Control Number: 51812

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DOCKET NO. 51812

OVERSIGHT OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

DOCKET NO. 50500

PETITION FOR DESIGNATION OF ELECTRIC PROVIDERS OF LAST RESORT FOR 2021-2022 AND SUBMISSION OF LARGE SERVICE PROVIDER ELECTRICITY FACTS LABELS	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

COMMENTS IN SUPPORT OF REHEARING

TO THE HONORABLE COMMISSION:

A Coalition of Competitive Retail Electric Providers (CCR)[1] offers the following comments in support of the three Motions for Rehearing[2] filed herein by Exelon Generation Company LLC (Exelon). These comments contain a specific plea that if the Commission has not granted the Motions for Rehearing on or before April 12, 2021,[3] an extension of time to act on the motions be ordered, so that state leaders and a new Commission can consider the important issues raised on rehearing.

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[1] The Coalition of Competitive Retailers supporting this filing consists of those companies listed in Attachment One hereto.

[2] Comments and Motion for Rehearing of Exelon Generation Company LLC (March 12, 2021) (hereinafter, "First Exelon Motion for Rehearing"); Exelon Generation Company. LLC's Expedited Motion for Relief and Rehearing of February 21 Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols (March 18, 2021) (hereinafter, "Second Exelon Motion for Rehearing"); Exelon Generation Company, LLC's Motion for Rehearing of February 19 Order Delegating Authority to the Executive Director and Granting Exception to Commission Rules (March 18, 2021) (hereinafter, "Third Exelon Motion for Rehearing") (collectively, "Exelon's Motions for Rehearing "). The First Exelon Motion for Rehearing was also filed in *Oversight of the Electric Reliability Council of Texas,* Docket No. 51617. The filing description on the Commission website for Control Number 51617 shows the filing as "VOID. MOVED TO DKT 51812."

[3] April 12, 2021 is the last day on which the Commission can extend time for ruling on Exelon's first Motion for Rehearing. The Commission can extend time for ruling until May 26, 2021.

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INTRODUCTION

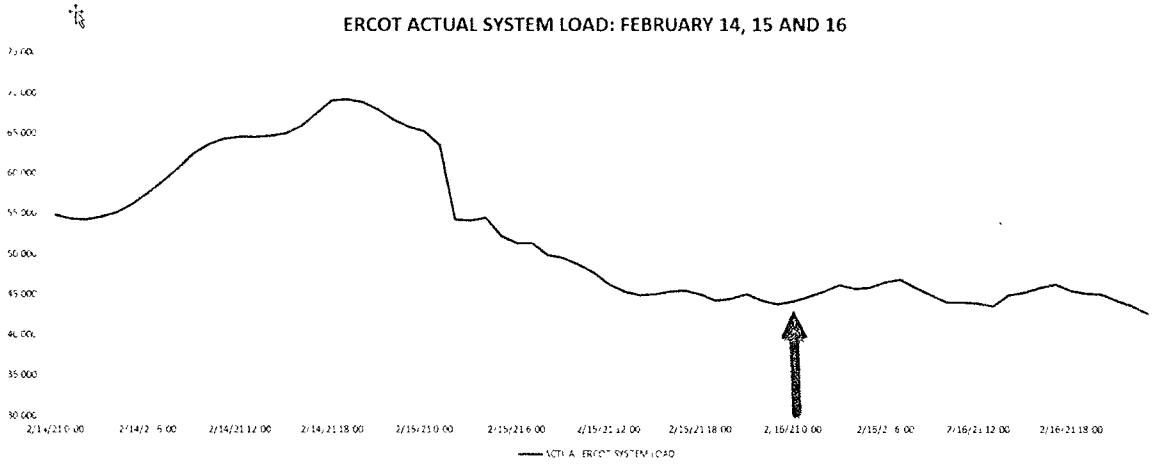
As explained below, the Commission erred and violated the Texas Administrative Procedures Act, the Public Utility Regulatory Act, Commission rules, ERCOT Protocols and due process rights through its issuance of four Orders in this Project. The first two Orders interrupted ERCOT protocols and the competitive market system by abruptly setting a price of $9000 per MWh for wholesale electricity without any notice to affected market participants and millions of Texans. The Commission and the public are well aware of the fallout caused by this unlawful ratemaking – billions of dollars of overcharges, bankruptcies, and continued economic anxiety in a Texas recovering from pandemic.

Through the rehearing process, the Commission can allow the Texas Legislature to have another tool with which to do its legislative work in fashioning relief. The Commission should grant the Exelon Motions for Rehearing, review the Orders, and provide appropriate relief for the unlawful market interruption and $9000 price setting.

Unfortunately, that $9000/MWh pricing was all for naught. The following graph[4] shows that ERCOT's actions had no positive impact on electricity generation, but instead created a massive bill foisted onto the market and ultimately upon Texas ratepayers. The red arrow on the graph shows that the $9000 pricing took effect at approximately 1:00 am on February 16, 2021. As the graph indicates, the system was running at the same capacity and the price algorithms were behaving accordingly both before and after the implementation of the $9000 pricing. The $9000 pricing had zero impact on bringing additional supply online. The grid was stable at approximately 45,000 megawatts, or 45 gigawatts, for nearly twelve (12) hours before ERCOT artificially set the

[4] The data demonstrates the ERCOT System Load before, during, and after $9000/MWh pricing was implemented. Load data can be found on the ERCOT website at http://www.ercot.com/gridinfo/load/load_hist.

price per the Commission Orders of February 15 and 16.



