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November 8, 2024

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 24-0424; *In Re ONCOR Electric Delivery Co. LLC; ONCOR Electric Delivery Co. NTU LLC; AEP Texas Inc.; American Electric Power Co.; Centerpoint Energy Houston Electric, LLC; and Centerpoint Energy, Inc.*

To the Honorable Members of the Supreme Court of Texas:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of the petition for writ of mandamus.

Statement of Interest

The Texas Civil Justice League ("TCJL") is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair, stable, and predictable civil justice system. TCJL has long participated as *amicus curiae* in matters that have a significant and pervasive impact on our membership and the Texas business climate.

TCJL members have a fundamental interest in litigation that, as is the case here, seeks to impose new common-law duties on businesses, non-profit entities, health care providers, and individuals.

This brief has been prepared in the ordinary course of TCJL's operations. No one has paid for the preparation of this brief.

Argument

It goes without saying that the reliable delivery of electricity is foundational to our economy and, more broadly, to our way of life. Both were seriously threatened in February 2021. A complete failure of the ERCOT power grid was averted by the narrowest of margins. That the catastrophe *was* averted depended on a swift and decisive response of the regulatory system and the immediate response to regulatory mandates by the transmission and distribution utilities ("TDUs"). These utilities are now defending that response in mass litigation seeking recovery of *billions* of dollars. And by virtue of prior judicial determinations dismissing all other parties from the litigation, they find themselves at risk of bearing the *entire* liability for a 100-year event, the severity of which exceeded even the most pessimistic weather forecasts. Specifically, gas producers, power generators, retail electric providers, and ERCOT itself have all obtained judicial decisions absolving them of liability for their conduct during the crisis, even though each of these entities played an integral

role in delivering electric power and maintaining the reliability of the system under emergency conditions. On this level alone, singling out the TDUs to bear the full consequences of their role in saving the grid is a purely punitive exercise.

Unlike gas producers, power generators, and retail electric providers that operate within ERCOT, investor-owned TDUs cannot charge whatever they think the market will bear. The Public Utility Commission of Texas sets the rates that a TDU *must* charge to retail providers for delivery to customers. At whatever level the rate may be, it has to pay for a TDU's cost of maintaining the electricity infrastructure, depreciation and taxes, expanding grid capacity as the state grows, and providing a reasonable rate of return to the private investors who capitalize the whole operation. If Plaintiffs ultimately win through to a multi-billion judgment (or any judgment that awards damages based on a TDU's liability), who will pay for it?

The short answer is that all Texans will have to pay the bill in one way or another. Though we are naturally not privy to the liability insurance arrangements that may be implicated in this case, we very much doubt that much relief will come from that quarter if the courts ultimately find in favor of plaintiffs on their remaining gross negligence and intentional nuisance claims. That leaves three pots of money: the business and individual consumers at the end of the line, the TDUs' private investors, or the state, that is, Texas taxpayers who are also consumers of electricity and investors in TDUs. In short, the $10 billion that Plaintiffs claim will have to

come out of the pockets of Texas businesses and individuals. Even in Texas, $10 billion is a lot of wealth, wealth that this lawsuit seeks to shift from the 23 million Texans served by ERCOT to the thousands of plaintiffs who have filed these lawsuits (we might also add, to the lawyers representing those plaintiffs, who stand to recover a few billion for themselves).

If Texas businesses, taxpayers, and consumers are made to foot this bill, they will foot it through increases in the rates they pay for electricity. They will foot it through the higher insurance costs and higher costs of borrowing that TDUs will incur as a result of an adverse judgment. They will foot it through the transfer of billions of dollars of private and public resources from maintaining and enhancing the reliability of the electric grid to a relatively small handful of claimants and their lawyers. And they will foot it through the deleterious effect of such a judgment on the Texas business climate that will necessarily result from targeting a critical infrastructure industry sector for ruinous damages.

TCJL members further fear that this litigation will undermine the comprehensive regulatory scheme upon which we all rely to make sure our power grid works. How will it do that? By significantly expanding common law tort duties for TDUs and overlaying them on a regulatory system that already enforces its standards through the administrative process that includes the imposition of administrative penalties for violations. If plaintiffs are successful, TDUs will be

trapped between a regulatory system that requires them to take certain actions in emergency situations and a common law system that makes them, in effect, strictly liable for taking those actions. We have seen no serious argument that, under the immediate pressure of a grid collapse, the TDUs acted with anything close to the requisite level of recklessness, conscious disregard, or intention to cause harm that would warrant punitive civil liability. In other words, any outcome of this litigation that determines otherwise can only do so by creating legal duties that do not currently exist in Texas law, turning the regulatory scheme on its head, and placing critical electricity infrastructure at significant risk.

The plain fact is that *any* actions TDUs took in response to ERCOT's load-shed order would have caused interruption of electricity services for somebody. Yet the plaintiffs want our courts to rule that TDUs targeted specific consumers either recklessly or on purpose, which in our view amounts to the same thing. Their intentional nuisance theory is especially suspect because it cannot be defended against. As this Court observed in *Crosstex N. Tex. Pipeline, L.P. v. Gardiner,* 505 S.W.3d 580 (Tex. 2016), in order to establish an intentional nuisance, "the evidence must establish that the defendant intentionally caused the interference that constitutes the nuisance, not just that the defendant intentionally engaged in the conduct that caused the interference." 505 S.W.3d at 605. As applied to the TDUs, this means that for liability to attach, the evidence simply has to show that the TDUs

carried out the load-shed order. By doing so, they "intentionally caused the interference that constitutes the nuisance" simply because they couldn't do anything else.

We also question exactly what constitutes the complained-of "nuisance." Is a temporary interruption of electric service during a natural disaster really contemplated by this term? There is no question that losing power in a winter storm resulted in serious, and sometimes tragic, consequences depending on individual circumstances, but is it the interruption of power or the cold weather that constituted "the legal injury . . . that gives rise to the cause of action." 505 S.W.3d at 604. The Court's definition requires the "interference" to "constitute[] the nuisance," but in this case the "interference"—mandatory compliance with ERCOT's load-shed order to prevent total grid collapse—appears quite distinct from the "nuisance"—prolonged freezing weather conditions—that resulted in the plaintiffs' injuries. At the very least we would urge the Court to grant the petition to sort out whether the plaintiffs have actually pleaded, as the court of appeals believed, a viable cause of action for "intentional nuisance" and under what circumstances such a cause of action would be viable.

Every decision this Court makes is consequential and usually has effects far beyond the parties involved. This case is no exception but, in our opinion, is of a different order of magnitude than others upon which we have commented in the past.

We appreciate the fact that if this Court decides *not* to grant the petition, this case will go back to the MDL court for further proceedings on the plaintiffs' remaining issues. The final outcome will be, of course, uncertain and may well result in a no liability determination down the road. But how long will that take? And how long will the TDUs be compelled to carry a contingent liability on their books that cannot but impair their ability to meet their statutory and regulatory responsibilities? A decision by this Court at this juncture can put an end to this damaging uncertainty and clarify what Texas law actually requires in these circumstances. We urge this Court to take *that* road, which may, to paraphrase a famous poet, be less traveled but will make all the difference.

Conclusion and Prayer

TCJL respectfully requests that this Court reverse the court of appeals and grant the Relators' petition.

Respectfully submitted,

/s/ George S. Christian

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,424 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter was served on counsel of record by using the Court's CM/ECF system on the 8th day of November, 2024.

/s/ George S. Christian