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

COMMISSION STAFF'S REPLY BRIEF

Dated: September 8, 2021

Respectfully Submitted,

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COMMISSION STAFF'S REPLY BRIEF

After the hearing on the merits conducted in this proceeding on August 24 and 25, 2021, the Commission administrative law judge directed the parties to file a reply brief by September 8, 2021. The Staff of the Public Utility Commission of Texas (Staff) timely files this reply brief.

I. INTRODUCTION

Staff's reply focuses on arguments related to whether a load-serving entity's (LSE) exposure to ancillary service (AS) costs in excess of the Commission's system-wide offer cap (SWCAP) and reliability deployment price adder (RDPA) charges (collectively, Extraordinary Costs) should be calculated on a net or a gross basis, and related issues, that were raised by the TXU Load-Serving Entities and Luminant Energy Company (collectively, TXU); Exelon Generation Company, L.L.C. and Constellation New Energy Inc. (collectively, Exelon); NRG Energy, Inc.; Joint Intervenors;[1] Calpine Corporation, and Texas Industrial Energy Consumers (TIEC). Staff also replies to certain arguments related to the process for opting out of uplift charges under PURA[2] § 39.653(d).

II. STATUTORY INTERPRETATION AND THE $2.1 BILLION CAP

Any statutory interpretation that does not address the $2.1 billion cap included in the definition of uplift balance under PURA § 39.652(4) should be rejected.[3] Courts will "read statutes contextually to give effect to every word, clause, and sentence, because every word or phrase is

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[1] This group includes Just Energy Texas, LP, Fulcrum Energy d/b/a Amigo Energy, Tara Energy, and Hudson Energy Services, LLC; Gexa Energy, LP; AP Gas & Electric (TX) LLC; and Southern Federal Power LLC.

[2] Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

[3] *See* TXU Load-Serving Entities' and Luminant Energy Company's Post-Hearing Brief at 2-6 (Sep. 1, 2021) (TXU and Luminant's Initial Brief); Exelon Generation Company L.L.C.'s and Constellation New Energy, Inc.'s Initial Brief at 4-5 (Sep. 1, 2021) (Exelon's Initial Brief).

presumed to have been intentionally used with a meaning and a purpose."[4] As explained in Staff's initial brief, the $2.1 billion cap is a net number,[5] and PURA chapter 39, subchapter N (Subchapter N) does not address how to prorate the distribution of financing proceeds in the event that the total amount of load-serving entity (LSE) exposure documented exceeds $2.1 billion. Consequently, interpreting Subchapter N to require a gross calculation of LSE exposure gives no effect to the inclusion of the $2.1 billion cap.

There may be several reasons that could explain the Legislature's decision to limit the amount that may be financed. However, the amount at which the limit was set, in combination with the absence of direction on proration, should not be ignored. To harmonize the full definition of uplift balance, including the cap, with the absence of a directive on proration, the Commission should interpret the phrase "exposed to the costs included in the uplift balance" to require netting.[6] This approach does not add any additional words to the statute,[7] it simply gives meaning and purpose to all of the words chosen by the Legislature.

III. SUBCHAPTER N LIMITATIONS ON NETTING

Subchapter N does not permit the holistic financial review urged by some parties as a reason to reject netting because the definition of uplift balance is limited to two discrete categories of costs: AS costs in excess of the SWCAP and RDPA charges.[8] To describe a netting approach that is limited to these two costs as "cherry-picking"[9] suggests that there is some broader array of costs against which the Commission could net an LSE's exposure to AS costs in excess of the SWCAP and RDPA charges; there is not.[10] While arguing that Staff's recommendation

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[4] *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

[5] Direct Testimony of Carrie Bivens, Staff Exhibit 2 at 18:21-19:1, fn. 10. As clarified during the hearing, the March 11, 2021 calculations actually presented a net amount of $1.9 billion. Tr. at 314:21-315:5 (Bivens Cross) (Aug. 25, 2021).

[6] *Rodriguez*, 547 S.W.3d at 839 (describing the court's role as "…consider[ing] the context and framework of the entire statute and meld[ing] its words into a cohesive reflection of legislative intent.").

[7] TXU and Luminant's Initial Brief at 4-5.

