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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** | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | **PUBLIC UTILITY COMMISSION OF TEXAS** |

# TXU LOAD-SERVING ENTITIES' AND LUMINANT ENERGY COMPANY'S POST-HEARING REPLY BRIEF

TXU Energy Retail Company LLC (TXU Energy), Ambit Texas, LLC (Ambit), Luminant ET Services Company LLC (ETS), TriEagle Energy LP (TriEagle), and Value Based Brands LLC dba 4Change Energy, Express Energy, and Veteran Energy (VBB) (collectively, the TXU load-serving entities or TXU LSEs) and Luminant Energy Company, LLC (Luminant Energy) file this Post-Hearing Reply Brief. Reply briefs are required to be submitted by 3:00 p.m. September 8, 2021. This brief is timely filed.

## I. INTRODUCTION

Some of the parties' post-hearing briefs predictably urge the Commission to reduce or eliminate the amount of securitization proceeds remitted to some load-serving entities by offsetting load-serving entities' exposure to uplift balance costs against revenues of affiliated entities.[1] The "netting" proposals are contrary to the plain statutory language and would not serve the statute's stated purposes of allowing wholesale market participants (load-serving entities) that were assessed extraordinary uplift charges due to consumption during Winter Storm Uri to pay those charges over a longer period of time, in turn stabilizing the wholesale electricity market and reimbursing customers that paid or were obligated to pay such costs. To comply with Subchapter N, the Commission must remit securitization proceeds to load-serving entities based on the amount of uplift balance costs "uplifted to load-serving entities on a load ratio share basis

[1] Office of Public Utility Counsel's Post-Hearing Initial Brief ("OPUC Brief"); Initial Brief of Joint Intervenors (Just Energy, Gexa, APG&E, and Southern Federal Power) ("Joint Intervenors' Brief"); Commission Staff's Initial Brief ("Staff's Brief"); City of Georgetown's Closing Brief ("Georgetown's Brief").

due to energy consumption during the period of emergency" (prorating, if necessary, on an uplift cost-weighted load ratio share basis).

## II. "NETTING" DOES NOT SERVE THE PUBLIC PURPOSE OF STABILIZING THE WHOLESALE ELECTRICITY MARKET

The parties agree that a central purpose of the Subchapter N securitization is to "stabilize the wholesale electricity market in the ERCOT power region" and "allow wholesale market participants who were assessed extraordinary uplift charges due to consumption during the period of emergency to pay those charges over a longer period of time, alleviating liquidity issues and reducing the risk of additional defaults in the wholesale market."[2] As Commission Staff stresses, the goal is to "preserve the viability of the ERCOT market *as a whole*."[3] But the parties that advocate for "netting" have not demonstrated that remitting securitization proceeds to only some load-serving entities—while giving diminished or even zero proceeds to other load-serving entities that were assessed hundreds of millions of dollars in uplift balance costs—would stabilize the market as a whole.

Indeed, Commission Staff concedes that "it is difficult to assess the overall financial health of wholesale market participants relative to one another," which Staff says means "there is no clear economic basis on which to prorate or prioritize the distribution of financing proceeds."[4] Yet pro-netting parties nonetheless argue that some load-serving entities should get proceeds and others should get none based on speculation that some load-serving entities are "*likely*" to be more at risk or "*likely* to be in financial distress," while other load-serving entities "*might* not have been … adversely affected," are "less *likely* to have liquidity issues," or "*may* be at no risk at all."[5] Importantly, however, there was no evidence presented that demonstrates the actual degree of liquidity concerns or "financial health" of any load-serving entity. The Commission should not base its decision on rank speculation regarding various load-serving entities' actual financial situations.

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[2] TEX. UTIL. CODE § 39.651(b)-(c).

[3] Staff's Brief at 4-5 (emphasis added).

[4] *Id.* at 13.

[5] *Id.* at 6 (emphasis added); Georgetown's Brief at 3 (emphasis added); Joint Intervenors' Brief at 3 (emphasis added).

