



utility, TXU Electric Company, in this original mandamus proceeding and by another, Reliant Energy, Inc., in a separate petition that is denied today.<sup>2</sup>

It is impossible to predict with any certainty how much utilities' stranded costs will be, or whether there will be any stranded costs at all, when they are finally determined in 2004. If the Commission's current estimates turn out to be close to accurate, then its reversal of mitigation efforts and consequent reduction in "wholesale" charges may prove beneficial to competition. But if in 2004 the Commission's 2001 estimates are found to be as far off the mark one way as it now thinks its 1998 estimates were off the other way, the lost opportunity to mitigate those costs at this early stage may necessitate increased "wholesale" charges that will snuff out fledgling competition. Because the future is unknowable, the Commission has no justification for deviating from the Legislature's prescribed plan for the transition to competition.

The issue here is not whether stranded costs will be over-recovered or under-recovered. Utilities that are finally determined to have stranded costs will be entitled to recover only those costs and no more. The issue here is what will happen in the meantime. The reversal of early efforts to mitigate stranded costs is, in my view, a significant deviation from the statutory plan. It impacts millions of Texans and involves billions of dollars. Its effects on competition cannot be undone on appeal because competition will have long been underway by the time the case winds through the district court, court of appeals, and back here. The scope of the Commission's statutory authority is a legal issue which we must ultimately decide without

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<sup>2</sup> *In re Reliant Energy, Inc.*, No. 01-1168 (Tex., filed Nov. 28, 2001, denied Dec. 31, 2001).

deference to the lower courts' decisions. While the district court can stay the Commission's orders pending adjudication of the principal issue, this does not guarantee the parties full and timely relief; even if a stay were granted by January 1 or shortly thereafter, the almost certain appeals from that decision to the court of appeals and this Court could not possibly be completed for months, and still the substantive issue of the Commission's authority would remain.

The Commission chairman observed that this dispute will likely be moot before judicial review can be completed. The Court proves him right. Faced with similar exigencies — as in a redistricting case three months ago<sup>3</sup> — this Court has granted mandamus relief, and I would do so here. To refuse to rule, as the Court does today, not only denies relator any meaningful review of the Commission's decision; it denies the Commission, the many other parties intensely interested in the future of competition, and the public a final, timely answer.

I respectfully dissent.

## I

TXU invokes this Court's original jurisdiction under section 22.002(a) of the Government Code, which states:

The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals,

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<sup>3</sup> *Perry v. Del Rio*, \_\_\_ S.W.3d \_\_\_, 44 Tex. Sup. Ct. J. 1147 (Sept. 12, 2001).

or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.<sup>4</sup>

JUSTICE BAKER’S concurring opinion argues that the jurisdiction conferred by this statute does not reach the Public Utility Commission itself, that TXU has not asked for relief against the three members of the Commission, and that TXU has named them as respondents merely as “a ruse,”<sup>5</sup> “purely to circumvent this Court’s holdings”.<sup>6</sup> Although this argument goes further than the Commission and its members have chosen to go, asserting only that the Court should not exercise jurisdiction, not that the Court does not have it, the Court may raise jurisdictional issues on its own.<sup>7</sup> Accordingly, I begin by addressing the concurring opinion.

Ever since the Texas Constitution was amended in 1891, this Court has had original jurisdiction to issue writs of mandamus “in such cases as may be specified” by the Legislature, “except as against the Governor of the State.”<sup>8</sup> In 1892 the Legislature enacted the statute that has become, with amendments that are not of concern here, section 22.002(a) of the Government Code, granting the Court power to mandamus “any district judge or officer of the state government”.<sup>9</sup> The statute did not further specify what

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<sup>4</sup> TEX. GOV’T CODE § 22.002(a).

<sup>5</sup> *Ante* at \_\_\_\_.

<sup>6</sup> *Ante* at \_\_\_\_.

<sup>7</sup> *Texas Ass’n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-446 (Tex. 1993).

<sup>8</sup> TEX. CONST. art. V, § 3; *see* Tex. S. J. Res. 16, 22nd Leg., R.S., 1891 Tex. Gen. Laws 197 (approved April 28, 1891).

<sup>9</sup> Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14, § 1, art. 1012, 1892 Tex. Gen. Laws 19, 21, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 383, 385 (Austin, Gammel Book Co. 1898) (codified as TEX. REV. STAT. art. 946 (1895), as TEX. REV. CIV. STAT. art. 1526 (1911), and as TEX. REV. CIV. STAT. art. 1733 (1925)) (“The supreme

officers were meant. In enacting the statute, the Legislature made no reference to an 1881 statute providing that “[n]o court of this State” — including the Supreme Court — “shall have power, authority or jurisdiction to issue the writ of mandamus . . . against any of the officers of the executive departments of the government of this State”.<sup>10</sup> This group of officers had also never been defined. The difference in the wording of the two statutes raised this question: did both refer to essentially the same group of officials so that the 1892 statute did no more than create a Supreme Court exception to the blanket prohibition in the 1881 law, or did the 1892 statute give the Court additional original jurisdiction, partially overlapping the district court’s jurisdiction, to mandamus a broader group of “officers of the state government” besides the “officers of the executive departments” that the Supreme Court alone could mandamus?

The lack of any clear answer is reflected in the Court’s early decisions construing the 1892 statute. In 1893, we held that the statute was a valid exercise of the Legislature’s authority under the 1891 amendment to the Constitution.<sup>11</sup> In an opinion granting mandamus against the Comptroller of Public Accounts, Chief Justice Stayton observed:

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court, or any justice thereof, shall have power to issue . . . writs of quo warranto and mandamus against any district judge or officer of the state government, except the governor of the state.”).

<sup>10</sup> Act approved Feb. 15, 1881, 17th Leg., R.S., ch. 12, § 4, 1881 Tex. Gen. Laws 7, 7-8, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 99, 99-100 (Austin, Gammel Book Co. 1898) (codified as TEX. REV. STAT. art. 4861 (1895), and as TEX. REV. CIV. STAT. art. 5732 (1911)) (“No court of this State shall have power, authority or jurisdiction to issue the writ of mandamus, or injunction, or any other mandatory or compulsory writ or process against any of the officers of the executive departments of the government of this State, to order or compel the performance of any act or duty, which, by the laws of this State, they or either of them are authorized to perform, whether such act or duty be judicial, ministerial or discretionary.”).

<sup>11</sup> *Pickle v. McCall*, 24 S.W. 265 (Tex. 1893).

Some question may arise as to what officers are embraced in the words “officer of the state government;” but there can be no doubt that the comptroller of public accounts is a state officer; he is an officer in one of the departments of the executive branch of the state government, whose duties extend to the transaction of the business of that department throughout the entire state.<sup>12</sup>

The Court did not suggest that the two groups of officials described in the 1881 and 1892 statutes could be equated, but concluded only that the Comptroller was unquestionably in both groups.

In an 1895 decision, however, the Court implied that there might be some closer identity between the two groups.<sup>13</sup> Holding that the 1892 statute essentially created an exception to the 1881 statute only to the extent that the latter applied to this Court but not as it applied to other courts, we concluded that the 1881 statute should “be construed to read: ‘No court of this state, except the supreme court, shall have power,’ etc.”<sup>14</sup> — the “etc.,” of course, including “to . . . mandamus . . . officers of the executive departments”. We did not hold that the 1892 statute was nothing more than an exception to the 1881 statute, but neither did we indicate that the 1892 statute was broader.

Just as easily as the Court concluded that it had original jurisdiction to mandamus the Comptroller, it also held in an 1897 case that it had no such jurisdiction to mandamus a county treasurer, even though he was in some sense an officer of state government.<sup>15</sup> We explained:

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<sup>12</sup> *Id.* at 266.

<sup>13</sup> *McKenzie v. Commissioner of Gen. Land Office*, 32 S.W. 1038 (Tex. 1895).

<sup>14</sup> *Id.* at 1039.

