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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	§ § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

LUMINANT ENERGY'S BRIEF REGARDING AUTHORITY FOR REQUESTED GOOD-CAUSE EXCEPTION

Luminant Energy Company LLC (Luminant Energy) files this Brief pursuant to Order No. 2 and in Response to the Electric Reliability Council of Texas' (ERCOT's) Brief Regarding Authority for Requested Good-Cause Exception. The Order requires intervenors' briefs to be submitted by 3:00 p.m. on August 3, 2021. This Brief is timely filed.

I. INTRODUCTION

On July 16, 2021, ERCOT filed an application for a financing order under Subchapter N of PURA Chapter 39. In its application, ERCOT requested a "good cause exception" to ERCOT Nodal Protocol (Protocol) 1.3.1.1(j) "to the extent it may become necessary during the course of this proceeding to disclose individual market participants' settlement and invoice information in discovery."

On July 29, 2021, in Order No. 2, ERCOT was instructed to file a brief outlining the legal authority supporting its request by July 30, 2021. In its brief, ERCOT asserted that (1) PURA § 39.151(d) provides the Commission authority to waive Protocol 1.3.1.1(j) and (2) in a March 12, 2021 order, a former sole Commissioner "already concluded that [the Commission] has authority" under that statute to waive requirements of Protocol 1.3.1.1. *See* ERCOT'S Brief at 4. Commission Staff and any intervenors were instructed to file responsive briefs by August 3, 2021. Luminant Energy files this brief because (1) it disagrees with ERCOT's statutory argument and (2) it is not necessary to grant an exception, when discovery can readily be conducted under a protective order and the protected information will become unprotected by mid-August.

II. A GOOD-CAUSE EXCEPTION IS NEITHER AUTHORIZED NOR NECESSARY

A. Section 39.151(d) does not provide the Commission authority to grant a good-cause exception to an ERCOT Protocol.

Neither PURA § 39.151(d) nor any other statutory provision allows the Commission to waive or grant an exception to an ERCOT Protocol without following the Protocol revision process or the Administrative Procedure Act (APA).

PURA § 39.151(d) provides that the Commission may "delegate to an independent organization responsibilities for adopting or enforcing" "rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants." Tex. Util. Code § 39.151(d). These rules remain "subject to commission oversight and review." *Id.*

Under a delegation from the Commission, ERCOT adopted the Protocols, which govern all participants in the ERCOT electricity market and are intended to ensure the orderly functioning of the market. Protocol §§ 1.1-1.2. "The Electric Reliability Council of Texas (ERCOT) Protocols [were] created through the collaborative efforts of representatives of all segments of Market Participants." *Id.* § 1.1(1). The Protocols are considered rules with the force and effect of law. *See Pub. Util. Comm'n of Tex. v. Constellation Energy Commodities Grp., Inc.*, 351 S.W.3d 588, 594-95 (Tex. App.—Austin 2011, pet. denied).

The Protocols themselves establish how they can be modified—through the Protocol revision process. Protocol § 21. ERCOT may request a Protocol revision, *Id.* § 21.2; must describe the reason for the suggested change and the impacts and benefits of the suggested change on the ERCOT market and market participants, *Id.* §§ 21.4.1(2), (4), 21.4.6, 21.4.8(4); and the request is then considered through the process laid out in Protocol 21, which includes the opportunity for comment by market participants, *Id.* § 21.4.5. An "urgent" revision request process is available when "an existing Protocol or condition is impairing or could imminently impair ERCOT System reliability or wholesale or retail market operations." *Id.* § 21.5(1), (3).

The Protocols also establish how, consistent with PURA § 39.151(d), the Commission can provide "oversight and review" of ERCOT Protocols. All Protocol revisions finally approved by the ERCOT Board must be filed with the Commission, and any market participant can appeal the approval or denial of a revision to the Commission. Protocol §§ 21.6(3)(a), 21.4.11.3(1). If the Commission disagrees with ERCOT's decision to adopt a revision, the Commission can reject that decision, and no revision adopted by ERCOT can take effect before receiving Commission approval. Tex. Util. Code § 39.151(d).

Once a Protocol is adopted or revised by ERCOT through its rulemaking procedures, if the Commission itself wants to amend the Protocols, it must do so through the APA rulemaking procedures. *See* Tex. Gov't Code § 2001.001; *Mosley v. Tex. Health & Human Servs. Comm'n*, 593 S.W.3d 250, 258 (Tex. 2019) ("The APA's provisions … generally apply to all state agencies."). PURA § 39.151(d) does not provide otherwise—and does not permit the Commission to provide a Protocol waiver or exception by fiat. While § 39.151(d) grants the Commission *substantive* authority to oversee ERCOT and its rules, and to withhold approval for a Protocol revision, it does not create a new *procedural* mechanism for waiving or granting an exception from an ERCOT Protocol. *See Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 130 (Tex. 2017) ("Any power an agency … has is directly conferred by the Legislature.").

