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PUC PROJECT NO. 51617

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OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS

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PUBLIC UTILITY COMMISSION

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PUBLIC UTILITY COMMISSION
OF TEXAS

PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF
DISASTER FOR THE FEBRUARY 2021
WINTER WEATHER EVENT

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PUBLIC UTILITY COMMISSION

OF TEXAS

**COMMENTS AND MOTION FOR REHEARING OF EXELON GENERATION
COMPANY LLC**

TO THE HONORABLE COMMISSIONERS:

Exelon Generation Company, LLC (“Exelon”)¹ respectfully files these Comments and Motion for Rehearing (“Motion”) with the Public Utility Commission of Texas (“Commission” or “PUC”) pursuant to Texas Administrative Procedure Act (“Administrative Procedure Act” or “APA”)² § 2001.146 and 16 Tex. Admin. Code § 22.264 to request reconsideration of Section I of the two Commission Orders filed in Project No. 51617, signed on February 15 and 16, 2021 (“Orders”),³ to provide Exelon’s objections to the Orders as comments in Project No. 51812, and

¹ Exelon Generation Company, LLC, through subsidiaries, owns 3,620 MWs of gas-fired capacity and 87 MWs of wind power in Texas. Exelon’s subsidiary, Constellation New Energy, Inc., also provided approximately 14 TWh of competitive retail supply to residential and commercial/industrial load in 2020. Exelon Generation Company, LLC also provides wholesale supply to a number of Texas cooperatives and municipalities.

² Tex. Gov’t Code §§ 2001.001-.903.

³ This petition addresses Section I of the Commission’s Orders, which requires automatic \$9,000/MWh energy prices while ERCOT has directed load shed, but does not address any other direction contained within those Orders: *Oversight of the Electric Reliability Council of Texas*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021). References herein to the “Orders” should be read to refer only to the \$9,000/MWh energy price requirement. The Commission’s action to temporarily suspend use of the LCAP formula prescribed in 16 Tex. Admin. Code § 25.505(g)(6), by contrast, was taken to prevent “expos[ing] consumers to prices that are *higher* than the usual maximum price (\$9,000/MWh) after a generator revenue threshold has been achieved.” The Commission then reinstated the LCAP and directed Staff to open a rulemaking to address the rule formula. *Issues Related to the State of Disaster for the February 2021 Weather Event*, Project 51812, Order Reinstating Low-System Wide Offer Cap (Mar. 3, 2021). Exelon is not challenging the Commission’s decision to temporarily suspend its rule to protect consumers from excessive prices

to preserve Exelon's rights to judicial review. In support thereof, Exelon respectfully shows as follows:

INTRODUCTION

During a historic winter storm the week of February 14, ERCOT was forced to order firm load shed to avoid a catastrophic system-wide blackout, and in response the Commission hastily issued two Orders that administratively changed the market clearing price for the duration of the load shed period, and into the morning of February 19. The Commission ordered ERCOT to ignore the prices set pursuant to its protocols and instead reset energy prices to the system-wide offer cap specified in 16 Tex. Admin. Code § 25.505(g)(6)(B) of \$9,000 per MWh. The Orders had the effect of changing ERCOT protocols, which act as agency rules, without following any procedure outlined in PURA or in the APA, and with no notice, no opportunity from market participants to comment, and no record evidence.

The Orders are particularly noteworthy because they imposed \$9,000/MWh prices whenever ERCOT was directing firm load shed, despite the fact that ERCOT had previously considered and rejected having firm load shed act as a trigger for scarcity pricing. The effect was continuous \$9,000/MWh energy market prices for nearly four full days. Market participants had no time to unwind the hedges that they had entered into prior to the Orders or to shield themselves from the effects of Commission decisions made in less than 7 minutes on February 15 and in 15 minutes on February 16.

Market participants that benefited from the Commission's Orders argue that they have no real-world impact. They claim that the Orders simply shuffle money between assets that

during a public emergency. Unlike the decisions made in Section I of the Orders, the impact of prices that are "50 times the natural gas price index value determined by ERCOT" on consumers can be readily discerned *via* a simple mathematical exercise and without the need for notice, comment, or record evidence.

underperformed during the extreme weather and those that performed somewhat better, but the facts do not line up with this claim. Many customers – including small Texas commercial and industrial loads, municipalities and cooperatives, and even some residential customers – buy power on indexed retail rates (*i.e.*, rates that track market-clearing prices), and are thus directly and severely harmed by the Commission’s decision.⁴ But there are significant indirect effects of the Commission’s orders as well. As of this filing, the Orders are anticipated to result in approximately \$3.1 billion in potential uplift (not counting uplift associated with defaults), which is spread across all market participants.⁵ Already, several competitive retail suppliers have exited the market and their customers have been absorbed by the larger competitive suppliers, undermining Texas’s robust retail competitive market.⁶ This result likely would have been avoided or avoided in part had the Commission taken a more measured response in its Orders, such as instructing ERCOT to consider ordering a system-wide Reliability Unit Commitment (“RUC”) guarantee payment, as noted by the Independent Market Monitor.⁷ And as the defaults by ERCOT market participants grow, current ERCOT rules provide that those creditworthy companies that remain standing, like Exelon, will be left to shoulder the additional financial burden of those defaults.

Exelon respectfully requests that the PUCT restore the prices that would have resulted from the ERCOT scarcity pricing protocols that were in effect at the time of the Orders. To the extent

⁴ Coalition of Concerned Customers’ Comments In Support of TEAM’s Emergency Request to Enforce Commission Order and Lower Prices, PUCT Project No. 51812, filed February 22, 2021 (“Coalition of Concerned Customers’ Comments”).

