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APPLICATION OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. FOR A DEBT OBLIGATION ORDER UNDER PURA CHAPTER 39, SUBCHAPTER M, AND REQUEST FOR A GOOD CAUSE EXCEPTION	**§ § § § § §**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

RAYBURN COUNTRY ELECTRIC COOPERATIVE, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

Rayburn Country Electric Cooperative, Inc. ("Rayburn") respectfully submits this brief regarding the Electric Reliability Council of Texas, Inc.'s ("ERCOT") Application for a Debt Obligation Order Under PURA Chapter 39, Subchapter M, and Request for a Good Cause Exception ("Application").[1] Rayburn does not oppose ERCOT's Application for a Debt Obligation Order that would authorize ERCOT to secure $800 million of Default Balance financing from the Comptroller, provided that electric cooperatives are not deemed ineligible to participate fully in Default Balance financing pursuant to Subchapter M.[2]

The Public Utility Regulatory Act ("PURA") provides no basis to exclude electric cooperatives from participating in securitization under Subchapter M of House Bill ("H.B.") 4492,[3] the statute that amended PURA to incorporate securitization measures under Subchapters M and N.[4] In fact, H.B. 4492 explicitly includes electric cooperatives among the wholesale market

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[1] *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter M and Request for Good Cause Exception*, Docket No. 52321 (filed July 16, 2021).

[2] Tex. Util. Code Ann. §§ 39.601-609.

[3] Act of May 30, 2021, 87th Leg., R.S. ("H.B. 4492").

[4] Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-66.016.

participants entitled to seek relief through the Default Balance financing process set out in Subchapter M. Excluding Rayburn and other electric cooperatives from participating in securitization under Subchapter M would contravene the clear statutory mandate of H.B. 4492 and be unreasonably discriminatory, prejudicial, and preferential.

II. BACKGROUND

Rayburn is a not-for-profit generation and transmission electric cooperative that, through its four members,[5] provides power to approximately 225,000 consumers — of which about 90% are residential customers, most of whom are rural, across Northeast Texas. Rayburn and its members are the sole providers of electricity to those residential customers. As an electric cooperative, Rayburn is owned by its customers, so those customers bear the full costs of the electric service Rayburn provides — there are no shareholders that receive any profit or absorb any loss.

Rayburn has received invoices for its February 14-19, 2021 usage of over $865 million which is approximately what Rayburn would typically pay over two and a half years — an astonishing bill for six days of usage.[6] In addition to H.B. 4492, the Texas Legislature passed Senate Bill ("S.B.") 1580 which allows electric cooperatives to securitize certain costs from Winter Storm Uri. Rayburn has taken steps to begin securitizing under S.B. 1580, however, the outcome of Rayburn's securitization under S.B. 1580 is unknown at this time. Therefore, Rayburn respectfully requests that the Commission adopt a Debt Obligation Order that allows Rayburn to

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[5] Rayburn's member cooperatives are Fannin County Electric Cooperative, Inc., Farmers Electric Cooperative, Inc., Grayson-Collin Electric Cooperative, Inc., and Trinity Valley Electric Cooperative.

[6] References to certain costs owed to ERCOT do not constitute an admission or waiver on Rayburn's behalf and Rayburn expressly reserves all rights and defenses.

participate fully in the Subchapter M securitization process, as permitted under the plain language of H.B. 4492.

III. ARGUMENT

A. The Plain Language of H.B. 4492 Permits Electric Cooperatives to Participate in the Default Balance Securitization Process Under Subchapter M

The Commission is required to adhere to the plain language of the statute when interpreting Subchapter M of H.B. 4492. Texas law requires that if a statute is clear and unambiguous, the language must be read according to its common meaning "without resort to rules of construction or extrinsic aids."[7] The Texas Supreme Court has held that:

> [t]here are sound reasons we begin with the plain language of a statute before resorting to rules of construction. For one, it is a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent … Moreover, when we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be.[8]

When interpreting a statute, the Legislature is presumed to "cho[o]se statutory language deliberately and purposefully."[9] Where the language of the statute is plain, the Commission should not look to legislative intent to provide a different meaning. Accordingly, ignoring the plain language of H.B. 4492 would contravene the intent of the Legislature and the purpose of Subchapter M which is "to address the Winter Storm Uri default balance . . . in a manner that benefits the public interest."[10] Subjecting electric cooperatives and their customers to disparate treatment under Subchapter M does not serve the public interest or comply with the plain language of H.B. 4492.

