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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 N, FOR AN ORDER
INITIATING A PARALLEL DOCKET,
AND FOR A GOOD CAUSE
EXCEPTION**

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**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

**INITIAL BRIEF
OF JOINT INTERVENORS**

This Initial Brief is filed on behalf of Just Energy,¹ Gexa,² APG&E,³ and Southern Federal Power,⁴ (collectively, “Joint Intervenors”). In addition to this consolidated brief, the same parties participate in a joint brief with other consolidated parties regarding other issues in this proceeding. The hearing on the merits provided the Commission with extensive testimony on the allocation of proceeds from the securitization pursuant to the terms of the applicable statute.⁵ In sum:

- As verified by the testimony before the Commission, by using the term “exposure,” the statute provides a clear framework on the distribution of proceeds under the Subchapter N Securitization.
- Exposure is a term used in the protocols that the Electric Reliability Council of Texas (“ERCOT”) implements every day regarding the net aggregate financial liability in the credit calculation.
- Further, the \$2.1 Billion cap indicates that the legislation requires the financing to include costs with the corresponding offsets, rather than a gross basis that would require some proration of proceeds for which no recognition is made in the statute.

Without the offsets as used in ERCOT’s calculation of exposure, the purpose of the

¹ “Just Energy” collectively refers to Just Energy Texas, LP, which holds REP Certificate No. 10052, Fulcrum Energy d/b/a Amigo Energy, which holds REP Certificate No. 10081, Tara Energy, which holds REP Certificate No. 10051, and Hudson Energy Services, LLC, which holds REP Certificate No. 10092.

² “Gexa” refers to Gexa Energy, LP, which holds REP Certificate No. 10027.

³ “APG&E” refers to AP Gas & Electric (TX) LLC, which holds REP Certificate No. 10105.

⁴ “Southern Federal Power” refers to Southern Federal Power LLC, which holds REP Certificate No. 10264.

⁵ HB 4492 Act of May 30, 2021, 87th Leg., R.S. (to be codified at Tex. Util. Code § 39.651(c)), (“HB 4492”).

financing order would not be met and material percentage of the actual exposure of the eligible costs would not be addressed.

I. CALCULATION OF EXPOSURE (BASE CASE)

A. The Record Evidence Supports Calculating Exposure on a Net Basis Across a Corporate Family.

In calculating exposure under HB 4492, the record evidence supports that the amounts paid within the same corporate umbrella for the ancillary service obligation of the Qualifying Scheduling Entity (“QSE”) representing a load serving entity (“LSE”) must be offset. Staff witness Carrie Bivens testified that “[e]xposure should be calculated on a net basis taking into consideration the larger corporate structure of an LSE and the other market participants within that corporate structure.”⁶

This is grounded on the plain language of PURA Subchapter N.⁷ While the statute defines uplift balances to include ancillary service costs above \$9,000/MWh and reliability deployment price adder (“RDPA”) costs, it does not allow full recovery of all of these costs. The statute requires that in order for proceeds to be available, there must be not only a demonstration of certain costs, but also “exposure” to those costs. In construing statutes, the text must be “read . . . as a whole so as to render no part inconsistent, superfluous, or devoid of meaning.” *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017). Further, the Texas Supreme Court instructs that statutory construction should interpret “each word, phrase, and clause in a manner that gives meaning to them all.” *Id.* As explained below, the inclusion of the cap and the use of the term *exposure*, read as a whole, support the use of offsets within the corporate umbrella for the specific charges and payments for the individual elements of cost in the statute. This does not contemplate a review of total revenues or profits or hedges in the financial markets of any kind. Instead it focuses solely on charges and payments between market participants and ERCOT for each specific element of cost defined in the term “uplift balance.”⁸ Accordingly, it is important that the distribution of the financing proceeds be “be aggregated so that the requested financing amount nets among affiliated entities.”⁹

⁶ Direct Testimony of Carrie Bivens, Staff Ex. 2 at 9:23-25.

⁷ HB 4492 at § 39.653(b)(3); Direct Testimony of Carrie Bivens, Staff Ex. 2 at 9:28-10:2.