<sup>15</sup> *Travis County v. Jourdan*, 42 S.W. 543 (Tex. 1897).

Counties are but political subdivisions of the state, and most of the officers of a county perform functions for the state, and are, in a certain sense, state officers. But it does not follow that they are “officers of the state government,” within the meaning of the [1892 law]. If it had been the intention of the legislature to confer jurisdiction upon this court to grant the writ of mandamus against any state officer, using those words in their widest sense, it would not have been necessary to provide expressly that the court might issue the writ against any district judge. The mention of that officer clearly shows that it was not the purpose to include within the meaning of the term “officers of the state government” any other officer of a district, and, for a stronger reason, such officers as are commonly known as county officers.<sup>16</sup>

The Court next revisited the issue in 1903 in *Betts v. Johnson*.<sup>17</sup> The relator in that case petitioned for mandamus directing the Board of Eclectic Medical Examiners to issue him a license to practice medicine. The Board was one of three physician-licensing agencies that the Legislature had created two years earlier<sup>18</sup> under the authority of article XVI, section 31 of the Texas Constitution, which authorized licensing but prohibited giving “preference . . . to any school of medicine.”<sup>19</sup> It appears that three licensing boards were necessary because physicians trained in one of the schools of medicine then prevalent — allopathic, homeopathic, and eclectic — had so little regard for physicians trained in either of the other schools that no single group could be trusted to license all physicians without violating the anti-preference provision of the Constitution. Each board was comprised of nine members “learned in medicine and

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<sup>16</sup> *Id.* at 543 (citations omitted).

<sup>17</sup> 73 S.W. 4 (Tex. 1903).

<sup>18</sup> Act approved Feb. 22, 1901, 27th Leg., R.S., ch. 12, 1901 Tex. Gen. Laws 12, *reprinted in* 11 H.P.N. GAMMEL, THE LAWS OF TEXAS 1897-1902 12 (Austin, Gammel Book Co. 1902).

<sup>19</sup> TEX. CONST. art. XVI, § 31 (“The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but no preference shall ever be given by law to any school of medicine.”).

surgery”, appointed by the Governor for two-year terms.<sup>20</sup> Their duty was to meet “at least twice a year at such times and places as the boards may from time to time determine” to “examine all persons making application to them who shall desire to commence the practice of medicine, surgery, [or] midwifery”.<sup>21</sup>

To decide whether the members of the one board were “officers of the state government” within the meaning of the 1892 statute, we began by noting:

The words “officers of the state government” are of a very indefinite meaning. All county and district officers are officers of the state government in a general sense, but we have held that they are not such within the meaning of the statute in question. Whether every officer of the state whose functions are not confined to a political subdivision of the state comes within the meaning of the terms, we have never decided. It would seem, however, that it was the purpose of the Legislature to include only such state officers as are charged with the general administration of state affairs, namely, the heads of the state departments.<sup>22</sup>

Such heads of departments were beyond the district court’s mandamus jurisdiction because of the 1881 statute. Any broader grant of jurisdiction to this Court, we reasoned, would unnecessarily overlap the district court’s jurisdiction and increase the caseload of an already overworked Supreme Court.<sup>23</sup> Thus, we concluded:

We can see a reason why the court should have been empowered to grant writs of mandamus against the heads of the departments of the state government. These officers must reside, and their offices must be kept, at the seat of the state government, and their official functions are to be performed there. A mandamus proceeding against the head of a department, as a rule, involves questions which are of general public interest and call for

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<sup>20</sup> Act approved Feb. 22, 1901, 27th Leg., R.S., ch. 12, §§ 2-3, 1901 Tex. Gen. Laws 12, 12-13, *reprinted in* 11 H.P.N. GAMMEL, THE LAWS OF TEXAS 1897-1902 12, 12-13 (Austin, Gammel Book Co. 1902).

<sup>21</sup> *Id.* §§ 4-5, at 13.

<sup>22</sup> *Betts*, 73 S.W. at 4-5 (citation omitted).

<sup>23</sup> *Id.*

a speedy determination. That they are of far more importance than those ordinarily arising in mandamus suits against other officers, whether of the state, or of a district, or a county, is, as we think, obvious.

We fail to see any very good and sufficient reason why the Legislature should have deemed it appropriate to confer original jurisdiction upon this court to grant a writ of mandamus against executive officers, other than those intrusted with the general administration of state affairs and who exercise general governmental functions. Others are officers in a certain sense, but in another sense they are mere agents charged with the performance of special functions. The district courts have jurisdiction to issue the writ of mandamus to all other officers except heads of departments, and, as in other cases, appeals are allowable for the correction of the errors of those tribunals. Therefore we think the Legislature might have well considered that it was neither necessary nor proper to give the Supreme Court jurisdiction to issue the writ of mandamus against such officers.<sup>24</sup>

Clearly, the members of the Board of Eclectic Medical Examiners were in this latter category. Although they licensed physicians to practice anywhere in the State, those physicians were from only one school of medicine (which no longer exists).<sup>25</sup> The board did not have offices in Austin and was required to meet only twice a year. It is perhaps some measure of the board's lack of importance that it was abolished only six years after it was created.<sup>26</sup> For these reasons, the members of the board were not within the mandamus jurisdiction conferred by the 1892 statute.

Neither was the board itself, as the Court's opinion explained in closing:

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<sup>24</sup> *Id.* at 6.

<sup>25</sup> See STEDMAN'S MEDICAL DICTIONARY 441 (5th Unabridged Lawyers' Ed. 1982) (defining "eclecticism" as "[a] now defunct system of medicine that advocated use of indigenous plants to effect specific cures of certain signs and symptoms").

<sup>26</sup> Act of April 17, 1907, 30th Leg., R.S., ch. 123, § 17, 1907 Tex. Gen. Laws 224, 228, reprinted in 13 H.P.N. GAMMEL, GENERAL LAWS OF THE STATE OF TEXAS 224, 228 (1907).

But the writ applied for in this case is against a board of officers, and not against an officer. It seems that, if it had been the purpose to empower this court to issue the writ as well against a board of officers as against a single officer, the language would have been, “any officer or board of officers of the state government.”<sup>27</sup>

JUSTICE BAKER reads this part of the opinion to foreclose this Court from granting mandamus relief against multiple members of the same governmental entity, as opposed to a single officer heading an agency, when the decision complained of is that of the entity, but his view is inconsistent with the Court’s decision in *McFall v. State Board of Education*,<sup>28</sup> the next case to construe the 1892 statute. There, relator petitioned the Court to mandamus the State Board of Education — a three-member board composed of the Governor, the Comptroller of Public Accounts, and the Secretary of State — to vacate one of its orders.<sup>29</sup> Chief Justice Gaines, who had written the Court’s opinion in *Betts*, also wrote the opinion in *McFall*. Referring to the language just quoted from *Betts*, he explained:

We held in effect in [*Betts*] that, because the board was a state board, it did not make them state officers within the meaning of the [1892 statute]. But it was held in that case that none of the board were state officers. But the statute does not authorize us to issue the writ of mandamus against the Governor of the state. The writ must go against all or none, and therefore cannot properly issue in this case.<sup>30</sup>

The Court thus expressly contemplated that mandamus could issue against the several members of a board — “[t]he writ must go against all” — as long as each of them was a state officer within the meaning of the

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<sup>27</sup> 73 S.W. at 6 (citation omitted); *see also A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 684 (Tex. 1995) (Hecht, J., dissenting).

<sup>28</sup> 110 S.W. 739 (Tex. 1908).

<sup>29</sup> *Id.* at 740.

<sup>30</sup> *Id.* at 739-740.

