ERCOT's regulatory mission. ERCOT is required to publish CDRs precisely because the State needs a reliable electric market, a vital component of its economic and public health. Because ERCOT publishes CDRs to further its regulatory mission of ensuring grid adequacy and reliability, its actions are protected by SRO immunity.

As described above, as the ISO certified by the PUC under Chapter 39, ERCOT is to perform functions that include "ensur[ing] the reliability and adequacy of the regional electrical network." UTIL. § 39.151(a). Rules adopted by the PUC require ERCOT to establish "mechanisms" to "provide for resource adequacy" in an energy-only market, which mechanisms "are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region." 16 ADMIN. § 25.505(a). Specifically, ERCOT is required to publish certain reports, including the CDRs. *Id.* §§ 25.505, 25.362(i)(2).

***17** Based on the statutes and rules described above, we conclude (1) ERCOT's regulatory responsibilities include ensuring the reliability and adequacy of the regional electrical network and (2) ERCOT's publication of the CDRs was "in connection with the discharge of" those regulatory responsibilities. *See* UTIL. § 39.151(a); 16 ADMIN. §§ 25.505, 25.362; *Standard Inv.*, 637 F.3d at 116–17. Therefore, ERCOT's complained of actions are protected by immunity. *See Standard Inv.*, 637 F.3d at 116–17; *see also NYSE Specialists*, 503 F.3d at 100; *DL Capital*, 409 F.3d at 98. Consequently, the trial court's denial of ERCOT's plea to the jurisdiction based on sovereign immunity constituted an abuse of discretion. *See Columbia Med. Ctr.*, 306 S.W.3d at 248.

[21] **[22]** Because ERCOT has established the first element required for mandamus relief, *see Prudential*, 148 S.W.3d at 135–36, we now proceed to the second element, lack of adequate remedy by appeal. *See id.* The supreme court has stated,

> The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests.... Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss ... and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

Id. at 136. "Incidental district court rulings, which include pleas to the jurisdiction, generally will not be reviewed by mandamus because an adequate appellate remedy exists." *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding). However, exceptions have been recognized. *See, e.g.*, *In re SWEPI, L.P.*, 85 S.W.3d 800, 808 (Tex. 2002) (orig. proceeding) (when one court renders order that directly interferes with another court's jurisdiction, appellate relief is inadequate); *In re Entergy Corp.*, 142 S.W.3d 316, 321–22 (Tex. 2004) (orig. proceeding) (applying exception where PUC had exclusive jurisdiction). "[W]hether an appellate remedy is 'adequate' so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules." *Prudential*, 148 S.W.3d at 137.

In its consolidated brief in this Court, ERCOT asserts (1) "by virtue of its immunity, [it] has a substantive right not to be subjected to discovery or hauled into court for trial"; (2) "[i]n the absence of mandamus relief, this substantive right would be nullified"; (3) "[g]ranting mandamus to protect ERCOT's sovereign immunity would also be consistent with the [Texas Supreme Court's] frequent use of mandamus relief to correct trial court actions 'that exceed[ ] its jurisdictional authority' "; and (4) the resulting "waste" and "damage done to governmental processes" cannot be corrected by delayed appellate review. Panda does not specifically address the mandamus element of lack of adequate remedy by appeal.

[23] This case does not fit squarely within the above-described exceptions to the rule that pleas to the jurisdiction generally will not be reviewed by mandamus. However, the determination as to the adequacy of an appellate remedy "is better guided by general principles." *Id.* Allowing mandamus review in this case would prevent "impairment or loss" of ERCOT's important substantive right to sovereign immunity. *See id.* at 136; *see also City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) ("governmental immunity does not spring into existence when a damages award is finally made; it shields governments from the costs of any litigation leading up to that goal"). Additionally, this case presents an extraordinary circumstance in that the resources implicated include revenue from fees authorized and established by the government respecting an essential service. *See* UTIL. § 39.151(e). Therefore, we conclude (1) this is an "exceptional" case in which mandamus review is "essential to preserve important substantive ... rights from impairment or loss ... and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings"; (2) the benefits to mandamus review in this case outweigh the detriments; and (3) ERCOT lacks an adequate appellate remedy. *See Prudential*, 148 S.W.3d at 136; *see also In re Team Rocket*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (mandamus can be warranted to avoid subjecting taxpayers, defendants, and courts to "meaningless proceedings and trials").

III. CONCLUSION

***18** For the reasons described above, we (1) dismiss ERCOT's interlocutory appeal for lack of jurisdiction and (2) conditionally grant ERCOT's petition for writ of mandamus and direct the trial court to vacate its order denying ERCOT's plea to the jurisdiction based on sovereign immunity and dismiss this case for lack of jurisdiction. If the trial court fails to do so, the writ will issue. Further, we vacate this Court's July 28, 2017 stay order.

All Citations

--- S.W.3d ----, 2018 WL 1790082

App. B

Order entered April 16, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00872-CV

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Appellant

V.

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; AND PANDA TEMPLE POWER II, LLC, Appellees

and

IN RE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., Relator

On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause No. CV-16-0401

ORDER

Before Justices Francis, Lang, and Evans

Based on the Court's opinion of this date in this consolidated interlocutory appeal and petition for writ of mandamus, we **CONDITIONALLY GRANT** relator's petition for writ of mandamus. We **DIRECT** the trial judge of the 15th Judicial District Court, Grayson County,

Texas, to issue an order (1) vacating his August 9, 2017 order denying relator's plea to the jurisdiction based on sovereign immunity and (2) dismissing this case for lack of jurisdiction. Also, we **VACATE** this Court's July 28, 2017 stay order.

We **ORDER** the trial judge to file with this Court, **within thirty (30) days of the date of this order**, a certified copy of his order issued in compliance with this order. Should the trial judge fail to comply with this order, the writ will issue.

/s/ DOUGLAS S. LANG
JUSTICE

App. C

FILED
8/15/2016 2:54:49 PM
Kelly Ashmore
District Clerk
Grayson County

NO. CV-16-0401

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; and PANDA TEMPLE POWER II, LLC,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
V.	§	
ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.,	§	
Defendant.	§	GRAYSON COUNTY, TEXAS 15th JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION AND JURY DEMAND

Plaintiffs 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, and Panda Temple Power II, LLC (collectively, "Plaintiffs"), demanding a jury, file this Second Amended Original Petition against Defendant Electric Reliability Council of Texas, Inc. ("ERCOT"), Defendant.

I.
DISCOVERY LEVEL

1. Plaintiffs plead that discovery should be conducted under Level Three in accordance with Rule 190.4 of the Texas Rules of Civil Procedure, considering the complexity of the issues presented.

II.
NATURE OF THE CASE

2. This is a fraud, breach of duty, and negligent misrepresentation case. Defendant, either alone or in complicity with others, sponsored false and misleading market reports describing capacity, demand, and reserves in the ERCOT region (these reports are also known as "CDRs"). Defendant ERCOT is certified by the State as an independent system operator ("ISO") whose mandate includes ensuring the reliability and adequacy of the regional electric network. As part of its responsibilities as an ISO, ERCOT publishes market data for use by those who participate in the ERCOT market.

3. The ERCOT market data at issue in this lawsuit falsely depicted a scarcity of electricity, and ERCOT knew that the market data it was publishing would encourage investors and their financial sponsors to build new power generation. This false market data was published at a time when ERCOT was subject to extensive criticism because the electric grid it managed had failed during times of peak demand, exposing the public to loss of income and, potentially, to personal injury as well. ERCOT had more than ample motive to generate power development through false market information. ERCOT's history of gross management, cost

over runs, and corruption had put its management at risk, and it put ERCOT at risk of losing its certification as an Independent System Operator. A loss of state certification meant a loss of millions of dollars of revenue used in part to pay the very lucrative salaries of ERCOT's officers and management.

4. ERCOT conditioned and informed the market by broadly broadcasting the false market information throughout the state via a publically accessible website maintained by ERCOT. ERCOT also broadcast the false market information throughout the state via ERCOT press releases and through ERCOT sponsored interviews with the press.

5. Plaintiffs are investors and project companies who relied on Defendant's representations to build three power plants at a cost of $2.2 billion. Plaintiffs relied on the misrepresentations by building one of the plants in Sherman, Texas, and two others in Temple, Texas. To justify the feasibility of a plant in Sherman, Plaintiffs provided the broadly broadcast CDRs on which it relied to the Sherman Economic Development Corporation ("SEDCO"), located in Sherman, Texas. SEDCO provided the real estate on which the Sherman Power Plant sits as well as other significant economic support in the belief shared with Plaintiffs that the Sherman power plant, once constructed, would become the largest single tax payer in Sherman.

6. After the investments were irrevocably committed and after the power plants were under construction, Defendant admitted that its earlier representations were false, with devastating consequences to Plaintiffs. Plaintiffs now sell power into the grid from Sherman and its other locations at a fraction of the price they would have enjoyed had the false market data been accurate. ERCOT, on the other hand, is able (thanks to Plaintiffs) to satisfy peak demands for power and tout its success as an ISO to the public. The lucrative pay enjoyed by ERCOT's

officers and managers has been made secure at Plaintiffs' cost and on the backs of tax payers where the power plants were constructed.

7. The ERCOT publications were made negligently or fraudulently and possibly to further expectations of special or personal interests. If not negligently or fraudulently made, Defendant negligently or fraudulently failed to disclose the falsity sooner than it did.

III.
PARTIES

8. Panda Power is a limited liability company. Panda Power acts as investment manager and ultimately oversees the construction of the power plants at issue in this lawsuit.

9. Panda Sherman Power Holdings, LLC ("Sherman Holdings") is a limited liability company that collected the equity investments used to help construct the power plant in Sherman, Texas at issue herein. Sherman Holdings is the sole parent of a series of holding companies that own the project company (the "Sherman Power Plant"). The assets of the Sherman Power Plant are pledged to secure millions of dollars of debt rated in reliance on the CDRs at issue in this case.

10. Panda Sherman Power Intermediate Holdings I, LLC is a limited liability company organized to act as an intermediated financing entity.

11. Panda Sherman Power Intermediate Holdings II, LLC is a limited liability company organized to act as an intermediate financing entity.

12. Panda Sherman Power, LLC, is the project company previously identified as the Sherman Power Plant. It is a limited liability company located in Sherman, Texas at 510 Progress Drive, Sherman, Texas 75092.

13. Panda Temple Power Holdings, LLC ("Temple Holdings I") is a limited liability company which collected the equity investments made to help construct one of two power plants

in Temple, Texas. Temple Holdings I is the sole parent of a series of holding companies that own the project company, (the "Temple I Power Plant"). The assets of the Temple I Power Plant are pledged to secure millions of dollars of debt rated in reliance on the CDRs at issue in this case.

14. Panda Temple Power Intermediate Holdings I, LLC is a limited liability company organized to act as an intermediate financing entity.

15. Panda Temple Power Intermediate Holdings II, LLC is a limited liability company organized to act as an intermediate financing entity.

16. Panda Temple Power, LLC is the project company previously identified as the Temple I Power Plant. It is a limited liability company located in Temple, Texas at 2892 Panda Drive, Temple, Texas 76501.

17. Panda Temple Power II Holdings, LLC ("Temple II Holdings") is a limited liability company that collected the equity investments made to help construct a second power plant in Temple, Texas. Temple II Holdings is the sole parent of a series of holding companies that own the project company (the "Temple II Power Plant"). The assets of the Temple II Power Plant are pledged to secure millions of dollars of debt rated in reliance on the CDRs at issue in this case.

18. Panda Temple Power II Intermediate Holdings I, LLC is a limited liability company organized to act as an intermediate financing entity.

19. Panda Temple Power II Intermediate Holdings II, LLC is a limited liability company organized to act as an intermediate financing entity.

20. Panda Temple Power II, LLC is the project company earlier identified as Temple II Power Plant. It is a limited liability company located in Temple, Texas at 2892 Panda Drive, Temple, Texas 76501.

21. ERCOT has answered the lawsuit. ERCOT is a non-profit corporation organized under the laws of the state of Texas. At all times material to this lawsuit, ERCOT's headquarters were located in Taylor, Texas, where the officers of ERCOT make the decisions controlling the day to day operations. This is also where ERCOT's largest, physical facility is located and where substantially all its employees are found.

IV.
JURISDICTION AND VENUE

22. The matter in controversy is within the subject matter jurisdiction of this Court. Plaintiffs seek damages in excess of $1 million and such other relief as alleged in the Prayer herein.

23. A substantial part of the events or omissions giving rise to the claims herein arose in Grayson County, where one of the power plants at issue was financed and constructed in reliance on the misrepresentations at issue. ERCOT broadcast its misrepresentations throughout the state, intending reliance on the market data wherever new generation was needed and might be constructed. At least one representative of ERCOT and the PUCT appeared in Sherman, Texas, to assure Plaintiffs that their investment in Sherman was safe. Plaintiffs relied on the false market data in Sherman by using the data in Sherman to help secure the land from SEDCO on which to construct the plant and to secure from SEDCO economic incentives to aid in construction of the plants. In reliance on the misrepresentations in Sherman, millions of dollars have been spent by Plaintiffs in Sherman, Texas, to build and operate the plant. As a direct cause of the misrepresentations, Plaintiffs now sell power from Sherman, Texas, at a fraction of

the price for which it would have been sold had the representations been true. After this lawsuit was filed, threats were issued by ERCOT that ERCOT would hold Plaintiffs liable for tortious interference with contract if they caused former ERCOT employees to breach severance agreements. Under these agreements, ERCOT, which now claims it is a quasi-governmental entity, paid money to departing employees in exchange for certain promises, including a promise not to say anything negative about ERCOT or its board (including a member of the PUCT appointed by the Governor) and a promise to keep their agreement a secret. As a consequence of this threat, Plaintiffs have filed a declaratory judgment action herein to establish that the contracts are illegal contracts and void as against public policy, and to permanently enjoin ERCOT from making or seeking to enforce such contracts. The threat that lead to the newly added claim was directly communicated by ERCOT to Plaintiffs in Sherman, Texas, to influence investigative efforts in this case. These newly added claims are properly joined here because the enforceability of these types of these secret contracts will impact discovery and trial. Moreover, these claims are relevant to the defense of limitations recently plead by Defendants. Plaintiffs dispute the bar of limitations, but if applicable, Plaintiffs hereby allege the discovery rule and estoppel. ERCOT is estopped from relying on limitations by its conduct in sealing the lips of departing employees through illegal contracts and chilling the willingness of those former employees with knowledge of relevant facts to speak out about ERCOT's conduct. ERCOT cannot plead that Plaintiffs were on notice of facts to incite enquiry (and should have brought suit sooner) and simultaneously secure or enforce contracts that seal the lips of witnesses who would be the focus of any such enquiry. Venue is proper in Grayson County as to all claims pursuant to TEXAS CIVIL PRACTICE AND REMEDIES CODE § 15.002(a)(1). The other plants at issue were constructed in Bell County, but they were constructed in reliance on the same or

similarly flawed CDRs market data broadcast throughout the state. The decisions to invest by the holding companies were made by the same group of people for all plants. The rating agencies and consultants who relied on the misrepresentations are the same for all plants. There are questions of law and fact common to all Plaintiffs, including but not limited to the degree of care exercised by the Defendant in publishing the CDRs, the scienter of the Defendant, actual reliance by those investing in the projects, whether the reliance was justified, whether ERCOT's secret agreements are enforceable, and whether ERCOT is estopped from relying on a limitations defense. Therefore all claims as to all Plaintiffs are properly joined under Rule 40, TEX. R. CIV. P.

V.
BACKGROUND

A. The Transformation of the Electric Power Transmission Industry

24. In 1992 the Federal Energy Policy Act (the "Act") was passed and this Act fundamentally changed how the electric transmission system was owned and operated. Before then, electric utilities were mostly vertically integrated. This meant that one company or family of companies bundled power generation, transmission, and distribution. Regional monopolies dominated the energy market.

25. The Federal Energy Regulatory Commission ("FERC") wanted vertically integrated electric utilities to unbundle to promote competition in the industry. In FERC Order No. 888, FERC required all jurisdictional public utilities to unbundle.

26. While unbundling promoted competition, it also posed practical challenges. For example, the public utility monopolist was better able to keep supply and demand in balance because it was both the power generator and the power seller. Thus, the monopolist had access to vitally important market data concerning supply and demand that enabled the monopolist to

gauge when to add power generation capacity. Under the new regime, there was still a need to share vital, confidential market information and projections, but this had to be accomplished without collusion between competitors.

27. To address these inefficiencies or challenges a new market entity emerged: the independent system operator or ISO.

28. While FERC Order No. 888 did not require utilities to participate in ISOs, it encouraged ISO formation as a means to effectively unbundle power generation and distribution.

29. An ISO is an organization that coordinates, controls, and monitors operation of an electric power system. ISOs are not governmental entities. ISOs perform a number of functions, some of which require them to collect confidential data from market participants. Generally speaking, ISOs then assimilate, model, and compile market data and projections into aggregated summaries that can be shared with market participant for their use. Those market participants who are power generators or who wish to become power generators rely on the reports, projections, and assessments of market capacity in deciding whether to enter a market or enlarge their presence in a market—or to perhaps exit the market or mothball a plant. When preparing these reports, ISOs must act independently from special interests. Nor can ISOs produce reports that favor one market participant or lobby group over another.

30. Since these reports dramatically influence supply, an ISO that negligently or purposely supplies false data for market participant purposes can defeat the purpose of the free market and in the process artificially affect price, injure market participants, and ultimately destroy the competitive market. An ISO has a fiduciary duty to the market participants who supply it with confidential information to act competently and independently when using and publishing aggregated market information. To act otherwise would have the same effect on the

power market as the monopolist who uses its power to manipulate the market by decreasing supply to artificially increase price or increasing supply to artificially deter entrants from the market so that it may raise prices later.

B. The Market Entry Of ERCOT As An ISO

31. In 1999, the Texas legislature enacted PURA Chapter 39 to restructure the electric utility industry in Texas and unbundle power generation and power transmission.

32. The legislature declared that each power region in Texas form an "independent organization," or ISO, to perform the following functions:

a) ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms;

b) ensure the reliability and adequacy of the regional electrical network;

c) ensure that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and

d) ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region.

33. The Texas legislature required that the ISO had to be independent of any undue influence by power suppliers or buyers.

34. ERCOT, sometimes called the ERCOT ISO, is very unique because it is not subject to FERC oversight. FERC's current position not to assert jurisdiction over ERCOT is somewhat controversial and is justified on the basis that ERCOT is engaged solely in the intrastate transmission of energy. Instead of FERC, ERCOT is subject to the supervision by the PUCT. The chairman of the PUCT is *ex officio* a member of the ERCOT board of directors. Commissioners of the PUCT are political appointees. No representative of FERC sits on the board of any ISOs under its jurisdiction. The remaining board members of ERCOT are culled

from segments of the industry and those the industry serves in an effort to achieve balance and avoid undue influence by any one group.