⁸ HB 4492 at § 39.651.

⁹ Direct Testimony of Carrie Bivens, Staff Ex. 2 at 4:26-27.

The record evidence establishes that the \$2.1 Billion cap on Subchapter N financing was set based on the presumption that exposure would be on a net basis. Ms. Bivens stated that it is the \$2.1 Billion cap that presents the “most material concern with regard to not netting.”¹⁰

The evidence highlights a major practical limitation of the Subchapter N financing that the Commission must consider. Because the \$2.1B cap was set based on netting, a departure from that method adds significant complexity to the distribution of proceeds.¹¹ “If financing is calculated on a gross basis, the total amount requested is expected to exceed the financing cap of \$2.1 billion by a *consequential sum*.”¹² “This would require a *significant proration* of financing proceeds that would *thwart the policy objective of protecting the financial integrity of the wholesale market*.”¹³

Accordingly, the testimony supports a finding that calculating exposure on a net basis also serves important statutory policy objectives. The stated policy objective of Subchapter N is “stabilizing the ERCOT wholesale electricity market by alleviating liquidity issues and reducing the risk of additional defaults.”¹⁴ Calculating gross exposure without recognition of the difference in impact to entities who did not receive the revenues associated with the ancillary service prices over \$9,000/MWh and the RDPA fails to adequately meet this objective.¹⁵ As Ms. Bivens testified, “if an LSE is part of a larger corporate structure that *received AS payments* in excess of the *SWCAP and RDPA payments* as part of the AS imbalance settlement in an amount sufficient to offset the LSE’s exposure to these costs, then the LSE is necessarily less likely to have liquidity issues.”¹⁶

Again, the evidence shows that the \$2.1 billion cap was set based on netting, and that if netting is not adopted by the Commission, the result will be to “vastly oversubscribe the financing program such that customers and LSEs alike may be deprived of sufficient financing to overcome the hardships experienced, due to significant proration.”¹⁷ Thus, “on the whole, netting provides the most benefit to the entities likely to be in financial distress.”¹⁸

¹⁰ Direct Testimony of Carrie Bivens, Staff Ex. 2 at 12:11-15.

¹¹ See Tr. at 314:21-315:20 (Carrie Bivens on Cross Examination) (Aug. 25, 2021).

¹² Direct Testimony of Carrie Bivens, Staff Ex. 2 at 11:4-5 (emphasis added).

¹³ *Id.* at 11:5:7 (emphasis added).

¹⁴ HB 4492 at § 39.651(b)-(c); Direct Testimony of Carrie Bivens, Staff Ex. 2 at 11:25-12:2.

¹⁵ See Direct Testimony of Carrie Bivens, Staff Ex. 2 at 11:4-12:2.

¹⁶ *Id.* at 11:7-11.

¹⁷ *Id.* at 12:12-14.

¹⁸ *Id.* at 12:14-15.

B. The Record Evidence Shows ERCOT Routinely Calculates Exposure, and Uses Netting When It Does So.

The ERCOT Nodal Protocols show that the concept of calculating exposure is not new. Indeed, as Mr. Carter testified for Just Energy, “ERCOT calculates exposure under the credit protocols by determining net aggregated liability every day.”¹⁹ Specifically, pursuant to the ERCOT Nodal Protocols, the credit calculations performed by ERCOT twice a day calculate the “Total Potential Exposure” for each market participant who participates as a financial counter-party at ERCOT by determining their “net positive exposure” considering each element of charges and payments between all affiliated QSEs within a particular “counter-party” in the market.²⁰ Thus, not only is exposure calculation already part of ERCOT’s routine calculations, but those calculations also use net aggregated liability.

“ERCOT requires all market participants including QSEs to identify their affiliates in the market.”²¹ “These affiliate relationships can be mapped and the adjustments can be made to back out the unaffiliated LSEs and REs.”²² ERCOT’s witness Kenan Ögleman confirmed on cross examination that ERCOT retains “defined affiliate descriptions that ERCOT tracks” and that ERCOT has “a record of the -- those affiliates per the bylaw requirements.”²³

C. ERCOT Should Perform a Threshold Calculation at the QSE level and that Calculation Will Serve as a Rebuttal Presumption, i.e., a Not-To-Exceed Level of Exposure.