1892 statute. The reason the Court gave for denying mandamus in *McFall* was not because relief had been sought against a board rather than an officer, or because the board had three members rather than a single head, but because not all of the board members were subject to the Court’s mandamus jurisdiction. The Court held that it could not mandamus some of the members, even a majority, if it could not mandamus them all. Relator’s remedy to challenge the validity of the board’s decision, we said, was to petition the district court for mandamus relief against a lesser school official charged with the duty to carry out the decision.<sup>31</sup> But we did not suggest that the availability of this remedy was a reason to deny mandamus relief. The Court’s only basis for denying relief was that the Governor, one of the board members, was beyond the Court’s mandamus jurisdiction.

JUSTICE BAKER’s position is also contradicted by three other decisions of this Court. In one, *Middlekauff v. State Banking Board*, the relator petitioned the Court to mandamus the board and others to pay a claim made against the bank depositors’ guaranty fund.<sup>32</sup> The Court ordered “that this suit be dismissed as to the respondents no longer in office, and that a writ of mandamus be issued against the remaining respondents, requiring the allowance of the claim of relator out of the bank guaranty fund.”<sup>33</sup> Although it is not clear from the Court’s opinion exactly what officials were mandamus, the guaranty fund was controlled and managed by the three-member State Banking Board,<sup>34</sup> so that relief would have been

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<sup>31</sup> *Id.* at 740.

<sup>32</sup> 242 S.W. 442, 442 (Tex. 1922).

<sup>33</sup> *Id.* at 443.

<sup>34</sup> See TEX. REV. CIV. STAT. art. 482 (1911); see also, e.g., *Guaranty State Bank of Graham v. Neill*, 275 S.W. 198, 199 (Tex. Civ. App.—Fort Worth 1925) (quoting article 482); *Chapman v. Guaranty State Bank*, 259 S.W. 972, 974 (Tex.

effective only if directed against the members of the board then in office. Consistently, in *State Banking Board v. Winters State Bank*, the Court held that mandamus against the three-member State Banking Board and the State Banking Commissioner, a member of the board, was the proper means of enforcing a claim against the guaranty fund.<sup>35</sup> In a third case, *State v. Thomas*, the Court granted mandamus relief in a petition filed against the members of the Public Utility Commission.<sup>36</sup> JUSTICE BAKER argues that *Thomas* was an “aberration” and “wrongly decided”<sup>37</sup> because relator sought relief against the individual commissioners and the Court granted relief against the Commission,<sup>38</sup> but this is a technical flaw immaterial to the scope of the Court’s original mandamus jurisdiction. The effect would have been the same had the Court granted relief against the commissioners instead of the Commission. The Court’s mistake in the rendition of judgment does not detract from its decision to grant relief against the state officers it clearly determined were within its original mandamus jurisdiction.<sup>39</sup>

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Civ. App.—Fort Worth 1924) (stating that the guaranty fund was “wholly within the control of the state banking board”); *State Banking Bd. v. Pilcher*, 256 S.W. 996, 1004 (Tex. Civ. App.—Dallas 1923) (stating that the guaranty fund was “under the control and management of the state banking board”), *rev’d on other grounds*, 270 S.W. 1004 (Tex. Com. App. 1925, judgment adopted).

<sup>35</sup> 13 S.W.2d 391, 393 (Tex. Civ. App.—Austin 1929, writ ref’d); *see also Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427 (Tex. 1963) (allowing mandamus against the State Banking Commissioner).

<sup>36</sup> 766 S.W.2d 217 (Tex. 1989).

<sup>37</sup> *Ante* at \_\_\_\_.

<sup>38</sup> *Ante* at \_\_\_\_.

<sup>39</sup> *See also Cathey & Carrell v. Terrell*, 45 S.W.2d 956 (Tex. 1932) (denying without prejudice mandamus relief directing the members of the Railroad Commission to rule in a proceeding on the ground that the members had not been shown to have unreasonably delayed their ruling, but suggesting that relief would be granted if a ruling were unreasonably delayed).

The issue regarding the scope of the 1892 statute was partially resolved by the Legislature in its 1925 statutory recodification. That recodification no longer included the 1881 statute but did include, as article 1735, a provision giving the Supreme Court exclusive mandamus jurisdiction over “officers of the executive departments”. In effect, the Legislature made its 1892 enactment an exception to the 1881 statute, consistent with our construction of the two statutes. The provision is now section 22.002(c) of the Government Code.<sup>40</sup> But the Legislature also recodified as article 1733 a separate grant of original mandamus jurisdiction to the Court over any “officer of state government”, which is the predecessor to what is now section 22.002(a) of the Government Code. Thus, the Legislature treated the two groups of officials described in the two statutes as different. The Court has indicated that the “officers of the executive departments” over which it has exclusive original mandamus jurisdiction is a very restricted group.<sup>41</sup> It follows that the Legislature intended that the “officer[s] of state government” over whom the Court has original mandamus jurisdiction be a broader category of officials.

Whether an official should be included in that category is determined by considerations like those set out in *Betts*, including the “general public interest” in the official’s decisions, the necessity of a “speedy determination” of whether those decisions were according to law, and the “importance” of those decisions to the State as a whole.<sup>42</sup> By any measure, the members of the Public Utility Commission easily pass each

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<sup>40</sup> TEX. GOV’T CODE § 22.002(c) (“Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.”).

<sup>41</sup> *City of Arlington v. Nadig*, 960 S.W.2d 641, 642 (Tex. 1997) (per curiam).

<sup>42</sup> *Betts*, 73 S.W. at 5.

of these tests. The Commission is a major state agency with “the general power to regulate and supervise the business of each public utility within its jurisdiction”.<sup>43</sup> The Commission is composed of three commissioners appointed by the Governor with the advice and consent of the Senate.<sup>44</sup> Virtually all of their decisions impact the State as a whole, are of general concern, and require prompt review, but this is unquestionably true of their decisions regarding deregulation of the sale of electricity. Other states’ experiences in moving toward the same goal, most recently California’s, vividly prove the enormity of the consequences of such decisions. The Public Utility Commission is not the Board of Eclectic Medical Examiners.

This view of the scope of the Court’s original jurisdiction to mandamus state officers is not inconsistent with any of this Court’s decisions that JUSTICE BAKER cites. In one, *Superior Oil Co. v. Sadler*, the Court construed only its exclusive jurisdiction over “officers of the executive departments” and held that it could not mandamus the School Land Board.<sup>45</sup> Even if the Court had considered whether the members of that board were state officers within the Court’s non-exclusive mandamus jurisdiction, it is apparent even from the Court’s brief *per curiam* opinion that the board’s decision — not to accept a bid on an oil and gas lease — was not an issue of statewide interest or importance. In the other two cases that

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<sup>43</sup> TEX. UTIL. CODE § 14.001.

<sup>44</sup> *Id.* § 12.051.

<sup>45</sup> 458 S.W.2d 55 (Tex. 1970) (*per curiam*).

JUSTICE BAKER cites, *Givens v. Woodward*<sup>46</sup> and *McLarty v. Bolton*,<sup>47</sup> and one which he does not, *Malone v. Rainey*,<sup>48</sup> the Court held without discussion that its original mandamus jurisdiction did not extend to routine decisions of university boards. In none of these cases did the Court refuse to exercise its mandamus jurisdiction over officials of the stature of members of the Public Utility Commission.<sup>49</sup>

JUSTICE BAKER argues that TXU is not entitled to relief against the individual commissioners because the concluding paragraphs in TXU's petition and brief request relief only against the Commission and not against its members. But TXU's petition identifies the three commissioners as respondents, and obtaining relief against them is the manifest plea throughout the papers it has filed here. For example, TXU argues in its brief that "the PUC Commissioners are indisputably within the Court's mandamus power" under both section 22.002(a) and 22.002(c). In its reply to the responses to its petition, TXU states:

the PUC Commissioners exercise extensive control over the intensely regulated electric power industry and exercise the sovereign functions of government for the protection and benefit of the public. They are state officers and are subject to this Court's original mandamus jurisdiction. The only question is whether that jurisdiction should be exercised. Since, as detailed below, the Commissioners abused their discretion and there exists no adequate remedy at law, mandamus should issue.

