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DOCKET NO. 49673

COMPLAINT OF ASPIRE
COMMODITIES, LLC AGAINST THE
ELECTRIC RELIABILITY COUNCIL
OF TEXAS

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PUBLIC UTILITY COMMISSION
OF TEXAS

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**ORDER NO. 6
DENYING MOTION TO DISMISS
AND ADDRESSING OTHER PROCEDURAL MATTERS**

This Order addresses the motion to dismiss filed by the Electric Reliability Council of Texas, Inc. (ERCOT) on July 24, 2019. This Order additionally addresses ERCOT’s motion filed on August 9, 2019, requesting leave to file a reply to the response of Aspire Commodities, LLC (complainant) to ERCOT’s motion to dismiss the complaint, and addresses other procedural matters.

I. BACKGROUND

Aspire filed the complaint at issue in this case on June 25, 2019. The complaint concerns the refusal of ERCOT to re-price the 14:50 security-constrained economic dispatch (SCED) interval for May 30, 2019, the pricing for which interval was impacted by erroneous telemetry. Aspire states that it is a commodities trader that lost money on ERCOT futures contracts on the Intercontinental Exchange as a result of ERCOT’s refusal to re-price the interval. Aspire contends that ERCOT was required by nodal protocol § 6.3(4) to perform a price correction. ERCOT agrees that the interval was impacted by erroneous telemetry, but disagrees with Aspire’s contention that a price correction is required.¹

Order No. 1 filed on June 26, 2019, established the following procedural schedule:

ERCOT provides notice per 16 TAC § 22.251(e)	On or before July 10, 2019
Deadline for responses to complaint	July 24, 2019
Deadline for Commission Staff comments	August 9, 2019
Deadline to intervene	August 9, 2019
Deadline for Aspire’s reply to a party’s response or Commission Staff comments	August 19, 2019

¹ ERCOT’s Motion to Dismiss and Response to the Complaint at 11-13.

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ERCOT timely responded to the complaint on July 24, 2019. The response included a motion to dismiss, statement of facts, and argument on the merits of the complaint. Aspire responded to the motion to dismiss on August 2, 2019. Thereafter, on August 9, 2019, ERCOT filed a motion for leave to file a reply to Aspire's response, and, simultaneously filed its reply. No party filed an objection to the motion for leave.

Also on August 9, 2019, Commission Staff filed an unopposed motion for extension of time to file a response to ERCOT's motion to dismiss and to file comments on the complaint. In Order No. 2 filed on August 9, 2019, the administrative law judge (ALJ) granted Commission Staff's motion, permitting Commission Staff until August 23, 2019 to respond to the motion to dismiss and until September 9, 2019 to comment on the merits of the complaint.

Commission Staff filed its response to the motion to dismiss on August 23, 2019, arguing in favor of dismissal. Commission Staff's response addressed the motion to dismiss, but did not address the merits of the complaint. Aspire replied to Commission Staff's response on September 3, 2019.

On September 6, 2019, Commission Staff filed a motion for extension of its comment deadline, requesting to extend this deadline to November 5, 2019 to allow for a decision on the motion to dismiss prior to commenting on the merits of the complaint. Although this requested extension was opposed by Aspire, it was granted on September 9, 2019 by Order No. 3.

In Order No. 4 filed on September 19, 2019, the ALJ denied motions to intervene filed by Aspire Power Ventures, LP, 3S Real Estate Investments, LLC, and V247 Power Corporation, which entities share common ownership with the complainant, on the basis that the motions to intervene were untimely filed.

II. ERCOT'S MOTION FOR LEAVE

ERCOT's motion for leave to file a reply to Aspire's response was not opposed. The administrative law judge (ALJ) finds that, due to the complexity of the legal arguments raised, good cause exists to permit the filing of ERCOT's response. Therefore, the ALJ grants ERCOT's motion for leave dated August 9, 2019.

III. ERCOT'S MOTION TO DISMISS³

ERCOT requested dismissal of the complaint on the basis of (1) insufficiency of the form of the complaint, (2) lack of jurisdiction, and (3) failure to state a claim upon which relief may be granted.² For the foregoing reasons, the ALJ concludes that dismissal is not warranted at this time.

A. Deficiencies Pertaining to the Form of the Complaint

Complaints to the Commission concerning conduct by ERCOT are governed by PURA³ § 39.151 and 16 Texas Administrative Code (TAC) § 22.251. The provisions of 16 TAC § 22.251(d) require that a complaint include certain information, including, *inter alia*, a statement of the case, which must meet certain specifications,⁴ and that any facts alleged in the complaint be supported by affidavit.⁵

The complaint in this case took the form of a letter addressed to the Commissioners by Adam Sinn on behalf of Aspire. The letter lacked headings and other formalities typical of a pleading and did not include a supporting affidavit. The letter bore the subject line "Re: Complaint Against ERCOT" and set forth, in narrative form, the facts alleged by the complainant and the relief sought, i.e., that ERCOT be required to re-price the pertinent interval. The letter did not refer to PURA § 39.151 or 16 TAC § 22.251, but referenced PURA § 15.051,⁶ in addition to referencing specific Nodal Protocols.

