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PUC PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF DISASTER FOR THE FEBRUARY 2021 WINTER WEATHER EVENT	§ § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

SUPPLEMENTAL COMMENTS OF CALPINE CORPORATION

TO THE HONORABLE CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS:

Calpine Corporation ("Calpine") submits these supplemental comments in response to several arguments raised by multiple commenters in Public Utility Commission of Texas ("PUC" or "Commission") Project No. 51812, all asking the Commission to modify its previous orders and reconsider its refusal to retroactively change prices arising from the February 2021 winter weather event.[1] Calpine previously provided comments to the Commission regarding its concerns with retroactive repricing of the energy and ancillary services markets.[2] Calpine files this supplement to highlight severe legal flaws in the arguments made by the commenters supporting retroactive repricing.

Specifically, Calpine urges the Commission to decline requests to revise energy and ancillary services pricing retroactively because (1) the Commission acted within its statutory authority and according to existing rules in issuing the Orders; (2) the Commission's Orders were procedurally proper; (3) revising energy and ancillary services pricing would exceed the

[1] *See, e.g., Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Enel North America Inc.'s Motion for Rehearing and Reconsideration (March 12, 2021) (Item 165) ("Enel Motion for Rehearing"); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812,, Motion for Reconsideration from Bobcat Bluff Wind, LLC, TX Hereford Wind, LLC, Las Majadas Wind, LLC, Miami Wind I, LLC, Goldthwaite Wind Energy, LLC, Ector County Energy Center LLC, and Pattern Energy Group LP (March 12, 2021)("Pattern Entities' Motion to Reconsider") (Item 168); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, RWE Renewables Americas LLC's Motion for Rehearing (March 12, 2021) (Item 169) ("RWE's Motion for Rehearing"); *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Comments and Motion for Rehearing of Exelon Generation Company LLC (Item 170) ("Exelon's Motion for Rehearing").

[2] *See Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Calpine Corporation's Response to Independent Market Monitor's March 1st Recommendations (March 4, 2021) (Item 72).

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Commission's power and constitute impermissible retroactive rulemaking; and (4) the commenters seeking repricing are estopped from doing so.

A. Background

On Friday, February 12, 2021, in response to the extreme winter weather event, Governor Abbott issued a statewide Declaration of a State of Disaster pursuant to Tex. Gov't Code § 418.014. That weekend, Texas experienced record-setting sub-freezing temperatures across the state. Late on Sunday February 14, 2021 and in the early morning of Monday February 15, 2021, extreme temperatures simultaneously rendered some generating units unable to generate power for the ERCOT system and increased load demand on the system, causing capacity reserves to shrink considerably. Then, at 1:20 AM, ERCOT declared an energy emergency Alert Level 3 ("EEA3")—its highest state of emergency. Later that same day, citing Tex. Util. Code § 39.151(d) and 16 Tex. Admin. Code § 25.501(a), the Commission issued an order directing ERCOT to adjust prices to ensure accurate "scarcity pricing signals."[3] The order, and a related order issued February 16, 2021, (collectively the "Orders") mandated ERCOT to set wholesale power prices at the Value of Lost Load (VOLL), which is $9,000/MWh, while ERCOT's EEA3 was in effect.[4] ERCOT complied with the Commission's directive and set the market clearing price for energy at VOLL until the EEA3 condition ended around 9:00 a.m. on Friday, February 19, 2021.

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[3] *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules at 2 (Feb. 15, 2021) (Item 31) (moved from Project No. 51617, *Oversight of the Electric Reliability Council of Texas*).

[4] *See id.*; *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021) (Item 31) (removing retroactive application of a portion of the order, effect of which is not contested or relevant here).