TXU also argues that "[t]he Commission itself is . . . also subject to that jurisdiction." Fairly read, TXU's prayer for relief against the Commission is only a shorthand reference to the agency and its members and

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<sup>46</sup> 196 S.W.2d 456 (Tex. 1946) (per curiam).

<sup>47</sup> 191 S.W.2d 850 (Tex. 1946) (per curiam).

<sup>48</sup> 133 S.W.2d 951 (Tex. 1939) (per curiam).

<sup>49</sup> See also *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 775-776 (Tex. 1999).

not a retraction of its arguments relating to the commissioners. JUSTICE BAKER's argument unfairly takes two sentences from the prayer in TXU's petition and brief out of context.

JUSTICE BAKER also argues that to hold the Court's original mandamus jurisdiction applicable to this case will open the floodgates to petitions for mandamus against other state boards and commissions. I doubt whether this prediction will prove correct, but even if it does, granting relief in this one very extraordinary case will not spell the demise of the ordinary process for judicial review of ordinary administrative decisions. Nor will the Court's resources be strained in turning away ordinary cases. Unmeritorious petitions are not that hard to deny.

For these reasons, I conclude, as the Court does, that we have jurisdiction to mandamus the members of the Commission as TXU requests. I now turn to whether TXU has met the two conditions for obtaining relief.

## II

One thing TXU must show to obtain mandamus relief is that the members of the Commission clearly abused their discretion.<sup>50</sup> Their failure to correctly construe the Public Utility Regulatory Act (PURA)<sup>51</sup> would be such a clear abuse of discretion.<sup>52</sup>

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<sup>50</sup> See *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

<sup>51</sup> TEX. UTIL. CODE §§ 11.001 et seq.

<sup>52</sup> See *Walker*, 827 S.W.2d at 840.

As the Court has said before, the Public Utility Commission “is a creature of the Legislature and has no inherent authority.”<sup>53</sup> Like other state administrative agencies, the Commission “has only those powers that the Legislature expressly confers upon it” and “any implied powers that are necessary to carry out the express responsibilities given to it by the Legislature.”<sup>54</sup> It is not enough that the power claimed by the Commission be reasonably useful to the Commission in discharging its duties; the power must be either expressly conferred or necessarily implied by statute. The Commission claims no express statutory authority to reverse stranded cost mitigation efforts before the 2004 true-up, when stranded costs will be finally determined,<sup>55</sup> and no such authority exists. The issue, then, is whether the authority asserted by the Commission is *necessarily* implied in PURA. To resolve this issue, one must begin with a basic understanding of stranded costs. The Court has thoroughly explored the matter of stranded costs in two cases last Term.<sup>56</sup> Here I review only those considerations most important to the issues currently raised.

In a deregulated, competitive market for the sale of retail electricity, it is possible that some incumbent utilities’ generation-related assets — principally nuclear power plants — will be worth less than their book value based on the historic costs of those assets in the regulated monopoly that has existed until

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<sup>53</sup> *Public Util. Comm’n v. GTE-SW Corp.*, 901 S.W.2d 401, 407 (Tex. 1995).

<sup>54</sup> *Public Util. Comm’n v. City Pub. Serv. Bd.*, 51 S.W.3d 310, 315 (Tex. 2001).

<sup>55</sup> TEX. UTIL. CODE § 39.262.

<sup>56</sup> *City of Corpus Christi v. Public Util. Comm’n*, 51 S.W.3d 231 (Tex. 2001); *TXU Elec. Co. v. Public Util. Comm’n*, 51 S.W.3d 275 (Tex. 2001).

now.<sup>57</sup> One reason is that it may be possible to generate electric power more economically using other fuels, such as natural gas.<sup>58</sup> This “positive excess of the net book value of generation assets over the market value of the assets”, referred to as ECOM, is what PURA defines as “stranded costs”.<sup>59</sup> PURA provides that “[a]n electric utility is allowed to recover all of its net, verifiable, nonmitigable stranded costs incurred in purchasing power and providing electric generation service”,<sup>60</sup> but that “[a]n electric utility, together with its affiliated electric provider and its affiliated transmission and distribution utility, may not be permitted to overrecover stranded costs”.<sup>61</sup>

The trouble is, whether a utility will have stranded costs in a competitive market, and how much they will be, depends largely on what the retail price of electricity will be in that as yet nonexistent market, which in turn depends on ever-changing variables like natural gas prices.<sup>62</sup> In 1996, the Commission began using an ECOM administrative computer model to estimate what stranded costs would be in a deregulated market.<sup>63</sup> In 1998, the Commission reported to the Legislature that utilities’ stranded costs were estimated

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<sup>57</sup> Public Utility of Texas, *Report to the Texas Senate Interim Committee on Electric Utility Restructuring — Potentially Strandable Investment (ECOM) Report: 1998 Update*, at 1-3 (April 1998).

<sup>58</sup> *Id.* at 3.

<sup>59</sup> TEX. UTIL. CODE § 39.251(7).

<sup>60</sup> *Id.* § 39.252(a).

<sup>61</sup> *Id.* § 39.262(a).

<sup>62</sup> *Report, supra* note 57, at 3.

<sup>63</sup> *Id.* at 3-7.

to be about \$3.3 billion if competition began in 2002.<sup>64</sup> But the Commission cautioned that actual stranded costs, based on market values rather than an administrative model, might be far more or far less than estimated, and might not even exist at all.<sup>65</sup> For example, the Commission estimated that TXU's stranded costs would be about \$1.1 billion, although they might be as high as nearly \$5 billion or as low as a negative \$3.5 billion.<sup>66</sup> By a negative number, the Commission meant that the market value of a utility's generation-related assets would exceed book value, rather than vice versa, by that amount.

The Commission's 1998 report to the Legislature recommended that stranded costs be finally determined using actual market values rather than any administrative approach.<sup>67</sup> The Legislature agreed and required that determination to be made in 2004, after competitive markets have begun to develop.<sup>68</sup> One of the principal mechanisms for recovering stranded costs is a "competition transition charge" (CTC) to be incorporated in the "wholesale" rates charged by the transmission and distribution utility (TDU) and passed through to retail customers.<sup>69</sup> The CTC is to be based on estimated stranded costs when competition begins January 1, 2002,<sup>70</sup> and later on the final determinations made in 2004.<sup>71</sup>

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<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 36.

<sup>67</sup> *Id.* at 11.

<sup>68</sup> TEX. UTIL. CODE § 39.262.

<sup>69</sup> *Id.* §§ 39.201, 39.262.

<sup>70</sup> *Id.* § 39.201.

<sup>71</sup> *Id.* § 39.262.

But recovery of stranded costs solely through the CTC may be detrimental to consumers. The Commission warned in its 1998 report to the Legislature that retail competition would be impaired if recovery of stranded costs were delayed and that therefore early efforts to mitigate such costs were essential:

If retail competition begins without some degree of prior ECOM mitigation, the time necessary to recover any applicable stranded costs may be extended, and the benefits of competition for consumers may be unnecessarily delayed. *(This appears to be the case in California — particularly for smaller consumers with less flexibility and fewer competitive alternatives.)*<sup>72</sup>

To avoid this danger, the Legislature required in PURA section 39.254 that utilities estimated in the Commission's 1998 report to have stranded costs mitigate those costs before January 1, 2002 by making certain accounting adjustments:

Each utility that was reported by the commission to have positive "excess costs over market" (ECOM) denoted as the "base case" for the amount of stranded costs before full retail competition in 2002 with respect to its Texas jurisdiction, in the April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring entitled "Potentially Strandable Investment (ECOM) Report," *must . . .* reduce the net book value of, otherwise referred to as "accelerate" the cost recovery of, its stranded costs each year.<sup>73</sup>

This mitigation is to be done by applying excess earnings to reduce the book value of generation assets.<sup>74</sup>

PURA also gives utilities the option of "redirect[ing] all or a part of the depreciation expense relating to

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<sup>72</sup> *Report supra* note 57, at 2 (emphasis added).

