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DOCKET NO. \_\_\_\_\_

PETITION FOR EMERGENCY RELIEF OF SPARK ENERGY, INC. FOR WAIVER OF ERCOT NODAL PROTOCOLS § PUBLIC UTILITY COMMISSION OF TEXAS

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DOCKET NO. 51617

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

DOCKET NO. 51812

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

PETITION FOR EMERGENCY RELIEF OF SPARK ENERGY, INC. FOR WAIVER OF ERCOT PROTOCOL SECTION 9.6(2)

Spark Energy, Inc. ("Spark") files this Petition for Emergency Relief requesting waiver of Section 9.6(2) of the Electric Reliability Council of Texas ("ERCOT") Nodal Protocols. This provision requires the entity challenging an ERCOT invoice to pay the invoice in advance of the dispute resolution process. In normal times, this provision works relatively smoothly without disrupting the ordinary course of business commercial activities of Spark and the parties with whom it has contractual relationships, including ERCOT, the generators from whom it purchases electricity, and its customers. Here, however, Texas has faced a historic weather event, and ERCOT has issued invoices substantially higher (+75,000%) than those historically issued to Spark. Further, ERCOT'S CEO Bill Magness has publicly admitted in legislative testimony that ERCOT has its own liquidity concerns arising out of the electricity failures of Winter Storm Uri. In addition, ERCOT has been named in a number of wrongful death and other lawsuits, which would almost certainly bankrupt ERCOT if the Texas Supreme Court overrules the Dallas Court

of its finding of sovereign immunity in *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 552 S.W.3d 297 (Tex. App.—Dallas 2018).

These are exactly the precarious and exigent circumstances where the Public Utility Commission of Texas (“the Commission”) should use its broad power and authority delegated to the Commission to supervise ERCOT and, in the exercise of its supervisory powers, to order ERCOT to waive ERCOT Protocol Section 9.6(2). This limited waiver would allow Spark time to fully exercise its dispute resolution rights with ERCOT without the requisite pre-resolution payment of the invoices it disputes. The Commission has already exercised its discretion in exercising the extraordinary remedy of interrupting the contractual relationships that Spark has with its some customers by strongly urging Spark to avoid sending out certain invoices to its customers. In contrast, the Commission has allowed ERCOT unfettered discretion to impose dramatically escalating collateral calls which directly contradicts the legislative testimony of ERCOT CEO Bill Magness who asserted that these draconian collateral calls were to assure downstream parties such as ICE of the security of the ERCOT market.

Spark has already requested that the Commission restore the deviation to ERCOT Protocols originally issued on February 22, 2021. (2/25/21 Spark Energy Inc. Request for Emergency Action). Though granting this request would delay payment of the unprecedented invoices issued to Spark (and other Retail Electric Providers (“REPs”) similarly situated), it leaves Spark Energy exposed to onerous payment obligations in ERCOT’s arcane dispute resolution process.<sup>1</sup> Spark urges the Commission to immediately grant Spark waiver of Section 9.6(2) of the ERCOT Nodal Protocols to allow Spark to delay payment of ERCOT Settlement Invoices related to the February 2021 Winter Weather Event while it fully exercises its rights under the ERCOT

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<sup>1</sup> The Commission is already considering very similar relief for Freepoint Commodities, LLC.

Nodal Protocols. Additionally, Spark requests that the Commission require ERCOT to place in escrow any invoiced amounts which Spark has already paid (in the amount of \$23,424,454) while the disputes are resolved.

## **BACKGROUND**

Spark operates in the ERCOT market as a certified retail electric provider ("REP"). Spark operates as a Market Participant, Certified Competitive Retailer, load serving entity ("LSE"), Congestion Revenue Rights ("CRR") account holder, and a Renewable Energy Credits ("REC") account holder in the ERCOT market.

