



(Tex. 1996). On the record before us, TXU has not shown compelling circumstances for our intervention because it has not established that no adequate remedy is available in the district court. Therefore, I would deny the petition for writ of mandamus.

## I

In 1999, the Legislature amended the Public Utilities Regulatory Act (PURA) to establish competition in the retail market for electricity beginning January 1, 2002, and to “protect the public interest during the transition” to competition. TEX. UTIL. CODE § 39.001(a); *City of Corpus Christi v. Pub. Util. Com’n*, 51 S.W.3d 231, 237 (Tex. 2001). Under deregulation, the incumbent utilities were required to separate their bundled business into three separate enterprises – a generating company, a transmission and distribution company, and a retail electric provider. TEX. UTIL. CODE § 39.051(b). After January 1, 2002, the generating company will own and operate the generating plants, the transmission and delivery company will deliver the electricity over transmission and distribution lines, and the retail electric provider will sell electricity to end-use customers and provide customer service. Because the generating companies and retail electric providers must use the existing power lines to move electricity from the plant to the retail customer’s home or business, the transmission and delivery companies will remain regulated monopolies. The generating companies and the retail electric providers will operate in what are intended to be competitive, unregulated markets.

Underpinning the Legislature's decision to restructure the electric power industry was its finding that regulation was no longer warranted, except for regulating transmission of electricity and overseeing the recovery of stranded costs. Although “stranded costs” have a precise, technical definition under chapter

39 of PURA, TEX. UTIL. CODE § 39.251(7), we have generally described them “as the portion of the book value of a utility's generation assets that is projected to be unrecovered through rates that are based on market prices.” *Corpus Christi*, 51 S.W.3d at 238-39. The largest part of stranded costs are attributable to investments in nuclear power plants. *Id.* at 238. The Legislature, agreeing that incumbent utilities should not have to bear these stranded costs, devised a three-phase program for such utilities to recover these costs in the new, unregulated market.

Under the first phase, ending on December 31, 2001, the Commission froze retail electric rates. Utilities identified as having stranded costs have been allowed to mitigate them through (1) shifting depreciation from the transmission and delivery assets to the generating assets, Tex. Util. Code § 39.256, and (2) keeping earnings in excess of the allowed rate of return to reduce book value. TEX. UTIL. CODE §§ 39.254. Under the second phase, from January 1, 2002, to December 31, 2003, the Commission is to consider remaining stranded costs in setting the “competition transition charge” or “CTC.” TEX. UTIL. CODE § 39.201(b)(3). The CTC is intended to cover the utilities’ stranded costs through collection from every customer taking power over the utility’s transmission and delivery system, thus making up the difference between a generating plant’s book value and its market value. Under the final phase, actual stranded costs are to be calculated in a “true-up” proceeding beginning January 2004. This “true-up” is based on market valuations of the utilities’ generation assets. TEX. UTIL. CODE §§ 39.201(l), 39.262. If stranded costs remain, the Commission can extend the CTC collection period or increase the charge. TEX. UTIL. CODE § 39.201(l). Conversely, if mitigation efforts and the CTC have overcompensated the utility, the Commission is authorized to make other adjustments. TEX. UTIL. CODE § 39.201(l)(1)-(4).

Consistent with the statutory scheme, on March 31, 2000, the Commission instituted separate contested case proceedings to consider applications filed by each of the nine incumbent electric utilities in Texas. Because the nine dockets shared many of the same legal and policy issues, the Commission concluded that a supplemental generic proceeding would be the most efficient method for resolving these common issues. Common issues resolved in the generic docket were then applied in each individual docket.

To fulfill the statute's mandates, the Commission segmented each individual docket into four phases. In Phase I, the Commission conducted a hearing on the business separation plan through which the utility proposed to divide itself into a power generation company, a transmission and delivery company, and an affiliated retail electric provider. In Phase II, the Commission conducted a hearing to project the amount of the utility's stranded costs when retail competition begins on January 1, 2002. TEX. UTIL. CODE § 39.201(g). In Phases III and IV, the Commission conducted hearings to determine the actual rates the transmission and delivery company could charge retailers.

