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

PUBLIC UTILITY COMMISSION
PUBLIC UTILITY COMMISSION
FILING CLERK
OF TEXAS

**TEXPO ENERGY’S COMMENTS REGARDING
THE FEBRUARY 2021 WINTER WEATHER EVENTS**

Texpo Power LP d/b/a Texpo Energy (“Texpo”) submits these comments relating to the February 2021 Winter Weather Event and responding to several comments previously filed in this docket. Texpo respectfully requests the Public Utility of Commission of Texas (“Commission”) consider its proposals.

I. RESPONSE TO COMMENTS

For sixteen years, Texpo has successfully operated in the Electric Reliability Council of Texas (“ERCOT”) market as a Retail Electric Provider (“REP”) under Certificate No. 10126. Having weathered many storms, including several heat waves and the rolling outages of 2011, Texpo has a prudent risk management policy and effectively hedged its spot market and ancillary services exposure within the bilateral markets, including, for example, hedging its Responsive Reserve Services (“RRS”) exposure. Other REPs had the same opportunity. Yet, it is clear from multiple filings in this docket that many REPs chose not to—presumably due to inexperience or as part of a calculated gamble to try to save money. Their failure to adequately hedge, and thus incur invoices they cannot now pay, should not be uplifted to Texpo and others who acted more responsibly. It would be unfair to allow one competitor, through its own intentional or negligent acts, to harm another competitor who behaved more responsibly.

The Commission’s February 15th and 16th orders to raise energy prices to the high offer cap of \$9,000 per MWh during the February 2021 Winter Weather Event should not be overturned retroactively. Market participants, including Texpo, have relied on these key market price points and made business decisions accordingly. Going forward, Texpo supports the Commission not artificially setting energy prices at the high offer cap (instead relying on supply and demand price signals even during emergency events), but the Commission should not now go back and undo its prior orders in the balancing energy market on which many relied.

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A number of REPs seek emergency orders to relieve them of their obligations to make timely payments to ERCOT. Texpo believes had REPs fully hedged their wholesale positions, they would have been long on supply once the outages occurred, with the outages reducing their load tremendously. If REPs were short even during the mandatory outages, then those positions likely were the result of undue or unwise risks with regard to hedging their load. It appears that ERCOT is generally allowing those REPs to short-pay ERCOT and continue to participate in the market. The short payments are threatening the cash flows to other market participants to whom such payments are owed. As such, Texpo opposes the emergency relief requests of various other REPs to the extent they seek to delay or postpone their payment obligations.

Further, any REP who short pays ERCOT, with or without Commission approval, should be barred from enrolling any new customers in Texas for any and all periods during which (a) the REP is insolvent; (b) the REP owes past due invoices issued by ERCOT; or (c) the REP is opting or requesting to withhold money owed to ERCOT while they are disputing ERCOT invoices. Texpo has complied with its obligations and the ERCOT Protocols and has *not* short paid ERCOT. Consequently, Texpo has less working capital that could otherwise be used to further grow, engage in marketing, and hedge new customers. REPs who short pay ERCOT will generate unfair levels of capital, and they should not be allowed to gain an unfair advantage over Texpo by short-paying ERCOT. Otherwise, REPs will have a perverse incentive to obtain an advantage over their competitors by keeping their capital versus paying ERCOT on time.

As an example, Just Energy (which owns Amigo Energy and Tara) purports in its public SEC filings to have incurred a loss from the February 2021 Weather Event of between \$50,000,000 to \$315,000,000 Canadian dollars, while at the same time claiming total liquidity of only about \$92,000,000 Canadian dollars. While all parties should do their own research and come to their own conclusions regarding Just Energy, we believe Just Energy is or may soon be insolvent. Yet, at the same time, Tara and Amigo Energy occupy two of the top five lowest fixed price plans on the Power to Choose site for the CenterPoint Energy Houston Electric, LLC (“CenterPoint”) service area as of the afternoon of March 2, 2020. REPs like Just Energy should not be allowed to aggressively enroll customers if they short pay ERCOT or if they’ve requested permission to short pay ERCOT, as they are receiving an unfair advantage in the market and, moreover, if Just Energy’s securities filings are true, correct, and consistent with Texpo’s beliefs, their customers may soon need to be shifted to the Provider of Last Resort (“POLR”) in any event.