B. The Commission's actions were within its authority and procedurally proper.

1. The Commission acted within its statutory authority and emergency powers.

The commenters seeking repricing allege that by issuing the Orders, the Commission acted outside the scope of its statutory authority, its own rules, or both.[5] On the contrary, by issuing its Orders the Commission was fulfilling the Legislature's mandate to protect consumers and utilities by ensuring the reliability of the "regional electrical network."[6] The Orders were an appropriate response to extraordinary circumstances, authorized by statute, and made in accordance with Commission rules.

The Legislature directed the Commission to "adopt and enforce rules relating to the reliability of the regional electrical network."[7] The Legislature further directed the Commission to delegate to ERCOT "responsibilities for establishing or enforcing such rules," while vesting the Commission with "complete authority" to "oversee" ERCOT's operations.[8] Indeed, ERCOT is "directly responsible and accountable to the Commission."[9]

To comply with the Legislature's directive to ensure the reliability of the electrical network, the Commission has adopted rules governing the wholesale market operated by ERCOT. These rules direct that the "protocols and other rules and requirements" adopted by ERCOT to "implement" the Commission's design "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."[10] The

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[5] *See, e.g.*, RWE's Motion for Rehearing at 2.
[6] Public Utility Regulatory Act ("PURA") § 39.101(a)(2).
[7] PURA § 39.151(d).
[8] *Id.*
[9] *Id*
[10] 16 Tex. Admin. Code § 25.501(a).

Commission also expressly delegated authority to ERCOT to determine market clearing prices of energy and ancillary services, but only where not "otherwise directed by the commission."[11]

Although the Commission has delegated substantial authority to ERCOT to manage the day-to-day operations of the wholesale power market and grid, the Commission has maintained its oversight responsibilities as well as issued its own rules enabling it to take necessary action to ensure the reliable operation of the grid. Those rules also provide the Commission the ability to act quickly in a crisis. During a "public emergency" or if "imperative public necessity" warrants it, the Commission may suspend its rules if such suspension will best serve the public interest.[12] And when there is "good cause," the Commission also has the power to make exceptions to Chapter 25, which contains the electric substantive rules.[13]

The February winter storm event caused exceptionally high electric demand while also causing generation outages and disruptions to fuel supply, which led ERCOT to declare an "EEA3" – its highest state of emergency. Faced with these extreme conditions, the Commission protected the reliability of the electrical network in two ways. First, it exercised its statutory and regulatory power over ERCOT, directing ERCOT to ensure that prices reflected the emergency and scarcity conditions that triggered the EEA3. ERCOT responded by setting the market clearing price for energy to reflect the VOLL at $9,000/MWh. And second, the Commission suspended the low system-wide offer cap ("LCAP") mechanism rule[14] to decouple the price of energy from the price

[11] 16 Tex. Admin. Code § 25.501(a); *and see Statement by Bill Magness, President and Chief Executive Officer, ERCOT* to March 24, 2021 Hearing of the U.S. House of Representatives Energy and Commerce Committee: Oversight and Investigations Subcommittee (noting that ERCOT is "subject to oversight by the Public Utility Commission of Texas and the Texas Legislature," and "implement[s] the policies adopted by the Public Utility Commission of Texas and the Texas Legislature.").
[12] *Id.* at § 22.5.
[13] *Id* at § 25.3.
[14] *Id.* at § 25.505(g)(6)(A).

of fuel. The Commission appropriately exercised its authority to preserve both market functions and grid reliability during the winter storm event.[15]

2. The Commission Orders were not rulemakings.

The commenters next argue that even if the Commission had the legal authority to direct ERCOT to ensure effective pricing, the Commission failed to substantively comply with the Texas Administrative Procedure Act's (the "APA") rulemaking procedures. The commenters concede that by the express terms the Orders are not agency rules—indeed, the Orders cited the Commission's emergency rule *suspension* authority. But they nevertheless contend that the Orders effectively constituted new substantive agency rules, the promulgation of which would have required publication in the *Texas Register* and a period of public comment.

