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PROJECT NO. 51830

REVIEW OF CERTAIN RETAIL ELECTRIC CUSTOMER PROTECTION RULES	**§ § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ALLIANCE FOR RETAIL MARKETS' COMMENTS IN RESPONSE TO PROPOSAL FOR PUBLICATION

I. INTRODUCTION

At the July 29, 2021 Open Meeting, the Public Utility Commission of Texas ("Commission") approved the Proposal for Publication ("PFP") to implement changes from House Bill ("H.B.") 16 and certain sections of Senate Bill ("SB") 3 of the 87th Legislature. The PFP was published in the *Texas Register* on August 13, 2021.

The PFP proposes to amend 16 TEXAS ADMINISTRATIVE CODE ("TAC") §§ 25.43, 25.471, 25.475, 25.479, and 25.498, as well as add a new rule: 16 TAC § 25.499. In addition to these rule changes, two questions for comment were included related to the Provider of Last Resort ("POLR") rates established by 16 TAC § 25.43 and the proposed Acknowledgement of Risk ("AOR") requirements of 16 TAC § 25.475. The PFP included a deadline of August 27, 2021 for responsive comments from stakeholders. Therefore, these comments are timely filed.

The Alliance for Retail Markets ("ARM")[1] is an association of competitive retail electric providers ("REPs"), and each member is certificated to provide retail electric service to customers in areas open to customer choice in Texas. On July 6, 2021, ARM filed comments in response to Commission Staff's Discussion Draft and ARM appreciates Commission Staff's consideration of these and other comments in crafting the PFP. ARM offers these additional comments to assist the Commission in further development efforts for this crucial rulemaking and is available to assist or provide additional information as may be helpful.

[1] The members of the Alliance for Retail Markets ("ARM") participating in this project are Calpine Retail; Constellation NewEnergy, Inc.; ENGIE Resources LLC; Gexa Energy, LP; NRG Retail Companies (Reliant, Green Mountain Energy Company, U.S. Retailers LLC (Cirro Energy and Discount Power), Stream SPE, Ltd., XOOM Energy Texas, LLC, and the Direct Energy family of retail electric providers); and the Vistra Corp. REPs (4Change Energy, Ambit Energy, Express Energy, TriEagle Energy, TXU Energy, and Veteran Energy).

II. COMMENTS

These comments first include a summary, followed by a more in-depth explanation of ARM's recommendations for applicable rule sections included in the PFP. Comments in response to the two questions included with the PFP are then included.

A. Summary

The following bullet points provide a summary of ARM's comments herein, and ARM would particularly emphasize the importance of the compliance deadline issue in the first item below:

- Applicability of New Customer Protection Rules – § 25.475(a) and new § 25.499:
  - Applicability with respect to wholesale indexed product ban for residential and small commercial customers, acknowledgment of wholesale pricing risk for larger customers, and increased contract notice expiration requirements for residential term contracts should track H.B. 16 to be effective only for contracts entered into on or after September 1, 2021.
  - Requirements that go beyond H.B. 16 should be effective 120 days after adoption of the rules to give REPs time to modify systems and implement.

- Wholesale Indexed Product Acknowledgment of Risk and Other Rules Applicable to Larger Customers – § 25.471 and new § 25.499
  - ARM supports the PFP's changes to the structure of the rules applicable to customers other than residential and small commercial customers; the creation of new § 25.499 improves § 25.471's enumeration of the rules that larger customers can waive than what was present in the Discussion Draft.

- Provider of Last Resort ("POLR") Rule – § 25.43
  - § 25.43(c)(8): Modify definition of Market-based product to allow for consistency with other in-market products.
  - § 25.43(f)(1):
    - Modification of the POLR rate will require modifications to the associated Standard Terms of Service provided via links in the rule.
    - Correct the typo in Section 1(iv) of the Standard Terms of Service for Large Non-Residential Service to state "energy charge" rather than "RTSPP."
  - § 25.43(l)(1)(E): Modify methodology to allocate those customers dropped to POLR among VREPs in a simpler manner by allocating equally up to the VREP's indicated maximum.
  - § 25.43(m)(2)(A) and (B):
    - (m)(2)(A)(i), (B)(i), and (C)(i): Modify definition of "non-bypassable charges" to include surcharges beyond nodal fees, ancillary service charges, and ancillary service imbalance charges.
    - (m)(2)(A)(iii) and (B)(iv):

- Because each TDU territory includes two to three load zones, modify the load zone reference to "load zone partially or wholly in a service area" to so that customer EFLs do not vary within the same TDU territory depending on the load zone that they are located in.
- The POLR rate for residential and small commercial customers would benefit from further refinement to ensure that Large Service Providers ("LSPs") that provide POLR service are able to sufficiently recover their costs to serve. Such changes should include a modification to the customer charge to $0.09 per kWh for residential customers and to $0.05 per kWh for small non-residential customers, combined with either of the following:[2]
    - modification to the maximum energy charge to be calculated as a rolling average of the RTSPP from the preceding 60 days with a 125% multiplier; or
    - a modification to the maximum energy charge that if the average RTSPP in the 30 days preceding the transition to a POLR rate is at least twice the historical average RTSPP, then the LSP energy charge must be the historical average RTSPP multiplied by the number of kWhs the customer used during that billing period and further multiplied by the ratio of the preceding 30 days' average RTSPP to the average RTSPP from the previous 12-month period ending September 1.

  - (m)(2)(A)(iv) and (B)(v): Clarify that "number of kWhs the customer used" is based on information provided by the TDU, rather than stating that it is "interval data."
  - (m)(2)(B): Separate POLR rate formulas for medium non-residential customers from small non-residential customers.
- § 25.43(p)(13) and (14): Now that advanced metering systems have made same-day switching possible and to ensure that the REP is prepared to serve that customer, modify switch date acceleration provisions to give the recipient REP the *option* to accelerate the switch date.
- § 25.43(t), (v), and (w):
  - (t)(1): Amend to acknowledge that ERCOT may use different messaging for customers transitioned to a VREP during a POLR drop because these customers are not served on the POLR rate.
  - (t)(2)(G), (t)(3)(A), (v), (w)(2)(A), and (w)(2)(B): Changes from "shall" to "must" do not always work; here, "shall" should be changed to "will" instead of "must."

- General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers Rule – § 25.475
  - § 25.475(b):

[2] ARM continues to evaluate other alternatives and reserves the right to modify or retract either of these recommendations in reply comments, or lend support to meritorious proposals from other commenters.

