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APPLICATION OF ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. FOR A DEBT OBLIGATION ORDER PURSUANT TO CHAPTER 39, SUBCHAPTER M, OF THE PUBLIC UTILITY REGULATORY ACT	**§**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.'S POST-HEARING BRIEF

Electric Reliability Council of Texas, Inc. ("ERCOT") requests that the Public Utility Commission of Texas ("Commission") issue a Debt Obligation Order allowing ERCOT to obtain $800 million of Default Balance financing from the Texas Comptroller of Public Accounts ("Comptroller") in accordance with Section 39.603 of the Public Utility Regulatory Act ("PURA").[1] Allowing ERCOT to finance the Default Balance will help preserve the integrity of the electricity market in the ERCOT power region, consistent with the legislative intent expressed in PURA § 39.601.

ERCOT will apply the proceeds of the financing to defray the costs of implementing the Debt Obligation Order, to pay the short-paid market participants for the energy and ancillary services they provided during the February 2021 winter storm event, and to replenish the Congestion Revenue Right ("CRR") auction revenue funds that ERCOT used to temporarily reduce amounts short-paid to market participants. ERCOT will service the debt by collecting

[1] PURA is codified in Title II of the Texas Utilities Code. Tex. Util. Code §§ 11.001 – 66.016. "Default Balance" means an amount of money of not more than $800 million that represents (1) amounts owed to ERCOT by competitive wholesale market participants from the Period of Emergency that would be or have been uplifted to other wholesale market participants; (2) financial revenue auction receipts used by ERCOT to temporarily reduce amounts short-paid to wholesale market participants related to the Period of Emergency; and (3) reasonable costs incurred by ERCOT to implement a debt obligation order under PURA § 39.603, including the cost of refinancing existing debt owed by ERCOT. *See* PURA § 39.602(1).

Default Charges from all market participants except those exempted by statute from those charges.[2]

No party opposes ERCOT's request for a Debt Obligation Order, and in fact most parties filed testimony or statements of position affirmatively supporting ERCOT's request.[3] In addition, most parties either support or do not oppose ERCOT's proposed methods for calculating and assessing the Default Charges. From ERCOT's perspective, the only disputed issues for the Commission to decide in this docket are the following:

1. In what priority should ERCOT apply the proceeds of the Default Balance financing?
2. Should Qualifying Scheduling Entities ("QSE") be ultimately responsible for paying Default Charges, consistent with all other charges to ERCOT market participants,[4] or should Load-Serving Entities ("LSE") and Resource Entities be ultimately responsible for payment of the Default Charges?
3. Is there a monthly cap on the amount of Default Charges that ERCOT may charge to QSEs and CRR Account Holders?

ERCOT will address those three issues in this post-hearing brief.

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[2] PURA § 39.602 defines Default Charges as "charges assessed to wholesale market participants to repay amounts financed under [PURA Chapter 39, Subchapter M] to pay the default balance." PURA § 39.151(j-1) expressly prohibits ERCOT from uplifting short-paid amounts to a municipally-owned utility that became subject to ERCOT's jurisdiction on or after May 29, 2021 and before December 30, 2021. Furthermore, PURA § 39.603(f) prohibits ERCOT from collecting Default Charges from a market participant that: (1) otherwise would be subject to a Default Charge solely as a result of acting as a central counterparty clearinghouse in wholesale market transactions in the ERCOT power region; and (2) is regulated as a derivatives clearing organization as defined by Section 1a, Commodity Exchange Act (7 U.S.C. Section 1a).

[3] *See, e.g.,* Austin Energy Statement of Position at 2. Statements of position are not evidence. ERCOT cites to them only to provide context for the discussion in this brief.

[4] ERCOT interacts financially with only QSEs and CRR Account Holders. Therefore, all of ERCOT's current charges and payments are transacted with those two types of entities. ERCOT Ex. 8 (Ögelman Rebuttal) at 15.

