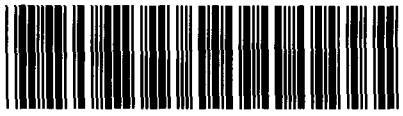

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PUBLIC UTILITY COMMISSION
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AGREED NOTICE OF VIOLATION AND SETTLEMENT AGREEMENT RELATING TO CITY OF GARLAND NONCOMPLIANCE WITH PURA § 39.151(j), 16 TAC § 25.503(f)(2), AND ERCOT NODAL PROTOCOLS § 8.1.3.3.1	§ § § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S RESPONSE TO GARLAND'S EXCEPTIONS

Staff of the Public Utility Commission of Texas (Commission) respectfully submits the following response to the exceptions filed by the City of Garland (Garland) in the above-referenced docket. Ordinarily, Commission Staff would not respond to corrections filed by another party or comment on a proposed order after the deadline for filing exceptions. However, in this case Garland's exceptions go well beyond mere corrections and into legal briefing of a matter not involved in the settlement currently before the Commission. Moreover, Garland delivered its response to Commission Staff late in the afternoon on the day of the deadline, and it did not preview the arguments contained within to Commission Staff. Accordingly, Commission Staff respectfully requests that the Commission consider Commission Staff's response to Garland's exceptions.

Commission Staff agrees that the changes Garland requests in its second and fifth exceptions would more closely align the proposed order with the negotiated settlement between the parties. However, Commission Staff opposes Garland's sixth exception as an attempt to renegotiate language that appears in the parties' proposed order filed in this docket. Commission Staff takes no position with regards to Garland's first, third, and fourth exceptions.

I. BACKGROUND

On July 2, 2019, Commission Staff and Garland filed a settlement agreement and proposed order. This settlement agreement resolved allegations that Garland did not comply with the Public Utility Regulatory Act (PURA),[1] Commission rules, and the Electric Reliability Council of Texas (ERCOT) Nodal Protocols relating to Emergency Response Service (ERS), which ERCOT uses to

[1] Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016 (PURA).

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maintain the reliability of the grid. On August 8, 2019, a Commission Administrative Law Judge (ALJ) filed a draft proposed order, which revised the proposed order filed by the parties. On August 21, 2019, Garland filed its exceptions.

II. OVERVIEW

As Garland details in its exceptions, Commission Staff and Garland disagree over whether the Commission has the authority to issue penalties against municipally owned utilities for violations of the ERCOT Nodal Protocols. In order to avoid litigation, Garland has agreed to pay an administrative penalty in this matter, and the parties submitted a proposed order designed to leave this question unanswered.

In its exceptions, Garland argues that the draft proposed order filed by the Commission ALJ modified the language submitted by the parties by addressing these unlitigated issues. However, Garland's exceptions go beyond defending the parties agreed-to language by giving a full, legal briefing on this unresolved issue. The question of whether the Commission has authority to assess penalties against municipally owned utilities for failure to follow the ERCOT Nodal Protocols has not been litigated in this case and is not addressed in the settlement reached between the parties. It is not a discussion that should be shoehorned into exceptions to a Commission proposed order.[2]

To be clear, Commission Staff believes Garland's position on the Commission's penalty jurisdiction is a false statement of law, runs counter to previous Commission orders, and, if adopted, would create dangerous conditions for grid stability and reliability. Accordingly, Commission Staff respectfully requests that the Commission deny each of Garland's exceptions that attempt to infuse the final order in this docket with Garland's view.

III. GARLAND'S ARGUMENT

In arguing for its exceptions, Garland dedicates multiple pages to this unlitigated issue attempting to prove it should be immune from administrative penalties, even in the context of

[2] Garland states that it is not asking the Commission to agree with its position on this issue. However, this claim is undermined by Garland's briefing on this topic and request that the Commission "grant any other relief to which Garland may be entitled." (Garland's Exceptions at 8). It is unclear precisely what Garland is suggesting with this request, but the item currently before the Commission is an agreement between the parties resolving Garland's 2017 ERS violations. Any other relief is inappropriate for consideration at this time.

Garland's failure to observe the scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by ERCOT. Protecting the reliability of the electric grid is one of the most critical functions of the Commission, and the ability to issue administrative penalties is an essential tool for ensuring compliance with the ERCOT Nodal Protocols. While Commission Staff agrees that this is not an appropriate forum to resolve this issue, Garland's flawed legal reasoning demands a response.