        - (b)(5) and (8): Remove the addition of "ancillary service charges" from the definitions of Fixed Rate Product and Price because this is adequately addressed by the current rules. Add changes for "regulatory actions" to the definition of Fixed Rate Product for clarity and consistency.
            - Alternatively on (b)(5) and (8): clarify the references to ancillary service charges to help distinguish the ancillary service costs that a REP can and cannot reasonably control.
        - (b)(1) and (2): Remove Acknowledgment of Risk ("AOR") reference from the definitions of Contract and Contract Documents because this should be a component of the Electricity Facts Label ("EFL") rather than a separate document.
    - § 25.475(c):
        - (c)(1)(A), (C), (D) and (c)(2)(A): Remove references to AOR as they are unneeded if AOR is included in the EFL.
        - (c)(3)(G): Modify phrasing to permit AOR to be incorporated into EFL.
    - § 25.475(e)(1) and (2):
        - (e)(1): Modify phrasing of communications requirement to track the language of H.B. 16 for consistency with (e)(2)(B).
        - (e) generally: H.B. 16 requires notice of contract expiration for residential customers only; do not expand notice requirements beyond H.B. 16 to apply to small commercial customers.
            - (e)(2)(A): If notice requirements are expanded to small commercial customers nonetheless, then add subsection (iii) to maintain the REP's ability to send the final notice of contract expiration 14 days prior to the expiration date.
        - (e)(2)(A): For contracts with terms 12 months or longer, REPs should be permitted to send the first contract expiration notice up to three months before expiration.
        - (e)(2)(C): Either delete as duplicative of § 25.475(c)(3)(E) or make conforming clarifications that "sufficient expiration notice" means the final contract expiration notice rather than sending three contract expiration notices.
    - § 25.475(e)(3):
        - (e)(3)(B)(i): Correct typo by adding "visible" back and removing "readily" instead.
        - (e)(3)(B)(ii)-(iii): Same correction to remove "readily" from these subsections.
    - § 25.475(e)(4): Remove reference to AOR.
    - § 25.475(g)(2)(B): Add AOR to EFL pricing disclosure requirement for indexed products.
    - § 25.475(j): Remove (j) because it is duplicative if AOR is added to EFL. Alternatively, modify reference to AOR to incorporate it into the EFL.

- Issuance and Format of Bills Rule – § 25.479
    - § 25.479:

        - (d)(1): Modify the months that public service notices must be sent to April and December rather than April and October so that the notices are provided during times where there are fewer additional required bill messages.
        - (d)(2): Align with website reference in Your Rights As a Customer ("YRAC") document by modifying to allow REP to satisfy public service notice requirement by directing customers to appropriate website.

- Maximum Rate for Prepaid Service Rule – § 25.498
    - § 25.498(c)(15): Modifications may be required to tests for establishing whether prepaid product is compliant with requirement that it be priced no greater than the POLR rate if Commission's changes in § 25.43(m)(2)(A) and (B) are implemented.

- Preamble Questions
    - Question 1:
        - No, an additional safety threshold in the POLR rate is not necessary because the 12-month lookback sufficiently dampens price volatility. Also, the POLR rate is not a long-term rate and no residential or small non-residential customer should be on it for more than 60 days
        - For the remainder of the 2021-2022 POLR term, the risk of customers being subject to the POLR rate during any further mass transitions should be low because customers will likely be transferred to VREPs, which offer market-based month-to-month products that are not the POLR rate.
    - Question 2:
        - The AOR requirements for indexed retail products are sufficient, particularly if the AOR is included in the EFLs because the EFLs allow customers to make informed decisions and compare across REP offerings.
        - Also, products indexed to NYMEX and other sources have significantly less volatility than wholesale-indexed products.
        - AORs for pass-throughs of ancillary service prices are not necessary because the current rules do not allow these to be passed through on fixed rate products.
        - It is important to distinguish between ancillary service prices and changes in ERCOT's procurement of ancillary services that introduce additional costs. The latter are regulatory changes that should be permissible for recovery as beyond REPs' control.
        - Product types should only be banned when it has been demonstrated that a ban is necessary because prohibitions stifle competition and frequently have unintended consequences.

B. 16 TAC § 25.43, Provider of Last Resort

1. 16 TAC § 25.43(c)(8), Definition of "Market-based product"

The PFP proposes to define a market-based product by matching exactly to a REP's non-POLR offers for the same customer classes. However, REP customer segmentations may not map

directly to the POLR customer classes (i.e., residential, small non-residential, medium non-residential, and large non-residential).

Further, a POLR event creates unique risks and demands on a REP's operations, and carries with it higher bad debt risk than other customer additions to a REP's book. Therefore, a REP should reasonably be able to factor those elements into its pricing for a market-based product alternative to the formulaic POLR rate. That may mean that there is not a precise match to an existing in-market product, but if the rate is *consistent* with the general market rates then that should be permissible.

Also, while ARM agrees that a month-to-month product cannot include a termination fee or penalty, ARM notes that this requirement is already well-established in 16 TAC § 25.475(b)(7) and therefore need not be repeated in 16 TAC § 25.43(c)(8).

Accordingly, ARM recommends the following modifications:

(8) **Market-based product** – A month-to-month product that is either offered to or ~~matches~~ is consistent with the rates of ~~a~~ other in-market products ~~offered to~~for non-POLR customers ~~of the REP~~ for the same TDU territory and similar customer class. ~~A month-to-month contract may not contain a termination fee or penalty.~~ For purposes of this section, a rate for residential customers that is derived by applying a positive or negative multiplier to the rate described in subsection (m)(2) of this section is not a market-based product.

2. 16 TAC § 25.43(f)(1), Customer Information

The PFP includes the Commission's POLR rule, 16 TAC § 25.43, for modification. Subsection (f)(1) of the rule contains links to the Standard Terms of Service documents for each class of POLR service. If the Commission modifies the POLR rate formula, each of these four Standard Terms of Service documents will require modification to reflect such changes.

Additionally, a sentence within the Standard Terms of Service for Large Non-Residential Service includes a typo: in the last sentence of Section 1(iv), "RTSPP" should instead refer to "energy charge":

(iv) LSP energy charge shall be the appropriate Real-Time Settlement Point Prices (RTSPPs), determined on the basis of 15-minute intervals, for the customer multiplied by 125%, multiplied by the level of kWh used. The ~~RTSPP~~energy charge shall have a floor of $7.25 per MWH.

3. 16 TAC § 25.43(l)(1)(E), VREP Customer Allocations

The incentive for a REP to take on the risks associated with being a volunteer POLR REP ("VREP") is the possibility that the VREP may be able to competitively retain some customers assigned to it through a POLR event. When there are multiple VREPs, the Commission's rules require that customers be allocated amongst the VREPs in a non-discriminatory fashion, and base the allocation on the ratio of the VREP's indicated willingness-to-serve count relative to that total for all VREPs. This invites an inefficient dynamic, however, since a VREP could conceivably indicate a very large number of customers, which would in effect dilute away the other VREPs from that calculation.