A. The Commission should approve ERCOT's proposed priority of Default Balance financing proceeds because that priority recognizes the necessity of reserving amounts to implement the Debt Obligation Order and because it strikes the appropriate balance necessary to preserve the integrity of the wholesale market.

Subchapter M does not prioritize the allocation of the Default Balance financing proceeds as between implementing the Debt Obligation order, paying short-paid market participants, and replenishing the CRR auction revenue funds. To meet all competing needs, ERCOT proposes that the $800 million in proceeds first be applied to defray the costs incurred to implement the Debt Obligation Order, including the retirement or refinancing of ERCOT's existing debt. ERCOT next proposes to pay approximately $243 million to the market participants who were short paid by competitive wholesale market participants that have since left the market.[5] ERCOT proposes to use the remaining proceeds to replenish the CRR auction revenue funds.

Several parties urge the Commission to order that ERCOT give first priority to the payment of short-paid market participants,[6] while other parties argue the Commission should require ERCOT to first replenish the CRR auction revenue funds.[7] But the retirement of existing ERCOT debt must take precedence because it is essentially a prerequisite to the financing of the Default Balance. ERCOT's Chief Financial Officer, Sean Taylor, testified that ERCOT currently has a credit facility with an unpaid balance of approximately $45 million,[8] and if that credit facility is

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[5] In direct testimony, ERCOT stated that the short payments by competitive wholesale market participants for activity during the Period of Emergency was approximately $418 million, but that ERCOT had used $100 million of the CRR auction revenue funds to reduce the short-paid amount. That left $318 million owed to the short-paid market participants for the energy and ancillary services they provided to defaulting competitive wholesale market participants during the February 2021 winter storm event. ERCOT Ex. 4 at 13. In rebuttal testimony, ERCOT witness Mr. Taylor explained that ERCOT has since refined the calculation and concluded that the market participants have actually received approximately $176 million from the CRR auction revenue funds. Therefore, the remaining amount owed to short-paid market participants for defaults by the competitive wholesale market participants is $243 million. ERCOT Ex. 10 at 13-18.

[6] *See, e.g.*, Enel Statement of Position at 4; Terraform Statement of Position at 3-4; LCRA Statement of Position at 2.

[7] *See, e.g.,* Golden Spread Statement of Position at 1; OPUC Statement of Position at 5.

[8] ERCOT Ex. 10 (Taylor Reb.) at 8.

prepaid, ERCOT will have to pay penalties of approximately $5 million.[9] ERCOT's current credit facility also contains covenants that prohibit ERCOT or any subsidiary from issuing additional debt without the lenders' consent.[10] Thus, if ERCOT were to issue additional debt without that consent, it would be in default of the credit facility, and ERCOT would have to repay the debt in full, along with significant prepayment penalties.[11]

ERCOT intends to seek consent from its lenders, but at this time ERCOT does not know whether they will consent.[12] Moreover, ERCOT will not be able to obtain the lenders' consent until the closing of the $2.1 billion debt securitization that ERCOT is seeking Commission approval of in Docket No. 52322.[13] Therefore, ERCOT must reserve approximately $50 million of the $800 million of Default Balance proceeds to retire or refinance its existing debt. If ERCOT does not reserve that amount, it simply cannot borrow the $800 million.

In addition to reserving approximately $50 million to retire or refund existing debt, ERCOT seeks Commission approval to reserve additional amounts to implement the terms of the Debt Obligation Order. Until the transaction with the Comptroller closes, ERCOT will not know the exact amount.