This failure of the $9000 price to add power onto the grid was noted in Exelon's First Motion for Rehearing[5]:

> *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. Exelon plant operators did the same. No amount of money, and no amount of penalties during the event could melt the frozen instrumentation or resolve the other operational issues.*"

Additionally, consider the following exchange from the hearing between Senator Johnson and ERCOT CEO Bill Magness further solidifying that the artificial $9000 price fixing was completely unnecessary:

> Sen. Johnson: "At EEA3, you are at emergency levels and no generator can go offline at that without permission at that point, right?"
> Bill Magness: "They need to get permission to come off before an EEA3, yeah"
> Sen. Johnson: "So if the price cap went down from $9000 to 8, 7, 6, or 5, they still gotta get permission to before they go offline, don't they?"
> Bill Magness: "The generators would yes."

[5] Exelon's First Motion for Rehearing at 17-18.

Sen. Johnson: "So there really wasn't a risk of the generator going off line if that cap would have been lifted, right?

Bill Mangess: "Well we could have required those generators if we remained in the emergency condition to do that. If we dropped out of the emergency condition they could drop off, but **as long as we remained in the emergency condition, we could have required them to stay on and then settled up with them later.**"[6]

BACKGROUND AND RELIEF REQUESTED

Exelon's Motions for Rehearing concern four Orders of the Commission. On February 15 and 16, 2021, the Commission issued two Orders[7] which directed the Electric Reliability Council of Texas (ERCOT) to suspend any use of the low system wide offer cap (LCAP) and set the price of wholesale energy at $9000 per MWh during periods of load shedding. Exelon filed a single Motion for Rehearing for the February 15 and February 16 Orders. On February 19th, 2021, the Commission issued an Order that placed a moratorium on mass transitions of the customers of defaulting retail electric providers for the period of February 19 to February 24, 2021.[8] On February 21, 2021, the Commission issued an Order that granted ERCOT the right to deviate from existing protocol requirements related to default uplift invoices.[9] Exelon has separately filed Motions for Rehearing for the February 19 and February 21 Orders. (The four Orders dated February 15, 16, 19 and 21, are collectively called the "Orders" hereafter.)

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[6] Testimony of ERCOT CEO Bill Magness, Senate Committee on Jurisprudence, at 2:46:50 (Mar. 11, 2021), available at https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15392 (Emphasis supplied.)

[7] *Oversight of the Electric Reliability Council of Texas*, Docket No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules, at 1-2 (Feb. 15, 2021) (Hereinafter, the "February 15th Order") and *Oversight of the Electric Reliability Council of Texas*, Docket No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules, at 1-2 (Feb 16, 2021) (hereinafter, the "February 16th Order") (hereinafter, collectively, the "February 15 and 16 Orders")

[8] Delegation of Authority to the Executive Director and Granting Exception to Commission Rules at 1 (Feb. 19, 2021) (hereinafter, the "February 19 Order").

[9] Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols at 1 (Feb. 21, 2021) (hereinafter, the "February 21 Order").

CCR urges the Commission to maintain maximum flexibility through the rehearing processes so that the Orders can be reconsidered by new Commissioners and the Texas Legislature can provide direction. New commissioners should be able to scrutinize the actions taken by the Commission in response to winter storm Uri – particularly, those actions reflected in the Orders and their implementation by the Electric Reliability Council of Texas (ERCOT). After that review, a new Commission should (i) grant pending Motions for Rehearing in Projects 51812 and 50500; (ii) find that the Orders were unlawful violations of the Texas Administrative Procedure Act, the Public Utility Regulatory Act ("PURA"), Commission rules, and due process rights; and were not reasonably supported by evidence; and (iii) vacate, or at least modify, the Orders; and (iv) conduct contested cases or rulemakings as needed.

DISCUSSION

I. This "Project" is by law a contested case; therefore, rehearing processes are applicable.

Even though this "project" and its predecessor Project 51617 have not been conducted as contested cases with the required due process afforded to affected parties, the proceedings are in fact and law, "contested cases." Chapter 39—where the Commission's stated authority to act in the February 15, February 16, and February 21 Orders is found[10]—has a specific provision concerning all proceedings held under that Chapter. It states: "Unless specifically provided otherwise, each commission proceeding under this chapter [39], other than a rulemaking

[10] February 15th Order at 1-2; February 16th Order at 1-2; February 21st Order at 1-2 (citing Tex. Util. Code § 39.151(d). The February 15th and 16th authorities referred to Tex. Util. Code § 39 151(d), stating "*Pursuant to this authority*, the Commission determines that adjustments are needed to ERCOT prices to ensure they accurately reflect the scarcity conditions in the market." February 15th Order at 1-2, February 16th Order at 1-2 (emphasis added) The February 21st Order stated "PURA § 39.151(d) gives the Commission *complete authority* over ERCOT, the independent organization certified by the Commission under PURA § 39.151." February 21st Order at 1-2 (citation omitted) (emphasis added). The February 19th Order did not specify a source of authority.

proceeding, report, notification, or registration, shall be conducted as a contested case."[11] Unfortunately, this clear statutory directive has not been followed.

Neither Project 51617 nor Project 51812 is a "registration" since the Commission has not registered anyone in either project as in the relatively new brokers' registration system.[12] And while the Commission may have received "reports" in Project 51812—notably from the Independent Market Monitor—the Commission has not issued any reports here such as the 2019 *Scope of Competition in Electric Markets* report pursuant to section 31.003 of the Public Utility Regulatory Act.

Arguably, Project 51617 began as a "notification" with the filing of a Control Number Request Form for a style of "Calendar Year 2020[13]—Open Meeting Agenda Items Without an Associated Control Number." The form's selection of a utility type is "other." However, what began as a vehicle for notification that issues without a preassigned control number might be discussed at open meetings became a proceeding to set wholesale electricity rates and to waive ERCOT protocols—which are activities for contested case and rulemaking proceedings.