<sup>73</sup> TEX. UTIL. CODE § 39.254 (emphasis added).

<sup>74</sup> *Id.*

transmission and distribution assets to its net generation plant assets.”<sup>75</sup> Section 39.256(c) of PURA requires that such accounting adjustments “shall be accepted and applied by the commission for establishing net invested capital and transmission and distribution rates for retail customers in all future proceedings.”<sup>76</sup> The Commission continues to recognize the importance of early stranded cost mitigation, stating in the course of the proceedings now before the Court: “The early mitigation and recovery are intended to minimize any detrimental impacts on the developing competitive retail electric market that the recovery of large amounts of stranded costs may have.”<sup>77</sup>

TXU began using both of these mitigation tools — reapplying excess earnings and redirecting depreciation — as soon as it was permitted by PURA to do so. In March 2000 each utility, including TXU, initiated a proceeding in the Commission as required by PURA<sup>78</sup> to establish a business plan for unbundling its generation, transmission and distribution, and retail services, and to set rates for its proposed TDU. In the course of those proceedings to determine the appropriate initial CTC, the Commission revised its ECOM administrative model and used it to re-estimate utilities’ stranded costs, using current data as PURA requires.<sup>79</sup> The Commission found that TXU’s estimated stranded costs were no longer \$1 billion but negative \$2.745 billion. Based on this finding, the Commission determined that no CTC should be set

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<sup>75</sup> *Id.* § 39.256(a).

<sup>76</sup> *Id.* § 39.256(c).

<sup>77</sup> Order on Certified Issues in Docket No. 22350 at 9 (Nov. 9, 2000).

<sup>78</sup> TEX. UTIL. CODE § 39.201.

<sup>79</sup> *Id.* § 39.201(h).

for TXU's TDU. However, the Commission went further and ordered that the TDU's rates should be reduced by reversing the redirection of \$798 million on TXU's books and refunding TXU's reapplication of \$888 million excess earnings through an "excess mitigation credit" (EMC) to be passed through to consumers. The Commission made similar determinations with respect to other utilities.

As I said at the start of this discussion, the Commission claims no express statutory authority for its order reversing TXU's mitigation efforts. The Commission argues that PURA is silent on the subject of mitigation reversal because the Legislature never contemplated that utilities estimated in the Commission's 1998 report to have stranded costs would later see those costs disappear, largely due to much higher natural gas prices that make nuclear plant generation of electricity more economic. But this argument is undercut, not supported, by the 1998 report, which specifically cautioned that stranded costs could fall anywhere within a very wide range of both positive and negative numbers. Furthermore, PURA itself recognizes that stranded costs might be nonexistent by 2001, whether due to mitigation efforts or changed circumstances, and therefore requires a calculation of the CTC, "*if any*," based on current information.<sup>80</sup> The words, "if any", strongly suggest that the Legislature contemplated that, due to fluctuations in model inputs to estimate stranded costs and the success of mitigation efforts, it was possible, perhaps even likely, that a CTC would not be necessary because the utility would have no positive estimated stranded costs in 2002. Thus, if the 1998 report and statutory language reflect legislative intent, it seems much more likely that PURA does not authorize the Commission to reverse stranded cost

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<sup>80</sup> *Id.* § 39.201(d),(g),&(h).

mitigation efforts because the Legislature did not want to risk the impacts on developing competition that, according to the report, delayed recovery of stranded costs could have. But whatever the explanation, PURA does not give the Commission express authority to reverse early mitigation efforts. The Commission is thus left to argue that such authority is necessarily implied in the statute.

The Commission points to three provisions. One is section 36.003(a) of PURA, which requires the Commission to “ensure that each rate an electric utility or two or more electric utilities jointly make, demand, or receive is just and reasonable.”<sup>81</sup> As the PUC’s argument goes, if depreciation on transmission-and-distribution-related assets is unnecessarily redirected to generation-related assets, the book value of the former, on which a TDU’s rates are based, is increased unjustly and unreasonably. While this argument clearly has merit, the power to correct rates by mitigation reversal is far too specific to be necessarily implied by the power to set just and reasonable rates. To read section 36.003(a) as the Commission does would be to give the Commission essentially unlimited authority to do whatever it thought “just and reasonable”, reducing to no more than mere suggestions the Legislature’s detailed requirements for the transition to a competitive retail market. Moreover, the evidence before the Commission does not show that wholesale rates will be just and reasonable only if early mitigation efforts are now reversed; to the contrary, the evidence is quite clear that the results of such reversal cannot be predicted with any reliability, any more than 2004 stranded costs could be predicted in 1998. Simply put, no one knows, or

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<sup>81</sup> *Id.* § 36.003(a).

can know, whether a reversal of stranded cost mitigation is necessary to ensure just and reasonable rates, or whether the opposite is true.

Another statutory provision on which the Commission relies for its power to reverse mitigation of stranded costs is section 39.201(h), which requires the Commission to update the data inputs into its ECOM administrative model in determining a TDU's wholesale charges beginning in 2002.<sup>82</sup> Why, the Commission asks, would the Legislature require stranded cost estimates to be updated before 2002 if it did not intend for the Commission to act on them by reversing early mitigation efforts? The history of PURA's enactment provides no answer. Logically, the Legislature could well have decided that updated stranded cost estimates should be used in setting the CTC to be incorporated in wholesale rates but not in determining whether early mitigation efforts should have been used. This middle course reduces the risks of both over-recovery and under-recovery of stranded costs before the 2004 true-up, thereby protecting competition from excessive wholesale rates both as it first emerges and as it later struggles to gain ground. The obvious rationality of this approach, based on risks not only consistently identified by the Commission in its 1998 report as well as in the current proceedings, but also reflected in PURA itself, prevents a necessary inference from section 39.201(h) that the Commission must be empowered to reverse mitigation.

The only other provision on which the Commission relies is section 39.262(a), which provides

An electric utility, together with its affiliated retail electric provider and its affiliated transmission and distribution utility, may not be permitted to overrecover stranded costs

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<sup>82</sup> *Id.* § 39.201(h).

through the procedures of this section or through the application provided by the other sections of this chapter.<sup>83</sup>

According to the Commission, this section qualifies every other part of PURA, including the requirement in section 39.254 that utilities with estimated stranded costs in 1998 undertake to mitigate them before any CTC charge is set, and gives the Commission not only the power but the duty to prevent over-mitigation. But even assuming that the Commission is correct that this provision in effect trumps all others, it cannot be invoked before 2004, when stranded costs are finally determined. The subject of section 39.262, entitled “True-Up Proceeding”, is the 2004 true-up proceeding, not any interim determinations. More importantly, to date stranded costs have only been, and can only be, estimated. In 1998, those estimates compelled the early mitigation efforts TXU and others undertook in order to minimize adverse effects on competition in 2004. Estimates in 2000, based on much higher natural gas prices, showed that those mitigation efforts might not have been necessary. Now, natural gas prices have fallen again, and if the proceedings before us were reopened, mitigation might once again appear to be the wiser course. There is every reason to believe that 2002 and 2003 will only bring more changes in the estimates. Revisions to the ECOM administrative model and variations in its data input necessarily produce stranded cost estimates that are kaleidoscopic; no fixed view of stranded costs can be formed until the 2004 true-up, when real, market values are available. Even then, stranded costs will be only a judgment call, albeit one mandated by the Legislature.

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<sup>83</sup> *Id.* § 39.262(a).