ERCOT requests that the second priority be the payment of approximately $243 million to market participants that were short paid by competitive wholesale market participants that have since left the market. Those short-paid market participants have already waited more than six months for payment, and it will help preserve the integrity of the wholesale market if ERCOT is

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[9] ERCOT Ex. 10 (Taylor Reb.) at 8.
[10] ERCOT Ex. 10 (Taylor Reb.) at 9.
[11] ERCOT Ex. 10 (Taylor Reb.) at 9.
[12] ERCOT Ex. 10 (Taylor Reb.) at 9. If the lenders consent, ERCOT will instead apply the amount reserved for retirement or refinancing of debt to replenish the CRR auction revenue funds. *Id.* at 10.
[13] ERCOT Ex. 10 (Taylor Reb.) at 9. Docket No. 52322 is currently pending before the Commission and is being litigated on a parallel track with this docket. *See Application of Electric Reliability Council of Texas, Inc. for a Debt Obligation Order under Subchapter N of PURA Chapter 39 and Request for Good Cause Exception*, Docket No. 52322 (filed July 16, 2021).

allowed to pay them as quickly as possible.[14] Placing $243 million in the hands of the short-paid market participants will also provide liquidity to the market.[15]

Fully replenishing the CRR auction revenue funds is important and will have to be done at some point, but using Default Balance financing proceeds only to replenish the CRR auction revenue funds will not instill as much confidence and provide as much liquidity to the market as also using those proceeds to pay short-paid market participant amounts will.[16]

One Intervenor, Golden Spread Electric Cooperative, Inc. ("Golden Spread"), argues that prioritizing payment to short-paid market participants discriminates against electric cooperatives, whereas applying the full amount of Default Balance proceeds to replenish the CRR auction revenue funds would not.[17] Golden Spread is mistaken. As ERCOT witness Mr. Taylor explained, replenishing the CRR auction revenue funds does not reduce the liability of any market participant that owes money to ERCOT. Even if ERCOT applied the entire $800 million of Default Balance proceeds to replenish the CRR auction revenue funds, it would not reduce the amounts owed by either competitive wholesale market participants or electric cooperatives.[18] Nor does the use of Default Balance proceeds to pay amounts owed by terminated competitive wholesale market participants relieve those market participants from paying the amounts they owe to ERCOT. No "credit" is being given to those terminated competitive wholesale market participants, just as no "credit" would be given to electric cooperatives if their defaults had been included in the Default Balance by the Legislature.[19] They still owe the money to ERCOT. Therefore, it is not clear how using the Default Balance financing to pay amounts owed by terminated competitive wholesale

[14] ERCOT Ex. 10 (Taylor Reb.) at 11.
[15] ERCOT Ex. 10 (Taylor Reb.) at 11.
[16] ERCOT Ex. 10 (Taylor Reb.) at 11.
[17] Golden Spread Statement of Position at 4-5.
[18] ERCOT Ex. 10 (Taylor Reb.) at 12.
[19] ERCOT Ex. 10 (Taylor Reb.) at 13.

market participants discriminates against electric cooperatives that have not been terminated and are continuing to participate in the market.

B. Imposing Default Charges on QSEs and CRR Account Holders is consistent with PURA, the Protocols, and the established settlement structure of the wholesale market.

Tenaska Power Services Co. ("Tenaska") argues that ERCOT's proposal to assess the Default Charges to QSEs and CRR Account Holders is contrary to PURA provisions requiring ERCOT to collect those charges directly from wholesale market participants such as LSEs and Resource Entities.[20] The Commission should reject that argument. PURA does not compel that result, and it is undisputed Tenaska's proposal would require ERCOT to set up new billing system software and processes to transact financially with LSEs and Resource Entities, at additional costs to all market participants.

Tenaska's primary argument is that assessing Default Charges to QSEs and CRR Account Holders contravenes PURA § 39.603(d) because the statute requires that Default Charges be imposed on all wholesale market participants except those exempted by statute. From that statutory language, Tenaska infers that ERCOT must charge the LSEs and Resource Entities directly, rather than charging QSEs.[21] Tenaska nevertheless proposes that QSEs act as "collection agents" with respect to the amounts owed by LSEs and Resource Entities, with the LSEs and Resource Entities retaining ultimate responsibility for payment of the Default Charges.[22]

In fact, nothing in PURA § 39.603(d) requires that ERCOT collect Default Charges directly from LSEs and Resource Entities. The statute simply says that ERCOT must "collect from and allocate among wholesale market participants the default charges using the same allocated pro rata