However, neither Project 51617 nor Project 51812 is a rulemaking proceeding, as the Commission has not taken any steps within the two projects to initiate a rulemaking proceeding pursuant to Procedural Rule 22.281(b). While numerous individuals and ERCOT market participants have filed comments and recommendations in this proceeding *after* the Commission's February 15 and 16 Orders, there has been no proposed rule published in the Texas Register, and there have been no other preliminary rulemaking activities within this Project 51812. In contrast,

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[11] Tex. Util. Code § 39.003.

[12] 16 Tex. Admin. Code § 25.112.

[13] A subsequent memorandum was filed on December 17, 2020 to clarify that the style was to be corrected to reference calendar year 2021.

the Commission Staff has recently opened a new Project No. 51871, *Review of the ERCOT Scarcity Pricing Mechanism,* to evaluate whether rules should be amended to adjust the low system-wide offer cap (LCAP) prior to the summer. Interested parties have been invited to make comments on particular questions posed by Staff.[14]

In this "Project," there was no opportunity for comments or evidence prior to the Orders' issuance. Instead, without any attempt to utilize emergency rulemaking powers under the Administrative Procedures Act or the Commission's own rules, the low system-wide offer cap (LCAP) was abruptly suspended and the competitive market was replaced by artificially setting the price of wholesale electricity at the high system wide offer cap (HCAP) of $9000 per MWh. The Commission placed market participants at threat of default by granting ERCOT the right to deviate from protocol requirements regarding the maximum amount of default uplift invoices, which will result in $3 billion of short-pays to be recovered from the remaining market participants.[15] The Commission also caused further uplift by preventing transition of customers from February 19-24, causing further short-pays by forcing greater losses on defaulting market participants: faults caused by the February 15 and 16 Orders.

Through all this, the Commission ignored its Procedural Rule 22.283 which allows emergency adoption of a rule upon a finding of imminent peril to the public health, safety, or welfare.[16] The Commission also chose not to use utilize the rule that authorizes cease and desist

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[14] *Review of the ERCOT Scarcity Pricing Mechanism*, Docket 51871, Request for Comments on the Low System-Wide Offer Cap at 1-2 (Mar. 8, 2021).

[15] *See* ERCOT Protocols § 9.19.1(4) and Exelon's Second Motion for Rehearing at 3.

[16] 16 Tex Admin. Code § 22.283.

orders where alleged conduct of a market participant poses a threat to continuous and adequate electric service or where the conduct creates an imminent danger to the public.[17]

An emergency rule could have been adopted to modify Substantive Rule 25.201, which provides in part:

> (a) General. The protocols and other rules and requirements of the Electric Reliability Council of Texas (ERCOT) that implement this section shall be developed with consideration of microeconomic principles and shall promote economic efficiency in the production and consumption of electricity; support wholesale and retail competition; support the reliability of electric service; and reflect the physical realities of the ERCOT electric system. **Except as otherwise directed by the commission, ERCOT shall determine the market clearing prices of energy and other ancillary services that it procures through auctions and the congestion rents that it charges or credits**, using economic concepts and principles such as: shadow price of a constraint, marginal cost pricing, and maximizing the sum of consumer and producer surplus.
>
> (d) Adequacy of operational information. **ERCOT shall require resource-specific bid curves for energy and ancillary capacity services that it competitively procures in the day-ahead or operating day, and ERCOT shall use these bid curves or ex-ante mitigated bid curves to address market failure, as appropriate, in its operational decisions and financial settlements.**[18]

Any emergency rule could have been guided by the pricing safeguards found at Substantive Rule 25.502 which are to "protect the public from harm when wholesale electricity prices in markets operated by ... ERCOT ... are not determined by the normal forces of competition."[19] That rule also "does not limit the Commission's authority to ensure reasonable ancillary energy and capacity service prices and to address market power abuse."[20] Additionally, the Commission

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[17] 16 Tex. Admin. Code § 25.54(b).

[18] 16 Tex. Admin. Code § 25.501(a) and (d).

[19] 16 Tex. Admin. Code § 25.502(a).

[20] 16 Tex. Admin. Code § 22.283(b).

could have followed the standards to be applied in monitoring the wholesale electricity markets administered by ERCOT, which standards are necessary to:

> (1) protect customers from unfair, misleading, and deceptive practices in the wholesale markets, including ERCOT-administered markets;
> (2) ensure that ancillary services necessary to facilitate the reliable transmission of electric energy are available at reasonable prices;
> (3) afford customers safe, reliable, and reasonably priced electricity;
> (4) ensure that all wholesale market participants observe all scheduling, operating, reliability, and settlement policies, rules, guidelines, and procedures established in the ERCOT procedures;
> (5) clarify prohibited activities in the wholesale markets, including ERCOT-administered markets;
> (6) monitor and mitigate market power as authorized by the Public Utility Regulatory Act (PURA) §39.157(a) and prevent market power abuses;
> (7) clarify the standards and criteria the commission will use when reviewing wholesale market activities;
> (8) clarify the remedies for non-compliance with the Protocols relating to wholesale markets; and
> (9) prescribe ERCOT's role in enforcing ERCOT procedures relating to the reliability of the regional electric network and accounting for the production and delivery among generators and all other market participants and monitoring and obtaining compliance with operating standards within the ERCOT regional network.[21]

Both the February 15 and February 16 Orders recite that "ERCOT has informed the Commission that energy prices across the system are clearing at less than $9000, which is the current system-wide offer cap pursuant to 16 TAC § 25.505(g)(6)(B)."[22] Presumably this information from ERCOT was conveyed pursuant to Substantive Rule 25.362(i)(4), which directs ERCOT management to immediately notify the Chairman of the Commission or the Executive Director by telephone of any event that could adversely affect the reliability of the regional electric network.[23] Unfortunately, compliance with this emergency-reports rule stopped there. ERCOT did

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[21] 16 Tex. Admin. Code § 25.503(a).