⁵ Calpine Corporation Response to Requests To Retroactively Reset Prices at 1, PUCT Project No. 51812, filed March 10, 2021 (indicating “the unhedgeable market uplift is **only** \$1.5 billion according to the IMM” (emphasis added)).

⁶ Just Energy, the largest unaffiliated retail electric provider in Texas, filed for bankruptcy following more than \$250 million in losses. <https://www.wsj.com/articles/texas-energy-fallout-tips-power-retailer-just-energy-into-bankruptcy-11615307592> Other retailers have either voluntarily left the market or were unable to pay their bills, with their customers switched to other retail electric providers. This list currently includes Griddy Energy LLC, Entrust Energy, Inc., and Power of Texas Holding, Inc., but is expected to grow.

⁷ See IMM Recommendation, PUCT Project No. 51812, filed March 11, 2021.

that the Commission is concerned with the impact of returning to prices determined by the ERCOT scarcity pricing protocols on market participants that may have relied on the Orders, the Commission should establish a proceeding to allow generators or other market participants to apply for and receive make-whole payments for verifiable costs that cannot be recovered under such market prices or losses incurred by detrimentally relying on the Commission's Orders. This will be a much cheaper solution for Texas consumers and the market and will protect those parties from further harm.

Further, Exelon respectfully challenges the notion that granting this request amounts to "repricing." The Commission's Orders *themselves* replaced the market clearing prices set by ERCOT protocols that were approved by the ERCOT Board and filed with the Commission. They were the rules of the road, upon which market participants relied, and the Commission diverged from them. Resettlement is the appropriate remedy when the prices published by the grid operator do not follow the ERCOT protocols or some other type of correction is needed. Here, for the reasons described below, Section I of the Commission's Order and was not valid and should not have supplanted the market rules, which were working as designed. Exelon agrees that market participants require certainty of, and adherence to, market rules. However, in all the talk about the importance of price certainty and concern for the impact on hedges that were taken on in reliance of the \$9,000/MWh prices, there is little recognition of the impact that the Commission's abrupt decision had on the hedges (including bilateral sales) that the market participants already had in place. Certainly, suppliers could not have anticipated when pricing those contracts that the Commission would step in and unilaterally establish prices at \$9,000/MWh for four straight days during and event (i.e., firm load shed) that was expressly omitted from the scarcity pricing in the ERCOT protocols.

The appropriate solution in light of the many procedural deficiencies outlined below, is for the Commission to restore the prices that resulted from the ERCOT scarcity pricing protocols in effect as of February 15. In order to ensure that market participants that detrimentally relied upon the Commission's Orders are made-whole for the costs or losses that they could not recover under such pricing the Commission should establish a proceeding allowing for make-whole payments.

Exelon also files this Motion to preserve its right to judicial review of the Commission's action. The Orders do not specify under what authority the Commission acted when it issued them. The Orders and the process under which they were issued do not fit squarely within any known procedure of the Commission — be it rulemaking, emergency rulemaking or contested case review. Therefore, in an abundance of caution, Exelon files this motion for rehearing within 25 days of the date of the Orders to preserve its right to judicial review under APA § 2001.146. Exelon further requests that even if the Commission declines to reconsider the substantive decision discussed herein, it reissue the Orders to clarify under what legal authority it has purportedly acted.

BACKGROUND - ISSUANCE AND EFFECT OF THE ORDERS

During the week of February 14, 2021, Texas experienced a severe cold weather event of historic proportions, with some areas seeing record-low temperatures, and the below-freezing weather lasting for several days. State officials, the Commission and ERCOT responded quickly. On February 11, the Commission warned that Texas could see record demand for electricity during the coming storm. On February 12, Governor Greg Abbott declared a state of disaster pursuant to Section 418.017 of the Texas Government Code, certifying that severe winter weather posed an imminent threat to the entire state.⁸

⁸ Proclamation by the Governor of the State of Texas (Feb. 12, 2021).

On February 14, ERCOT and the Commission began appealing to the public to conserve energy. In the early morning hours of February 15, facing a dangerous drop in system frequency, ERCOT declared an Emergency Energy Alert Level 3 (“EEA3”) and took the further step of directing transmission providers to shed firm load in order to reduce demand and stabilize the transmission system.⁹ Significant amounts of generation capacity had become unavailable due to impacts of the severe weather, and the resulting capacity shortage left many Texans without power for several days.

Meanwhile, the Commission adopted several orders affecting the electric power markets at open meetings it held during the week of February 14. On February 15, the Commission held a 7-minute meeting at which it adopted an order setting an administrative price – not a market price – for electricity. In that order, the Commission indicated that some locations had seen prices of \$1,200/MWh earlier that day, and that this pricing outcome was “inconsistent with the fundamental design of the ERCOT market,” stating that during load shed, “the market price for the energy needed to serve that load should be at its highest.” The order “direct[ed] ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.” The Commission did not address the fact that it was adopting a rule that had been explicitly rejected in

⁹ The ERCOT Protocols make clear that ERCOT may declare EEA Level 3 conditions without actually directing load shed. Section 6.5.9.4.2.(3) of the ERCOT Protocols specifies that:

(a) ERCOT may declare an EEA Level 3 when the clock-minute average system frequency falls below 59.91 Hz for 20 consecutive minutes. ERCOT will declare an EEA Level 3 when [physical responsive capability] cannot be maintained above 1,430 MW or when the clock-minute average system frequency falls below 59.91 Hz for 25 consecutive minutes. Upon declaration of an EEA Level 3, ERCOT will implement any measures associated with EEA Levels 1 and 2 that have not already been implemented.