A simpler and equally non-discriminatory approach that does not carry this risk would be to allocate customers dropped to POLR amongst VREPs equally, up to the VREP's maximum indicated. Conceptually, this is more like a card dealer distributing a deck of cards to the players at the table. To implement this, the Commission could adopt a change such as the following:

> (E) Assign ESI IDs in numerical order to VREPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each VREP indicated a willingness to serve pursuant to subsection (i) of this section. If the number of ESI IDs is less than the total that the VREPs indicated that they are willing to serve, each VREP must be assigned ~~a proportionate~~ an equal number of ESI IDs, ~~as calculated by dividing~~ up to the number that each VREP indicated it was willing to serve ~~by the total that all VREPs indicated they were willing to serve, multiplying the result by the total number of ESI IDs being transferred to the VREPs, and rounding to a whole number~~ for a given class and POLR area.

4. 16 TAC § 25.43(m)(2)(A) and (B), Rates Applicable to POLR Service

The PFP proposes a series of amendments to 16 TAC § 25.43(m)(2)(A) and (B) in order to decrease direct pass-through in the POLR rate to the real-time settlement point prices ("RTSPPs") that H.B. 16 has prohibited for residential and small commercial customers. As the Commission considers options to change the POLR rate, it should bear in mind that if the POLR rate is too low this will be contrary to the intent of POLR as a short-term rate of last resort and could severely interfere with the competitive market in unintended ways.

For instance, Public Utility Regulatory Act ("PURA") § 39.107(g) and 16 TAC § 25.498(c)(15) cap prices for prepaid products based on the POLR rate. Prepaid plans are a valuable product offering for customers that allow them to actively manage their electricity bill and provide an option for those without good credit to avoid a deposit. However, there can be added risk for REPs in providing prepaid products because of this lack of a deposit and with the

possibility of a moratorium on disconnections, particularly for month-to-month products. POLR pricing that is too low may impede REPs' ability to offer prepaid service.

It should also be noted that 16 TAC § 25.43(e)(1) requires an LSP to provide service at the POLR rates defined in subsection (m)(2) upon customer request, even outside of a mass transition. If the POLR rate is lower than market-based offers, this would impact REPs' ability to provide service through other products that adequately incorporate their costs. This requirement can only be sustained if the LSP is able to fully recover the costs and risks associated with providing service to such customers upon demand. The existing formula in 16 TAC § 25.43(m)(2) achieves this by allowing POLR rates to reflect completely unhedged service costs through the real-time market. The changes proposed in the PFP radically alter that dynamic, however, by capping the POLR rates in subsection (m)(2) using a formula that is rooted in a prior year's real-time energy costs. This has the risk of creating perverse incentives and material unintended consequences. For example, if a very mild weather year precedes a very extreme weather year, then it is quite possible that the POLR rate as proposed in the PFP would effectively be "under water" for at least a full year. This dynamic could result in significant, uncontrollable losses for LSPs while hindering the ability of non-LSPs to make compelling cost-based offers. This is a problematic dynamic that many other retail choice jurisdictions have run into with utility-backstop default service, and a trap that Texas would be wise to avoid setting for its widely-celebrated competitive retail electricity market.

Further, there is a significant risk for POLRs in covering loads in mass transitions as they are acquired quickly on days' notice, and therefore are most likely unhedged. It is important that the POLR rate be developed with the understanding that there is a higher risk in serving these customers than customers acquired in the general course of business. ARM offers the following feedback regarding the POLR rate with these considerations in mind.

First, the definition of "non-bypassable charges" should be expanded to include surcharges other than nodal fees, ancillary service charges, and ancillary service imbalance charges. This change should be made for all POLR customer classes (i.e., it is appropriate for 16 TAC § 25.43(m)(2)(C)(i) as well as for 16 TAC §§ 25.43(m)(2)(A)(i) & (B)(i)). While ERCOT no longer assesses nodal fees, it is possible that other such fees could be assessed in the future but

may not be specifically referred to as "nodal fees."[3] Additionally, as highlighted by the recent passage of H.B. 4492, REPs may be subject to significant unhedgeable uplift costs under certain market conditions, including the market conditions likely to give rise to a POLR event, and an LSP should not be required to bear this kind of incremental exposure without the ability to recover that cost.

Second, the PFP's proposed amendments to the LSP energy charge component in 16 TAC §§ 25.43(m)(2)(A)(iii) and (B)(iv) would use the average RTSPPs for the customer's load zone, however each TDU territory covers two to three load zones. As drafted, this would result in customers within the same TDU service territory having different EFLs, which would be confusing to customers as well as to the REP call centers that would need to use load zone maps to explain which EFL applies to a customer. To avoid this result, the current rule's approach should be maintained by referring to "the load zones *located partially or wholly* in the customer's TDU service territory…" (emphasis added), and to continue the current rule's approach of using the highest of those load zone averages.

Third, the PFP's proposed pricing formula in subsection 25.43(m)(2)(A) for residential customers is essentially 5% lower than the current formula for minimum prices. The proposed pricing formula for small non-residential customers in § 25.43(m)(2)(B) is equivalent to the current formula for minimum prices. For 2022, these formulas may result in a higher POLR rate, however in subsequent years they may produce a lower rate that would raise the concerns mentioned above. Given the risks inherent to this dynamic, ARM proposes as an alternative that[4] the LSP customer charge in § 25.43(m)(2)(A)(ii) for residential customers could be set at $0.09 per kWh and in (m)(2)(B)(iv) for small non-residential customers at $0.05 per kWh, combined with either of the following:

- The maximum energy charge for both residential and non-residential customers could be set at a rolling average of the RTSPP for the preceding 60 days with a multiplier of 125%. ARM notes that this would not violate H.B. 16 because it would

[3] *See, e.g.,* Issue for the ERCOT Board of Directors: Approval by the Board of Directors of ERCOT 2022-2023 Biennial Budget at 3 (Aug. 10, 2021) ("The Budget recommended by ERCOT staff does not fund the inspections required by Senate Bill 3 from the system administration fee. Those inspection costs will be funded through a different recovery mechanism, such as an ERCOT user fee."), available at: http://www.ercot.com/content/wcm/key_documents_lists/214069/9.2_2022-2023_Budget_and_Fee.pdf

[4] ARM continues to evaluate other alternatives and reserves the right to modify or retract either of these recommendations in reply comments, or lend support to meritorious proposals from other commenters.

not directly pass-through RTSPPs and instead smooth out the RTSPP exposure over the maximum period that a customer could be served on the POLR rate under 16 TAC § 25.43(p)(14), striking a more appropriate balance between customer price risk and the significant financial risk to LSPs that can accrue during an extreme market event.

- For the maximum energy charge, if the average RTSPP in the 30 days preceding the transition to a POLR rate is at least twice the historical average RTSPP used for calculating the minimum POLR rate, the LSP energy charge must be the historical average RTSPP multiplied by the number of kWhs the customer used during that billing period and further multiplied by the ratio of the preceding 30 days' average RTSPP to the average RTSPP from the previous 12-month period ending September 1.