[22] February 15th Order at 1; February 16th Order at 1.

[23] 16 Tex. Admin. Code § 25.362(i)(4).

not file a written report by the end of the following business day, and the Executive Director did not specify, in writing, that the report could be delayed.[24] As a result, the public was left in the dark—figuratively and literally for millions of Texans. Had the emergency reports rule been followed, there could have been an emergency open meeting of the Commission to monitor whether the $9000 pricing had been successful in adding generation resources and the Commission could have learned that the pricing change did nothing to bring more generation online. The public and the Commission could have learned that the $9000 pricing had not been successful in bringing any more power to the grid. Instead, the Orders remained in place, disrupting the energy market, and made worse by the subsequent Orders regarding customer transitions and uplift.

The Commission has ignored its own rules, ERCOT protocols, PURA, and APA requirements and has set rates, waived or modified rules and protocols, and supposedly received—but has not made—reports. In its disregard for the protections provided by these laws, the Commission has violated PURA §39.003 which instructs that if a proceeding isn't a rulemaking, report, notification, or registration, then it must be a contested case. In *Reliant Energy v. the PUC of Texas*, the Travis County District Court held that PURA § 39.003 applies to all PUC electricity market proceedings, regardless of whether or not the type of preceding is specifically delineated under the statute.[25] In the *Reliant Energy* case, the Commission had determined that a proceeding governing a voluntary mitigation plan "does not fit within the definition of a contested case in the Administrative Procedure Act, and is not a proceeding under chapter 39 of PURA, therefore no

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[24] *Id*

[25] *Reliant Energy, Inc. v. Public Utility Commission, et. al*, Cause No. D-1-GN-07-002494, Letter Ruling (Oct. 8, 2007) (Attachment Two hereto.)

legal obligation to proceed with a contested case hearing in this matter exists."[26] The Travis County District Court refuted this position, stating:

> Had the legislature intended to authorize the P.U.C. to conduct proceedings it neither mandated nor mentioned and to give the P.U.C. permission to conduct unmentioned proceedings in any manner it chose while at the same time and in the same statute, dictating a particular manner for conducting the proceedings it did mention, it could and would have done so in clearer language.[27]

The Commission has previously recognized that contested case proceedings allow affected parties "to intervene and provide comments and evidence in response to a proposed action."[28] Unfortunately, no such opportunity was made available to affected parties prior to the issuance of the Orders or afterwards within time to mitigate the devastating impact of the $9000 pricing for almost five days.[29] Parties could have urged the Commission to end the $9000 pricing and to direct ERCOT to implement a system-wide Reliability Unit Commitment (RUC) guarantee payment.[30] Likewise, with respect to the February 19 Order, affected market participants could have recommended alternative methods to protect transitioning customers from indexed rates, such as by simply prohibiting that pricing option from applying for a set period of time after transition.[31]

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[26] TXU Wholesale Companies' Request for Approval of a Voluntary Mitigation Plan Pursuant to Subst. R. §25.504(e), Docket No 34480, Order on Threshold Issues at p. 1 (Aug. 3, 2007)

[27] *Reliant Energy*, Cause No. D-1-GN-07-002494, Letter Ruling at 1-2 (Oct. 8, 2007).

[28] *Rulemaking Relating to Renewable Energy Amendments,* Docket No. 31852 Order Adopting New § 25.174 as Approved at the December 1, 2006, Open Meeting at 31 (Dec. 15, 2006).

[29] The $9000 pricing was only intended to apply during periods of load shedding. In her testimony to the Senate Committee on Business & Commerce, former Commission Chairwoman DeAnn Walker stated: "I don't think when the 9000 was adopted that anyone that adopted it or argued for it at the time envisioned having it in place for four or five days, and so I think we have to look at that." Testimony of Chairwoman DeAnn Walker, Senate Committee on Business & Commerce, at 6:28:07-6:28:24 (Feb. 25, 2021), available at https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15392.

[30] *See* Potomac Economics' Letter (Mar. 11, 2021).

[31] Exelon's Third Motion for Rehearing at 2

Contested case proceedings at the Commission can and do cover a wide range of matters, such as ratemaking cases,[32] the designation of Competitive Renewable Energy Zones,[33] and review of a protocol or procedure of ERCOT.[34] Since Projects 51617 and 51812 are not notifications, registrations or rulemakings, they must, by statutory mandate, be contested cases. There is no justiciable reason why the Commission has failed thus far to offer the due process protections of contested case proceedings.

Also, there is no special emergency power enabling the Commission to avoid the Administrative Procedures Act and contested case requirements. The Commission has not cited to any such emergency authority despite having issued several orders in the Projects. Although the February 15, 16, and 19 Orders began by noting Governor Greg Abbott's Declaration of a State of Disaster, the Orders failed to claim that the Governor's Declaration somehow provided a basis for its Orders and directives that followed. The Orders further failed to claim that the Governor's Declaration allowed the Commission to ignore requirements of the Administrative Procedure Act.