[8] PURA § 39.652(4).

[9] TXU and Luminant's Initial Brief at 6.

[10] PURA § 39.652(4); *see also*, TXU and Luminant's Initial Brief at 6 (referencing "…the two charge types included in the uplift balance…").

impermissibly adds the word net or netting to the statute,[11] these same parties then seek to add language to expand the universe of costs at issue in Subchapter N to explain why netting is not the right policy.[12] Staff does not dispute that the payments for AS and RDPA received by a generator are not dispositive of how the generator fared financially during the period of emergency. However, Subchapter N only allows for netting of these charge types because these are the only costs that the Electric Reliability Council of Texas, Inc. (ERCOT) is authorized to finance as part of the uplift balance.

In advocating for a more holistic financial review, Exelon mischaracterizes Staff's testimony. The hypothetical presented by Ms. Bivens that ends with a conclusion about hedging is limited only to RDPA charges and payments—a fact Ms. Bivens clarified on cross examination.[13] It does not mention AS costs in excess of the SWCAP nor is it intended to suggest that LSEs do not have the ability to hedge AS costs. However, while LSEs do have the ability to hedge AS costs, the benefits of hedging are difficult to ascertain and quantify.

Staff's testimony also does not dispute that generators incurred unusually high fuel costs during Winter Storm Uri.[14] What Staff disputes is Exelon's insistence on conflating that fact with a purpose that RDPA payments do not serve within the ERCOT market, i.e., reimbursing fuel costs.[15] As explained by Ms. Bivens on cross-examination, RDPA payments represent an indifference payment for the capacity between where a generation resource is dispatched by ERCOT and the generation resource's high sustained limit.[16] Not only is Exelon's argument another attempt to impermissibly broaden the types of costs relevant to this proceeding, it is also based on a misperception of the function of the RDPA adder in the overall design of the wholesale market.

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[11] TXU and Luminant's Initial Brief at 4-5; Exelon's Initial Brief at 6.

[12] TXU and Luminant's Initial Brief at 6; Exelon's Initial Brief at 12-13.

[13] Staff Exhibit 2 at 11:12-21; Tr. at 336:11-20 (Bivens Cross) (Aug. 25, 2021).

[14] *See* Exelon's Initial Brief at 12-13. Like fuel costs, there were days during the period of emergency when RDPA payments to generators were also unusually high. Tr. at 343:9-23 (Bivens Cross) (Aug. 25, 2021).

[15] Tr. at 371:3-7 (Bivens Redirect) (Aug. 25, 2021).

[16] Tr. at 330:6-9 (Bivens Cross), 371:3-7 (Bivens Redirect) (Aug. 25, 2021).

In defense of its anti-netting position, Exelon's testimony goes a step further and accuses Staff's witness of injecting her "personal desires" into her reading of Subchapter N.[17] This accusation is patently ridiculous. As stated on the record, Ms. Bivens offered testimony on behalf of Staff,[18] and Staff is one of the only parties that does not have a monetary interest in the outcome of this proceeding that is separate and apart from the overall financial stability of the ERCOT wholesale market. Moreover, Ms. Bivens's testimony as a witness for Staff was informed by her position as the Independent Market Monitor[19] where her "principal areas of responsibility are twofold: 1) detect and prevent market manipulation strategies and market power abuses; and 2) evaluate the operations of the wholesale market with the current market rules and propose changes to those market rules, and recommend other measures to enhance market efficiency."[20] To insinuate that Ms. Bivens has motives other than to present recommendations that further the public purpose of helping the Commission stabilize the ERCOT wholesale market[21] is nothing more than an act of frustration that flies in the face of Ms. Bivens's professional track record.

IV. EXISTING PROVISIONS OF PURA CHAPTER 39

TXU argues that netting is contrary to the anti-discrimination language in PURA § 39.051(c).[22] Inherent in a competitive market are strategic business decisions about corporate structure, and there are a myriad of corporate structures and affiliate relationships that have been chosen by the entities that participate in the ERCOT wholesale market. There are also numerous other business decisions about the types of products to be offered to end use customers, the types of customers to serve (residential, large commercial, etc.), and other contractual arrangements.[23]

No party has disputed that if LSE exposure is not calculated on a net basis, then it is highly likely that the total amount of financing needed will exceed $2.1 billion and necessitate that the Commission prorate the remittance of financing proceeds.[24] ERCOT's estimates indicate that the

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[17] Exelon's Initial Brief at 6.