(b) When [physical responsive capability] falls below 1,000MW and is not projected to be recovered above 1,000 MW within 30 minutes, or when the clock-minute average frequency falls below 59.91 Hz for 25 consecutive minutes, ERCOT shall direct all TSPs and ESPs or their agents to shed firm Load . . .⁹

the past, nor why such a change was merited over other, less draconian solutions, such as a market-wide reliability unit commitment (“RUC”), which would allow for make-whole payments. At a 15-minute open meeting held the following day, the Commission approved a revised version of the February 15 order that removed a provision directing ERCOT to revise past prices during the EEA3 event.

ERCOT responded to these Orders by setting market prices at the high system-wide offer cap (“HCAP”) of \$9,000/MWh though an administrative adjustment to one of the input values to its Real-Time Reliability Deployment Price Adder,¹⁰ which it announced was done to “implement the pricing outcomes directed by the [Commission’s February 15 Order].”¹¹ This administrative adjustment remained in place for several days.¹²

The direct effect of the Commission’s February 15 and 16 orders has been devastating. The estimated total cost of electricity for the week of February 14 is in excess of \$50 billion, as compared to an estimate for the previous week of \$4.2 billion.¹³ As recounted in the Coalition of Concerned Customers’ Comments, the impact of the Commission’s Orders on commercial and industrial customers, including agricultural facilities, manufacturing facilities, and even large churches, which are more likely to take retail service on an index-rate, is crushing: these entities will end up paying approximately 24 times their bill for the entire month of January in just 32

¹⁰ ERCOT Nodal Protocols § 6.5.7.3.1 describes the calculation of the Real-Time Reliability Deployment Price Adder.

¹¹ ERCOT Market Notice, M-C021521-01 Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices. (Feb. 15, 2021).

¹² See ERCOT Market Notice, M-C021521-02, Update: Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 16, 2021) (stating that pricing change was effective as of 22:15 SCED interval on February 15); ERCOT Market Notice, M-C021521-05, Update: ERCOT Expectations Regarding Exiting EEA3 and Public Utility Commission Emergency Orders Affecting ERCOT Market Prices (Feb. 19, 2021) (stating that ERCOT discontinued pricing change starting with 9:05 a.m. SCED interval on February 19).

¹³ <https://www.bloomberg.com/news/articles/2021-02-22/texans-will-pay-for-the-state-s-power-crisis-for-decades-to-come>

hours of the Commission's administrative pricing.¹⁴ The impact of the Commission's administrative prices for the entire duration of the event is multiples of that astronomical number.

The ripple effects of this extraordinary price increase are just beginning to be understood. The State's oldest electric cooperative, Brazos Electric Power Cooperative, has filed for bankruptcy.¹⁵ Vistra Corp. estimates its losses from the storm will total \$900 million to \$1.3 billion.¹⁶ Just Energy Group estimates it could experience losses of \$250 million and has sought bankruptcy protection.¹⁷ Rayburn Electric Cooperative expects to receive invoices totaling an almost 92,000% increase from its normal February weekly bill, and has indicated it may need to charge each of its members an extra \$3,200 and may be forced into bankruptcy.¹⁸ ERCOT has seen payment defaults of over \$2.1 billion from parties including competitive retailers, electric cooperative and municipalities.¹⁹ Ratings agency Fitch has placed all ERCOT retail and wholesale electric utilities on negative ratings watch status.²⁰ CPS Energy has approved a plan to seek an additional \$500 million in debt to help pay off the costs it incurred during storm.²¹ Exelon preliminarily estimates that the impact on the company will be between \$750 million and \$950 million on a pre-tax basis.²² Meanwhile, the HCAP pricing has also created enormous windfalls for others, who are now vigorously advocating for "price certainty."

¹⁴ See Docket No. 51812, Coalition of Concerned Customers' Comments In Support of TEAM's Emergency Request to Enforce Commission Order and Lower Prices at 5 (Feb. 22, 2021).

¹⁵ <https://www.wsj.com/articles/texas-blackout-bills-plunge-power-supplier-brazos-into-bankruptcy-11614612602>

¹⁶ Vistra Corp. Press Release dated Feb. 26, 2021, available at <https://www.sec.gov/Archives/edgar/data/0001692819/000119312521058302/d121629dex991.htm>

¹⁷ Just Energy Group Inc. Press Release dated Feb. 26, 2021, available at <https://www.sec.gov/Archives/edgar/data/0001692819/000119312521058302/d121629dex991.htm>

¹⁸ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event, Project No. 51812*, Petition for Emergency Relief of Rayburn Country Electric Cooperative Inc., p. 3-4 (March 4, 2021).

¹⁹ ERCOT Market Notice, W-B022621-01 (Feb. 26, 2021).