Additionally, contrary to Staff's assertion, Subchapter N itself expressly provides a clear economic basis on which to prorate or prioritize the distribution of the financing proceeds. The uplift balance "was uplifted to load-serving entities *on a load ratio share basis* due to energy consumption during the period of emergency for reliability deployment price adder charges and ancillary services costs in excess of the commission's system-wide offer cap."[6] Likewise, ERCOT "shall assess uplift charges to all load-serving entities *on a load ratio share basis*."[7] A load ratio share basis is the clear economic basis on which to remit securitization proceeds among load-serving entities—a basis that has the effect of helping to stabilize *all* load-serving entities in the wholesale electricity market by ensuring that *all* load-serving entities can pay extraordinary uplift charges over a longer period of time.

Relatedly, Commission Staff and Just Energy argue that the need to prorate securitization proceeds must be avoided, with Staff again speculating that "proration *could* deprive some LSEs of an amount of financing that is sufficient to overcome liquidity issues and other financial hardships and prevent their exit from the wholesale market."[8] But again, there was no evidence presented that demonstrates the amount of proceeds that any load-serving entity needs "to overcome liquidity issues and other financial hardships"—and no evidence that a prorated amount of proceeds would be insufficient to allow any load-serving entity to do so. Nor was there any evidence presented that excluding certain load-serving entities would not *cause* liquidity issues or financial hardships.

As the basis for its no-proration argument, Staff suggests that because "Subchapter N does not address how the Commission should proceed" if proration is necessary, "[t]his notable omission further bolsters the interpretation that such an outcome was not intended."[9] Paradoxically, the pro-netting parties ignore that Subchapter N also does not address *netting*—a notable omission that supports the conclusion that netting was not intended. In fact, nothing about prorating securitization proceeds among all load-serving entities would be harmful to the electricity market. Uplift costs themselves are prorated on a load ratio share basis: that is how the market operates, so that everyone pays their fair share (or under Subchapter N, receives and then

[6] TEX. UTIL. CODE § 39.652(4) (emphasis added).

[7] *Id.* § 39.653(c) (emphasis added).

[8] Staff's Brief at 7 (emphasis added); *see also* Joint Intervenors Brief at 3.

[9] Staff's Brief at 8.

repays their fair share). Therefore, prorating using the uplift cost-weighted load ratio share methodology proposed by TXU LSE witness Mathew Parker and Exelon witness Lori Simpson is the appropriate methodology.

Netting proponents are inconsistent in their public policy arguments, and are consistently unsupported by factual evidence. For instance, the City of Georgetown argues that if proration is necessary, it should be done based on "a reasonable approach" of looking at each load-serving entity's exposure.[10] But Georgetown first wants to completely cut out numerous load-serving entities before distributing any proceeds at all. It offers no valid public policy, evidence-supported basis for doing so.

Other public policy arguments fare no better. For example, while acknowledging that another stated purpose of securitization is to "protect the public interest, considering the impacts on both wholesale market participants *and retail customers*,"[11] netting advocates fail to provide any public policy reason for providing refunds and credits to some customers and zero refunds or credits to others. No party disputes that netting would discriminate against customers of load-serving entities that have affiliated generators—and no party offers any evidence-based justification for doing so.

Moreover, Georgetown and the Office of Public Utility Counsel (OPUC) ignore the market structure mandated by PURA when arguing for netting of RDPA payments received "by the LSEs and their affiliate entities."[12] If retail electric providers—the relevant competitive load-serving entities under Subchapter N—could both be charged and paid uplift balance costs, there might be an argument for netting those charges and receipts. But under PURA, a retail electric provider "may not own or operate generation assets," and a power generation company cannot serve retail customers.[13] Netting advocates ignore the separation between those companies and use terms like "corporate parent" and "corporate entity" instead of load-serving entity in the hopes that the Commission will ignore the actual statutory language, which refers solely to load-serving entities. In addition to being contrary to Subsection N, netting against "affiliate entities" or "the corporate

[10] Georgetown's Brief at 7.

[11] *See* Staff's Brief at 5 (citing TEX. UTIL. CODE § 39.653(a)) (emphasis added).

