FILED
23-0231
1/23/2024 10:09 AM
tex-83681417
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 23-0231

IN THE
SUPREME COURT OF TEXAS

PUBLIC UTILITY COMMISSION OF TEXAS,
Petitioner,

vs.

LUMINANT ENERGY COMPANY LLC,
Respondent.

On Petition for Review from the Court of Appeals for the Third Judicial District, Austin, Texas, No. 03-21-00098-CV

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE*

Amicus Curiae The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country, including Texas. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has filed more than forty amicus briefs in this Court in the past two decades, including five in the past year (e.g., in No. 22-0521, *Alonzo v. John*), consistently supporting positions that uphold the rule of law and benefit free enterprise.

The Chamber submits this amicus brief in support of the propositions, asserted by Respondent (and its Intervenors), that (1) this dispute is justiciable; and (2) the subject Orders violated the Texas Administrative Procedure Act (APA). The Chamber and its members have a strong interest in ensuring that agencies do not evade judicial review of their actions, and that reviewing courts hold agencies to compliance with the APA and other laws by which the Legislature ensures that they

* No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* TEX. R. APP. P. 11(c).

take only lawful and accountable action. This brief takes no position on any other issues presented in this appeal.

SUMMARY OF ARGUMENT

1. This dispute is justiciable.

This Court has long recognized that judicial review of administrative rule-making is especially important because judicial oversight of the rulemaking process represents an important check on government power. Such review bolsters the fundamental principle that government is subordinate to the law, and so agencies exercising governmental power must respect its limits. Thus, the Court should reject the PUC's insinuation that the subject Orders are *never* subject to judicial review.

This Court has held that when an agency promulgates a rule without complying with proper rulemaking procedures, the rule is *invalid*. The court of appeals is right that if the subject Orders are invalidated in the present proceeding, Respondent may succeed in obtaining favorable financial adjustments in subsequent administrative proceedings. That prospect of success is "redress" in any reasonable usage of the term. Given this redressability, the Court's ruling will affect the parties' rights and interests, and therefore the case is not moot.

2. The subject Orders violated the APA.

As an alternative ground to affirm the decision of the court of appeals, Respondent argues that the PUC violated the APA. If the Court reaches this issue,

the Court should reaffirm that *emergency* is not a license for the PUC to bypass the requirements set forth in the law. That precept holds especially when the Legislature has expressly taken account of emergencies and has carefully prescribed the procedures for agencies to follow in responding to those emergencies. The Legislature did just that in the APA, expressly authorizing an agency to adopt a rule without prior notice or hearing if it satisfies three discrete requirements. One of those is that the agency file the rule — along with reasons for its finding that an imminent peril requires the adoption of the rule on fewer than 30 days' notice — in the office of the secretary of state for publication in the Texas Register. That requirement promotes public accountability and facilitates judicial review. The Court should resist the PUC's invocation of *emergency* as an excuse to evade these public-regarding strictures of the APA.

The subject Orders are not valid unless the PUC substantially complied with the APA's requirements. If the Court reaches this issue, the Court should confirm that "substantial compliance" with the APA is a demanding requirement that does not excuse material noncompliance. The PUC concedes that it filed *nothing* in the office of the secretary of state. That the PUC buried notice on its website does comply substantially with the APA's notice requirements.

The judgment of the court of appeals should be affirmed.

ARGUMENT

We address first whether this dispute is justiciable and second whether the subject Orders complied with the Administrative Procedure Act.

I. This dispute is justiciable.

As elaborated below, judicial review of administrative rulemaking is crucially important, Respondent's injuries are redressable, and the case is not moot.

A. Judicial review of administrative rulemaking is crucially important.

The parties dispute whether the court of appeals had jurisdiction under the statute providing for "[j]udicial review of *competition rules* adopted by the [PUC]." TEX. UTIL. CODE § 39.001(e) (emphasis added). Indeed, they dispute both whether the subject Orders are "rules" and (if so) whether they are "competition" rules. *See, e.g.*, PUC Brief at 20 (arguing that "the challenged Orders were not rules at all," and "even if they were rules under the APA, . . . the Orders were not *competition* rules").