35. Though subject to PUCT supervision, ERCOT is not by law a governmental entity, and the directors of ERCOT acting in their capacity as directors expressly owe fiduciary duties to the Members of ERCOT. By law ERCOT is not the agent of the state, and is supposedly independent of political influence. By law the CEO and other executives of ERCOT are elected by the ERCOT board to manage ERCOT's day to day operations. The CEO and other officers of ERCOT are supposedly free from political influence and are not elected by the public, nor are they appointed by the Governor.

36. In or around 2006 the relationship between ERCOT and the PUCT fundamentally changed, and ERCOT ceased to be an "independent" system operator.

37. It was around this time that highly placed employees and an officer of ERCOT were charged and sentenced for felonious misconduct. It was also around this time that ERCOT suffered one of its first, major grid failures. ERCOT was on life support.

38. Fearful of decertification and the press, ERCOT ceased functioning as a truly independent system operator.

C. The False and Misleading CDRs

39. ERCOT's report on the Capacity, Demand and Reserves (the "CDR") is the cornerstone of investment decisions made by those wishing to invest or construct power plants in the ERCOT region. The CDR represents the expert assessment by ERCOT of power capacity and the demands for power in the region. It also identifies the reserve margin that the PUCT says is essential to guarantee the reliability of power delivery to consumers in times of extreme demand. The reserve margin is not mandatory. It is a target reserve margin that signals when investors should build generation. If ERCOT were to artificially set the reserve margin too high

or to artificially manipulate projected capacity and demand to levels below the target reserve margin, ERCOT could stimulate investment even though not actually supported by the market. The CDR is expressly provided for market participant purposes. It is reviewed, compiled, and analyzed by ERCOT, and it is compiled from confidential data separately supplied by market participants that only ERCOT possesses in full.

40. In 2006 and 2008, ERCOT experienced extraordinary demands for power. Beginning in 2010, ERCOT wanted to encourage private enterprise to invest and build more power plants to protect against power shortages in the future. Then, in the summer of 2011, the demands for power became so great that the region experienced power shortages and came dangerously close to rolling blackouts. Something had to be done to remedy the situation.

41. The problem confronting ERCOT was how to encourage investment without capacity pricing.

42. Capacity pricing is one method to assure resource adequacy. Many of the ISOs subject to FERC regulation allow for what is known as capacity pricing—a sum charged for power on top of the energy market price to ensure that power generators have sufficient incentive to construct plants that may only be used or mostly used during periods of extreme or peak demand. In a capacity market, investors analyze the capacity payments to determine whether an investment is a sound decision.

43. ERCOT does not administer a capacity market and instead relies solely on the energy market price for energy set by the market to furnish sufficient incentives to construct new power plants. Thus in an energy-only market like ERCOT, the CDRs or similar reports form the basis of investment analysis and drive the investment.

44. Depicting capacity in the CDR in excess of the target reserve margin obviously discourages investment. Conversely, depicting capacity less than the target reserve margin encourages investment. This is because investors can expect higher prices for power when there is scarcity of supply, and the higher price will cover the enormous cost of plant construction and development.

45. In November 2010, ERCOT took its first step to condition the market by increasing its target reserve margin from 12.5% to was 13.75%.

46. In late 2011, ERCOT took its next major step to spur investment. In its 2011 CDR, ERCOT for the first time projected serious and long-term scarcity of power supply. This description of the market continued in the 2012 CDR.

47. These CDRs depicted extreme capacity shortfalls in power capacity well below the target of 13.75%. The CDRs created the picture of an energy market that ERCOT knew would lure investors to construct plants because investors would believe that the price for power in such short supply would be high enough to cover the cost of construction without any need for a capacity payment.

48. In furtherance of ERCOT's plan to spur investment, ERCOT's Warren Lasher (Director of System Planning) addressed the Gulf Coast Power Association on or about May 4, 2012. At the presentation, Mr. Lasher confirmed the December 2011 CDR results. Mr. Lasher and ERCOT emphasized without qualification that "Current information indicates long-term reserves are expected to fall well below the target reserve margin." The purpose of this statement was to signal to the market that now was the time to invest.

49. All these representations had the intended effect. Rating agencies such as S&P relied on the representations to give favorable ratings on debt supporting construction of new

power plants. Plaintiffs, their investors, and their experts looked to the CDRs as the benchmark for investment and planning decisions—and committed to building the new plants.

50. Based on the representations, Plaintiffs made investments they believed were critical for reliable power generation for Texas. But for Defendant's representations, Plaintiffs would not have invested in or built the power plants.

51. ERCOT specifically intended to induce investments, and ERCOT assured Plaintiffs their investment was safe.

> a) On or about November 8, 2012, at the Groundbreaking Ceremony for the Sherman Power Plant in Sherman, Texas, then PUCT Commissioner Rolando Pablos expressed to all present the following sentiments: "This is a very important day for Texas, for North Texas, for ERCOT. This project is very important. The plant is going to help our grid. We have strains on our infrastructure. The challenge right now is our tremendous growth is outpacing our ability to generate and deliver electricity. Thank Panda Power for stepping up. Your investment is safe in Texas."
>
> b) On or about January 30, 2013, a few months before the financial closing on the second Temple power plant, executives of Panda Power and certain investors in the power plants at issue met with John Dumas (ERCOT director of wholesale market operations) and Mr. Lasher to hear first-hand confirmation of under-capacity in the region. After being reassured concerning the need for power generation, Panda Power closed on the second Temple power plant.

52. Then, things began to change.

53. In 2013, the target reserve margin and formula for the CDR was elevated to "protocol" status subject to PUCT review.

54. Then, and only after the investments closed and the plants were substantially under construction, ERCOT published new CDRs using different data and a different methodology, one depicting a far different energy market. The ERCOT market changed overnight. What was once a market showing extreme scarcity of supply became a different market of extreme over capacity.

55. Information slowly surfaced showing that ERCOT's methodology and data points used in the 2011 and 2012 CDRs were either seriously flawed or rigged. Questions began to surface as to whether ERCOT knew about the defective forecasting but suppressed this fact to induce construction of plants without capacity payments. Questions arose concerning ERCOT's competency and independence, and whether the science underlying the CDRs was so unsound as to be wholly unreliable.

56. In the 2011 and 2012 CDRs, ERCOT took great care on its website to disclaim any responsibility for the accuracy of the data supplied by market participants upon which the CDRs were based. But nowhere did ERCOT disclose doubts about its own methodology. Nowhere did ERCOT warn market participants that its science was unsound, or that it lacked the competence or independence to produce reliable assessments of capacity, demand, or reserves. At no time did Plaintiffs assent to any attempt by ERCOT to limit its responsibility or liability for misconduct in connection with the CDRs.

57. The new market reflected by the new CDRs created the perfect storm. The predictions of over capacity depressed the market price for power both in the short and long term, making it more difficult to hedge against temporary market distortions through selling power in the forward markets.

VI.
CAUSES OF ACTION

A. Negligent Misrepresentation

58. The foregoing allegations are incorporated by reference.

59. Defendant made or caused to be made representations in the course of their business or profession that supplied false information for the guidance of Plaintiffs in their business

60. Defendant did not exercise reasonable care or competence in obtaining or communicating the information

61. Plaintiffs justifiably relied on the information and suffered substantial damages.

B. Fraud

62. The foregoing allegations are incorporated by reference.

63. Defendant knowingly or recklessly made or caused to be made false representations to induce Plaintiffs to invest and construct power plants in Sherman and Temple, Texas.

64. Plaintiffs have suffered substantial damages in reliance on the false representations.

C. Breach Of Duty

65. The foregoing allegations are incorporated by reference.

66. ERCOT owed a fiduciary duty to Plaintiffs to act independently and competently in the performance of its responsibilities as an ISO.

67. A formal fiduciary relationship arose by virtue of the statutory and common law duties owed by ERCOT to members and market participants.

68. Moreover, an informal fiduciary duty arose under the facts of this investment.

69. Defendant possessed confidential market information that only it had. While other market participants might have access to bits and pieces of the market data, ERCOT, by virtue of its position as an ISO, was the only market entity with a complete, unobstructed view into the ERCOT market.

70. ERCOT knew that Plaintiffs were relying on ERCOT's superior knowledge in making their investment.

71. Defendant breached its fiduciary duty, causing Plaintiffs substantial damages.

D. Declaratory and Injunctive Relief

72. The foregoing allegations are incorporated by reference.

73. Though by law ERCOT is obligated to act in a transparent manner, it in fact operates under a veil of secrecy.

74. ERCOT has a history of keeping information from the PUCT and the public, and of silencing whistleblowers.

75. Employees who depart ERCOT are required to sign agreements as a condition to severance pay that obligates the employee not to say anything negative about ERCOT, or market participants, their officers, directors, and others. Significantly, a member of the ERCOT board is a commissioner of the PUCT. The Governor appoints the commissioners to the PUCT and banning negative statements about ERCOT's board effectively gags employees from saying anything critical to anyone about those who hold political office and who monitor or oversee ERCOT.

76. ERCOT alone decides what is "negative." The ERCOT employee is free to testify, provided ERCOT decides the testimony is "truthful." ERCOT pays the employee money for this promise of silence and for the employee's promise to keep the arrangement a secret. According to the terms of the agreement, a breach allows ERCOT to claw back all money paid to the employee under the agreement regardless of the employees' age, financial condition, or physical infirmities and regardless of whether the negative statement was true and or caused any actual harm to ERCOT.

77. ERCOT intends these secret agreements to have a chilling effect on any witness coming forward in a civil or a criminal case with evidence of wrong doing, or to alert any elected representative or any investigative agency at a state or a federal level of wrongdoing.

78. Though in theory the witness is free under the contract to give "truthful" testimony, the witness would as a practical matter have to first breach the agreement by informing a lawyer, elected representative, or investigative agency of the "negative" facts he knows—facts to which he would later give testimony. Moreover, even though he testified truthfully, the former employee would inevitably confront an expensive lawsuit brought by ERCOT in an effort by ERCOT to prove the testimony was untruthful and to reclaim money paid to the witness. The former employee would pay in legal defense more that the compensation paid under the secret agreement. The courts and prosecutors have ample weapons in their arsenal to punish those who dare to give false testimony, and ERCOT does not need by contract to act as a special prosecutor or private grand jury for ERCOT or any of the special interests it represents.

79. Keeping ERCOT's payment of money for silence a secret has the touch and feel of a bribe where potential witnesses are rewarded with cash if and only if they agree to say nothing negative about ERCOT. This is particularly egregious if, as now claimed by ERCOT, ERCOT is acting under color of state law. It is particularly egregious that those protected from negative statements include political appointees and publically traded companies. These agreements cannot and should not remain a dirty "state secret."

80. After this lawsuit was filed, a former ERCOT employee came forward and told Plaintiffs that, in the words of the witness, ERCOT had monkeyed with the numbers in the CDRs. Plaintiffs later became aware that the witness was prepared to give testimony contrary to statements, some sworn, offered by ERCOT in this case. For example, the witness said that ERCOT's headquarters were in Taylor, Texas—not Austin as claimed by ERCOT. The witness' statement has been corroborated by other evidence. The truthfulness and accuracy of testimony

is for the jury in Sherman, Texas to decide, and this Court must take steps to assure that justice is served and the jury is given a chance to hear all the evidence and not just the evidence that ERCOT wants the jury to hear.

81. An affidavit was later procured from the employee and filed without the secret agreement attached to it to try to protect the witness, a retiree and a resident of Florida, from harassing litigation he could never afford to defend. The complete affidavit with the secret agreement attached was delivered to the Court and opposing counsel.

82. ERCOT was then given an opportunity to seek a seal order under Texas law, which requires ERCOT to justify keeping the agreement from the public record and to give public notice of its intent to seal the record.

83. ERCOT refused, but admonished Plaintiffs that it fully intended to enforce the contract and warned Plaintiffs not to interfere with the contractual relationship.

84. Plaintiffs should not be subjected to litigation because they interviewed former employees subject to these secret agreements and request that the Court declare these contracts unenforceable at least as far as they might subject Plaintiffs or potential witnesses in this case to lawsuits for saying negative things about ERCOT or disclosing the agreements under which their silence was attempted to be purchased. This Court (and not ERCOT) should control the evidence that the jury hears.

85. Plaintiffs will not agree to a seal order, and any such agreement is irrelevant anyway because seal orders impact concerns far broader than the interests of the litigants in this case.

86. Plaintiffs maintain that these employee agreements are illegal contracts and void as against public policy. Plaintiffs also maintain that the agreements fail for vagueness and

contain an illegal and unenforceable penalty clause that punishes the former employee for breach in an amount that bears no relationship to actual damages and is not a sum identifiable at the time the contract was made to reasonably compensate the former employer for a breach. As such the remedy is nothing more than an illegal punitive damage clause.

87. Alternatively, Plaintiffs seek a declaration that these agreements may not enforced in such a way as to impair or impede access to this Court or to any legislative or administrate body or elected representative operating in Texas.

88. Plaintiffs are concerned that they may be sued for bringing this claim seeking declaratory relief. Plaintiffs are absolutely privileged to petition this Court for relief and are entitled to a permanent injunction enjoining ERCOT from bringing any claims however characterized that seek damages or any other relief based on the filing this action for declaratory relief.

89. Plaintiffs further pray for a permanent injunction consistent with whatever declaratory relief is ultimately granted by the Court.

VII.
JURY DEMAND

90. Plaintiffs hereby request a trial by jury pursuant to TEX. R. CIV. P. 216(a).

VIII.
PRAYER

WHEREFORE, Plaintiffs request that, upon final hearing of this case, that they have and recover, from Defendant, the relief requested herein as well as pre-judgment interest, post-judgment interest, actual damages, consequential and incidental damages, costs of court, attorneys' fees and such other and further relief to which Plaintiffs may show themselves entitled, both at law and in equity.

Respectfully submitted,

/s/ Werner A. Powers

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been served on all counsel of record electronically in accordance with the Texas Rules of Civil Procedure on this the 15th day of August, 2016.

/s/ Werner A. Powers
Werner A. Powers

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App. D

No. 03-14-00303-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

HWY 3 MHP, LLC,

Appellant,

v.

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.,

Appellee.

On Appeal from Cause No. D-1-GN-09-003607
in the 419th District Court, Travis County, Texas

BRIEF OF APPELLEE
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ATTORNEYS FOR ELECTRIC
RELIABILITY COUNCIL OF
TEXAS, INC.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

TO THE HONORABLE JUSTICES OF THE THIRD COURT OF APPEALS:

Appellee Electric Reliability Council of Texas, Inc. ("ERCOT") respectfully submits this brief in response to the brief of Appellant HWY 3 MHP, LLC ("HWY 3").

I. Statement of the Case

ERCOT filed the underlying lawsuit in order to recover a $1.25 million sum owed by HWY 3 for energy ERCOT provided to HWY 3's retail electric customers before HWY 3 defaulted on its collateral obligations and exited the market.[1] More than two years after ERCOT filed this lawsuit, HWY 3 filed a counterclaim alleging ERCOT was responsible for HWY 3's default and demise.[2] In response to HWY 3's counterclaim, ERCOT filed a plea to the jurisdiction on the basis that HWY 3's counterclaim fell squarely within the scope of the Public Utility Regulatory Act's ("PURA")[3] pervasive regulatory scheme governing the ERCOT market.[4] The trial court granted ERCOT's plea and dismissed HWY 3's counterclaim.[5] This interlocutory appeal followed.

[1] CR 3-76, Plaintiff's Original Petition.
[2] CR 161-68, Defendant HWY 3 MHL LLC's Original Counterclaim.
[3] Public Utility Regulatory Act, TEX. UTIL. CODE §§11.001-66.017.
[4] CR 169-174, Plaintiff's Plea to the Jurisdiction and Motion to Dismiss.
[5] CR 823, Order on Plea to the Jurisdiction.

II. Statement Concerning Jurisdiction

ERCOT disputes HWY 3's assertion that the Court has jurisdiction over this interlocutory appeal. HWY 3 claims that jurisdiction arises under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, which allows an interlocutory appeal when a court grants or denies a plea to the jurisdiction of a "governmental unit," as that term is defined in section 101.001(3)(D) of the Texas Tort Claims Act. As explained below in section VII.A., ERCOT is not a "governmental unit" as defined in the Texas Tort Claims Act because it is not an "institution, organ, or agency of government." Moreover, this appeal fails to satisfy the intended purpose of interlocutory review under section 51.014(a)(8), which is to resolve government claims of immunity from suit without requiring the government to fully litigate the lawsuit. Because ERCOT is not a governmental unit, its plea to the jurisdiction was based on exclusive agency jurisdiction, not sovereign immunity. This appeal therefore does not meet the requirements for interlocutory appellate jurisdiction and should be dismissed.

III. Statement Regarding Oral Argument

This case raises three important questions of first impression: (1) whether ERCOT is a governmental unit under the Tort Claims Act, and if so, (2) whether the PUC has exclusive original jurisdiction over claims against ERCOT arising under the ERCOT Protocols and (3) whether ERCOT is entitled to assert sovereign immunity from suit. ERCOT believes oral argument is likely to be helpful to the Court's evaluation of these issues.

IV. Issues Presented

1. Is ERCOT a "governmental unit" within the meaning of section 101.001(3) of the Tort Claims Act?

2. Does the Public Utility Regulatory Act give the Public Utility Commission exclusive original jurisdiction to resolve a dispute between ERCOT and one of its market participants concerning the interpretation of the rules governing ERCOT's market?

3. If the Court has jurisdiction over this appeal because ERCOT is a governmental unit within the meaning of the Tort Claims Act, does ERCOT's status as a governmental unit vest it with immunity from suit?

V. Statement of Facts

A. History and Role of ERCOT

ERCOT has long been responsible for ensuring the reliability of the electric system covering the majority of the State of Texas. ERCOT was first organized as an unincorporated association of investor-owned utilities in 1970 to comply with reliability requirements of the North American Electric Reliability Corporation ("NERC").[6] Pursuant to these requirements, ERCOT coordinated the dispatch of generation between the region's vertically integrated electric utilities to ensure reliability and promote efficiency. In 1990, ERCOT was formally established as a non-profit corporation under Texas law. ERCOT today remains a membership-based 501(c)(4) non-profit corporation.[7]

Until 2001, ERCOT's existence and operations were entirely a function of the private agreement between its member utilities. This status changed with the introduction of competition in the wholesale electric market. In 1995, the Texas Legislature began the transition to wholesale competition when it amended PURA to allow unaffiliated power producers "open access" to the utilities' transmission systems for the purpose of selling their generation at wholesale in the Texas electric market.[8] In 1999, the Legislature enacted SB7, which fully abandoned the

[6] ERCOT's history is described on its website at http://www.ercot.com/about/profile/history/.
[7] *See* http://www.ercot.com/about/profile.
[8] *See* Act of March 29, 1995, 74th Leg., R. S., ch. 9, § 1, 1995 Tex. Gen. Laws 31.

existing model of vertically integrated electric service by requiring utilities to "unbundle" into separate generation, transmission and distribution, and retail electric provider entities.[9] SB7's reforms aimed to foster competition in both the wholesale market (generators selling to retail providers) and the retail market (retail providers selling to end consumers).[10] Only the transmission and distribution segment of the industry continues to be subject to traditional cost-of-service rate regulation.[11]

The centerpiece of SB7 was the creation of Chapter 39 of PURA. The stated purpose of Chapter 39 is to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry."[12] SB7 reflects the Legislature's understanding that protecting the public interest in a competitive environment would require an independent entity to ensure open access to the transmission system and to account for and settle wholesale energy transactions in the new wholesale market.[13] Accordingly, SB7 introduced a requirement that the PUC certify an "independent organization" to perform these functions, in addition to the traditional grid reliability functions that ERCOT had already been providing

[9] *See* Act of May 27, 1999, 76th Leg., R. S., ch. 405, 1999 Tex. Gen. Laws 2543 ("SB7"); TEX. UTIL. CODE § 39.051(b) (requiring unbundling); *see also State v. Pub. Util. Comm'n*, 344 S.W.3d 349, 352-354 (Tex. 2011).
[10] *See State v. Pub. Util. Comm'n*, 344 S.W.3d at 352.
[11] *Id.*
[12] TEX. UTIL. CODE § 39.001(a).
[13] *See BP Chems., Inc. v. AEP Texas. Cent. Co.*, 198 S.W.3d 449, 451-52 (Tex. App.—Corpus Christi 2006, no pet.).