Texpo generally supports the position of the Independent Market Monitor (“IMM”) and many others that RRS (and all ancillary services) should never exceed the high market cap of \$9000/MWh, for the reasons set forth by the IMM on March 1, 2021. On March 3, 2021, the Commission adopted the IMM’s recommendation to have ERCOT “claw back” revenues received by resources that did not actually provide the ancillary services they were required to provide from February 14-19, 2021. The Commission expressed the need for additional time to consider the IMM’s recommendation regarding capping ancillary services at \$9,000/MWh and is expected to take this issue up on March 4’s open meeting. Texpo supports this additional recommendation by the IMM. This issue is believed to be distinguishable from the balancing energy prices themselves; heading into the weather event this past February, Texpo believes every reasonable market participant already believed (or had reason to believe) that RRS prices in the day ahead markets are to be capped at \$9,000/MWh, consistent with the caps in the balancing energy market.

II. UPLIFTS CAUSED BY DEFAULTING MARKET PARTICIPANTS

Uplifts from Defaulting REPs; Constitutionality and Administrative Issues

Texpo urges the Commission to update and clarify the procedures and methodologies used to try and uplift short payments from defaulting REPs to the non-defaulting REPs.

First, ERCOT’s “uplift” invoices sent to Texpo this week are purportedly based on Texpo’s “pro rata” share of the market pursuant to which Texpo is being asked to pay and cover “its share” of other market participants’ payment failures. Yet, ERCOT’s uplift charge invoices are three times Texpo’s *pro rata* share of the market and are incorrect, and this appears to be a systemic error affecting others as well. Moreover, ERCOT is refusing to substantiate and provide detail for its short-pay uplift invoices, which, as noted above, are three times Texpo’s *pro rata* share of the market. Texpo urges the Commission to order ERCOT to accurately invoice market participants and provide reasonable calculations for such uplifts.

Second, Texpo disputes ERCOT’s ability to pass through uplifts from defaults arising from parties such as Brazos Electric Power Cooperative. Brazos is not a permitted party for which such uplifts can be passed through to load (versus resources). Such uplifts comprise a transfer of wealth from private companies to governmental bodies and quasi-governmental bodies and constitute an unconstitutional taking and a deprivation of due process.

Any short payments from electric cooperatives, municipalities and cities must instead be recovered from state and federal emergency relief funds. These are not failures of the market participants, but are, rather, failures caused by the State of Texas's inadequate systems to vet and require adequate collateral (and waivers) from cooperatives, municipalities and cities transacting with ERCOT in an extraordinary set of circumstances related to a natural disaster. Moreover, unlike RRS and wholesale power, which REPs can hedge via various instruments, REPs and QSEs had no way to procure hedges to cover exposure to ERCOT uplifts resulting from other market participants' short payments; this is not a typical market risk that can just be "passed through" to load, as load has no means to hedge or recover it. More importantly, ERCOT cannot constitutionally or lawfully uplift monies from private companies to cover the bills of governmental and quasi-governmental entities.

Per Article I, Section 17 of the Texas Constitution, and as the court said in *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004), **at the heart of the takings clause is the idea that the government should not force some people to bear public burdens on their own when, in all fairness and justice, the burdens should be borne by the public as a whole, and a taking under this provision can be physical or regulatory.** Accordingly, whether seeking to apply this principle pursuant to case law or just in the spirit of good public policy, the losses incurred by entities such as Brazos must be borne by the public as a whole. Texpo urges the Commission to bar uplifts to REPs and QSEs arising from payment defaults by electricity cooperatives, cities and municipalities.