The Legislature provided that those utilities the Commission identified as having potentially stranded costs in an April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring (1998 ECOM Report) should use mitigation tools to reduce these potential costs. TEX. UTIL. CODE § 39.254. In this report, the Commission estimated that TXU had potentially two billion dollars in stranded costs, created primarily by TXU's investment in the Comanche Peak nuclear plant. Based on this estimate, TXU began mitigation efforts by shifting depreciation from transmission and delivery assets to generating assets and by applying excess earnings to reduce book value. *See* TEX. UTIL. CODE §§ 39.254, 39.256.

Before setting rates the transmission and delivery company could charge in 2002, the Commission updated the 1998 ECOM Report in 2001 and concluded that market forces, particularly the surge in natural gas prices, had dramatically impacted TXU's projected stranded costs. Under the new update, the Commission estimated that TXU now had negative stranded costs in excess of two billion dollars. In other words, TXU's investment in the Comanche Peak nuclear plant, once a liability, had now become profitable because the cost of generating electricity from natural gas plants exceeded that of generating electricity from nuclear plants.

Consumers and retail electric providers, who had intervened in the proceeding to determine the cost of service rates for the unbundled transmission and delivery companies, argued that because TXU's and certain other utilities' updated stranded cost estimates were negative, the Commission should make adjustments for excess mitigation costs when setting transmission and delivery charges. TXU argued that the Commission had no authority to revise its stranded cost estimates because the statute did not authorize the Commission to update the 1998 ECOM Report except for CTC setting purposes or to revisit the mitigation issue until the true-up proceeding in 2004. The Commission disagreed; and on November 9, 2000, it determined in the generic docket that utilities with substantial negative stranded costs estimates should stop redirecting depreciation expense and applying annual excess earnings to reduce stranded generation assets.

On June 5, 2001, the Commission applied this ruling to TXU in an interim order issued in TXU's individual docket. The Commission found that TXU should discontinue mitigation because its updated ECOM analysis reflected that TXU presently had a negative \$2.7 billion in stranded costs. Because TXU

had already redirected \$798 million in depreciation expense, the Commission instructed TXU to reassign the expense back to transmission and distribution assets. Similarly, because TXU had previously applied \$888 million in excess earnings to generation assets, the Commission further directed that those excess earnings be returned to ratepayers as credits on monthly bills over a seven-year period.

TXU promptly petitioned this Court to mandamus the Commission to rescind its June 5 order and subsequently sought similar relief from the Travis County district court as well. TXU alleges that by disregarding the statutory scheme, the Commission will cause competition to develop “differently” than the Legislature intended, and that this difference will cause irreparable harm because it will impact the ability of TXU’s affiliated retail electric provider to compete during deregulation’s first years. The district court has not acted on TXU’s petition.

While the mandamus proceeding was pending here, the Commission issued its final order in TXU’s docket on October 3, 2001. This order addressed numerous issues raised during the four phases of the proceeding, and it also incorporated the June 5 ruling on excess mitigation. TXU sued the Commission in Travis County district court on December 17, 2001, for judicial review of the final order. *See* TEX. UTIL. CODE § 15.001; TEX. GOV’T CODE § § 2001.145, 2001.171.

## II

I agree with JUSTICE HECHT and JUSTICE BRISTER that this Court has jurisdiction to mandamus the individual members of the Public Utility Commission. But I differ with JUSTICE HECHT’s conclusion that we should exercise that authority in this case, and I do not reach the question of whether the Commission has abused its discretion, which is the basis of JUSTICE BRISTER’s opinion.

In my opinion, TXU has not shown that relief is unavailable in the district court. The issues TXU raises in its appeal to the district court are the same that it presents here. JUSTICE HECHT argues that even if this is so, the district court cannot prevent irreparable harm because it cannot act before the second phase of deregulation begins on January 1, 2002. But on this record, I cannot determine that irreparable harm will befall TXU if we do not act.