(e.g., balancing supply with demand in real-time and scheduling transmission outages).[14] In 2001, following a contested case proceeding, the PUC certified ERCOT as the independent organization for the ERCOT power region.[15]

As the independent organization, ERCOT is subject to a comprehensive scheme of PUC regulation detailed in section 39.151 of PURA. This section broadly grants the PUC "complete authority" over ERCOT's "finances, budget, and operations," and imposes specific oversight requirements concerning ERCOT's governance (including board structure), debt financing, budget, and operational accountability.[16] Section 39.151 also authorizes the PUC to "take appropriate action" in the event of the organization's failure to comply with its duties, including de-certification of the organization or assessment of administrative penalties.[17] This section also requires ERCOT to charge wholesale buyers and sellers a "system administration fee" to fund the organization's budget.[18] Thus, while ERCOT began as a purely private entity subject to the control of only its member utilities, the competitive evolution of the Texas

[14] *See* TEX. UTIL. CODE § 39.151(c).
[15] *See* Tex. Pub. Util. Comm'n, *Application of the ERCOT ISO for Certification as an Independent Organization to Perform Transmission and Distribution Access, Reliability, Information Exchange, and Settlement Functions*, Docket No. 22061 (Feb. 2, 2001) (Final Order).
[16] TEX. UTIL. CODE §§ 39.151(d), (d-1), (d-2), (d-3), (g), (g-1).
[17] TEX. UTIL. CODE § 39.151(d).
[18] TEX. UTIL. CODE § 39.151(e).

electricity market has naturally required ERCOT to assume a more formal public function with greater PUC control and oversight.

B. Rules of the ERCOT Market

In addition to establishing PUC control over ERCOT, section 39.151 of PURA grants the PUC authority to "adopt and enforce rules" governing an independent organization's reliability and market functions or to delegate that rulemaking authority to that independent organization "subject to commission oversight and review."[19] Although the PUC has adopted a number of rules concerning ERCOT and its wholesale market,[20] the majority of market standards are contained in the ERCOT Protocols.[21] The PUC approved the original version of the Protocols in 2001, prior to the implementation of retail customer choice on January 1, 2002.[22] Pursuant to authority delegated to ERCOT, and in accordance with the processes established under PUC Rules, the ERCOT Board of Directors has approved a number of revisions to the Protocols over the years. Nonetheless, the Protocols remain subject to the PUC's ongoing oversight and review.[23]

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[19] TEX. UTIL. CODE § 39.151(d).
[20] *See* PUC Subst. R. 25.361-366; 25.501-.508 (16 TEX. ADMIN. CODE §§ 25.361-.366; 25.501-.508).
[21] *See BP Chems., Inc.,* 198 S.W.3d at 452.
[22] *See* Tex. Pub. Util. Comm'n, *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of the ERCOT Protocols,* Docket No. 23220 (June 4, 2001) (Order on Rehearing).
[23] *See Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588, 591 (Tex. App.—Austin 2011, pet. denied).

C. The Standard Form Agreement

Both ERCOT's and HWY 3's claims for breach of contract in the underlying litigation arise under the ERCOT Standard Form Market Participant Agreement (the "Standard Form Agreement"), which resides in Section 22, Attachment L of the May 2008 ERCOT Protocols.[24] The Standard Form Agreement is a non-negotiable, standard form contract that all market participants are required to sign as a condition for their participation and that establishes the basic legal relationship between ERCOT and the participant.[25] Among other things, the Standard Form Agreement requires the signatory to follow the ERCOT Protocols and to provide timely payment of all financial obligations.[26] It also establishes the rights of ERCOT and the signatory in the event of a default by either the market participant or ERCOT.[27]

D. HWY 3's Default on the ERCOT Market

Until August of 2008, HWY 3 was a PUC-registered Retail Electric Provider ("REP") in the ERCOT market, buying electricity at wholesale and reselling it to

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[24] CR190-204.

[25] ERCOT Zonal Protocols, May 1, 2008 (hereinafter, "Protocols") § 16.1 (requiring execution of Standard Form Agreement). Unless specifically noted, all citations to the Protocols in this brief refer to the May 1, 2008 version of the ERCOT Zonal Protocols, which are available at http://www.ercot.com/content/mktrules/protocols/library/2008/05/May_1,_2008_Protocols.pdf.

[26] CR195, Standard Form Agreement at 8.A.1 ("Failure to make payment or transfer funds, provide collateral or designate/maintain an association with a QSE (if required by the ERCOT Protocols) as provided in the ERCOT Protocols shall constitute a material breach . . . .").

[27] CR196-97, Standard Form Agreement at 8.B.

customers on a prepaid basis.[28] In late May 2008, wholesale power prices increased dramatically, and entities like HWY 3 that relied on the ERCOT real-time energy market to cover their customers' obligations were exposed to these prices.[29] This exposure required these entities to post additional collateral under the credit formulas in the ERCOT Protocols.[30] As determined by the PUC in two subsequent contested cases,[31] HWY 3 failed to meet the higher collateral requirement, which constituted a "material breach" under the express terms of the Protocols.[32]

On May 30, 2008, ERCOT provided written notice of this breach to HWY 3 and gave HWY 3 two business days—until June 3, 2008—to cure the breach, consistent with the process required under the Standard Form Agreement.[33] HWY 3 failed to provide the additional collateral by June 3, 2008 and thus did not cure

[28] CR162, Defendant HWY 3 MHL LLC's Original Counterclaim at 2.
[29] *Id.*; *see also* Rebecca Smith, *Sharp Power-Price Rise Hits Texas*, Wall St. J., May 30, 2008, available at http://online.wsj.com/news/articles/SB121210503608831079.
[30] *See* Protocols §§ 16.2.7.3, 16.2.7.4, attached at Appendix Tab G.
[31] *See* CR 453-460, Tex. Pub. Util. Comm'n, *Petition of Commission Staff to Revoke the Retail Electric Provider Certificate of HWY 3 MHP, LLC, d/b/a eTricity*, Docket No. 35775 (Aug. 14, 2008) (order revoking certification) (hereinafter, "Decertification Order"); CR 462-69, Tex. Pub. Util. Comm'n, *Notice of Violation by HWY 3 MHP of PUC Subst. R. 25.107(f)(2), Related to Financial Standards Required for Customer Protection, PUC Subst. R. 25.107(i)(8), Related to Requirements for Reporting and for Changing the Terms of a REP Certification, PUC Subst. R. 25.478(j)(2), Related to Refunding of Deposits and Voiding Letter of Guaranty, and PUC Subst. R. 25.43(n)(7), Related to Transition of Customer to POLR Service*, Docket No. 37152 (May 23, 2012) (order) (hereinafter, "Penalty Order").
[32] *See* Decertification Order at 3 Finding of Fact (FOF) 4; 7, Conclusion of Law (COL) 9; Penalty Order at 2, FOF 4; Standard Form Agreement at 8.A.1 ("Failure to make payment . . . as provided in the ERCOT Protocols shall constitute a material breach . . . .").
[33] Decertification Order, supra, n.31, at 3, FOF 3.

the breach within the requisite timeframe.[34] HWY 3's failure to timely cure the breach constituted a default under the Standard Form Agreement.[35] As required by the Protocols, and in accordance with the PUC's rules, ERCOT initiated a mass transition of HWY 3's customers to other REPs the next day, June 4, 2008.[36]

E. Subsequent Agency and Judicial Proceedings Against HWY 3

Shortly after HWY 3 defaulted on the market, the PUC initiated a proceeding to revoke HWY 3's certification as a REP.[37] Despite being provided notice of the proceeding, HWY 3 did not participate.[38] In August 2008, the PUC issued an order revoking HWY 3's REP certification.[39] That order included explicit findings of fact stating that HWY 3 had received timely notice of the breach and that it had violated the ERCOT Protocols by failing to post the required security.[40] HWY 3 did not seek rehearing or judicial review of the order.

In 2009, the Texas Attorney General sued HWY 3 to recover prepayments and deposits that HWY 3 failed to refund its customers when it left the ERCOT

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[34] *Id.* at 7, COL 9.
[35] CR195, Standard Form Agreement at 8.A.1 (failure to make timely payment "shall constitute an event of default ("Default") unless cured within two (2) Business Days after the non-breaching Party delivers to the breaching Party written notice of the breach"); Protocols § 16.2.9 ("If ERCOT receives a Late Payment which fully pays the Market Participant's payment or collateral obligation to ERCOT within two (2) Bank Business Days of the due date, ERCOT will waive the Payment Breach, except for ERCOT's Remedies for Late Payments, as set forth in Section 16.2.9.2, ERCOT's Remedies for Late Payments.").
[36] Decertification Order, supra, n.31 at 3, FOF 6.
[37] *Id.* at 1.
[38] *Id.* at 6, COL 2.
[39] *Id.* at 1-8; Ordering Paragraphs 1, 2.
[40] *Id.* at 3, FOF 2, 3, 4, COL 9.

market.[41] The litigation resulted in a settlement requiring HWY 3's principals to make payments to a restitution fund.[42]

In 2012, the PUC initiated an enforcement proceeding seeking administrative penalties for HWY 3's violation of PUC rules requiring refunds of customer payments and deposits.[43] The PUC ultimately adopted an order assessing a penalty of $1.44 million against HWY 3 and ordering HWY 3 to refund any amounts not already paid into the restitution fund.[44] HWY 3 challenged this order, and this separate suit remains pending in Travis County District Court.[45]

F. The Underlying Lawsuit

ERCOT filed suit in October 2009 seeking $1,239,080.88 that HWY 3 owed for energy ERCOT provided to serve HWY 3's retail customers prior to the default.[46] As alleged in ERCOT's petition, HWY 3's failure to pay for the energy breached the Standard Form Agreement's requirement to timely remit payments when invoiced.[47] Because HWY 3 never disputed any of the invoices and did not respond to ERCOT's letter demanding payment of the liquidated sum, ERCOT's

[41] CR471-79, Agreed Judgment, *State of Texas v. HWY 3 MHP, LLC, d/b/a eTricity, Larry Michael McBride, Marla Jo Hanley-Lobert, Scotty Ray Hanley, Louis Dale Saladino, Billy V. Stewart, and Donald Rit Hanley*, Cause No. 09-07753, 68th Judicial District Court, Dallas County, Texas (April 7, 2011).
[42] CR474, *Id.* at 4, para. 15.
[43] Penalty Order, supra, n.31 at 1.
[44] Penalty Order at 3, FOF 18; 6, 7, COL 15-17.
[45] *See HWY 3 MHP LLC v. Pub. Util. Comm'n*, No. D-1-GN-12-002380, 250th Judicial District Court, Travis County.
[46] CR3-76, Plaintiff's Original Petition; CR175-254, Plaintiff's Third Amended Petition (hereinafter, "Petition").
[47] CR177-78, Petition at 3-4.

petition also stated a claim for a suit on a sworn account.[48] Each of the unpaid invoices is attached to ERCOT's petition.[49]

More than two years after ERCOT filed suit, HWY 3 filed a counterclaim alleging that ERCOT had itself breached the Standard Form Agreement by failing to provide proper notice of HWY 3's breach of the collateral requirement, by failing to comply with the "further assurances" provision of the agreement, and by violating the ERCOT Protocols' non-discrimination provision and other provisions describing the calculation of collateral requirements.[50]

ERCOT filed a plea to the jurisdiction seeking dismissal of HWY 3's counterclaims on the basis that they fall within the scope of PURA's pervasive regulatory scheme governing the ERCOT market which gives the PUC explicit authority to "resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes."[51] ERCOT asserted that because HWY 3 did not address its concerns to the PUC within the 35 days required under PUC Rule 22.251, which establishes the process for challenging ERCOT conduct, HWY 3's counterclaims should be dismissed with prejudice.[52]

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[48] CR178, Petition at 4.
[49] CR219-254.
[50] CR161-68, Defendant's Original Counterclaim; CR381-89, Defendant's Amended Counterclaim (hereinafter, "Counterclaim").
[51] CR169-74, Plaintiff's Plea to the Jurisdiction and Motion to Dismiss.
[52] *Id.*

HWY 3 and ERCOT each filed multiple briefs on the plea.[53] The PUC filed an amicus curiae brief in support of ERCOT's plea to the jurisdiction, and HWY 3 submitted a response to the PUC's brief.[54] The matter was ultimately heard by Travis County District Judge Stephen Yelenosky. Following oral argument from ERCOT and HWY 3, Judge Yelenosky issued an order granting ERCOT's plea to the jurisdiction and dismissing HWY 3's counterclaims with prejudice.[55]

VI. Summary of the Argument

As a threshold matter, the Court should dismiss this interlocutory appeal because the statute on which HWY 3 bases its claim of appellate jurisdiction—Civil Practice and Remedies Code section 51.014(a)(8)—is inapplicable. That provision allows review of a trial court order that "grants or denies a plea to the jurisdiction by a "governmental unit" as that term is defined in Section 101.001." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). ERCOT is not a governmental unit under the Tort Claims Act because it is not an "institution, agency, or organ of government." Also, as the Supreme Court has previously recognized, the purpose of interlocutory review under section 51.014(a)(8) is to ensure prompt resolution of governmental claims of immunity from suit, and ERCOT made no such claim in the trial court because it is not a governmental unit.

[53] CR255-265, 266-380, 429-784, 796-808, 809-822.
[54] CR390-428, 785-795.
[55] CR823, Order on Plea to the Jurisdiction.

Nonetheless, if ERCOT is deemed to be a governmental unit for purposes of the Tort Claims Act, then it should accordingly enjoy immunity from suit, which would include immunity from HWY 3's suit. Consequently, if the Court were to determine that it has jurisdiction over this appeal, it should affirm the trial court's dismissal of HWY 3's claims on the independent basis that ERCOT is immune from suit.

Setting aside the issues of appellate jurisdiction and immunity, the trial court properly dismissed HWY 3's counterclaims because they fall well inside the scope of PURA's pervasive regulatory scheme concerning the operation of the ERCOT market. PURA explicitly gives the PUC "complete authority" over ERCOT, including the ultimate authority to adopt the rules governing the market as well as authority to "resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes." TEX. UTIL. CODE § 39.151(d-4)(6). HWY 3's counterclaims allege that ERCOT violated various ERCOT Protocols (including provisions of the Standard Form Agreement), and the trial court properly concluded that the PUC has exclusive original jurisdiction over these claims. If HWY 3 had any legitimate complaint about ERCOT's calculation of its collateral requirements or the sufficient and timely notice of HWY 3's breach, it was required to bring those complaints to the

PUC within the 35 days required under PUC Rule 22.251. Decisional law is clear that HWY 3's delay presents a jurisdictional bar to judicial relief.

HWY 3's insistence that the PUC can have no jurisdiction over a contract claim seeking money damages ignores that the Standard Form Agreement is not a private agreement negotiated by the signatory parties. It is part of the ERCOT Protocols, and consistent with the Supreme Court's decisions on point, the interpretation of its terms and the assessment of any appropriate remedies involves policy considerations that fall directly within the scope of the pervasive regulatory scheme set out in PURA establishing PUC control over ERCOT, its operations, and its rules.

While the PUC has exclusive jurisdiction over HWY 3's claims, it does not have exclusive jurisdiction over ERCOT's claim in the underlying lawsuit because (1) the PUC lacks any ability to grant ERCOT a money judgment upon which collection could be initiated and because (2) there is yet no bona fide dispute as to HWY 3's financial responsibility for the energy ERCOT provided. ERCOT's invoices requesting payment for the energy were validly issued to HWY 3 pursuant to ERCOT Protocols, and HWY 3 did not file any dispute with ERCOT or the PUC challenging any of those invoices. Because the invoices were, at the time of suit, valid, owing, and undisputed, ERCOT's only option was to file suit to reduce

the invoices to a money judgment so that it could eventually attempt to collect the funds owed.

The PUC cannot grant ERCOT an enforceable money judgment; nor can it issue an advisory opinion as to the validity of any particular invoice in the absence of any dispute. However, if HWY 3's pleadings eventually present a bona fide dispute as to the validity of this debt, and the defenses it may assert have not already been waived, the PUC would likely have exclusive or primary jurisdiction to decide any disputed issues. But even in that case, the trial court would retain jurisdiction over ERCOT's suit because only the trial court may issue a money judgment upon which collection may be initiated.

VII. Standard of Review

"Determining if an agency has exclusive jurisdiction requires statutory construction and raises jurisdictional issues. Thus, whether an agency has exclusive jurisdiction is a question of law [courts] review de novo." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Similarly, questions of sovereign immunity are reviewed de novo. *See Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009).

VIII. Argument and Authorities

A. The Court lacks jurisdiction over this appeal because ERCOT is not a "governmental unit" within the meaning of the Tort Claims Act.

A party may not appeal an interlocutory order unless explicitly authorized by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). HWY 3 maintains that appellate jurisdiction is proper under Texas Civil Practice and Remedies Code section 51.014(a)(8), which authorizes review of an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Although no court has previously decided whether ERCOT is a "governmental unit" for purposes of the Tort Claims Act, ERCOT submits that it cannot be considered a governmental unit as defined in the Act.

Moreover, allowing this interlocutory appeal would not serve the recognized purpose of section 51.014(a)(8), which is to allow prompt resolution of government claims of sovereign immunity. ERCOT's plea to the jurisdiction asserted only that the PUC has exclusive original jurisdiction over claims concerning the ERCOT Protocols. ERCOT asserted no claim of sovereign immunity, and the trial court considered no such ground for dismissal. However, if the Court determines that it does have jurisdiction over this appeal because ERCOT is a governmental unit within the meaning and purpose of Section

51.014(a)(8), the Court should also conclude, as a matter of deduction, that ERCOT is entitled to assert sovereign immunity as a bar to HWY 3's counterclaims.