[12] Georgetown's Brief at 3, 5; OPUC Brief at 2.

[13] TEX. UTIL. CODE §§ 31.002(10), (17).

parent" improperly attempts to pierce the corporate separateness of distinct retail companies and generation companies.[14]

Finally, most parties agree that "financing the uplift balance in a timely manner is of the utmost importance."[15] But no party has offered a netting proposal that is objective, verifiable, and complete that would not inject complexity and delay in the financing process. Timeliness and fairly assisting all of the market (and all customers)—not creatively reading Subchapter N to cut many load-serving entities (and customers) from receiving any proceeds—should be the Commission's primary objectives for the securitization.

## III. "NETTING" IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF SUBCHAPTER N

Not only are the netting proposals unsupported by public policy, as detailed above, but they contravene the plain language of Subchapter N as well. Subchapter N applies to *load-serving entities*—not to non-load-serving entity affiliates that some load-serving entities may happen to have. The Commission should not insert a "netting" requirement into Subchapter N when the subchapter plainly does not call for it.[16]

OPUC, Just Energy, Georgetown, and Commission Staff tie themselves in knots attempting to insert "netting" into Subchapter N when the term does not appear in the statute's plain language. For instance, OPUC claims that the following provision supports that "PURA contemplates true ups, offsets, *and netting* in any debt obligation order issued by the Commission to avoid over-collections"[17]:

> (e) An order issued under this section must include a requirement that any *load-serving entity* that receives proceeds from the financing that exceed the *entity's* actual exposure to uplift charges from consumption during the period of emergency notify the independent organization and remit any excess receipts. Any payments

[14] *See id.* § 39.157(d); *accord PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173 (Tex. 2007) ("Texas law presumes that two separate corporations are distinct entities.") (citation omitted).

[15] *E.g.,* Staff's Brief at 11.

[16] *See, e.g., Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 n.41 (Tex. 2007) ("As a rule, a court should not by judicial fiat insert non-existent language into statutes or into parties' agreed-to contracts, or delete existent language from them either.").

[17] OPUC's Brief at 4 (emphasis added).

> received under this subsection must be credited against the uplift balance to reduce the remaining uplift charges.[18]

But this subsection says nothing about netting—nor even suggests by inference that the revenues of affiliates should be considered in determining a load-serving entity's exposure to uplift balance costs. Rather, the provision plainly refers solely to a "load-serving entity" and such "entity's actual exposure."[19] It is not reasonable to construe "entity's actual exposure" as referring to anything other than the "load-serving entity" referenced a few words earlier in the same sentence.[20] Certainly, the provision does not state "the entity's [*and its affiliates'*] actual exposure."

Likewise, Just Energy argues 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" because of the "plain language of PURA Subchapter N."[21] It maintains—contrary to any reasonable "plain language" rationale—that its purported "plain language" analysis is rooted solely in Subchapter N's $2.1 billion cap and use of the term "exposure."[22]

But Just Energy's argument has no basis in the plain language of the statute. Its brief is focused on what it and Joint Intervenors believe is the best result for their individual companies, completely unrooted in statutory language. The statute does not state or reasonably imply that the Commission should pick winners and losers if there is not enough money available to cover each load-serving entity's full exposure to uplift balance costs. If total exposure exceeds $2.1 billion, the most logical, simplest, and fairest approach is simply to follow the statute and reduce the amount that each load-serving entity receives on a pro rata basis rather than picking winners and losers. This is particularly so when the record does not support that "netting provides the most benefit to the entities likely to be in financial distress."[23] There was no evidence presented that load-serving entities that do not have affiliates are in financial distress or that load-serving entities that have affiliates are not. And the evidence actually demonstrates that the TXU LSEs and their

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[18] TEX. UTIL. CODE § 39.653(e) (emphasis added).

[19] *Id.*

[20] *See, e.g., Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 391 (Tex. 2020) (in construing statutes, courts "'give effect to legislative intent as it is expressed by the statute's language and the words used,' including any definitions provided") (citation omitted).

