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What Went Wrong?
Bankruptcy in the Wake of Winter Storm Uri
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What Happened?

- February 13, 2021 – An unprecedented winter storm hits the State of Texas
- Demand for energy soared
- Supply plummeted
 - power plants shut down
 - natural gas supply lines froze

What Happened? (cont'd)

- February 16, 2021 – The Public Utility Commission of Texas (“PUCT”) which oversees the Electric Reliability Counsel of Texas (“ERCOT”) directed ERCOT to raise prices to \$9,000 per MWh
 - the previous three month average price was between \$21 and \$29 per MWh
- ERCOT is an independent system operation that serves as a clearinghouse for market transactions between buyers and sellers of electricity throughout the majority of Texas

What is ERCOT?

- Does not create electricity but controls the flow
- Takes direction from the Texas legislature and PUCT
- Major market participant
 - Resource Entities (generators)
 - Transmission Service Providers (deliver power to local markets)
 - Distribution Service Providers (deliver power to consumers)
 - consumers

What is ERCOT? (cont'd)

- Supposed to ensure that supply meets demand, setting prices for supplying electricity and setting prices for taking it from the grid
- Supposed to facilitate a competitive market while maintaining reliability

BECAUSE *Risk* DOES NOT GET BETTER WITH AGE

Immediate Repercussions and Fallout

- Most significantly, an energy crisis enveloped the state resulting in loss of life and extensive property damage
- Legislative and regulatory reaction
- ERCOT's decision to abide by the PUCT order put it at odds with its obligations under the terms of its agreements with market participants
- Litigation at every level

Immediate Repercussions and Fallout (cont'd)

- Bankruptcy of retail providers
- Significant insurance coverage issues
- Investigations by FERC, PUCT and the state legislature into market manipulation
 - Energy Transfer – made \$2.4 billion from the storm for 2021 – WINNER?
 - Vistra Energy – paid \$1.4 billion for natural gas during the week of the storm (more than it usually pays for an entire year) – LOSER?

Financial and Legal Aftermath

- Lawsuits against market participants and regulators
- Record high bills for market participants and resulting defaults
- Exposure to uplift default charges
- Insurance claims and coverage issues
- Force Majeure – was it triggered by Storm Uri?
- Increase in counterparty collateral requirements
- Bankruptcy implications to regulators and counter-parties

Major Bankruptcies Resulting from Winter Storm Uri

- Griddy
- Entrust
- Just Energy
- Brazos

BECAUSE *Risk* DOES NOT GET BETTER WITH AGE

Griddy Energy Chapter 11

- Actually encouraged customers to leave its services during the February, 2021 weather event
- ERCOT blocked Griddy from the market as a result of Griddy's failure to pay the exorbitant bills resulting from the storm
- Entered Chapter 11 on March 15, 2021 with a \$29 million unpaid obligation to ERCOT

Griddy Energy Chapter 11 (cont'd)

- The wholesale rate of \$9,000/MWh was passed on to its customers, leaving one Houston resident in a one bedroom apartment with a \$4,677 bill for one week
- Class action by customers
- Post-filing, Griddy began negotiations with the Texas Attorney General with regard to relief to Griddy customers

Griddy Energy Chapter 11 (cont'd)

- A committee of customer creditors was formed during the Chapter 11 case
- Griddy took the position early on that it would not engage in collection efforts with respect to its customers during the Chapter 11 case
- The Chapter 11 case was a liquidation from the start with no prospect for restructuring

Griddy Energy Chapter 11 (cont'd)

- Griddy's Plan of Liquidation
 - approximately a 1% distribution to the secured creditors
 - general unsecured claims would receive a 2.4%-8.7% recovery
 - customers who have paid can seek a refund
 - settlement with Texas Attorney General – customers release their claims against the debtor and others and their debt to Griddy would be waived unless they opt out of the settlement

