

Congressional Probe Considerations For Texas Energy Cos.

By **Samuel Ramer, Joseph Williams and Edward Lewis**

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Congress is gearing up to pronounce judgment on energy-related companies in Texas. In mid-February, two severe winter storms swept across parts of the South and the Ohio Valley.

Over 5 million Americans lost power as a result of the winter blitz, with nearly 4.3 million homes and businesses in Texas suffering from intermittent outages.[1]

By Feb. 16, according to Time magazine, a total of "45 gigawatts ... were offline, with 28 gigawatts from thermal sources and 18 gigawatts from renewable sources." [2] The combination of cold weather, rolling blackouts implemented by grid operators to reduce strain on the electrical system, [3] food shortages and reduced access to clean water even proved fatal in some circumstances. [4]

The storms in the Lone Star State have become the backdrop to political debates. Critics of Texas' regulatory framework include Austin Mayor Steve Adler, who has said that "[w]e have a deregulated power system in the state, and it does not work because it does not build in the incentives in order to protect people and that has to change." [5]

Texas Gov. Greg Abbot has laid the blame squarely at the feet of the Electric Reliability Council of Texas, or ERCOT, saying that they "failed on each of these [preventive] measures that they said they had undertaken" and that "Texans deserve answers on why these shortfalls occurred." [6]

On a national level, House Speaker Nancy Pelosi, D-Calif., stated to reporters that the House Energy and Commerce Committee is going to act as the investigating committee for the outages. [7] Committee Chair Frank Pallone Jr., D-N.J., later confirmed Pelosi's remarks, declaring that the committee will "investigate the Texas crisis further and we'll see what other action we have to take." [8]

Although ERCOT has historically operated outside of the jurisdiction of federal regulatory agencies such as the Federal Energy Regulatory Commission, [9] Congress retains broad authority to investigate any and all issues that are arguably



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under the valid jurisdiction of a congressional committee or subcommittee.

So long as the subject of the investigation is within a committee's authority, the inquiries are reasonably related to the committee's broad subject matter area, and the investigation is "pursuing a valid legislative purpose,"[10] congressional investigators have near-plenary power to issue subpoenas for documents and testimony.

Now is the time for companies that may be under the purview of the Energy and Commerce Committee to consider the risks posed by a congressional investigation, and to prepare for the questions the committee's investigators may soon be asking.

Risks of a Congressional Investigation

Congressional investigations and oversight are markedly different from judicial proceedings, and the risks are different as well. Although the U.S. Supreme Court stated in its 2020 opinion in *Trump v. Mazars* that Congress cannot issue subpoenas "for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary,'" [11] Congress' authority to investigate for legislative reasons functionally imposes many of the same costs on the targets of investigations.

Managing such an investigation can be expensive, cause harm to a company's reputation and even lead to criminal indictment when handled poorly. Congressional requests for information are usually quite broad, and legal remedies are few.

In addition, attorney-client privilege is not recognized by Congress, since the privilege derives from common law and is viewed by Congress as existing only within Article III courts. Any limit to the scope of documents sought by Congress must be negotiated carefully with congressional staff.

Once that discovery takes place, any hearing or report by Congress can include the facts produced by the committee's investigation. This can cause any manner of risks for a company and its executives. Congressional investigations can also lead to follow-on investigations and litigation. For example, members of Congress frequently pressure executive branch agencies to investigate specific industries and corporations.

While the executive branch agencies strive to remain nonpartisan, pressure and continued inquiries from persistent legislators can spur agencies to take actions they might not have otherwise taken — including devoting more resources to an investigation than an agency might have originally planned. In addition, the material or testimony that a company produces during a congressional investigation can serve as a road map for agencies.

FERC has already announced that it will investigate both the natural gas and wholesale electricity markets surrounding the recent weather events affecting Texas.[12] FERC has announced that it will also work with the North American Electric Reliability Corporation, or NERC, to examine operational and reliability issues related to the events, and that both organizations will coordinate "with other federal agencies, states, regional entities and utilities." [13]

Of relevance to energy companies, Pallone, Energy Subcommittee Chair Bobby Rush, D-Ill., Oversight and Investigations Subcommittee Chair Diana DeGette, D-Colo., Rep. Marc Veasey, D-Texas, and Rep. Lizzie Fletcher, D-Texas, wrote to Abbott, voicing concern that underlying issues identified in a comprehensive 2011 report by FERC and NERC following an earlier major winter storm in Texas have not been adequately addressed.