ERCOT complains that Aspire (1) failed to include a proper statement of the case, which under § 22.251(d)(1)(B) must include a proper statement regarding the applicability of ERCOT's alternative dispute resolution (ADR) procedures; (2) failed to include a detailed and specific statement of issues, required by § 22.251(d)(1)(C); and (3) failed to include a supporting affidavit, as required by § 22.251(d)(3).⁷

² The motion to dismiss presented the grounds for dismissal in this order. For purposes of clarity, the ALJ will address these grounds in the same order.

³ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016.

⁴ 16 TAC § 22.251(d)(1)(B).

⁵ *Id.* at (d)(3).

⁶ PURA § 15.051, as pointed out in ERCOT's motion to dismiss, pertains to complaints against electric utilities and not to complaints against ERCOT. Because it was clear from the context of the complaint that ERCOT was the party complained of, Order No. 1 reflected that the ALJ interpreted the complaint as being brought under PURA § 39.151 and 16 TAC § 22.251. The complainant did not object to this interpretation. Because ERCOT contends that Aspire's improper citation constitutes a jurisdictional, rather than a curable pleading defect, the ALJ will address this ground in the discussion of jurisdiction.

⁷ Although ERCOT additionally alleges by footnote that Aspire failed to meet the formal requisites of 16 TAC § 22.27(b) and (c) by failing to meet the required form and format for a complaint, ERCOT does not specify

As ERCOT correctly notes, under 16 TAC § 22.181(d)(7), a complaint may be dismissed for failure to amend the complaint such that it is sufficient after repeated determinations that it is insufficient. In this case, because the complaint has not previously been determined to be insufficient, the complaint is not ripe for dismissal due to the alleged deficiencies in form.

B. Alleged Jurisdictional Defects

ERCOT contends that Aspire, by improperly filing its complaint under PURA § 15.051, failed to properly invoke the jurisdiction of the Commission. ERCOT additionally contends that the complaint is subject to dismissal or abatement due to Aspire's failure to use ERCOT's ADR procedures or properly establish an exemption from the ADR procedures.

1. The complaint's improper reference to PURA § 15.051

ERCOT correctly notes that PURA § 15.051 concerns complaints against public utilities, that ERCOT is not a public utility, and that complaints against ERCOT are governed by PURA § 39.151 and 16 TAC § 22.251. Because it was clear from the face of the complaint, however, that the complaint concerned the conduct of ERCOT under the Nodal Protocols, and because Order No. 1 made clear that the Commission's jurisdiction over the complaint was under PURA § 39.151, to which categorization the complainant did not object, ERCOT was reasonably on notice concerning the applicable PURA provision. The ALJ considers Aspire's citation error to be one of form, and not to be a deficiency depriving the Commission of jurisdiction over the complaint.

2. Aspire's failure to participate in ADR procedures

PURA § 39.151(d-4)(6) provides that the Commission may resolve disputes between an affected person and an independent organization (ERCOT) and may adopt procedures for the efficient resolution of such disputes. Under 16 TAC § 22.251(c), an entity, with certain exceptions, must avail itself of the ADR procedures in Section 20 (pertaining to ADR procedures) or 21 (pertaining to the process for protocol revision) of the ERCOT Nodal Protocols prior to presenting a complaint to the Commission. In the event the entity fails to do so, § 22.251(c) provides that the presiding officer "may dismiss the complaint or abate it to give the complainant an opportunity to

how Aspires petition fails in this regard. The ALJ therefore assumes that any alleged deficiencies under these provisions mirror the deficiencies alleged under § 22.251.

use the Applicable ERCOT Procedures.” Subsection (c)(1) lists three circumstances under which a complainant may present a formal complaint to the Commission without participating in ERCOT’s ADR procedures: (A) where the complainant is Commission Staff or the Office of Public Utility Counsel, (B) where the complainant is not required to comply with the applicable ERCOT procedures, or (C) where the complainant seeks emergency relief necessary to resolve health or safety issues or where compliance with the applicable ERCOT procedures would inhibit the ability of the affected entity to provide continuous and adequate service. Subsection (c)(2) states that “For any complaint that is not addressed by paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for using the Applicable ERCOT Procedures. The complainant shall clearly state the reasons why the Applicable ERCOT Procedures are not appropriate. The commission may grant the request for good cause.” Subsection (d)(1)(iv) requires a complaint to include “a statement of the ERCOT procedures, protocols, by-laws, articles of incorporation, or law applicable to resolution of the dispute and whether the complainant has used the Applicable ERCOT Procedures for challenging or modifying the complained of ERCOT conduct or decision (as described in subsection (c) of this section) and, if not, the provision of subsection (c) of this section upon which the complainant relies to excuse its failure to use the Applicable ERCOT Procedures.”

