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

TEXAS INDUSTRIAL ENERGY CONSUMERS' INITIAL BRIEF

I. INTRODUCTION

After Winter Storm Uri, a number of competitive wholesale market participants (primarily retail electric providers) defaulted on their obligations to pay ERCOT.[1] ERCOT applied funds from the congestion revenue right ("CRR") auction accounts to partially cover these defaults, but could not pay all wholesale market participants for their services during the winter storm.[2] To address this situation and stabilize the ERCOT market, the Legislature adopted PURA Chapter 39, Subchapter M, which authorizes ERCOT to finance up to $800 million of the "Default Balance." The Default Balance is defined as: (1) amounts owed to ERCOT by "***competitive*** wholesale market participants"[3] that would be or have been uplifted to other wholesale market participants; (2) CRR auction receipts used by ERCOT to temporarily reduce short payments to wholesale market participants; and (3) reasonable costs incurred to implement the debt obligation order.[4]

TIEC supports the issuance of a debt obligation order consistent with Subchapter M, and agrees with ERCOT that the Default Balance cannot include amounts owed to ERCOT by electric cooperatives.[5] Using the Subchapter M bond proceeds to finance cooperatives' debt would conflict with the plain language of the statute and the Legislature's intent because cooperatives are

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[1] ERCOT Ex. 1, Direct Testimony and Attachments of Kenan Ögelman (Ögelman Dir). at 21-22.

[2] *Id.* at 6.

[3] PURA § 39.602(1)(A) (emphasis added).

[4] PURA § 39.602(1).

[5] ERCOT Ex. 1, Ögelman Dir at 10 n. 7; ERCOT Ex. 8 Rebuttal Testimony and Attachments of Kenan Ögelman (Ögelman Reb.) at 19.

not "***competitive*** market participants,"[6] and they are not similarly situated to defaulting competitive entities. First, electric cooperatives have captive customers (their "members") to fund remaining amounts owed from February, while competitive market participants do not. Second, the electric cooperatives in default from February are still participating in the ERCOT market, while the competitive entities that have defaulted have exited and relinquished any available credit to ERCOT. Recognizing these differences, the Legislature determined that ERCOT should continue to pursue payment from the defaulting cooperatives, and should not finance their costs and spread them to other wholesale market participants. This is why the Legislature defined the Default Balance as the amounts unpaid by "competitive" wholesale market participants, and provided a separate mechanism for cooperatives to securitize their costs from February under Senate Bill (SB) 1580.

II. ARGUMENT AND AUTHORITIES

A. Consistent with the plain language of PURA § 39.602(1) and legislative intent, the Default Balance should not include amounts that cooperatives owe to ERCOT.

PURA § 39.602(1) unambiguously excludes amounts cooperatives owe to ERCOT from the Default Balance to be securitized under Subchapter M. "Default Balance" is defined as "an amount of money not more than $800 million that includes only: (A) amounts owed to the independent organization by ***competitive*** wholesale market participants from the period of emergency that otherwise would be or have been uplifted to other wholesale market participants…"[7] as well as CRR funds used to temporarily reduce short pays and ERCOT's costs to implement a financing order.[8] The term "competitive" must be given meaning within this definition.[9] If all wholesale market participants are "competitive" by virtue of their wholesale

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[6] PURA § 39.602(1)(A) (emphasis added).

[7] (Emphasis added).

[8] PURA § 39.602(1)(B)-(C).

[9] Tex. Gov't Code § 311.021("In enacting a statute it is presumed that:…(2) the entire statute is intended to be effective…"); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (quoting *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex.1987)) ("Consistent with these fundamental principles, we 'give effect to all the words of a statute and [do] not treat any statutory language as surplusage if possible.'").

sales, then the modifier "competitive" in Subchapter M would have no meaning. Instead, by using the word "competitive," the Legislature limited the Default Balance to entities that are solely competing in wholesale and retail markets, and are not recovering their costs through tariffed retail rates charged to captive customers. ERCOT witness Mr. Taylor explained in his rebuttal testimony that the defaulting cooperatives have not opted into retail competition,[10] so they are not considered "***competitive***" wholesale market participants and the amounts they owe cannot be included in the Subchapter M Default Balance.[11]

Legislative history confirms that cooperatives' debts are excluded from Subchapter M because the Legislature authorized a separate securitization process for cooperatives under SB 1580. The Senate added the "Default Balance" definition into HB 4492, which was ultimately incorporated into the final bill in conference.[12] In the Senate Business and Commerce Committee hearing for HB 4492, Senator Hancock (the Senate sponsor) explained that HB 4492 "builds on [the Electric Cooperative Securitization Bill—SB 1580] by creating an account at the Office of the Comptroller and authorizes a transfer from the Economic Stabilization Fund to be used as a loan to ERCOT for ***the remaining*** default invoices…"[13] In referencing the "remaining" invoices, Senator Hancock meant the balances from competitive entities that were not eligible for recovery under SB 1580. As ERCOT witness Mr. Ögelman explained, SB 1580, rather than Subchapter M, is the intended vehicle for cooperatives to obtain financing for their debts from February.[14] The two bills work together to allow securitization of the total unpaid invoices for all wholesale market

