Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-21-00242-CV

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. and Bill Magness,
Appellants

v.

CPS ENERGY,
Appellee

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2021-CI-04574
Honorable Solomon Casseb, III, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: December 13, 2021

DISMISSED FOR WANT OF JURISDICTION IN PART; REVERSED AND RENDERED IN PART

Appellants Electric Reliability Council of Texas, Inc. and Bill Magness appeal the trial court's order denying ERCOT's plea to the jurisdiction. Appellee CPS Energy filed a motion to dismiss this interlocutory appeal for want of jurisdiction. We grant CPS's motion to dismiss as to Magness and dismiss Magness's appeal for want of jurisdiction. We deny CPS's motion to dismiss as to ERCOT, reverse the trial court's order denying ERCOT's plea to the jurisdiction, and render judgment dismissing CPS's claims against ERCOT. We also dissolve this court's July 15, 2021 order restraining ERCOT from taking certain actions.

BACKGROUND

The Texas Utilities Code requires the Public Utility Commission of Texas to certify an independent organization to perform certain functions associated with Texas's self-contained electric grid. TEX. UTIL. CODE ANN. § 39.151(c). Currently, ERCOT is that organization. ERCOT is statutorily charged with, inter alia, "ensur[ing] the reliability and adequacy of the regional electrical network" in the ERCOT region and "ensur[ing] that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers" of electricity. TEX. UTIL. CODE ANN. § 39.151(a)(2), (4). ERCOT operates under the Texas Utilities Code, the Texas Administrative Code, the PUC's oversight, and the ERCOT Protocols. "ERCOT [P]rotocols are rules that provide the framework for the administration of the Texas electricity market." *Pub. Util. Comm'n v. Constellation Energy Commodities Grp., Inc.*, 351 S.W.3d 588, 595–96 (Tex. App.—Austin 2011, pet. denied).

CPS is a municipally owned utility serving the San Antonio area. Because CPS is both a buyer and seller of electricity, ERCOT collects money from and pays money to CPS. Prior to the dispute at issue in this case, ERCOT and CPS signed a Standard Form Market Participant Agreement establishing their contractual obligations to each other. The parties appear to agree that the issues in this lawsuit are governed by the ERCOT Protocols, the Market Participant Agreement, and Title 2 of the Utilities Code, also known as the Public Utility Regulatory Act (PURA).

This dispute arises out of the catastrophic winter storm that hit Texas in February of 2021. During the storm, the PUC ordered ERCOT to set the per-megawatt hour price of electricity at the highest permissible rate—$9,000 per megawatt hour—to account for a scarcity in electric supply.[1] CPS alleges ERCOT improperly kept prices at this rate after any alleged need for scarcity pricing

[1] CPS alleges that "ERCOT raised prices from $30 per MWh to $9,000 per MWh[.]"

had ended. CPS alleges this decision resulted in billions of dollars of overcharges to market participants, ERCOT improperly refused to correct these overcharges, and some market participants were driven into insolvency as a result.

The parties appear to agree that CPS does not currently owe any money to ERCOT. However, CPS alleges ERCOT owes CPS money and that ERCOT's plan to use "Default Uplift Invoices" to recoup funds owed to ERCOT by insolvent market participants will improperly reduce the amount ERCOT owes to CPS. It describes these payment reductions as both an unconstitutional taking and an unconstitutional extension of its credit to cover the debt of private entities.

On March 12, 2021, CPS sued ERCOT for breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of the Texas Constitution, seeking declaratory and injunctive relief and, alternatively, money damages. It also asserted ultra vires claims against ERCOT's former executives and board, including Magness. ERCOT—but not Magness—filed a plea to the jurisdiction arguing the trial court lacked jurisdiction over CPS's claims for various reasons. ERCOT also filed a motion to transfer venue to Travis County. On May 10, 2021, the trial court signed an "Agreed Extended Temporary Restraining Order" that prohibited ERCOT from taking certain actions until "the earlier of (a) June 11, 2021 or (b) the conclusion of a hearing on [CPS's] Application for Temporary Injunction."

On May 24, 2021, CPS nonsuited its claims against all the individual defendants except Magness. On May 26, 2021, the trial court denied ERCOT's plea to the jurisdiction and its motion to transfer venue to Travis County. At that point, Magness had not yet been served or entered an appearance in this lawsuit. Magness appeared for the first time on June 14, 2021, when he filed his own motion to transfer venue.

On June 15, 2021, ERCOT and Magness filed a notice of interlocutory appeal from the trial court's order denying ERCOT's plea to the jurisdiction. CPS then filed a motion to dismiss

this appeal for lack of appellate jurisdiction. On July 15, 2021, we granted CPS's motion to extend the trial court's May 10, 2021 temporary restraining order and ordered ERCOT to refrain from taking any actions prohibited by that order.

ANALYSIS

CPS's Motion to Dismiss

CPS's motion to dismiss argues that neither ERCOT nor Magness are governmental units as that term is defined by Section 101.001 of the Texas Civil Practice and Remedies Code and we therefore lack jurisdiction over this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8). CPS also argues Magness lacks standing to appeal because he was not a party to ERCOT's plea to the jurisdiction.

Motion to Dismiss ERCOT's Appeal

Standard of Review and Applicable Law

This court reviews questions of its own jurisdiction de novo. *See, e.g.*, *Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020). If the record does not affirmatively show we have jurisdiction over a matter, "we have no option but to dismiss the appeal." *Gonzales Nursing Operations, LLC v. Smith*, No. 04-20-00102-CV, 2020 WL 5646482, at *2 (Tex. App.—San Antonio Sept. 23, 2020, pet. denied) (mem. op.) (citing *Nikolouzos v. St. Luke's Episcopal Hosp.*, 162 S.W.3d 678, 681 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

This court generally lacks jurisdiction to review interlocutory orders. *See Bonsmara*, 603 S.W.3d at 390; *Orion Real Estate v. Sarro*, 559 S.W.3d 599, 602 (Tex. App.—San Antonio 2018, no pet.). However, the Texas Civil Practice and Remedies Code permits an interlocutory appeal of an 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).