The Ancillary Services charged by ERCOT related to the February 2021 Winter Weather event — which were many multiples higher than the highest cap on such services — contradict ERCOT's own legal market notice. ERCOT's market notice M-C021521-01 Legal (issued February 15, 2021), provided: "ERCOT may soon reach the Peaker Net Margin revenue threshold established in PUC Rule 25.505(g)(6), which requires ERCOT to use the Low System-Wide Offer Cap ("LCAP") instead of the \$9,000 High System-Wide Offer Cap ("HCAP") currently in effect." The next day, ERCOT issued another order<sup>2</sup> stating that use of the LCAP as required by the rule could result in prices that exceed the HCAP, given current gas prices. Thus, the order directs ERCOT to "suspend any use of the LCAP until after the Commission's regularly-scheduled next open meeting," and to "continue to use the HCAP as the system-wide offer cap until that time."<sup>3</sup> ERCOT's website indicated a system-wide offer cap of \$9,000 per MWh.

Based on the invoices received so far, Spark Energy has been able to determine that the DAM Charges attributable to Ancillary Services reflect grossly disproportionate unit prices:

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<sup>2</sup> *Oversight of the Electric Reliability Council of Texas*, Docket No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021) ("Winter ERCOT Order").

<sup>3</sup> Winter ERCOT Order at 2.

\$21,819/MWh for February 15, 2021

\$24,284/MWh for February 16, 2021

\$25,674/MWh for February 17, 2021

\$24,902/MWh for February 18, 2021

\$24,108/MWh for February 19, 2021

In short, these prices violate ERCOT's own notices, orders, and publicly available information.

Spark is still trying to understand how ERCOT so badly missed its own stated mark. Others are doing the same. It is possible that, as Freepoint Commodities suggests in its filings with the Commission, it is related to a failed algorithm.

What is clear is that Spark needs time to understand the significant charges levied. But ERCOT's dispute resolution procedures, if enforced as written, would create irreparable harm to Spark Energy by interfering with its contractual obligations to and with its customers, commodity suppliers, vendors, and lenders.

Further, granting this relief will not cause any harm to ERCOT for any legitimate operational reason as the settlement obligations which its CEO has cited for justification of its draconian enforcement of collateral invoices and pricing for Ancillary Services have been proven to mathematically erroneous by others in the industry. For example, some users were charged exorbitant amounts for electricity where no electricity was used! All of this is contrary to the legislative mandate to the Commission (and in turn, to ERCOT) to ensure safe, affordable and reliable electricity supply. Furthermore, the so-called harm to the integrity of downstream markets asserted by ERCOT CEO Bill Magness to justify these charges is flatly contradicted by those contractual terms, with any concerns raised as to the integrity of the markets, the ability of market participants to meet their respective contractual obligations, and the reliability of electricity supply were not in any way comforted by these ERCOT actions. Instead, these issues were exacerbated

by the ERCOT's leadership's action in the events leading up to and during the Winter Uri event.

**ERCOT'S PROCEDURES ARE  
UNSUITED TO THIS HISTORIC EVENT**

ERCOT's dispute resolution procedures can be lengthy. But when coupled with a pre-resolution payment obligation in this circumstance, the procedures are draconian. ERCOT's procedures require initiation of disputes within ten (10) business days after ERCOT posts an invoice. (Nodal Protocols Section 9.14). ERCOT then has another seven (7) business days to request additional information regarding the dispute. Once a dispute is initiated, ERCOT will attempt to resolve a dispute within fifteen (15) days, but if the issue is complex (as is likely the case here) resolution can take more time. Then, if the parties are not able to resolve the dispute under Section 9.14, the party raising the dispute may proceed to the Alternative Dispute Resolution ("ADR") Procedures. (Nodal Protocols Section 20). In short, the process, at the very best, takes at least one (1) month, but in all likelihood can span a period of months to even years, depending on various delays in the ADR process.

Despite this, ERCOT's procedures require immediate payment of invoices even while disputing the charges. Section 9.6(2) of the ERCOT Nodal Protocols requires "[e]ach Invoice Recipient shall pay any net debit and be entitled to receive any net credit shown on the Settlement Invoice on the payment due date, whether or not there is any Settlement and billing dispute regarding the amount of the debit or credit."

