

CAUSE NO. 2021CCV-60188-1

DONALD MCCARLEY,
Plaintiff,

v.

**ELECTRIC RELIABILITY COUNCIL OF
TEXAS, INC., AMERICAN ELECTRIC
POWER COMPANY, INC., AND AEP
TEXAS, INC.,**
Defendants.

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COUNTY COURT AT LAW

NO. _____

NUECES COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of this Court:

Plaintiff Donald McCarley files this Original Petition against Defendants Electric Reliability Council of Texas, Inc., American Electric Power Company, Inc., and AEP Texas, Inc. and would respectfully show as follows:

I. DISCOVERY PLAN

1. Pursuant to TEX. R. CIV. P. 190.4, Plaintiff intends to conduct discovery in this case under a Level 3 Discovery Plan.

II. PARTIES

2. Plaintiff Donald McCarley is an individual residing in Corpus Christi, Nueces County, Texas.

3. Defendant Electric Reliability Council of Texas, Inc. ("ERCOT") is a Texas corporation with its principal place of business at 7620 Metro Center Dr., Austin, TX 78744. Defendant ERCOT may be served with process by serving its registered agent, Bill Magness, at 7620 Metro Center Dr., Austin, TX 78744.

4. Defendant American Electric Power Company, Inc. ("AEP") is a New York Corporation with its principal place of business at 1 Riverside Plaza, Columbus, OH 43215.

Defendant AEP may be served with process by serving its registered agent, CT Corporation System, at 1999 Bryan St., Ste. 900, Dallas, TX 75201. Defendant AEP in its assumed or common name is sued under TEX. R. CIV. P. 28 and includes suit against any and all partnerships, unincorporated associations, private corporations, and individuals doing business under the assumed name “AEP” or “American Electric Power,” which is hereby sued in its partnership, assumed, or common name in connection with producing, transmitting, or distributing electric power. *See* TEX. R. CIV. P. 28. Service of process on American Electric Power Company, Inc. effects service on AEP in its assumed or common name. At all relevant times, AEP regularly transacted, solicited, and conducted business in the State of Texas.

5. Defendant AEP Texas, Inc. (“AEP Texas”) is a Delaware corporation with its principal place of business at 1 Riverside Plaza, Columbus, OH 43215. Defendant AEP Texas may be served with process by serving its registered agent, CT Corporation System, at 1999 Bryan St., Ste. 900, Dallas, TX 75201. Defendant AEP Texas in its assumed or common name is sued under TEX. R. CIV. P. 28 and includes suit against any and all partnerships, unincorporated associations, private corporations, and individuals doing business under the assumed name “AEP Texas,” which is hereby sued in its partnership, assumed, or common name in connection with producing, transmitting, or distributing electric power. *See* TEX. R. CIV. P. 28. Service of process on AEP Texas, Inc. effects service on AEP Texas in its assumed or common name. At all relevant times, AEP Texas regularly transacted, solicited, and conducted business in the State of Texas.

6. Defendant AEP Texas is a wholly owned subsidiary of Defendant AEP.

III. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under TEX. GOV’T CODE § 25.1802.

8. Plaintiff’s counsel states that the amount of damages he seeks in monetary relief

falls under TEX. R. CIV. P. 47(c)(5).

9. Venue is mandatory Nueces County, Texas under TEX. CIV. PRAC. & REM. CODE § 15.011 because this suit seeks recovery of damages to real property. Venue is also proper in Nueces County, Texas under TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) because it is the county in which all or a substantial part of the events or omissions giving rise to Plaintiff's claims occurred.

10. Plaintiff has not alleged any federal causes of action.

11. Plaintiff and Defendant ERCOT are citizens of the State of Texas. Pursuant to 28 U.S.C. § 1441(b)(2), this action cannot be removed.

IV. FACTS

12. On or about February 14, 2021, the State of Texas experienced a cold weather event in which more than 4 million Texas households, including Plaintiff's, lost power.

13. As a result of the impending cold weather event, Texas Governor Greg Abbott issued a disaster declaration on February 12, 2021, for all 254 counties in the State of Texas.