Admittedly, mandamus is a more expeditious remedy than appeal, but the delay inherent in the appellate process is ordinarily not sufficient reason to justify us to act. *Walker*, 827 S.W.2d at 842. In its harm analysis, TXU urges that the Commission's erroneous actions will cause competition to unfold in a manner different from that contemplated by the Legislature with unknown but irreparable consequences. Thus, TXU argues that we should mandamus the Commissioners to preserve the integrity of the Legislature's plan for deregulation. Our mandamus authority, however, is not a general, supervisory power. See TEX. GOV'T CODE § 22.002(a); *Pope v. Ferguson*, 445 S.W.2d 950, 953 (Tex. 1969). Our exercise of the power "is justified only when parties stand to lose their substantial rights," *Walker*, 827 S.W.2d at 842, that is, rights personal to the party seeking relief. If mandamus were justified whenever a government official or a lower court misread a statute, mandamus would supplant appeal as the normal avenue for statutory interpretation.

Moreover, TXU itself has never, in any brief, motion or argument, asked this Court to expedite this proceeding or act to meet any prescribed deadline.<sup>2</sup> More importantly, if TXU can demonstrate immediate,

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<sup>2</sup> Justice Hecht questions why I do not address Reliant Energy's Petition for Mandamus, suggesting that it articulates reasons for expedited action in this case. It does not. Reliant did file a motion to expedite its own Petition for Mandamus by consolidating it with TXU's because the two petitions addressed the same issues. Reliant's

irreparable harm, the district court is authorized to grant an immediate stay in TXU’s appeal. *See* TEX. UTIL. CODE § 15.04. While any stay the district court issues may itself be stayed if the Commission appeals the order, *see Pub. Util. Comm’n v. Coalition of Cities for Affordable Utility Rates*, 776 S.W.2d 221, 222 (Tex. App.--Austin 1989, no writ), the appellate court can itself grant a stay if necessary to preserve the subject matter of the appeal and protect its own jurisdiction. *See City of Dallas v. Wright*, 36 S.W.2d 973, 975 (Tex. 1931); *Riverdrive Mall, Inc. v. Larwin Mortgage Investors*, 515 S.W.2d 2, 4 (Tex. Civ. App.--San Antonio 1974, writ ref’d n.r.e.). The lower courts thus have full authority to review and correct any errors that TXU alleges and proves and to protect it from irreparable harm during that process.

JUSTICE HECHT argues at some length that this case is similar to *Perry v. Del Rio*, \_\_\_ S.W.3d \_\_\_ (Tex. 2001). But in *Perry*, two district courts each asserted jurisdiction over the same parties in the same dispute, working against a deadline imposed by a three-judge federal court. Only this Court could timely determine which of the two courts had the dominant jurisdiction to proceed because the deadline simply did not leave room for normal appellate remedies. Here, only one district court has jurisdiction, and it has full authority to resolve TXU’s complaints.

JUSTICE HECHT claims that I “ignore[] precedent” because we have granted mandamus before, in discovery disputes and other matters. And he points to our holding in *CSR, Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996), that “exceptional circumstances may make a right of appeal inadequate.” In all these cases,

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Motion to Consolidate and Expedite asserts that “[i]t is in the public interest to address and resolve those issues in an expedited and consolidated fashion as they concern both Reliant and TXU,” but it does not ask this Court to act on either petition by a certain date.

however, we granted conditional mandamus against a trial court that had already ruled. Here, of course, the trial court has jurisdiction but has not yet made a decision.

Nor is this case similar to three related cases we recently considered involving securitization bonds, a legislatively-created financing mechanism allowing an electric utility to issue low-cost bonds to retire certain debts known as “regulatory assets.” *TXU Electric Co. v. Pub. Util. Comm’n*, 51 S.W.3d 275 (Tex. 2001). The deregulation statute expressly provided for an interlocutory appeal of these decisions to district court, and it directed that both the district court and this Court should determine the appeals “as expeditiously as possible with lawful precedence over other matters.” TEX. UTIL. CODE § 39.303(f). In all other cases, however, PURA requires that each Commission proceeding under section 39 be conducted as a contested case proceeding under the APA. TEX. UTIL. CODE § 39.003. On no other issue, including the one before us today, did the Legislature provide for an expedited review of any aspect of the deregulation process. I would not circumvent the Legislature’s scheme for orderly review when an adequate legal remedy is available.

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For the foregoing reasons, and without addressing whether the Commission has abused its discretion, I would deny Relator’s petition for writ of mandamus.

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Thomas R. Phillips  
Chief Justice

Opinion Delivered: December 31, 2001