Entrust Chapter 11

- Files for Chapter 11 protection on March 30, 2021
- Prior to the filing, Entrust, a retail power provider throughout the U.S., was a party to various agreements with Shell Energy North America and other Shell related entities for the purchase and sale of physical and financial electricity and related services
 - Entrust claimed to have been in compliance with these agreements before Winter Storm Uri hit

Entrust Chapter 11 (cont'd)

- Immediately after the storm, Shell declared a default and effectively terminated the agreements
- Entrust could no longer guarantee service to its customers as a result and was forced to liquidate
 - they tried to sell their customer relationships but ERCOT blocked one transaction
- Owed \$270 million to ERCOT at the time of the filing
- The dispute with Shell was the primary issue in the case from the outset

Entrust Chapter 11 (cont'd)

- \$8 million owed by Shell based upon an accounting as of the alleged termination
- \$60 million being held as a result of Shell's termination of Entrust's hedges
- Shell had a lien on Entrust's cash
- significant but unliquidated damages alleged by Entrust based upon Shell's improper termination
- Entrust filed a liquidating plan on September 27, 2021
 - liquidating trust to administer insignificant assets other than the claims against Shell
 - discloses that a demand was made on Shell for damages of at least \$175 million
 - settlement discussions were ongoing with respect to the ERCOT claim

Entrust Chapter 11 (cont'd)

- Adversary proceeding filed against Shell on October 11, 2021
 - primarily breach of contract for refusing to supply electricity and unlawful termination which resulted in Entrust's bankruptcy
 - forced to purchase electricity at highly inflated market prices – 10,000 % increase
 - damages were the difference between the contract price with Shell and the cost within the ERCOT market plus the value of the hedges
 - equitable subordination of Shell's claims

Entrust Chapter 11 (cont'd)

- Impairment of Shell's claim a confirmation issue – Entrust takes the position that the claim is unimpaired
 - solution by the Court – a toggle allowing Shell to vote on the plan with the issue to be determined after confirmation through the adversary proceeding – Shell claims to be owed \$52 million
- Shell votes to reject the plan but all issues relating to Shell's disputed secured claim are put off until after confirmation and the resolution of the adversary proceeding

Entrust Chapter 11 (cont'd)

- No indication yet of any litigation seeking an affirmative recovery against ERCOT – appears to be a matter of economics other than an objection to ERCOT's claim asserted by the liquidating trustee
 - equitable subordination
 - exorbitant and excessive charges contrary to the relevant contract and ERCOT's own protocols
 - laundry list of issues including interfering with a pre-petition sale of residential customer equivalents

Entrust Chapter 11 (cont'd)

- Shell has recently moved to dismiss Entrust's adversary proceeding which was taken over by the liquidating trustee
 - Entrust breached its duty to lock in sufficient electricity to meet expected demands
- Motion to dismiss largely denied – July mini-trial scheduled on the threshold issue of Entrust's breach as to its own risk policy

Just Energy Cross-Border Proceedings

- CCAA proceeding filed in Canada
- Chapter 15 filed in the Bankruptcy Court (Southern District of Texas)
- This case is distinct from other filings in several key respects
 - cross-border
 - Just Energy paid its ERCOT bill in order to stay in the system and is seeking to recover its payment from ERCOT through litigation in the Bankruptcy Court

Just Energy Cross-Border Proceedings (cont'd)

- able to obtain DIP financing
- seeking to reorganize, not liquidate
- PUCT is a named party in the adversary proceeding
- other market participants successfully intervene in Just Energy's litigation against ERCOT
- Filed on March 9, 2021 owing ERCOT approximately \$250 million-obtained a financing package to pay ERCOT but under protest with a full reservation of rights

Just Energy Cross-Border Proceedings (cont'd)

- Attempted to have ERCOT suspend collecting on invoices until all issues and questions were investigated, addressed and resolved – that did not happen
- Commenced an Adversary Proceeding against ERCOT and PUCT on November 12, 2021
 - challenges \$274 million of the \$335 million invoiced by ERCOT – all for the week of February 13, 2021
 - several claims are asserted – avoidance of post-petition transfer, turnover of estate property, set off, claim disallowance

