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

**ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.’S
BRIEF IN RESPONSE TO ORDER NO. 2
REGARDING AUTHORITY FOR REQUESTED GOOD-CAUSE EXCEPTION**

Electric Reliability Council of Texas, Inc. (“ERCOT”) files this brief in response to Order No. 2 in this docket, which requires briefing regarding the legal authority under which the Administrative Law Judge (“ALJ”) “may grant ERCOT’s request for a good cause exception to ERCOT Nodal Protocols § 1.3.1.1(j).”¹ As explained in this brief, the ALJ has authority to grant a good cause exception to Protocol § 1.3.1.1(j)² under the Public Utility Regulatory Act (“PURA”)³ and under the procedural rules governing cases before the Public Utility Commission of Texas (“Commission”).

I. Background

Protocol § 1.3.1 states that ERCOT may not disclose “Protected Information” received from a Disclosing Party to any other entity except as specifically permitted in Section 1 and other parts of the Protocols.⁴ Protocol § 1.3.1.1(1) lists numerous categories of Protected Information,

¹ Docket No. 52321, Order No. 2 Finding Application Sufficient and Notice Reasonable, Memorializing Prehearing Conference, and Adopting Amended Procedural Schedule at 1 (July 29, 2021).

² For the sake of brevity, ERCOT uses only the term “Protocol” to refer to each of the ERCOT Nodal Protocols discussed in this brief.

³ PURA is codified in Title II of the Texas Utilities Code. *See* Tex. Util. Code §§ 11.001-66.016.

⁴ “Disclosing Party” is defined in the Protocols as ERCOT, the Independent Market Monitor, or any Market Participant in its capacity as the provider of Protected Information to one of the others. Protocol § 1.3(2)(b).

one of which is “Settlement Statements and Invoices identifiable to a specific” Qualified Scheduling Entity (“QSE”). Protocol § 1.3.1.1(1)(j) prohibits ERCOT from publicly disclosing the settlement statements and invoices identifiable to a specific QSE until 180 days after the applicable operating day.

In this docket, one of the primary issues is likely to be the extent to which ERCOT Market Participants were short-paid for activity during the Period of Emergency.⁵ Because ERCOT interacts with Market Participants only through QSEs, it may be necessary for ERCOT to disclose settlement statements and invoices that are identifiable to a specific QSE in order for the Commission to quantify the short-paid amounts. Parties may also seek other information in discovery that would require ERCOT to disclose settlement statement and invoices identifiable to a specific QSE. But because 180 days have not elapsed since the Period of Emergency, ERCOT cannot publicly disclose settlement statements and invoices identifiable to a specific QSE without a waiver from the Commission or a good cause exception to Protocol § 1.3.1.1(1)(j).

II. Existing Authority to Disclose Protected Information to Parties

ERCOT already has authority to produce settlement statements and invoices identifiable to a specific QSE in response to discovery requests in this case, but that authority is limited. As a party to a Commission proceeding, ERCOT is required by law to respond to discovery propounded by parties in that proceeding,⁶ and Protocol § 1.3.6(1)(a) expressly allows ERCOT to disclose Protected Information if the disclosure is to “governmental officials, Market Participants, the public, or others as required by any law, regulation, or order, or by these Protocols.”

⁵ “Period of Emergency” means the period beginning 12:01 a.m., February 12, 2021, and ending 11:59 p.m., February 20, 2021. Tex. Util. Code § 39.652(3).

⁶ 16 Tex. Admin. Code (“TAC”) § 22.141.

However, Protocol § 1.3.6(1)(a) also requires ERCOT to make reasonable efforts to restrict public access to the disclosed Protective Information by protective order, by aggregating information, or otherwise if reasonably possible. Thus, with respect to settlement statements and invoices still within the 180-day confidentiality period, ERCOT can currently disclose that information in response to a discovery request if ERCOT follows the procedures set forth in the Protective Order; however, any such disclosure could only be made to those parties in this case who have signed the requisite Protective Order certifications. ERCOT will not be able to disclose the settlement statements and invoices publicly until either the 180-day confidentiality period expires or, as is requested here, an order is issued by the ALJ that specifically authorizes ERCOT to disclose this information without having to follow the Protective Order procedures.⁷

III. Need for Public Disclosure

For numerous reasons, ERCOT believes that the settlement statements and invoices identifiable to a specific QSE should be publicly available, rather than being restricted to parties in this docket. First, most of the default charges resulting from this docket may ultimately be paid by end-use customers in ERCOT, and those customers have a right to know what amount they will be asked to pay and how that amount was calculated. Indeed, the Commission has concluded that the public's need to understand the events that occurred during the February 2021 winter storm