Nevertheless, as noted by Exelon in its Motions, the Commission did not lawfully follow the requirements of the Administrative Procedure Act.[35] The Commission did not follow the procedures required of an ordinary rulemaking proceeding, which include:

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[32] *See, e g.*, Application of Southwestern Electric Power Company for Authority to Change Rates, Docket No. 46449, Proposal for Decision (Sept. 21, 2017).

[33] 16 Tex. Admin. Code § 25.174(b): "The designation of Competitive Renewable Energy Zones (CREZs) pursuant to PURA §39.904(g) shall be made through one or more contested case proceedings initiated by commission staff, for which the commission shall establish a procedural schedule."

[34] 16 Tex. Admin. Code § 22.251.

[35] Exelon Motion for Rehearing at Points of Error 2 and 3.

- 30-day notice of intent to adopt a rule, filed with the Texas Register;[36] and
- Opportunity for public comment on a proposed rule.[37]

A rule is voidable if it is not adopted in substantial compliance with these rulemaking procedures.[38]

Likewise, the Commission did not follow the procedures required of an emergency rulemaking proceeding,[39] which would allow the Commission to adopt an emergency rule without prior notice or hearing.[40] The Commission may only enact an emergency rule if the Commission:

- finds in writing 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;[41]
- files the emergency rule and the written reasons for the adoption in the Texas Register.[42]

None of these procedures to adopt an emergency rule were followed. An emergency rule is voidable if it is not adopted in substantial compliance with the emergency rulemaking procedures.[43]

The Commission did not and has not followed APA provisions regarding contested cases either.[44] The Commission did not:

- give parties opportunity for hearing and participation;[45]

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[36] Tex. Gov't Code § 2001.023.

[37] Tex. Gov't Code § 2001.029; 16 Tex. Admin. Code § 22.282(c).

[38] Tex. Gov't Code § 2001.035(a).

[39] Exelon Motion for Rehearing at Point of Error 4.

[40] Tex. Gov't Code § 2001.034(a); 16 Tex. Admin. Code § 22.283.

[41] Tex. Gov't Code § 2001.034(a)(1) and (2); 16 Tex. Admin. Code § 22.283.

[42] Tex. Gov't Code § 2001.034(d); 16 Tex. Admin. Code § 22.283.

[43] Tex. Gov't Code § 2001.035(a).

[44] Exelon Motion for Rehearing at Point of Error 5.

[45] Tex. Gov't Code § 2001.051; 16 Tex. Admin. Code § 22.102(b).

- give notice of a pending contested case;[46]
- issue findings of fact and conclusions of law;[47]

The Texas Supreme Court has held "that in administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues."[48] Thus, the issuance of the Orders violated the due process rights of the market participants who were denied an opportunity for hearing and participation.

Additionally, although the February 15, 16, and 19 Orders referenced[49] the Governor's February 12 Disaster Proclamation,[50] as noted by Exelon, the Orders did not comply with the procedural requirements of the Proclamation.[51] The Proclamation allowed suspension of regulatory statutes and rules prescribing procedures for conduct of state business, but only "upon written approval of the Office of the Governor."[52] There is no indication that the Commission sought or received such approval.

The Orders complained of in Exelon's Motions for Rehearing were all issued with a callous disregard of applicable laws governing the Commission. As such, the Commission was not authorized to issue these Orders. Where orders are granted in excess of an agency's authority they are to be reversed or remanded under the APA.[53]

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[46] Tex. Gov't Code § 2001.052; 16 Tex. Admin. Code § 22.51-56.

[47] Tex. Gov't Code § 2001.141; 16 Tex. Admin. Code § 22.263(a)(2).

[48] *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 262 (Tex. 2001).

[49] The February 15th Order at 1, the February 16th Order at 1; the February 19th Order at 1.

[50] Tex. Proclamation (Feb. 12, 2021).

[51] Exelon Motion for Rehearing at Point of Error 6.

[52] Tex Proclamation (Feb. 12, 2021) (citing Tex. Gov't Code § 418.016).

[53] Tex. Gov't Code § 2001.174(2)(B).

II. Rehearing affords maximum opportunity and flexibility for remedies.

ERCOT issued a notice in response to the February 21 Order that stated in part: "Invoices or settlements will not be executed until issues are finalized by State leaders considering solutions to the financial challenges caused by the winter event. . . ."[54] Unfortunately the very next day, without any explanation and without affording State leaders an opportunity to meaningfully consider solutions, ERCOT abruptly issued a new notice ending the previous day's deviation from protocol deadlines.[55] *The same mistake should not be repeated with respect to rehearing processes.*

State leaders are still considering solutions and should be allowed the maximum opportunity to craft legislative directives that the PUC implement the Independent Market Monitor's (IMM) recommendations and/or securitization or something else. Rehearing processes allow legislators to have all options on the table. Rehearing further allows new commissioners to review the Commission's actions taken in February and make decisions to remedy the violations of law described above and in the pending Motions for Rehearing.

By granting the Motions for Rehearing, the Commission has an opportunity to vacate[56] the Orders which interrupted market principles and disregarded laws governing the Commission and ERCOT protocols on which market participants relied. The Commission may also "modify, correct or reform"[57] those Orders as necessary.

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[54] ERCOT Market Notice M-A022221-01 (Feb. 22, 2021).

[55] "ERCOT Market Notice M-A022221-02 (Feb. 23, 2021.

[56] Tex. Gov't Code § 2001.146(h)(2).

[57] *Id.*at sub-part (h)(1).