We leave for the parties the technicalities of both issues, but we urge the Court to resolve those issues mindful of what it said about judicial review nearly three decades ago:

> Judicial review of administrative rulemaking is especially important because, although the executive and legislative branches may serve as political checks on the consequences of administrative rulemaking, the judiciary is assigned the task of policing the *process* of rulemaking. Given the vast power allocated to governmental agencies in the modern administrative state, and the broad discretion ordinarily afforded those agencies, judicial oversight of the rulemaking process represents an important check on government power that might otherwise exist without meaningful limits.

National Association of Independent Insurers v. Texas Department of Insurance, 925 S.W.2d 667, 670 (Tex. 1996) ("*Independent Insurers*") (citation omitted). The very "check on governmental power" represented by judicial review of administrative rulemaking accords with a principle more recently articulated by this Court: "the fundamental principle that government is subordinate to the law and thus individuals exercising governmental power must respect its limits." *Phillips v. McNeill*, 635 S.W.3d 620, 627 (Tex. 2021) (citing TEX. CONST. art. I, §§ 13, 19.5). That principle, which undoubtedly applies as well to *agencies* exercising governmental power, exists "to ensure the rule of law." *Id.*

It bears emphasis that the PUC is not merely arguing that the subject Orders were reviewed by the wrong court at the wrong time. As we read the PUC's briefs, the agency carefully avoids acknowledging that the Orders are *ever* subject to judicial review. The Court should reject any suggestion that the Orders are beyond the "judicial oversight of the rulemaking process" that this Court found so important in *Independent Insurers*.

B. Respondent's injuries are redressable.

The PUC also seeks to evade judicial review in arguing that the subject Orders are "*voidable*, not invalid or void *ab initio*." PUC Brief at 13. Whatever this distinction might mean in other contexts, the PUC takes it to mean here that "the Orders are binding until disaffirmed," so that "any controversy concerning their

validity will have no effect on transactions that have already occurred." *Id.* at 12. In other words, "the only available relief is a reversal of the Orders, which would operate prospectively and not redress Respondents' retrospective harm." *Id.* at 17. It would follow that administrative agency orders affecting billions of dollars of commerce — even if unlawful — can never be redressed at the behest of the directly affected parties.

That is not the law. Even after the APA was amended in 1999 to incorporate the term "voidable," *see id.*, this Court held that when "an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid." *El Paso Hospital District v. Texas Health & Human Services Commission*, 247 S.W.3d 709, 715 (Tex. 2008) (citing TEX. GOV'T CODE § 2001.035(a)); *accord, e.g., Texas Workers' Compensation Commission v. Patient Advocates*, 136 S.W.3d 643, 648 (Tex. 2004) ("If an order fails to substantially comply with these requirements [of the APA], the rule is invalid." (citing same)). And as explained below, once a court declares a rule invalid, the rule "is" (as just quoted) invalid, and there is (in many if not most contexts) no real distinction between invalidity *ab initio* and invalidity *now*.

"As a rule, court decisions apply retroactively," *Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 685 (Tex. 2015), and the APA creates no general exception to that rule. If (as the PUC concedes) the "available relief" to Respondent is "a reversal of the Orders" — which is more accurately described as an *invalidation* of the Orders

— then that invalidation necessarily has retroactive application. In practical terms, there will be very few circumstances in which a person will be able to rely on an invalidated rule to support or defend the validity, lawfulness, propriety, or effectiveness of an action or transaction in any ongoing proceeding. This case, therefore, is no different from a case in which this Court "invalidates" one legal precept in favor of another: parties in all pending cases throughout Texas may no longer rely on the invalidated precept — even if it was assumed to be "valid" at the time of their conduct. *See, e.g., Life Partners*, 464 S.W.3d at 685 (rejecting plea that "we give our holding only prospective effect, and thus alleviate Life Partners from any liability to the Arnolds or the State in these cases based on its prior conduct").

Thus, the PUC is wrong to assert categorically that judicial invalidation of the subject Orders "would operate prospectively and not redress Respondents' retrospective harm." PUC Brief at 17. Conversely, the court of appeals is right that if "the Orders are held unlawful, [Respondents] (barring other factors not considered here) may succeed in their administrative challenges and secure adjustments to the invoiced amounts." 665 S.W.3d at 177. That prospect of success is "redress" in any reasonable usage of the term.