14. On the following day, February 13, 2021, Governor Abbott requested a federal emergency declaration, which was approved on February 14, 2021.

15. By February 15, 2021, the National Weather Service had issued a winter storm warning for the entire State of Texas.

16. The cold weather event caused increased energy demands across the state as Texans tried to keep their homes and businesses warm, with total state energy demand peaking around 69,000 megawatts.

17. A peak winter demand of 69,000 megawatts is by no means unusual. As recently as the 2018 winter season, the Texas energy grid experienced demand in excess of 65,000

megawatts.

18. The Texas energy grid regularly meets summer demands of 125,000 megawatts—almost twice the peak demand experienced in February 2021.

19. As energy demand rose in February 2021, the supply of energy fell as outdated power generators failed, including power generators owned and operated by Defendants AEP and AEP Texas, depriving the Texas power grid of 45,000 megawatts of energy.

20. Along with Defendants AEP, AEP Texas, Inc., and others, Defendant ERCOT provides 90 percent of Texas’s electricity and serves 26 million customers.

21. Defendants ERCOT, AEP, AEP Texas, and others could have increased electric production capacity in Texas in the days and weeks leading up to the February 2021 cold weather event, but consciously chose not to do so.

22. Similarly, Defendants AEP, AEP Texas, and others could have weatherized and updated their generation, transmission, and distribution facilities in order to prevent cold-weather failures like those experienced in February 2021, but consciously chose not to do so.

23. In response to Defendants’ failure to anticipate increased energy demands in February 2021, as well as the failure of Defendants AEP, AEP Texas, and others to weatherize and updated their generation, transmission, and distribution facilities, the transmission and distribution utilities—including Defendant AEP Texas—that make up the Texas energy grid were ordered to initiate rolling blackouts. These rolling blackouts left millions in the State of Texas without power for several days.

24. This cold weather event and its effects on the Texas energy grid were neither unprecedented, nor unexpected, nor unforeseen.

25. In fact, similar cold weather events in 1989 and 2011 led to exactly the same type

of rolling blackouts that have affected and continue to affect Texas residents and businesses.

26. Texas also experienced disruptive cold weather events in 1983, 2003, 2006, 2008, and 2010.

27. After investigating the Texas power grid in the wake of the cold weather event of 1989, the Public Utilities Commission of Texas made the following recommendations:

- “All utilities should ensure that they incorporate the lessons learned during December of 1989 into the design of new facilities in order to ensure their reliability in extreme weather conditions.
- All utilities should implement procedures requiring a timely annual (each Fall) review of unit equipment and procedures to ensure readiness for cold weather operations.
- All utilities should ensure that procedures are implemented to correct defective freeze protection equipment prior to the onset of cold weather.
- All utilities should maintain insulation integrity and heat tracing systems in proper working order. Generating unit control systems and equipment essential to cold weather operations should be included in a correctly managed preventive maintenance program.
- Additional training programs for plant personnel on the emergency cold weather procedures, including periodic drills, should be implemented by each responsible utility.”

PUCT 1989 Report at 7.

28. The Federal Energy Regulatory Commission and a nonprofit regulatory authority investigated the Texas power grid after rolling blackouts were again required during a cold weather event in 2011. The FERC report concluded:

Despite the recommendations issued by the PUCT in its report on the 1989 event, the majority of the problems generators experienced in 2011 resulted from failures of the very same type of equipment that failed in the earlier event. And in many cases, these failures were experienced by the same generators. . . . In its 1989 report, the PUCT commented that “whether the corrective actions being implemented [by the generators in the wake of the event] are sufficient to prevent future freeze-off related power plant failures, only direct experience with another deep freeze will ascertain.” **Texas has now had that second event, and the answer is clearly that**

the corrective actions were not adequate, or were not maintained. Generators were not required to institute cold weather preparedness, and efforts in that regard lapsed with the passage of time.

FERC 2011 Report at 178–79 (footnote omitted) (emphasis added).