It makes sense for PURA to require that stranded costs cannot be over-recovered in the final analysis; otherwise, utilities would receive a windfall from deregulation. It makes far less sense to argue for shifting mitigation efforts in the meantime. The Legislature may well have considered that the development of a competitive market requires more stability with adjustments made only at prescribed times. Yet as the Commission construes its power under section 39.262(a), it could keep on readjusting mitigation efforts back and forth until 2004. The Commission made that very assertion earlier in the administrative proceedings we are reviewing, stating that its power to review stranded cost mitigation “is not limited in time or by method.”<sup>84</sup> Now before this Court, the Commission has retreated to a more limited view of its statutory authority, refusing to argue, although invited to do so by other parties in the proceeding and questioned on the subject by the Court in oral argument, that it can revisit mitigation efforts in 2002 or 2003. But while the Commission refuses to make this argument, it concedes that its construction of section 39.262(a) to empower monitoring of stranded cost recovery knows no logical bounds. Nothing in PURA suggests such a role for the Commission.

The Commission’s claim of authority to reverse mitigation efforts is readily contrasted with its claim of authority to utilize a non-standard true-up to protect the security and payment of transition bonds which we upheld last Term in *City of Corpus Christi v. Public Utility Commission*<sup>85</sup> and *TXU Electric Co. v. Public Utility Commission*.<sup>86</sup> Section 39.307 of PURA authorizes the Commission “to ensure the

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<sup>84</sup> Order on Certified Issues in Docket No. 22350 at 9 (Nov. 9, 2000).

<sup>85</sup> 51 S.W.3d 231 (Tex. 2001).

<sup>86</sup> 51 S.W.3d 275 (Tex. 2001).

expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the transition bonds.’<sup>87</sup> No party to the proceedings reviewed in those cases questioned that absent some adjustment in the allocation of transition costs to various classes of customers, those costs would force customers in at least one class to look elsewhere for affordable electric service, and without anyone left to pay that part of the transition bond obligations, the security and payment of the bonds would be impaired. This was not a risk; it was a certainty. Although PURA did not expressly provide for inter-class reallocations of transition costs, the Court had little difficulty in concluding that the Commission’s power to order such adjustments was necessarily implied under section 39.307 to prevent the entire securitization scheme set out by the statute from failing. The parties in *City of Corpus Christi* and *TXU* disagreed only on the means chosen by the Commission to remedy the problem — the non-standard true-up; they did not disagree that some remedy was necessary. By contrast, what is certain in the proceedings now before us is not that over-mitigation will collapse the statutory scheme; rather, what is certain is that the effects of over-mitigation cannot be known. Absent Commission authority to order something like a non-standard true-up, the statutory securitization process central to deregulation was doomed to failure; absent Commission authority to order reversal of mitigation, no one knows whether the competitive market will be better off or worse off. PURA necessarily implies that the Commission has the power to save the deregulation scheme from certain failure; it does not necessarily imply that the Commission has the power to tweak the scheme in ways that may as likely prove harmful as beneficial.

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<sup>87</sup> TEX. UTIL. CODE § 39.307; *City of Corpus Christi*, 51 S.W.3d at 268.

It is important to emphasize that over-mitigation of stranded costs will not result in over-recovery, any more than under-mitigation will result in under-recovery. The purpose of mitigation is simply to minimize the effects of stranded cost recovery in 2004. PURA expressly provides that a utility “is allowed to recover all of its net, verifiable, nonmitigable stranded costs”<sup>88</sup> and “may not be permitted to overrecover stranded costs”.<sup>89</sup> TXU and the Commission agree that sections 39.201(l) and 39.262(g) of PURA expressly give the Commission ample tools to fully correct any over-recovery of stranded costs shown in the 2004 true-up to have resulted from mitigation efforts. This is the plain import of these provisions.

The effect of the Commission’s reversal of TXU’s mitigation efforts should be to reduce the TDU’s rates, thereby widening the margin between a potential retailer’s wholesale costs and the “price to beat”<sup>90</sup> that an incumbent utility’s related retail provider must charge for several years, and thus encouraging competition in 2002. But even if that is the immediate effect of the Commission’s decision, the risk is that when a CTC is set in 2004 to achieve full recovery of stranded costs within a reasonable period of time, it will be so high that fledgling competition will be stifled when it otherwise would have survived. The purpose of mitigation, urged by the Commission in its 1998 report, is to minimize that risk. The decision whether to incur the risk was the Legislature’s to make, and it chose not to do so. The Commission is not authorized to redetermine the issue.

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<sup>88</sup> TEX. UTIL. CODE § 39.252(a).

<sup>89</sup> *Id.* § 39.262(a).

<sup>90</sup> *Id.* § 39.202.

Finally, it bears mention that the Legislature was asked this past session in H.B. 2107 to amend PURA to give the Commission the power to reverse mitigation efforts before 2004, and the Legislature refused to do so.<sup>91</sup> Bills fail for many reasons other than legislative rejection of proposals on their merits; hence, one cannot read very much into the failure of H.B. 2107 to pass. While the demise of H.B. 2107 does not weigh much against the Commission's argument here, it certainly adds nothing in support of the argument.

JUSTICE BRISTER accepts the Commission's argument. In my view, his concurring opinion contains two basic flaws. One is that he assumes that more is now known about TXU's stranded costs than was known in 1998. TXU's stranded costs "no longer exist[]", he says; they have been "reduced to zero", they have "disappear[ed]".<sup>92</sup> This is simply is not true. Two important things have changed since 1998: the Commission has modified its administrative ECOM model for estimating stranded costs — it changed the formula, in other words — and the price of natural gas has risen. But neither of these things, nor anything else that has happened, has improved the accuracy of stranded cost predictions. The present proceedings have produced exactly what the Commission's 1998 report contained: an *estimate*. TXU's stranded

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<sup>91</sup> Tex. H.B. 2107, 77th Leg., R.S. (2001) (amending TEX. UTIL. CODE § 39.201(d), relating to the 2000-2001 proceedings, to add the following sentence: "If the commission determines that an electric utility that is subject to Section 39.254 and that has a service area exclusively located within the Electric Reliability Council of Texas does not have positive stranded costs based on a computation under Subsection (h), the commission shall order that mitigation attributable to positive differences identified under Section 39.257, excluding estimates of positive differences for calendar year 2001 and including mitigation attributable to excess earnings identified in accordance with transition plans approved by the commission, be applied such that 50 percent of such amounts allocable to residential customers, according to a methodology determined by the commission, shall be applied as a nonbypassable credit to the electric utility's residential customers in September 2001 as ordered by the commission.").

<sup>92</sup> *Ante* at \_\_\_\_.

costs, if any, have not any more disappeared since 1998 than they could have been said to have climbed over the same period if natural gas prices had remained low. If today's data were used, the ECOM model would estimate higher stranded costs because natural gas prices have fallen since the estimate made in the present proceedings. If tomorrow's data were used, the model would produce yet a different estimate. JUSTICE BRISTER charges that TXU is mitigating stranded costs it does not have, but the unquestioned fact is that stranded costs cannot be determined with any accuracy until one knows what the retail price of electricity is in a competitive market, and no such market exists. The Legislature has required early mitigation of stranded costs not because those costs actually exist now but because it has been estimated that they will exist after the 2004 true-up and waiting until then to begin recovery threatens competition.

The second flaw in JUSTICE BRISTER's opinion, it seems to me, is that it assumes that it would be better for mitigation to be based on current data. However reasonable that proposition may sound, it was not adopted by the Legislature, and it cannot simply be assumed. The assumption that there is a better approach than the Legislature has chosen pervades JUSTICE BRISTER's opinion. He argues that there is no reason to deprive the Commission of current information in monitoring mitigation efforts, but there is: to minimize the risk of a large CTC in 2004, and to provide a stable environment for the commencement and development of competition. He argues that without a reversal of TXU's mitigation efforts, its TDU's charges will be "excessive", but that is true only relative to revised stranded cost estimates; relative to the 1998 estimates, TXU's mitigation efforts are precisely what the Legislature intended. JUSTICE BRISTER recognizes that his view would not only permit but encourage continued stranded cost estimates over the next two years but notes that the Commission has not claimed such authority. He does not appear to see,

however, that the reason the Commission does not claim such authority is that constantly changing a TDU's rates could have a destabilizing effect on developing retail competition. He argues that the 2004 true-up may not determine stranded costs with much more accuracy; perhaps not, but the Legislature has expressly decided that stranded costs should be finally determined using market data in 2004. JUSTICE BRISTER concludes that the members of the Commission "may be wrong, but under any theory of legislative delegation, it is their mistake to make."<sup>93</sup> This is dangerously incorrect. Deregulation of the retail market for electricity, and how it is to be accomplished, are calls only the Legislature can make.