Exelon's first Motion for Rehearing will be overruled by operation of law after the 55th day after the date of the February 15 Order.[58] If the date lies on a Saturday or Sunday, the date is extended to the next weekday.[59] The 55th date after the February 15th Order is Sunday, April 11, 2021, so the final date before the Motion is overruled by operation of law is Monday, April 12, 2021.[60] *The Commission should extend time for ruling on the Motions for Rehearing by this date.*

There is also a later opportunity for the Commission to act. The Commission has until the 10th day after the period for taking agency action to extend the date for consideration for the Motion for Rehearing.[61] Accordingly, the Commission has until April 22, 2021, to extend the date for consideration for the first Motion for Rehearing.[62] The Commission may do so on its own initiative and without any motion filed by a party.[63] The Commission may extend the date of consideration to no later than 100 days after the date of the order.[64] So the Commission can extend the date for reconsideration to as late as May 26, 2021.

III. Rehearing allows the Commission to do the right thing.

Upon rehearing, the Commission should vacate the Orders and find that they were issued in violation of the Texas Administrative Procedures Act, PURA, Commission rules, and ERCOT protocols as explained above. To the extent that the Orders can be construed as rules, then such

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[58] Tex. Gov't Code § 2001.146(c); *see also* 16 Tex. Admin. Code § 22.264(a) ("Motions for rehearing, replies thereto, and commission action on motions for rehearing shall be governed by APA.")

[59] Tex. Gov't Code § 311.014(b).

[60] Tex. Gov't Code § 311.014(b).

[61] Tex Gov't Code § 2001.146(e).

[62] Tex. Gov't Code § 2001.146(e).

[63] Tex. Gov't Code § 2001.146(e)

[64] Tex. Gov't Code § 2001.146(e).

rule changes are voidable as not having been adopted in substantial compliance with either the ordinary or emergency rulemaking procedures.[65] To the extent that the Orders were adopted under contested-case procedures, then such Orders are void for failure to provide due process.[66]

As a consequence of a Commission decision upon rehearing to vacate the Orders, ERCOT could revise all billings for energy costs, ancillary services, and uplift that relate to the February 15 – 19 period. Then unlawful $9000 pricing would be removed for the period of February 15 - 19, as if the Commission Orders of February 15 and 16 had never occurred, and market participants would not be exposed to the unlimited amounts of uplift under the February 21 Order. ERCOT and market participants could then identify and calculate prices with and without the discretionary adder used by ERCOT to implement the inappropriate and unlawful pricing intervention.

IV. Rehearing and vacating the Commission's Orders of February 15 and 16 would not be a violation of the Texas Constitution.

The Texas Attorney General recently discussed constitutional concerns with regards to "repricing" in response to a query by Lieutenant Governor Dan Patrick.[67] The Opinion addressed separately the concerns that a statute ordering ERCOT or the PUC to reprice costs impacted by the Orders herein would constitute a taking without compensation,[68] or that such an act would constitute a prohibited retroactive law.[69] The Attorney General determined that repricing would not violate either constitutional prohibition.[70] Although the Opinion was written while considering

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[65] Tex. Gov't Code § 2001.035(a).

[66] *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 262 (Tex. 2001); *see also In re E.R.*, 385 S.W.3d 552, 566 (Tex. 2012) (explaining that judgments resulting from due process violations are void).

[67] Op. Tex. Att'y Gen. No. KP-0363 (2021).

[68] Op. Tex. Att'y Gen. No. KP-0363 at 5-6 (2021) (citing TEX. CONST. art. I, § 17).

[69] Op. Tex. Att'y Gen. No. KP-0363 at 6 (2021) (citing TEX. CONST. art. I § 16)

[70] Op. Tex. Att'y Gen. No. KP-0363 at 5-6 (2021).

the possibility of a legislative statute, the analysis applies to any constitutional concerns that may involve vacating the Orders upon rehearing.

A. Vacating or Modifying the Orders would not be a constitutionally-prohibited taking.

Under the Texas Constitution, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made. . ."[71] However, as the Attorney General Opinion noted, the antecedent issue is whether the generators' right to the proceeds at the $9000 price set by the February 15 and 16 Orders is vested so as to constitute property within the meaning of the Takings Clause.[72] "Engrained in the concept of vested rights is the idea of certainty. When a lawmaking power can declare that a right does not exist, the right is not 'fixed or vested."[73]

ERCOT has thirty days to alter prices if they are in need of a correction,[74] and from this the Attorney General correctly concluded that generators' rights to proceeds are not vested,[75] as the prices would still be subject to the Commission's lawmaking power. However, the Commission's lawmaking power extends beyond ERCOT's thirty days to correct a price: the Commission has corrected prices in proceedings taking well over a year to conclude.[76] Thus, the

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[71] TEX. CONST. art. I, § 17(a).

[72] Op. Tex. Att'y Gen. No. KP-0363 at 5 (2021) (citing *City of Austin v Whittington*, 384 S.W.3d 766, 790 (Tex. 2012).

[73] *Houston Indep. Sch. Dist v Houston Chronicle Pub. Co* , 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

[74] *See* ERCOT Protocol 6.3(6).

[75] Op. Tex. Att'y Gen. No. KP-0363 at 5-6.

[76] *See Complaint of Direct Energy, LP and Tenaska Power Services Co. Against the Electric Reliability Council of Texas*, Docket No. 29210, Order (Nov. 5, 2004). In this proceeding, the Commission issued an Order on November, 5, 2004 to correct prices dating as far back as January of 2003, a minimum of 22 months. *See Id* at 1.

rights to proceeds at a certain price cannot be vested until the time period has passed for both the Commission and ERCOT to correct prices.

The Orders are not final, motions for rehearing are pending, and the proceeding concerning the Orders is still underway and subject to further rulings by the Commission, a lawmaking power. Because the Orders are not final, and this proceeding is still ongoing, no party has a fixed or vested right in the prices or processes as set by the Orders. Thus, no taking can occur by action of the PUC in vacating, modifying, or correcting the Orders.