When companies and executive are summoned before Congress about the deep freeze in Texas, they will face competing narratives from each political party about the actions the companies took and why. Each political party will seek to elicit facts from Texas energy producers and distributors to support their interpretation of the causes of the disaster. In this environment, there may be no ally or safe quarter.

A serious risk stemming from congressional investigations is potential harm to a company's reputation. Failure to appreciate Congress' ability to inflict this injury can lead to ill-prepared public testimony, engenderment of negative public sentiment and even widespread public condemnation.

In the most serious cases, a failure to properly manage congressional investigations can lead to criminal indictments for perjury, obstruction of proceedings or witness tampering. Although these charges are rarely sought by prosecutors, the costs and penalties associated with indictment necessitate vigorous efforts to mitigate potential risk.

Industries to Watch

With the Energy and Commerce Committee investigating the situation in Texas, wide swathes of industry could fall under the eye of congressional investigators. The committee has extremely broad authority to legislate — and thus broad discretion to focus its investigations into not only energy supplies issues but also health care, food safety, clean air, climate change and internet communication issues.

Pallone, however, gave an indication that his committee's investigation will likely have an initial focus on promoting a shift to "clean and resilient energy infrastructure."^[14]

How Companies Should Prepare

Companies that could potentially be the targets of investigations by Congress should not wait to receive a subpoena to prepare for a potential inquiry. Instead, companies that fall under the Energy and Commerce Committee's purview should look at the following best practices to get ahead of congressional investigators:

Internal Risk Assessment

Companies should start to measure internal risks associated with a potential investigation. Although FERC has limited jurisdiction within the ERCOT region, congressional investigations are not so limited.

Internal Investigation

Internal investigations can help counsel to prepare for any alternative investigations that may spring from initial congressional inquiries.

Potential targets of congressional investigators should think about developing a crisis management plan that identifies key parties and documents, a public relations management plan that outlines and helps mitigate potential fallout, and a policy advisement plan that covers negotiations and management of potential subsequent agency action springing from the investigation.

When it comes to congressional investigations, proactive measures can help keep executives from being left out in the cold.

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[1] <https://time.com/5939633/texas-power-outage-blackouts/>.

[2] *Id.*

[3] <https://www.texastribune.org/2021/02/18/texas-power-outages-ercot/>.

[4] <https://www.cnn.com/2021/02/18/weather/texas-winter-storm-thursday/index.html>.

[5] <https://www.statesman.com/story/news/2021/02/20/texas-power-grid-outages-did-ken-lays-deregulation-set-calamity/4495921001/>.

[6] <https://www.cnn.com/2021/02/18/weather/texas-winter-storm-thursday/index.html>.

[7] <https://www.msn.com/en-us/news/politics/pelosi-says-house-panel-to-investigate-texas-winter-power-outages/ar-BB1dNU8n>.

[8] *Id.*

[9] <https://www.keranews.org/texas-news/2021-02-16/why-does-texas-have-its-own-power-grid>.

[10] <https://www.law.com/texaslawyer/2021/02/11/congressional-and-government-investigations-in-2021-what-to-expect-from-the-biden-harris-administration-and-how-to-prepare/?sreturn=20210121184748>, quoting *Wilkinson v. U.S.*, 365 U.S. 399, 409-09 (1961). The outer limits of this plenary power to investigate were recently examined by the Supreme Court in *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (holding that courts should apply careful scrutiny to congressional subpoenas for information from the president).

[11] *Trump v. Mazars*, 140 S. Ct. 2019, 2024 (2020).

[12] <https://www.ferc.gov/news-events/news/ferc-examine-potential-wrongdoing-markets-during-recent-cold-snap>.

[13] <https://www.ferc.gov/news-events/news/ferc-nerc-open-joint-inquiry-2021-cold-weather-grid-operations>.

[14] <https://www.msn.com/en-us/news/politics/pelosi-says-house-panel-to-investigate-texas-winter-power-outages/ar-BB1dNU8n>.