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AM LAW LITIGATION DAILYLitigators of the Week: A Texas Appellate Win Over Agency's  
Electricity Pricing Moves During 2021 Winter Storm

By Ross Todd

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**D**uring the deadly winter storms that rocked Texas in February 2021, the state's Public Utility Commission raised the wholesale price of electricity to the maximum \$9,000 per megawatt-hour—a rate as much as 300 times higher than normal—in hopes of spurring additional power generation. The Commission kept the level there for four days—something an independent monitor has since determined led to some \$16 billion in overcharges.

This week's Litigators of the Week—**Allyson Ho** and **Mike Raiff** of **Gibson Dunn & Crutcher** and **Bill Moore** of **Enoch Kever**—got a blockbuster win last week for client Luminant Energy Co. at the state's Third District Court of Appeals finding that the Public Utility Commission's moves violated its statutory mandate to "use competitive methods to the greatest extent feasible and impose the least impact on competition."

**Who is your client and what is at stake?**

Bill Moore: We represent Luminant Energy Company LLC (a subsidiary of Vistra Corp.), a terrific and hardworking company based in Texas that generates electricity and is dedicated to helping power Texas. About 25 years ago, the Texas Legislature transformed the Texas electricity market to harness the forces of competition to incentivize the generation and retail sale of electricity. Unfortunately, however, during an unprecedented winter storm in February 2021, the PUC commissioners (who all resigned after the storm) went beyond the Legislature's mandate and set the price of electricity by regulatory order.



(l-r) Allyson Ho and Mike Raiff of Gibson, Dunn & Crutcher, and Bill Moore of Enoch Kever. Courtesy photos

That was not consistent with the competitive market framework. So, preserving the competitive framework and making sure market pricing was set by competition was at stake.

Mike Raiff: For context, during normal times, electricity prices are around \$30 per MWh. And during this emergency, prices had already risen to about \$1,200 per MWh (reflecting the scarcity of supply and the increase in demand). The PUC then set prices at \$9,000 per MWh, a whopping 650% increase over even that high pricing. Unfortunately, Texans saw bills many times over their ordinary amounts, and several electricity companies even went bankrupt.

**Tell me about the collection of other parties who were challenging the Public Utility Commission's actions here. Who was joining this dispute alongside your client, in what capacity, and how did you coordinate your efforts with theirs?**

Raiff: Well, as I said, the PUC's artificial prices harmed a lot of people, not just our clients. While

Luminant was the first to step up and take the lead on the challenge, we were soon joined by Exelon Generation Company, LLC, Constellation NewEnergy Inc., and others.

Standing shoulder to shoulder with these companies and their counsel, we were able to demonstrate the wide-ranging impact of the PUC's actions on the market as a whole. We were also able to join forces to prep Allyson to lead the charge and argue on behalf of all the challengers.

Allyson Ho: And we assembled a fantastic coalition of amici that highlighted the real-world impact of the PUC's rash decision across a broad spectrum. One brief talked about how an orphanage got hit with an electricity bill for that week nearly three times its utility budget for the entire year. Another described how a steel mill—deemed essential, critical infrastructure by the federal government—struggled to keep operating as its electricity bills soared as a result of the PUC's unlawful price-setting. And a third explained how one retail electric provider who was used to paying invoices for electricity in the thousands of dollars was hit with invoices in the tens of millions of dollars. Our amici really helped us show the serious practical consequences when agencies don't operate within the guardrails the legislature sets for them and instead regulate by fiat.

**Who is on your team and how have you divided the work?**

Raiff: This case was a cross-firm, cross-office, cross-expertise partnership at its finest. We could ask for no finer expert on the Texas electricity market than Bill. Along with his colleague **Melissa Lorber** at Enoch Keever, Bill got our all-star cross-office appellate team, led by Allyson, up to speed quickly on the market, and then it was no holds barred from there. Underneath Allyson, we had an amazing appellate team, led by **Elizabeth Kiernan** along with **Trenton Van Oss**, **Joseph Barakat** and **Katherine Montoya**. Allyson and her team dove straight in, bringing to bear their expertise on administrative law, statutory interpretation, and the separation of powers, while Bill and Enoch Keever helped flesh out the intricate nuances and history of the Texas electricity market.

And of course throughout the entire process we worked very closely with the in-house team, including **Stephanie Moore**, **Dan Kelly** and **Sam Siegel**. No one knows the Texas market better than that group!