III. ADDITIONAL PROPOSED ACTIONS BY THE COMMISSION

Texpo respectfully proposes the following three-pronged approach to provide incentive to generators to behave in the market's best interest despite severe weather:

1) *A new rule related to "Unweatherized Generators"*

The Commission should prohibit unweatherized generators from receiving any price (rewards) for energy or ancillary service in excess of \$500/MWh for as long as the unweatherized condition continues for 5% or more of its or its affiliates' total fleet. The term "Unweatherized Generator" could be defined as any generator with a plant within its fleet that tripped or misperformed due to failures to weatherize. It should include a generators' affiliates and the power the affiliates schedule into the system while part of their fleet is down, whether it is wholesale

power they're producing, or wholesale power to which they have the rights pursuant to bilateral (financial) contracts. A rule like this would provide incentive to the generators to properly weatherize and maintain weatherization. Otherwise, the system set up by the Commission and ERCOT merely rewards large generators who fail to weatherize parts of their fleets.

2) *Biannual Weatherization Inspections*

The Commission should implement a requirement that generators engage a third party or ERCOT to inspect, no less than twice per year, all generator equipment and their facilities for weatherization, with the inspection fees being charged to the generators. This requirement should be enforced by use of fines, penalties, and the right to inspect the premises and facilities of any generator claiming a plant tripped due to bad weather.

3) *Private right of action in state or federal court for market manipulation or violation of antitrust laws*

Market participants should not be required to exhaust administrative remedies at ERCOT or the Commission prior to pursuing claims against other market participants. Both ERCOT and the Commission have frameworks in place to address disputed charges and complaints against other market participants; however, these regulatory schemes are not sufficient for the magnitude of issues market participants are attempting to address after the winter weather event, nor do they come with adequate remedies to aggrieved parties.

Deregulated markets will always be exposed to risks of market manipulation and antitrust activity. As such, market participants need a statutorily enacted unbiased forum to hear their disputes and claims, free of the biases that may come when power is too consolidated within any one state administrative agency, and with the potential to recover their attorneys' fees and all remedies available under state and federal antitrust and antifraud laws. Such private rights of action will also lessen pressure on the Commission to oversee such disputes. Generators long by even 1,000 MW made \$864,000,000 over a four-day period in February on the spot market power alone (not including the ancillary service gains) – it is not credible to argue that any generator may need to defend an occasional lawsuit by another market participant. The generators, with their huge wealth reserves and non-transparently run trade desks, are difficult to prosecute as it is. Parties, to be able to finance and sustain such suits and investigate market manipulation, need the prospect of, if successful, the recovery of attorney fees and regular antitrust law damages models. Such suits will also give Texas the transparent and “unbiased” reputation that any deregulated markets

need, in order to attract new investment. There are already court-enacted rules to deal with frivolous law suits, so that should not be a concern. Texas's deregulated energy markets direly need private rights of action, which is basically the privatization of market manipulation investigations. The market participants are in the best position to know if they are willing to spend the \$2,000,000 to \$5,000,000 in legal fees that is required to bring a lawsuit against a large generator.

IV. NATURAL GAS WITHIN TEXAS – MUST BECOME COMPETITIVE

Texas needs to fully deregulate the natural gas business

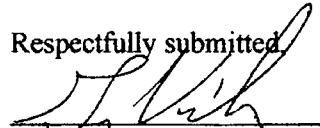
Inadequate and illiquid opaque natural gas markets worsened the situation during Winter Storm Uri. If it made sense to deregulate electricity in Texas, then it likewise makes as much or more sense to deregulate gas, upon which a large portion of electricity infrastructure is based. The two industries are intricately related. The issues in the gas markets during the outage critically emphasize the need for an overall of the Texas natural gas systems and markets. Gas is already “competitive” in CenterPoint’s gas territory under T-90 and T-92 with a great deal of success. There is no reason that *solely* industrial customers and school districts within CenterPoint should enjoy the benefits of competitive markets. Accordingly, Texpo urges the Commission to work with the Railroad Commission and the Texas Legislature to finally deregulate natural gas across all of Texas and for all Texas consumers, which will increase liquidity and natural gas systems across Texas and give consumers a choice in their retail gas provider.

[Texpo’s Conclusion and Signature Page is on the Next Page.]

V. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Texpo urges the Commission to consider its comments and proposed actions.

Respectfully submitted



Greg Veiseh, SVP Supply
Texpo Energy

March 4, 2021