Garland argues that PURA § 15.023, the authorizing provision for the Commission's broad penalty authority, applies to a "person," and a municipally owned utility is not a "person."[3] However, the Commission rejected this very argument over fifteen years ago in Docket 26201, a rulemaking to adopt 16 Texas Administrative Code § 25.503. The City of Austin submitted comments arguing this very point – that the Commission did not have authority under PURA § 15.023 to levy administrative penalties against municipally owned utilities.[4] In the order adopting the rule, the Commission rejected this argument, making it clear that the Commission's penalty authority in this context originated from PURA § 39.151(j),[5] stating that "PURA § 39.151(j) requires all providers of electricity, including municipally owned utilities and electric cooperatives, to comply with the ERCOT procedures and authorizes the imposition of administrative penalties for failure to comply with those procedures."[6] Garland provides no evidence that the Commission has ever contradicted this point in the 15 years since it was made.

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[3] Garland's Exceptions at 5. Notably, "person" is defined by PURA § 11.003(14) as "includ[ing] an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative." An MOU does not fall into any of these categories, but Garland asserts that its absence precludes it from being considered as a "person" under PURA § 15.023. This is an incorrect reading. Under the Texas Code Construction Act, Texas Government Code § 311.005(13), "includes" is a term of "enlargement and not of limitation or exclusive enumeration, and the use of the [term] does not create a presumption that components not expressed are excluded." Garland, as an MOU, is not expressly included, and as argued here, for the purposes of PURA § 15.023, should be considered to be included as a "person."

[4] *See Rulemaking on Enforcement of Wholesale Market Rules*, Docket 26201, Comments of the City of Austin d/b/a on Proposed §25.503, Oversight of Wholesale Market Participants at 18 (Sept. 15, 2003).

[5] PURA § 39.151(j): A retail electric provider, municipally owned utility, electric cooperative, power marketer, transmission and distribution utility, or power generation company shall observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent system operator in ERCOT. Failure to comply with this subsection may result in the revocation, suspension, or amendment of a certificate as provided by Section 39.356 or in the imposition of an administrative penalty as provided by Section 39.357.

[6] *See Rulemaking on Enforcement of Wholesale Market Rules*, Docket 26201, Order Adopting New §25.503 as Approved at the January 29, 2004 Open Meeting at 27 (Feb. 9, 2004).

Garland attempts to refute this connection by pointing out that PURA § 39.151(j) only subjects entities to administrative penalties "as provided by" PURA § 39.357, which only imposes administrative penalties "as provided by" PURA § 15.023. Garland interprets this to mean that, if PURA § 15.023 does not apply to municipally owned utilities, then PURA § 39.357 and, therefore, PURA § 39.151 do not apply. Garland justifies its analysis of "as provided by" by citing to two cases, one from 1912 and the other from 2009.[7] Fatally, both cases involve the interpretation of "provided that" rather than "as provided by," which has a different meaning.[8] "Provided that" introduces a condition to the preceding. "As provided by" only establishes a linkage. The reference to PURA § 15.023 is to incorporate the penalty infrastructure that this provision provides, i.e. the terms of procedure, the penalty limits and the penalty factors, among others. Under Garland's interpretation, the penalty language in PURA 39.151(j) would be rendered ineffective, because PURA § 15.023 already grants the Commission broad penalty authority for violations of PURA and the Commission rules.

Garland also attempts to argue their position using PURA § 40.001(a), which reads: "with respect to the regulation of municipally owned utilities, this chapter controls over any other provision of this title, except for sections in which the term 'municipally owned utility' is specifically used."[9] Garland goes on to point out how neither PURA § 15.023 or PURA § 39.357 contain the term municipally owned utility. However, the Commission's authority to assess penalties against municipally owned utilities for violations of the ERCOT Nodal Protocols originates in PURA § 39.151(j), which does explicitly include the term municipally owned utilities.

From a policy perspective, Garland's suggestion that there is a class of entities that, despite controlling billion-dollar assets that are interconnected with the electricity supply of millions of Texans, is immune from the Commission's penalty authority is not only absurd on its face, it is dangerous. If Garland's argument is upheld, this would mean that Garland would be immune

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[7] Garland's Exceptions at 5-6.