B. Overruling the Orders would not be a constitutionally-prohibited retroactive law.

In a 2010 opinion in *Robinson v. Crown Cork & Seal Co.*, the Texas Supreme Court set out three factors for "determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution."[77] They are:

1. the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;
2. the nature of the prior right impaired by the statute; and
3. the extent of the impairment.[78]

Each of the *Robinson* factors is discussed below.

1. the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;

The Attorney General Opinion noted that the first *Robinson* factor favored the constitutionality of repricing.[79] "A valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally

[77] *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010).

[78] *Robinson*, at 145.

[79] Op. Tex. Att'y Gen. No. KP-0363 at 6.

retroactive."[80] That includes instances where the retroactive legislation contained legislative findings that the law was "vital to the general economy and welfare of this state."[81] Likewise, the Commission can serve the public interest by rehearing the Orders, declaring them to have been issued contrary to law, vacating the Orders, and allowing the restoration of pricing that would have resulted but for the Commission's unlawful actions. As noted in the Exelon Motion for Rehearing,[82] the Texas electric market is hemorrhaging competitive providers, and the Orders have led to defaults by REPs[83] and co-ops,[84] and have caused catastrophic economic harm to REPs, co-ops, and municipalities.[85]

2. the nature of the prior right impaired by the statute; and

"The constitutional prohibition against retroactive laws" only "protects settled expectations."[86] As noted by the Attorney General's Opinion, "if generators were aware prices were subject to future modification, the generators cannot be said to have a settled expectation in

[80] *Robinson*, at 144.

[81] *Robinson*, at 144-145.

[82] Exelon Motion for Rehearing at 3.

[83] *See, e g.*, "Texas Energy Fallout Tips Power Retailer Just Energy into Bankruptcy" (Mar. 9, 2021) (accessed on Mar. 23, 2021), *available at* https://www.wsj.com/articles/texas-energy-fallout-tips-power-retailer-just-energy-into-bankruptcy-11615307592.

[84] *See, e.g* , "Texas Energy Co-Op Files for Bankruptcy After Storm, High Bill," (Mar. 1, 2021) (accessed on Mar. 23, 2021) *available at* https://www.npr.org/2021/03/01/972408584/texas-energy-co-op-files-for-bankruptcy-after-storm-high-bill.

[85] *See, e.g.*, Coalition of Concerned Customers' Comments in Support of TEAM's Emergency Request to Enforce Commission Order and Lower Prices (Feb. 22, 2021).

[86] *Robinson*, at 145.

those prices."[87] As discussed above, ERCOT has thirty days to alter prices (after notifying market participants) if they are in need of a correction.[88] From this, the Attorney General concluded:

> In other words, until at least the close of the thirty-day window, the Commission and ERCOT retain the power to alter prices. Until that window closes, there is only an expectation of receiving the full cleared price, not a settled expectation or immediate entitlement.[89]

However, as discussed above, the Commission's lawmaking power extends beyond ERCOT's thirty days to correct a price. Indeed, the Commission has corrected prices in proceedings taking well over a year to conclude.[90] The Commission continues to "retain the power to alter prices," and, as the Attorney General Opinion noted, "there is only an expectation of receiving the full cleared price, not a settled expectation or immediate entitlement." Furthermore, market participants are on notice of the Commission's authority and responsibilities set out in the APA, PURA, and Commission rules. Participants are also aware of the Commission's past actions in routinely reviewing prices reflected in ERCOT billings and settlements. Thus, the nature of the right impaired by any action vacating, modifying, or correcting the Orders would not impact a settled expectation or immediate entitlement; thus, such an action would be constitutionally permissible under the second *Robinson* factor.

3. the extent of the impairment.

The extent of the impairment was not addressed by the Attorney General Opinion, and this factor is generally less discussed than the other two factors. However, courts have noted the

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[87] Op. Tex Att'y Gen. No. KP-0363 at 6.

[88] *See* ERCOT Protocol 6.3(6).

[89] Op. Tex. Att'y Gen. No. KP-0363 at 6.

[90] *See Complaint of Direct Energy, LP and Tenaska Power Services Co. Against the Electric Reliability Council of Texas*, Docket No. 29210, Order (Nov. 5, 2004). In this proceeding, the Commission issued an Order on November, 5, 2004 to correct prices dating as far back as January of 2003, a minimum of 22 months. *See Id* at 1.

significance between a complete impairment and a partial impairment. The Texas Supreme Court noted that, in *Robinson*, the retroactive law "effectively extinguished" the complaining party's common law civil action.[91] The Texas Supreme Court determined that such an extinguished right constituted a "significant impact;" thus, the retroactive law was impermissible. Likewise, the Court of Appeals for Austin determined that an ordinance that eliminated a rental property right had "a significant impact" on property owners; thus, that ordinance was constitutionally impermissible.

By contrast, any action vacating, modifying, or correcting the Orders would not entirely eliminate generators' rights to proceeds in this case; instead, the amounts of the proceeds would be changed to match ERCOT protocols. Thus, any action vacating, modifying, or correcting the Orders would not have a "significant impact" on a pre-existing right, and would be constitutionally permissible under the third *Robinson* factor.

CONCLUSION

The Commission should preserve the ability of the Texas Legislature and new Commissioners to thoroughly review the Orders of February 15, 16, 19, and 21 by utilizing rehearing processes. The Commission can extend time to act on the Motions for Rehearing for approximately two more months and can grant rehearing at any time during this period. Rehearing allows all options to be considered by the Texas Legislature and provides opportunity for newly appointed Commissioners to correct the violations of law reflected in the Orders and the lack of process in adoption of same.