[18] Tr. at 309:1-4 (Bivens Cross) (Aug. 25, 2021).

[19] Tr. at 309:5-9 (Bivens Cross) (Aug. 25, 2021).

[20] Staff Exhibit 2 at 3:11-15.

[21] PURA § 39.651(c).

[22] TXU and Luminant's Initial Brief at 10-11.

[23] Tr. at 346:7-22, 358:19-360:4 (Bivens Cross) (Aug. 25, 2021).

[24] Staff Exhibit 2 at 12:11-15.

total amount of Extraordinary Costs is closer to $3.42 billion.[25] Therefore, regardless of whether the Commission orders a gross or a net calculation of exposure, there is no perfect solution that ensures all of the competing policy objectives of Subchapter N can be completely satisfied,[26] and no debt obligation order the Commission can issue that affects all LSEs in the same manner. To call a Commission decision that chooses among competing policy priorities identified by the Legislature discriminatory would render virtually any decision the Commission makes in this or any proceeding discriminatory because it is not possible for the Commission to account for all of the variations inherent in a competitive market structure.

Netting AS costs in excess of the SWCAP and RDPA charge against payments for the same services made to an affiliate does not contravene the requirement of PURA § 39.051, which required by January 1, 2002 the unbundling of an electric utility into a power generation company; a retail electric provider (REP); and a transmission and distribution utility.[27] As stated in PURA § 39.051(c), an electric utility was permitted to effect its unbundling "through the creation of separate nonaffiliated companies or separate affiliated companies owned by a common holding company or through the sale of assets to a third party." Thus, if an electric utility desired a true and complete separation of its three component parts, it had two options by which to achieve this goal. Given these options, an electric utility electing to create a separate affiliated company owned by a common holding company was making a conscious choice to maintain a connection between itself and its competitive affiliates—power generation companies or REPs.

Furthermore, the rulemaking authority granted to the Commission was for the purpose of "govern[ing] transactions or activities between a transmission and distribution utility and its competitive affiliates to avoid potential market power abuses and cross-subsidizations *between regulated and competitive activities*."[28] Thus, the concerns underlying unbundling were not related to the relationships between competitive affiliates. This is reinforced by the rule adopted by the Commission, which requires only that "[a] utility shall be a separate, independent entity from any

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[25] Electric Reliability Council of Texas Inc.'s Response to NRG Energy, Inc.'s First Request for Information, NRG Exhibit 2 at Question No. NRG 1-1.

[26] *See* Staff Exhibit 2 at 11:22-24.

[27] *See* Exelon's Initial Brief at 8.

[28] PURA § 39.157(d) (emphasis added).

competitive affiliate."[29] This focus on maintaining separation between a transmission and distribution utility and its competitive affiliates is reflected throughout 16 TAC § 25.247.

V. IMPACTS ON RETAIL CUSTOMERS

The Commission must carefully consider how to consider the impacts of its debt obligation order on wholesale market participants and on retail customers.[30] Subchapter N identifies providing refunds to customers who were passed-through and paid costs included in the uplift balance, or would otherwise be obligated to pay such costs, as one of the permitted uses of financing proceeds[31] and requires an LSE that receives offsets to adjust customer invoices to offset any costs that were passed through.[32] What Subchapter N does not mandate is that each LSE must receive financing proceeds in an amount sufficient to refund or credit every customer either partially or in full. Instead, the focus is on "allowing the commission to stabilize the wholesale electricity market in the ERCOT power region."[33]

While providing refunds or credits to end use customers is a critical goal that will be accomplished as part of the debt obligation order, Staff disagrees that this should happen before netting.[34] While the reality of a netting proposal is that some LSEs, and by association their retail customers, may not receive any financing proceeds because of payments received by affiliates, the argument that netting "discriminates" against end use customers[35] fails to acknowledge the already disparate circumstances of end use customers and the REPs that serve them. For example, there are certain categories of REPs that have been given the opportunity to opt out of receiving financing proceeds or paying uplift charges.[36] Of the REPs that cannot opt out, some did not pass through any costs to customers[37] because not all retail customers were enrolled in a product that

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[29] 16 Tex. Admin. Code § 25.247 (TAC).