Section 101.001 of the Civil Practice and Remedies Code defines "governmental unit" as, inter alia, an "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 ANN. § 101.001(3)(D). The Texas Supreme Court has held this definition imposes two conditions: first, the entity "must be an 'institution, agency, or organ of government,' and, second, [it] must derive its 'status and authority . . . from the Constitution of Texas or from laws passed by the legislature under the constitution.'" *Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 907 (Tex. 2017) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(D)).

The Texas Supreme Court has not yet determined whether ERCOT is a governmental unit under this definition. *See Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 639–42 (Tex. 2021) (holding mootness doctrine barred review of appeal presenting that question). However, two of our sister courts have held ERCOT does not meet this definition and therefore does not qualify as a governmental unit. *See Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 552 S.W.3d 297, 309 (Tex. App.—Dallas 2018, pet. dism'd w.o.j.); *HWY 3 MHP, LLC v. Elec. Reliability Council of Tex.*, 462 S.W.3d 204, 212 (Tex. App.—Austin 2015, no pet).

LTTS Charter School

The controlling line of cases begins with the Texas Supreme Court's 2011 conclusion that that an open-enrollment charter school was a "governmental unit" for the purpose of bringing an interlocutory appeal. *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011). There, the supreme court noted that the Texas Education Code: (1) describes those schools as "part of the public school system of this state"; and (2) gives them "the powers granted to [traditional public] schools." *Id.* at 76–79 (internal quotation marks omitted). The court also noted that the

Education Code and "a host of other laws outside the Education Code" describe such schools as a "governmental body," "local government," "governmental entity," and "political subdivision" for various statutory purposes, including open meetings, record regulation, and procurement and bidding requirements. *Id.* at 78, 82. The court further noted that open-enrollment charter schools may be audited by the Commissioner of Education and that the commissioner has authority to revoke their charters. *Id.* at 80.

The *LTTS* dissent suggested that because open-enrollment charter schools receive their charters from the State Board of Education, rather than from the legislature, they should not be considered governmental units. *Id.* at 84 (Guzman, J., dissenting). The majority rejected this analysis, noting, "The dispositive issue is not who grants a charter but who grants a charter *meaning*." *Id.* at 81. It concluded, "The wellspring of open-enrollment charter schools' existence and legitimacy is the Education Code and its multiplicity of provisions that both detail and delimit what these public schools can and cannot do." *Id.*

Redus

The Texas Supreme Court next addressed a similar question in *Redus*, holding that the police department of a private university was a "governmental unit" that could pursue an interlocutory appeal under Civil Practice and Remedies Code Section 51.014(a)(8). *See Redus*, 518 S.W.3d at 911. The court began by noting that the definition of governmental unit includes an "organ of government"—a term the statute does not define. *Id.* at 910; *see also* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D). The court therefore looked to dictionary definitions and concluded "that an 'organ of government' is an entity that operates as part of a larger governmental system." *Redus*, 518 S.W.3d at 910. The court then turned to statutory "indicators of governmental-unit status," such as a provision of the Education Code that gave "UIW the power to operate a police department like that of any city." *Id.* (citing TEX. EDUC. CODE ANN. § 51.212(b)). It also noted,

"UIW must follow the same state-promulgated rules its public counterparts follow[.]" *Id.* The court recognized that "UIW lacks public funding, and 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." *Id.* Even so, the court reasoned, "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.

HWY 3 and *Panda Power*

The Austin Court of Appeals issued its opinion in *HWY 3* prior to the supreme court's opinion in *Redus*. Accordingly, it relies primarily on the supreme court's analysis in *LTTS* and does not consider *Redus*'s conclusion "that an 'organ of government' is an entity that operates as part of a larger governmental system." *Compare HWY 3*, 462 S.W.3d at 207–12, *with Redus*, *Redus*, 518 S.W.3d at 910.[2] In considering whether ERCOT "derives its status and authority from laws enacted by the legislature," the *HWY 3* court took note of several statutes which "demonstrate that ERCOT has been delegated great authority and powers by the legislature and that it is a highly regulated entity." *HWY 3*, 462 S.W.3d at 208–09. The court noted, however, that "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." *Id.* at 209. The court determined that the control the PUC exerts over ERCOT "is not dissimilar from the financial oversight that the legislature has exerted over utilities that are not

[2] CPS emphasizes that in *HWY 3*, ERCOT itself argued it was not a governmental unit. *See HWY 3*, 462 S.W.3d at 206; *see also Panda Power*, 552 S.W.3d at 306. However, a court's "[s]ubject-matter jurisdiction is always front and center and must always be confirmed" and cannot be waived. *State v. Naylor*, 466 S.W.3d 783, 805 (Tex. 2015). Accordingly, while CPS is correct that ERCOT has changed its position on whether it is a governmental unit, we may not resolve this jurisdictional question based on ERCOT's changed position.

considered governmental units," and it noted that ERCOT does not receive its funding directly from the state. *See id.* at 210–11.

The *HWY 3* court further determined that "key to the supreme court's conclusion [in *LTTS*] were the facts that charter schools are statutorily classified as part of the public school system . . . [and] are the functional equivalent of public-school districts, which by statute qualify as governmental units." *Id.* at 209. The court reasoned that unlike the open-enrollment charter school in *LTTS*, ERCOT does not "operate parallel to and alternatively to governmental units," and it concluded "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." *Id.* at 210. The court held ERCOT therefore was not a governmental unit. *Id.* at 212.