The Commission's February 15 and 16 Orders did not constitute a "rulemaking" as described under the APA. Rather, the Orders were what they said they were: emergency *actions* under the Commission's statutory authority to direct one entity, ERCOT, to take action to improve the reliability of the grid, which in turn required a suspension of a related agency pricing rule. These actions were properly taken to fulfill the Legislature's mandate that the Commission maintain the reliability of the electrical network in an emergency. Once the emergency subsided, and the actions were no longer necessary, the actions ended, ERCOT's operations returned to normal, and the suspended rule was reinstated.[16]

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[15] The Parties also contend that the Commission's actions were improper because they did not conform to the procedural requirements stated in the Governor's Emergency Order. RWE Motion for Rehearing at 13. However, because the Commission had full authority by statute to issue the Orders, and the Governor's Emergency Order did not confer any additional powers on the Commission, the Governor's Emergency Order is irrelevant to this analysis.

[16] *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Reinstating Low System-Wide Offer Cap (Mar. 3, 2021) (Item 57) ("[t]he natural gas price index has now stabilized and the LCAP is not expected to exceed the HCAP going forward. Therefore, good cause no longer exists to suspend the use of the LCAP and reinstatement of the LCAP mechanism is necessary to protect consumers, as originally contemplated by the scarcity pricing mechanism. Accordingly, the Commission terminates the suspension of the use of the LCAP and orders ERCOT to resume application of the LCAP when administering the scarcity pricing mechanism as provided by Commission rule.").

Under the APA, a "rule:"

(A) means a state agency statement of *general applicability* that:
  i. implements, interprets, or prescribes law or policy; or
  ii. describes the procedure or practice requirements of a state agency;
(B) *includes the amendment or repeal of a prior rule*; and
(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.[17]

The Commission's Orders were not generally applicable rules and did not include the amendment or repeal of a prior rule. The Orders were a one-time directive to the Commission's delegee ERCOT and *suspended* a single rule for a temporary period before that rule was reinstated when the emergency subsided.

Agency rules are statements of "general applicability" in that they "affect the public at large such that they cannot be given effect without public comment."[18] Even if a rule only applies to a single person or entity on its face, if it could be extended to a class that is similarly situated it is a rule.[19] However, here the Orders were directed solely at ERCOT to ensure that prices reflected the emergency and scarcity conditions that triggered the EE3 declaration. The Orders could not be applied to a broader class because ERCOT is the sole entity with responsibility to manage the ERCOT grid and market. That is, the Orders were narrowly targeted at a specific entity that is under the authority of the Commission.

Similarly, the Orders did not amend or repeal Commission rules. The Orders directed ERCOT to take action as allowed under the Commission's rules (to impose scarcity pricing),[20] and

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[17] Tex. Gov't Code Ann. § 2001.003(6)(A) (emphasis added).
[18] *See Teladoc, Inc v. Texas Medical Board*, 453 S. W.3d 606 (Tex. App. Austin 204, pet. denied").
[19] *See Railroad Com'n of Texas v. WBD Oil & Gas Co.* 104 S.W.3d 69, 72 (Tex 2003) (finding that field rules are not rules because the apply to specific oil and gas fields)..
[20] *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules at 2 (Feb. 15, 2021) (Item 31) ("Energy prices should reflect scarcity of the supply").

temporarily suspend the application of another rule (suspension of the LCAP).[21] The Orders did not make a change to the Commission's existing rules and were an appropriate use of the Commission's authority needed during an emergency to protect consumers and ensure that the market could function. When the exigent circumstances ended and the EEA3 was lifted, the directive to ERCOT regarding scarcity pricing was also lifted and the LCAP mechanism was reinstated.[22]

In addition to its statutory authority to oversee ERCOT and its emergency rule suspension power, the Commission's market pricing mechanism rules specifically provide for the Commission to take "actions necessary to protect the public interest, including actions that are otherwise inconsistent with the other provisions in this section."[23] That is, the very rule that assigns the high system-wide offer cap ("HCAP") as the VOLL and includes the LCAP mechanism provides for its suspension when necessary. In this extraordinary winter storm, the "protection of the public interest" required that the Commission exercise its existing regulatory authority to maintain the reliability of the electric network and protect consumers from exceedingly high natural gas prices by suspending the LCAP mechanism for the duration of the emergency.[24] The

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[21] *Id* ("On this basis, and because of the aforementioned concerns with the application of the LCAP, the Commission orders that ERCOT shall suspend any use of the LCAP until after the Commission' s regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP as the system-wide offer cap until that time.").