A method for calculating exposure on a net basis is included in the record evidence, in the direct testimony of Michael Carter.²⁴ The record evidence supports adoption of this method, which includes a threshold calculation by ERCOT that becomes a rebuttable presumption for exposure. “[I]t would streamline matters and ensure appropriate allocation of proceeds for ERCOT to perform the threshold calculations of exposure” that can serve as a “rebuttable presumption.”²⁵

¹⁹ Direct Testimony of Michael Carter, Just Energy Ex. 1 at 6:3-4.

²⁰ Nodal Protocol 16.11.4 - *Determination of Total Potential Exposure for a Counter-Party*.

²¹ Direct Testimony of Michael Carter, Just Energy Ex. 1 at 7:6-7.

²² *Id.* at 7:7-8.

²³ Tr. at 118:8-25 (Kenan Ögleman on Cross Examination by Catherine Webking) (Aug. 24, 2021).

²⁴ Direct Testimony of Michael Carter, Just Energy Ex. 1 at 5-8 & Attachment MC-1.

²⁵ *Id.* at 7:11-12.

This proposal is consistent with the overarching theme of ERCOT's proposal that it has certain data that it would be willing to and able to provide to help verify LSE exposure.²⁶ This proposal simply treats ERCOT's initial calculation, with any necessary simplifying assumptions, as the calculation that is presumed to be correct but that may be rebutted with the submission of additional information and documentation by the individual entities, rather than the other way around. Even if, for some entities, the ERCOT threshold calculation is only made at the QSE level of granularity, it will serve an important purpose of providing an unbiased calculation that can be serve as a check – the ERCOT threshold calculation is necessary to verify whether the claimed total exposure of the LSEs within that QSE is even in the realm of reasonableness.²⁷ At minimum, “no LSE should be coming in and saying their exposure was greater than their QSE's exposure.”²⁸ As Staff witness Ms. Bivens agreed, ERCOT could drill down further with some “simplifying assumptions” for the entire market to create not-to-exceed numbers.²⁹

Thus far, ERCOT has confirmed that ERCOT can, for the purposes of a threshold calculation, quantify LSE exposure as directly equivalent to QSE exposure when (1) a QSE contains a single LSE or (2) a QSE contains multiple LSEs that are affiliated.³⁰ Rather than having ERCOT attempt to make particular adjustments, ERCOT's threshold calculation makes a simplifying assumption that all QSE costs were passed through the LSE or group of affiliated LSEs.³¹ If a QSE did not pass through all costs, then it is incumbent on the individual entities to provide documentation indicating how their actual exposure varies from the rebuttal presumption.

The record as to Rayburn in this proceeding includes an example of this very type of threshold calculation by ERCOT and opportunity for the LSE to rebut the presumed validity of the calculation. Staff witness Carrie Bivens confirmed the nature of the Rayburn example at hearing.³² Here, Rayburn proffered in the direct testimony of its witness an exposure number of \$171 million.³³ ERCOT, however, disagreed with Rayburn's calculation.³⁴ ERCOT performed its own threshold calculation, and determined Rayburn's exposure to instead be \$94.9 million.³⁵ At

²⁶ See Tr. at 143:12-145:2 (Kenan Ögleman on Clarifying Examination by Commissioner Cobos) (Aug. 24, 2021).

²⁷ *Id.* at 350:9-19 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

²⁸ *Id.* at 351:18-21 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

²⁹ *Id.* at 351:8-17, 355:7-356:9 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

³⁰ Rebuttal Testimony of Kenan Ögleman, ERCOT Ex. 7 at 14:20-15:11.

³¹ See *id.* at 14:20-15:11.

³² Tr. at 350:9-351:1 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

³³ Rebuttal Testimony of Kenan Ögleman, ERCOT Ex. 7 at 25:3-15.

³⁴ *Id.* at 25:3-15.