Unlike the *HWY 3* court, the *Panda Power* court issued its opinion post-*Redus*, and it considered the supreme court's analysis in that case. *Panda Power*, 552 S.W.3d at 306–09. However, the court concluded ERCOT did not show "how the analytical framework applied in [*Redus*] differs from that in *HWY 3* or would effect a different outcome than in *HWY 3*." *Id.* at 308–09. As a result, the court relied on *HWY 3* to hold ERCOT was not a governmental unit for purposes of an interlocutory appeal. *Id.* at 309.

In listing the factors that might support ERCOT's claim of being a governmental unit, the *Panda Power* and *HWY 3* courts both recognized that ERCOT "'is subject to review under Chapter 325, Government Code (Texas Sunset Act)[.]'" *Id.* at 304 (quoting TEX. UTIL. CODE ANN. § 39.151(n)); *see also HWY 3*, 462 S.W.3d at 209 n.2 (noting that although ERCOT is subject to the Sunset Act, it cannot be abolished under it). However, neither court explicitly noted that Chapter 325 of the Government Code—which contains the Sunset Act—expressly defines an entity like ERCOT that is subject to the Sunset Act as a "state agency." TEX. GOV'T CODE ANN. § 325.002(1).

Application

Is ERCOT an Institution, Agency, or Organ of Government?

Again, the *Redus* court concluded "that an 'organ of government' is an entity that operates as part of a larger governmental system." *Redus*, 518 S.W.3d at 910. This court has similarly recognized that "the phrase 'institution, agency, or organ of government' has a broad meaning[.]" *Orion Real Estate*, 559 S.W.3d at 603. Here, the following factors mandate a conclusion that ERCOT falls within that "broad meaning":

- PURA permits the PUC to delegate rulemaking and enforcement authority to ERCOT. TEX. UTIL. CODE § 39.151(d), (i). The ERCOT Protocols, which ERCOT promulgates under this rulemaking authority, "have the force and effect of statutes[.]" *Constellation Energy*, 351 S.W.3d at 595.

- The PUC certified ERCOT to perform specific statutory functions. *See* TEX. UTIL. CODE ANN. § 39.151(a); 16 TEX. ADMIN. CODE § 25.361; *see also Agency*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining agency as "a department or body providing a specific service for a government or similar organization").

- While ERCOT was not created by the legislature, its certification arose out of a legislative delegation of authority to the PUC. *See* TEX. UTIL. CODE ANN. § 39.151(c); *see also LTTS*, 342 S.W.3d at 81.

- There is no evidence that ERCOT performs any functions other than those statutory functions delegated to it by the PUC and, by extension, the legislature. *See Redus*, 518 S.W.3d at 911 (considering "the function the Legislature has authorized [the entity] to perform and the way the Legislature has authorized [the entity] to perform it").

- ERCOT "is directly responsible and accountable to" the PUC, and the PUC has "complete authority" over ERCOT's 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." TEX. UTIL. CODE § 39.151(d).

- ERCOT must develop performance measures to track its operations and submit those measures to the PUC for review and approval. *Id.* § 39.151(d-3). The PUC must then annually or biennially prepare a report on ERCOT's performance and submit the report to the lieutenant governor, the speaker of the house, and "each house and senate standing committee that has jurisdiction over electric utility issues." *Id.*

- During the 2021 legislative session, the legislature amended PURA to provide that ERCOT's governing body will now be chosen by a committee whose members are

appointed by the governor, the lieutenant governor, and the speaker of the house. TEX. UTIL. CODE ANN. § 39.1513(a). That committee will also "designate the chair and vice chair of [ERCOT's] governing body[.]" *Id.* § 39.1513(d). While this statute did not take effect until after this lawsuit was filed, it is relevant to the question of whether the legislature views ERCOT as operating within a larger government system. *Cf. Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 21 (Tex. 1996) ("When the meaning of an existing law is uncertain, the Legislature's later interpretation of it is highly persuasive.").

- Because PURA expressly makes ERCOT subject to the Sunset Act, ERCOT is statutorily defined as a "state agency" for purposes of Chapter 325 of the Government Code. TEX. GOV'T CODE § 325.002(1); TEX. UTIL. CODE § 39.151(n).

As these authorities apply to CPS's allegations, we conclude they show that ERCOT "operates as part of a larger governmental system" and is therefore an "institution, agency, or organ of government" for purposes of this case.[3] *Redus*, 518 S.W.3d at 909–10; *Orion Real Estate*, 559 S.W.3d at 603; *see also* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D). While the *HWY 3* and *Panda Power* courts concluded ERCOT was not a governmental unit because it does not "operate parallel to and alternatively to governmental units," we conclude *Redus*'s construction of the phrase "institution, agency, or organ of government" mandates a broader application of the statutory language. *Compare HWY 3*, 462 S.W.3d at 210, and *Panda Power*, 552 S.W.3d at 307, *with Redus*, 518 S.W.3d at 910, *and Orion Real Estate*, 559 S.W.3d at 602–03.

Does ERCOT Derive Its Status and Authority from State Law?

We must also determine whether ERCOT derives its status and authority from state law. TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D); *Redus*, 518 S.W.3d at 909. We conclude that it does. Like the open-enrollment charter school in *LTTS*, ERCOT is certified by a state agency, and the meaning of its certification and the functions it is authorized to perform under that certification are prescribed by the legislature. *See* TEX. UTIL. CODE § 39.151; *LTTS*, 342 S.W.3d at 81.

[3] We express no opinion about whether ERCOT would satisfy the definition of governmental unit under different allegations.

Accordingly, ERCOT "clearly derives its status and authority . . . from laws passed by the Legislature." *Redus*, 518 S.W.3d at 909.

Because ERCOT satisfies both prongs of the relevant statutory definition of governmental unit under these circumstances, we have jurisdiction over ERCOT's interlocutory appeal of the denial of its plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D). We respectfully disagree with our sister courts' holdings to the contrary in *Panda Power* and *HWY 3*. We therefore deny CPS's motion to dismiss ERCOT's appeal.