C. Given redressability, the case is not moot.

The PUC mounts another attack on judicial review in contending that this "case became moot before it even began: administrative rules are presumed valid

until declared otherwise," and "any request to declare the orders invalid became moot when the price adjustments in the Orders expired on February 19, 2021." PUC Brief at 11–12. PUC's contention is essentially that mootness applies — and judicial review is categorically precluded — whenever a rule "expires."

That is not the law either. To be sure, a judicial challenge to a rule with purely prospective effect — like an injunction, *see id.* at 15 — is presumptively moot when that rule is no longer enforced (and is unlikely to be reinstated). But the Orders at issue in this case are different: a rule that, as the PUC concedes, caused potentially "[b]illions of dollars" to change hands under legal compulsion cannot be said to have only prospective effect. The implications for holding moot — and thus precluding judicial review of — agency rules having practical and far-reaching impacts of this kind are staggering. As is true of the PUC's other attacks on judicial review, such a ruling would trammel "the fundamental principle that government is subordinate to the law." *Phillips*, 635 S.W.3d at 627.

In any case, once redressability is established, lack of mootness follows easily. As discussed above, this Court *can* "grant the requested relief" of invalidation and thereby "affect the parties' rights or interests." *ERCOT v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 635 (Tex. 2021). And if that is true, the parties *do* "have a legally cognizable interest in the case's outcome," meaning that there *is* indeed a "justiciable controversy" but *no* "advisory opinion." *Id.* at 634–35.

For all of these reasons, the case is justiciable.

II. The subject Orders violated the Administrative Procedure Act (APA).

As an alternative ground for affirmance, Respondent argues that the PUC violated the APA. As elaborated in this part, PUC must follow the APA, including its public-notice provisions, and it is not entitled to ignore the law by invoking the concepts of "emergency" and "substantial compliance."

A. Even "emergency" situations require compliance with the APA.

The word *emergency* — used both as an adjective (e.g., "emergency Orders" and "emergency rulemaking") and as a noun (e.g., "grave emergency") — appears no fewer than three dozen times in the PUC's opening brief. Indeed, the first page of that brief warns the Court that the "stakes are high" in this case, implicating the PUC's "ability to react quickly in *emergency* situations to save lives by minimizing blackouts and preventing system-wide collapse." PUC Brief at 1 (emphasis added).

To be sure, "decisive executive [or administrative] action is sometimes necessary and appropriate," as Justice Neil Gorsuch observed last year in connection with the global pandemic. *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1316 (2023) (statement of Gorsuch, J.). But *emergency* is not a license for the PUC — or any actor within our "government of laws," *Phillips*, 635 S.W.3d at 628 — to bypass the requirements set forth in the law. That precept holds especially when the Legislature has expressly taken account of emergencies and carefully prescribed the procedures for agencies

to follow in responding to those emergencies. *See, e.g., BankDirect Capital Finance, LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 81 (Tex. 2017) (We "must presume the Legislature acted intentionally, not inadvertently," and when it chooses to enact a restriction, "we are bound by that restriction.").

The Legislature did just that in the APA, expressly authorizing an agency like the PUC to "adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and a hearing that it finds practicable." TEX. GOV'T CODE § 2001.034(a). But an emergency rule adopted without prior notice or hearing is subject to critical guardrails. Crucially, the agency must (1) find that "an imminent peril to the public health, safety, or welfare . . . requires adoption of a rule on fewer than 30 days' notice"; (2) state "in writing" — specifically in the rule's "preamble" — the reasons for [that] finding"; and (3) file the rule and the reasons "in the office of the secretary of state for publication in the Texas Register." *Id.* § 2001.034(a)(1)–(2), (b), (d). These three requirements, minimal though they might seem to some, promote reasoned and accountable decisionmaking.

In the non-emergency context, this Court has held that "[r]equiring an agency to demonstrate a rational connection between the facts before it and the agency's rules promotes public accountability and facilitates judicial review." *Texas Workers' Compensation Commission*, 136 S.W.3d at 648 (citing *Independent Insurers*, 925 S.W.2d at 669). It may be debated whether the emergency procedures in § 2001.034

require a *demonstration* by the agency of a rational connection; however, it is indisputable that those procedures require at least an *articulation* —in writing, and in a form readily available to the public — of the connection between the perceived "imminent peril" (i.e., the emergency) and the agency's rule. Even if requiring an agency to *articulate* a rational connection is a lesser burden, that requirement still promotes public accountability and facilitates judicial review.