29. The FERC report further noted:

the massive amount of generator failures that were experienced raises the question whether it would have been helpful to increase reserve levels going into the event. This action would have brought more units online earlier, might have prevented some of the freezing problems the generators experienced, and could have exposed operational problems in time to implement corrections before the units were needed to meet customer demand.

FERC 2011 Report at 8.

30. As the FERC report observed, “[m]any of the generators that experienced outages in 1989 failed again in 2011.” FERC 2011 Report at 8.

31. Now, many of these same power generators, transmitters, and distributors, including Defendants AEP, AEP Texas, and others, have failed once again due to their refusal to implement the reasonable economical remedies recommended in 1989 and 2011.

V. CLAIMS FOR RELIEF

COUNT 1: TAKING OF PROPERTY IN VIOLATION OF ARTICLE I, SECTION 17 OF THE TEXAS CONSTITUTION – ERCOT

32. Article I, Section 17 of the Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.”

33. Article I, Section 17 of the Texas Constitution waives sovereign immunity for takings claims.

34. The rolling blackouts ordered by Defendant ERCOT took, damaged, or destroyed Plaintiff’s property without adequate compensation.

35. Defendant ERCOT knew that ordering the rolling blackouts was certain or substantially certain to harm the Texas residents such as Plaintiff because it would cause Texas residents such as Plaintiff to be without power.

36. Defendant ERCOT knew that ordering the rolling blackouts was certain or substantially certain to harm Texas residents such as Plaintiff because it would cause Texas residents such as Plaintiff to be without heat.

37. Defendant ERCOT knew that ordering the rolling blackouts would materially and substantially impair access to and use of property owned and used by Texas residents such as Plaintiff.

38. Defendant ERCOT knew that ordering the rolling blackouts would materially and substantially impair access to and use of property owned and used Texas residents such as Plaintiff.

39. Defendant ERCOT knew that ordering the rolling blackouts would render the residences owned and used by Texas residents such as Plaintiff devoid of all economically viable uses.

40. Defendant ERCOT knew that ordering the rolling blackouts would unreasonably interfere with the ability of Texas residents, including Plaintiff, to use and enjoyment of their property.

41. Defendant ERCOT's rolling-blackout orders constituted a taking of Plaintiff's property in violation of the Texas Constitution, to which he is entitled to just and adequate compensation.

COUNT 2: NEGLIGENCE AND GROSS NEGLIGENCE – ERCOT

42. Defendant ERCOT had a duty to take reasonable care in estimating and planning the amount of power that would be required in the Winter 2021 season.

43. Defendant ERCOT further had a duty to take reasonable corrective actions when it became clear that its own projections showed insufficient supply capacity to meet forecast demand.

44. Defendant ERCOT failed to take reasonable care in estimating and planning the amount of power that would be required in the Winter 2021 season.

45. Defendant ERCOT failed to take reasonable corrective actions when it became clear that its own projections showed insufficient supply capacity to meet forecast demand.

46. Defendant ERCOT failed to “make all reasonable efforts to prevent interruptions of service” as required by 16 TEX. ADMIN. CODE § 25.52.

47. Defendant ERCOT failed to “make reasonable provisions to manage emergencies resulting from failure of service” as required by 16 TEX. ADMIN. CODE § 25.52.

48. Defendant ERCOT’s violations of 16 TEX. ADMIN. CODE § 25.52 constituted negligence per se.

49. Defendant ERCOT’s negligent acts and omissions, as described above, caused Plaintiff to lose power at his home and proximately caused his injuries and damages.

50. In addition, Defendant ERCOT’s acts and omissions described herein involved an extreme degree of risk of harm to others, including Plaintiff.

51. Despite knowledge of this extreme risk of harm, Defendant ERCOT persisted in performing the acts and omissions described herein with a conscious indifference to and reckless disregard of to the rights, safety, or welfare of others.

52. Such gross negligence was a proximate cause of Plaintiff’s injuries and damages. Accordingly, Defendant ERCOT was grossly negligent, and Plaintiff is entitled to recover exemplary damages in an amount sufficient to punish Defendant ERCOT and deter others from engaging in similar conduct.