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[10] TIEC recognizes that generation and transmission cooperatives to not directly serve retail customers; they serve distribution cooperatives who serve member customers at tariffed rates. Nonetheless, these generation and transmission cooperatives earn recovery of and on their investment through tariffed rates, and do not rely on competitive cost recovery.

[11] ERCOT Ex. 10, Rebuttal Testimony and Attachments of Sean Taylor (Taylor Reb). at 13.

[12] *See* Senate Amendments Section-by-Section Analysis at 15 (available at: https://capitol.texas.gov/tlodocs/87R/senateamendana/pdf/HB04492A.pdf#navpanes=0) (adding the 'Default balance' definition to include only amounts owed by competitive wholesale market participants); Conference Committee Report at 8 (May 30, 2021) (available at: https://lrl.texas.gov/scanned/87ccrs/hb4492.pdf#navpanes=0) (including the same applicable language).

[13] Senate Business Committee on Business & Commerce Recorded Hearing at 2:09 (available at: https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=16131) (emphasis added).

[14] ERCOT Ex. 1, Ögelman Dir. at 19.

participants. Therefore, electric cooperatives must use SB 1580 to fund their unpaid invoices from February and may not socialize them to other market participants under Subchapter M.

B. Excluding cooperatives' debt from the Default Balance is not discriminatory.

Some electric cooperatives argued that excluding cooperatives' debts from the Subchapter M default balance would be discriminatory.[15] However, unlike competitive market participants who defaulted, forfeited their collateral, and exited the market, the defaulting electric cooperatives have captive ratepayers and have continued to actively participate in the ERCOT market since February. Recognizing that these cooperatives have the means to ultimately pay their bills, the Texas Legislature, not ERCOT or the PUC, made the decision to exclude cooperatives from securitizing and socializing their debts under Subchapter M.[16] There is no justification for requiring the entire wholesale market to pay the debts of defaulting cooperatives when they have the opportunity finance those balances under SB 1580 and continue participating in the ERCOT market as their customers pay off the debt over time.[17]

Importantly, even though cooperatives' debts cannot be securitized under Subchapter M, the Default Balance proceeds will be distributed to ***all*** short-paid market participants, including cooperatives.[18] Each cooperative will receive its pro rata share of the Default Balance proceeds as either satisfaction of short-paid amounts the cooperative is owed or a credit against the cooperative's debt to ERCOT.[19] Accordingly, cooperatives will be treated the same as all other wholesale market participants in receiving both the benefits and burdens of Subchapter M securitization.

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[15] *See, e.g.* Rayburn Ex. 1, Testimony of Julie Carey at 5-6; Docket No. 52321, Golden Spread Electric Cooperative Inc's Statement of Position at 5-6 (Aug. 12, 2021).

[16] ERCOT Ex. 10, Taylor Reb. at 13.

[17] *See* PURA § 41.153 (c) ("Securitized charges shall be collected and allocated ***among customers*** in the manner provided by the financing order"); PURA § 41.156 (a) ("A financing order shall include terms ensuring that the imposition and collection of securitized charges authorized in the order shall be nonbypassable and apply to all customers connected to the electric cooperative's system assets and taking service, regardless of whether the system assets continue to be owned by the electric cooperative.").

[18] ERCOT Ex. 8, Ögelman Reb. at 17-18.

[19] *Id.* at 18.

III. CONCLUSION

The Texas Legislature created PURA Chapter 39, Subchapter M to securitize amounts owed to ERCOT by "***competitive*** wholesale market participants,"[20] meaning entities that rely solely on competitive markets for their cost recovery and not tariffed rates. Electric cooperatives are not "competitive" and including their defaults in this financing would contradict the Legislature's explicit intent for cooperatives to securitize their debts under SB 1580. Unlike the defaulting competitive market participants, the cooperatives remain a part of ERCOT's wholesale market and the cooperatives' members, rather than other market participants, should pay to securitize the cooperatives' debt. TIEC respectfully requests that the Commission reflect these conclusions in its final order.

Respectfully submitted,

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ATTORNEYS FOR TEXAS INDUSTRIAL ENERGY CONSUMERS

[20] PURA § 39.602(1)(A) (emphasis added).

CERTIFICATE OF SERVICE

I, John R. Hubbard, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 1st day of September 2021 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.

/s/ John Hubbard
John R. Hubbard