[22] *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Reinstating Low System-Wide Offer Cap (Mar. 3, 2021) (Item 57).

[23] 16 Tex. Admin. Code § 25.505(h).

[24] *Id.* at § 22.5; *and see Statement by Bill Magness, President and Chief Executive Officer, ERCOT* to March 24, 2021 Hearing of the U.S. House of Representatives Energy and Commerce Committee: Oversight and Investigations Subcommittee ("This crisis required ERCOT, using procedures established for such emergencies, to call on transmission providers to use controlled load shedding to balance the system and prevent a devastating blackout of the entire electric grid. Avoiding a complete blackout is critical. Were it to occur, the Texas grid could be down for several days or weeks, while the damage to the electrical grid was repaired and the power restored in a phased and highly controlled process. The costs of restoration of the system, the economic loss to Texas, and the personal costs to the wellbeing of Texas citizens would be unfathomable. As terrible as the consequences of the controlled outages in February were, if we had not stopped a blackout, power could have been out for 90% of Texans for weeks. The steps we took were difficult, but they had to be taken. And when power was able to be fully restored, the Texas electric delivery system returned immediately to pre-emergency conditions.").

Orders do not fit within the APA's definition of a rulemaking.[25] Instead, the Orders were proper emergency actions, which were taken by the Commission to protect the public interest during a crisis and expired at the end of the crisis. Indeed, the Commission's actions were taken *pursuant to the existing rules* that specifically provide for the Commission to take emergency action upon good cause and in the public interest.

3. The Orders were not part of a contested case, and an adjudicatory hearing was not required.

The commenters alternatively allege that the Commission was required to, but did not, follow its contested case process in issuing the Orders.[26] If the Orders were not issued according to the Commission's rulemaking process, the argument goes, then they must have been issued in a contested case. And if that is so, the commenters argue, the Orders violate the APA for failure to comply with that statute's contested case procedural protections.

As set out above, the Orders themselves state what they are: a directive to ERCOT to ensure that prices reflected the emergency and scarcity conditions that triggered ERCOT's EE3

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[25] It is doubtful that the Commission's challenged actions constitute "proceedings" at all under PURA. *See* PURA § 11.003(15) ("'Proceeding' means a hearing, investigation, inquiry, or other procedure for finding facts or making a decision under this title. The term includes a denial of relief or dismissal of a complaint."). Nevertheless, even if the Commission's actions could be considered not only proceedings but rulemaking proceedings under the APA, the Commission substantially complied with the statutory requirements for emergency rules. It appears that they were not published in the Texas Register, but the only party that was subject to the Orders – ERCOT – received and implemented them. There is no argument by any market participant that it did not have notice of the Orders. Further, it should be undisputed that the Commission acted in response to imminent peril to public health and safety. The Orders do not parrot the language of Section 2001.034(a). but they discuss the fact that ERCOT had declared the highest state of emergency due to exceptionally high electric demand exceeding supply. *Issues Related to the State of Disaster for the February 2021 Winter Weather Event,* Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021) (Item 31). They also state that ERCOT had directed the curtailment of more than 10k MW of load and that the load shed was expected to last for the duration of the weather event. They state that if load is being shed, then prices should reflect that. Therefore, even if these Orders could be characterized as emergency rulemakings, they do not fail for any mere technicality under the APA. *See* Tex. Gov't Code Ann. § 2001.035(d) ("A mere technical defect that does not result in prejudice to a person's rights or privileges is not grounds for invalidation of a rule.").