Fourth, the PFP amends the description of the "number of kWhs the customer used" in 16 TAC §§ 25.43(m)(2)(A)(iv) and (B)(v) to state only that it is based on interval data. This would be relevant if the POLR rate was remaining directly indexed to RTSPPs, but given the PFP's proposal (and ARM's alternative proposal's) to break that link interval data is no longer a necessary input. ARM recommends that, for the residential and small commercial customer segments, it is more accurate to state that usage information is provided by the TDU, rather than stating that it is "interval data."

Finally, 16 TAC § 25.43(m)(2)(B) currently lumps small and medium non-residential customers together under the same POLR rate formula, however there is no clear reason for doing so. Because H.B. 16's prohibition on products that directly pass through RTSPP does not apply to medium non-residential customers and the same pricing rationale applies to medium non-residential customers as to large non-residential customers, this POLR rate should be maintained as is and separated into its own subsection.

5. 16 TAC § 25.43(p)(13) and (14), Acceleration of Future-Dated and Post-POLR Event Switches

16 TAC § 25.43(p)(13) aims to give precedence to customer choices over POLR drops, and ARM unequivocally supports that principle. However, that provision also requires that a customer being dropped to POLR for whom there is a future-dated switch have that switch

accelerated to the next available switch date prior to the transition date. 16 TAC § 25.43(p)(14) also establishes monitoring of switch activity for customers that were dropped to POLR and subsequently switched to a provider of choice, and directs ERCOT to accelerate any switches within that 60-day window as an unprotected, out-of-cycle switch (regardless of how the switch was submitted).

These provisions to accelerate switches before and after a POLR event made sense before the ubiquitous deployment of advanced metering systems ("AMS"), which allow for same-day switching, and when accelerated switching had substantive costs related to physical meter reading. These constraints are no longer material with AMS. As such, these provisions can now cause more harm than good by moving the customer over to the REP before the REP is expecting and financially prepared to serve that customer. Accordingly, ARM recommends that the automatic move-up of the switch be replaced with giving the recipient REP the option to accelerate the switch date or proceed with the switch date as originally requested. This way the customer's choice can still be honored, but so can the REP's ability to honor the terms of the customer's choice.

(13) A mass transition under this section must not override or supersede a switch request made by a customer to switch an ESI ID to a new REP of choice, if the request was made before a mass transition is initiated. If a switch request has been made but is scheduled for any date after the next available switch date, ~~the switch must be made on the next available switch date~~ the scheduled recipient REP shall be notified and given the opportunity to accelerate the switch date.

(14) ERCOT must identify customers who are mass transitioned for a period of 60 calendar days. The identification must terminate at the first completed switch or at the end of the 60-day period, whichever is first. If necessary, ERCOT system changes or new transactions must be implemented no later than 14 months from the effective date of this section to communicate that a customer was acquired in a mass transition and is not charged the out-of-cycle meter read pursuant to paragraph (16) of this subsection. ~~To the extent possible, the systems changes should be designed to ensure that the 60-day period following a mass transition, when a customer switches away from a POLR provider, the switch transaction is processed as an unprotected, out-of-cycle switch, regardless of how the switch was submitted.~~

6. 16 TAC § 25.43(t), Notice of Transition to POLR Service to Customers

ARM suggests that that 16 TAC § 25.43(t)(1) be amended to acknowledge that ERCOT may use different messaging for customers transitioned to a VREP, since customers transferred to a VREP in a POLR drop are served on market-based month-to-month rates instead of the POLR rate calculated under 16 TAC § 25.43(m)(2).

Additionally, ARM acknowledges the decision to implement a general change to the use of "must" instead of "shall" throughout the Commission's rules. However, in certain instances it may make more sense to vary from this change. 16 TAC § 25.43(t)(2)(G) is one such situation in which an alternative to "must" would be more correct, such as "will" or "plans to":

> (G) If applicable, a description of the activities that the REP ~~shall~~will use to collect any outstanding payments…

Similar tweaks are also appropriate for 16 TAC § 25.43(t)(3)(A) and (B), as well as 16 TAC § 25.43(v), (w)(2)(A), and (w)(2)(B).

C. 16 TAC § 25.471, General Provisions of Customer Protection Rules

ARM appreciates the Commission's proposed amendments to 16 TAC § 25.471 reflected in the PFP. Specifying which rules may not be waived rather than referring to "applicable portions" provides certainty and will help to ensure compliance.

D. 16 TAC § 25.475, Information Disclosures to Customers

1. 16 TAC § 25.475(a), Applicability

House Bill 16 is clear that the new requirements for notices of contract expiration and acknowledgements of risk for wholesale indexed products applies to "enrollment or re-enrollment of a customer in a retail electric product that is executed on or after the effective date of this Act," which is September 1, 2021.[5] However, as currently drafted, the PFP would make contract expiration notice ("CEN") requirements in § 25.475(e) applicable on September 1 and therefore applicable to existing contracts. Because this contradicts the plain language of H.B. 16, ARM recommends that the applicability of such notice requirements be revised to apply only to contracts executed on or after September 1.

[5] *See* Tex. H.B. 16, 87th Leg., R.S., Sections 2 and 3 (2021).

Furthermore, as noted in ARM's Response to the Strawman, REPs will need time to develop and modify the processes and operational systems required to implement this rulemaking.[6] ARM acknowledges that the specific requirements of H.B. 16 will become effective for contracts executed on or after September 1, however to the extent that the Commission chooses to include additional requirements for REPs, ARM requests that the Commission provide 120 days from the date of the order adopting the amendments for REPs to develop the processes and materials to implement these additional changes. That timeframe is consistent with the implementation date imposed for the previous amendments to § 25.475 in Project No. 37214.[7]

To implement these changes, ARM recommends the following changes:

(a) **Applicability**. The requirements of this section apply to retail electric providers (REPs) in connection with the provision of service and marketing to residential and small commercial customers. When specifically stated, the requirements of this section apply to brokers, aggregators, and transmission and distribution utilities (TDUs). ~~This section is effective for contracts entered into on or after September 1, 2021. REPs are not required to modify contract documents related to contracts entered into before this date but must provide notice of expiration as required by subsection (e) of this section.~~ The additional notice of contract expiration and ban on wholesale-indexed products for residential and small commercial customers are effective for contracts entered into on or after September 1, 2021. REPs must comply with the requirements set forth in subsections (b)(5), (b)(8), (c)(3)(D)-(G), (e)(2), (e)(3)(B)(ii), (e)(3)(C)(iii), (v), and (vii), (h)(4), (h)(6)(C), and (j) of this section by [date 120 days after adoption of the rules]. Contracts entered into prior to September 1, 2021 must comply with the provisions of this section in effect at the time the contracts were executed.