[8] *See* Woods v. VanDevender, 296 S.W.2d 275, 282 (Tex. App.—Beaumont 2009, pet. denied) ("Usually, a proviso containing the words "**provided that**" before a sentence or clause, states an exception to the preceding sentence or clause.); Fenet v. McCuistion, 147 S.W. 867, 869 (1912) ("The following sections of the charter are pertinent to the issue before us: . . . 'Sec. 11. **Provided, that** the offices of assessor and collector and city secretary, as heretofore combined by the city council under the name of city secretary, may so continue at the option of the council, and said city secretary shall perform all the duties of said offices, and shall devote his whole time to the same. **Provided, further, that** the city council may combine or abolish any of the offices above named.'") (emphasis added)

[9] Garland's Exceptions at 6.

from any sort of punitive or retributive action under PURA. Every enforcement mechanism under Chapter 15 of PURA, whether undertaken by the Commission or the Attorney General, applies to a "person."[10] Based on its arguments, Garland believes that it has complete immunity from any of PURA's enforcement mechanisms. An interconnected grid, reliant on the behaviors of all its participants, simply cannot survive if an entire class of entities cannot be held accountable.

IV. GARLAND'S EXCEPTIONS

Exceptions No. 1 and 4 - Garland excepts to proposed finding of fact number 1 and its failure to define Garland as a "municipally owned utility, and Garland excepts to the proposed order not concluding, as a matter of law that, Garland is a municipally owned utility.

Commission Staff does not take a position on Garland's first and fourth exceptions, but it does disagree with the analysis that Garland provided in support of these exceptions.

In its first and fourth exceptions, Garland requests that the Commission include, either as a finding of fact or conclusion of law, a statement that Garland meets the definition of a municipally owned utility.[11] This exception is based on the ALJ removing the following finding of fact from the parties' proposed order: "Garland is a municipally owned utility as defined in 16 TAC § 25.5(71)."[12] Garland argues that "this definition is important because an MOU is not included in the definition of a 'person' under PURA and, therefore, is not subject to the Commission's administrative penalty jurisdiction under Chapter 15 of PURA."[13]

Since the parties have agreed not to address the jurisdictional question in this case, Commission Staff believes that the inclusion of this statement is not material to either the settlement agreement or the final order. Whether Garland, as a municipally owned utility, is a "person" has no bearing on whether it met its ERS obligations or on the penalty that it agreed to pay. However, because it was agreed-to language, Commission Staff does not oppose Garland's request to include the parties' original language in the final order as either a finding of fact or conclusion of law.

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[10] PURA § 15.021 provides that the attorney general may apply for a court order to enjoin or require compliance "if the commission determines that a public utility or other person is" either violating PURA or failing to comply with PURA. PURA § 15.030 allows for criminal charges if "a person willfully and knowingly violates" PURA. PURA § 15.101 provides that the Commission may issue a cease and desist order "to a person" to whom PURA §§ 15.021-.033 applies.

[11] Garland's Exceptions at 2, 4-5 (Aug. 8, 2019).

[12] Parties' Proposed Finding of Fact 1 (July 2, 2019).

[13] Garland's Exceptions at 2.

Commission Staff, however, strongly disagrees with Garland's reasoning and objects to Garland's attempt to use these exceptions as a pretext to brief the Commission on a legal question that is not currently before it: how Garland is defined under Commission rules has no bearing on Garland's statutory claims, and even if it did, that issue is not relevant to an order that does not intend resolve those claims.

Exception No. 2 – Garland excepts to the Proposed Order's exclusion of Garland's reservation of its jurisdictional claims regarding the administrative penalty authority of the Commission over MOUs.

Commission Staff supports Garland's second exception.

The proposed order filed by the parties contained the following finding of fact, which the Commission ALJ did not include in his draft proposed order:

> Garland did not waive any arguments or stance concerning the Commission's statutory authority to impose or assess an administrative penalty against Garland. However, Garland agreed not to challenge the resolution of this matter so long as the resolution is materially consistent with the agreement. Commission Staff acknowledges that, consistent with paragraph 13 of the agreement, settlement of this matter does not obligate any party to take the same position as set out in this agreement in other proceedings. Commission Staff further acknowledges that, consistent with paragraph 15 of the agreement, if Garland is adversely affected by any material chances made to this agreement by the Commission, Garland has the right to withdraw from the agreement.[14]

Garland argues that this is a material settlement provision that ensures Garland is not waiving its jurisdictional claims by agreeing to pay the penalty.[15]

This finding of fact accurately describes the agreement made by the parties. As this language was negotiated and agreed-upon by the parties, Commission Staff supports Garland's request that it remain in the final order.

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[14] Parties' Proposed Finding of Fact 12.

[15] Garland's Exceptions at 4. Garland also offers an ultimatum that "it is willing to settle this matter so long as the Order includes language from the settlement agreement not waiving its jurisdictional claims."