³⁵ *Id.*

hearing, given the discrepancy between ERCOT's threshold calculation and Rayburn's originally-proffered number, the Commissioners requested that Rayburn re-perform its calculation against ERCOT's.³⁶

In response to Commissioner Cobos' clarifying examination, ERCOT's witness Kenan Ögleman again testified that are certainly "easy" scenarios where ERCOT could calculate exposure that is "relatively accurate."³⁷ In contrast, Mr. Ögleman merely hypothesized as to whether there may be a "hard" scenario in which "a QSE, and let's say for the sake of argument, . . . has a hundred load-serving entities in it" that would be "very difficult for us to understand exposure."³⁸ However, Mr. Ögleman's for-the-sake-of-argument hypothetical is far outside the realm of the present QSE structures at ERCOT, which are much more limited and do not come close to achieving that level of complication.³⁹ The record also shows that ERCOT has the ability to provide the Commission with data reflecting how the existing QSEs are, in fact, are structured, as ERCOT's witness Kenan Ögleman testified in response to Commissioner Cobos' clarifying examination.⁴⁰

Ultimately, it will be each individual LSE's responsible for verifying the correct affiliate relationships for purposes of documenting that entity's exposure.

D. The Threshold Calculation.

A summary of the threshold calculation follows. First, "[i]n order to calculate a base-case for exposure, ERCOT can calculate exposure at the counter-party level."⁴¹ After that calculation, "ERCOT [can] adjust the calculation for third-party non-affiliated arrangements."⁴² "Then, the Commission can require that each LSE provide documentation either verifying that the calculation accurately reflects their exposure per the Commission-approved parameters, or indicating how their actual exposure varies[.]"⁴³ The record evidence includes several sample charts included in Just Energy's Exhibit 1 that diagram examples of the various scenarios for the threshold

³⁶ See, e.g., Tr. at 242:11-243:7, 245:7-19, 250:14-18 (David Braun on Clarifying Examination by Commissioner Cobos) (Aug. 24, 2021).

³⁷ *Id.* at 144:4-7 9 (Kenan Ögleman on Clarifying Examination by Commissioner Cobos) (Aug. 24, 2021).

³⁸ *Id.* at 144:12-15 (Kenan Ögleman on Clarifying Examination by Commissioner Cobos) (Aug. 24, 2021).

³⁹ *Id.* at 352:19-353:6 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁴⁰ *Id.* at 145:3-9 (Kenan Ögleman on Clarifying Examination by Commissioner Cobos) (Aug. 24, 2021).

⁴¹ Direct Testimony of Michael Carter, Just Energy Ex. 1 at 7:4-6.

⁴² *Id.*

⁴³ *Id.* at 7:12-15.

calculation.⁴⁴ Staff witness Carrie Biven's direct testimony proposes netting information collection and calculation, that is generally consistent in goal with the process proposed by Just Energy witness Michael Carter.⁴⁵

This proposed calculation allows determination of net positive exposure by considering net aggregate liability among affiliates.⁴⁶ Each LSE will have responsibility for verifying their unique affiliate relationships with one or more QSEs for purposes of determining the final calculation of exposure for each LSE.

ERCOT's Ancillary Service Charges already include an offset to the load ratio share of Ancillary Services to account for instances where the load serving entities have "self-arranged" for ancillary services either within the same QSE serving load and generation providing ancillary services or within a separate QSE to QSE transaction where the QSE for the LSE has entered into a bilateral agreement for a physical supply of ancillary services.⁴⁷ It would be incongruent to allow an entity that has its generation and LSE businesses in separate QSEs to be quantified differently than an entity who has its generation and LSE businesses under the same QSE.

The calculation of exposure to the reliability deployment price adder ("RDPA") also involves a determination of offsets within the same corporate umbrella.⁴⁸ For example, if a QSE represented affiliated LSEs and an affiliated generation resource that was paid the RDPA, the exposure for that entity would include an offset of those payments. As with the ancillary services priced above \$9,000 per MW, any offset would need to be adjusted if the QSE(s) involved provided QSE services for third-party entities that were not affiliated with that QSE.⁴⁹

⁴⁴ Direct Testimony of Michael Carter, Just Energy Ex. 1 at Attachment MC-1.