1. ERCOT is not a "governmental unit" within the meaning of the Tort Claims Act.

ERCOT does not fall within the scope of the definition of "governmental unit" in the Tort Claims Act. The Act defines the term as follows:

> (3) "Governmental unit" means:
>
> (A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;
>
> (B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
>
> (C) an emergency service organization; and
>
> (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the Legislature under the constitution.

TEX. CIV. PRAC. & REM. CODE § 101.001(3). HWY 3 does not contend that ERCOT falls within the scope of paragraph (A), (B), or (C), and none of those provisions would appear to apply on their face. Rather, HWY 3 argues that ERCOT is a governmental unit under paragraph (D) because its status and authority are derived from statute.

ERCOT does not dispute that its authority to ensure grid reliability and administer the ERCOT energy market is wholly derived from the PUC's designation of ERCOT as the "independent organization" responsible for those functions pursuant to section 39.151 of PURA. As discussed in part VII.B, below, section 39.151 describes in great detail the responsibilities of such an independent organization and establishes the PUC's exhaustive authority over that organization. In fact, the existence of this pervasive regulatory scheme was the very basis for ERCOT's plea to the jurisdiction in the trial court[56]. Thus, even while ERCOT's status as the statutory independent organization depends entirely on the PUC's designation of ERCOT for that purpose, one could reasonably conclude that ERCOT's status and authority are "derived from . . . laws passed by the Legislature" within the meaning of section 101.001(3)(D).

To be a governmental unit under paragraph (D), however, an entity must also be an "institution, organ, or agency *of government* . . . ." TEX. CIV. PRAC. &

[56] CR 171, ERCOT's Plea to the Jurisdiction.

REM. CODE § 101.001(3)(D). Without giving some meaning to this part of the definition, all private entities whose legal status and authority could plausibly be said to arise from statute would be considered governmental units under the Tort Claims Act. Under such a broad reading, all entities whose commercial or occupational status is conferred by a license granted pursuant to legislative authorization—child-care facilities, hospitals, insurance agencies, doctors, and plumbers, among many others—would be deemed governmental units. *See* TEX. HUM. RES. CODE § 42.021; TEX. HEALTH AND SAFETY CODE § 241.021; TEX. INS. CODE § 101.102; TEX. OCC. CODE § 155.001; TEX. OCC. CODE § 1301.351. ERCOT submits that the Legislature cannot have reasonably intended to sweep all of these private entities into the coverage of the Tort Claims Act.

Similarly, private entities that may have been granted special powers under statute would also come within a broad interpretation of "governmental unit." For example, electric utilities exercise rights of eminent domain by express statutory authorization and enjoy monopoly rights to serve customers under certificates of convenience and necessity issued by the Public Utility Commission. *See* TEX. UTIL. CODE §§ 181.004, 37.051. The fact that these private entities are charged with unique public functions is not understood to change their essential character as private entities. And it would be absurd to consider them governmental units solely by virtue of these special powers.

Nor does the fact that entities may be the subject of a "pervasive regulatory scheme" reasonably require that they be considered part of the government. For example, no court has previously held that a privately owned electric or telecommunications utility should be considered a governmental unit, even though such utilities have been found to be the subject of a pervasive regulatory scheme.[57] In fact, one court has held that even a corporation *created* by the Texas Legislature and subject to a similarly pervasive regulatory scheme governing workers' compensation insurance—the Texas Mutual Insurance Company—is not considered a government entity for purposes of establishing federal subject matter jurisdiction under ERISA.[58] In the same manner, ERCOT—a private 501(c)(4) non-profit corporation whose original incorporation *preceded* the legislation authorizing its public functions as the PUC-designated "independent organization"—is not an "institution, organ, or agency of government" and therefore does not meet the qualifications of a governmental unit under section 101.001(3)(D).

HWY 3's statement of the case notes a 2011 Texas Supreme Court decision that found a private, non-profit corporation to be a governmental unit for purposes of establishing appellate jurisdiction under section 51.014(a)(8). *See LTTS Charter*

[57] *See In re Southwestern Bell Telephone Co., L.P.*, 235 S.W.3d 619, 627 (Tex. 2007) (orig. proceeding); *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004).
[58] *See Pridgen v. Tex. Mut. Ins. Co.*, No. Civ.A.3:04–CV–0189–G, 2004 WL 2070956 at *6 (N.D. Tex. Sept. 15, 2004).

School v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2011). *LTTS* held that an interlocutory appeal based on the grant or denial of an open-enrollment charter school's plea to the jurisdiction may properly be maintained because the school's status and authority are conferred by statute. The court did not expressly address the role of the phrase "of government" in section 101.001(3)(D), but whether a charter school could conceivably be part of government was not in question because, as the court specifically noted, the Education Code already explicitly grants a charter school status as a "governmental entity," a "political subdivision," and an instrumentality of "local government" for certain specified purposes. *See LTTS Charter School*, 342 S.W.3d at 77 (citing TEX. EDUC. CODE § 12.1053). But in ERCOT's case, there is no such similar declaration of government status in statute or any other law. Whether ERCOT can be conventionally be considered an "institution, organ, or agency of government" is an essential threshold consideration, and a conventional understanding of the term "of government" would not seem to include a private corporation that is not elsewhere recognized by the Legislature to be a part of government.

Furthermore, in the lone case that cites to *LTTS* in evaluating the permissibility of interlocutory appellate review, the Thirteenth Court of Appeals similarly relied upon other statutory indicators of government status in determining that a workforce development board should be considered a "governmental unit."

See Arbor E&T, LLC v. Lower Rio Grande Valley Workforce Dev. Bd., Inc., No. 13-13-00139-CV, 2013 WL 8107122 (Tex. App.—Corpus Christi Dec. 5, 2013, no pet.) ("We conclude that local workforce development boards are governmental units under the TTCA for the following reasons: . . . (7) the fact that the "Texas Legislature considers local workforce development boards to be "governmental" in nature under other laws outside Chapter 2308 of the Texas Government Code.").

While ERCOT's status and authority as the PUC-designated "independent organization" arise entirely under PURA section 39.151, that statute does not suggest any legislative intention to make ERCOT part of the government, unlike the scheme in *LTTS*. Nothing in PURA states or even suggests that ERCOT is a "government body," a "governmental entity," a "political subdivision," or a part of "local government" for any purpose, unlike the statutes governing charter schools. In fact, PURA implicitly recognizes that ERCOT is not part of government because it specifically imposes certain open meeting requirements on ERCOT that would be redundant of obligations applicable to governmental bodies under the Open Meetings Act. *See* TEX. UTIL. CODE § 39.1511; TEX. GOV'T CODE §§ 551.001- .146. Furthermore, unlike the charter schools in *LTTS*, ERCOT is not funded in any part by state or local tax funds. ERCOT's funding is rather more akin to that of private electric utilities whose revenues are determined by rates set by the PUC. In the same manner, PURA requires ERCOT to cover its costs

through a PUC-established rate—a "system administration fee"—charged to wholesale buyers and sellers of electricity. *See* TEX. UTIL. CODE § 39.151(e). In at least these meaningful respects, ERCOT's governing scheme is different from the laws governing the charter schools at issue in *LTTS*.

Accordingly, while ERCOT's "status and authority . . . are derived . . . from laws passed by the Legislature," ERCOT is not a part of government under any conventional understanding of that term and PURA evinces no legislative intention to treat ERCOT as a part of government.

2. The purpose of section 51.014(a)(8) is to ensure prompt appellate review of a governmental unit's claims of immunity, and ERCOT made no such claim in the trial court.

Exercising jurisdiction over this appeal would also be inconsistent with the purpose of allowing interlocutory review of orders granting or denying government pleas to the jurisdiction. The Supreme Court has observed that the purpose of interlocutory review under section 51.014(a)(8) is to ensure that government claims of sovereign immunity can be resolved without requiring the government to fully litigate the underlying case:

> Section 51.014(a)(8) was designed to reduce litigation expenses for all parties involved in suits against state entities *by resolving the question of sovereign immunity* prior to suit rather than after a full trial on the merits. . . . [T]he purpose of the provision was to allow state agencies to more quickly ascertain whether or not a trial court could assert jurisdiction over a dispute.

Texas A & M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 845 (Tex. 2007) (emphasis added) (citing House Comm. On Civil Practices, Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997); Debate on Tex. S.B. 453 Before the House Comm. on Civil Practices, 75th Leg., R.S. (1997) (statement of Rep. Pete Gallego)).

HWY 3's appeal does not serve the purpose of interlocutory review under section 51.014(a)(8) because ERCOT never made any claim of sovereign immunity in the trial court. Its plea to the jurisdiction was based entirely on the PUC's exclusive original jurisdiction under PURA to decide disputes concerning ERCOT's market rules.[59] Allowing this appeal to proceed would plainly ignore the purpose of interlocutory review under section 51.014(a)(8). The Court should conclude that ERCOT is not a "governmental unit" and that an interlocutory appeal is improper in this case.

If, however, the Court does determine that ERCOT is a "governmental unit" for purposes of the Tort Claims Act, it should also recognize as a consequence ERCOT's right to assert sovereign immunity—including immunity from suit—consistent with the Legislature's aim in defining "governmental unit" in the Tort Claim Act (*see* part VII.C., below), and consistent with the Legislature's purpose in granting interlocutory review of a governmental unit's plea to the jurisdiction.

[59] CR171, Plaintiff's Plea to the Jurisdiction at 3.

If the Court has jurisdiction over this appeal because ERCOT is a "governmental unit," then it follows that ERCOT should be entitled to assert immunity from suit.

B. The trial court properly determined that the Public Utility Commission has exclusive original jurisdiction over HWY 3's counterclaims because they concern the proper interpretation and application of the ERCOT Protocols and therefore fall within the pervasive regulatory scheme establishing PUC authority over the ERCOT market.

If the Court concludes that it has jurisdiction over this appeal, it should affirm the trial court's order dismissing HWY 3's counterclaims. The trial court properly determined that it had no subject matter jurisdiction over these claims that raise matters concerning the appropriate interpretation and application of the ERCOT Protocols and therefore fall within the scope of PURA's pervasive regulatory scheme which gives the PUC comprehensive oversight over ERCOT's operations and explicitly authorizes the PUC to decide controversies between market participants and ERCOT.

Contrary to HWY 3's representation, the controversy at issue does not arise from a mere private contract, but rather from ERCOT's Standard Form Market Participant Agreement—a standard-form, generally applicable, non-negotiable agreement that establishes the basic terms of participation in the ERCOT market. This agreement is a part of the Protocols (Section 22, Attachment L), and its terms are thus determined entirely through the ERCOT Protocol revision process pursuant to the PUC's delegation of its rulemaking authority. When a conflict

arises that requires the interpretation of that agreement—as with any other section of the Protocols—that interpretation should be made as a matter of public policy by the agency responsible for the administration of the regulatory scheme at issue.

1. The Legislature has created a pervasive regulatory scheme giving the Public Utility Commission plenary authority over ERCOT's operations and rules and explicit authority "to resolve disputes between ERCOT and its market participants."

Under the doctrine of exclusive jurisdiction, the Legislature grants an administrative agency the sole authority to make an initial determination in a dispute. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). In deciding whether an agency has exclusive jurisdiction, courts consider "whether the Legislature has enacted express statutory language indicating that the agency has exclusive jurisdiction or, if not, whether a 'pervasive regulatory scheme' nonetheless reflects legislative intent that an agency have the sole power to make the initial determination in the dispute." *Vista Med. Ctr. Hosp. v. Tex. Mut. Ins. Co.*, 416 S.W.3d 11, 30 (Tex. App.—Austin 2013, no pet.).

PURA does not explicitly state that the PUC has "exclusive original jurisdiction" over claims involving the ERCOT Protocols. But the Legislature has established a pervasive scheme of plenary PUC regulation of the ERCOT independent organization, the ERCOT market, and ERCOT's operations, and has

also explicitly authorized the PUC to resolve related disputes and to establish rules to facilitate the resolution of those disputes.

a. PURA establishes comprehensive PUC authority over ERCOT, its operations, and its rules.

Section 39.151 of PURA gives the PUC comprehensive authority over all facets of ERCOT's statutory functions:

> An independent organization certified by the commission is directly responsible and accountable to the commission. 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*. The organization shall fully cooperate with the commission in the commission's oversight and investigatory functions. The commission may take appropriate action against an organization that does not adequately perform the organization's functions or duties or does not comply with this section, including decertifying the organization or assessing an administrative penalty against the organization.

TEX. UTIL. CODE § 39.151(d) (emphasis added).[60]

This general grant of authority is supplemented by a number of specific oversight requirements. Section 39.151(d-1) requires the PUC to review and approve ERCOT's budget at least biennially and authorizes the PUC to "approve, disapprove, or modify any item included in a proposed budget." Section 39.151(d-2) requires the PUC to oversee ERCOT's debt financing. Section 39.151(d-3)

[60] For the Court's convenience, the text of section 39.151 of PURA is attached at Appendix Tab A.

authorizes the PUC to establish performance measures and review ERCOT's achievement of them. Section 39.151(d-4) provides that the PUC may require reports, prescribe a system of accounts, conduct audits and inspections of organization's records and facilities, assess administrative penalties, and resolve disputes involving ERCOT and an affected person.

Section 39.151 also explicitly vests the PUC with authority to establish rules governing reliability and market operations, or to delegate that authority to ERCOT:

> The commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules. Any such rules adopted by an independent organization and any enforcement actions taken by the organization are subject to commission oversight and review.

Id. Section 39.151(i) similarly recognizes that the PUC possesses ultimate enforcement authority over all operating standards in the ERCOT market when it authorizes the PUC to "delegate authority to the existing independent system operator in ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures." PURA § 39.151(i).

Pursuant to its rulemaking authority, the PUC has adopted a number of detailed rules to facilitate its exercise of authority over ERCOT and the markets

administered by ERCOT. *See* 16 TEX. ADMIN. CODE §§ 25.361-.365 (detailing ERCOT's functions, responsibilities, governance, rulemaking authority, budget, accounting requirements, and creating an "independent market monitor" to guard against market power abuse in ERCOT markets); §§ 25.501-.508 (establishing, among other things, the basic ERCOT wholesale market framework, a scheme of oversight and enforcement of market rules, specific restrictions on the exercise of market power in ERCOT, and mechanisms for ensuring resource adequacy in ERCOT).

The ERCOT Protocols themselves are also an integral part of the regulatory framework under the PUC's control. The Protocols, which currently fill nearly 1200 pages, provide specific details on market operations, registration, settlement, metering, transmission planning, and other activities.[61] The Court has previously determined that the Protocols are considered administrative rules and that the PUC is entitled to deference in its interpretation of those rules—in part because the PUC's interpretation of those rules becomes part of those rules. *Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588, 595 (Tex App.—Austin 2011, pet. denied). Thus, the ERCOT Protocols come within the scope of the PUC's regulatory authority under section 39.151.

[61] The current version of the Protocols can be found on ERCOT's website at http://www.ercot.com/mktrules/nprotocols/lib.

b. PURA specifically authorizes the PUC to resolve disputes between market participants and ERCOT.

Apart from granting the PUC comprehensive authority over ERCOT's operation and its market rules, section 39.151 of PURA also provides that "[t]he commission may . . . resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes." TEX. UTIL. CODE § 39.151(d-4)(6). This language reflects a legislative determination that the PUC is the appropriate tribunal when disagreements arise about the interpretation and application of the ERCOT Protocols and related PUC rules.

In accordance with this authorization, the Commission has adopted procedures providing for the prompt resolution of disputes involving ERCOT. PUC Procedural Rule 22.251, entitled "Review of Electric Reliability Council of Texas (ERCOT) Conduct," prescribes the process by which an affected market participant may complain to the PUC about ERCOT conduct. *See* 16 TEX. ADMIN. CODE § 22.251.[62] The rule authorizes a market participant to submit a complaint about any action taken by ERCOT:

> Any affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any

[62] For the Court's convenience, the text of PUC Procedural Rule 22.251 is attached at Appendix Tab B.

> protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer.

PUC PROC. R. 22.251 (16 TEX. ADMIN. CODE § 22.251). The rule requires that any person, before filing a complaint, must first exhaust any administrative remedies at ERCOT (including complying with ERCOT's alternative dispute resolution process). Any complaint must be submitted within 35 days of the date of the relevant ERCOT conduct (or, if applicable, the conclusion of the ERCOT alternative dispute resolution process). *Id.* at 22.251(d). A party may request that the ERCOT action be suspended pending a determination on the complaint upon a showing of good cause. *Id.* at 22.251(i).

Upon a determination that a complaint has merit, the rule allows the PUC to grant any relief it has the authority to provide:

> Where the commission finds merit in a complaint and that corrective action is required by ERCOT, the commission shall issue an order granting the relief the commission deems appropriate, including, *but not limited to*:
>
> (1) Entering an order suspending the conduct or implementation of the decision complained of;
> (2) Ordering that appropriate protocol revisions be developed;
> (3) Providing guidance to ERCOT for further action, including guidance on the development and implementation of protocol revisions; and
> (4) Ordering ERCOT to promptly develop protocols revisions for commission approval.

PUC PROC. R. 22.251(o) (emphasis added). Consistent with the rule's recognition that the list of specified remedies is not intended to be exhaustive, the PUC has

previously granted relief beyond the rule's specifically enumerated remedies when it has determined that ERCOT has improperly applied its Protocols.[63]

c. The regulatory framework in PURA section 39.151 is a pervasive regulatory scheme that demonstrates a legislative intention to establish the PUC's exclusive original jurisdiction over HWY 3's claims.

The PUC's exhaustive statutory authority over the ERCOT markets is precisely the sort of framework that the Supreme Court and this Court have held constitutes a "pervasive regulatory scheme" justifying a finding of exclusive agency jurisdiction. In the case of *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004), the Supreme Court held that the PUC had exclusive jurisdiction to resolve a dispute concerning an agreement reached between ratepayers and an electric utility in a prior PUC proceeding. *Entergy*, 142 S.W.3d at 323. The agreement at issue required the utility to share certain savings with ratepayers in future rate proceedings. *Id.* In concluding that the PUC had exclusive jurisdiction to construe the terms of the agreement, the court relied on language in Chapter 31 of PURA expressing a legislative intention "to establish a comprehensive and adequate regulatory system for electric utilities." *Id.* The court reasoned that "[t]he Legislature's description of PURA as 'comprehensive,' coupled with the fact that

[63] *See, e.g.,* Tex. Pub. Util. Comm'n, *Appeal and Complaint of Longhorn Energy LP and West Oaks Energy LLC Concerning ERCOT Decision to Conduct Market Resettlement*, Docket 39433 (Mar. 7, 2012) (Final Order) (granting complaint submitted under Rule 22.251 and reversing resolution of ERCOT Board of Directors requiring resettlement of market that would remove certain de-energized buses from ERCOT's Congestion Revenue Rights network model).

PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness." *Id.* The court also relied on the fact that PURA specifically granted the PUC "exclusive original jurisdiction over the rates, operations, and services of an electric utility." *Id.* at 323-24. Since the dispute raised an issue bearing on the utility's rates, the issue fell within the scope of the PUC's exclusive authority to resolve the dispute as a matter of policy. *Id.*

In the case of *In re Southwestern Bell Telephone Co., L.P.*, 235 S.W.3d 619 (Tex. 2007) (orig. proceeding), the Supreme Court considered whether a trial court could properly entertain a ratepayer suit challenging a telecommunications utility's authority to recover universal service fund (USF) charges. The ratepayers sought a declaration that recovery of those charges violated a PURA provision under which the utility's rates were to have been temporarily capped. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 623. In holding that the PUC had exclusive jurisdiction over this dispute, the court noted a number of provisions that, when read together, demonstrated an intention to establish a pervasive regulatory scheme under the PUC's exclusive authority. *Id.* at 625. Specifically, the court found the following statutory language persuasive:

- A grant to the PUC of "exclusive original jurisdiction over the business and property of a telecommunications utility" and "general power to regulate and supervise such utilities";
- A requirement that the PUC "adopt and enforce rules requiring local exchange companies to establish a universal service fund";

- A requirement that utilities must fund the USF charge "in accordance with procedures approved by the commission";

- A delegation to the PUC of "general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction";

- A requirement that the PUC must "adopt eligibility criteria and review procedures, including a method for administrative review, the commission finds necessary to fund the universal service fund" and "adopt rules for the administration of the universal service fund" and to "act as necessary and convenient to administer the fund";

- PUC authority to "resolve disputes between a retail customer and a billing utility, service provider, [or] telecommunications utility";

- PUC authority to investigate an alleged violation, order a service provider to produce information or records, and require a service provider to "refund or credit overcharges or unauthorized charges with interest"; and

- PUC authority to seek an injunction against a utility prohibiting acts that violate PURA and to assess administrative penalties against that utility.

Id. at 625-26 (statutory citations omitted).

Similar to the regulatory schemes at issue in *Entergy* and *Southwestern Bell*, PURA also gives the PUC exclusive original jurisdiction to determine matters of reliability and market operations entrusted to ERCOT. Just as PURA provided "comprehensive" authority over the rates of electric utilities, justifying dismissal of the ratepayers' suit in *Entergy*, PURA also explicitly affords the PUC "complete authority to oversee . . . the independent organization's . . . operations" so as "to

ensure that the organization adequately performs the organization's functions and duties." TEX. UTIL. CODE § 39.151(d). And just as PURA's framework for the regulation of telecommunications utilities and the universal service fund at issue in *Southwestern Bell* provided a number of specific grants of authority to the PUC, including a delegation of authority to adopt rules governing the administration of that fund, PURA similarly includes a number of provisions granting the PUC specific authority to regulate all aspects of ERCOT and its operations and express authority to adopt rules governing these matters. TEX. UTIL. CODE §§ 39.151(d), (d-1), (d-2), (d-3), (d-4), (i).

Chapter 39 of PURA also gives the PUC dispute resolution authority similar to that noted by the court in *Southwestern Bell*. In finding exclusive PUC jurisdiction over the plaintiffs' allegations, the court cited to the PUC's statutory authority to "resolve disputes between a retail customer and a . . . telecommunications utility." *See In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 625-26 (citing TEX. UTIL. CODE § 17.157(a)). Similarly, the PUC's authority under Chapter 39 to "resolve disputes between an affected person and an independent organization" also demonstrates an unequivocal legislative intention that the PUC have the initial opportunity to hear any disputes arising under this statutory scheme. *See* TEX. UTIL. CODE § 39.151(d-4)(6).

HWY 3 argues that explicit statutory language granting "exclusive original jurisdiction" over disputes is a necessary condition to a determination that an agency has exclusive jurisdiction to resolve a dispute. This is incorrect. The Supreme Court has recognized on multiple occasions that exclusive original jurisdiction may be conferred not only by express provision but also by "a pervasive regulatory scheme indicat[ing] that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed." *See Employees Ret. Sys. of Texas v. Duenez*, 288 S.W.3d 905, 909 (Tex. 2009); *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 625 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d at 323; *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006); *Subaru of Am., Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Tellingly, HWY 3's brief never once mentions the term "pervasive regulatory scheme," even while ERCOT's plea to the jurisdiction and its three briefs in the trial court relied upon this explicit ground for exclusive jurisdiction.

Finally, HWY 3 asserts that the absence of published opinions finding exclusive PUC jurisdiction over ERCOT-related disputes proves that the PUC lacks jurisdiction over such claims.[64] But HWY 3 fails to note that ERCOT has been party to only three appeals in which an opinion has been issued, and none of

[64] Brief of Appellant HWY 3 MHP, LLC at 14.

these cases involved any question of the PUC's exclusive jurisdiction.[65] What is not surprising is that there is yet no law on this issue, as it is indeed a matter of first impression.

2. Recognizing the PUC's exclusive jurisdiction to resolve this dispute is critical to ensuring the proper implementation of the Legislature's regulatory scheme.

Deference to the PUC is important to avoid disrupting the agency's plenary oversight of the relevant regulatory framework—and this is especially true where that framework is particularly complex. *See Constellation*, 351 S.W.3d at 629–30 (holding, in case concerning PUC construction of ERCOT Protocols, that "deference [to the PUC] is particularly important in a complex regulatory scheme like the Public Utility Regulatory Act.").

In *Constellation* this Court recognized that one reason the PUC's interpretation of the ERCOT Protocols is entitled to deference is that the ERCOT Protocols are essentially PUC rules. *See Constellation*, 351 S.W.3d at 594-95. The Court recognized the principle that courts "will generally uphold an agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule." *Id.* at 595. When an agency interprets its own rules, judicial deference is appropriate because it may be presumed the agency

[65] *See In re Texas Commercial Energy*, 607 F.3d 153 (5th Cir. 2010); *Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588 (Tex. App.—Austin 2011, pet. denied); *Elec. Reliability Council of Texas, Inc. v. Met Ctr. Partners-4, Ltd.*, No. 03-04-00109-CV, 2005 WL 2312710 (Tex. App.—Austin Sep. 22, 2005, no pet.).

knows best what it meant when it adopted the rule. Similarly, as between the PUC and the courts (irrespective of whether findings would be made by a judge or jury), the PUC can be expected to know best the regulatory purposes served under various competing interpretations of a particular Protocol provision.

The need for a PUC determination is especially compelling in this case. HWY 3 challenges ERCOT's interpretation and application of standards for determining a qualified scheduling entity's financial exposure and minimum collateral amounts.[66] These credit issues fall squarely within the PUC's authority to oversee ERCOT's operations.[67] Creditworthiness of market participants is critical to the effective operation of an electric market; entities that do not maintain sufficient security can impose substantial financial harm on consumers or other market participants.

In fact, ERCOT's authority to establish credit parameters is explicitly provided in the PUC's rule governing ERCOT's core functions. *See* P.U.C. SUBST. R. 25.361(B)(2) (16 TEX. ADMIN. CODE § 25.361(b)(2)) (tasking ERCOT with responsibility for "assessing creditworthiness of market participants and establishing and enforcing reasonable security requirements in relation to their responsibilities under ERCOT rules."). Any allegation that ERCOT's standards

[66] *See* HWY 3 MHP, LLC's Amended Counterclaim at 6, para. 16, 24, 28.
[67] *See* TEX. UTIL. CODE § 39.151(d).

are unreasonable or that ERCOT abused its discretion in applying them would most appropriately be determined by the entity that created this rule—the PUC.

Moreover, under the relevant collateral provisions cited in HWY 3's counterclaims—namely Protocol sections 16.2.7.3 and 16.2.7.4[68]—ERCOT must determine the value of a market participant's Estimated Aggregate Liability ("EAL") and Net Load/Resource Imbalance Liability ("NLRI") in determining the total collateral required, and when appropriate, it may even elect to use some value other than the EAL or NLRI calculated under the specified formula.[69] Evaluating any challenge to ERCOT's application of its discretion in calculating EAL or NLRI naturally requires an understanding of the principles underlying this credit framework.

Furthermore, even those of HWY 3's counterclaims that might facially appear to raise only matters of contract interpretation also warrant application of the PUC's expert judgment. The Standard Form Agreement is part of the ERCOT Protocols and therefore comes within the PUC's regulatory province. As noted in part VII.B.4.a., below, this Court has held that when a contract has an

[68] For the Court's convenience, the text of these sections is attached at Appendix, Tab G.

[69] *See* ERCOT Protocols § 16.2.7.4 ("To the extent that ERCOT, using commercially reasonable measures, determines that the EAL so calculated does not adequately match the financial risk to the MPs in the market in the ERCOT Region, ERCOT may specify a larger or smaller EAL than would be produced by the use of the above formula."); § 16.2.7.4 ("To the extent that ERCOT, using commercially reasonable measures, determines that the NLRI as calculated above does not adequately match the financial risk to Market Participants, ERCOT may specify a larger or smaller NLRI than that produced by using the above-referenced formula."). These sections are attached at Appendix Tab G.

administrative character (as does the Standard Form Agreement), the PUC is not bound by the strict terms of that contract in fashioning appropriate relief. *See AEP Texas N. Co. v. Pub. Util. Comm'n of Texas*, 297 S.W.3d 435, 446 (Tex. App.—Austin 2009, pet. denied).

Allowing parties to circumvent PUC review of matters that require the interpretation of ERCOT Protocols would thwart the Legislature's goal of consolidating expertise on these matters in one regulatory body. Dismissing HWY 3's claims in favor of requiring such claims to be brought to the PUC is the only way to give appropriate regard to the Legislature's establishment of this "pervasive regulatory scheme."

Moreover, HWY 3's assertion that the Court has original jurisdiction over its claims simply because it alleges a breach of contract would establish a dangerous precedent. Sections 5.A. and 6.A. of the Standard Form Agreement obligate the signing participant and ERCOT, respectively, to "comply with, and be bound by, all ERCOT Protocols." Under HWY 3's reasoning, any market participant aggrieved by any ERCOT decision could immediately sue ERCOT for breach of the Standard Form Agreement and proceed to a jury trial on the contested issues without following either the required ERCOT-level dispute resolution process or the PUC appeal process.

This result would facially contradict Section 10.A. of the Standard Form Agreement, which requires that "[i]n the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using the applicable dispute resolution procedures set forth in the ERCOT Protocols."[70] It would also conflict with the PUC's express statutory authority to "resolve controversies between affected entities and ERCOT,"[71] as the PUC would be powerless to exercise its dispute resolution authority in any case in which the complaining party went directly to court. It is simply unreasonable to suggest that the Legislature intended this illogical result. Pursuant to this statutory authority, the PUC has created the process for appealing ERCOT decisions in Procedural Rule 22.251, and a market participant must follow that process as a condition for seeking judicial review.

3. HWY 3 misconstrues the PUC's explicit discretion to resolve disputes under section 39.151(d-4)(6).

HWY 3 argues that the use of the word "may" in section 39.151(d-4)(6) conclusively demonstrates that jurisdiction was not intended to be exclusive. *See* TEX. UTIL. CODE § 39.151(d-4)(6) ("The commission may . . . resolve disputes between an affected person and an independent organization . . . ."). ERCOT

[70] CR 12-26, Standard Form Agreement.
[71] TEX. UTIL. CODE § 39.151(d-4)(6).

agrees that "may" suggests discretion,[72] but its use here likely reflects only a legislative understanding that the PUC does not have jurisdiction over disputes that have nothing to do with ERCOT's statutory functions described in Section 39.151. For example, a suit brought to recover damages for personal injuries sustained on ERCOT premises or a suit to enforce a janitorial services contract with ERCOT would presumably fall outside the PUC's exclusive original jurisdiction because they presumably do not implicate section 39.151's pervasive regulatory scheme.

But claims such as HWY 3's, which derive entirely from ERCOT's performance of its statutory market functions, are inextricably intertwined with this pervasive regulatory scheme and clearly fall within the scope of the PUC's regulatory authority. There is simply no reasonable ground for narrowly reading 39.151(d-4)(6)—which affirmatively grants PUC review authority—to suggest that the PUC lacks jurisdiction over claims that fall within the scope of section 39.151's regulatory framework.

Moreover, whatever the nature of the discretion intended by the use of "may" here, that discretion indisputably lies with the PUC—not with the party filing a dispute. For this reason, section 39.151(d-4)(6) cannot be read to create a choice of venues for plaintiffs.

[72] *See* TEX. GOV'T CODE § 311.016(1) ("'may' creates discretionary authority or grants permission or a power.").

4. HWY 3's styling of its claim as a common-law breach of contract suit for damages and attorneys' fees does not affect the PUC's exclusive original jurisdiction to review ERCOT's application of the Protocols.

a. The Standard Form Agreement is part of the ERCOT Protocols and has an "administrative character" that justifies PUC consideration of disputes involving that agreement.

HWY 3 reasons that because some of its claims arise under the ERCOT Standard Form Agreement, the PUC lacks exclusive original jurisdiction to decide its claims because agencies cannot decide issues of contract. But HWY 3 cannot hide behind the general rule that agencies may not resolve private breach of contract claims because the Supreme Court and this Court have held that this principle does not apply where the agreement at issue has taken on an administrative character as part of the scheme of regulation. *See In re Entergy*, 142 S.W.3d at 321; *AEP Texas N. Co.*, 297 S.W.3d at 446; *Public Util. Comm'n v. Sw. Bell Tel. Co.*, 960 S.W.2d 116, 119–120 (Tex. App.—Austin 1997, no pet.).

The Standard Form Agreement is not a mere private contract whose terms reflect the bargaining of the affected parties but is instead a standard-form, non-negotiable agreement that is a part of the ERCOT Protocols—namely, Section 22, Attachment L.[73] Like other parts of the Protocols, the Standard Form Agreement embodies the intent of the PUC and ERCOT—not the intent of the parties to the

[73] *See* CR190-204, Standard Form Agreement; attached at Appendix Tab H.

agreement. Indeed, the Standard Form Agreement was part of the original version of the Protocols adopted by the PUC in 2001, and while the agreement has since been amended by the ERCOT Board of Directors, each of the provisions of the agreement on which HWY 3's counterclaims rely existed in identical form in the original PUC-approved version of the Protocols.[74] Each market participant must take the terms of the Standard Form Agreement as they exist, and if ERCOT (or the PUC) revises the agreement, the market participant must re-execute the new agreement as a condition for its continued participation in the ERCOT market.[75]

Although its primary purpose is to formally bind a market participant to following the Protocols, the Standard Form Agreement also includes important procedural requirements and remedial limitations that reflect the broader public policy import of the Agreement. Many of these provisions bear directly on HWY 3's claims. For example, in order to limit the public's exposure to market participants' default risk, the agreement requires that a market participant cure any failure to tender payment within two days.[76] The agreement also limits a party's remedies in the event of an ERCOT breach:

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[74] *See* June 2001 Protocols, available at: http://www.ercot.com/mktrules/protocols/library/2001. Even if the terms at issue had not been expressly approved by the PUC, they would still be part of the ERCOT Protocols and subject to the PUC's exclusive jurisdiction as part of the regulatory framework.

[75] *See* Protocols § 16.1 (ERCOT shall require all Market Participants (MPs) to . . . execute *the* Standard Form Market Participant Agreement . . . .") (emphasis added).

[76] CR195, Standard Form Agreement at 8.A.(1).

> (a) Unless otherwise specified in this Agreement or in the ERCOT Protocols, and subject to the provisions of Section 12, Dispute Resolution of this Agreement, in the event of a Default by ERCOT, Participant's remedies shall be limited to:
>
> (i) Immediate termination of this Agreement upon written notice to ERCOT,
>
> (ii) Monetary recovery in accordance with the Settlement procedures set forth in the ERCOT Protocols, or
>
> (iii) Specific performance.[77]

Significantly, the Standard Form Agreement also conspicuously forecloses the recovery of consequential damages:

> NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.[78]

Finally, the agreement also requires each party to bear its own attorney's fees:

> In the event of a dispute, including a dispute regarding a Default, under this agreement, each Party shall bear its own costs and fees, including , but not limited, to attorney's fees, court costs, and its share of any mediation or arbitration fees.[79]

[77] CR197, Standard Form Agreement at 8.B.(2)(a).
[78] CR198, Standard Form Agreement at 9.A.
[79] CR199, Standard Form Agreement at 10, para. 10.B.

These important limitations demonstrate not only that HWY 3's claims for damages and attorney's fees are foreclosed on the merits because they seek remedies beyond those permitted in the Standard Form Agreement, but for the purposes of the present jurisdictional analysis, these limitations also demonstrate that the Standard Form Agreement is an inextricable component of the relevant regulatory framework because it embodies the PUC's determination as to the appropriate remedies in the event of an ERCOT breach of its obligations. And because the agreement is a component of the PUC's implementation of the pervasive regulatory scheme of oversight over ERCOT, any controversy surrounding its interpretation should be considered in the first instance by the PUC.

This conclusion is consistent with previous court decisions finding exclusive PUC jurisdiction to construe agreements that have assumed an administrative character—notwithstanding that the actions may have been explicitly couched as breach of contract claims. In the Supreme Court's *Entergy* decision, plaintiff ratepayers had brought a breach of contract action against Entergy, an electric utility, to enforce the terms of an agreement to share savings related to a merger affecting the utility. *In re Entergy*, 142 S.W.3d at 321. The agreement at issue had previously been adopted by the PUC in a final order in a proceeding to review the merger. *Id.* at 319. As with the claims asserted by HWY 3 in this case, the *Entergy* plaintiffs argued that the PUC lacked authority to decide a contract claim.

Id. at 323. But the Supreme Court nonetheless held that the PUC had exclusive jurisdiction of the dispute because "while the Merger Agreement may have begun as a private contract, it took on an administrative character when the parties agreed that the merger savings would be implemented 'in post-merger Gulf States rate proceedings' filed with the PUC and requested that their agreement be placed in the PUC order resolving [the merger docket]." *Id.* at 323-34.

The *Entergy* court cited with approval the decision of this Court in *Public Utility Commission of Texas v. Southwestern Bell Telephone Co.* In that case, Southwestern Bell had sued to invalidate a PUC order construing a settlement agreement on attorney's fees from an earlier rate case at the PUC. *Sw. Bell Tel. Co.*, 960 S.W.2d at 119. This Court held that the trial court had no jurisdiction over the suit because the contract fell within the jurisdiction of the PUC. *Id.* at 119-120. In rejecting Southwestern Bell's argument that agencies have no authority to decide contract disputes, the Court noted that "the attorneys' fee agreement was more than a private agreement. It affected directly the public interest. The Commission's acceptance of the agreement . . . was necessary to give the agreement the administrative effect requested by the litigants." *Id.* at 122-23.

This Court reached a similar conclusion in *AEP Texas North Co. v. Public Utilities Commission*. In that case, the Court considered whether the PUC had incorrectly construed the terms of a settlement agreement between parties to an

earlier merger-approval proceeding. *AEP Texas N. Co.*, 297 S.W.3d at 444-46. That agreement required AEP Texas North Company, an electric utility, to share its margins from off-system sales with its customers through credits in annual fuel reconciliation proceedings from 1999 to 2004. *Id.* However, when the Legislature enacted SB7 in 1999, it provided for only one final fuel reconciliation proceeding, raising a question as to whether AEP would still be obligated to issue the merger savings credits after its final proceeding, and if so, how this could be done. *Id.* at 444-45.