I do not know whether the Commission's approach in these proceedings is better than the one the Legislature has prescribed, but that is not for this Court to decide. The Commission's claim of power to reverse early mitigation efforts based on revised estimates of stranded costs is not unreasonable, but reasonableness is not the standard by which this Court must measure that claim. The power must either be expressly conferred by PURA or *necessarily* implied by its provisions. Because it is neither, I would hold that the Commission clearly abused its discretion.

### III

JUSTICE BRISTER is alone in arguing that the Commission has the power it claims here. CHIEF JUSTICE PHILLIPS's concurring opinion argues only that TXU has failed to show that relief by appeal is inadequate, the second requirement for obtaining mandamus relief.<sup>94</sup> In light of many previous cases in which we have granted mandamus relief, the inadequacy of an appellate remedy here is manifest.

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<sup>93</sup> *Ante* at \_\_\_\_.

<sup>94</sup> See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Earlier this Term, in *Perry v. Del Rio*, the Court granted mandamus relief to determine which of two courts should proceed to trial on claims that Congressional districts in Texas should be reapportioned.<sup>95</sup> Each court had prepared its case for trial, both trial judges had cooperated to minimize conflicts in scheduling and the presentation of evidence, and the parties assured us that they were prepared to go to trial in both courts simultaneously. Had both cases proceeded to trial, it was possible that judgments could have been rendered in both and all appeals exhausted within the three weeks remaining before the federal court's deadline for deferring to state litigation. It was also possible that the federal court would grant a reasonable extension of its deadline, as it ultimately did, if the state litigation were nearing completion. Nevertheless, we concluded that one court should be mandamus'd not to proceed further because of the *threat* that simultaneous litigation posed to a timely end of the process. We explained it this way:

We stated in *Walker v. Packer* that an appellate remedy is inadequate, justifying issuance of mandamus relief, “when parties stand to lose their substantial rights.” In the current circumstances, further confusion or delay in the trial of the pending challenges to congressional districting poses the very real threat that the parties will not be able to obtain a decision in the state courts that is final on appeal before the October 1 deadline set by the federal courts. Although counsel assured us at oral argument that they and the two district courts involved have cooperated in an effort to conduct two trials of the same issues, we think the inefficiency of such an approach and the uncertainty that will attend two appeals and a final appeal to this Court pose an intolerable risk to completing the process within the limited time remaining. The Supreme Court has recognized that the right of a state's citizens to have districts drawn by state institutions is so substantial that federal courts must reasonably accommodate the state process and defer to a state solution. We believe that protection of this right necessitates the issuance of mandamus relief here.

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<sup>95</sup> \_\_\_ S.W.3d \_\_\_, 44 Tex. Sup. Ct. J. 1147 (Sept. 12, 2001).

Furthermore, in *CSR Ltd. v. Link*, we recognized that exceptional circumstances may make a right of appeal inadequate. The circumstances presented here clearly fall within that category. The importance of achieving a decision of the districting claims that is final on appeal by the deadline set by the federal court and in time for review under the Voting Rights Act, all so as to minimize the risk of disruption to the impending election cycle, makes the issuance of mandamus relief not only appropriate but imperative.<sup>96</sup>

Proceeding in two courts simultaneously did not make it impossible or even improbable that the state system would produce a final decision by any federal court deadline; the duplicate proceedings only threatened compliance with the deadline.

By contrast, once competition begins, its development based on wholesale costs that have been wrongly set cannot be reversed. It may or may not be possible to reverse the harm done, but this threat seems to me to be exactly what we faced in *Perry*. CHIEF JUSTICE PHILLIPS's opinion dismisses *Perry* by saying that it involved proceedings in two trial courts while this involves proceedings in only one. This distinction has the same significance to the adequacy of an appellate remedy as the fact that the petitions in the two cases were filed in this Court on different dates — that is, none. Would mandamus relief be appropriate in this case only if appeals from the Commission's orders were pending in two different courts instead of one? No.

The competition genie cannot be forced back into his bottle once he has been released. In days retailers will begin to advertise, to promise customers rates based on their anticipations of what wholesale costs will be. The market will develop on the assumptions that the incumbent utilities' stranded costs were correctly estimated in 2001 rather than in 1998. If in 2004 the 2001 estimates are as far off as the

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<sup>96</sup> *Id.* at \_\_\_\_.

Commission now thinks the 1998 estimates were, the adverse effects on competition will be exactly those predicted by the Commission in its 1998 report when it warned the Legislature to provide for early mitigation of estimated stranded costs.

CHIEF JUSTICE PHILLIPS correctly states that a party seeking mandamus relief must show a real danger of a permanent loss of substantive rights,<sup>97</sup> but he seems to equate this with some private pecuniary loss, and this, in my view, is the principal flaw in his opinion. Will TXU suffer financially from the Commission's ruling? No, the Commission says; we're really helping TXU. No thanks, says TXU. The Commission and TXU obviously do not see the future through the same crystal ball. But regardless of who turns out right, TXU is not required to show a financial loss to obtain mandamus relief. TXU has other substantive rights at stake, and what it argues it has lost by the Commission's reversal of mitigation is the plan prescribed by the Legislature, a plan that was devised after long study and negotiations among all interested parties. This is not the kind of loss that must simply be suffered quietly in hopes for the best, in hopes that the Commission is really trying to help TXU; TXU is entitled to seek to prevent its loss of promises made by the Legislature, even if it is impossible to show whether that loss will eventually harm it financially.

The impossibility of reliably forecasting the financial impact of the Commission's reversal of mitigation efforts is no reason to deny mandamus relief. Suppose the Commission were to decide that it would be better to commence competition a year from now,<sup>98</sup> despite the Legislature's clear mandate that

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<sup>97</sup> *Ante* at \_\_\_\_.

<sup>98</sup> *See* TEX. UTIL. CODE § 39.103.

it commence on January 1, 2002. Would consumers or incumbent utilities or prospective retailers be helped or hurt by such a decision, and thus be entitled to challenge it by mandamus? Assuming, which would be likely, that no one in such a case could prove harm one way or the other with any certainty, is there any doubt that mandamus would lie to prevent the Commission from substituting its judgments for the Legislature's on such a fundamental issue? CHIEF JUSTICE PHILLIPS's concurring opinion states that "on this record, [it] cannot [be] determine[d] that irreparable harm will befall TXU if we do not act."<sup>99</sup> Even assuming that this is true in some economic sense, the statement sidesteps the principal issue and TXU's main argument, which is that TXU, as well as the other parties to this proceeding, other utilities, prospective retailers, and Texas consumers, are all entitled to the plan the Legislature has prescribed and not some other plan, even if it turned out to be a better one. Fundamentally, whether an appeal is adequate in these circumstances does not depend on whether TXU's ox ends up being gored, but on whether everyone is deprived of the transition plan mandated by the Legislature.

CHIEF JUSTICE PHILLIPS's opinion argues that a decision on mandamus relief cannot be made "on this record". But the factual considerations related to whether the reversal of mitigation efforts will be harmful or helpful have been thoroughly explored before the Commission. It is highly unlikely that the district court would be justified in hearing additional evidence on this score.<sup>100</sup> No more thorough record

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<sup>99</sup> *Ante* at \_\_\_\_.