⁴⁵ Direct Testimony of Carrie Bivens, Staff Ex. 2 at 14-16; *see also* Joint Intervenors' Brief in Response to Order No. 4, incorporated herein by reference.

⁴⁶ Nodal Protocol 16.11.4.1 - *Determination and Monitoring of Counter-Party Credit Exposure*.

⁴⁷ A summary of the applicable protocols for the calculation of Ancillary Services is included in the Joint Intervenors' Brief in Response to Order No. 4.

⁴⁸ Direct Testimony of Carrie Bivens, Staff Ex. 2 at 15:19-16:2; Direct Testimony of Michael Carter, Just Energy Ex. 1 at 7-8 & 22-26 (Attachment MC-1).

⁴⁹ *Id.*

II. PRORATION

A. If Proration of the Securitization Proceeds Is Necessary, Any Proration Should Occur Consistent with NRG's Proposal.

If the \$2.1 billion cap is exceeded and proration becomes necessary, the record supports that proration be done using the existing Nodal Protocol basis as proposed in the direct testimony of NRG witness Bill Barnes.⁵⁰ As explained in Mr. Barnes' testimony this proration would use the method in the ERCOT short-payment process outlined in Nodal Protocol § 9.19(1)(d).⁵¹ Contrary to other proposals (as discussed below), this process of proration is familiar, fair, and "has been utilized in the ERCOT settlement and billing process since the start of the market."⁵² "Adopting a different proration methodology that prioritizes certain market participants or the types of specific eligible costs would result in an inequitable distribution of proceeds."⁵³

B. The Commission Should Not Adopt Calpine's Proposal to Prioritize Certain Customers Over Others.

Calpine proposed a competing theory of prioritizing the distribution of proceeds to LSEs that passed the charges through to end-use customers. The record evidence shows that Calpine's proposal, or any proposal that bases proration on the extent to which an LSE passed charges through to their customers, should be rejected. As Ms. Bivens testified on behalf of Staff, Calpine's proposal is *not* the best process for the health of the entire wholesale market.⁵⁴

Specifically, Ms. Bivens testified that "the proration methodology should take into account that there are LSEs that do not pass through cost to customers."⁵⁵ This, for example, would occur for a retail electric provider (REP) that predominantly serves residential and small-commercial customers. Their amount of pass-through, if any, would be much less than a REP that was serving primarily industrial customers.⁵⁶ Adopting Calpine's proposal, however, would prioritize the distribution of the securitization proceeds to REPs who have already charged their customers, to the detriment of those REPs who either were unable to pass their charges through or who have

⁵⁰ Direct Testimony of Bill Barnes, NRG Ex. 1 at 7.

⁵¹ *Id.* at 7:13-18.

⁵² *Id.* at 7:18-20.

⁵³ *Id.* at 7:20-22.

⁵⁴ Tr. at 309:23-310:6 (Carrie Bivens on Cross Examination) (Aug. 25, 2021).

⁵⁵ *Id.* at 346:14-16 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁵⁶ *Id.* at 346:17-22 (Carrie Bivens on Cross Examination by Catherine Webking) (Aug. 25, 2021).

determined not to. The statute requires that proceeds be assigned based on entity exposure, not individual customer relationships.

Many LSEs ended up bearing the costs themselves, in whole or in part, rather than passing them directly through, although these costs will ultimately be borne indirectly by their customers or by the market as a whole, if not stabilized. This is supported by record evidence and testimony across multiple parties that have wide variation in their business models and affiliations. For example, Vistra's witness Amanda Frazier testified the same – the customers that Vistra did pass the charges through to is not the same as those that Vistra could have passed through to.⁵⁷ Even Calpine's witness Steven Schleimer testified on cross examination it was "true" that "an LSE's exposure doesn't directly correlate to the amount of uplift cost passed through to customers," "because not every LSE passed through uplift costs to customers."⁵⁸