²⁰ Fitch Ratings Action Commentary dated Feb. 24, 2021, available at <https://www.fitchratings.com/research/us-public-finance/fitch-places-texas-public-power-utilities-electric-cooperatives-on-rating-watch-negative-24-02-2021>

²¹ <https://www.expressnews.com/business/eagle-ford-energy/article/CPS-Energy-looking-to-seek-500-million-loan-to-15989704.php>

²² For Exelon, losses associated with the Orders, in combination with outages at its plants, are preliminarily estimated at between \$750 million and \$950 million on a pre-tax basis. See Slide 5, Exelon Earnings Conference

LEGAL ANALYSIS AND POINTS OF ERROR

The Commission's Orders are unprecedented. They change the ERCOT scarcity pricing protocols and impose entirely new pricing on market participants without any opportunity for public comment, hearing, or presentation of evidence or argument. As described below, Section I of the Orders violates the intent of PURA § 39.001; it was issued through an unlawful procedure in excess of the Commission's statutory authority; it does not substantially comply with the Administrative Procedure Act; it violates affected parties' due process rights by obscuring the path to judicial review; and the decision reached is not reasonably supported by substantial evidence.

A. Point of Error 1: Section I of the Orders Violates PURA § 39.001

Chapter 39 of PURA was enacted for the purpose of introducing competition to the State's wholesale and retail power markets. PURA § 39.001 mandates that prices for electric service be determined not by a governmental regulatory body, but by the forces of competition. PURA § 39.001(a) states:

[T]he public interest in competitive electric markets requires that, except for transmission and distribution services and for the recovery of stranded costs, electric services and their prices should be determined by *customer choices and the normal forces of competition*.²³

The statute also makes explicit that regulatory authorities are limited in their ability to regulate the competitive electric markets. PURA § 39.001(c) and (d) provide, in relevant part:

Regulatory authorities . . . may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title.

Call Fourth Quarter 2020 (February 24, 2021) available at <https://investors.exeloncorp.com/static-files/2dda3a5d-b5c9-40d6-829f-da5c2efd6cc9>.

²³ Tex. Util. Code § 39.001(a) (emphasis added).

and

Regulatory authorities . . . shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition.

In administratively pricing the entire ERCOT wholesale power market at \$9,000/MWh, the Commission violated PURA § 39.001(a) by disrupting the operation of the ERCOT protocols, which are designed to arrive at market prices through the “normal forces of competition.” The Commission also contravened PURA § 39.001(c)’s prohibition on “mak[ing] rules or issu[ing] orders regulating . . . prices” and has restricted competition in further violation of that section. It has also violated PURA § 39.001(d) by using “regulatory methods” rather than competitive ones to settle power transactions within the wholesale market. While the Commission has previously adopted rules that impose some limits on the forces of competition, such as the system-wide offer caps provided in 16 Tex. Admin. Code § 25.505(g), those rules merely limit, rather than completely supplant the operation of the competitive market as a method for determining electricity prices.²⁴ Nor was the decision to administratively price the market authorized by any other provision of PURA, as it was not a necessary or reasoned response to the emergency capacity shortage, as further explained below.

B. Point of Error 2: Section I of the Orders Was Made Through Unlawful Procedure Beyond the Commission’s Statutory Authority Because It Was Not Adopted Under Any Process Described in the Administrative Procedure Act or PURA.

Under the Texas Administrative Procedure Act, state agencies are charged with providing an opportunity for public participation in the rulemaking process and providing an opportunity for hearing and participation in any contested case proceeding that determines the legal rights, duties

²⁴ For this reason, Exelon supports the Commission’s action in Section II of the Order, which temporarily modified the LCAP.

or privileges of a party.²⁵ The Texas Public Utility Regulatory Act²⁶ (“PURA”) confirms the scope of the Commission’s authority to act within the competitive power market, stating: “Unless specifically provided otherwise, each commission proceeding under [Chapter 39 of PURA], other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case.”²⁷

With respect to the operation of the competitive market, PURA directs the Commission to “adopt and enforce rules relating the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants.”²⁸ The Commission “may delegate to an independent organization responsibilities for establishing or enforcing such rules.”²⁹ Rules adopted and enforcement actions taken by the independent organization are subject to commission oversight and review.³⁰

Section I of the Orders was issued through an unlawful procedure that exceeds the Commission’s statutory authority because, as explained further below, it revised the ERCOT scarcity pricing protocols, which have the force of agency rules, and determined the legal rights of market participants without complying with either rulemaking or contested case procedures. As such, Section I of the Orders is unlawful, exceeds the Commission’s statutory authority, and should be rescinded by the Commission on that basis.

²⁵ See Tex. Gov’t Code §§ 2001.001, 2001.0003(1), 2001.029, 2001.051.

²⁶ Tex. Util. Code §§ 11.001-66.016.

²⁷ Tex. Util. Code § 39.003.

²⁸ *Id.* at § 39.151(d).

²⁹ *Id.*

³⁰ *Id.*

C. Point of Error 3: In Issuing Section I of the Orders, the Commission Failed to Substantially Comply with Administrative Procedure Act’s Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Rulemaking

The ERCOT Protocols have the force and effect of administrative rules adopted by a state agency.³¹ As such, the Orders may properly be characterized as effecting amendments to existing administrative rules. The existing ERCOT Protocols determine a market price at each of thousands of pricing nodes across the ERCOT grid by calculating in real time the available generation, load and physical transmission constraints applicable to each nodal location, as adjusted with reserve price adders. Section I of the Orders amended these rules by administratively setting the market price for electricity at \$9,000 per MWh across every pricing node whenever ERCOT-directed firm load shed was occurring during the EEA3 event.