[21] Joint Intervenors' Brief at 2 (quoting Direct Testimony of Carrie Bivens, Staff Ex. 2 at 9).

[22] *Id.* at 3.

[23] *Id.* at 3 (quoting Direct Testimony of Carrie Bivens, Staff Ex. 2 at 12).

affiliates were the biggest financial "losers" during the Winter Storm, but would receive *zero* dollars under netting proposals.[24]

Just Energy's position is accurately—and notably—summed up in the concluding paragraph of its brief, in which it does not mention the statute at all, but instead asks the Commission to determine exposure "in a manner consistent with the ERCOT protocols."[25] Just Energy does not want the Commission to apply the actual statute—because the statute does not support netting—but, rather, it asks the Commission to ignore the statute and apply extraneous ERCOT Protocol provisions (provisions directly overridden by the Legislature's statutory enactment) or hypothetical versions of the statute. It is a notable illustration of how pro-netting parties ask this Commission to look at anything but the actual statutory language.

Georgetown similarly hypothesizes that "if a LSE had an affiliate or some other mechanism allowing it to receive a portion of [the uplift balance], the LSE *might* not have been exposed to and adversely affected by the extraordinary prices at issue because it could have offset the charges incurred by the payments received."[26] Georgetown also refers to a Senate letter and a letter from the Lieutenant Governor as purportedly evincing the Legislature's intent for affiliate netting. But Georgetown does not analyze or discuss the actual statutory text, and private statements by individual legislators are irrelevant when statutory text is clear.[27] Worse, Georgetown invites the Commission to consider netting only in determining the amount of proceeds a load-serving entity will receive, but not in determining each load-serving entity's liability for uplift charges.[28] But both the subchapter's "exposure" provision and the "uplift charges" provision refer solely to load-serving entities—not to affiliates.[29] If affiliate netting is written into one end of the statutory

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[24] Frazier Cross-Examination, v.3 at 286.

[25] Joint Intervenors' Brief at 10.

[26] Georgetown's Brief at 3.

[27] *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528-29 (Tex. 2006) ("[T]he statement of a single legislator, even the author or sponsor of the legislation, does not determine legislative intent."); *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) ("Statements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute.") (citation omitted). In any event, as the Commission is aware, statements of legislative intent go both ways on the netting issue. The bill's author, Chairman Paddie, has stated that the Legislature did *not* intend for Subchapter N to contemplate or authorize any "netting" between companies. Letter from Representative Chris D. Paddie to the Commissioners (filed in this proceeding Aug. 3, 2021).

[28] Georgetown's Brief at 5-6.

[29] TEX. UTIL. CODE § 39.653.

equation, it must likewise be written into the identical statutory language on the other end of the equation, so that a load-serving entity that receives no proceeds due to netting would concomitantly be liable for no uplift charges based on that same "netting" interpretation of the same statutory language. Any opposition to that consistent approach must be based solely on a "heads I win, tails you lose" rationale.

Finally, Staff's arguments in support of netting fail for many of the same reasons.[30] Staff's statutory analysis is results-oriented and wholly untethered to the subchapter's plain terms. Similar to Just Energy, Staff claims that "netting" is in the public interest because of Subchapter N's $2.1 billion cap, and Staff assumes that a load-serving entity that has affiliates is in a better financial position than one that does not[31]—despite, once again, the presumption in Texas that separate corporations are distinct.[32] Staff argues netting is appropriate because "[v]iewed in terms of a *market participant* that was both charged payments and received payments that included AS costs in excess of the Commission's SWCAP, or one that was charged payments and received payments based on the RDPA—either on a standalone basis or through an affiliate—it is likely that such a *market participant* is at less risk of financial loss than a market participant that was only charged in either of these cases."[33]

It is telling that Staff uses the term "market participant" in place of load-serving entity throughout its brief when the subchapter uses the narrower, more specific term "load-serving entity."[34] As Staff surely knows, competitive load-serving entities *themselves* (i.e., retail electric providers) do not receive the ancillary services revenues or RDPA payments that would allegedly offset the uplift balance costs. And again, there was no evidence presented that a load-serving entity with affiliated generators financially fared better during the Winter Storm.