Finally, as Vistra's witness Amanda Frazier testified on cross examination, to implement Calpine's "customer first" proposal would be "very complicated," in addition to being unnecessary.⁵⁹ As Ms. Frazier testified, "[f]irst, the statute already requires that if a customer was subject to these charges, that you do pass through the charges to them."⁶⁰ To instead distribute proceeds based on Calpine's proposal to use customer-level data and customer-level contracts would "require ERCOT or some other entity to figure out that group of customers" would necessarily require ERCOT to "look at all of the contracts for those customers."⁶¹ As Calpine witness Steven Schleimer testified, the process would be even more complicated; he suggests having ERCOT review customer invoices shows that the charges were passed through and paid.⁶² This would add a level of complexity and delay that would far exceed the use of QSE and LSE information to calculate exposure.

For these reasons, Calpine's proposal, or any proposal that bases proration on the extent to which an LSE passed charges through to their customers, should be rejected. Instead, proration, if needed, should be done on using the ERCOT short-payment process outlined in Nodal Protocol § 9.19(1)(d), as proposed in the direct testimony of NRG witness Bill Barnes.⁶³ Under this

⁵⁷ Tr. at 282:9-21 (Amanda Frazier on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁵⁸ *Id.* at 169:23-170:5 (Steven Schleimer on Cross Examination) (Aug. 24, 2021).

⁵⁹ *Id.* at 281:25-283:13 (Amanda Frazier on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁶⁰ *Id.* at 283:5-7 (Amanda Frazier on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁶¹ *Id.* at 283:8-13 (Amanda Frazier on Cross Examination by Catherine Webking) (Aug. 25, 2021).

⁶² *Id.* at 172:3-10 (Steven Schleimer on Cross Examination) (Aug. 24, 2021).

⁶³ Direct Testimony of Bill Barnes, NRG Ex. 1 at 7.

methodology, if the aggregate exposure exceeds \$2.1 Billion, each LSE would receive proceeds equivalent to their exposure times the ratio of \$2.1 Billion to the total aggregate exposure.

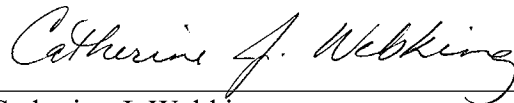
III. COLLATERAL

Although ERCOT's Application had a different proposal, in rebuttal ERCOT proposes an alternative collateral calculation of 2 months of the total uplift charges.⁶⁴ Joint Intervenor do not object to the alternative methodology. The only caveat would be that ERCOT not also include these charges in the standard credit calculation that includes all other ERCOT charges including the System Admin Fee.

IV. CONCLUSION

Based on the foregoing, the Joint Intervenor request that the Commission's Debt Obligation Order set forth a process for calculating exposure in a manner consistent with the ERCOT protocols with adjustments as described in the testimony addressed herein to account for only affiliated interests.

Respectfully submitted,



Catherine J. Webking
State Bar No. 21050055
cwebking@scottdoug.com
Stephanie Kover
State Bar No. 24102042
skover@scottdoug.com
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
512.495.6337
512.495.6399 (facsimile)

**ATTORNEYS FOR JUST ENERGY, APG&E
and SOUTHERN FEDERAL POWER**

⁶⁴ Rebuttal Testimony of Kenan Ögleman, ERCOT Ex. 7 at 22:9-18.

/s/ Tracy Davis


Tracy C. Davis
State Bar No. 24045758
Senior Attorney
NextEra Energy Resources, LLC
5920 W. William Cannon Dr., Bldg. 2
Austin, TX 78749
Office: (512) 236-3141
Facsimile: (512) 236-0484
Email: tracy.c.davis@nexteraenergy.com

Stephen W. Crawford
State Bar No. 05040700
Assistant General Counsel
NextEra Energy Resources, LLC
20455 State Highway 249, Suite 200
Houston, TX 77070
Office: (713) 401-5557
Facsimile: (713) 401-6271
Email: steve.crawford@nexteraenergy.com

ATTORNEYS FOR GEXA ENERGY, LP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served in accordance with the governing procedural orders to all parties of record in this proceeding on this 1st day of September 2021.


Stephanie Kover