2. 16 TAC § 25.475(b), Definitions

The PFP proposes to amend the definitions of Fixed Rate Product and Price in subsections (b)(5) and (8) to include ancillary services charges. As ARM noted in its Comments to the Strawman though, the definition of Fixed Rate Product arguably already prohibits REPs from passing through changes in ancillary service prices because the definition only permits the

[6] *See* Alliance for Retail Markets' Comments in Response to Commission Staff's Strawman at 4-5 (July 6, 2021) ("ARM's Strawman Comments").

[7] *See Rulemaking to Implement Changes to Customer Disclosures As Required by HB 1822*, Project No. 37214, Order Adopting Amendment to §25.475 as Approved at the November 20, 2009 Open Meeting at 3 (Dec. 2, 2009) (The Commission's response agreed to change the compliance deadline to April 1, 2010, which is 120 days from the Order's issuance on December 2, 2009.).

following specified variances to price: (1) actual changes in TDU charges, (2) changes to ERCOT or Texas Regional Entity administrative fees charged to loads, or (3) changes resulting from federal, state, or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control.[8] However, there is an important distinction between variations in ancillary services prices and variations in the quantity of ancillary services obtained (or suite of ancillary services procured).

While variations in the price of ancillary service charges may not be permissible to pass-through, changes to ERCOT's process for determining the *quantity* of ancillary services to be obtained or the creation of new ancillary service products that result in charges assessed to load serving entities (such as REPs) arguably qualify as regulatory actions that would permit a price change pursuant to 16 TAC § 25.475(d)(2)(B).[9] This is justified from a policy perspective because while REPs have a limited ability to anticipate and hedge for changes in ancillary services costs, REPs have no control over regulatory actions that unexpectedly change the quantity of ancillary services obtained or regulatory actions that create new ancillary service products, both of which are akin to regulatory actions to approve new non-bypassable TDU charges. ERCOT's actions this summer to dramatically increase the quantity of ancillary services procured are an example of regulatory actions that should be a permissible reason under § 25.475(d)(2)(B) for a price change on a fixed rate product. This significant increase to ancillary services procurement was beyond the REPs' control or ability to reasonably predict and it is necessary for REPs to have the ability to make a price change if a REP chooses to do so in order to manage unforeseeable costs.

16 TAC § 25.475(d)(2)(B) and the EFL template in 16 TAC § 25.475(g)(6) already currently provide for the pass-through of costs arising from regulatory actions in fixed rate products, which is consistent with the broader context in 16 TAC § 25.475 that REPs should not be required to unilaterally bear policy-driven risks that are beyond their control. For clarity and consistency, ARM recommends that this allowance be reflected in the definition as well.

For these reasons, ARM continues to urge the Commission not to include ancillary services charges in the definitions of Fixed Rate Products or Price:

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[8] *See* ARM Strawman Comments at 5-6.

[9] *See* 16 TAC § 25.475(d)(2)(B) ("For a fixed rate product, each bill shall either show the price changes on one or more separate line items, or shall include a conspicuous notice stating that the amount billed *may include price changes* allowed by law *or regulatory actions*." (emphasis added)).

(5) **Fixed rate product** – A retail electric product with a term of at least three months for which the price (including all recurring charges ~~and ancillary service charges~~) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in TDU charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity, Inc. administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REP's control.

(8) **Price** – The cost for a retail electric product that includes all recurring charges, ~~including the cost of ancillary services,~~ excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

In the alternative, the Commission could clarify the references to ancillary service charges to help distinguish the ancillary service costs that a REP can and cannot reasonably control:

(5) **Fixed rate product** – A retail electric product with a term of at least three months for which the price (including all recurring charges and charges for known ancillary service ~~charges~~quantities at the time of the contract) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in TDU charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity, Inc. administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REP's control.

(8) **Price** – The cost for a retail electric product that includes all recurring charges~~, including the cost of~~ and charges for known ancillary service~~s~~ quantities at the time of the contract, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

The PFP also includes the AOR as a distinct document within the definitions of Contract and Contract Documents in 16 TAC § 25.475(b)(1) and (2), however as further addressed in the subsequent section of these comments, ARM recommends that these and similar separate references to the AOR be removed because the AOR is best included as a component of the EFL:

(1) **Contract** – The Terms of Service document (TOS), the Electricity Facts Label (EFL), Your Rights as a Customer document (YRAC), and the documentation of enrollment pursuant to 25.474 of this title (relating to Selection of Retail Electric Provider)~~, and, if applicable, the Acknowledgement of Risk (AOR)~~.

(2) **Contract documents** – The TOS, EFL and YRAC~~, and, if applicable, the AOR~~.

3. 16 TAC § 25.475(c), Specific Contract Requirements

H.B. 16 establishes the concept of an acknowledgement of risk associated with wholesale indexed products for customer classes that are permitted to use such products (i.e. a customer other than a residential or small commercial customer), requiring such customers to agree to that AOR before enrolling. The PFP goes a step further and would require an AOR for certain other products, including products that could be offered to residential and small commercial customers. Section 25.475 of the PFP appears to assume that the AOR would be a distinct document. For residential and small commercial customers, ARM recommends that the efficacy of AORs is maximized if included in the EFL rather than as a separate document. EFLs are intended as a means for customers to make an informed decision by providing information on REP offers in a standardized format that facilitates apples-to-apples comparisons.[10] Including the AOR on the EFL ensures that customers are made aware of the risks of a product before that customer has gone down the path of selecting a product. It also could allow customers to search for products that do, or do not, contain this element while shopping and comparing plans. Furthermore, establishing a separate document requirement would require additional rule changes beyond those included in the scope of this rulemaking (e.g., § 25.474's authorization and verification procedures and § 25.473's non-English language requirements, among others). Therefore, incorporating the concepts in the AOR into the EFL promotes rulemaking efficiency as well.

Accordingly, ARM recommends that references to the AOR as a separate document be removed from proposed §§ 25.475(c)(1)(A), (C), (D) and 25.475(c)(2)(A) (which would result in these sections maintaining their existing rule language) and that proposed § 25.475(c)(3)(G) be modified to incorporate the AOR into EFLs:

(c)(1)(A) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, billing statements, TOSs, EFLs,

[10] *See* Electricity Facts Labels for Residential Electric Service, Commission website: www.puc.texas.gov/industry/electric/rates/facts/Facts.aspx.

and YRACs~~, and, if applicable, AORs~~ distributed by a REP or aggregator must be clear and not misleading…

(c)(1)(C) The TOS, EFL, and YRAC~~, and, if applicable, AOR~~ must be provided to each customers upon enrollment….

(c)(1)(D) A REP must retain a copy of each version of the TOS, EFL, and YRAC~~, and, if applicable, AOR~~ during the time the plan is in effect for a customer and for four years after the contract ceases to be in effect for any customer….