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[7] *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

[8] *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).

[9] *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384 (Tex. 2014).

[10] Tex. Util. Code Ann. § 39.601(a).

Section 39.002 of PURA defines the applicability of the statute.[11] In addition to adding Subchapters M and N to PURA, H.B. 4492 also amended section 39.002 as follows:

> This chapter, other than Sections 39.151, 39.1516, 39.155, 39.157(e), 39.159, 39.203, 39.904, 39.9051, 39.9052, and 39.914(e), and Subchapters M and N, does not apply to a municipally owned utility or an electric cooperative.[12]

Revised section 39.002 explains that PURA does not apply to municipally owned utilities or electric cooperatives, *except for the specifically identified provisions*, which include Subchapters M and N. Electric cooperatives are not barred from participating in Subchapter M, but rather the Legislature identified Subchapter M as one of several provisions of PURA, including Subchapter N, that are specifically applicable to electric cooperatives.

ERCOT's witnesses initially staked out an unfounded argument in their prepared direct testimony that Subchapter M does not apply to electric cooperatives. In his prepared direct testimony, ERCOT witness Kenan Ögelman explained that he understood the Default Balance to exclude short pay amounts from electric cooperatives:

> Amounts that were invoiced applicable to the Period of Emergency but that to date remain unpaid to ERCOT by market participants that were subsequently terminated from the ERCOT market due to financial default. *This amount does not include short payments by electric cooperatives and active market participants that owe money but that are on payment plans.*[13]

Later in his testimony, Mr. Ögelman again suggested that short payments related to electric cooperatives cannot be funded by the Default Balance because Subchapter M uses the term "competitive wholesale market participants" when referring to the types of short-paid entities

[11] Tex. Util. Code Ann. § 39.002.

[12] *Id.*

[13] *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter M and Request for Good Cause Exception*, Docket No. 52321, Pre-Filed Direct Testimony of Kenan Ögelman, ERCOT Ex. 1 at 11:-15-20 (Ögelman Direct) (emphasis added).

eligible to submit costs to the Default Balance.[14] The implication was that electric cooperatives were not competitive wholesale market participants and were therefore unable to receive funding under Subchapter M, an unsupported position that has no basis in H.B. 4492.

H.B. 4492 does not define "competitive wholesale market participants" or in any way explain how they are distinct from wholesale market participants. ERCOT does not have a "non-competitive" wholesale market; all participants in the wholesale market are participants in a competitive wholesale market. While the Legislature's use of the word "competitive" might invite confusion with respect to retail choice and whether an electric cooperative opted into retail choice, retail competition and the competitive wholesale market are two entirely different concepts. Rayburn buys from and sells into ERCOT's competitive wholesale markets, and therefore is a "competitive wholesale market participant" regardless of its retail choice status.

In rebuttal testimony and at hearing, ERCOT recanted and rectified its position on whether electric cooperatives are eligible to take part in the Subchapter M securitization process. ERCOT witness Mr. Ögelman explained in his rebuttal testimony that:

> ERCOT will treat all market participants the same insofar as the short-paid amounts are concerned. Therefore, to the extent Rayburn and other parties are complaining that ERCOT intends to discriminate against them with respect to the distribution of Default Balance proceeds, they are mistaken. ERCOT intends to treat electric cooperatives just like everyone else.[15]

During the hearing in the Subchapter M proceeding, in an exchange with counsel for Golden Spread Electric Cooperative, Inc., ERCOT witness Mr. Sean Taylor unequivocally admitted that

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[14] ERCOT Ex. 1 at 22:22-23:1-2 (Ögelman Direct) ("This amount does not include short payments by electric cooperatives or active market participants that owe money but that are on payment plans.").

[15] *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter M and Request for Good Cause Exception*, Docket No. 52321, Rebuttal Testimony of Kenan Ögelman, ERCOT Ex. 8 at 18:16-20 (Ögelman Rebuttal).

electric cooperatives in ERCOT are participants in the competitive wholesale market.[16] Therefore, electric cooperatives should be afforded the right to participate in Subchapter M.