The Commission must adopt any new administrative rules, as well as amendments to existing rules, pursuant to the rulemaking processes set forth in the APA and the Commission’s Procedural Rules.³² The Commission may initiate a rulemaking on its own motion by publishing notice of the proposed rule in accordance with the APA, which requires that public notice be provided at least 30 days prior to adopting the proposed rule and that the proposed rule be filed with the Secretary of State for publication in the *Texas Register*.³³ The Commission must afford all interested persons a reasonable opportunity to submit data, views and arguments in the form of written comments on the rule, and must grant a public hearing if requested by 25 persons, a governmental subdivision or agency, or an association with at least 25 members.³⁴

³¹ See *PUC v. Constellation Energy Commodities Grp.*, 351 S.W.3d 588, 595 (Tex. App.—Austin 2011, pet. denied).

³² See generally APA Subchapter B, *Rulemaking*; see also Tex. Gov’t Code §§ 2001.003(6) (defining “rule” as including “the amendment or repeal of a prior rule”).

³³ Tex. Gov’t Code § 2001.023; 16 Tex. Admin. Code §§ 22.281(b), 22.282(b).

³⁴ Tex. Gov’t Code § 2001.029; 16 Tex. Admin. Code § 22.282(c),(d).

A rule is voidable unless a state agency adopts it in substantial compliance with the procedures described above.³⁵ The ERCOT Protocol changes directed by the Commission's Orders do not meet this substantial compliance standard. Market participants received no notice of the proposed rule revision and had no opportunity to submit written comments or participate in a public hearing on its adoption. The change to impose \$9,000/MWh prices whenever firm load shed was directed by ERCOT is particularly egregious when one considers the fact that firm load shed was originally proposed to be one of the triggers for scarcity pricing, as reflected in Section 6.5.7.3.1 "Determination of Real-Time On-Line Reliability Deployment Price Adder"³⁶:

6.5.7.3.1 Determination of Real-Time On-Line Reliability Deployment Price Adder

(1) The following categories of reliability deployments are considered in the determination of the Real-Time On-Line Reliability Deployment Price Adder:

- (a) RUC committed Resources with a telemetry Resource Status of ONRUC**
- (b) RMR Resources that are On-Line**
- (c) Deployed Load Resources other than Controllable Load Resources**
- (d) Deployed Emergency Response Service (ERS); and**
- (e) Firm Load Shed**

Importantly, subsection (e) was specifically deleted in response to Technical Advisory Committee ("TAC") comments memorializing a compromise reached at the May 29, 2014 TAC Workshop³⁷:

³⁵ See Tex. Gov't Code § 2001.035 ("A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.34.")

³⁶ See "626NPRR-01 ORDC Price Reversal Mitigation Enhancements 051614", posted on May 16, 2014 and available at <http://www.ercot.com/mktrules/issues/NPRR626#keydocs>.

³⁷ See May 30, 2014 TAC Comments, available at http://www.texasadmin.com/tx/ercot/technical_advisory/201405292/.

Comments

On 5/29/14, a TAC Workshop was held to address the PUC directive to examine price reversal and impacts on ORDC from ERS Deployments, Load RRS Deployments, and RUC (0 – LSL). A compromise solution related to NPRR626 was developed in the TAC Workshop.

On 5/29/14, TAC unanimously voted to endorse the compromise solution related to NPRR626 as follows:

Compromise Proposal to Adjust Pricing Through NPRR626 Type Methodology:

- Adjust Real-Time Settlement Point Price through adder that reflects the impact of (as filed in NPRR626)
 - (a) 0 to LSL RUC energy,
 - (b) Deployed ERS with a 10 hour return;
 - (c) On-Line RMR energy and emergency capacity acquisitions under paragraph (2) of Section 6.5.1.1, ERCOT Control Area Authority
 - (d) Deploy Load Resources other than Controllable Load Resources
- Adder calculated by adding a 3rd SCED run that considers (a), (b), (c), and (d) MWhs and comparing the difference in price to the 2nd SCED run
- Adder paid to all available online Resources as proposed in NPRR626 as filed
- For Load Resources other than Controllable Load Resources insert a proxy bid to buy to curtail at a linear curve starting at \$300/MWh to \$700/MWh.

626NPRR-02 TAC Comments 053014 doc
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The categories of reliability deployments in the compromise proposal (eliminating firm load shed) were approved by the ERCOT Board, filed with the Commission, and became part of the ERCOT Protocols. On Monday, February 15, the Commission, with no notice or opportunity to comment, abruptly reversed this decision and imposed a condition that had been specifically considered and rejected in the process of developing the Protocols. As a result, the rule change directed by the Orders was not adopted in substantial compliance with the Administrative Procedure Act.

The lack of clear process also disrupts market participants' rights to obtain judicial review. For PUCT rule changes, the normal appellate process is to bring a declaratory judgment action asking a court to determine "the validity or applicability of a rule, including an emergency rule" adopted pursuant to the APA.³⁸ PURA § 39.001(f) further prescribes: "[a] person who challenges

³⁸ Tex. Gov't Code § 2001.038.

the validity of a competition rule must file a notice of appeal with the court of appeals and serve the notice on the commission not later than the 15th day after the date on which the rule as adopted is published in the Texas Register.” In the face of an agency order that failed to clearly follow either rulemaking or contested case procedures, it is imperative that the Commission reconsider the Orders to at least clarify the legal authority under which it is taking action to alter ERCOT’s rules, if not to reconsider that action in light of the disastrous consequences thereof.