Just Energy Cross-Border Proceedings (cont'd)

- unlike Entrust, no equitable subordination claim
- PUCT orders are unlawful
- ERCOT and PUCT seek to dismiss the complaint
 - sovereign immunity
 - lack of subject matter jurisdiction
 - payments authorized by the Bankruptcy Court
 - no estate to administer in Chapter 15
 - if based on PUCT's orders, PUCT and state court have exclusive jurisdiction

Just Energy Cross-Border Proceedings (cont'd)

- NRG, Calpine and Luminant seek to intervene as true economic parties in interest – ERCOT will pass on the cost of any successful claim by Just Energy to other market participants
- Judge Isgur grants the intervention motion on a targeted basis
- NRG and Calpine join in ERCOT's and PUCT's motion to dismiss the complaint
- PUCT dismissed but ERCOT is not – claims were to be repleaded but Court ruled that it did have subject matter jurisdiction over claims against ERCOT – no actual live disputes against PUCT

Just Energy Cross-Border Proceedings (cont'd)

- unauthorized transfer claim dismissed
- The stay in the CCAA proceeding is extended and therefore recognized in the Chapter 15. A further extension has been granted through 3/25. No plan of arrangement has been filed in the CCAA proceeding.

Brazos Chapter 11

- Largest and oldest power cooperative in Texas files for Chapter 11 protection on March 1, 2021
- Brazos claims that it was financially stable and bankruptcy was unfathomable but for the fallout from the unprecedented winter storm. After 7 days of energy prices at \$9,000 per MWh, Brazos was presented with a bill from ERCOT for around \$2.1 billion. In 2020, Brazos total power costs to its members was approximately \$774 million

Brazos Chapter 11 (cont'd)

- First four months of the case relatively uneventful with key players indicating a desire to help Brazos reorganize in Chapter 11
- Key Players
 - The Debtor
 - ERCOT
 - PUCT
 - Texas Legislature
 - Cooperative Members
 - Affected Market Participants

Brazos Chapter 11 (cont'd)

- Fundamental issues begin to take shape in July, 2021 in response to Brazos standard exclusivity extension motion where ERCOT signals that Brazos will have to pay \$1.9 billion to continue to participate in the ERCOT market and must assume its contracts with ERCOT
- ERCOT further takes the position that its claim is for “goods” Brazos received within 20 days prior to the Chapter 11 filing, creating an administrative obligation under section 503(b)(9) of the Bankruptcy Code

Brazos Chapter 11 (cont'd)

- Eight days later Brazos files its objection to ERCOT's claim. Brazos argues that:
 - ERCOT breached its agreements with Brazos by following the PUCT's order and that breach excused Brazos performance under the contracts
 - ERCOT failed to mitigate its damages
 - Brazos was not in default when the Chapter 11 case was filed
 - ERCOT's failure to protect the market constituted a breach

Brazos Chapter 11 (cont'd)

- impossibility of performance caused by the unprecedented storm
- 503(b)(9) does not apply to Brazos claim
- Now all of the fun begins
- Brazos files a nine count adversary proceeding complaint against ERCOT
- Key issues begin to take shape as ERCOT moves to dismiss the complaint

Brazos Chapter 11 (cont'd)

- Unsecured Creditors Committee joins the party
- abstention is raised by ERCOT
- ERCOT claims PUCT is an indispensable party
- Brazos takes the position that this is all about the amount and classification of ERCOT's claim and nothing more
- ERCOT's motion to dismiss is ultimately denied
 - the court has been and continues to be hard on ERCOT

Brazos Chapter 11 (cont'd)

- Market participants (wholesale power, electric and ancillary service providers) allowed to intervene in the adversary proceeding, claiming they are the ones with the financial stake (see Just Energy)
- Plan mediation is urged in the third quarter of 2021 but gets little traction – stay tuned
- Members of the cooperative also allowed to intervene in the adversary proceeding