ERCOT reiterated its corrected view that electric cooperatives are not precluded from participating in securitization under H.B. 4492 at the onset of the Subchapter N proceeding in Docket No. 52322. ERCOT counsel Mr. Moss made the point of explaining to Commissioners McAdams, Cobos, and Glotfelty that Subchapters M and N of PURA apply to electric cooperatives, and that electric cooperatives can avail themselves of securitization under both Subchapters M and N of H.B. 4492.[17] As further demonstrated in the excerpted exchange with Commissioner McAdams, ERCOT concedes that Subchapter M applies to electric cooperatives:

ERCOT counsel Mr. Moss:	Well, my reading, sir, just briefly here is that it says this chapter, other than Subchapters M and N does not apply to a municipally owned utility or an electric cooperative. So I -- my --
Comm. McAdams:	Okay.
Mr. Moss:	-- seat-of-the-pants reading is that Subchapter M and N do --
Comm. McAdams:	They do apply.
Mr. Moss:	-- do apply. Yes, sir.[18]

ERCOT does not dispute the fact that H.B. 4492 does not single out electric cooperatives for disparate treatment. On the contrary, the revised applicability provisions in H.B. 4492 make it

[16] *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter M and Request for Good Cause Exception*, Docket No. 52321, Tr. at 82:13-16; 85:16-21 (Taylor Cross) (Aug. 23, 2021).

[17] *Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter N and Request for Good Cause Exception*, Docket No. 52322, Tr. at 62:5-14 (ERCOT Counsel Moss) (Aug. 24, 2021).

[18] Docket No. 52322, Tr. at 62:5-14 (ERCOT Counsel Moss).

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clear that electric cooperatives are entitled to participate fully in the Subchapter M securitization process, a plain reading of the statute that ERCOT and Rayburn agree on.

B. Excluding Electric Cooperatives from the Subchapter M Default Balance Securitization Process is Unreasonably Discriminatory, Prejudicial, and Preferential

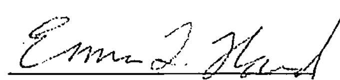
Limiting the ability of electric cooperatives to participate fully in securitization under Subchapter M would be unreasonably discriminatory, prejudicial, and preferential. As discussed, H.B. 4492 does not countenance disparate treatment for electric cooperatives. Electric cooperatives were subject to the same ERCOT pricing error that saddled Texas ratepayers with excessive bills during Winter Storm Uri. A Debt Obligation Order under Subchapter M that subjects electric cooperative customers to rates or charges for Subchapter M financing that they are not allowed to use or receive the benefit from would be discriminatory in nature, inconsistent with regulatory and economic principles, and contrary to the plain text of H.B. 4492.[19] Such an approach would treat Rayburn and its member customers disparately and force electric cooperative customers to subsidize the rest of ERCOT's customers and market participants whose payments would otherwise be higher. Accordingly, as ERCOT now acknowledges, to the extent that a Debt Obligation Order requires Rayburn and other electric cooperatives to pay for default balances pursuant to under Subchapter M, Rayburn and other electric cooperatives should be eligible to receive Subchapter M securitization proceeds on the same basis as all other market participants.

[19] *See Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Default Balances Under PURA Chapter 39, Subchapter M and Request for Good Cause Exception*, Docket No. 52321, Pre-Filed Direct Testimony of Julie Carey, Rayburn Ex. 1 at 5:8-19 (Carey Direct).

III. CONCLUSION

Rayburn respectfully requests that the Commission approve a Debt Obligation Order in this proceeding that allows electric cooperatives to participate fully in the Subchapter M securitization, as authorized under H.B. 4492.

Respectfully submitted,



Emma F. Hand[20]
Justin J. Mirabal
State Bar No. 24074731
Dentons US LLP
1900 K St NW
Washington, DC 20006
(202) 408-7094
emma.hand@dentons.com
justin.mirabal@dentons.com

Grace M. Dickson
State Bar No. 24113634
Dentons US LLP
2000 McKinney Avenue, Suite 1900
Dallas, TX 75201
(214) 259-0937
grace.dickson@dentons.com

[20] Ms. Hand is a licensed attorney in good standing with Virginia, Ohio, and the District of Columbia. Per the Administrative Law Judge's Order No. 4, dated August 5, 2021, it is our understanding that filing a motion to appear *pro hac vice* is not necessary to appear in the above captioned proceeding.

CERTIFICATE OF SERVICE

In accordance with Order No. 4 in this docket, filing a document on the Commission's Interchange website constitutes service of the document on all parties to this proceeding.

Grace Dickson