More critically, even though Commission Staff witness Carrie Bivens admitted at the hearing that the word "net" does not appear in the statutory definition of "uplift balance," and acknowledged that her direct testimony inserted the word "net" in two places in her description of

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[30] Staff's Brief at 4-5.

[31] *Id.* at 4.

[32] *PHC-Minden*, 235 S.W.3d at 173.

[33] Staff's Brief at 6 (emphasis added).

[34] *See, e.g., id.*

"uplift balance,"[35] Staff continues to argue that its reading of the statute is right, even though that word—or any derivation or synonym thereof—does not appear where they say it does. This type of revisionist interpretation cannot prevail.

The Legislature simply did not choose to reach its market-stabilization goal by penalizing some load-serving entities (and their customers) while rewarding others through considering affiliate revenue. And speculating that a load-serving entity that is affiliated with generation "may be at no risk at all" does not justify interpreting Subchapter N in any manner except in accordance with its plain terms. This is particularly so when the record demonstrates that load-serving entities without resource affiliates, like Just Energy, engaged in all kinds of hedges not reflected in ERCOT data and may also "be at no risk at all."[36] In the event load-serving entities' cumulative exposure exceeds the $2.1 billion cap, there is no evidence that simply prorating the amount of payments each load-serving entity receives would result in insufficient financial assistance for any particular load-serving entity—or be insufficient to stabilize the market as a whole, for that matter.

Several of Staff's other arguments similarly lack statutory basis:

- Staff claims that "the Commission is limited to reviewing the risk of financial loss specific to the universe of costs included in the definition of uplift balance."[37] Staff does not point to any portion of Subchapter N mandating or even supporting this interpretation.

- Staff asks the Commission to insert the definition of "affiliate" found in ERCOT Nodal Protocol § 2.1 into Subchapter N—but with hand-picked deletions to that definition. Rather than straining to insert a modified definition of "affiliate" from the ERCOT Nodal Protocols into Subchapter N, the better course is to follow Subchapter N's mandates and not to infer "netting" from "affiliates" when these terms do not appear in the relevant part of the statute at all.

- Staff claims that the $2.1 billion cap is based on a "netted" figure common in ERCOT called Counter-Party netting.[38] Again, none of this is found anywhere in Subchapter N's text.

Further, it is insincere for Staff and other pro-netting parties to argue that the $2.1 billion cap was based on the form of netting now proposed in this proceeding. Even assuming that there

[35] Bivens' Cross-Examination, v.3 at 364-65.

[36] Carter Cross-Examination, v.2 at 200-02; Ogelman Cross-Examination, v.2 at 108-09.

[37] Staff's Brief at 6.

[38] *Id.* at 7.

is some truth to the assertion that the cap was impacted by one of the three letters that the Independent Market Monitor (IMM), Potomac Economics, wrote and filed at the Commission, none of the letters contains any recommendation equaling $2.1 billion, as Ms. Bivens admitted at the hearing.[39] The letters addressed a proposed correction of energy prices across a shorter period during the Winter Storm, rather than focusing on the week-long RDPA and ancillary services charges that the Legislature ultimately determined to securitize. The pro-netting parties can no better speculate as to the true genesis of the cap than anyone else.

In sum, the Commission should—and must—apply Subchapter N as written. The Commission cannot pick winners and losers based solely on whether a load-serving entity has affiliates that received certain revenues when Subchapter N nowhere states or even implies that any form of "netting" is appropriate.

## IV. CONCLUSION AND PRAYER

For the reasons outlined in the TXU LSEs' and Luminant Energy's Pre-Hearing Brief, Post-Hearing Brief, and this Reply, the Commission should enter a debt obligation order that remits securitization proceeds to load-serving entities based on their load ratio shares during the period of emergency, without implementing any form of "netting," and prorated (if necessary) on a load ratio share basis.

**Respectfully submitted,**

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[39] *Id.*; Staff's Exhibit 2 at 2, 18-19; Bivens' Cross-Examination, v.3 at 314-15.

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