Brazos Chapter 11 (cont'd)

- Unsecured Creditors Committee objects to the \$1.4 billion claims of largest coop members
 - claims are in essence an ill-fated defense to the claims against the coop members under the Wholesale Power Contract
- Brazos commences an adversary proceeding against several gas claimants challenging their claims -- \$180 million in charges are at stake
 - the challenge is to both the amount and classification of the claims

Brazos Chapter 11 (cont'd)

- some similar issues to the ERCOT complaint – 35,000% increase in price, unconscionability, contrary to public policy, duress, 503(b)(9) does not apply
- In late December, both Brazos (along with the Creditors Committee) and ERCOT file motions for summary judgment on most counts of the complaint
 - after much fanfare, briefing and table pounding, the Court for the most part, denies the motions for summary judgment except for one key issue

Brazos Chapter 11 (cont'd)

- the court held that the charges ERCOT levied in the wake of Winter Storm Uri were not in the ordinary course of business and therefore did not qualify as 503(b)(9) administrative claims
- the court did not rule on whether electricity was a “good” because he didn’t have to
- ERCOT’s appeal on the issue of abstention is certified for direct appeal to the Fifth Circuit
- The parties head to trial in February

Brazos Chapter 11 (cont'd)

- The court, predictably was not bashful in its assessment of the candor and substance of the witnesses, including former PUCT and ERCOT senior executives
- After a week of trial, the parties agree to an immediate adjournment of the trial in favor of mediation before Judge Isgur
 - problem – Judge Isgur is the presiding judge in Entrust and Just Energy

Legal Issues Abound in the Wake of Winter Storm Uri

- Some of the important/interesting legal issues that have arisen in the Winter Storm Uri Chapter 11 cases and elsewhere are:
 - Sovereign Immunity – ERCOT and PUCT
 - abstention – agency and state court jurisdiction vs. bankruptcy court
 - Force Majeure
 - intervention by non-debtor market participants

Legislative Fixes

- Omnibus Bills – SB2 and SB3
- SB2 – Shrinks ERCOT board from 16 members to 12, of which nine will have voting rights. Eight of the nine to have executive level experience in areas such as finance, business, engineering etc. BOD members to be appointed by politicians.
- SB3 – Requires creation of an emergency pricing program for wholesale market. Program would go into effect if high system wide offer cap is in place for 12 hours during a twenty-four hour period after reaching the high system offer cap. Also requires generators to harden system.

Legislative Fixes (cont'd)

- SB 1580 – Allow electric cooperatives to securitize costs and expenses related to Winter Storm Uri.
- HB 4492 – Allow ERCOT to finance the remaining (non-coop) short pay amounts so sellers who are owed funds can be paid, and offers a financing opportunity for load-serving entities which paid certain deemed to be excessive Winter Storm costs.
- HB 1520 – Allow securitization of gas costs arising from Winter Storm Uri.

Winners and Losers and What's Next

WINNERS

- Gas Producers - Comstock, EQT, Macquarie, etc.
- Refineries with limited exposure to Texas market
- Generators who were able to keep operating
(Vistra, but...)

LOSERS

- Utilities/Retail Power Providers
- Innergex Renewable up to \$48 million hit on windfarm operations
- Just Energy – Chapter 11
- Entrust – Chapter 11
- Griddy – Chapter 11
- Brazos – Chapter 11
- Texas Shale Oil Producers
- Gulf Refiners
- Retail Customers

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Winners and Losers and What's Next

MORE LOSERS

- Algonquin (Wind) - \$45 - \$55 million hit to earnings
- Atmos – Additional Natural Gas purchase to cost - \$2.5 billion - \$3.5 billion
- Vistra - \$900 million - \$1.3 billion hit

Questions

- What's Next:
- Brazo's trial
- Just Energy Trial
- Force Majeure Litigation
- Will Texas Market Learn From URI?
- Is there a broader lesson?

BECAUSE *Risk* DOES NOT GET BETTER WITH AGE

Your Questions

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