<sup>100</sup> See *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503 (Tex. 1978) (approving trial court's decision to determine utility's request to stay the Commission's order based on the agency record, excluding new evidence on confiscation); *Public Util. Comm'n v. Water Servs., Inc.*, 709 S.W.2d 765 (Tex. App.—Austin 1986, writ dismissed) (affirming admission, in a temporary injunction hearing, of evidence on irreparable harm and the bond's adequacy, but noting that only the evidence in the agency record would be relevant to the issue of probability of success on the merits).

than the one we have before us, developed over eighteen months of intense debate in multiple proceedings, could possibly be presented in the district court, even if the court were permitted to go beyond the agency record, and it clearly is not.<sup>101</sup> For this reason, the fact that the district court is authorized to stay the Commission's order<sup>102</sup> does not warrant denial of mandamus relief. It does not appear that anything can be gained from simply shuffling the matter off to the district court, and by whatever route the issue of the validity of the Commission's order comes to us, we must eventually decide it. To delay that decision while the district court determines whether to grant a stay and the court of appeals and this Court review that determination threatens the irreparable harm — either to TXU, or its competition, or the public — that a competitive market will have begun to evolve in ways contrary to the Legislature's plan. The imminent commencement of competition counsels an immediate decision rather than one that might otherwise be delayed.

CHIEF JUSTICE PHILLIPS argues that mandamus relief should not be used merely to correct the misconstruction of a statute. There are two answers. First, this case does not involve mere statutory misconstruction. The Commission and the Legislature plainly believed that early mitigation of stranded costs was essential to deregulation. A retreat from that position now is a fundamental departure from the Legislature's deregulation scheme. Second, CHIEF JUSTICE PHILLIPS's argument ignores precedent. This Court often uses mandamus to prevent disclosure of privileged documents.<sup>103</sup> Which is more readily

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<sup>101</sup> *Id.*

<sup>102</sup> TEX. UTIL. CODE § 15.004.

<sup>103</sup> *See, e.g., Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

correctable on appeal: a discovery dispute between private parties, or deregulation of electric utilities involving millions of Texans? In *Travelers Indemnity Co. v. Mayfield*, we mandamus a trial court to vacate its order requiring the carrier in a workers' compensation case to reimburse the plaintiff's attorney fees periodically throughout the litigation, holding that the order "radically skewed the dynamics of the case".<sup>104</sup> Which is more readily correctable on appeal: an award of several hundred dollars in attorney fees, as in *Travelers*, or a reversal in \$1.6 billion stranded cost mitigation, as in this case? In *CSR Limited v. Link*<sup>105</sup> and *In re Masonite*,<sup>106</sup> we mandamus trial courts to vacate rulings on special appearances and venue, respectively, that could have affected thousands of other parties in hundreds of other cases. Which is more readily correctable on appeal: rulings involving hundreds or thousands of private litigants, as in those cases, or rulings involving millions of Texas consumers, as in the present case? In *In re University Interscholastic League*,<sup>107</sup> we mandamus a trial court to vacate an injunction prohibiting the League from disqualifying Robstown High School from participating in the state baseball tournament then in progress. Which is more readily correctable on appeal: standings in a state baseball tournament, or the development of a deregulated electric industry? No rational jurisprudence would put the important but limited consequences of discovery disputes, special appearances, venue, and baseball tournaments ahead of the enormous consequence of electric deregulation.

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<sup>104</sup> 923 S.W.2d 590, 595 (Tex. 1996).

<sup>105</sup> 925 S.W.2d 591 (Tex. 1996).

<sup>106</sup> 997 S.W.2d 194 (Tex. 1999).

<sup>107</sup> 20 S.W.3d 690 (Tex. 2000).

CHIEF JUSTICE PHILLIPS's answer to these cases is that they all involved trial court rulings while here the district court has not yet ruled, but this distinction is wholly irrelevant. CHIEF JUSTICE PHILLIPS does not disagree that the Court can mandamus the Commission in an original proceeding without a ruling from the district court. We disagree not over *whether* but *when* exigency justifies action by this Court without awaiting proceedings in the lower courts. The cited cases illustrate what the Court has considered in the past to be exigent circumstances. A state baseball tournament qualifies.<sup>108</sup> So should electric deregulation.

CHIEF JUSTICE PHILLIPS's concurring opinion makes two other arguments that are wholly lacking in merit. One argument is no more than a suggestion that TXU should be denied mandamus relief because it did not ask for expedited consideration of its mandamus petition. The Court did not need a motion to tell it that time was of the essence; it was obvious to us all that TXU's petition required an expedited consideration, witness the accelerated briefing and argument schedule, and these hurried opinions. Furthermore, the suggestion that a motion to expedite would have been important is belied by the Court's denial today of Reliant Energy's petition for mandamus; Reliant did file a motion to expedite, which the Court refused to grant. CHIEF JUSTICE PHILLIPS's answer to Reliant's motion is that it was faulty because it did not state a specific date by which the Court should act.<sup>109</sup> Again, Reliant and TXU may justifiably have thought that the Court would realize from their arguments that it was important to have a ruling on the merits by January 1, 2002, or as soon afterward as possible. I suspect it will come as a surprise to

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<sup>108</sup> *Id.* at 692.

<sup>109</sup> *Ante* at \_\_\_ n.3.

Reliant's counsel that its motion was denied for lack of a specific date. The other argument in CHIEF JUSTICE PHILLIPS's concurring opinion against mandamus relief is that the Legislature provided for expedited review of issues when it thought haste was necessary,<sup>110</sup> and reversal of mitigation efforts was not one of those issues. The answer to this argument is simple: the Legislature provided for expedited review of issues it thought would be controversial; having no more idea that the Commission would attempt to reverse mitigation efforts than that the Commission would delay commencement of competition<sup>111</sup> or deny recovery of stranded costs, the Legislature never imagined that there would ever be any reason to appeal on such issues, let alone the necessity for an expedited appeal. We cannot justifiably say to the Legislature: never having imagined the worst, you're stuck with it.

Perhaps it was important enough for Robstown High School to be excluded from the state baseball playoffs that this Court grant extraordinary mandamus relief; it is often important enough to issue mandamus relief to protect private parties' legitimate claims of privilege; mandamus relief is certainly warranted when necessary to protect the rights of hundreds and thousands of litigants; it was necessary to prevent distorting workers' compensation litigation although only a few hundreds or thousands of dollars were involved; and mandamus relief is rightly granted to help assure a successful end to redistricting proceedings. But if all of this is true, and I think it is, then I do not see any colorable reason for denying relief in a case of the extraordinary magnitude of this one.

Consistent with the Court's many precedents, I would grant mandamus relief in this case.

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<sup>110</sup> TEX. UTIL. CODE § 39.303(f); *see City of Corpus Christi*, 51 S.W.3d at 235.

<sup>111</sup> *See* TEX. UTIL. CODE § 39.103.

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In all likelihood, we have not seen the last of this case. Back it goes to the district court, from whence from the granting or denial of a stay it will bounce on appeal to the court of appeals and this Court, and then on appeal from the affirmance or reversal of the Commission’s decision, up and down again, until the private parties, and the taxpayers, have multiplied their investments in obtaining a simple yes-or-no answer. Incipiant ludi! Mindless of this waste, the Court bids the parties return another day and another day, raising the same issues, making the same arguments, until finally they are given the only answer they ever wanted — can the Commission reverse mitigation or not — on which the Court has long since made up its mind. The process thus more closely resembles a game of “mother, may I”, than anything that could remotely be called jurisprudence.

It is always important for issues to be fully developed factually and legally before a final resolution by the ultimate arbiter. But here they have been. The Court has an answer for the parties, and it is irresponsible not to deliver it.

In *Perry* we reiterated that “[c]ourts are erected to settle controversies, not to multiply them.”<sup>112</sup>

We followed that imperative in *Perry*; here we do not.

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Nathan L. Hecht  
Justice

Opinion delivered: December 31, 2001

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<sup>112</sup> *Perry v. Del Rio*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 44 Tex. Sup. Ct. J. 1147, 1159 (Sept. 12, 2001) (quoting *Cleveland v. Ward*, 285 S.W. 1063, 1071 (Tex.1926)).