

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: June 15, 2021

Re: June 2 Referral Relating to Winter Storm Uri Direct Appeals

I. Matter referred to subcommittee

The Court's June 2, 2021 referral letter and Chairman Babcock's June 7, 2021 email referred the following matter to our subcommittee:

Uri-Related Direct Appeals. Several bills add provisions to the Utilities Code to provide that certain district court judgments related to a Winter Storm Uri "may be reviewed only by direct appeal to the Supreme Court of Texas": HB 1520, HB 4492, and SB 1580. The Committee should consider whether Rule of Appellate Procedure 57, governing direct appeals, should be changed or a comment added to reference or restate the statutes.

II. Relevant statutes

All three bills provide for the issuance of bonds by various entities to reduce the financial impact of Winter Storm Uri on electric customers, utilities, and market participants:

- HB 1520 provides that the Railroad Commission can authorize the recovery and securitization of certain extraordinary costs incurred by certain gas utilities because of Winter Storm Uri and similar extraordinary events.
- HB 4492 creates the Texas Electric Securitization Corporation and provides for the securitization of certain costs incurred by ERCOT market participants that would otherwise be uplifted to the wholesale market.
- SB 1580 provides electric cooperatives the option to utilize the financial tool of securitized financing to fund the unprecedented impact of Uri.

All three bills provide for a direct appeal of a district court's judgment on financing orders to the Texas Supreme Court. While the language varies to reflect the particular type of financing order, they are all essentially the same:

- HB 1520. “The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas. The appeal must be filed not later than the 15th day after the date of entry of judgment. (g) All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the railroad commission and briefs to the court and limited to whether the financing order: (1) complies with the constitution and laws of this state and the United States; and (2) is within the authority of the railroad commission to issue under this subchapter.”
- SB 4492. “The judgment of the district court may be reviewed only by a direct appeal to the Supreme Court of Texas that is filed not later than the 15th day after the date of the entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.”
- SB 1580. “The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed not later than the 15th day after the date of the entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the financing order adopted by the board, other information considered by the board in adopting the resolutions, and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the board under this subchapter.”

III. Recommendation

TRAP 57 (attached as App. A) governs direct appeals to the Texas Supreme Court. The subcommittee unanimously recommends that no amendment be made or comment added to Rule 57 to reflect passage of the Winter Storm Uri securitization bills. It has been the usual practice not to cross-reference particular statutes in the appellate rules or comments. Several other statutes authorize direct appeals and they are not referenced in Rule 57.

III. Discussion

In 1940, the Texas Constitution was amended to authorize the Legislature to “provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.” Tex. Const. art. V § 3-b.

Since 1940, the Legislature has adopted several statutes authorizing a direct appeal:

- Tex. Govt Code § 22.001(c) is the primary direct appeal statute and allows direct appeal of certain injunctions: “An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.”
- Tex. Util. Code § 39.303(f) allows direct appeal of PUC securitization orders: “A financing order is not subject to rehearing by the commission. A financing order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the financing order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.”
- Tex. Util. Code § 36.405(g) similarly allows for review of securitization orders relating to electric utility system recovery costs: “The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.”
- Tex. Gov’t Code § 1205.068 provides that, in declaratory judgment actions brought by issuers of public securities, “A party may take a direct appeal to the supreme court as provided by Section 22.001(c).”
- House Bill 4 § 23.01(e) (2003) provided for a direct appeal for certain challenges: “There is a direct appeal to the supreme court from an order, however characterized, of a trial court granting or denying a temporary or otherwise interlocutory injunction of a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of Article 10 of this Act [the damages cap provision].”

The three recently enacted bills contain direct appeal language that parallels the language in existing provisions of the Utilities Code quoted above relating to PUC securitization orders. The Texas Supreme Court has decided several securitization direct appeals under TRAP 57. See *TXU Elec. Co. v. Public Util. Comm'n*, 51 S.W.3d 275 (Tex. 2001); *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231 (Tex. 2000).

Since September 1, 2010, 26 direct appeals have been filed in the Texas Supreme Court. The great majority of these were not authorized by any of the direct appeal statutes and were dismissed. The Court noted probable jurisdiction in only two: *Morath v. Tex. Taxpayers & Student Fairness Coalition*, No. 14-0776, and *Episcopal Diocese of Ft. Worth v. Episcopal Church*, No. 11-0265.

These direct appeals have been prosecuted at the Supreme Court without specific mention of the authorizing statute in the rule or its comments. It has been the usual practice not to cite to specific statutes in the appellate rules or comments because the list of authorizing statutes can easily become outdated or the code location of a particular provision might change. There are multiple statutes authorizing direct appeals and they have not been incorporated into the rule either directly or in a comment. The same can be said of the rule governing interlocutory appeals. In recent legislative sessions, including the one just ended, numerous new interlocutory appeals have been created. Referencing them in the rule would likely require amendment on a regular basis.

The subcommittee conferred with Blake Hawthorne, Clerk of the Supreme Court of Texas, that the direct appeal rule in its current form is working. He did not see a need for any changes to the rule at this time.

The subcommittee recommends no change to TRAP 57.

Appendix A Direct Appeal Rule

Rule 57. Direct Appeals to the Supreme Court

57.1. Application

This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.

57.2. Jurisdiction

The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3. Statement of Jurisdiction

Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.

57.4. Preliminary Ruling on Jurisdiction

If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

57.5. Direct Appeal Exclusive While Pending.

If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

Notes and Comments

Comment to 1997 change: This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.