(c)(2)(A) Each TOS, EFL, and YRAC~~, and, if applicable, AOR~~ must be complete, written in language that is clear, plain and easily understood, and be printed in paragraphs of no more than 250 words in a font no smaller than 10 point…

(c)(3)(G) A REP, aggregator, or broker may enroll a residential or small commercial customer in an indexed product or a product that contains a separate assessment of ancillary service charges only if the REP, aggregator, or broker ~~obtains before the customer's enrollment~~includes in the customer's EFL an AOR in compliance with the requirements of this section.

4. 16 TAC § 25.475(e)(1) and (2), Contract Expiration and Renewal Offers

The PFP amends § 25.475(e) by establishing timeline requirements for expiration notice of a non-fixed rate term product in subsection (e)(1) and the notice timeline requirements for the expiration of a fixed rate product in subsection (e)(2). Subsection (e)(2)(B) mirrors the phrasing of PURA § 39.112(c) added by H.B. 16, however § 25.475(e)(1) diverges from this phrasing. For consistency and to avoid any divergent interpretations, ARM recommends that (e)(1) be amended to also conform to the terminology of H.B. 16:

(e)(1) …The REP must send the notice by mail to a residential customer or must send the required notice to a customer's email address if available to the REP and if the customer has requested to receive ~~contract-related notices~~communications electronically from the REP.

H.B. 16 requires that a REP provide three CENs to residential customers,[11] but the PFP would expand these requirements to apply to small commercial customers as well. One of the fundamental principles of statutory interpretation is that the Legislature is presumed to have

[11] *See* Tex. H.B. 16, 87th Leg., R.S., Section 2.

included or excluded each word of a statute intentionally.[12] In H.B. 16, the Legislature was intentional in its use of "small commercial customer", for instance by specifically including small commercial customers in the provisions prohibiting wholesale indexed products. The Legislature was equally intentional in *not* including small commercial customers within the statutory requirements for CENs. ARM requests that the Commission not expand the applicability of these CEN provisions beyond the scope of H.B. 16 by not adding small commercial customers in the PFA.

If the Commission determines that the triple CEN requirement should apply to small commercial customers nevertheless, ARM recommends the following changes in order to preserve the REP's ability under the existing rule to send the final CEN to a small commercial customer 14 days prior to the contract expiration date. These proposed edits would also harmonize (e)(2)(A) with the provisions of (e)(1):

> (A) For fixed rate products, the REP must provide the customer with at least three written notices of the date the fixed rate product will expire. The notices must be provided during the last third of the fixed rate contract period and in intervals that allow for, as practicable, even distribution of the notices throughout the last third of the fixed rate contract period.
>
> (i) ~~Of~~For a residential customer with a fixed rate contract with a period of more than four months, the final notice must be provided at least 30 days before the date the fixed rate contract will expire.
>
> (ii) ~~Of~~For a residential customer with a fixed rate contract for a period of four or fewer months, the final notice must be provided at least 15 days before the date the fixed rate contract will expire.
>
> (iii) For a small commercial customer, the final notice must be provided at least 14 days before the date the fixed rate contract will expire.

Also, to ensure that the CENs are sent to customers within a window that the customer would most benefit from, ARM recommends that for contracts with terms 12 months or longer, the REP be allowed to send the first CEN up to three months prior to the contract end date. This would accomplish the statutory objective of being "during the last third" of the contract term. Requiring REPs to send CENs several months, even possibly a year or more, prior to the contract

[12] The doctrine of *expressio unius est exclusio alterius* begins with the presumption that the omission of a provision or term from a statute is intentional. *See* PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 84 (Tex. 2004); *see also* Meritor Auto., Inc. v. Ruan Leasing Co., 44 S.W.3d 86, 90 (Tex. 2001).

end date risks the customer ignoring the notice or worse, sparking customer confusion that might result in early termination fees being incurred:

> (A) For fixed rate products, the REP must provide the customer with at least three written notices of the date the fixed rate product will expire. The notices must be provided during the last third of the fixed rate contract period and in intervals that allow for, as practicable, even distribution of the notices throughout the last third of the fixed rate contract period. For contracts with a period of 12 months or longer, the first notice may be provided up to three months prior to the contract end date. For fixed rate contracts for a period:

Alternatively, the Commission could indicate in the preamble to the order adopting the rule amendments in this proceeding that § 25.475(e)(2)(A) provides this flexibility.

5. 16 TAC § 25.475(e)(2)(C), Notice Timeline for Expiration of a Fixed Rate Product

New subsection 25.475(e)(2)(C) provides that in the event that a REP does not provide the required CEN and the customer does not select another retail electric product prior to the expiration date, then the REP must continue to serve that customer under the terms of the fixed rate contract until "sufficient expiration notice is provided" or the customer selects a new retail electric product. ARM recommends that this subsection be deleted as duplicative of subsection (c)(3)(E) which provides these CEN requirements:

> ~~(C) If a REP does not provide the required notice of the expiration of a customer's fixed rate contract and the customer does not select another retail electric product before expiration of the fixed rate contract term, the REP must continue serving the customer under the terms of the fixed rate contract until sufficient expiration notice is provided or the customer selects another retail electric product.~~

In the alternative, if subsection (e)(2)(C), is not deleted, ARM recommends that it be conformed with subsection (c)(3)(E) in order to clarify that "sufficient expiration notice" means the final CEN and not that all three CENs must first be sent:

> (C) If a REP does not provide the required notice of the expiration of a customer's fixed rate contract and the customer does not select another retail electric product before expiration of the fixed rate contract term, the REP must continue serving the customer under the terms of the fixed rate contract until ~~sufficient expiration~~the REP provides notice ~~is provided~~ in accordance with applicable requirements of subsection (e)(2)(A)(i) or (ii) or the customer selects another retail electric product.

6. 16 TAC § 25.475(e)(3), Contract Expiration and Renewal Offers

In the PFP's amendment to § 25.475(e)(3)(B)(i), it appears that the word "visible" was inadvertently struck from that provision. If the intent was to remove the modifier "readily" as ARM recommended in its Comments to the Strawman,[13] ARM would continue to support such a change:

> (B)(i) If notice is provided with a residential customer's bill, the notice must be printed on a separate page. A statement must be included in a manner ~~readily~~visible on the outside of the envelope sent to a residential customer's billing address by mail…

The same edit would apply in § 25.475(e)(3)(B)(ii)-(iii) as well.