[26] *See, e g ,* RWE's Motion for Rehearing at 9.

declaration and an accompanying suspension of the LCAP mechanism rule[27] to protect consumers from exceedingly high natural gas prices. They did not arise out of a "contested case."

Under the APA, a "contested case" is "a proceeding, including a ratemaking or licensing proceeding, in which the *legal rights, duties, or privileges of a party* are to be *determined* by a state agency after an opportunity for *adjudicative hearing*."[28] The term is defined the same way by Commission rules.[29]

The Orders did not determine the legal rights, duties, or privileges of any party except the obligations of ERCOT as the Commission's delegee. The Orders were not directed to any particular market participant. They did not grant or deny a party the right to enter the market, to provide service, to charge a particular rate, or to collect a particular fee—all legal rights, duties, or privileges regularly adjudicated through a contested case hearing. The subject of the Orders, ERCOT, is a delegee of the Commission, charged with implementing the Commission-designed wholesale energy market. To the extent that the Orders impacted market participants, it was only indirectly through individual market activity; the Orders themselves did not directly determine the rights, duties or privileges of a specific market participant.

Even if the Orders did fix the legal rights, duties, or privileges of a party, an agency must comply with the APA's contested case hearing procedural requirements only where "the legal rights, duties, or privileges of a party '*are to be determined* by a state agency *after an opportunity for adjudicative hearing.*'"[30] In *Best & Co.*, Third Court of Appeals specifically "reject[ed] a proposed construction of the definition [of contested case] that would require an agency to follow

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[27] 16 Tex. Admin. Code § 25.505(g)(6)(A).
[28] Tex. Gov't. Code § 2001.003(1) (emphases added).
[29] 16 Tex. Admin. Code § 22.2(16).
[30] *Best & Co. v. Texas State Bd Of Plumbing Examiners*, 927 S.W.2d 306, 308 (Tex. App.—Austin 1996, writ denied) (emphases in original) (quoting Tex. Gov't. Code § 2001.003(1)).

contested-case procedures any time rights, duties, or privileges of a party are determined, without regard to whether an adjudicative hearing is required or provided."[31] The court held that not "every Board proceeding is a contested case" and not "every Board decision must be made following contested-case procedures."[32] Here, neither the statute allowing the Commission to direct the operations of ERCOT, nor the Commission rule providing for the suspension of agency rules during an emergency, requires an adjudicative hearing before the Commission can act. Absent such a requirement, the APA's contested case hearing procedures do not apply.[33]

4. The Commission did not violate the due process rights of any market participants.

One of the commenters claims that by denying it,

> 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.[34]

Given the structure of the wholesale energy market, participants do not have a vested right in future prices or pricing formulas. Absent such a right the commenter cannot bring a due process claim. Indeed, parties now have such a right given that markets have closed.

Some argue that the ERCOT protocols in place prior to the orders "were the rules of the road, upon which market participants relied, and [from which] the Commission diverged."[35] Yet those same protocols and the Commission rules, provide for ERCOT and the Commission to manage real-time operations to ensure the electrical network's reliability on a going-forward basis.

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[31] *Id.* at 309.
[32] *Id* at 308.
[33] If Texas courts were later to review the validity of the Commission's Orders as having arisen out of a contested case, that review would be undertaken with particular deference under the statutory "substantial evidence" standard. The Commission's Orders would be upheld unless they were (1) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (2) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. That is, courts will uphold Commission decisions if "there is some reasonable basis in the record for the action taken by the agency." *Pub. Util. Comm'n of Tex and Southwestern Elec. Power Co. v. Tex. Ind. Energy Consumers, et al.*, No. 18-1061 (Tex. 2021).
[34] Exelon's Motion for Rehearing at 21.
[35] *Id.* at 4.