[20] Tenaska Statement of Position at 4.
[21] Tenaska Statement of Position at 4.
[22] Tenaska Statement of Position at 4-5.

methodology under which the charges would otherwise be uplifted under the protocols in effect on March 1, 2021."[23] It is indisputable that QSEs are "market participants" under the ERCOT Protocols,[24] so Tenaska errs by arguing that PURA § 39.603(d) requires ERCOT to transact directly with LSEs and Resource Entities. A more plausible reading is that the Legislature intended for ERCOT to assess Default Charges to the same market participants that it interacts with for other charges and payments, which are the QSEs and CRR Account Holders.

Indeed, to the extent PURA § 39.603(d) speaks to the issue at all, it suggests that ERCOT should allocate and charge the Default Charges consistently with the ERCOT Protocols in effect on March 1, 2021. The formula in the ERCOT Protocols for calculating uplift amounts provides that ERCOT will calculate the uplift amount at the "Counter-Party" level,[25] and it is undisputed that Counter-Parties are QSEs and CRR Account Holders, not LSEs and Resource Entities.[26]

Moreover, under well-settled principles of statutory construction, the Commission must assume that the Legislature was aware of the existing Protocols defining "market participant" to include QSEs and requiring ERCOT to interact financially with only QSEs and CRR Account Holders.[27] As such, there is no indication that the Legislature intended to change the current financial relationship between ERCOT and Counter-Parties.

Finally, Tenaska's statutory construction argument is internally inconsistent. If PURA compels ERCOT to assess and collect Default Charges directly from LSEs and Resource Entities, as Tenaska argues, then there would be no role for Tenaska to play as a "collection agent"

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[23] PURA § 39.603(d).

[24] The definition of "Market Participant" in the Protocols is, "An Entity, other than ERCOT, that engages in any activity that is in whole or in part the subject of these Protocols, regardless of whether that Entity has signed an Agreement with ERCOT. Examples of such an Entity include but are not limited to the following: . . . (b) Qualified Scheduling Entity (QSE)."

[25] ERCOT Protocol 9.19.1.

[26] The Protocols define "Counter-Party" to mean a "single Entity that is a QSE and/or a CRR Account Holder."

[27] *Dugger v. Arredondo*, 408 S.W.3d 825, 835 (Tex. 2013) (stating that it must be presumed the Legislature enacts a statute with awareness of existing law).

intermediary between ERCOT and the LSEs and Resource Entities. ERCOT would have to interact directly with the LSEs and Resource Entities.

In addition to being wrong as a matter of statutory construction, Tenaska's argument is impractical and unreasonable because it would require extensive changes to the way the ERCOT market currently operates. As ERCOT witness Kenan Ögelman testified, ERCOT currently financially interacts with QSEs and CRR Account Holders, not with other market participant types (i.e., LSEs or Resource Entities). If ERCOT were required to allocate financial responsibility directly to those market participant types, it would have to develop new billing system software that would have no purpose other than tracking financial responsibility for Default Charges.[28] ERCOT has not done any analysis on the cost impact associated with implementing new billing system software and processes, but whatever the cost is, it would be borne by ERCOT market participants, either as part of the Default Charges or under normal uplift charges.[29] The time to implement entirely new accounting systems to track Default Charges to these specific market participants – LSEs and Resource Entities – could also result in a delay in disbursing and collecting securitization funds.[30] Moreover, ERCOT would still have to maintain its existing billing systems in order to financially interact with QSEs and CRR Account Holders with respect to all financial transactions other than the assignment of responsibility for Default Charges.[31]

In addition to the billing system, ERCOT would have to obtain and keep track of the required amounts of collateral from these other market participants, rather than from QSEs and CRR Account Holders.[32] That would also impose additional costs and burdens on ERCOT, and

[28] ERCOT Ex. 8 (Ögelman Reb.) at 15.
[29] ERCOT Ex. 8 (Ögelman Reb.) at 15.
[30] ERCOT Ex. 8 (Ögelman Reb.) at 15-16.
[31] ERCOT Ex. 8 (Ögelman Reb.) at 15-16.
[32] ERCOT Ex. 8 (Ögelman Reb.) at 16.

of course those costs are ultimately borne by ERCOT market participants. It would also cause delay in implementing the Debt Obligation Order.