The Court affirmed the PUC's decision to estimate AEP's future off-system sales margins and to credit those savings to ratepayers in the final fuel reconciliation, notwithstanding that this remedy was clearly not contemplated in the agreement (which was known as the "ISA"). *Id.* at 446. Citing to *Entergy*, the Court reasoned that:

> The ISA was more than a private agreement because it directly affected the public interest. . . . The Commission's acceptance of the ISA was necessary to give the agreement the administrative effect required by the litigants. The very administrative character that gave the ISA effect also gave the Commission *the authority to adjudicate disputes arising from that agreement and to fashion an administrative remedy that reasonably accomplished the intended objectives of the Commission's order*.

Id. at 446 (emphasis added; internal citations omitted). Furthermore, the Court ultimately determined that, because of the administrative nature of the ISA, the

PUC's construction of the agreement in fact presented no genuine issue of contract law at all:

> [W]e hold that the rules of contract interpretation do not apply in construing the ISA and that, while the ISA may have begun as a private contract, it assumed the character of an administrative order when it became the basis for the Commission's approval of the merger between AEP and CSW.

Id. at 447.

Like the agreements at issue in *Entergy*, *Southwestern Bell*, and *AEP Texas North*, the Standard Form Agreement has assumed an administrative character because it is an integral part of the PUC's policy framework governing the administration of the ERCOT market. Although HWY 3's claims are presented as common-law claims for breach of contract, they are, in substance, claims falling within the framework of the PUC's oversight of ERCOT's statutory functions and are therefore subject to that agency's exclusive jurisdiction.

HWY 3's argument that its common-law contract claim cannot be heard by the PUC ignores that the only reason there is any contract at issue in the first place is that PURA authorizes the PUC (and, by extension, ERCOT) to develop market rules, which include the Standard Form Agreement. TEX. UTIL. CODE § 39.151(d). To the extent the PUC and ERCOT chose to devise a form contract to create procedures and remedial limitations as part of this rule framework, any dispute

arising out of that form contract should be resolved in the same manner as any other dispute arising under this regulatory scheme—by the PUC.

HWY 3 cites several PUC and court decisions recognizing the general rule that agencies lack authority to resolve private contract disputes.[80] However, these cases are distinguishable for the simple reason that they involved privately negotiated contracts that had *not* assumed an administrative character like the contracts at issue in *Entergy*, *Southwestern Bell*, *AEP Texas North*, and in this case.

Among the authorities cited by HWY 3 is a PUC order concluding that the agency lacked jurisdiction to resolve a dispute concerning a private mediation settlement agreement between ERCOT and a market participant.[81] But HWY 3 fails to note that this decision predated the 2005 amendments to section 39.151 of PURA which gave the PUC explicit authority to "resolve disputes between an affected person and an independent organization . . ." and refashioned section 39.151(d) to provide the PUC "complete authority" over ERCOT's operations.[82] Although this decision is distinguishable for reasons already mentioned, it is quite likely that this decision would be different today in light of these amendments. In fact, the PUC submitted an amicus brief in the trial court in this case explicitly

[80] Brief of Appellant HWY 3 MHP, LLC at 16-17.
[81] Brief of Appellant HWY 3 MHP, LLC at 17-18, citing Tex. Pub. Util. Comm'n, *Petition of the Electric Reliability Council of Texas for Declaratory Order Interpreting ERCOT Protocols*, Docket No. 27538 (May 19, 2004).
[82] *See* TEX. UTIL. CODE §§ 39.151(d), (d-4)(6); amended by Acts 2005, 79th Leg., R.S., ch. 797 (SB 408), § 9.

stating that it has "exclusive original jurisdiction over complaints that ERCOT improperly applied the Protocols."[83] The PUC's amicus brief is dispositive of the agency's position on the issue.

HWY 3 also argues that an agency's approval of a form contract does not make the contract "part of the agenc[y's] rules" or give the agency exclusive jurisdiction over disputes arising from the contract. But this misstates ERCOT's argument. ERCOT does not contend that the Standard Form Agreement falls within the PUC's exclusive jurisdiction merely because it was promulgated by the PUC, or by ERCOT pursuant to delegated authority; rather, the agreement falls within the PUC's exclusive jurisdiction because it is part of a pervasive regulatory scheme under the PUC's control. Additionally, this Court decided in *Constellation* that the ERCOT Protocols *are themselves* administrative rules, and that deference to the PUC's interpretation of ERCOT Protocols is critical for the very reason that "an agency's interpretation of a rule *becomes part of the rule itself. . . .*" *Constellation*, 351 S.W.3d at 595 (citing *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 604 (Tex. App.—Austin 2000, pet. denied)).

Without citing any case in support, HWY 3 also posits that the prevalence of insurance coverage disputes based on standard property policy forms adopted by the Texas Department of Insurance (TDI) demonstrates that agencies do not have

[83] CR402, Brief of Amicus Curiae Public Utility Commission of Texas at 9.

exclusive jurisdiction over disputes concerning an interpretation of those forms.[84] But in fact, this Court has previously determined that the TDI *should* have the initial say in a suit seeking to construe the terms of a standard TDI insurance policy form. *See Beacon Nat. Ins. Co. v. Montemayor*, 86 S.W.3d 260, 264 (Tex. App.—Austin 2002, no pet.). Although the Court in *Beacon* couched its decision in terms of primary jurisdiction, the Court ultimately sustained TDI's plea to the jurisdiction and dismissed the suit based on its determination that the plaintiff failed to exhaust its administrative remedies. *Id.* at 264. This relief is consistent with a determination that the agency had exclusive original jurisdiction. *See Apollo Enters., Inc. v. ScripNet, Inc.*, 301 S.W.3d 848, 871 (Tex. App.—Austin 2009, no pet.) (noting that primary jurisdiction does not divest the trial court of its subject matter jurisdiction).

b. HWY 3's claims for consequential damages and attorney's fees do not foreclose the PUC's exclusive original jurisdiction over the allegations asserted in HWY 3's counterclaims.

HWY 3 further argues that the PUC cannot have jurisdiction over its complaint because the PUC cannot award it money damages. But this argument ignores that remedies may be limited as part of a regulatory scheme,[85] and the mere

[84] Brief of Appellant HWY 3 MHP, LLC at 19-20.

[85] *See,e.g.*, *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430, 445-46 (Tex. 2012) (holding that procedural and remedial scheme in Workers' Compensation Act demonstrates legislative intent to preclude suits for unfair and deceptive practices under Insurance Code or Deceptive Trade Practices Act); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 815 (Tex.

assertion of an entitlement to a particular form of relief is not sufficient to invade an agency's regulatory sphere and supplant its lawfully established procedures and remedies.

In this case, the Standard Form Agreement explicitly precludes recovery of consequential damages and attorney's fees.[86] Allowing HWY 3 to proceed to trial on these claims would plainly circumvent the remedial limitations adopted by the PUC pursuant to its express rulemaking authority under section 39.151. In *American Motorists v. Fodge*, the Supreme Court held that a trial court was without jurisdiction to award plaintiff damages for wrongful deprivation of workers compensation benefits because to do so necessarily impinged on the authority of the Workers' Compensation Commission's administration of the workers compensation scheme:

> Allowing courts to award damages for wrongful deprivation of benefits would circumvent the Commission's jurisdiction and therefore could not be permitted. Thus, just as a court cannot award compensation benefits, except on appeal from a Commission ruling, neither can it award damages for a denial in payment of compensation benefits without a determination by the Commission that such benefits were due.

Am. Motorists Ins. Co. v. Fodge, 63 S.W.3d 801, 804 (Tex. 2001). Similarly, allowing HWY 3 to proceed to jury trial on a claim for consequential damages

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2010) (holding that Texas Commission on Human Rights Act provides exclusive remedy for sexual harassment claims, thus prohibiting common-law suits for negligence).

[86] CR 20-21, Standard Form Agreement at 9.A, 10.B.

would necessarily violate the limitations on recovery adopted by the PUC within the scope of its delegated authority.

Moreover, with regard to HWY 3's request for attorney's fees, the Supreme Court has determined that such a request alone does not confer jurisdiction on the trial court when the agency has exclusive jurisdiction over the subject matter in dispute, notwithstanding the unavailability of that relief at the PUC. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 626 (Tex. 2007) ("[P]laintiffs' request for core-claim attorney's fees . . . cannot operate to vest the trial court with jurisdiction where there was none before.").

Money damages would be unnecessary if HWY 3 had timely availed itself of the PUC's complaint process under Rule 22.251. Under that rule, the PUC could have provided any appropriate relief—including temporary relief[87]—to prevent any harm from occurring in the first place. Specifically, HWY 3 could have requested that the PUC suspend the mass-transitioning of its customers to another REP, or could have requested that the PUC order ERCOT to return those customer accounts, thus precluding the loss of its business for which it now seeks damages. But HWY 3 never availed itself of these administrative remedies. HWY 3's failure to take timely action to mitigate the harms it now alleges cannot vest the Court with jurisdiction to hear its claim.

[87] Rule 22.251 authorizes the PUC to "suspend the conduct or the implementation of the decision complained of while the complaint is pending . . . ." 16 TEX. ADMIN. CODE § 22.251(d)(2).

5. The Standard Form Agreement's venue provision does not affect the Public Utility Commission's exclusive original jurisdiction over this matter.

The Standard Form Agreement's venue provision—requiring any suit to be filed in Travis County state or federal court[88]—is irrelevant to the issue of jurisdiction because it governs only venue. The relevant part of the provision reads as follows:

> Neither Party waives primary jurisdiction as a defense; provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas, and the Parties hereby waive any defense of forum non-conveniens, except defenses under Tex. Civ. Prac. & Rem. Code § 15.002(b).[89]

Contrary to HWY 3's assumption, the mere existence of the venue provision does not suggest an implicit understanding by the parties (or by the PUC) that a court must have jurisdiction over any complaint arising out of the Protocols. Rather, the provision simply requires that, for those complaints over which the courts *do* have jurisdiction (such as ERCOT's suit), venue in Travis County is mandatory. HWY 3's strained construction of the provision ignores that jurisdiction cannot be conferred by agreement[90] and also fails to acknowledge that the provision expressly reserves the availability of a primary jurisdiction defense,

[88] *See* CR100, Standard Form Agreement at 10, § 11.A.
[89] *Id.*
[90] *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866 (Tex. App.—Austin 2008, no pet.).

which reflects an expectation that the PUC should have the initial authority to decide certain issues requiring its expertise.[91]

6. The fact that the trial court has jurisdiction over ERCOT's suit does not require a determination that the PUC lacks exclusive original jurisdiction over HWY 3's claims.

HWY 3 suggests that, by bringing suit for breach of contract, ERCOT has admitted that the Court has jurisdiction over HWY 3's claims. ERCOT disagrees. HWY 3's counterclaims challenge ERCOT's interpretation and application of the Protocols and therefore raise a dispute within the PUC's jurisdiction under section 39.151 of PURA. By contrast, ERCOT's suit simply seeks to recover liquidated sums HWY 3 owes for the energy its customers used. Until it filed its sworn denial in response to ERCOT's suit, HWY 3 had never disputed the validity of ERCOT's claim. HWY 3 could have disputed these invoices by filing a settlement and billing dispute of these claims at ERCOT,[92] or by seeking relief from the PUC under Rule 22.251. But HWY 3 never did so.

When an ERCOT market participant does not dispute an invoice, it is axiomatic that the invoice must be presumed to be valid—at least until it is

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[91] *See* CR100, *Standard Form Agreement* at 10, § 11.A. ("*Neither Party waives primary jurisdiction as a defense*, provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas . . . ."). Because primary jurisdiction is considered a "prudential" doctrine, not a jurisdictional one, there are valid reasons that the PUC may have included this express reservation of the availability of primary jurisdiction as a defense, while there could have been no similar utility to expressly permitting the assertion of exclusive jurisdiction.

[92] *See* Protocols § 9.5 (describing settlement and billing dispute process).

eventually disputed in court. *Cf. Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986) (agency actions "carr[y] a presumption of validity"). Without this presumption, ERCOT would have no authority to collect payments from its participants. The ability to collect payment is an essential requirement for any market.

Well after the time had passed for HWY 3 to dispute its obligation to pay this sum, ERCOT filed suit to obtain a judgment allowing it to collect that sum. ERCOT cannot initiate collection on an amount owed without a court judgment affirming its right to collect that amount. And ERCOT cannot request such an order from the PUC prior to filing suit because there would be no purpose in obtaining the PUC's confirmation of the sum owing in the absence of any dispute, and without a bona fide dispute of the sum, any order declaring ERCOT's right would amount to an unlawful advisory opinion. Moreover, even if the PUC were to issue such an advisory opinion in favor of ERCOT, ERCOT would still need to invoke the jurisdiction of the trial court in order to obtain a judgment on the sum owed. Clearly, the PUC cannot have exclusive original jurisdiction over a suit which seeks to reduce a liquidated sum to a money judgment for the purpose of collection.

Furthermore, unlike HWY 3's counterclaims, ERCOT's claims do not disrupt the remedial framework established in PURA and in the Protocols; rather ERCOT's suit is filed expressly *in furtherance* of this scheme, as the only way to

collect the sums that are owed and previously undisputed is to file suit. If ERCOT did not file suit, all consumers in ERCOT would be unjustly forced to bear the cost of the debt—just as they have thus far in this litigation.

ERCOT acknowledges that when a dispute arises as to the validity of any debt claimed in a suit on sworn account, that dispute will likely raise an issue for the PUC to decide within its exclusive jurisdiction. However, HWY 3's sworn denial does not specify the precise grounds on which the account is disputed, and HWY 3's pleadings will need to be clarified before it can be determined whether there is any bona fide dispute that should be considered by the PUC. [93] Upon such clarification, the trial court may well determine that HWY 3 has waived these defenses because it failed to timely bring them to the PUC or ERCOT.

If the trial court does ultimately decide that such a dispute exists, and that any proper defense has not already been waived, the trial court should instead abate the proceeding pending PUC resolution of the disputed issues because only the court has the authority to grant the remedy to which ERCOT is entitled under the regulatory framework.[94]

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[93] HWY 3's Original Answer to ERCOT's suit only generally denies ERCOT's claims and provides only boilerplate defenses such as failure of conditions precedent, failure to mitigate damages, and waiver and estoppel. C.R. at 77-78.

[94] *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 228 (Tex. 2002) (If defect in jurisdiction is curable, a "court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured.").

C. If the Court determines that it has jurisdiction over this appeal because ERCOT is a governmental unit under the Tort Claims Act, then the dismissal of Appellant's counterclaims was appropriate for the additional reason that ERCOT is immune from suit.

HWY 3 claims interlocutory appellate jurisdiction under section 51.014(a)(8) of the Civil Practice and Remedies Code, which authorizes review of a trial court's order that "grants or denies a plea to the jurisdiction by a governmental unit *as that term is defined in Section 101.001*." Section 101.001 of the Civil Practice and Remedies Code is part of the Tort Claims Act. As already noted, the Supreme Court has recognized that the purpose of interlocutory review under section 51.014(a)(8) is to "resolv[e] the question of *sovereign immunity* prior to suit rather than after a full trial on the merits. . . ." *Koseoglu*, 233 S.W.3d at 845. Given this legislative aim, it follows that the Legislature must have understood that any entity that qualifies as a "governmental unit" would presumably be entitled to assert immunity from suit.

This conclusion is supported by a review of the Texas Tort Claims Act. The purpose of the Tort Claims Act is to establish a limited waiver of sovereign immunity. *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (recognizing that "basic purpose" of Tort Claims Act is "waiving immunity only to a limited degree."). The core provisions of the Tort Claims Act are section 101.021, which states that "[a] *governmental unit* in

the state is liable for" various classes of injuries, and section 101.025, which allows a person to "sue a *governmental unit* for damages allowed by this chapter." *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, .025(b) (emphasis added). Thus, it is apparent that the Legislature's purpose in defining "governmental unit" in section 101.001(3) was to create a term that would conceptually include all entities entitled to assert immunity from suit at common law so that the waiver of immunity in sections 101.021 and 101.025 would be effective for all such entities.

Any assertion that the Legislature meant to include within the scope of the term "governmental unit" additional entities beyond those that were understood to be entitled to assert immunity is unsupported by the language of the Tort Claims Act, as all references to "governmental unit" in the Act either support, or follow from, the broader legislative purpose of a limited waiver.

Accordingly, when an entity is deemed to be a "governmental unit" as defined in the Tort Claims Act, it should be understood to be among the class of entities entitled to assert immunity from suit. *See, e.g., Christus Spohn Health Sys. Corp. v. Ven Huizen*, No. 13-10-400-CV, 2011 WL 1900174 (Tex. App.—Corpus Christi May 19, 2011, pet. denied) (holding that hospital district management contractor was entitled to assert immunity from suit because it is considered a governmental unit for Tort Claims Act purposes).

Concluding that ERCOT is a governmental unit for purposes of establishing jurisdiction over an interlocutory appeal but then denying ERCOT the corresponding immunity its acknowledged governmental status should bestow would be inconsistent and unfair. Either ERCOT is a governmental unit for all purposes under the Tort Claims Act, or it is not a governmental unit for any purpose under the Act. ERCOT maintains that it is not a governmental unit, but if it is, it should be entitled to assert sovereign immunity from suit in this and all other cases where such immunity may otherwise be validly asserted.

If this Court determines that it has jurisdiction over this appeal because ERCOT is a governmental unit, then the trial court lacked jurisdiction over HWY 3's counterclaims for the additional reason that ERCOT is entitled to immunity from suit. Immunity from suit deprives a trial court of jurisdiction to hear claims against the governmental entity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

D. The trial court properly dismissed HWY 3's claims with prejudice to refiling.

Although PUC Rule 22.251 establishes a process for appealing ERCOT decisions, HWY 3 can no longer avail itself of this process because it must be commenced "within 35 days of the ERCOT conduct complained of" or within 35

days of the date the ERCOT-level dispute resolution process was completed.[95] Indeed, HWY 3 waived its right to seek relief at the PUC in the first instance by failing to file a dispute with ERCOT, as required by Section 10.A. of the Standard Form Agreement and Section 22.251 of the PUC's Procedural Rules.[96]

HWY 3's failure to timely file a dispute with the PUC is an incurable jurisdictional defect, requiring the dismissal of its claims with prejudice. *See Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (concluding that, where time for submitting claims subject to agency's exclusive jurisdiction had lapsed, such claims "would no longer be viable and should be dismissed."); *Apollo Enterprises, Inc. v. ScripNet, Inc.*, 301 S.W.3d 848, 867 (Tex. App.—Austin 2009, no pet.) (holding that failure to submit medical fee dispute before agency-imposed deadline was incurable jurisdictional defect requiring dismissal of dispute).

IX. Conclusion and Prayer

HWY 3 has improperly attempted to invoke this Court's jurisdiction. The Court has no jurisdiction over this appeal because ERCOT is not a governmental unit as defined in the Tort Claims Act and because this appeal would not serve the recognized purpose of interlocutory appellate review. If the Court accepts jurisdiction over this appeal, however, it should affirm the trial court's dismissal of

[95] *See* PUC Proc. R. 22.251(d) (16 TEX. ADMIN. CODE § 22.251(d)).
[96] *See id.* ("An entity must use Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures, or ADR), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures, before presenting a complaint to the commission.")