For example, ERCOT Protocol § 6.5.7.3 allows ERCOT to override one or more of a Controllable Load Resource's parameters in the Security Constrained Economic Dispatch system if ERCOT determines that the Controllable Load Resource's participation is having an adverse impact on the reliability of the ERCOT system. ERCOT Protocol § 6.5.7.3 also provides for ERCOT to calculate non-binding projections of Real-Time Reliability Price Adders, Real-Time-On-Line Reserve Price Adders, and Real-Time Off-Line Reserve Price Adders. Market participants may use these projected price adders to make decisions regarding their activities. But the projected price adders are not fixed and may not be reflected in final prices. And, as noted *supra*, the Commission itself has the power to intervene in the ERCOT market and take "actions necessary to protect the public interest, including actions that are otherwise inconsistent with the other provisions" in the Commission's market structure rules.[36]

Given the "managed market" structure of the wholesale energy market, no participant, including the commenters seeking repricing, can have a vested interest in expected <u>future</u> pricing formulas. A vested interest for a due process violation "must be something more than a mere expectation based upon an anticipated continuance of the existing law."[37] Such an interest is essential for a due process claim. Without it, the due process claim fails.

Finally, market participants are not without process to dispute ERCOT pricing actions. Commission rules provide for the "review of ERCOT conduct."[38] Complaints may be filed

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[36] 16 Tex. Admin. Code § 25.505(h). Section 25.505 relates to *Reporting Requirements and the Scarcity Pricing Mechanism in the Electric Reliability Council of Texas Power Region.*

[37] *Nat'l Carloading Corp v Phoenix-El Paso Exp*, 176 S.W.2d 564, 570 (Tex. 1943); *see also Lopez v Pub Util. Comm'n of Texas*, 816 S.W.2d 776, 783 (Tex. App.—Austin 1991, writ denied) (holding that "no one has a vested right in any particular utility rate, but only a statutory right shared with others to have rates that are 'just, fair and reasonable,' as fixed by the appropriate regulatory body subject to judicial review for errors of law").

[38] *See* 16 Tex. Admin. Code § 22.251 (providing that any "affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer"); *see also Collins v. Texas Natural Res. Conservation*

regarding "ERCOT's promulgation and enforcement of procedures relating to reliability, transmission access, customer registration, and accounting for the production and delivery of electricity among generators and other market participants." But a request for rehearing of the Orders is not the proper vehicle to assert such claims.

C. Multiple legal barriers preclude the commenters' requested repricing relief.

1. The Commission lacks the authority to retroactively alter prices in the ERCOT market.

Even if the commenters' procedural complaints were correct, which they are not, the extraordinary relief the commenters seek—retroactive repricing of the electricity market—would remain legally impermissible for a host of reasons. No statute grants the Commission the power to change wholesale power prices retroactively. As a "creature of the legislature," the Commission "has no inherent authority" and instead possesses only those powers expressly conferred upon it by statute.[39] PURA grants the Commission many powers, but nowhere among them is the power to retroactively alter prices in the ERCOT market. The commenters do not identify any statutory authority or precedent for retroactive repricing.

That lack of retroactive ratemaking power in the ERCOT market is neither an anomaly nor a legislative oversight. PURA has long prohibited retroactive ratemaking. As the Third Court of Appeals noted over three decades ago, PURA prohibits the Commission from retroactively changing even those rates that are "unreasonable or in any way in violation of law."[40] Its powers are limited to the prospective—setting the rates that are "*thereafter* to be observed."[41] That core

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Comm'n, 94 S.W.3d 876, 884–85 (Tex. App.—Austin 2002, no pet.) (concluding that a hearing request may be decided through a less formal proceeding before an agency, which would not violate due process rights).

[39] *See PUC v. GTE-Sw , Inc.*, 901 S.W.2d 401, 407 (Tex. 1995).

[40] *Tex Ass'n of Long Distance Tel. Companies (TEXALTEL) v PUC*, 798 S.W.2d 875, 882 (Tex. App.—Austin 1990, writ denied) (quoting PURA § 43(f)).