Upon final consideration of the Motions for Rehearing, CCR urges the Commission to vacate the Orders of February 15, 16, 19, and 21, 2021, as having been issued in violation of the

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[91] *Union Carbide Corp v. Synatzske*, 438 S.W.3d 39, 58 (Tex. 2014) (citing *Robinson v Crown Cork & Seal Co.*, 335 S.W.3d 126, 148-49 (Tex. 2010).

Texas Administrative Procedures Act, PURA, Commission rule, ERCOT protocols, and due process rights, and CCR urges the Commission to direct ERCOT to make all necessary adjustments to invoices and processes.

Respectfully Submitted,

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Attachment One

Coalition of Competitive Retail Electric Providers Supporting these Comments in Support of Rehearing

Background

The Coalition of Competitive Retailers is an ad hoc group of competitive Retail Electric Providers that joined together in its desire to address the market issues stemming from the February 2021 Winter Weather Emergency.

Participants in this filing:

AP Gas & Electric (TX) LLC
ATG Clean Energy Holdings Inc.
Brooklet Energy Distribution LLC
Liberty Power
Pogo Energy LLC
Summer Energy LLC
Varsity Energy LLC
Volt Electricity Provider LP
Windrose Power and Gas, LLC
Young Energy, LLC d/b/a Payless Power

These ten companies serve more than 250,000 customers in Texas and employ more than 350 employees.

Attachment Two

***Reliant Energy, Inc. v. Public Utility Commission, et. al*,**
Cause No. D-1-GN-07-002494, Letter Ruling (Oct. 8, 2007)

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October 8, 2007

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Filed In The District Court
Travis County, Texas
OCT - 8 2007
At 3 P.M.
Amalia Rodriguez-Mendoza, Clerk

Re: D-1-GN-07-002494; *Reliant Energy, Inc. vs. Public Utility Commission of Texas, Paul Hudson, Chairman, Julie C. Parsley, and Barry T. Smitherman, Commissioners;* in 53rd Judicial District, Travis County, Texas.

Dear Counsel:

Section 39.003 states that "[u]nless specifically provided otherwise, each commission proceeding under this chapter, other than a rulemaking proceeding, report, notification or registration, shall be conducted as a contested case ...."

"Proceeding" is broadly defined in PURA, and it clearly includes the consideration of a voluntary mitigation plan resulting in a Commission order pre-approving a generator's bidding conduct and granting it a safe harbor from any claims based on that conduct. A voluntary mitigation plan is not a report, notification or registration.

Although the P.U.C. argued otherwise in its brief, it appeared to concede at oral argument, as the amici have conceded, that voluntary mitigation plans have substantive statutory authority and the authority is Chapter 39. The P.U.C. now appears to have adopted the argument of amici that voluntary mitigation plans do not result from a "commission proceeding under [Chapter 39]" because they are not *mandated by, or specifically mentioned in* Chapter 39.

The dictionary definitions of "under" include "with the authorization of" and that is the plain meaning in the context of a statute delegating authority to an entity that has no authority *but that* delegated. Had the legislature intended to authorize the P.U.C. to conduct proceedings it neither mandated nor mentioned and to give the P.U.C. permission to conduct unmentioned proceedings in any manner it chose while, at the

same time and in the same statute, dictating a particular manner for conducting the proceedings it did mention, it could and would have done so in clearer language.

The continuation of the sentence in 39.003 stating "and the burden of proof is on the incumbent electric utility," does not limit the scope of 39.003 to only those proceedings in which there is an incumbent electric utility. The explicit scope – "each commission proceeding" – cannot be eclipsed by a possible implication of language that does not speak to scope. That would be the tail wagging the dog. Rather, the burden of proof language is limited to those proceedings that involve incumbent electric utilities. Silence in this statute as to the burden of proof in proceedings without an incumbent electric utility is no more anomalous than its silence as to any number of procedural rules provided by other statute, rule, or common law.

Further, the P.U.C. suggests that a "sensible construction" of section 39.003 is that it applies only during the transition to competitive utilities. What the P.U.C. is really arguing, however, is that it would be a sensible *policy* to require contested case proceedings only during that period. Why that is sensible escapes me if Chapter 39 has continued applicability after deregulation, as it clearly does. In any event, policy is determined by the legislature as expressed in its statutory language. It is not a sensible or reasonable *construction* of the statute that the contested case requirement applies only during the transition to competition. The requirement for contested case proceedings, section 39.003, appears in the "General Provisions," at the beginning of a long statute with multiple subchapters. It is not in the subchapter on "Transition," nor is it imbedded next to any language about transition.

Finally, the P.U.C. and amici argue that construing the statute to require contested case proceedings to determine voluntary mitigation plans would be absurd because no generator would then seek one. That is speculation. Even if it is true it does not establish legislative intent here. Avoiding absurdity is a guide to construction, and statutory construction often necessarily involves determining "intent" where no legislator, and certainly not the legislative body, ever formed an intent regarding the particular matter before the court. It goes too far, however, to conclude that the legislature both intended to authorize voluntary mitigation plans and to exempt them from an explicit requirement, all by mere implication.

Accordingly, without reaching the constitutional claims, I will grant Reliant Energy, Inc. declaratory and injunctive relief.

Please prepare an order. If you are unable to reach agreement on the form, please present your disagreements in writing. I will determine whether to resolve any disagreement on submission or by hearing.

Sincerely,

STEPHEN YELENOSKY
Judge, 345th District Court
Travis County, Texas

SY/nh

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