These procedures work in normal circumstances. But they make no sense when applied to invoices that exceed historic charges by over thousands of percentages and cripple the REPs to which they are invoiced. The procedures make even less sense considering ERCOT's admitted

liquidity concerns.<sup>4</sup> For example, this procedure would require pre-resolution payment of over \$20 million in invoices that Spark Energy (if it even could pay those amounts) may never see again.

**THIS LIMITED WAIVER IS APPROPRIATE AND NECESSARY TO PREVENT  
IRREPARABLE HARM TO SPARK ENERGY**

The recent weather event has placed unprecedented stress on market participants in Texas. Spark Energy appreciates the Commission and ERCOT's efforts during this event. Indeed, ERCOT has worked with Spark following the event to delay the significant business impacts ERCOT's invoices introduce. Even so, this waiver is necessary to avoid Spark Energy having to make payments immediately to ERCOT despite the continuing uncertainty surrounding the invoices' propriety and ERCOT's admitted liquidity concerns. Were Spark required to pay these disputed invoices in advance (along with any other invoices ERCOT issues related to the February 2021 Winter Weather event), its Texas supply chain relationships would be disrupted, and Spark would have no recourse if ERCOT would be unable to meet its financial obligations to Spark in the event that the invoices were determined to be grossly inflated and erroneous, which Spark contends will be the case.

The requested waiver is also in keeping with the Commission's broad powers, which it continues to exercise during an emergency. Indeed, the Commission has issued many orders related to the February 2021 Winter Weather event. Additionally, the Public Utility Regulatory Act<sup>5</sup> gives the Commission complete authority over ERCOT<sup>6</sup>, the independent organization

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<sup>4</sup> During a meeting open to the public held on Wednesday, February 24, 2021, senior ERCOT executives were asked if they expected to have sufficient liquidity through Friday, February 26, 2021. In response, ERCOT admitted that it does not have a solid answer and would have to wait and see how much money comes in.

<sup>5</sup> Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016 ("PURA").

<sup>6</sup> PURA § 39.151(d)

certified by the Commission under PURA § 39.151.<sup>7</sup> Thus, granting this waiver is within the Commission's jurisdiction.<sup>8</sup>

Spark's requested waiver is limited in scope and addresses an immediate, concrete problem related to emergency circumstances. Spark is not requesting that the Commission make a substantive determination as to the propriety of the invoices. To be clear, Spark will address its disputes with ERCOT, including through ERCOT's dispute resolution procedures. Spark is simply requesting that the Commission waive Section 9.6(2)'s requirements to delay Spark's payment obligations until the dispute with ERCOT is resolved. Spark also requests, which respect to invoices it has already paid on the disputed invoices, ERCOT place those amounts in escrow until the dispute with ERCOT is resolved.

### CONCLUSION

Spark urges the Commission to immediately grant Spark a waiver of Section 9.6(2) of the ERCOT Nodal Protocols by issuing an order to: (1) allow Spark to delay payment of certain ERCOT Settlement Invoices while it fully exercises its rights under the ERCOT Nodal Protocols to dispute the invoiced payment amounts; (2) direct ERCOT place in escrow amounts Spark has already paid in connection with disputed invoices pending resolution of such disputes; (3) direct ERCOT to not draw any portion of the \$14,000,000 Letter of Credit; and (4) direct ERCOT not to require the posting of any additional collateral.

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<sup>7</sup> *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 ERCOT Protocols (Feb. 21, 2021) ("February 21 PUC Order").

<sup>8</sup> Spark Energy incorporates the additional discussions of the Commission's broad powers in *Petition for Emergency Relief of Freepoint Commodities LLC For Waiver of ERCOT Protocol Section 9.6(2)*.



Dated: February 26, 2021

Respectfully submitted,

**JONES WALKER LLP**

*/s/ Joshua A. Norris*

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