Exception No. 3 – Garland excepts to proposed Finding of Fact No. 20, as it is ambiguous and overly broad.

Commission Staff does not take a position on Garland's third exception.

The Commission ALJ added a finding of fact to the draft proposed order that reads: "20. This decision is not adverse to any party."[16] Garland objects to the addition of this finding of fact, because it believes that the order, as proposed by the Commission ALJ, would be adverse to Garland for the reasons described in its exceptions. Garland proposes modifying this finding to read: " 20. This decision is not adverse to any third-party."[17]

Commission Staff is under the impression that this finding is intended to address the requirement for informal disposition contained in 16 Texas Administrative Code (TAC) § 22.35(a) that "the decision is not adverse to any party other than the commission staff." If this is the case, Commission Staff supports the ALJ's included language, as the parties intended to resolve this matter through informal disposition. To the extent that some of the ALJ's changes may be adverse to Garland, Garland is able to withdraw under the terms of the settlement.

Exception No. 5 – Garland excepts to Conclusion of Law No. 6 that concludes Garland is subject to the "revocation, suspension, or amendment of a certificate, or the imposition of an administrative penalty.

Commission Staff supports Garland's fifth exception but disagrees with Garland's argumentation in support of this exception, as detailed above.

The parties' proposed order included a conclusion of law that read: "3. Under PURA § 39.151(j), Garland is required to comply with ERCOT's operating and reliability policies, rules, guidelines, and procedures."[18] The Commission ALJ modified this conclusion to read: "6. Under PURA § 39.151(j), Garland is required to observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent system operator in ERCOT or be subject to the revocation, suspension, or amendment of a certificate, or the imposition of an administrative penalty."[19]

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[16] Draft Proposed Order, Finding of Fact 20 (Aug. 8, 2019).
[17] Garland's Exceptions at 4.
[18] Parties Proposed Finding of Fact 3.
[19] Draft Proposed Order, Finding of Fact 6.

Garland objects, specifically, to the portion of ALJ's proposed conclusion that states Garland could be subject to "the revocation, suspension, or amendment of a certificate, or the imposition of an administrative penalty."[20] Garland argues that this language should not be included because "it is not a litigated issue and because it is unnecessary to approve a settlement agreement."[21] Commission Staff supports Garland's request to remove this portion of the conclusion of law from the proposed order to better reflect the agreement reached between the parties.

Exception No. 6 – Garland excepts to Conclusion of Law No. 10 that implies the Commission's penalty authority is applicable to any entity

Commission Staff opposes Garland's sixth exception.

The parties' proposed order included the following conclusion of law: " 7. Under PURA § 15.023, the Commission has authority to impose penalties for violations of PURA § 39.151 and Commission rules."[30] The Commission ALJ modified this to read: "10. Under PURA § 15.023, the Commission has authority to impose administrative penalties for violations of PURA § 39.151, **the ERCOT protocols,** and Commission rules." (emphasis added).[31] Garland recommends further modifying this to read: "10. Under PURA § 15.023(a), the Commission has authority to impose administrative penalties **against any 'person'** for violations of PURA § 39.151, the ERCOT protocols, and Commission rules." (emphasis added).[32]

The only modification made by the ALJ to the agreed-upon language was the addition of "the ERCOT protocols," to which Garland does not appear to object. Instead, Garland requests the addition of "against any 'person'" to clarify that this does not apply to municipally owned utilities in furtherance of its immunity argument.[33] However, this would be new language not agreed to by the parties. Commission Staff opposes the adoption of Garland's language as an attempt to renegotiate the agreement and recommends the adoption of either the parties' proposed language or the Commission ALJ's proposed language.

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[20] Garland's Exceptions at 5.
[21] *Id.*
[30] Parties' Proposed Conclusion of Law 7.
[31] Draft Proposed Order, Conclusion of Law 10.
[32] Garland's Exceptions at 7.
[33] *Id.*

V. CONCLUSION

Insofar as Garland's exceptions bring the Commission's final order in line with the parties' negotiated language, Commission Staff respectfully requests that the Commission adopt Garland's requested modifications. However, Commission Staff requests that the Commission reject Garland's exceptions that attempt to renegotiate settled language. Further, Commission Staff requests that the Commission take no action in response to Garland's attempt to gain immunity from enforcement through the briefing of an unlitigated issue in its exceptions.

DATE: August 26, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 26rd day of August, 2019, in accordance with 16 TAC § 22.74.

David Smeltzer

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