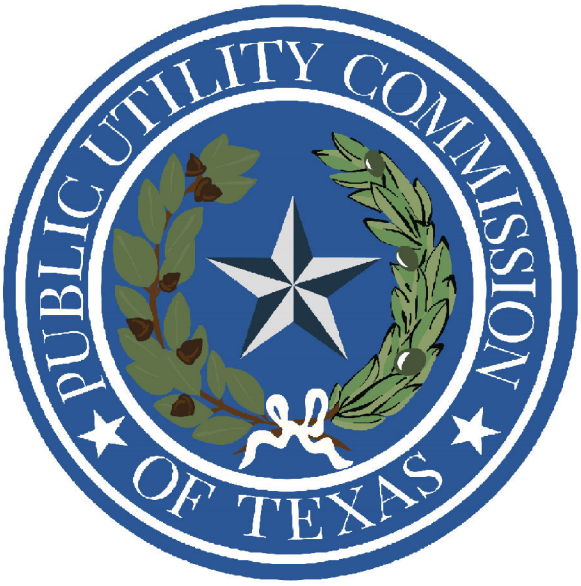

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APPLICATION OF THE ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. FOR A DEBT OBLIGATION ORDER TO FINANCE UPLIFT BALANCES UNDER PURA CHAPTER 39, SUBCHAPTER N, AND REQUEST FOR A GOOD CAUSE EXCEPTION	**§**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

RAYBURN COUNTRY ELECTRIC COOPERATIVE INC.'S REPLY BRIEF

Rayburn Country Electric Cooperative, Inc. ("Rayburn") respectfully submits this reply brief regarding the Electric Reliability Council of Texas, Inc.'s ("ERCOT") Application for a Debt Obligation Order to Finance Uplift Balances Under PURA Chapter 39, Subchapter N, and Request for a Good Cause Exception ("Application").[1] Consistent with the relief requested in its initial brief filed in this proceeding,[2] Rayburn requests that the Commission adopt a Debt Obligation Order that either:

(1) allows Rayburn to include its Reliability Deployment Price Adder ("RDPA") and ancillary service costs that exceed the system-wide offer cap in the Subchapter N securitization (collectively, the "Uplift Costs"), as permitted under the plain language of House Bill ("H.B.") 4492;[3] or

(2) if Rayburn is prohibited from participating in the Subchapter N securitization process, deems Rayburn to have opted out of the Subchapter N securitization mechanism and therefore does not subject Rayburn to the associated Uplift Charges or otherwise finds that the Uplift Charges are inapplicable to Rayburn.

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[1] *Application of the Electric Reliability Council of Texas, Inc. for a Debt Obligation Order to Finance Uplift Balances Under PURA Chapter 39, Subchapter N, and Request for a God Cause Exception*, Docket No. 52322 (filed July 16, 2021).

[2] Rayburn Country Electric Cooperative, Inc.'s Initial Post-Hearing Brief (Sept. 1, 2021) ("Rayburn's Initial Brief").

[3] Act of May 30, 2021, 87th Leg., R.S. ("H.B. 4492").

Rayburn's reply brief corrects the record and addresses initial post-hearing briefs filed in this proceeding by ERCOT,[4] the Staff of the Public Utility Commission of Texas ("Staff"),[5] and NRG Energy, Inc. ("NRG").[6]

The plain language of H.B. 4492 permits all electric cooperatives in Texas, including Rayburn, to include their Uplift Costs in the Subchapter N securitization process. As filed, ERCOT's Application would prohibit electric cooperatives from receiving any securitization proceeds raised by the debt obligations issued under Subchapter N on the basis that they are eligible to securitize under S.B. 1580, but would require electric cooperatives to nevertheless pay the associated Uplift Charges unless they are able to opt out of securitization by immediately paying 100% of all invoices owed to ERCOT, despite that there has not yet been sufficient time for coops to receive any securitization funds from the S.B. 1580 mechanism or resolve their disputes with ERCOT over the invoiced amounts. ERCOT's proposal defies the clear legislative mandate of H.B. 4492, subjects electric cooperatives to patently disparate treatment, and upends the beneficiary-pays principle.