Finally, Exelon notes that the Commission’s responsibility to follow the rulemaking procedures of the Administrative Procedure Act and its own Procedural Rules is in no way obviated by its separate responsibility to conduct oversight of ERCOT’s business operations. The Orders state that the Commission has “‘complete authority’ over ERCOT,” citing PURA § 39.151. In context, that provision of PURA gives the Commission “complete authority to oversee and investigate [ERCOT’s] finances, budget and operations as necessary to ensure the organization’s accountability and to ensure that the organization adequately performs the organization’s functions and duties.”³⁹ This general duty to oversee ERCOT’s administrative operations is distinct from the Commission’s obligation to follow legislative intent with respect to competitive pricing. It is also distinct from the Commission’s power to delegate its rulemaking authority to ERCOT and to then review and revise those rules, which powers are separately addressed in the same provision of PURA.⁴⁰ Nor would it be sensible to conclude that Commission can avoid the state’s administrative rulemaking process altogether by delegating its rulemaking authority to ERCOT and thereafter altering any ERCOT rule, by any method it chooses, as an exercise of its “complete authority.”⁴¹

³⁹ Tex. Gov’t Code § 39.151(d).

⁴⁰ *Id.*

⁴¹ Nor do 16 Tex. Admin. Code § 25.501 or 16 Tex. Admin. Code § 22.5 authorize any ad-hoc adoption of new administrative rules outside of the process mandated by the APA. The Texas Supreme Court has held that an

D. Point of Error 4: In Issuing Section I of the Orders, the Commission Failed to Substantially Comply with Administrative Procedure Act's Emergency Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Emergency Rulemaking.

The Commission can bypass the prior notice and comment requirements of APA §§ 2001.023 and 2001.029 by adopting an emergency rule pursuant to APA § 2001.034 and 16 Tex. Admin. Code § 22.283, which require only that (1) the rule's preamble include a finding that "an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice" and stating a reason for that finding, and (2) the emergency rule and written reasons for its adoption be provided to the office of the Secretary of State for publication in the *Texas Register*.⁴² However, Section I of the Orders did not contain the required finding to support the adoption of an emergency rule, and there has been no publication thereof in the *Texas Register*.

Moreover, these failures were not mere technical defects or oversight in drafting; it is clear that the rule change effected by Section I of the Orders was not required to prevent any peril to public health, safety or welfare. Put another way, there was no nexus between the Commission's action and the peril at hand. Scarcity pricing is, at best, an indirect method of incentivizing an increase in electric generation supply or a decrease in demand for electricity. Because generators can be forced offline by severe weather, and demand for electricity is largely inelastic, scarcity pricing works best as a long-term method to incentivize the construction of new generation, and not as an emergency tool during weather-driven shortages. Importantly, ERCOT already has the

administrative agency cannot adopt rules permitting it to stray from the minimum requirements of the APA. *Mosley v Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 261 (Tex. 2019) ("Whatever an agency's authority is under [APA § 2001.004, *Requirement to Adopt Rules of Practice*], it cannot extend to contravening the APA's express requirements. The APA's purpose is to 'provide minimum standards of uniform practice and procedure for state agencies.' *Id.* § 2001.001(1). It would be self-defeating for the APA to allow an agency to use the rulemaking process to sidestep its requirements.").

⁴² Tex. Gov't Code § 2001.034; 16 Tex. Admin. Code § 22.283.

ability to keep all available generation online during an emergency by using the RUC process. The RUC process permits ERCOT to forcibly dispatch generation resources that are physically capable of generating but otherwise would not, if those resources are needed to meet ERCOT's forecasted load.⁴³ Resources that have been dispatched through RUC can obtain a "make-whole" payment from ERCOT if their startup and operating costs exceed the market revenues they receive for their generation.⁴⁴ This means that pricing adjustments are not necessary to cause generators to stay online during an emergency shortage, and any natural gas or other marginal costs of generating during a RUC order are recoverable under the existing ERCOT Protocols. Further, to the extent that the RUC make-whole process is insufficient to compensate parties for certain extraordinary costs during the winter storm (e.g., bilateral costs), a rulemaking or contested case process could be developed to address such costs.

Nor are pricing adjustments necessary to stabilize the grid when capacity shortages are caused by forced outages of generating units. If a unit is forced out due to icing or pressure issues caused by freezing temperatures, \$9,000/MWh hour prices cannot "solve" the technical problems it faces. And the idea that plant operators would try harder to bring their units online when prices are \$9,000/MWh rather than \$1,200/MWh frankly fails to understand their mindset or appreciate the strong signal that prices of \$1,200/MWh already provide. As Vistra's CEO, Curt Morgan, testified before the Texas legislature, Vistra's plant operators were doing everything that they could to operate under the conditions.⁴⁵ Exelon plant operators did the same. No amount of

⁴³ See ERCOT Nodal Protocols § 5.5.2.

⁴⁴ See *id.* at § 5.7.1.

⁴⁵ See also February 17, 2021 Statement of Curt Morgan ("Our people have worked round the clock, across the company and especially at our power plants, under difficult circumstances and continue to do so. We know that many of our fellow Texans are without electricity and are suffering through the unprecedented winter weather event. We are committed to doing everything possible to provide electricity to them with the utmost urgency.") available at <https://m.marketscreener.com/quote/stock/VISTRA-CORP-34858180/news/Vistra-nbsp-Effort-to-Powering-Texas-During-Unprecedented-Winter-Storm-32465149/>.

money, and no amount of penalties during the event could melt the frozen instrumentation or resolve the other operational issues.