[30] PURA § 39.653(a).

[31] PURA § 39.651(d).

[32] PURA § 39.660.

[33] PURA § 39.651(c).;

[34] *See* Initial Brief of Calpine Corporation at 3 (Sep. 1, 2021) (Calpine's Initial Brief); Texas Industrial Consumers' Initial Brief at 5 (Sep. 1, 2021) (TIEC's Initial Brief); *see also*, TXU and Luminant's Initial Brief at 11-12; Exelon's Initial Brief at 8.

[35] *See* Calpine's Initial Brief at 3, 5; TIEC's Initial Brief at 5.

[36] PURA § 39.653(d).

[37] Tr. at 346:14-16 (Bivens Cross) (Aug. 25, 2021).

allowed for the pass-through of Extraordinary Costs.[38] There may be other REPs who had a contractual right to pass-through costs but made arrangements to put the customer on a payment plan or reduce the amount of pass-through costs owed.[39] Moreover, there is only one category of retail customer that has the opportunity to opt out—transmission-voltage customers.[40]

Because "an LSE's exposure doesn't directly correlate to the amount of uplift costs passed-through to customers,"[41] the Commission faces the difficult policy choice between an outcome that ensures all end use customers that were passed through Extraordinary Costs are treated similarly and an outcome that ensures adequate financial support for those LSEs that are most likely to have liquidity issues. To make this choice, the Commission should focus on what will stabilize the wholesale market in ERCOT and prevent additional LSEs from exiting the market. As recommended by Staff, a compromise approach would be to calculate LSE exposure on a net basis to minimize the possibility that the amount to be financed exceeds $2.1 billion, and if proration is still necessary, allocate the financing proceeds based on the amount of costs an LSE passed through to retail customers.

As noted above, not all LSEs passed through Extraordinary Costs to their customers, and as acknowledged by Staff witness Carrie Bivens during cross-examination, Staff's recommended proration methodology does not take into account these LSEs.[42] Accordingly, it would also be reasonable for the Commission to adopt a mixed proration method that would allocate a portion of the financing proceeds in a proportional manner and the remaining portion in a way that gives priority to those LSEs that passed-through Extraordinary Costs to end-use customers.[43]

VI. OPT OUT PROCESS

Pursuant to PURA § 39.653(d), the Commission must develop a process that allows eligible entities to obtain an exemption from uplift charge assessments. Based on the post-hearing

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[38] Staff Exhibit 2 at 12:8-10.

[39] Tr. at 358:18-359:2 (Bivens Cross) (Aug. 25, 2021).

[40] PURA § 39.653(d).

[41] Tr. at 169:23-170:1 (Schleimer Cross) (Aug. 24, 2021).

[42] Tr. at 346:7-16 (Bivens Cross) (Aug. 25, 2021).

[43] Tr. at 348:3-20, 359:8-18 (Bivens Cross) (Aug. 25, 2021).

briefing, Staff addresses four issues:[44] (1) can entities apply on the behalf of other entities?;[45] (2) what information is required to obtain an uplift charge exemption?;[46] (3) what is the scope of an uplift charge exemption?;[47] and (4) what is necessary to maintain an uplift charge exemption?[48] Staff's positions can be summarized as follows.[49]

Staff supports the proposal that one entity should be permitted to apply on behalf of another entity,[50] with the clarification that no entity is required to do so. The entity submitting the opt out must clearly identify if it is acting on behalf of some other entity. The opt out process must collect sufficient information for ERCOT to identify and exclude the loads for which the opt out is submitted pursuant to PURA § 39.653(c).[51] However, it will ultimately be the responsibility of the entity that was opted out, and not the entity that submitted the opt out on its behalf, to make sure that it is not assessed uplift charges. Staff also believes that an uplift charge exemption should only extend to the meters (boundary or ESI ID) in service during the period of emergency.[52] Accordingly, load growth would not be subject to uplift charges.[53] However, an uplift charge exemption would not extend to new premises or new ESI IDs.[54]