As was demonstrated in Rayburn's Initial Brief, the Commission would compromise a bedrock tenet of PURA by issuing a Debt Obligation Order that targets electric cooperatives and their customers for unreasonably discriminatory treatment under Subchapter N.[7] Embedding unjust and unreasonable rates and unreasonably discriminatory practices into a Debt Obligation Order will not foster stability in Texas' electricity market, nor will it remedy the market and

[4] Electric Reliability Council of Texas, Inc.'s Post-Hearing Brief (Sept. 1, 2021) ("ERCOT's Initial Brief").

[5] Commission Staff's Initial Brief (Sept. 1, 2021) ("Staff's Initial Brief").

[6] NRG Energy, Inc.'s Initial Post-Hearing Brief (Sept. 1, 2021) ("NRG's Initial Brief").

[7] Rayburn's Initial Brief at 4-7.

protocol failures that occurred during Winter Storm Uri and that have financially crippled market participants and ratepayers across the state.

I. DISCUSSION

A. Electric Cooperatives Are Not Precluded from Participating in H.B. 4492

ERCOT's counsel, Mr. Ron Moss, conceded during the hearing in this matter that the language of H.B. 4492 allows electric cooperatives to participate in Subchapter N securitization.[8] Nonetheless, in its post-hearing brief, ERCOT urges the Commission to issue a Debt Obligation Order that defies the plain language of H.B. 4492 by limiting the ability of electric cooperatives to seek securitization relief pursuant to Subchapter N. ERCOT claims that H.B. 4492 and Senate Bill ("S.B.") 1580 together reflect the Texas Legislature's intent to not include Rayburn's Winter Storm Uri costs in the Uplift Balance under Subchapter N.[9]

As was demonstrated in Rayburn's Initial Brief, the plain language of H.B. 4492 authorizes electric cooperatives to include their Uplift Costs in the Subchapter N Uplift Balance.[10] Under Texas law, an administrative agency's interpretation of a statute is entitled to deference only "so long as the construction is reasonable and does not contradict the plain language of the statute."[11]

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[8] Tr. at 62:5-14 (Moss) (Aug. 24, 2021).

[9] ERCOT's Initial Brief at 4 ("Expecting Rayburn to utilize the tools the Legislature provided to it under SB 1580, the Legislature also made clear that it did not intend for Rayburn' s winter storm costs to be part of the Uplift Balance securitized under Subchapter N . . .").

[10] Rayburn's Initial Brief at 3-7.

[11] *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011) (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)); *see also Nucor Steel Tex. v. PUC of Tex.*, 363 S.W.3d 871, 878 (Tex. App. 2012) ("reviewing courts also give 'serious consideration' or 'some deference' to an agency's interpretation of a statute that it is charged with enforcing, provided that the statutory language at issue is 'ambiguous,' and provided that the agency's interpretation 'is reasonable and does not contradict the plain language of the statute.'") (internal citations omitted).

Moreover, "[w]hen a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language."[12]

ERCOT reads ambiguity into H.B. 4492 where there is none and calls on the Commission to overwrite the Legislature's express directive to include electric cooperatives in the Subchapter N securitization process. The Commission should adhere to the plain language of H.B. 4492 and approve a Debt Obligation Order that grants electric cooperatives the right to participate fully in securitization under Subchapter N of H.B. 4492.

B. Participation in S.B. 1580 Does Not Preclude Participation in H.B. 4492

There is no statutory basis to preclude electric cooperatives from participating in securitization measures under both H.B. 4492 and S.B. 1580, nor is there any provision that affords electric cooperatives second-tier rights under either law. ERCOT and NRG make similar unsupported claims that Rayburn is prohibited from securitizing its costs under Subchapter N of H.B. 4492 because S.B. 1580 is also available to electric cooperatives.[13] To reiterate, H.B. 4492 specifically identified Subchapter N as being applicable to electric cooperatives. Neither H.B. 4492 nor S.B. 1580 states that electric cooperatives must use only one securitization provision or the other, only that costs may not be securitized under both mechanisms.