Section I of the Orders themselves also indicates that their purpose was not to stabilize the grid or end emergency load shed, but to engineer financial outcomes that differ from the outcomes dictated by the ERCOT Protocols. The February 15 and 16 Orders refer to “significant market anomalies” and indicate that certain prices were “inconsistent with the fundamental design of the ERCOT market,” but in no way indicate how re-pricing the market at \$9,000/MWh would help mitigate or avoid any imminent peril to public health, safety or welfare. Thus, while firm load shed during the week of February 14 undoubtedly posed an imminent risk to public safety, the Commission’s Orders did not impact the immediate capacity crisis. Instead, the Orders changed the financial rules under which market participants operate and did so without any public input, magnifying the effect of losses and windfalls across all of ERCOT. As such, the Orders neither complied with the finding and notice requirements of the emergency rulemaking process, nor do they offer a reasoned justification for emergency action. As such, the Commission decision to replace the scarcity pricing rules failed to substantially comply with APA § 2001.034, making that Section of the Orders voidable.⁴⁶

E. Point of Error 5: In Issuing Section I of the Orders, the Commission Violated APA § 2001.051 and its Own Procedural Rules With Respect to Contested Cases, Acted in Excess of Its Statutory Authority, and Followed an Unlawful Procedure

A state agency may also issue a final order affecting the rights of parties in a contested case proceeding conducted in accordance with the APA. Nonetheless, the Commission’s issuance of the Orders was not preceded by any of the primary features of a contested case; there has been no opportunity for interested parties to participate in a hearing or to respond and present evidence and

⁴⁶ Tex. Gov’t Code § 2001.035.

argument, each of which are required under APA § 2001.051. No factual record was developed to support the decisions made in Section I of the Orders. Nor do the Orders contain the required elements of a final order in a contested case, as they do not include “findings of fact and conclusions of law, separately stated.”⁴⁷ Nor were the Orders issued in a Commission docket styled as contested case, but rather they were filed in a “project” docket with the caption, “Oversight of the Electric Reliability Council of ERCOT.” As such, the Commission violated APA § 2001.051 by issuing orders affecting Exelon’s and others’ rights without providing the right to participate in a hearing or present evidence and argument, and in doing so the Commission exceeded its statutory authority as a state agency and instead followed an unlawful procedure when it issued the Orders.

We note that the Commission’s Procedural Rules also set out a specific contested-case process that may be used to review ERCOT’s rules and conduct. 16 Tex. Admin. Code § 22.251 permits the filing of a complaint regarding ERCOT’s conduct, including its promulgation of any “procedures . . . accounting for the production and delivery of electricity among generators and other market participants,” which process may be initiated by Commission staff.⁴⁸ Thus, a contested case could have been initiated under 16 Tex. Admin. Code § 22.251 alleging, as the Commission did in its Orders, that ERCOT’s pricing Protocols are “inconsistent with the design of the ERCOT market.”⁴⁹ This would have allowed interested parties to participate in review of ERCOT’s scarcity pricing structure and to develop a record of evidence supporting any revised rule. 16 Tex. Admin. Code § 22.251 also permits the Commission to suspend the operation of any ERCOT rule that is the subject of review and to expedite the contested proceeding, each following a showing of good cause.⁵⁰ Despite the availability of these processes, the Commission afforded

⁴⁷ Tex. Gov’t Code § 2001.141 (b); 16 Tex. Admin. Code § 22.263(2).

⁴⁸ 16 Tex. Admin. Code § 22.251(b),(c).

⁴⁹ *Id.*

⁵⁰ *See Id.* at § 22.251(i), (k).

interested parties no right participate in the decision to alter critical features of the ERCOT Protocols and now leaves them with great uncertainty as to how they may seek judicial review.

F. Point of Error 6: The Commission Did Not Act Within the Authority Granted by the Governor’s Emergency Proclamation

The Governor’s February 12 emergency proclamation permitted the suspension of “any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster,” but only provided for such a suspension “upon written approval of the Office of the Governor.”⁵¹ While the February 15 and 16 Orders refer to the Governor’s proclamation, the Commission did not indicate that it had either requested or obtained written approval of the Governor to suspend the normal operation of the Administrative Procedure Act before issuing its Orders and fundamentally altering the scarcity pricing provisions of the ERCOT Protocols. Thus, it is clear that the Governor’s proclamation does not grant the Commission any additional authority or affect any analysis as to whether the Commission adopted new ERCOT Protocols in substantial compliance with the APA, or whether it acted in violation of PURA or the APA or otherwise in excess of its authority when it issued the Orders.

G. Point of Error 7: The Orders Violate the Due Process Rights of ERCOT Market Participants, Who Have a Right to Comment and Hearing, or at a Minimum, to Judicial Review

As explained above, the Commission did not follow the procedures set forth in the Administrative Procedure Act in issuing the Orders. Generators, retail electric providers, marketers and cooperatives who may ultimately be driven from the ERCOT market by the Commission’s administrative pricing decision had no opportunity to comment on that decision, no opportunity for a hearing, and no opportunity to present evidence or arguments. In addition, the

⁵¹ Disaster Proclamation of Gov. Greg Abbott dated Feb. 12, 2021.

right of affected parties to seek judicial review of the Commission's Orders has been fundamentally jeopardized because the Commission has neither clearly issued a final, appealable order nor has it properly promulgated a new rule, leaving parties to guess what process they can follow to obtain review of the Commission's actions.

Due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner."⁵² By denying Exelon and others the opportunity to provide written comments or arguments prior to replacing the ERCOT scarcity pricing protocols, and by now impairing their right to judicial review in acting outside of any authorized procedure, the Commission has violated those parties' right to due process. It is imperative that the Commission reconsider its Orders and reinstate the prices that would have resulted from the ERCOT protocols. Moreover, to address the potential impact of returning to prices determined by the ERCOT protocols on market participants that may have relied on the Orders, the Commission should establish a rulemaking process or contested case to allow generators or other market participants to apply for and receive make-whole payments for (i) verifiable costs that cannot be recovered under such market prices, or (ii) losses incurred by detrimental reliance on the Commission's Orders.

