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January 6, 2023

**Via E-Filing**

Mr. Blake Hawthorne, Clerk  
Supreme Court of Texas

Re: No. 22-0196, *ERCOT v. Panda Power Funds*  
No. 22-0056, *CPS Energy v. ERCOT*  
No. 21-0834, *In re ERCOT*

Dear Mr. Hawthorne:

In his capacity as “the Chief Executive Officer of the State,” Governor Greg Abbott submits this letter brief as amicus curiae supporting ERCOT in the above-captioned cases. TEX. CONST. art. IV, § 1. The Court should reverse and render in No. 22-0196, and either affirm in No. 22-0056 or else grant mandamus relief in No. 21-0834.\*

To ensure the reliability of Texas’s electric grid, the Legislature has conferred authority upon the Public Utility Commission and put ERCOT at that agency’s complete disposal. *See, e.g.*, TEX. UTIL. CODE § 39.151. But ERCOT cannot serve this important governmental function if it is subject to competing commands and retrospective money judgments from district judges scattered across our 254 counties. *See, e.g.*, PUC Amicus Br. 1 (No. 22-0196); PUC Amicus Br. 1–2 (Nos. 22-0056 & 21-0834); Calpine Amicus Br. 3–7 (No. 22-0056).

The Court should solve this too-many-cooks problem by recognizing ERCOT’s governmental immunity, acknowledging PUC’s exclusive jurisdiction, or both. By choosing any of those doctrinal options, the

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\* No fee was paid or will be paid for preparing this brief. *See* TEX. R. APP. P. 11(c).

Judicial Branch can avoid upsetting the grid-regulating system that the Legislative Branch has carefully crafted for the Executive Branch.

It has been suggested that separation-of-powers doctrine cuts against ERCOT here. Specifically, one of the parties purports to flag “serious constitutional concerns under non-delegation principles” because ERCOT is a private entity seeking governmental immunity. Panda Br. 29–30 (No. 22-0196); *see also* NASP Amicus Br. 13–16 (No. 22-0196) (suggesting that “PURA should be struck down as constitutionally invalid”). ERCOT, though, is not some run-of-the-mill private entity. *See, e.g.*, ERCOT Br. 17–34 (No.22-0196). In any event, those concerns are overblown under this Court’s eight-factor standard. *See, e.g.*, *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1997); *TWC v. Patient Advocates*, 136 S.W.3d 643, 653–54 (Tex. 2004). “The Legislature can . . . delegate authority to private entities if the legislative purpose is discernible and there is protection against the arbitrary exercise of power,” and that is just what it did with ERCOT. *Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998) (internal quotation marks omitted).

PUC can and does delegate rulemaking authority to ERCOT. *See* TEX. UTIL. CODE § 39.151(d). Even if a quasi-public entity like ERCOT were treated as private for nondelegation purposes, *cf. Boll Weevil*, 952 S.W.2d at 470–71, most of the Court’s eight factors cut in favor of this delegation’s constitutionality, *see id.* at 472. First, and most importantly, PUC’s “complete authority” over ERCOT expressly allows for meaningful review, on pain of “decertif[ication or] an administrative penalty,” insofar as ERCOT’s rules “are subject to [PUC] oversight and review and may not take effect before receiving [PUC] approval.” TEX. UTIL. CODE § 39.151(d). Second, market participants affected by ERCOT’s rules can participate in the process of amending them and can appeal unfavorable decisions to PUC. *See* 16 TEX. ADMIN. CODE § 25.362. Third, ERCOT has no pecuniary interest that conflicts with its rulemaking function, for its PUC certification requires ERCOT to be so “independent . . . that its decisions will not be unduly influenced by any producer or seller.” TEX. UTIL. CODE § 39.151(b). Fourth, PUC itself has declared that “ERCOT has no power to impose criminal sanctions against any individual.” *In re Enforcement of Wholesale Market Rules*, 2004 WL 367935, at \*80. Fifth,

members of ERCOT's governing body, some of them public officials, are selected by a governmentally appointed committee on the basis of their special qualifications or training. *See* TEX. UTIL. CODE §§ 39.151(g-1), 39.1513. Sixth, the Legislature has provided sufficient standards to guide ERCOT's work. *See id.* § 39.151(a)(1)–(4).

In short, ERCOT does not present the kind of “extraordinary case” that warrants a departure from the admonition that “[t]he nondelegation doctrine should be used sparingly.” *Boll Weevil*, 952 S.W.2d at 475. There is no good reason to doubt the constitutionality of the statutory scheme for regulating Texas's electric grid. This Court should instead respect the Legislature's work by pulling grievances against ERCOT out of the lower courts, redirecting them to PUC in the first instance for expert adjudication, and then standing ready to provide orderly judicial review of any administrative action.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 711 words, excluding the exempted portions of the document.

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## CERTIFICATE OF SERVICE

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