COUNT 3: NEGLIGENCE AND GROSS NEGLIGENCE – AEP AND AEP TEXAS

53. Defendants AEP and AEP Texas had a duty to Plaintiff to exercise reasonable care in maintaining and updating its generation, transmission, and distribution facilities in order to prevent cold-weather failures like those experienced in February 2021.

54. Defendants AEP and AEP Texas failed to take reasonable corrective actions to prevent cold-weather failures in its generation, transmission, and distribution facilities.

55. In addition, Defendants AEP and AEP Texas had a duty under 16 TEX. ADMIN. CODE § 25.52 to “make all reasonable efforts to prevent interruptions of service.”

56. Defendants AEP and AEP Texas failed to “make all reasonable efforts to prevent interruptions of service” as required by 16 TEX. ADMIN. CODE § 25.52.

57. In addition, Defendants AEP and AEP Texas had a duty under 16 TEX. ADMIN. CODE § 25.52 to “make reasonable provisions to manage emergencies resulting from failure of service.”

58. Defendants AEP and AEP Texas failed to “make reasonable provisions to manage emergencies resulting from failure of service” as required by 16 TEX. ADMIN. CODE § 25.52.

59. Defendants AEP and AEP Texas’s violations of 16 TEX. ADMIN. CODE § 25.52 constituted negligence per se.

60. Defendant AEP and AEP Texas’s negligent acts and omissions, as described above, caused Plaintiff to lose power at his home and proximately caused the resultant injuries and damages.

61. In addition, Defendants AEP and AEP Texas’s acts and omissions described herein involved an extreme degree of risk of harm to others, including Plaintiff.

62. Despite knowledge of this extreme risk of harm, Defendants AEP and AEP Texas

persisted in performing the acts and omissions described herein with a conscious indifference to and reckless disregard of to the rights, safety, or welfare of others.

63. Such gross negligence was a proximate cause of Plaintiff's injuries and damages. Accordingly, Defendants AEP and AEP Texas were grossly negligent, and Plaintiff is entitled to recover exemplary damages in an amount sufficient to punish Defendants AEP and AEP Texas and deter others from engaging in similar conduct.

COUNT 4: PRIVATE NUISANCE – ALL DEFENDANTS

64. Defendants' acts and omissions created conditions that caused Plaintiff to lose power in his home.

65. By causing Plaintiff to lose power in his home, Defendants substantially interfered with his use and enjoyment of his home.

66. Loss of power would cause unreasonable discomfort or annoyance to a person of ordinary sensibilities who was attempting to use and enjoy his home.

67. Additionally, Defendants are strictly liable because their acts and omissions that substantially interfered with Plaintiff's use and enjoyment in his home were abnormally dangerous.

68. The conditions Defendants created and maintained caused damages to Plaintiff's property and person, for which he is entitled to compensation.

VI. INDIVISIBLE INJURY

69. Plaintiff would show that wrongful acts and omissions of the Defendants joined to produce an indivisible injury that cannot be apportioned with reasonable certainty to any individual defendant. Accordingly, each defendant is jointly and severally liable for the entire amount of Plaintiff's damages.

VII. NOTICE

70. Defendants are hereby provided with notice under TEX. R. CIV. P. 193.7 that all documents produced by them in this suit will be used at pretrial proceedings and at trial in this case.

VIII. REQUEST FOR RELIEF

71. As a result of the foregoing, Plaintiff respectfully requests that the defendants be cited to appear and answer, and that upon final trial and hearing hereof, Plaintiff recover:

- a. Actual damages;
- b. Exemplary damages;
- c. Costs of court;
- d. Pre- and post-judgment interest; and
- e. Such other and further relief, both general and special, at law or in equity, to which Plaintiff may be entitled.

IX. JURY DEMAND

72. Plaintiff hereby demands trial by jury on all claims so triable.

Dated: February 19, 2021

Respectfully submitted,

/s/ Patrick A. Luff

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