None of this is disputed. To the contrary, Tenaska expressly "recognizes that ERCOT does not have systems in place to enable it to allocate and collect Default Charges directly from wholesale market participants without relying on QSEs to administer this allocation and collection effort."[33] Nor does Tenaska allege that it is unable to collect the Default Charges, or that the Default Charges are somehow qualitatively different from all of the other charges that QSEs collect on behalf of LSEs and Resources Entities. In its role as a QSE, Tenaska already assumes responsibility for the charges assessed to the LSEs and Resource Entities for which Tenaska serves as QSE, and it should assume responsibility for payment of the Default Charges as well.

Tenaska has not provided a valid reason for the Commission to require ERCOT to implement new billing processes solely for Default Charges, with all of the expense and delay that such a change would entail. Accordingly, the Commission should reject Tenaska's argument.

C. Nothing in PURA or the ERCOT Protocols caps the monthly Default Charge that ERCOT may assess.

Vitol argues that "a monthly cap is implied by the calculation of the monthly Default Charge related to the securitization of the Default Balance Obligation."[34] According to Vitol, that cap is $2.5 million per month.[35] Vitol confuses the Protocol default uplift process requirement that allows ERCOT to uplift a maximum of $2.5 million per month with the Legislature's clear intent to create a separate and distinct debt financing mechanism in PURA. As such, Vitol is wrong, because there is no monthly Default Charge cap either stated or implied in PURA.

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[33] Tenaska Statement of Position at 4. Tenaska offered no evidence at the proceeding and questioned no witnesses. Its Statement of Position and its counsel's opening statement are not evidence.

[34] Vitol Statement of Position at 3. Vitol did not appear at the hearing on the merits and did not present any evidence or cross-examination related to this issue. Nevertheless, in an abundance of caution, ERCOT will address it briefly.

[35] Vitol Statement of Position at 3.

Vitol's argument is also flawed because it would render the entire statutory scheme erected by the Legislature a nullity. As ERCOT witness Charles Atkins testified, "Limiting the monthly Default Charge payments to $2.5 million per month would preclude the full payment of bond interest and ongoing financing costs, which would be inconsistent with the statute."[36]

D. ERCOT requests that the Commission authorize the development of new Protocols to implement the Debt Obligation Order.

The current ERCOT Protocols do not contain any provisions governing the assessment and collection of Default Charges. Transparency of the obligations imposed by the Debt Obligation Order, including the assessment and collection of Default Charges, on existing and new wholesale market participants is paramount going forward for the next 30 years. ERCOT accordingly requests that the Commission order the creation of a new Protocol section that will govern the assessment and collection of Default Charges consistent with the requirements of the Debt Obligation Order.

Requested Relief

ERCOT requests that the Commission issue a Debt Obligation Order authorizing ERCOT to secure $800 million of Default Balance financing from the Comptroller and to distribute the proceeds of that financing in the priority discussed in this post-hearing brief. ERCOT further requests that the Commission reject Tenaska's proposal to require that LSEs and Resource Entities bear ultimate responsibility for payment of Default Charges, and that the Commission reject Vitol's proposal to cap the monthly default charge at $2.5 million. Finally, ERCOT requests that the Commission order ERCOT, in conjunction with other stakeholders, to develop new Protocols to implement the provisions of the Debt Obligation Order.

[36] ERCOT Ex. 9 (Atkins Reb.) at 9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This document was filed on the Commission Interchange website on September 1, 2021. In accordance with Order No. 2 in this docket, filing a document on the Commission's Interchange website constitutes service of the document on all parties to this proceeding.

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