7. 16 TAC § 25.475(e)(4), Affirmative Consent

For the reasons outlined above in response to amendments to § 25.475(c), the reference to the AOR as a separate document in § 25.475(e)(4)(C) should be removed:

> (C) Indicate if the customer has received, or when the customer will receive, copies of the TOS, EFL, and YRAC~~, and, if applicable, AOR~~;

8. 16 TAC § 25.475(g)(2)(B), Pricing Disclosures

16 TAC § 25.475(g)(2) requires that REPs must disclose pricing information in an EFL. As addressed in response to § 25.475(c), ARM recommends that AORs are best included as a component of the EFL because this maximizes disclosure to the customer of potential risks at the time that the customer is shopping and comparing products. Because the AOR addresses potential pricing risks, ARM recommends that the requirement to include the AOR in the EFL be established in § 25.475(g)(2), including the required language of the AOR. As addressed in response to § 25.475(j) below, the only context in which this could arise is for indexed products, so § 25.475(g)(2)(B) should be amended as follows:

> (B) For an indexed product, the EFL must provide sample prices for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, resulting from a reasonable range of values of the inputs to the pre-defined pricing formula. The EFL must also include an Acknowledgement of Risk (AOR) disclosure stating, "This is an indexed product. By enrolling in this product, you understand that the rate you will be charged for electricity can change for reasons beyond your control. These changes may result in unexpectedly high bills, potentially significantly higher than previous bills, and you must pay any amount you are properly billed. Please ensure that you understand the risks involved with this plan."

[13] *See* ARM's Strawman Comments at 9-10.

9. 16 TAC § 25.475(j), Acknowledgement of Risk

The PFP adds subsection (j) to require that an AOR be obtained prior to a residential or small commercial customer's enrollment in an indexed product or a product that contains a separate assessment of ancillary service charges. If the AOR requirement is incorporated into the EFL as ARM recommends, then the inclusion of subsection (j) is duplicative and not necessary. The addition to § 25.475(g)(2)(B) recommended above would add the AOR requirement for indexed products. Furthermore, there is no need to add an AOR requirement for products that contain a separate assessment of ancillary service charges because such products are necessarily either indexed products or month-to-month products and the latter already have flexibility to update price in response to changes in cost regardless of the reason. Therefore, ARM recommends that subsection (j) not be included in the Proposal for Adoption.

If the Commission nevertheless prefers to maintain a separate requirement for AOR, ARM recommends as an alternative the omission of § 25.475(j)(1) and (2) along with the following edits to subsection (j) to allow for the integration of the AOR into the EFL, and other conforming changes:

> (j) **Acknowledgement of Risk**. ~~Before a residential or small commercial customer's enrollment in an~~An indexed product ~~or a product that contains a separate assessment of ancillary service charges, an aggregator, broker, or retail electric provider~~ must ~~obtain~~include an AOR~~, signed by the customer, verifying~~ in the customer's EFL that the customer accepts the potential price risks associated with the product.

E. 16 TAC § 25.479, Issuance and Format of Bills

The PFP proposes to amend 16 TAC § 25.479(d) to include certain public service notice requirements. In its Comments in Response to the Strawman, ARM recommended that these new public service notices be required to be sent in April and December, rather than April and October.[14] With hurricane messaging requirements included in bills from May through November, as well as the new CENs that may be included in bills upon adoption of the changes in this rulemaking, ARM continues to recommend that the new public service notice requirements occur in bill timeframes that are less crowded in order to better catch the customer's attention.

[14] *See id.* at 13-14.

Additionally, many of the public service notice requirements added in subsection (d) are very similar (if not identical to) the information that proposed § 25.475(h)(4) would add to the YRAC and allow the use of website references to comply. These and similar resources should be leverageable for purposes of compliance with subsection (d).

Taken together, ARM's recommendations would read:

(d)(1) Additionally, in April and ~~October~~December of each year, or as otherwise directed by the commission, the REP must provide information to each customer along with the customer's bill about:

[renumber existing (d)(1) through (d)(4) as (d)(1)(i) through (d)(1)(iv), respectively]

(d)(2) A REP may satisfy (i)-(iii) above by directing customers to a website or websites maintained for purposes of Section 25.475(h)(4). A REP may satisfy (iv) above by directing customers to an appropriate website maintained by the REP, the commission, ERCOT, or a TDU.

F. 16 TAC § 25.498(c)(15), Maximum Rates for Prepaid Service

ARM notes that 16 TAC § 25.498(c)(15) provides several tests for establishing whether a prepaid product is compliant with the requirement that it be priced no greater than the POLR rate in the applicable TDU service territory. Consistent with the discussion above regarding 16 TAC § 25.43(m)(2)(A) and (B), some of the changes proposed in the PFP may render the tests envisioned in 16 TAC § 25.498(c)(15) impractical and would warrant revision. If the alternative proposed by ARM in 16 TAC § 25.43(m)(2)(A) and (B) is adopted, however, then the tests in 16 TAC § 25.498(c)(15) could likely be left as-is in the PFP.

G. 16 TAC § 25.499, Acknowledgement of Risk Requirements for Certain Commercial Customers

ARM appreciates the Commission's inclusion of the new rule 16 TAC § 25.499 to separately address requirements for larger customers, including C&I customers. With § 25.475 appropriately limited to the context of residential and small commercial customers, the use of the new § 25.499 more cleanly delineates between these substantially different types of customers.

H. Comments in Response to Published Questions

1. **Should the maximum rate for provider of last resort service that is charged by a large service provider to a residential customer in proposed §25.43(m)(2)(A)(iii) and small and medium non-residential customers in proposed §25.43(m)(2)(B)(iv) include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis? If so, what is an appropriate safety threshold?**

If the pricing as proposed in the PFP is adopted, then ARM recommends that an additional safety threshold is not necessary because the energy charge in the POLR formula is not chosen by REPs but rather is set by a one year average with a small adder. The averaging of one year of the RTSPP would already serve as a safety net to dampen periods of price volatility. Furthermore, a safety threshold to protect specific customers from year to year is not needed for the POLR rate because it is not intended to be a long-term rate. As the Commission affirmed in its original Order adopting § 25.43, "...POLR service...is intended to be short-term and transitional in nature."[15] As a short-term solution for customers whose REP has abruptly exited the market, customers should not remain on the POLR rate from one year to the next. To that end, 16 TAC § 25.43(j)(4) already requires LSPs to move residential and small non-residential customers that have been dropped to POLR to a month-to-month market-based product within 60 days if the customer has not switched or selected another offer from the POLR.

ARM notes that, at least for the remainder of the 2021-2022 POLR term, any further mass transitions will likely result in the transfer of customers to VREPs, which offer market-based month-to-month products that are not the POLR rate, and any LSP has the option to serve customers dropped to POLR at a market-based rate that is not the POLR rate. And many LSPs have historically placed customers dropped to POLR on a market-based rate rather than the rates under § 25.43(m)(2). As such, the risk of customers actually being subject to the default POLR rate during a mass transition is extremely low.