Motion to Dismiss Magness's Appeal

Our conclusion that we have jurisdiction over ERCOT's appeal does not necessarily mean we have jurisdiction over Magness's appeal. CPS contends Magness lacks appellate standing to challenge the trial court's order denying ERCOT's plea to the jurisdiction because he was not a party to that plea. ERCOT responds, inter alia, that Magness has a justiciable interest in the trial court's order because the plea and response that resulted in that order "fully briefed the question of whether the trial court had jurisdiction over the claims against Magness."

Because standing is a component of subject-matter jurisdiction, "an appeal filed by an improper party must be dismissed." *Naylor*, 466 S.W.3d at 787. "While appellate standing typically extends only to those who were parties before the trial court, party status per se is not controlling—the ultimate inquiry is whether the appellant possesses a justiciable interest in obtaining relief from the lower court's judgment." *Tex. Quarter Horse Ass'n v. Am. Legion Dep't of Tex.*, 496 S.W.3d 175, 184 (Tex. App.—Austin 2016, no pet.). An appealing party lacks standing to challenge trial court errors that "merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000).

Both CPS's original and live petitions name Magness as a party to this case. However, he was not specifically named in either ERCOT's plea to the jurisdiction or the order being appealed. The parties have not cited any authority that is directly on point with this situation, and we have found none. But after reviewing analogous authority, we conclude appellate standing requires a showing that the appellant is a party to the challenged order, not just a party to the overall litigation. A litigant can be "party" to an order either directly (because the order specifically names him) or through the doctrine of virtual representation. *See Naylor*, 466 S.W.3d at 789–90. To benefit from the doctrine of virtual representation, the would-be appellant must show: "(1) it is bound by the judgment; (2) its privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between the appellant and a party to the judgment." *Id.* at 789 (internal quotation marks omitted).

Here, nothing in the record indicates Magness is bound by the trial court's order. *See id.* As noted above, ERCOT's plea does not request relief on Magness's behalf, and the order denying the plea does not mention Magness. *See Matter of Marriage of Dilick*, 550 S.W.3d 766, 774–75 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (order on appeal was "not directed to" the appellant); *see also Spates v. Office of Attorney Gen., Child Support Div.*, 485 S.W.3d 546, 550–51 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (where order bound entity, not individual member of entity, individual member who was not party to case lacked standing to appeal order that arguably affected him). Nothing in the text of the order places any obligations on Magness or precludes him from exercising his legal rights. *See Naylor*, 466 S.W.3d at 789. Because Magness is not bound by the judgment, he may not rely on the doctrine of virtual representation to establish appellate standing. *See id.*

It is true that both the plea and the trial court's order address other individual defendants who, at first glance, appear to be similarly situated to Magness. However, CPS sued each of the

individual defendants in the capacities in which they formerly served at ERCOT. With regard to Magness specifically, it sued him in his capacity as ERCOT's former CEO, and CPS's petition does not allege that any other individual defendant held that position. Additionally, Magness is the only individual defendant CPS has not non-suited. These facts show that CPS treated Magness differently than the other individual defendants in this litigation. Accordingly, the record does not support a conclusion that Magness and the other individual defendants "have such an identity of interest that the party to the judgment represented the same legal right" Magness seeks to vindicate here. *See, e.g.*, *Brown v. Zimmerman*, 160 S.W.3d 695, 703 (Tex. App.—Dallas 2005, no pet.). For this additional reason, Magness may not establish appellate standing under the doctrine of virtual representation. *See Naylor*, 466 S.W.3d at 789–90.

Finally, while it is well-established that jurisdictional issues can be raised for the first time on appeal, we conclude this general proposition still requires a threshold showing that the appellant is personally aggrieved by the challenged order or judgment. *See Torrington*, 46 S.W.3d at 844. We are not aware of any authority that allows a litigant to seek our review of the trial court's subject-matter jurisdiction before the trial court has issued any orders affecting that litigant. By doing exactly that, Magness has invited us to issue an advisory opinion. The constitution requires us to decline. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.3d 440, 444 (Tex. 1993); *see also Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004).

For these reasons, Magness lacks standing to appeal the trial court's order granting ERCOT's plea to the jurisdiction. We therefore grant CPS's motion to dismiss Magness's appeal for want of jurisdiction. *See Naylor*, 466 S.W.3d at 787–88.

ERCOT's Plea to the Jurisdiction

Standard of Review

"A plea to the jurisdiction is a dilatory plea that defeats a cause of action whether the claims have merit or not." *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 267 (Tex. 2018). This court reviews a trial court's ruling on a plea to the jurisdiction de novo. *San Antonio Water Sys. v. Smith*, 451 S.W.3d 442, 445 (Tex. App.—San Antonio 2014, no pet.). "When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the pleadings do not demonstrate incurable defects in the trial court's jurisdiction but are also insufficient to affirmatively demonstrate jurisdiction, "the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Id.* at 226–27. However, "[i]f the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227.

Exclusive Jurisdiction

Standard of Review

In its first issue, ERCOT argues CPS's claims fall within the exclusive jurisdiction of either the Travis County district court or the PUC. In determining these issues, we must examine the relevant statutes. *See, e.g.*, *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222–23 (Tex. 2002); *State v. Novall, Inc.*, 770 S.W.2d 589, 590 (Tex. App.—Austin 1989, writ denied). Statutory construction presents a question of law we review de novo. *Regent Care of San Antonio, L.P. v. Detrick*, 610 S.W.3d 830, 834 (Tex. 2020). "[O]ur primary objective is to give effect to the Legislature's intent," looking first to the statute's plain language. *Straub v. Pesca Holding LLC*, 621 S.W.3d 299, 301 (Tex. App.—San Antonio 2021, no pet.) (internal quotation