[41] *Id* (quoting PURA § 43(f)); *see also State v. Pub Util Comm'n of Texas*, 883 S.W.2d 190, 199 (Tex. 1994) ("Fundamental in the utility ratemaking process is the principle that utility rates are set for the future, not the past.").

prohibition on retroactive repricing recognized by the Third Court survived the codification of the Utilities Code: Even if a rate is "unreasonable or in violation of the law," the Commission has no authority to reach back into the past and remedy that rate.[42] Instead, it may only establish a new prospective rate to "be observed *thereafter*."[43] Here, there is no ability to go backwards after considerable time has passed.

2. Retroactive repricing would violate the Texas Constitution's prohibition against retroactive laws.

Even if the Commission had the statutory authority to alter prices retroactively in the ERCOT market, exercising those powers here would violate the Texas Constitution, which prohibits "retroactive laws."[44] That provision "protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment."[45] That is precisely what is at issue here. The Commission set the rules, the market participants were told the rules, and the market participants chose to operate under those rules in the market in real-time. The Commission—and even the Legislature—cannot go back and change those rules after the fact. That is what the constitutional prohibition against retroactive laws is all about.

This analysis holds up on the granular level as well. The Texas Supreme Court has identified three factors that guide the analysis of whether a retroactive law violates the Texas Constitution.[46] Each precludes the commenters' requested retroactive repricing:

- **"[T]he nature and strength of the public interest served by the [law]"**: The public interest would be disserved by retroactive repricing, as it would cause market

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[42] Tex. Util. Code § 36.111.
[43] *Id.* (emphasis added); *see also* Tex. Util. Code § 36.151 (similar).
[44] Tex. Const., art. I, § 16.
[45] *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 145 (Tex. 2010).
[46] *Id.*

participants to distrust the stability of compensation formulas and mechanisms implemented by ERCOT.

- **"[T]he nature of the prior right impaired by the [law]"**: Calpine and others acted in reliance on the rules as they existed at the time.[47] Countless business decisions were made and substantial sums were expended on the reasonable expectation that the Commission's Orders and ERCOT pricing would be honored.[48]

- **"[T]he extent of the impairment"**: The energy-only market would suffer enormous financial losses as a result of the requested retroactive repricing.[49] An untold number of business decisions have been made because of the transactions completed during the EE3 pricing period: Credit has been obtained, bonds have been issued, hedges have been made, bankruptcies have been filed. Other, non-financial actions have been taken as well, including departures from the market altogether, as both market participants and myriad other actors in the vast power market ecosystem have accounted for the winter storm and its aftermath. Should the Commission reprice the market now, all those decisions, most of which cannot be undone, will have been made on a premise that was in place at the time of the decisions, but will no longer exist. Yet even setting these significant secondary impacts aside, the complex nature of the market and related ancillary and bilateral markets makes truly complete repricing and resettlement of all ERCOT transactions impossible.[50]

This factor-by-factor analysis further confirms that any backward-looking repricing would run afoul of the Texas Constitution's prohibition on "retroactive laws."[51]

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[47] For example, as gas supplies became unavailable, generators decided to buy gas at hundreds of dollars per mmbtu, and other market participants exercised options for thousands of dollars per MWh to meet obligations and respond to ERCOT emergency directives. Market participants similarly sold power and settled on the Intercontinental Exchange in reliance on the $9,000 per MWh market price set by ERCOT in response to the Orders. In sum, as discussed in Calpine's previous comments, billions of dollars were spent in reliance on the market rules in place based on the Orders.

[48] Before *Robinson*, the retroactivity analysis focused on whether a right was a "vested right." 335 S.W.3d at 143. *Robinson* recognized that "the term 'vested right' is conclusory" and that disputes over it were "often driven not so much by what the words mean as by the consequence of applying the label." *Id.* That said, to the extent it still matters in the retroactivity analysis, the Orders granted Calpine vested rights by setting firm expectations that Calpine (and many others) relied on when it expended substantial sums and took consequential actions.