In terms of the interplay between H.B. 4492 and S.B. 1580 (*i.e.*, Subchapter D, Chapter 41), the definition of "Uplift balance" under section 39.652(4) of H.B. 4492 "exclud[es] *amounts*

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[12] *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

[13] ERCOT's Initial Brief at 4 ("the Legislature . . . did not intend for Rayburn's winter storm costs to be part of the Uplift Balance securitized under Subchapter N."); NRG's Initial Brief at 13 ("Rayburn should not be allowed to receive proceeds under Subchapter N because [it] has not paid all invoices due for market activity during the winter storm and because it has the ability to seek securitization proceeds under Subchapter D.").

securitized under Subchapter D, Chapter 41."[14] The plain language of the statute only excludes *amounts actually securitized* under S.B. 1580; it does not exclude all amounts that are eligible for securitization under S.B, 1580. The Legislature did not require S.B. 1580 to be the exclusive securitization option for electric cooperatives; on the contrary, electric cooperatives have the right to submit their RDPA and ancillary service costs that exceed the system-wide offer cap in the Uplift Balance as long as those costs have not already been securitized under S.B. 1580. Section 39.652(4) of H.B. 4492 merely ensures that electric cooperative costs are not securitized twice, under both H.B. 4492 and S.B. 1580.

As discussed in Rayburn's Initial Brief in this proceeding, Rayburn is pursuing securitization opportunities through S.B. 1580, but it is unclear at this point how much of Rayburn's Winter Storm Uri costs will ultimately be securitized under this provision.[15] If Rayburn is unable to securitize a sufficient amount of its costs through S.B. 1580 to pay what is owed and is not able to opt out of H.B. 4492, under ERCOT and NRG's erroneous reading of H.B. 4492, Rayburn and electric cooperatives in a similar situation and their customers would be subjected to rates or charges for Subchapter N financing that yields no benefit to them.[16] Notably, ERCOT, Staff, and NRG's Initial Briefs fail to address the very real possibility that their recommended approaches to the Debt Obligation Order could saddle electric cooperatives and their customers with Uplift Charges under H.B. 4492 with no commensurate securitization relief.

Staff also suggests, without any support in the securitization laws at issue in this case, that the existence of S.B. 1580 authorizes the Commission to assign electric cooperatives inferior rights

[14] Tex. Util. Code Ann. § 39.652(4) (emphasis added).

[15] Rayburn's Initial Brief at 7-9.

[16] *Id.* at 6-7.

under H.B. 4492.[17] Staff asserts that "[i]t is also reasonable to prioritize the remittance of proceeds to [load-serving entities ("LSEs")] that do not have access to the unique financing option provided under PURA chapter 41, subchapter D (Chapter 41),"[18] even though Staff witness Ms. Carrie Bivens admitted under cross examination at hearing that H.B. 4492 does not contain any such rule.[19] H.B. 4492 does not prioritize LSEs, and it certainly does not situate electric cooperatives on unequal footing. Contrary to Staff's recommendation, H.B. 4492 makes securitization of Uplift Costs available to all LSEs, including cooperatives, on a non-discriminatory basis. Although the Legislature has entrusted the Commission with implementing the securitization mandates under H.B. 4492 and S.B. 1580, it did not authorize the Commission to arbitrarily whittle down the relief available to electric cooperatives under Subchapter N of H.B. 4492. The Commission cannot bolster the electricity market in Texas by baking in unreasonably discriminatory practices. Should the Uplift Balance under Subchapter N exceed the $2.1 billion cap established in H.B. 4492, the Commission should adopt a just and reasonable and fair solution and prorate securitization proceeds to all LSEs on a non-discriminatory basis.

H.B. 4492 and S.B. 1580 establish a clear securitization path for electric cooperatives. Any RDPA and ancillary service costs above the system-wide cap that are not securitized under S.B. 1580 are eligible for securitization under Subchapter N of H.B. 4492. Electric cooperatives that examine their options to securitize under S.B. 1580 or even those that exercise their statutory right to participate in S.B. 1580 are not barred from seeking relief under H.B. 4492 for eligible costs that are not covered by S.B. 1580.

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[17] Staff's Initial Brief at 13-14.

[18] *Id.* at 13.

[19] Tr. at 362:6-9 (Bivens Cross) (Aug. 25, 2021).