marks omitted). "Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

Travis County District Court Jurisdiction

ERCOT contends that by statute, certain of CPS's claims fall within the exclusive jurisdiction of the Travis County district courts. As support for this assertion, ERCOT first relies on Section 2001.176 of the Government Code, which requires a person seeking "judicial review in a contested case" to file a petition in Travis County district court. *See* TEX. GOV'T CODE ANN. § 2001.176. However, Section 2001.176 "fails to express a clear legislative intent that the [Travis County] filing requirement is jurisdictional[.]" *In re C.H.*, No. 13-17-00544-CV, 2019 WL 5251145, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 17, 2019, no pet.) (mem. op.) (internal quotation marks omitted). For that reason, at least three of our sister courts have held Section 2001.176 is a mandatory venue statute, not a jurisdictional mandate. *See id.*; *Combined Specialty Ins. Co. v. Deese*, 266 S.W.3d 653, 665–66 (Tex. App.—Dallas 2008, no pet.); *In re Hartford Underwriters Ins. Co.*, 168 S.W.3d 293, 295–96 (Tex. App.—Eastland 2005, no pet.). We agree with their analysis and conclude that Section 2001.176 is not jurisdictional.

ERCOT next argues that "to the extent CPS seeks relief against ERCOT's compliance with any future orders issued by the PUC pursuant to" newly enacted legislation, the text of the new legislation requires such claims to be brought in Travis County. As support for this assertion, ERCOT points to Sections 39.603 and 39.653 of the Utilities Code. *See* TEX. UTIL. CODE ANN. § 39.603 (permitting the PUC, "[o]n application by [ERCOT]," to authorize ERCOT "to establish a debt financing mechanism to finance the default balance if [the PUC] finds that the debt obligations are needed to preserve the integrity of the wholesale market and the public interest"), § 39.653 (requiring ERCOT to "file an application with [the PUC] to establish a debt financing

mechanism for the payment of the uplift balance if [the PUC] finds that such financing will support the financial integrity of the wholesale market and is necessary to protect the public interest"). If the PUC issues an order under either Section 39.603(a) or Section 39.653(a), that order "is not subject to rehearing by the commission" but "may be reviewed by appeal by a party to the proceeding to a Travis County district court[.]" *Id.* §§ 39.603(h), 39.653(g). Like Section 2001.176 of the Government Code, neither Section 39.603 nor Section 39.653 explicitly confers exclusive jurisdiction on the Travis County district courts. *Id.* §§ 39.603(h), 39.653(g); *cf. In re C.H.*, 2019 WL 5251145, at *3.

Finally, ERCOT argues that Section 2001.038 of the Texas Government Code grants the Travis County district courts exclusive jurisdiction over CPS's claims under the Uniform Declaratory Judgments Act. *See* TEX. GOV'T CODE ANN. § 2001.038. Section 2001.038 provides:

> (a) The validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.
>
> (b) The action may be brought only in a Travis County district court.

Id. Like the statues described above, Section 2001.038 does not confer the Travis County district courts with exclusive jurisdiction in express terms. *See id.*; *In re C.H.*, 2019 WL 5251145, at *3. As a result, we do not interpret Section 2001.038 as a grant of exclusive jurisdiction. *See* TEX. GOV'T CODE § 2001.038; *cf. In re C.H.*, 2019 WL 5251145, at *3.

We conclude ERCOT has not shown that any of CPS's claims fall within the exclusive jurisdiction of the Travis County district courts.

PUC Jurisdiction

Standard of Review

We turn now to ERCOT's contention that the PUC has exclusive jurisdiction over CPS's claims. An administrative agency possesses "only those powers expressly conferred and necessary to accomplish its duties." *Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC*, 546 S.W.3d 133, 138 (Tex. 2018) (internal quotation marks omitted). This court must presume the district courts possess subject-matter jurisdiction to resolve disputes unless the constitution or the legislature confers exclusive jurisdiction on an administrative agency. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding). The party resisting the district court's jurisdiction bears the burden of showing exclusive agency jurisdiction. *In re Oncor Elec. Delivery Co. LLC*, 630 S.W.3d 40, 44–45 (Tex. 2021) (orig. proceeding).

"An agency has exclusive jurisdiction when the Legislature has granted that agency the sole authority to make an initial determination in a dispute." *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (orig. proceeding). "A statute grants an agency exclusive jurisdiction when its language clearly expresses the Legislature's intent for the [agency] to have exclusive jurisdiction over matters the [statute] governs." *Chaparral Energy*, 546 S.W.3d at 138 (internal quotation marks omitted). Alternatively, an agency can also possess exclusive jurisdiction "'when a pervasive regulatory scheme indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.'" *Id.* (quoting *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 624–25). However, even if an agency possesses exclusive jurisdiction over a matter, the specific claim at issue must "fall[] within that jurisdictional scope." *Id.* at 139. This court applies de novo review to determine whether an administrative agency has exclusive jurisdiction over a dispute. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 625.

To determine the authority the legislature conferred on an administrative agency, courts must "look to the pertinent statutes" and "begin with the words used," considering "the act as a whole, and not just single phrases, clauses, or sentences." *Cities of Austin, Dall., Fort Worth, & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). This court may not imply authority to agencies that exceeds "those powers the law, in clear and express statutory language, confers upon them." *David McDavid Nissan*, 84 S.W.3d at 220.

If an administrative agency has exclusive jurisdiction over a matter and the dispute falls within the scope of that jurisdiction, the party asserting the claim "must exhaust all administrative remedies before seeking judicial review of the agency's action, and then only at the time and in the manner designated by statute." *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 428 (Tex. 2017) (internal quotation marks omitted). If a party is required to exhaust administrative remedies but fails to do so, "the trial court lacks subject-matter jurisdiction and must dismiss the claims within the agency's exclusive jurisdiction." *Id.*

Applicable Law

ERCOT does not argue a statute explicitly grants the PUC exclusive jurisdiction. Instead, it contends the PUC's exclusive jurisdiction arises out of a pervasive regulatory scheme established by PURA.