HWY 3's counterclaims because PURA unequivocally creates a pervasive regulatory scheme requiring the PUC's exclusive original jurisdiction of all disputes concerning the ERCOT Protocols. Alternatively, the Court should affirm the trial court's order on the basis that the claims were properly dismissed because ERCOT, as a governmental unit, is entitled to sovereign immunity from suit.

For the foregoing reasons, ERCOT requests that the Court dismiss this appeal, or alternatively, that it affirm the order of the trial court dismissing HWY 3's counterclaims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because the word court reported by Microsoft Word states that this brief contains 14,683 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it uses Times New Roman 14-point font for the text of the body and Times New Roman 12-point font in the text of the footnotes.

/s/ J. Hampton Skelton
J. Hampton Skelton

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, a true and correct copy of the foregoing document was electronically filed using a certified Electronic Filing Service Provider, which will send electronic notification of such filing to counsel of record, and via email to:

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App. E

461 S.W.3d 117
Supreme Court of Texas.

BROWN & GAY ENGINEERING, INC., Petitioner,
v.
Zuleima OLIVARES, Individually and as the Representative of the Estate of Pedro Olivares, Jr., & Pedro Olivares, Respondents

No. 13–0605
|
Argued October 15, 2014
|
Opinion Delivered: April 24, 2015

Synopsis
Background: Representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on a tollway brought an action against various entities, including private engineering firm that was contracted by county toll road authority to design the tollway. The 334th District Court, Harris County, Kenneth Price Wise, J., granted firm's plea to the jurisdiction based on governmental immunity under the Texas Tort Claims Act. Representative appealed. The Houston Court of Appeals, Fourteenth District, 401 S.W.3d 363, reversed and remanded. Firm petitioned for review.

Holdings: As matters of apparent first impression, the Supreme Court, Lehrmann, J., held that:

[1] extension of sovereign immunity to firm would not further the doctrine's rationale, and

[2] firm was not entitled to share in authority's sovereign immunity on the ground that authority was statutorily authorized to engage firm's services and would have been immune had it performed those services itself.

Affirmed.

Hecht, C.J., concurred in judgment and filed opinion in which Willett and Guzman, JJ., joined.

See also 316 S.W.3d 114.

West Headnotes (13)

[1] **States** Conditions and restrictions
States Necessity of Consent
"Sovereign immunity" is the doctrine that no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.

3 Cases that cite this headnote

[2] **Municipal Corporations** Capacity to sue or be sued in general

Referred to as "governmental immunity" when applied to the state's political subdivisions, sovereign immunity encompasses both immunity from suit and immunity from liability.

14 Cases that cite this headnote

[3] **Municipal Corporations** Capacity to sue or be sued in general

"Immunity from liability" is an affirmative defense that bars enforcement of a judgment against a governmental entity, while "immunity from suit" bars suit against the entity altogether and may be raised in a plea to the jurisdiction.

5 Cases that cite this headnote

[4] **Municipal Corporations** Capacity to sue or be sued in general

States Liability and Consent of State to Be Sued in General

Doctrine of sovereign immunity protects the state and its political subdivisions from lawsuits for monetary damages and other forms of relief and leaves to the legislature the determination of when to allow tax resources to be shifted away from their intended purposes toward defending lawsuits and paying judgments.

3 Cases that cite this headnote

[5] **States** Power to Waive Immunity or Consent to Suit

While inherently connected to the protection of the public fisc, sovereign immunity preserves separation-of-powers principles by preventing the judiciary from interfering with the legislature's prerogative to allocate tax dollars.

5 Cases that cite this headnote

[6] **States** Independent contractors

That a statute recognizes that private contractors are not entitled to sovereign immunity under certain circumstances, such as when a private party contracts with the government to finance, construct, operate, maintain, or manage correctional facilities, does not imply that such entities are entitled to immunity in all other situations. Tex. Gov't Code Ann. §§ 495.001, 495.005.

3 Cases that cite this headnote

[7] **States** Liability and Consent of State to Be Sued in General

States Necessity of constitutional or statutory consent

Sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine and to determine under what circumstances sovereign immunity exists in the first instance; by contrast, the legislature determines when and to what extent to waive that immunity.

6 Cases that cite this headnote

[8] **States** Independent contractors

Absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising their independent discretion in performing government functions.

17 Cases that cite this headnote

[9] **Automobiles** Liabilities of contractors, public utilities, and others

Extension of sovereign immunity to private engineering firm that was contracted by county toll road authority to design a tollway would not further the doctrine's rationale, in a case in which firm was sued by representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on the tollway; sovereign immunity was designed to guard against the unforeseen expenditures associated with the government's defending lawsuits and paying judgments that could hamper government functions by diverting funds from their allocated purposes, and immunizing firm would in no way further that rationale.

6 Cases that cite this headnote

[10] **Automobiles** Liabilities of contractors, public utilities, and others

Private engineering firm that was contracted by county toll road authority to design a tollway was not entitled to share in authority's sovereign immunity on the ground that authority was statutorily authorized to engage firm's services and would have been immune had it performed those services itself, in a case which firm was sued by representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on the tollway; the lawsuit did not threaten allocated government funds and did not seek to hold firm responsible merely for following authority's directions, and firm was responsible for its own alleged negligence as a cost of doing business and could insure against that risk.

2 Cases that cite this headnote

[11] **Public Employment** Qualified immunity

Unlike sovereign immunity,“ qualified immunity” does not protect the government's tax-funded coffers from lawsuits and monetary judgments; rather, it protects government officials' personal coffers by shielding officials from harassment, distraction, and liability when they perform their duties reasonably.

Cases that cite this headnote

[12] **Public Employment** Qualified immunity

Qualified immunity is a uniquely federal doctrine.

3 Cases that cite this headnote

[13] **Public Employment** Privilege or immunity in general

Public Employment Privilege or immunity in general

Unlike sovereign immunity from suit, which may be raised in a plea to the jurisdiction, “official immunity” is an affirmative defense that must be pled and proved by the party asserting it.

11 Cases that cite this headnote

*119 ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

Justice Lehrmann delivered the opinion of the Court, in which Justice Green, Justice Johnson, Justice Boyd, and Justice Devine joined.

The doctrine of sovereign immunity bars suit against the government absent legislative consent. In this case, a private engineering firm lawfully contracted with a governmental unit to design and construct a roadway, and a third party sued the firm for negligence in carrying out its responsibilities. The firm filed a plea to the jurisdiction seeking the same sovereign-immunity protection that the governmental unit would enjoy had it performed the work itself. The trial court granted the plea, but the court of appeals reversed, holding that the firm was not immune from suit. We hold that extending sovereign immunity to the engineering firm does not serve the purposes underlying the doctrine, and we therefore decline to do so. Accordingly, we affirm the court of appeals' judgment.

I. Background

During the early hours of January 1, 2007, an intoxicated driver entered an exit ramp of the Westpark Tollway in Fort Bend County. He proceeded east in the westbound lanes for approximately eight miles before colliding with a car driven by Pedro Olivares, Jr. Both drivers were killed.

The Fort Bend County portion of the Tollway fell under the purview of the Fort Bend County Toll Road Authority, a local government corporation created to design, build, and operate the Tollway. Rather than utilize government employees to carry out its responsibilities, the Authority entered into an Engineering Services Agreement with Brown & Gay Engineering, Inc. pursuant to Texas Transportation Code section 431.066(b), which authorizes local government corporations to retain "engineering services required to develop a transportation facility or system." Under that agreement, the Authority delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority's Board of Directors.[1] Brown & Gay was contractually responsible for furnishing the necessary equipment and personnel to perform its duties and was required to *120 maintain insurance for the project, including workers' compensation, commercial general liability, business automobile liability, umbrella excess liability, and professional liability.

1 The Authority maintained no full-time employees.

Olivares's mother, individually and as representative of his estate, and his father sued the Authority and Brown & Gay, among others,[2] alleging that the failure to design and install proper signs, warning flashers, and other traffic-control devices around the exit ramp where the intoxicated driver entered the Tollway proximately caused Olivares's death. The Authority filed a plea to the jurisdiction on governmental-immunity grounds. The trial court denied the plea, but on interlocutory appeal the court of appeals reversed, holding that the Authority was immune from claims based on its discretionary acts related to the placement and sufficiency of signs and other traffic-control and traffic-safety devices. *Fort Bend Cnty. Toll Road Auth. v. Olivares,* 316 S.W.3d 114, 121–26 (Tex.App.–Houston [14th Dist.] 2010, no pet.). The court of appeals remanded the case to the trial court to give the Olivareses an opportunity to amend their pleadings. *Id.* at 129. On remand, the Olivareses nonsuited the Authority, whose immunity is no longer at issue in this proceeding.

2 The Olivareses initially sued the Authority, Harris County, Fort Bend County, the Texas Department of Transportation, and the Harris County Toll Road Authority. They amended their petition to add Brown & Gay and Michael Stone Enterprises, Inc. as defendants. Harris County, Fort Bend County, TxDOT, and the Harris County Toll Road Authority have all been nonsuited. Stone Enterprises is not a party to the petition for review filed in this Court.

Brown & Gay then filed its own plea to the jurisdiction, arguing that it was an employee of the Authority being sued in its official capacity and was therefore entitled to governmental immunity. *See Tex. Adjutant General's Office v. Ngakoue,* 408 S.W.3d 350, 356 (Tex.2013) (explaining that a suit against a government official acting in an official capacity is "merely another way of pleading an action against the entity of which the official is an agent" (internal quotation marks and citation omitted)). The trial court granted the plea, but the court of appeals reversed, holding that Brown & Gay was not entitled to governmental immunity because it was an independent contractor, not an "employee" of the Authority as that term is defined in the Texas Tort Claims Act.[3] 401 S.W.3d 363, 378–79 (Tex.App.–Houston [14th Dist.] 2013).

3 The Tort Claims Act defines "employee" as "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." TEX. CIV. PRAC. & REM. CODE § 101.001(2).

In this Court, Brown & Gay argues that its status as an independent contractor rather than a government employee does not foreclose its entitlement to the same immunity afforded to the Authority. It argues that the court of appeals' reliance on the Tort Claims Act was misplaced because the Act "uses 'employee' to delineate the circumstances where the government will be liable under a waiver of immunity," not "to limit the scope of ... unwaived governmental immunity." Brown & Gay further argues that the purposes of sovereign immunity are served by extending it to private entities performing authorized governmental functions for which the government itself would be immune.

*121 II. Analysis

A. Origin and Purpose of Sovereign Immunity

[1] [2] [3] Once again we are presented with questions about the parameters of sovereign immunity, the well-established doctrine "that 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.' " *Tooke v. City of Mexia,* 197 S.W.3d 325, 331 (Tex.2006) (quoting *Hosner v. DeYoung,* 1 Tex. 764, 769 (1847)). While sovereign immunity developed as a common-law doctrine, we "have consistently deferred to the Legislature to waive such immunity." *Reata Constr. Corp. v. City of Dall.,* 197 S.W.3d 371, 375 (Tex.2006) (emphasis omitted). Referred to as governmental immunity when applied to the state's political subdivisions,[4] *Travis Cent. Appraisal Dist. v. Norman,* 342 S.W.3d 54, 57–58 (Tex.2011), sovereign immunity encompasses both immunity from suit and immunity from liability, *Reata Constr. Corp.,* 197 S.W.3d at 374. Immunity from liability is an affirmative defense that bars enforcement of a judgment against a governmental entity, while immunity from suit bars suit against

the entity altogether and may be raised in a plea to the jurisdiction. *State v. Lueck,* 290 S.W.3d 876, 880 (Tex.2009); *Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 696 (Tex.2003).

4 We will use the term sovereign immunity throughout the remainder of the opinion to refer to both doctrines.

[4] **[5]** Although the doctrine's origins lie in the antiquated "feudal fiction that 'the King can do no wrong,' " modern-day justifications revolve around protecting the public treasury. *Taylor,* 106 S.W.3d at 695. At its core, the doctrine "protects the State [and its political subdivisions] from lawsuits for money damages" and other forms of relief, and leaves to the Legislature the determination of when to allow tax resources to be shifted "away from their intended purposes toward defending lawsuits and paying judgments." *Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 853–54 (Tex.2002) (plurality op.); *see also Tex. Dep't of Transp. v. Sefzik,* 355 S.W.3d 618, 621 (Tex.2011) (per curiam) (noting that sovereign immunity "shield[s] the state from lawsuits seeking other forms of relief," not just suits seeking money judgments). And while inherently connected to the protection of the public fisc, sovereign immunity preserves separation-of-powers principles by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars. *See Rusk State Hosp. v. Black,* 392 S.W.3d 88, 97 (Tex.2012) (noting that immunity respects "the relationship between the legislative and judicial branches of government"); *see also Fed. Sign v. Tex. S. Univ.,* 951 S.W.2d 401, 414 (Tex.1997) (Hecht, J., concurring) (outlining modern political and financial justifications for sovereign immunity).

Sovereign immunity thus protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation. It also recognizes that the Legislature has the responsibility to determine how these public funds will be spent. But with this benefit comes a significant cost: in "shield[ing] the public from the costs and consequences of improvident actions of their governments," *Tooke,* 197 S.W.3d at 332, sovereign immunity places the burden of shouldering those "costs and consequences" on injured individuals. *See* ***122** *Bacon v. Tex. Historical Comm'n,* 411 S.W.3d 161, 172 (Tex.App.–Austin 2013, no pet.) (noting that "sovereign immunity generally shields our state government's improvident acts—however improvident, harsh, unjust, or infuriatingly boneheaded these acts may seem" (internal quotation marks and citation omitted)). And it does so by foreclosing—absent a legislative waiver—the litigation and judicial remedies that would be available to the injured person had the complained-of acts been committed by private persons. *Id.*

In this case, we do not consider whether a governmental unit is immune from suit or whether the government's immunity has been waived. Instead, a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit seeks to invoke the same immunity that the government itself enjoys. With the considerations outlined above in mind, we examine the parties' arguments.

B. Effect of Statutes Extending or Limiting Immunity

[6] Notwithstanding the doctrine's judicial origins, both parties argue in part that the Legislature has resolved whether to extend sovereign immunity to a private contractor like Brown & Gay. Brown & Gay cites a statute that explicitly prohibits private parties that contract with the government to finance, construct, operate, maintain, or manage correctional facilities from claiming sovereign immunity in a suit arising from services under the contract. TEX. GOV'T CODE §§ 495.001, .005. [5] Brown & Gay infers from this provision that sovereign immunity extends to private entities contracting to perform government functions, unless otherwise provided by statute. We disagree. The fact that a statute recognizes that private contractors are not entitled to sovereign immunity under certain circumstances does not imply that such entities are entitled to immunity in all other situations.

5 "A private vendor operating under a contract authorized by this subchapter may not claim sovereign immunity in a suit arising from the services performed under the contract by the private vendor or county." TEX. GOV'T CODE § 495.005.

On the other hand, the Olivareses contend that affirmative statutory extensions of immunity to private contractors in some instances demonstrate legislative intent to foreclose such immunity absent a specific legislative grant. For example, the Transportation Code provides that an independent contractor of a regional transportation authority that "performs a function of the authority or [certain other specified entities] is liable for damages only to the extent that the authority or entity would be liable" for performing the function itself. TEX. TRANSP. CODE § 452.056; *see also id.* § 452.0561 (extending the same immunity to independent contractors of certain statutory transportation entities). The Olivareses argue that the absence of similar legislation applicable to contractors of local government corporations like the Authority evinces legislative intent to deprive such contractors of immunity. That may be the case, but it does not answer the question before us.

[7] **[8]** Sovereign immunity is a common-law creation, and "it remains the judiciary's responsibility to define the boundaries of the ... doctrine and to determine under what circumstances sovereign immunity exists in the first instance." *Reata Constr. Corp.,* 197 S.W.3d at 375. By contrast, as noted above, the Legislature determines when and to what extent to waive that immunity. *Id.* Accordingly, the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity ***123** encompass private government contractors exercising their independent discretion in performing government functions. [6] For the reasons discussed below, we hold that they do not.

6 To that end, Brown & Gay is correct that the Tort Claims Act does not create sovereign immunity; it "provides a limited waiver" of that immunity. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 224 (Tex.2004).

C. Sovereign Immunity and Private Contractors

1. Extending Sovereign Immunity to Brown & Gay Does Not Further the Doctrine's Rationale and Purpose

[9] Guiding our analysis of whether to extend sovereign immunity to private contractors like Brown & Gay is whether doing so comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine. Brown & Gay contends that extending immunity serves these purposes. We disagree.

Seizing on the general purpose of protecting the public fisc, Brown & Gay argues that immunity for government contractors will save the government money in the long term. More specifically, while Brown & Gay recognizes that its exposure to defense costs and a money judgment will not affect the Tollway project's cost to the government, Brown & Gay asserts that the increased costs generally associated with contractors' litigation exposure will be passed on to the government, resulting in higher contract prices and government expense. Citing the same rationale, an amicus brief urges us to adopt a framework that would extend sovereign immunity to a private entity performing discretionary government work, so long as the contractor is authorized to do so and the government would be immune had it performed the work itself. In proposing this test, the amicus contends that, just as sovereign immunity has been extended to political subdivisions performing governmental functions, it should be extended to private entities authorized to perform those functions.

As an initial matter, we note that Brown & Gay cites no evidence to support its proposed justification and ignores the many factors at play within the highly competitive world of government-contract bidding. It also disregards the fact that private companies can and do manage their risk exposure by obtaining insurance, as Brown & Gay did in this case. But even assuming that holding private entities liable for their own negligence in fact makes contracting with those entities more expensive for the government, this argument supports extending sovereign immunity to these contractors only if the doctrine is strictly a cost-saving measure. It is not.

Sovereign immunity has never been defended as a mechanism to avoid any and all increases in public expenditures. Rather, it was designed to guard against the "unforeseen expenditures" associated with the government's defending

lawsuits and paying judgments "that could hamper government functions" by diverting funds from their allocated purposes. *Sefzik,* 355 S.W.3d at 621; *IT–Davy,* 74 S.W.3d at 853. Immunizing a private contractor in no way furthers this rationale. Even if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price. This allows the government to plan spending on the project with reasonable accuracy.

***124** By contrast, immunizing the government—both the State and its political subdivisions—from suit directly serves the doctrine's purposes because the costs associated with a potential lawsuit cannot be anticipated at the project's outset. Litigation against the government therefore disrupts the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose. [7] It is this diversion—and the associated risk of disrupting government services—that sovereign immunity addresses. Accordingly, the rationale underlying the doctrine of sovereign immunity does not support extending that immunity to Brown & Gay.

7 As noted above, private parties like Brown & Gay have an established means of protecting themselves from the specter of costly litigation—insurance. Indeed, as noted above Brown & Gay was contractually required to, and did, purchase several categories of insurance coverage on the Tollway project. The premiums for this coverage were undoubtedly taken into account during the bidding process.