[49] *Id.*

[50] The impossibility of untangling that Gordian knot suggests that the repricing issue is potentially moot. Further, the practicality and prudence of attempting to re-pick winners and losers among the untold number of affected market participants and third parties is questionable at best. Even if the Commission had the authority and ability to do that, the question would remain whether it *should*. The law recognizes that sometimes discretion is best left unexercised when it comes potentially unwinding such a vast number of interconnected transactions on which many have relied. *Cf. In re Grimland, Inc.*, 243 F.3d 228, 231 (5th Cir. 2001) ("An appeal is equitably moot when a plan of reorganization has been so substantially consummated that a court can order no effective relief even when there may still be a live dispute between parties to the bankruptcy proceeding. The doctrine rests on the need for finality, and the need for third parties to rely on that finality, in bankruptcy proceedings."). This is one of those times.

[51] Tex. Const., art. I, § 16. Retroactive repricing would also upset innumerable contractual obligations and thus violate constitutional prohibition against "any law impairing the obligation of contracts" as well. *Id.*

3. Market participants that freely and voluntarily benefited from the Commission's Orders are estopped from challenging them now.

Further, the commenters' voluntary market participation under the Orders estops them from challenging the Orders now. "Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken."[52] Estoppel prohibits a person from taking a position that is inconsistent with a position to which the person previously agreed or, or a position from which the person previously accepted a benefit.[53] In addition, the commenters are barred by laches from challenging the Orders. Laches applies where it would be inequitable to allow enforcement of a claim because the delay in raising the claim would cause injury to an opposing party.[54]

All the market participants—including the commenters—had notice of the Orders and were fully aware of the rules at the time. The commenters are voluntary market participants and to the extent they felt that the Orders were outside of the Commission's authority, they could have raised concerns shortly after the Orders were entered.[55] Instead, the commenters waited to see what would result from ERCOT's implementation of the Orders. Then, after the Orders had expired and other market participants had made financial decisions based on ERCOT's actions, the commenters decided to raise objections. The commenters waited until after the impacts of ERCOT's actions played out in the market, determined that the actions did not have favorable results for them, and now want the Commission to rerun the market for their benefit. Other market

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[52] *Lopez v. Muñoz, Hockena & Reed, L L P.*, 22 S.W.3d 857, 864 (Tex. 2000).
[53] *Id.*
[54] *See Regent International Hotels, Ltd. V. Las Colinas Hotels Corp.*; 704 S.W.2d 101, 106 (Tex. App. – Dallas 1985, no writ) (*citing Bordages v. Stanolind Oil & Gas Co* 129 S.W.2d 786, 790 (Tex. Civ. App. – Galveston 1938, writ dism'd.))
[55] Indeed, the week of the winter storm event, over 200 filings were made at the PUC on a variety of matters. See PUCT Filings Interchange reflecting filings made between February 16 and February 19, 2021 http://interchange.puc.texas.gov/search/dailyfilings/?DateFiledFrom=2021-02-15&DateFiledTo=2021-02-19&UtilityType=E (February 15 was a Commission holiday.)

participants made decisions in reliance on the Orders and on commenters' market conduct, and would thus be harmed if the Commission were now to go back and rescind ERCOT's directive to take those actions. Therefore, quasi-estoppel and laches bar them from seeking a different outcome after the fact.

Conclusion

The Commission's Orders were an appropriate exercise of its statutory and regulatory authority and were consistent with the Legislature's mandate to protect consumers and utilities by ensuring the reliability of the electrical network. To now retroactively alter prices in the ERCOT market would be a mistake. It would be beyond the Commission's power and constitute unconstitutional retroactive lawmaking. And having elected not to challenge the Orders promptly to put other parties on notice, the commenters cannot now seek retroactive repricing.

Respectfully submitted,

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