The legislature's stated purpose for PURA is "to grant the Public Utility Commission of Texas authority to make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the public interest." TEX. UTIL. CODE ANN. § 11.002(c). With regard to electric utilities specifically, PURA's purpose "is to establish a comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities." TEX. UTIL. CODE ANN. § 31.001(a). The Texas Supreme Court has held that "the statutory description of PURA as

'comprehensive' demonstrates the Legislature's belief that PURA would comprehend all or virtually all pertinent considerations involving electric utilities operating in Texas. That is, PURA is intended to serve as a 'pervasive regulatory scheme' of the kind contemplated in" previous supreme court opinions regarding exclusive agency jurisdiction. *In re Entergy Corp.*, 142 S.W.3d at 323.

PURA requires ERCOT to: "(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 (4) ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region." TEX. UTIL. CODE § 39.151(a). In carrying out these functions, ERCOT "is directly responsible and accountable to" the PUC, and the PUC has "complete authority to oversee and investigate [ERCOT's] finances, budget, and operations as necessary to ensure [ERCOT's] accountability and to ensure that [ERCOT] adequately performs [ERCOT's] functions and duties." *Id.* § 39.151(d). The PUC's authority even includes the power to "approve, disapprove, or modify any item included in" ERCOT's budget. TEX. UTIL. CODE § 39.151(d-1). The supreme court has held, "The Legislature's description of PURA as 'comprehensive,' coupled with the fact that PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness." *In re Entergy Corp.*, 142 S.W.3d at 323.

Additionally, the PUC has chosen to delegate its rulemaking authority to ERCOT—as PURA permits it to do—and that delegation resulted in ERCOT's promulgation of the ERCOT Protocols. The ERCOT Protocols are subject to the PUC's review "and may not take effect before receiving [the PUC's] approval." TEX. UTIL. CODE § 39.151(d). In addition to its "complete

authority" over ERCOT's operations, accountability, and budget, the PUC has power to: (1) audit ERCOT; (2) decertify ERCOT; (3) inspect ERCOT's facilities, records, and accounts; (4) delegate authority to ERCOT to "enforce operating standards" and "oversee transaction settlement procedures" in the ERCOT region; and (5) require ERCOT to contract with certain vendors selected by the PUC. *Id.* §§ 39.151(d), (d-4), (e), (i); *see also* TEX. UTIL. CODE ANN. §§ 39.1515(a), 39.1516(b).

This regulatory scheme extends to the relationship between the PUC, ERCOT, and the market participants who buy and sell electricity in the ERCOT region. Each market participant in the ERCOT region that sells electricity, including municipally owned utilities like CPS, "shall report to the [PUC] its installed generation capacity, the total amount of capacity available for sale to others, the total amount of capacity under contract to others, the total amount of capacity dedicated to its own use, its annual wholesale power sales in the state, its annual retail power sales in the state, and any other information necessary for the [PUC] to assess market power or the development of a competitive retail market[.]" TEX. UTIL. CODE ANN. § 39.155(a). Market participants are also required to "observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by" ERCOT. *Id.* § 39.151(j). Additionally, if a market participant violates PURA, the rules adopted under PURA, or "any reliability standard adopted by [ERCOT] to ensure the reliability of a power region's electrical network, including the failure to observe any scheduling, operating, planning, reliability, or settlement protocols established by the independent organization," the PUC may suspend, revoke, or amend the market participant's certificate or registration or impose other administrative penalties. *Id.* §§ 39.356, 39.357.

Application

Common-Law Claims

In its common-law breach of contract, negligence, gross negligence, and fiduciary duty claims, CPS alleges that ERCOT: "failed to implement its protocols in a way to ensure the integrity of its system"; "failed to take reasonable precautions to meet its load projections expected as a result of [the] Winter Storm Event"; "failed to take reasonable corrective action when it became clear that its own projections showed insufficient capacity to meet forecast demand"; failed "to correct an acknowledged $16 billion error" in electricity pricing; acted "in violation of the Texas Utilities Code"; and "fail[ed] to timely address the market issues in the face of an acknowledged Overcharge created by ERCOT's own mistake." On their face, these claims allege ERCOT breached its statutory duties to "ensure the reliability and adequacy of the regional electrical network" and "ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region." TEX. UTIL. CODE § 39.151(a). Because the PUC has "complete authority to oversee and investigate" ERCOT as necessary "to ensure that [ERCOT] adequately performs" these duties, CPS's common-law claims fall within the pervasive regulatory scheme established by PURA. *Id.* § 39.151(d); *cf. In re Entergy Corp.*, 142 S.W.3d at 323–24. Because it is undisputed that CPS has not exhausted its administrative remedies on these claims, CPS's pleadings affirmatively demonstrate incurable jurisdictional defects. *See Miranda*, 133 S.W.3d at 226–27.

Although CPS presents several arguments why it believes its common-law claims fall outside the PUC's exclusive jurisdiction, we do not find those arguments persuasive. CPS first argues that none of the claims in its petition "call into question the rates, operations, or services of any electric utility." But CPS's claims "call into question" the operations of ERCOT itself, an issue over which the legislature has given the PUC "complete authority." TEX. UTIL. CODE § 39.151(d).

Next, CPS argues "the PUC's jurisdiction under § 39.151 is limited" for two reasons. First, it contends it cannot bring a complaint before the PUC under Section 39.151(d-4)(6)'s dispute resolution provision because it is a municipally owned utility and is therefore "not a 'person' who can be aggrieved" and avail itself of that dispute resolution procedure. *See* TEX. UTIL. CODE ANN. § 11.003(11), (14) (separately defining "municipally owned utility" and "person"). ERCOT responds that it "does not rely on [section 39.151(d-4)(6)] as the source of the PUC's exclusive jurisdiction," and it notes that the Texas Administrative Code permits "[a]ny affected entity"—a term that neither PURA nor the Administrative Code defines—to file a complaint in the PUC regarding ERCOT's conduct. *See* 16 TEX. ADMIN. CODE § 22.251. While an administrative agency cannot confer exclusive jurisdiction on itself, this administrative rule appears to be consistent with the legislature's decision to give the PUC "complete authority" to ensure ERCOT adequately performs its statutory functions. *See* TEX. UTIL. CODE § 39.151(d). Accordingly, even if we assume arguendo that CPS is not a "person" that can seek relief under Section 39.151(d-4)(6), that assumption does not remove this dispute from the PUC's exclusive jurisdiction. *See id.*; 16 TEX. ADMIN. CODE § 22.251.