Indeed, the Commission's rules do not purport to provide the Commission—or the Administrative Law Judge (ALJ)—authority to grant the type of waiver or exception requested here. The Texas Administrative Code (TAC) provides that the Commission has authority to grant a "good cause exception" in two *other* contexts. 16 TAC § 22.5(b) provides that the Commission may grant an exception from "any requirement in this chapter or in a commission-prescribed form for good cause." 16 TAC § 25.3(b) similarly provides that the Commission "may make exceptions to this chapter for good cause." There is no similar provision allowing the Commission to make an exception to an ERCOT Protocol. *Compare* 16 TAC § 22.251(c) (entities ordinarily "must use … Section 21 of the Protocols (Process for Protocol Revision) … before presenting a complaint to the commission").

ERCOT—not the Commission—possesses the power to amend its Protocols. That is why 16 TAC § 22.251(o) authorizes the Commission, when it determines in a complaint proceeding that corrective action is needed by ERCOT, to direct ERCOT to develop Protocol revisions. It does *not* authorize the Commission to unilaterally change ERCOT's Protocols by Commission action. Nor does the ALJ have such authority, since the ALJ's authority flows from the Commission's. *See* 16 TAC § 22.202(a).

The fact that a prior Commissioner entered an order purporting to waive an ERCOT Protocol does not change this analysis. The Commission lacked statutory authority to do so in the March 12, 2021 order; the Commission should not repeat that usurpation of authority again now. Indeed, the Commission's erroneous attempts to amend rules by fiat, without compliance with the APA or Protocol revision process, is the subject of two appeals pending in the Texas Third Court of Appeals. *See Luminant Energy Co. LLC v. Pub. Util. Comm'n of Tex.*, Nos. 03-21-00098-CV & 03-21-00108-CV.#

B. Waiver of Protocol 1.3.1.1(j) is not necessary.

Protocol 1.3.1.1(j) provides "Protected Information status" to "Statements and Invoices identifiable to a specific QSE" for "180 days after the applicable Operating Day." Protocol § 1.3.1.1(j). ERCOT requests a "good cause exception" to this Protocol "to the extent it may become necessary during the course of this proceeding to disclose individual market participants' settlement and invoice information in discovery." But ERCOT does not claim (and has not shown) that granting an exception to this Protocol is necessary—or that market participants' settlement and invoice information cannot adequately be exchanged by the parties in discovery under a protective order.

Instead, ERCOT claims that it "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." *See* ERCOT Brief at 3. That is not ERCOT's decision to make. The market participants about whom ERCOT seeks to disclose confidential and proprietary information are *competitive* companies, not regulated "electric utilities." *See* Tex. Util. Code § 31.002(6). Protocol 1.3.1.1(j)—which was "created through the collaborative efforts of representatives of all

segments of Market Participants," Protocol § 1.1(1)—provides that this information is protected from public disclosure for 180 days, not some lesser period decided by ERCOT. That length of time represents an acknowledgement that 180 days is a reasonable time after which public disclosure will not cause competitive harm. *See id.* § 1.3.1.1(j). ERCOT's request to unilaterally shorten that time period gives no consideration to the harm its request may impose on market participants. Requiring consideration of input from market participants is yet another reason why Protocol revisions must be done through the Protocol revision process and not by administrative fiat.

As ERCOT concedes, the Protected Information will become unprotected under the Protocols by mid-August. Any need for "public" disclosure can be met after that date, without the Commission acting beyond its statutory authority to grant a "good cause exception."

III. CONCLUSION AND PRAYER

For all the foregoing reasons, the Commission lacks statutory authority to grant a "good cause exception" to Protocol 1.3.1.1(j). Accordingly, Luminant Energy respectfully asks the Commission to reject ERCOT's request.

Respectfully submitted,

By: Samuel A. Siegel /s/ (with permission)
Samuel A. Siegel
State Bar No. 24066083

Luminant Energy
6555 Sierra Drive
Irving, Texas 75039
214-812-0070
samuel.siegel@vistracorp.com

Stephanie Zapata Moore
Executive Vice President & General Counsel
State Bar No. 24008328
Daniel Jude Kelly
Sr. Vice President & Dep. General Counsel
State Bar No. 24041229

Vistra Corp.
6555 Sierra Drive
Irving, Texas 75039
214-875-8183
stephanie.moore@vistracorp.com
dan.kelly@vistracorp.com

William A. Moore
State Bar No. 00794330
Melissa Lorber
State Bar No. 24032969
Mandy Kimbrough
State Bar No. 24050613
Shelby O'Brien
State Bar No. 24037203
Christopher Kirby
State Bar No. 24116620
Enoch Kever PLLC
7600 N. Capital of Texas Hwy
Building B, Suite 200
Austin, Texas 78731
512-615-1200
bmoore@enochkever.com
mlorber@enochkever.com
mkimbrough@enochkever.com
sobrien@enochkever.com
ckirby@enochkever.com

Michael L. Raiff
State Bar No. 00784803
Allyson N. Ho
State Bar No. 24033667
Gibson, Dunn & Crutcher LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
214-698-3100 / 214-571-2900 fax
mraiff@gibsondunn.com
aho@gibsondunn.com

ATTORNEYS FOR LUMINANT ENERGY