Because Aspire does not in its complaint seek revision of ERCOT protocols, Section 21 of the protocols does not apply to this case. Therefore, if Aspire is required under 16 TAC § 22.251(c) to engage in ERCOT’s ADR procedures, it may only be Section 20 of the protocols that so requires. In the event that Aspire does not fall within the scope of Section 20, it follows that, under 16 TAC § 22.251(c)(1)(B), Aspire is not required to participate in the ADR procedures.

ERCOT notes in its motion to dismiss that Aspire does not meet any of the three scenarios of (c)(1).⁸ Aspire does not appear to contend otherwise, but appears to contend that because it is not a “Market Participant,” within the meaning of the ERCOT protocols, it is not subject to the provisions of Section 20.⁹

Under Section 20(4) of the Nodal Protocols, “Applicability,” the ADR procedures appear to be limited in their availability to Market Participants, a term defined under Section 2 of the Nodal Protocols to include, “An entity, other than ERCOT, that engages in any activity that is in

⁸ See ERCOT’s motion to dismiss at 7.

⁹ See Complaint at 3.

whole or in part the subject of these Protocols, regardless of whether that Entity has signed an Agreement with ERCOT.”¹⁰ ERCOT admits that Aspire is not a Market Participant under Section 2, but contends that a related entity, Aspire Power Ventures, LP is a registered Market Participant and is the entity who should have submitted the complaint.¹¹ ERCOT thus complains that, by filing its complaint in the name of Aspire rather than Aspire Power Ventures, Aspire improperly attempted to circumvent the ADR procedures.¹² Aspire counters that, although it is related to Aspire Power Ventures, it was Aspire that suffered harm from the erroneous prices.¹³

The ALJ concludes that, because Aspire is not a Market Participant within the meaning of Section 20 of ERCOT’s Nodal Protocols, under 16 TAC § 22.251(c)(1)(B) Aspire was not required to participate in the ADR procedures. Therefore, Aspire’s complaint is not subject to dismissal or abatement for failure to engage in ADR procedures.

3. Aspire’s Alleged Failure to State a Claim for which Relief May be Granted

Lastly, ERCOT contends that Aspire’s complaint fails to state a claim for which relief may be granted. ERCOT therefore argues for dismissal under 22 TAC 22.181(d)(8). In support, ERCOT contends that any claimed connection between the ERCOT market and the activity of a trader, such as Aspire, is too attenuated to support a claim for relief. ERCOT contends that if such a complaint could be maintained, any person or entity could allege a tangential connection to an ERCOT action and seek a price correction or “other invasive remedy” against ERCOT, which ERCOT argues could not have been the result intended under Commission rules.¹⁴

The ALJ disagrees with ERCOT’s contentions in this regard. Neither the text of PURA § 39.151 nor 16 TAC § 22.251 reveal an intent limit the scope of the Commission’s complaint procedure to ERCOT Market Participants. Further, PURA § 39.001, in addressing the legislative purposes of PURA chapter 39, expresses a policy preference that electric prices should be determined by customer choices and the normal forces of competition.¹⁵ The ALJ concludes that permitting Aspire’s complaint falls within the scope of complaints authorized by PURA § 39.151 and 16 TAC § 22.251. Therefore, dismissal under 22 TAC 22.181(d)(8) is not warranted.

For the above reasons, the ALJ denies ERCOT’s motion to dismiss.

¹⁰ Section 20(4) goes on to include a non-exclusive list of types of entities that constitute Market Participants.

¹¹ See ERCOT’s reply dated August 9, 2019, Section I.

¹² See *Id.*

¹³ See Aspire’s reply dated September 3, 2019 to Commission Staff comments at 2.

¹⁴ See motion to dismiss at 8-9.

¹⁵ See PURA § 39.001(a).

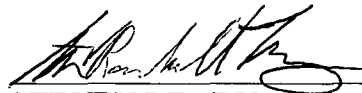
IV. OTHER PROCEDURAL MATTERS

Under 16 TAC § 22.251(m), if a complaint does not require determination of any factual issues, the Commission may decide the issues on the basis of the complaint, written comments, and responses. This controversy in this case appears to center on the interpretation of PURA, Commission rules, and ERCOT Nodal Protocols, and does not appear, based on the ALJ's review of the pleadings to date, to involve disputed facts. If no hearing is requested, or if no genuine issue as to any material fact is shown, the Commission may dispose of this case without a hearing under 16 TAC § 22.251(m) or 16 TAC §22.182.

The parties are requested to confer and to, on or before January 13, 2020, submit a proposed procedural schedule for further processing of the case, including deadlines for requesting a hearing, and for the submission of proposed findings of fact and conclusions of law (in the event that no hearing is requested). If the parties are unable to agree to a proposed procedural schedule, each party must, on or before January 13, 2020, submit its own proposed procedural schedule.

Signed at Austin, Texas the 5th day of December 2019.

PUBLIC UTILITY COMMISSION OF TEXAS



STEVEN LEARY
ADMINISTRATIVE LAW JUDGE