As its second reason why Section 39.151 does not apply to it, CPS contends municipally owned utilities are exclusively governed by Chapter 40 of the Utilities Code. CPS is correct that "[w]ith respect to the regulation of municipally owned utilities, [Chapter 40] controls over any other provision of [PURA], except for sections in which the term 'municipally owned utility' is specifically used." TEX. UTIL. CODE ANN. § 40.001(a). However, PURA provides that Section 39.151 explicitly applies to municipally owned utilities. *See* TEX. UTIL. CODE ANN. § 39.002 ("This chapter, *other than Sections 39.151*, 39.1516, 39.155, 39.157(e), 39.159, 39.160, 39.203, 39.904, 39.9051, 39.9052, and 39.914(e), and Subchapters M and N, does not apply to a municipally owned utility[.]") (emphasis added). Additionally, Section 39.151 specifically

requires municipally owned utilities to "observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by" ERCOT. TEX. UTIL. CODE § 39.151(j). That statute also gives the PUC authority to impose penalties on a municipally owned utility for any failure to comply with ERCOT's rules. *Id.* Accordingly, the statutory language requires us to reject CPS's assertion that Section 39.151 does not apply to it.

CPS next argues the PUC lacks jurisdiction to resolve disputes "over the interpretation of private contracts." The contract in question here is the Market Participant Agreement, which tracks a template set forth in the ERCOT Protocols. ERCOT Protocols § 16.1(1) ("ERCOT shall require each Market Participant to register and execute the Standard Form Market Participant Agreement[.]"); ERCOT Protocols § 22A (text of the "Standard Form Market Participant Agreement"). PURA therefore required ERCOT to obtain the PUC's approval of that contract's terms. TEX. UTIL. CODE § 39.151(d). The Texas Supreme Court has held that an agreement that would otherwise be a private contract can "[take] on an administrative character" where, as here, the PUC approved that contract pursuant to its rulemaking authority. *In re Entergy Corp.*, 142 S.W.3d at 323–24. In this case, as in *In re Entergy*, "the very administrative character that gives the [agreement] effect also gives the PUC the authority to adjudicate disputes arising from the agreement." *Id.* at 324.

CPS also contends the ERCOT Protocols allow it "to file a petition seeking direct relief from the [PUC] or another Governmental Authority" and alleges the Protocols "expressly provide for judicial resolution of disputes." However, we see nothing in CPS's cited provisions of the Protocols that broadly permits judicial resolution of disputes. The section of the Protocols CPS cites is entitled "Alternative Dispute Resolution Procedure," and the specific subsections CPS points to provide only that the Protocols' alternative dispute resolution procedures are not "intended to limit or restrict the right of a Market Participant to file a petition seeking direct relief

from the [PUC] or another Governmental Authority without first exhausting this ADR procedure where actual or threatened action by ERCOT or a Market Participant could cause irreparable harm and where such harm cannot be addressed within the time permitted under the ADR process." ERCOT Protocols §§ 20.1(3), 20.6. Because ERCOT's plea to the jurisdiction did not argue CPS was required to participate in any ADR procedure, this section does not appear to apply here.

Furthermore, the ERCOT Protocols define "Governmental Authority" as "[a]ny federal, state, local, or municipal body having jurisdiction over a Market Participant or ERCOT." ERCOT Protocols § 2.1. CPS's contention that this definition applies here necessarily assumes the Bexar County district court has "jurisdiction over [CPS] or ERCOT." *See id*. "But when the legislature grants an administrative agency exclusive jurisdiction over a dispute"—as we have held is the case here—"the district court lacks jurisdiction to the extent of the agency's exclusive authority to decide the dispute." *In re Mid-Century Ins. Co. of Tex.*, 426 S.W.3d 169, 171 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). The ERCOT Protocols cannot vest jurisdiction in the district court that would not otherwise exist. *Cf. Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 379 (Tex. 2006) (Brister, J., concurring) ("Subject-matter jurisdiction cannot be waived or conferred by agreement[.]"). Additionally, while CPS contends Section 11.A of the Market Participant Agreement "expressly authorizes suit in state or federal courts," that provision of the agreement: (1) speaks to choice of law and venue, not jurisdiction; and (2) provides that "any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas." For these reasons, neither the ERCOT Protocols nor the Market Participant Agreement negate our conclusion that the PUC has exclusive jurisdiction over this dispute.

Next, CPS argues its claims fall outside the PUC's authority because it has alleged ERCOT's "actions were not in accordance with the Protocols and Commission Orders." As support, CPS cites two cases noting that the exhaustion of administrative remedies doctrine is

"inapplicable if the action complained of was taken without authority or in violation of a statute." *Garcia-Marroquin v. Nueces Cty. Bond Bd.*, 1 S.W.3d 366, 375 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.); *see also City of Sherman v. Pub. Util. Comm'n of Tex.*, 643 S.W.2d 681, 683 (Tex. 1983). However, neither *Garcia-Marroquin* nor *City of Sherman* involved claims against ERCOT. Accordingly, neither case compels us to conclude that the legislature intended to exempt claims like CPS's from the scope of the PUC's "complete authority" over ERCOT. TEX. UTIL. CODE § 39.151(d). Additionally, the Texas Administrative Code expressly permits the PUC to review claims that ERCOT has violated the PUC's orders or the ERCOT Protocols. 16 TEX. ADMIN. CODE § 22.251(b). We therefore reject CPS's assertion that the PUC categorically lacks jurisdiction over claims alleging ERCOT violated the Protocols and the PUC's orders.