In another decision in which this Court recently granted review, the court of appeals rightly observed that "forcing the [PUC] to abide by the APA's mandatory rulemaking procedures" — whether normal or emergency — would undoubtedly take some time and effort," but "that misses the point." *RWE Renewables Americas, LLC v. PUC*, 669 S.W.3d 566, 582 (Tex. App.—Austin 2023, pet. granted). To the contrary, the "importance of the APA requirements cannot be overstated"; even if the emergency procedures do not enable an (immediate) "opportunity to be heard," the above-cited requirements of TEX. GOV'T CODE § 2001.034 at very least "assure[] notice to the public and affected persons" of the PUC's findings. 669 S.W.3d at 582 (quoting *El Paso Hospital District*, 247 S.W.3d at 715). The scale of the Orders issued by the PUC here is hardly insignificant, underscoring the potential impacts of failing to give full notice. *See, e.g.*, PUC Brief at 1 (acknowledging that "[b]illions of dollars are potentially implicated").

In short, the Court should resist the PUC's invocation of *emergency* as an excuse to escape the public-regarding strictures of the APA. Instead, if the Court reaches this issue, the Court should reaffirm that in an emergency, the PUC must follow the emergency procedures of the APA.

B. "Substantial compliance" with the APA is a demanding requirement that does not excuse material noncompliance.

Though continuing to insist that the subject "Orders were not rules as the APA defines that term" (i.e., that the APA did not even govern the Orders), the PUC insists that it "substantially complied with the APA's [emergency] rulemaking procedures." PUC Brief at 34. If the Court reaches the APA issue, we urge the Court to take this opportunity to make clear that the substantial compliance standard "requires more than a faint effort or hollow rhetoric." *RWE Renewables*, 669 S.W.3d at 581.

Nearly three decades ago, this Court held that an "agency's order substantially complies with [an APA] requirement if it (1) accomplishes the legislative objectives underlying the requirement and (2) comes fairly within the character and scope of each of the statute's requirements in specific and unambiguous terms." *Independent Insurers*, 925 S.W.2d at 669. The standard is a demanding requirement that does not excuse material non-compliance. That is, the "test of substantial compliance should not allow an agency to 'fill in the blanks' with meaningless rhetoric and thereby frustrate the legislative intent of" the APA requirement at issue. *RWE Renewables*, 669 S.W.3d at 582 (quoting Ronald L. Beal, *The Scope of Judicial*

Review of Agency Rulemaking: The Interrelationship of Legislating and Rulemaking in Texas, 39 BAYLOR L. REV. 597, 688 (1987)).

Respondent argues that the PUC violated the APA by (for example) failing to file its emergency rule and its written reasons for adopting the rule "in the office of the secretary of state for publication in the Texas Register." TEX. GOV'T CODE § 2001.034(d). The PUC concedes that it filed *nothing* in the office of the secretary of state; rather, the agency merely "posted [the emergency Orders] on its website," and those Orders were "summarized in a market notice on ERCOT's website." PUC Brief at 43. It should be sufficient here to say that the "total disregard of a statutory provision is *never* substantial compliance." Luminant Brief at 53 (emphasis added) (quoting 1 Ronald L. Beal, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE § 4.2.1 (2021)).

In any event, the court of appeals has previously "reject[ed] the notion that posting [a notice] somewhere on ERCOT's website could, without more, constitute substantial compliance with the APA's notice requirements. Members of the public know from the provisions of the APA that they can look to the Texas Register to find proposed agency rules or rule changes. The public does *not* know to search on the website of an individual agency or sub-agency for that information." *RWE Renewables*, 669 S.W.3d at 577–78. Consequently, "a notice that is buried on an agency's website does not 'accomplish the legislative objectives underlying the

requirements, or 'come fairly within the character and scope of each of the statute's requirements in specific and unambiguous terms.'" *Id.* at 578 (cleaned up) (quoting *Independent Insurers*, 925 S.W.2d at 669). This sort of material noncompliance cannot qualify as "substantial" compliance.

For all of these reasons, and as further explained by Respondent, the subject Orders violated the APA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: January 23, 2024

Respectfully submitted,

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