C. Rayburn Is Not In Default and Is Eligible to Participate Fully in the Securitization of RDPA and Eligible Ancillary Service Costs Under Subchapter N[20]

ERCOT ignores its own operating protocols in asserting that Rayburn is in default and therefore ineligible for Subchapter N securitization.[21] As detailed in Rayburn's Initial Brief, Rayburn is not currently in default to ERCOT for invoiced amounts from Winter Storm Uri, and ERCOT has not declared a payment breach or default.[22] ERCOT Protocol section 8(A)(5) states that "[ilf, due to a Force Majeure Event, a Party is in breach with respect to any obligation hereunder, such breach shall not result in a Default by that Party." Pursuant to section 8(C)(1) of the Market Participant Agreement, Rayburn provided notice to ERCOT on February 24,2021, that Winter Storm Uri and the aftereffects thereof (including any related events whether by government or agency orders or directives), constitute a Force Majeure Event under the Market Participant Agreement. Moreover, Rayburn has filed challenges to the invoices ERCOT issued to Rayburn for the Winter Storm Uri period in accordance with the procedures set forth in the ERCOT Protocols, and those challenges are currently pending. Rayburn has complied fully with the ERCOT Protocols and is not in default at this time despite that it has outstanding invoices.

Contrary to arguments presented by ERCOT[23] and NRG,[24] nothing in H.B. 4492 prevents Rayburn from participating in Subchapter N securitization because it has not paid the amounts

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[20] References to certain costs invoiced by ERCOT to Rayburn do not constitute an admission or waiver on Rayburn's behalf and Rayburn expressly reserves all rights and defenses.

[21] ERCOT's Initial Brief at n.9.

[22] Rayburn's Initial Brief at 9-10.

[23] ERCOT's Initial Brief at n.9.

[24] NRG's Initial Brief at 13.

invoiced by ERCOT during the winter storm period from February 12-20, 2021. Section 39.651(d) of H.B. 4492 states in part that:

> A load-serving entity that receives proceeds from the debt obligations may use the proceeds solely for the purposes of fulfilling payment obligations directly related to [Uplift Costs] and refunding such costs to retail customers who have paid or otherwise would be obligated to pay such costs.[25]

H.B. 4492 specifically instructs that the securitization proceeds to be issued in connection with the Subchapter N Debt Obligation Order are to be used for fulfilling payment obligations related to Uplift Costs. If market participants who had not yet fulfilled their payment obligations to ERCOT were to be excluded from eligibility, there would be no reason to include the provision allowing recipients of funds to use them for the fulfillment of payment obligations. The fact that Rayburn has not paid Uplift Costs at this time has no bearing on whether Rayburn is eligible to participate in Subchapter N securitization. As an LSE, the plain language of H.B. 4492 permits Rayburn to include its Uplift Costs in securitization under Subchapter N regardless of whether Rayburn has paid the amounts invoiced by ERCOT.[26]

II. CONCLUSION

Rayburn respectfully requests that the Commission approve a Debt Obligation Order that comports with the plain meaning of H.B. 4492 and either (1) allows Rayburn to include its costs in the Subchapter N securitization as is allowed under the plain meaning of H.B. 4492, or (2) if Rayburn is prohibited from participating in securitization under Subchapter N, does not subject Rayburn to Uplift Charges or deems Rayburn to have opted out of the mechanism and to therefore

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[25] Tex. Util. Code Ann. § 39.651(d).

[26] Rayburn is not the only market participant disputing invoices issued by ERCOT. In response to a question from Commissioner Cobos, ERCOT General Counsel Mr. Chad Seely noted at hearing that ERCOT has "a number of settlement billing disputes and ADRs related to Winter Storm Uri." Tr. at 263:20-22 (Seely) (Aug. 25, 2021).

be exempt from the Uplift Charges. Rayburn further requests any and all other relief to which it may be entitled, and reserves all its rights and defenses.

Respectfully submitted,

/s/ Emma F. Hand

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[27] Ms. Hand is a licensed attorney in good standing with Virginia, Ohio, and the District of Columbia. Per the Administrative Law Judge's Order No. 4, dated August 5, 2021, it is our understanding that filing a motion to appear *pro hac vice* is not necessary to appear in the above captioned proceeding.

CERTIFICATE OF SERVICE

In accordance with Order No. 4 in this docket, filing a document on the Commission's Interchange website constitutes service of the document on all parties to this proceeding.

Justin J. Mirabal