Finally, CPS notes that the Texas Supreme Court recently held the PUC did not have exclusive jurisdiction over tort claims against utility companies. *See In re Oncor*, 630 S.W.3d at 43; *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 153, 160 (Tex. 2021) (orig. proceeding). However, neither *In re Oncor* nor *In re CenterPoint* involved claims against ERCOT. And unlike the plaintiffs' claims in those cases, CPS's claims against ERCOT directly challenge the adequacy of ERCOT's exercise of its statutory duties—and, by extension, the PUC's oversight of those duties. Accordingly, CPS's claims implicate "the very activity the Commission regulates" with regard to ERCOT. *See In re Oncor*, 630 S.W.3d at 49; TEX. UTIL. CODE § 39.151(d).

For these reasons, we hold that the PUC has exclusive jurisdiction over CPS's common-law claims against ERCOT. Accordingly, CPS must exhaust its administrative remedies in the PUC before seeking judicial review of those claims.

Constitutional Claims

CPS also argues its constitutional claims cannot be subject to an exhaustion of administrative remedies requirement because the PUC lacks jurisdiction to consider constitutional

issues. The Texas Supreme Court "has never globally exempted claims based on the Texas constitution from statutory exhaustion-of-administrative-remedies requirements[.]" *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 552 n.9 (Tex. 2016); *see also Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006). The relevant question, therefore, is not whether the PUC can decide constitutional questions, but whether CPS is required to exhaust available administrative remedies on its non-constitutional claims before it may assert a constitutional claim in the district court. *See Marquez*, 487 S.W.3d at 543–44.

CPS's first constitutional claim alleges "an unjust taking of property in violation of Article I, section 17 of the Texas Constitution." "[A] litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim." *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012). This is because "'if a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure's use, been taken *without just compensation*.'" *Id.* (quoting *City of Dallas v. VSC*, 347 S.W.3d 231, 237 (Tex. 2011)). Here, if the PUC agrees with CPS that the "Overcharge," the "Excessive Prices," and ERCOT's proposed use of the default-uplift procedures violated or threatened to violate the ERCOT Protocols or the PUC's rules, then that conclusion may permit the PUC to reprice the "Overcharge" and "Excessive Prices" and resolve CPS's claims, thereby mooting CPS's takings claim. *See id.* But even if the PUC disagrees with CPS on those claims, Texas Supreme Court authority provides that CPS can still obtain de novo judicial review of its takings claim after the PUC resolves its non-constitutional claims. *See id.* at 580–81; *see also Chaparral Energy*, 546 S.W.3d at 142. Accordingly, CPS's takings claim is not exempt from the exhaustion-of-administrative-remedies requirement. *See Stewart*, 361 S.W.3d at 579; *see also Marquez*, 487 S.W.3d at 552 n.9.

CPS also argues that as applied under these circumstances, the ERCOT Protocols' default-uplift procedures will require CPS to lend its credit to insolvent market participants in violation of the Texas Constitution. *See* TEX. CONST. art. XI, § 3; TEX. CONST. art. III, § 52(a). As with CPS's takings claim, however, it is possible that an administrative proceeding in the PUC would moot this claim. For example, if the PUC issues an order modifying the default-uplift procedures or prohibiting ERCOT from enforcing those procedures against CPS under these circumstances, then that action may moot CPS's unconstitutional debt claims.

Finally, CPS contends that "the PUC cannot grant injunctive relief for constitutional questions." The Texas Administrative Code provides otherwise. When a complainant alleges ERCOT has committed conduct "that is in violation or claimed violation of any law that the [PUC] has jurisdiction to administer, of any order or rule of the [PUC], or of any protocol or procedure adopted by ERCOT pursuant to any law that the [PUC] has jurisdiction to administer," the Texas Administrative Code allows the complainant to seek an order suspending "the conduct or the implementation of the decision complained of while the complaint is pending[.]" 16 TEX. ADMIN. CODE § 22.251(b), (d)(2), (i). Because the PUC has authority to order ERCOT to cease any conduct that violates "any law that the [PUC] has jurisdiction to administer," we reject CPS's assertion that the administrative process denies it remedies to which it would otherwise be entitled. *See id.*

For these reasons, we hold CPS's pleadings affirmatively show that its claims fall within the PUC's exclusive jurisdiction. Accordingly, we reverse the trial court's order denying ERCOT's plea to the jurisdiction and render judgment dismissing CPS's claims for failure to exhaust administrative remedies. *See, e.g.*, *Thomas v. Long*, 207 S.W.3d 334, 342 (Tex. 2006).

Appellate Injunction

Because we have concluded the district court lacked subject-matter jurisdiction over CPS's claims against ERCOT, it also necessarily lacked jurisdiction to issue a temporary restraining order

against ERCOT. *See City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009). The Texas Supreme Court has long recognized, "The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law." *Id.* (internal quotation marks omitted). Because the trial court lacked jurisdiction to enter the May 10, 2021 "Agreed Extended Temporary Restraining Order," we dissolve our July 15, 2021 order granting CPS's request for an extension of that order.

CONCLUSION

We deny CPS's motion to dismiss this appeal as to ERCOT, grant the motion to dismiss as to Magness, and dismiss Magness's appeal for want of appellate jurisdiction. We reverse the trial court's order denying ERCOT's plea to the jurisdiction, render judgment dismissing CPS's claims against ERCOT for failure to exhaust administrative remedies, and dissolve our July 15, 2021 order extending the trial court's temporary restraining order. We note that nothing in our opinion and judgment prohibits CPS from re-filing its claims against ERCOT after it has exhausted its administrative remedies before the PUC.

Beth Watkins, Justice