**A quick question before we get into the meat of the case: How were you all affected by the storm individually? What was that time like for you?**

Ho: The week of the storm, I was actually preparing for a big oral argument. We were very fortunate to be among those who didn't lose power, so we moved my parents and sister in with us for the duration—but then our pipes burst, which was quite the experience. The year before, our house had been hit by a tornado (while we were home) and nearly destroyed—and we'd only just finished rebuilding. So it was quite the year for our family (like many others throughout the state) for dealing with extreme weather events.

Moore: It was certainly hectic and quite unusual. We had a client with many issues to be addressed, lots of interest in the electricity industry from all levels of government, and many questions to field, and we all were dealing with record cold and snow and adjusting to things at home like loss of water supply and receiving only intermittent internet or cell service. Each workday ran long, but we stayed coordinated among ourselves and our client through persistent, proactive communication.

Raiff: I was out of power for parts of the week. I ended up working closely with my energy clients from home, but most of my contacts at Vistra and Luminant were staying at hotels near their offices and plants to make sure they could be physically present to do whatever they could to keep electricity flowing in Texas.

**How did you deal with the PUC's arguments that the Court of Appeals lacked jurisdiction here?**

Ho: The PUC and its supporters certainly lobbed every argument they could think of to keep the court from reaching the merits of our challenge—kind of a death-by-a-thousand-cuts strategy. We found it telling that they doubled down so hard on jurisdictional arguments—and thought we could even turn it to our advantage, pointing out that it only confirmed that the PUC really went too far. So the PUC's roadblocks to review ultimately helped us tell our story about the important

role courts have to play in making sure agencies stay in their lane, even during times of crisis and emergency.

Moore: Agreed. This decision reminds agencies across Texas that the Legislature's enactments constrain their authority and agency actions are subject to review by the courts. Most importantly, the decision says that competition reigns in the Texas wholesale and retail electricity markets.

**Allyson, what stood out to you about the oral argument at the Third District?**

Ho: How the judges drilled down to the key decision points in a case with so many moving parts, including a very complicated regulatory scheme. The Third Court is the Texas version of the D.C. Circuit—a frequent destination for litigation involving agencies. The judges who presided at the argument plainly understood the ramifications their decision could have, and also the importance of their role in ensuring that agencies don't overstep their bounds.

**What's important for participants in Texas's electricity market about where the court came out?**

Moore: Market participants can rest assured that the Third Court of Appeals recognizes that competition, not regulation, governs this market. That's good for customers—competition brings lower prices, innovation, and better customer service. The opinion makes clear that competition, not government regulation, is the order of the day.

**Where does this ruling leave us? What's next for your clients and others with still-pending administrative challenges of settlement statements from this period?**

Raiff: This is a positive development for all those, like Luminant, who didn't accept the PUC's illegal pricing and invoked their right to challenge the issued invoices. The market provides for resettlement of invoices when promptly challenged. That's a standard practice—repricing has occurred before in the Texas market through this and other avenues.

Now that the court has stated in no uncertain terms that its holding applies to those administrative proceedings, invoices can be readjusted. In fact, the Texas Solicitor General's Office, on behalf of the PUC, agreed

just last year that Luminant and others were allowed to dispute the pricing in these administrative proceedings.

Moore: That's right, Mike. The pending settlement disputes at ERCOT are in place, and the PUC's rules and ERCOT's Protocols provide a process for dealing with them. It was a math exercise at ERCOT to create the improper, regulated price during the storm and it'll simply be a math exercise to determine how to restore the correct prices. The pending settlement disputes provide the data for that math exercise.

**What will you remember most about reaching this milestone in this matter?**

Ho: Sharing it with such a phenomenal client and team. Taking on a case in a highly regulated industry is no easy task, but our resident experts Bill and Melissa got me and my team up to speed in no time. It's easy to get lost in the weeds in administrative-law cases, but our team really came together to focus on the fundamentals—the rule of law, the separation of power, the role of courts. Making sure those principles aren't just empty words on a page is even more important in times of crisis and emergency, like the winter storm, which was devastating for so many Texans. Getting the opportunity to vindicate those bedrock principles as part of this top-notch team is just beyond compare.

Moore: The best part for me was working with such a stellar team. As Mike and Allyson noted, we are a cross-firm team that worked together like we are all in the same firm. I can't say enough about how the Gibson Dunn folks approach life without egos and just work with everyone on the team to get to the best result for the client. That's rare, to have such great inter-firm cooperation, and that made it meaningful, even in the context of a terrible event for Texans.

Raiff: I've been working with Luminant and its parent company, Vistra, for many, many years. After reading the court's opinion, I actually started taking a trip down memory lane, remembering all of the significant matters I've worked on for Vistra and Luminant under the strong leadership of GC Stephanie Moore and Deputy GC Dan Kelly. While I love winning cases, I love even more being part of an amazing team trying to do the right thing.