2. Sovereign Immunity Does Not Extend to Private Companies Exercising Independent Discretion

[10] We have never directly addressed the extension of immunity to private government contractors, but our analysis in *K.D.F. v. Rex,* 878 S.W.2d 589 (Tex.1994), is instructive. In that case, we examined whether a private company that contracted with the Kansas Public Employees' Retirement System, a Kansas governmental entity created to manage and invest Kansas state employees' retirement savings, could benefit from the system's sovereign immunity and take advantage of a Kansas statute that required all "actions 'directly or indirectly' against the system" to be brought in a particular county in Kansas. *Id.* at 592. *K.D.F.* required us to interpret statutory language that is not at issue here; however, in rejecting the private company's assertion that any lawsuit against it was "indirectly" a lawsuit against the system, we tellingly noted:

> While sovereign immunity protects the activities of government entities, no sovereign is entitled to extend that protection *ad infinitum* through nothing more than private contracts. [The private entity] is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the Kansas government, executed subject to the control of [the system].

Id. at 597. In turn, we held that another private company that "operate [d] solely upon the direction of [the system]" and "exercise[d] no discretion in its activities" was indistinguishable from the system, such that "a lawsuit against one [wa]s a lawsuit against the other." *Id.* This reasoning implies that private parties exercising independent discretion are not entitled to sovereign immunity.

The control requirement discussed in *K.D.F.* is consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances. For example, in *Butters v. Vance International, Inc.,* a female employee of a private security firm hired to supplement security at the California residence of Saudi Arabian royals sued the firm for gender discrimination after being declined a favorable assignment. 225 F.3d 462, 464 (4th Cir.2000). Although the firm had recommended the employee for the assignment, Saudi military supervisors rejected the recommendation on the grounds that the assignment would offend Islamic law and Saudi cultural norms. *Id.* Concluding that the Saudi government would be immune from suit under the Foreign Sovereign Immunities Act, the Fourth Circuit then considered ***125** whether that immunity attached to the security firm. *Id.* at 465. Holding that it did, the court relied on the fact that the firm "was following Saudi Arabia's orders not to promote [the employee]," expressly noting

that the firm "would not [have been] entitled to derivative immunity" had the firm rather than the sovereign made the decision to decline the promotion. *Id.* at 466.

This limitation on the extension of immunity to government contractors is echoed in other cases. For example, in *Ackerson v. Bean Dredging LLC,* federal contractors were sued for damages allegedly caused by dredging in conjunction with the Mississippi River Gulf Outlet project. 589 F.3d 196 (5th Cir.2009). Relying on *Yearsley v. W.A. Ross Construction Co.,* 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940), the Fifth Circuit held that the contractors were entitled to immunity for their actions taken within the scope of their authority for the purpose of furthering the project. 589 F.3d at 206–07, 210. [8] Notably, however, the court found significant that the plaintiffs' allegations "attack[ed] Congress's policy of creating and maintaining the [project], *not any separate act of negligence by the Contractor Defendants*." *Id.* at 207 (emphasis added); *see also Yearsley,* 309 U.S. at 20, 60 S.Ct. 413 (holding that a contractor directed by the federal government to construct several dikes was immune from claims arising from the resulting erosion and loss of property when the damage was allegedly caused by the dikes' existence, not the manner of their construction).

8 The Fifth Circuit noted that the contractors' entitlement to dismissal was not jurisdictional. 589 F.3d at 207.

We cited *Yearsley* in a case involving a city contractor hired to build sewer lines along a city-owned easement in accordance with the city's plans and specifications. *Glade v. Dietert,* 156 Tex. 382, 295 S.W.2d 642, 643 (1956). The city had inadvertently failed to acquire the entire easement as reflected in the plans, and the contractor was sued for trespass after bulldozing a portion of a landowner's property. *Id.* While immunity was not at issue in *Glade* because the city owed the landowner compensation for a taking, we cited *Yearsley* and other case law for the proposition that a public-works contractor "is liable to third parties only for negligence in the performance of the work and not for the result of the work performed according to the contract." *Id.* at 644.

In each of these cases, the complained-of conduct for which the contractor was immune was effectively attributed to the government. That is, the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government *through* the contractor. [9] In ***126** this case, the Olivareses do not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders. Under the contract at issue, Brown & Gay was responsible for preparing "drawings, specifications and details for all signs." Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown & Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay's decisions in designing the Tollway's safeguards are its own. [10]

9 One federal district court aptly summarized the framework governing the extension of derivative immunity to federal contractors as follows:

> The rationale underlying the government contractor defense is easy to understand. Where the government hires a contractor to perform a given task, and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications, the contractor is entitled to the same immunity the government would enjoy, because the contractor is, under those circumstances, effectively acting as an organ of government, without independent discretion. Where, however, the contractor is hired to perform the same task, but is allowed to exercise discretion in determining how the task should be accomplished, if the manner of performing the task ultimately causes actionable harm to a third party the contractor is not entitled to derivative sovereign immunity, because the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner. Similarly, where the contractor is hired to perform the task according to precise specifications but fails to comply with those specifications, and the contractor's deviation from the government specifications actionably harms a third party, the contractor is not entitled to immunity because, again, the harm was not caused by the government's insistence on a specified manner of performance but rather by the contractor's failure to act in accordance with the government's directives.

Bixby v. KBR, Inc., 748 F.Supp.2d 1224, 1242 (D.Or.2010).

10 At oral argument, Brown & Gay's counsel recognized that the details of the Tollway project, or the "discretionary functions" as put by counsel, were delegated to Brown & Gay.

Similar principles have been echoed in Texas appellate court decisions, cited by Brown & Gay, addressing the extension of immunity to private agents of the government. Two of these cases extended immunity to private law firms hired to assist the government with collecting unpaid taxes. *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.,* 333 S.W.3d 736 (Tex.App.–Houston [1st Dist.] 2010, no pet.); *City of Hous. v. First City,* 827 S.W.2d 462 (Tex.App.–Houston [1st Dist.] 1992, writ denied). In *City of Houston,* the court of appeals engaged in a traditional principal–agency analysis to hold that the law firm was not liable as the city's agent on the plaintiff's claim that the city breached an "accord and satisfaction." 827 S.W.2d at 479–80. In contrast, the Olivareses do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions.

In *Ross,* the court of appeals held that the law firm was the "equivalent of a state official or employee" being sued in its official capacity. 333 S.W.3d at 742–43. But Brown & Gay has notably abandoned the very argument that the case would seem to support: that the Olivareses sued Brown & Gay as a government employee in its official capacity and therefore effectively sued the government. Moreover, in determining whether the law firm was the equivalent of a state official in *Ross,* the court of appeals examined the pleadings to conclude that the plaintiff had sued the law firm as an agent of the taxing entity and had "asserted no facts indicating that the taxing entities did not have the legal right to control the details of the tax-collecting task delegated to [the firm]." *Id.*

Regardless of whether these cases were correctly decided, the government's right to control that led these courts to extend immunity to a private government contractor is utterly absent here. The evidence shows that Brown & Gay was an independent contractor with discretion to design the Tollway's signage and road layouts. We need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative. [11]

11 The amicus asserts that "no policy reason" supports employing a control-oriented analysis. In doing so, the amicus implicitly recognizes that policy concerns are central to deciding whether immunity should be extended. As discussed at length above, the policy behind immunity does not support its extension here regardless of whether a control-oriented analysis applies.

***127** Finally, Brown & Gay cites *Foster v. Teacher Retirement System,* 273 S.W.3d 883 (Tex.App.–Austin 2008, no pet.), to support the extension of immunity in this case. In that case, a retired teacher sued the Teacher Retirement System of Texas (a state agency) as well as Aetna, the private company hired to administer the agency's insurance plan. *Id.* at 885. The suit arose from Aetna's denial of health coverage on a claim after concluding that the provider was not in-network and the treatment was not medically necessary. *Id.* The court of appeals held that both the agency and Aetna were immune from suit for claims arising out of the coverage denial. *Id.* at 890. However, the terms of the contract, the relationship between the state agency and the contractor, and the direct implication of state funds in that case distinguish it from the case at hand.

In *Foster,* the court of appeals recognized that Aetna had discretion to interpret the insurance plan, but explained that, under the contract with the agency, "Aetna simply provide[d] administrative services to facilitate the provision of health care to [covered] retirees." *Id.* Further, the insurance plan was fully funded by the state such that Aetna had no stake in a claim's approval or denial, the agency set the terms of the plan, Aetna acted as an agent of and in a fiduciary capacity for the agency, and the agency agreed to indemnify Aetna for any obligations arising out of its good-faith performance. *Id.* at 889–90. The court compared Aetna to the "fiduciary intermediaries" discussed in federal case law holding that "a private company is protected by Eleventh Amendment immunity if the suit amounts to one seeking to recover money from the state." *Id.* at 889 (citing cases). In this case, no fiduciary relationship exists between Brown & Gay and the Authority. Further, in suing Brown & Gay the Olivareses do not effectively seek to recover money from the government. Unlike the coverage claims in *Foster,* which implicated both the state-funded insurance plan and the agency's duty to indemnify Aetna, the underlying suit threatens only Brown & Gay's pockets.

In sum, we cannot adopt Brown & Gay's contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself. That is, we decline to extend to private entities the same immunity the government enjoys for reasons unrelated to the rationale that justifies such immunity in the first place. The Olivareses' suit does not threaten allocated government funds and does not seek to hold Brown & Gay liable merely for following the government's directions. Brown & Gay is responsible for its own negligence as a cost of doing business and may (and did) insure against that risk, just as it would had it contracted with a private owner.

D. Justifications for Qualified and Official Immunity Do Not Support the Extension of Sovereign Immunity to Private Parties

In addition to the cost-saving rationale discussed above, Brown & Gay cites the U.S. Supreme Court's opinion in *Filarsky v. Delia* to argue that extending sovereign immunity to government contractors advances the government interest in avoiding "unwarranted timidity" on the part of those performing public duties. ***128** —— U.S. ——, 132 S.Ct. 1657, 1665, 182 L.Ed.2d 662 (2012). The issue in *Filarsky* was whether individuals hired to do government work "on something other than a permanent or full-time basis" enjoyed the same qualified immunity as traditional government employees from claims brought against them under 42 U.S.C. § 1983. *Id.* at 1660. The Supreme Court held that a private attorney engaged by a city to investigate a personnel matter could assert qualified immunity in a suit alleging constitutional violations committed during the course of the investigation. *Id.* at 1661, 1667–68. The Court saw no basis to distinguish between a full-time government employee, who would be entitled to assert such immunity, and an individual hired to do government work on some other basis. *Id.*

[11] Brown & Gay's reliance on *Filarsky* 's qualified-immunity analysis is misplaced. The federal doctrine of qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Unlike sovereign immunity, qualified immunity does not protect the government's tax-funded coffers from lawsuits and money judgments. Rather, it protects government officials' personal coffers by "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

[12] **[13]** Qualified immunity is a uniquely federal doctrine, calling into further doubt *Filarsky* 's relevance to the issue in this case. At best, the doctrine bears some resemblance to the Texas common-law defense of official immunity, which protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority.[12] *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex.1994); see also *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex.2004) ("Common law official immunity is based on the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation."). In *Kassen*, we noted the well-established distinction between "official immunity, which protects individual officials from liability, [and] sovereign immunity, which protects governmental entities from liability." 887 S.W.2d at 8. We also recognized that a government employee's right to official immunity is unrelated to a plaintiff's right to pursue the government under a legislative waiver of sovereign immunity. *Id.* Further, unlike sovereign immunity from suit, which as noted above may be raised in a plea to the jurisdiction, official immunity is an affirmative defense that must be pled and proved by the party asserting it. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994).

12 In *City of Lancaster v. Chambers,* we noted that federal law on qualified immunity was instructive in evaluating whether a police officer was entitled to official immunity for his actions in conducting a high-speed chase. 883 S.W.2d 650, 654 (Tex.1994).

In this case, Brown & Gay has never argued that the official-immunity defense may be asserted by a person performing government work "on something other than a permanent or full-time basis." *Filarsky,* 132 S.Ct. at 1660. Nor has it ever pled or argued that the elements of the defense are satisfied here. Instead, Brown & Gay argues that it is entitled to the same immunity that the government ***129** itself enjoys. But the policies underlying official and qualified immunity are simply irrelevant to that contention.

Brown & Gay also argues that declining to extend sovereign immunity to contractors like Brown & Gay will make it difficult for the government to engage talented private parties fearful of personal liability. As noted above, such speculation fails to take into account a private party's ability to manage that liability exposure through insurance. It also ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay.

Moreover, a long line of Texas case law recognizes government contractors' liability for their negligence in road and highway construction. *See, e.g., Bay, Inc. v. Ramos,* 139 S.W.3d 322, 328 (Tex.App.–San Antonio 2004, pet. denied) (holding that a government contractor hired for highway construction work was not entitled to share in the state's sovereign immunity when the contractor exercised considerable discretion in maintaining the construction site where the plaintiff's injury occurred); *Overstreet v. McClelland,* 13 S.W.2d 990, 992 (Tex.Civ.App.–Amarillo 1928, writ dism'd w.o.j.) (holding that a government contractor hired for highway construction work had a duty to exercise ordinary care to protect travelers using the highway despite the fact that the government itself could not be held liable for the negligence of its officers or agents); *cf. Strakos v. Gehring*, 360 S.W.2d 787, 790, 793–94 (Tex.1962) (holding, in the context of rejecting the "accepted work" doctrine, that a county contractor hired to relocate fencing alongside widened roads was not insulated from tort liability for injuries that occurred after the county accepted the work but were caused by the condition in which the contractor left the premises). Brown & Gay cites no evidence supporting a shortage of willing contractors notwithstanding this line of cases.

III. Conclusion

We decline to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so. We hold that the trial court erred in granting Brown & Gay's plea to the jurisdiction and that the court of appeals properly reversed that order. Accordingly, we affirm the court of appeals' judgment.

Chief Justice Hecht filed an opinion concurring in the judgment, in which Justice Willett and Justice Guzman joined.

Justice Brown did not participate in the decision.

Chief Justice Hecht, joined by Justice Willett and Justice Guzman, concurring in the judgment.
Immunity protects the government. An independent contractor is not the government. Therefore, immunity does not protect an independent contractor. That simple syllogism seems to me to resolve this case.

An independent contractor may act *as* the government, in effect becoming the government for limited purposes, and when it does, it should be entitled to the government's immunity. A statutory example is Section 452.0561 of the Transportation Code, which provides that "[a]n independent contractor ... performing a function of [certain public transportation entities] is liable for damages only to the extent that the entity ... would be liable if the entity ... itself were performing the ***130** function." [1] The Court cites several cases providing other examples. But an independent contractor acting only in the service of the government is not a government actor. A statutory example of this is Section 495.005 of the

Government Code, which provides that "[a] private vendor operating under a contract [for correctional facilities and services] may not claim sovereign immunity in a suit arising from the services performed". [2]

1 TEX. TRANSP. CODE § 452.0561; *see also id.* § 452.056(d) ("[A]n independent contractor ... that ... performs a function of [a regional transportation authority or certain other public transportation entities] is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function...."); *id.* § 454.002(b) ("An independent contractor that on behalf of a municipality provides mass transportation service that is an essential governmental function ... is liable for damages only to the extent that the municipality would be liable if the municipality were performing the function."); *id.* § 460.105(c) ("[A]n independent contractor of [a coordinated county transportation authority] that performs a function of the authority is liable for damages only to the extent that the authority would be liable if the [authority] itself were performing the function.").

2 *Id.* § 495.005.

In determining whether an independent contractor is acting *as* or only *for* the government, the extent of the government's control over the independent contractor's actions is relevant but not conclusive. For example, the government's control over its lawyer is necessarily limited by the lawyer's duty under the rules of professional conduct to "exercise independent professional judgment" in representing a client. [3] That limited control notwithstanding, a lawyer has been said to be immune from suit for his conduct in representing a governmental entity. [4] Courts have concluded that a construction contractor's immunity from suit may depend, not on a governmental entity's control over the contractor's work, but rather over whether the suit complains of the very existence of a project, a governmental decision, as opposed to the contractor's performance. [5] A contractor may act for itself in the sense that it is liable for negligent performance of its work, but insofar as it is simply implementing the government's decisions it is entitled to the government's immunity. [6] An independent contractor's authority or even agency to serve the government are also relevant, but the ultimate issue is whether the independent contractor is actually authorized by the government to act in its place.

3 TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01.

4 *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.,* 333 S.W.3d 736, 742, 745–747 (Tex.App.–Houston [1st Dist.] 2010, no pet.).

5 *See Yearsley v. W.A. Ross Constr. Co.,* 309 U.S. 18, 20–21, 60 S.Ct. 413, 84 L.Ed. 554 (1940) (federal contractor immune from liability where the lawsuit attacked dikes' existence rather than the method of construction); *Ackerson v. Bean Dredging LLC,* 589 F.3d 196 (5th Cir.2009) (concluding that federal contractors were entitled to *Yearsley* 's "government-contractor immunity" from liability where the lawsuit attacked Congress's project rather than contractors' own acts).

6 We recognized in *Allen Keller Co. v. Foreman,* 343 S.W.3d 420, 425–426 (Tex.2011), that a government contractor owes no duty of care to design a highway project safely where the contractor acts in strict compliance with the governmental entity's specifications. We distinguished between "the duties that may be imposed upon a contractor that has some discretion in performing the contract and a contractor that is left none". *Id.* at 425 (citing *Strakos v. Gehring,* 360 S.W.2d 787, 803 (Tex.1962) (op. on rehearing)). That such a contractor acts as the government and may therefore be entitled to its immunity follows from the same principle.

The Fort Bend County Toll Road Authority tasked Brown & Gay with selecting ***131** and designing road signs and supervised the firm's work. But the Authority did not tell Brown & Gay *how* to do the work. The discretion Brown & Gay retained separated it from the Authority and thus from the Authority's immunity. [7] I therefore concur in the Court's judgment.

7 The Legislature has also recognized that compliance with governmental direction may be a prerequisite for limits on liability. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 97.002 ("A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from

> the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.").

But I cannot join its opinion. In my view, it is unnecessary, and also incorrect, to argue, as the Court does, that affording a highway contractor immunity does not serve immunity's purpose in shielding the government from financial liability. Brown & Gay argues that contractor liability, or the cost of insurance to cover it, increases construction costs, and consequently contract costs to the government, long-term. The Court's response is that the purpose of immunity is only to protect the government from *unforeseen* expenditures, not merely to save costs. The Court's position is contradicted by the very authority on which it relies: "While the doctrine of sovereign immunity originated to protect the public fisc from unforeseen expenditures that could hamper governmental functions, *it has been used to shield the state from lawsuits seeking other forms of relief*".[8] The Court's restricted view of the purpose of immunity is not supported by authority.

8 *Tex. Dept. of Transp. v. Sefzik,* 355 S.W.3d 618, 621 (Tex.2011) (per curiam) (emphasis added) (citations omitted).

All Citations

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