2. **Do the acknowledgement of risk requirements in proposed §25.475(c)(3)(G) and §25.475(j) provide adequate customer protections for residential and small commercial customers that enroll in indexed retail electric products and retail electric**

[15] *Rulemaking Proceeding to Amend Requirements for Provider of Last Resort Service,* Project No. 25360, Order Adopting New § 25.43, Repeal of Existing § 25.43, and Amendments to §§ 25.478, 25.480, 25.482, and 25.483 as Approved at the August 22, 2002 Open Meeting at 39 (Aug. 23, 2002).

products that allow for the pass-through of ancillary service charges? If not, should these products be prohibited for residential and small commercial customers?

If the Commission chooses to require an acknowledgement of risk for indexed retail electric products, inclusion of the acknowledgement within the EFLs would adequately protect customers. EFLs are intended to provide customers with a means to easily compare REP product offerings and inclusion of the acknowledgement of risk within the EFL will make customers aware of any such risks at the outset while they are comparing plans. EFLs also provide other protections for indexed products, such as showing a total average price resulting from a reasonable range of values for the inputs to the pricing formula[16] and including a website and phone number where customers may contact the REP to determine the current price.[17] Furthermore, a customer signature should not be required for such AORs because existing Commission rules in 16 TAC § 25.474 provide for multiple enrollment paths, each with its own appropriate disclosure and enrollment verification standards.

Questions were raised at the Commission's July 29 Open Meeting as to the potential impact of indexed retail products such as those indexed to the NYMEX. It should be noted that products indexed to the NYMEX and other similarly indexed plans do not carry anywhere near the same type of volatility as the wholesale-indexed products prohibited by H.B. 16 for residential and small commercial customers.[18] Some indexed products are designed to only ratchet down with changes in the referenced indexed price. If the Commission is concerned with daily indexing to other volatile price indicators, then rather than banning indexed products this may be better addressed by modifying the definition in § 25.475 to not allow for price indices that move more frequently than once per month.

In regard to products that pass-through changes in ancillary service prices, ARM disagrees that that is necessary because as described above in response to proposed changes to 16 TAC § 25.475(b), the current rules already do not allow for changes in ancillary services prices

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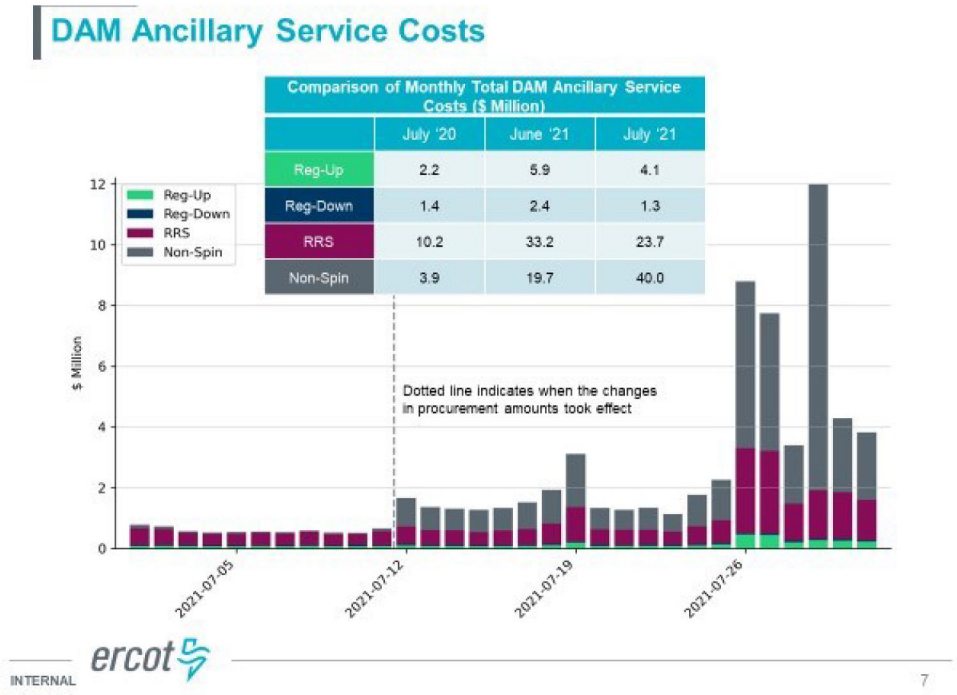
[16] *See* 16 TAC § 25.475(g)(2)(B).

[17] *See* 16 TAC § 25.475(g)(2)(F).

[18] Retail electric products for residential customers that are indexed to NYMEX typically provide that the applicable NYMEX value for incorporation into the pricing formula disclosed on the EFL is the closing price of the monthly NYMEX natural gas futures contract. In 2021, that value has ranged between roughly $2.50-$4.00 per MMBtu, with the closing price in February being less than $3.00 per MMBtu. Using monthly closing prices, rather than spot market or daily pricing, subjects customers to far less price volatility.

alone to be passed through to customers on fixed rate products. It should also be emphasized that, to ARM's knowledge, products with ancillary services price pass-through elements are predominantly used by larger C&I customers. If separate ancillary services pass-through products were to be implemented for residential and small commercial customers, then additional rule amendments are likely necessary.

However, as ARM explains in greater detail above, it is important to distinguish between passing through changes in ancillary service prices versus changes in ERCOT's procurement of ancillary services that may introduce regulatory costs beyond the REP's control. These costs can be material, as ERCOT's recent ancillary procurement changes have demonstrated:[19]



ARM recommends reasonable suggestions in these comments that strike an appropriate balance with the status quo by specifying that changes in price for ancillary service quantities that were known at the time of the contract cannot be passed through on a fixed price contract, but allowing recovery for regulatory changes in ancillary service procurement that are beyond the REP's control.

[19] Impact of Additional Procurement on Day-Ahead Market Ancillary Service Prices and Costs for July '21, ERCOT Technical Advisory Committee Presentation (Aug. 6, 2021), available at: http://www.ercot.com/content/wcm/key_documents_lists/214207/Stakeholders_Comments_Received_08032021_on_Proposed_Ancillary_Service_Changes.docx.

As for the banning of products generally, any prohibition stifles competition by its very nature and often has unforeseen knock-on consequences. Accordingly, ARM strongly recommends that products only be prohibited if a demonstrated necessity exists. Indexed products, such as those indexed to NYMEX prices, can serve a valuable purpose which is evidenced by the fact that customers choose them and find them appealing in certain circumstances. And as noted above, products indexed to NYMEX prices have not experienced the level of volatility that the wholesale indexed products tied to RTSPPs have and so should not be prohibited solely because they share a mechanism of indexing.

III. CONCLUSION

For the reasons stated herein, ARM respectfully recommends that the Commission propose amendments to its customer protection rules and to the POLR rule in accordance with these comments in the forthcoming Proposal for Adoption.

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Respectfully submitted,

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