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[44] There are other issues related to the opt-out process that are not being addressed in this pleading including, for example: notice requirements; whether Rayburn can opt-out; and the timing of the opt-out process relative to the process in 39.653(b)(3). *See, e.g.*, Rayburn Country Electric Cooperative Inc.'s Initial Post-Hearing Brief at 7-9 (Sep. 1, 2021) (Rayburn's Initial Brief); City of Georgetown's Closing Brief at 7 (Sep. 1, 2021); NRG Energy, Inc.'s Initial Post-Hearing Brief at 13-15 (Sep. 1, 2021).

[45] Joint Initial Brief of South Texas Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., and East Texas Electric Cooperative, Inc. on Subchapter N Securitization Opt Out Procedures at 7 (Sep. 1, 2021) (STEC et. al's Initial Brief); Lower Colorado River Authority and LCRA WSC Energy's Initial Post Hearing Brief at 5 (Sep. 1, 2021) (LCRA's Initial Brief); TIEC's Initial Brief at 3-4.

[46] STEC et al.'s Initial Brief at 4-6; LCRA's Initial Brief at 6; Joint Intervenors' Initial Brief at 2; TIEC's Initial Brief at 7-9.

[47] TIEC's Initial Brief at 7; Exelon's Initial Brief at 14-15.

[48] STEC et al.'s Initial Brief at 2; Exelon's Initial Brief at 14-15.

[49] *See also* Commission Staff's Initial Brief at 14-17 (Sep. 1, 2021); Direct Testimony of Rebecca Zerwas, Staff Exhibit 3; Staff Exhibit 2 at 17:10-14, 22-24.

[50] Any contractual obligations should be left to those parties.

[51] *See* Staff Exhibit 3 at 8:10-9:20.

[52] *Id.* at 9:7, 9.

[53] *Id.* at 10:3-6.

[54] *Id.*

Staff contends that, because the opt out is a one-time process,[55] an entity should lose its uplift charge exemption if it changes its structure in a manner that would have made it ineligible to opt out initially. [56] For example, if a REP was affiliated with each of its customers when it opted out, it would lose its exemption if it begins serving unaffiliated customers. In contrast, the addition of new affiliates would not result in the loss of the uplift charge exemption for the entire REP. That being said, the load corresponding to these new affiliates would be subject to uplift charges if they are served through an ESIID or premise that was not served during the period of emergency.

VII. OTHER ISSUES

Staff agrees with the positions taken by various parties as follows:

- Rayburn is not entitled to receive financing proceeds under Subchapter N because, by definition, its costs are not included in the uplift balance.[57]
- Rayburn should have the opportunity to opt out under PURA § 39.653(d) "with the understanding that Rayburn is seeking to securitize the amounts owed to ERCOT for Winter Storm Uri under S.B. 1580."[58]
- Uplift charges should be imposed at the QSE level and passed through to LSEs.[59]
- If the opt out form proposed by Joint Intervenors is used, the form should be modified to provide a process for the customer to provide internal documentation to show that it has paid all usage charges if the current REP and REP of record during the period of emergency cannot or will not sign the form.[60]

VIII. CONCLUSION

On balance, netting AS costs in excess of the Commission's SWCAP and RDPA charges against payments to affiliates for those same services is in the public interest because it gives meaning and purpose to the entire definition of uplift balance, is consistent with the plain meaning

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[55] PURA § 39.653(d).

[56] Staff Exhibit 3 at 10:8-16.

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

[58] Rayburn's Initial Brief at 8-9.

[59] ERCOT's Initial Brief at 8-10; Joint Intervenors' Post Hearing Brief at 9 (Sep. 1, 2021); Calpine's Initial Brief at 7.

[60] TIEC's Initial Brief at 9.

of the word "exposed" a used in Subchapter N, aligns with legislative intent, and promotes the goal of preserving the overall viability of the ERCOT wholesale market by buttressing LSEs financially and preventing them from exiting the market. Therefore, Staff continues to recommend adoption of a debt obligation order that requires LSEs to document their exposure to Extraordinary costs on a net basis.

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on September 8, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ R. Floyd Walker
R. Floyd Walker