⁷ Calpine has filed a statement of position suggesting that ERCOT's request for a good cause exception may inadvertently result in disclosure of other Protected Information because ERCOT requested a good cause exception for "settlement and invoice *information*." ERCOT notes that information is only considered "Protected Information" under the ERCOT Protocols if it is specifically identified as such in Protocol § 1.3.1.1(1). No other subparagraph in Protocol § 1.3.1.1(1) makes reference to settlement statements or invoices other than Protocol § 1.3.1.1(1)(j), and that is the only subparagraph of Protocol § 1.3.1.1(1) for which ERCOT is requesting an exception. Accordingly, ERCOT does not believe granting the requested exception would result in inadvertently allowing for disclosure of information deemed Protected Information under other subparagraphs of Protocol § 1.3.1.1(1).

creates a heightened need for disclosure of information that would otherwise remain protected under the ERCOT Protocols.⁸

Second, it is likely that the \$800 million available for financing under PURA § 39.603 will not be sufficient to pay all of: (1) the amounts owed to ERCOT by competitive wholesale market participants from the Period of Emergency that otherwise would be or have been uplifted to other wholesale market participants; (2) the financial auction revenue 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. If the total of those amounts exceeds the available funds, it will be important for all parties and other stakeholders to determine how ERCOT calculated the amounts. The settlement statements and invoices identifiable to a specific QSE could be critical to those determinations.⁹

Third, the settlement statements and invoices at issue will not remain Protected Information for much longer regardless of what happens in this case. As noted earlier, the Period of Emergency encompassed the period from February 12, 2021 through February 20, 2021, so at least 160 days have elapsed since the last operating day within the Period of Emergency. Given that the settlement statements and invoices will no longer be designated as Protected Information by the time the hearing on the merits begins on August 23, 2021, it is logical to remove that designation at a time when parties can use them to develop information that might be probative in the hearing on the merits.

⁸ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Requiring ERCOT to Disclose Certain Generator Outage Information at 2 (Mar. 12, 2021).

⁹ If the settlement statements and invoices were marked as “Confidential” in accordance with the Protective Order in this docket, other parties who signed Protective Order certifications would presumably be able to review those settlement statements and invoices. However, if a Disclosing Party were to insist that its settlement statements and invoices be designated as Highly Sensitive Protected Information, wholesale market participants’ review of that information would be curtailed.

IV. Authority to Order Public Disclosure

As noted earlier, the Commission has already concluded that it has authority under PURA § 39.151(d) to waive the Protocol § 1.3.1.1 prohibition on disclosure of Protected Information when expedited disclosure is necessary to inform the public about the February 2021 winter storm event.¹⁰ Thus, the only remaining question for purposes of this briefing is whether the ALJ has independent authority to waive the prohibition on disclosure of Protected Information or to grant a good-cause exception to it.

The Commission's procedural rules grant an ALJ the decision making authority set out in the Commission rules, the Government Code, the Administrative Procedure Act, and PURA.¹¹ The procedural rules also grant an ALJ "broad discretion in conducting the course, conduct, and scope of the hearing,"¹² and an ALJ may "take any other action not prohibited by law or by commission rule which is necessary for an efficient and fair hearing."¹³ Thus, under those procedural rules, the ALJ appears to have the authority to order expedited disclosure of the settlement statements and invoices identifiable to a specific QSE.

The ALJ also has the explicit authority to grant a good cause exception to any requirement in the Commission's procedural rules or in a Commission-prescribed form.¹⁴ Because the standard Protective Order approved in this docket is the Commission's prescribed form of protective order, the ALJ has authority to approve exceptions to that Protective Order. ERCOT requests that the ALJ grant a good cause exception allowing ERCOT to disclose the settlement statements and

¹⁰ Project No. 51812, Order Requiring ERCOT to Disclose Certain Generator Outage Information at 2.

¹¹ 16 TAC § 22.202(a).

¹² 16 TAC § 22.202(c).

¹³ *Id.*

¹⁴ 16 TAC § 22.5(b).

invoices identifiable to a specific QSE without designating them as Confidential or Highly Sensitive Protected Material under the Protective Order.

Finally, the Commission rule on ERCOT governance expressly contemplates that, in contested case proceedings before the Commission, parties will have an opportunity to present information regarding whether information that has been designated as Protected Information under the ERCOT Protocols should remain confidential.¹⁵ That rule implies that the Commission or its designee (i.e., an ALJ) may authorize public disclosure of documents that would otherwise qualify as Protected Information.

V. Prayer

For the reasons set forth in this brief, ERCOT prays that the ALJ find that ERCOT may publicly disclose settlement statements and invoices identifiable to a specific QSE less than 180 days after the operating day.

¹⁵ 16 TAC § 25.362(e).

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CERTIFICATE OF SERVICE

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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