H. Point of Error 8: Section I of the Orders Is Not Reasonably Supported by Evidence; A Public Process to Determine Equitable and Efficient Wholesale Settlements for the Week of February 14 is in the Public Interest.

While the Commission and others have expressed concern that revisiting Section I of the Orders would upset the expectations of market participants and artificially pick winners and losers, those ills have already been realized by the Commission's decision to administratively impose a \$9,000/MWh price across every one of ERCOT's thousands of pricing nodes for several days

⁵² *Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted).

without making any findings of fact or considering any comments as to whether that price was supported by sound economic principles. This decision is particularly egregious in light of the fact that ERCOT considered but declined to adopt firm load shed as a triggering condition for scarcity pricing back in 2014, which the Commission presumably reviewed and had the ability to change, through the appropriate process, prior to the storm. Moreover, in acting without public comment and hearing, the Commission itself was deprived of the detailed market information and expert analysis it needs to make a carefully considered, reasoned decision. As such, Section I of the Orders is not reasonably supported by evidence and should be reconsidered.

In response to the argument that the Commission's administratively-set prices provided assurance that all fuel costs would be recovered, these appear to be post-hoc rationalizations for the Commission's action urged by the supporters of high prices. Nowhere in either of the Commission's Orders does the Commission state that such assurances are its goal in establishing \$9,000/MWh prices. Rather the Commission stated that:

[a]t various times today, energy prices across the system have been as low as approximately \$1,200. The Commission believes this outcome is inconsistent with the fundamental design of the ERCOT market. Energy prices should reflect scarcity of the supply. If customer load is being shed, scarcity is at its maximum, and the market price for the energy needed to serve that load should also be at its highest.⁵³

Furthermore, as discussed above, there are other means to provide such assurances, rather than set market-wide prices at the cap for nearly four days. As stated by the Coalition of Concerned Customers, "[f]or context, in the ten-year history of the nodal market there were only 16 hours spent near the cap in RT before this: 3 hours in 2019 and 13 hours in 2011 (the cap was \$3,000 in

⁵³ Order Directing ERCOT to Take Action and Granting Exception to Commission Rules, Project No. 51617 (Feb. 15, 2021), Section I, p. 1; Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021), Section I, p. 1.

2011).”⁵⁴ It is hard to see how four days of sustained \$9,000/MWh prices are consistent with the fundamental design of the ERCOT market, which yielded prices at the cap so rarely before.

Because it did not conduct a contested case or even take written comments from interested parties before issuing the Orders, there is no evidentiary record reasonably supporting the Commission’s Orders or even explaining its decision. Had the Commission conducted a thorough public process, it may have had the benefit of evidence that could shed light on important questions that go unanswered in the two-page Orders, such as “Is a \$9,000/MWh price necessary for generators to recover their costs during the winter storm event?” This is not an easy question to answer, but it is critical that the Commission undertake a thorough analysis of generators’ actual costs before it interferes in the normal operation of the competitive market.

The Commission’s decision to select a single market price to apply to all transactions for an extended period of time not only has had dire financial consequences but also defies the careful, considered economic analysis that market participants have come to expect from the Commission and ERCOT. We have seen no evidence to suggest that any generator’s marginal cost of production reached \$9,000 or more, even with a sharp increase in natural gas prices. Perhaps the most unfortunate aspect of the Commission’s decision is the fact that an equitable, less-expensive alternative to mandated HCAP pricing already existed under the ERCOT Protocols: ERCOT could have issued a RUC order if necessary to prevent economic curtailment of generation, and would have made RUC-committed generators whole if market prices were in fact insufficient to cover their costs. The Commission’s scant justification for its action as explained in the Order and the complete absence of any evidentiary record demonstrate that the decision to impose a \$9,000/MWh price was not reasonably supported by evidence. Exelon is aware that the RUC make

⁵⁴ Coalition of Concerned Customers’ Comments at 2.

whole process at ERCOT has its limitations, e.g., recovery for ancillary bilateral transactions. However, these issues can and should be vetted in a rulemaking and evidentiary process. As other parties have suggested, the Commission should correct its mistake by investigating generators' actual costs during the winter storm and determining equitable pricing accordingly. It does not serve the public interest to create windfalls through administrative pricing without any supporting analysis.

CONCLUSION

For the foregoing reasons, Exelon respectfully requests that the Commission

(1) Rescind Section I of its February 15 and 16 Orders in light of the multitude of substantive and procedural deficiencies that underly its decision and restore the prices that would have resulted from the application of the ERCOT Protocols, and

(2) Open a rulemaking or evidentiary docket to allow market participants that detrimentally relied upon the Commission's Orders to (a) demonstrate their costs that would not be recovered under the pricing generating by the ERCOT Protocols or the losses they incurred by detrimentally relying on the Commission's Orders, and (b) be made-whole.

Exelon further requests that even if the Commission declines to reconsider its substantive decision amending the ERCOT Protocols, that it reissue the Orders to clarify under what legal authority it has acted.

Exelon also requests all other relief to which it may be entitled.

Respectfully submitted,

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On behalf of Exelon Generation Company, LLC

CERTIFICATE OF SERVICE

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on March 12, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Lynda Fohn
Lynda Fohn

