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PUC DOCKET NO. 52322

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	**§**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

JOINT INTERVENORS' RESPONSE TO COMMISSION'S STAFF RECOMMENDATIONS ON PARALLEL DOCKET

Intervenors Just Energy,[1] Gexa,[2] APG&E,[3] and Southern Federal Power[4] (together, "Joint Intervenors") jointly file this response to Commission Staff's ("Staff's") recommendations regarding ERCOT's request for a parallel docket to be opened, which were filed July 27, 2021.[5] Order No. 1 established the deadline to file a response to Staff's recommendations as July 30, 2021. Therefore, this response is timely filed. As reflected herein, Joint Intervenors generally agree with Staff's recommendations. However, as set forth in part I(D) of this response, Joint Intervenors disagree with the last step of Staff's proposal regarding the opt out process for transmission-voltage customers served by a REP, because Staff's proposal effectively turns the process into an opt in process as to those customers, and that does not comply with PURA § 39.653(d).

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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 Commission Staff's Recommendations on Sufficiency of the Application and Notice Request for Good Cause Exception, and Request for Parallel Proceeding (July 27, 2021) ("Staff Recommendations on Parallel Docket").

I. RESPONSE TO STAFF RECOMMENDATIONS

A. Response to Recommendations on Opening of Parallel Docket.

Joint Intervenors agree with Staff's recommendation that it is advisable to open a separate docket parallel to this proceeding to (1) "implement the 'one-time' process mandated by PURA § 39.653(d) that allows certain LSEs to opt out" and (2) "allow LSEs to submit documentation to demonstrate their eligibility for Uplift Balancing financing proceeds."[6]

B. Response to Recommendations on Inclusion of Issues in Debt Obligation Order, and Interplay with Scope and Nature of the Parallel Docket.

Joint Intervenors strongly agree with Staff's recommendation that *this* contested proceeding (Docket 52322) must decide two issues and describe them in the Debt Obligation Order: (1) "the process used to document exposure" and (2) "how best to address a situation where the total amount of exposure to uplift charges documented by LSEs exceeds the $2.1 billion cap established in PURA § 39.652(4)."[7] It is Joint Intervenor's firm position that these issues should be decided in this contested docket. These issues should not be litigated or contested in the parallel docket. The parallel docket should not be opened as a contested case proceeding, but should merely receive the actual opt-out submissions and the documentation establishing exposure. As best put by Staff, the parallel proceeding would "serve as the clearinghouse for [these] filings."[8]

C. Response to Recommendations on Timeline for the Parallel Docket.

Joint Intervenors agree with Staff's recommendations in the section titled "Timeline for parallel docket."[9] This includes Staff's recommendation of "opening the parallel docket now, but establishing a deadline for these [opt-out and exposure-documentation] filings that is 30 days after

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6 Staff's Recommendations on Parallel Docket at 3-4 (citing Application N at 12-13).
7 *Id.* at 4-5.
8 *Id.* at 6.
9 *Id.* at 5.

the date the Commission issues the Debt Obligation Order in this proceeding,"[10] as well as Staff's recommendations concerning the timing and nature of ERCOT's review of the filings documenting exposure.[11] It is important that LSEs and other eligible entities have time to actually make these filings so that they can receive the economic benefits of HB4492 and newly enacted PURA Subchapter N (or opt out of it, if those that are eligible so choose).

D. Response to Recommendations on Process for Opting Out.

Joint Intervenors generally agree with Staff's recommendations in the section titled "Process for opting out,"[12] however, Joint Intervenors disagree with the process Staff recommends for implementing opt-outs by transmission-voltage customers served by a REP. It seems that the opt in methodology suggested does not comply with PURA § 39.653(d) and risks depriving transmission-voltage customers of the securitization benefits. As to (i) municipally owned utilities, (ii) electric cooperatives, (iii) river authorities, (iv) REPs that have the same corporate parent as each of the REP's customers, and (v) REPs that are affiliates of each of the REP's customers, Staff recommends that to opt out of the securitization benefits of HB4492 and PURA Subchapter N, the entity must "submit an affirmative statement that it is electing to opt out."[13] This proposal presents a true "opt out" process, in which an entity must affirmatively elect and take action to opt out. Thus, these recommendations comply with PURA § 39.653(d) and are supported by Joint Intervenors.

As to eligible transmission-voltage customers that are served by REPs, because ERCOT does not maintain information at the customer level, Staff recommends a different process. Joint

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10 Staff's Recommendations on Parallel Docket at 5 (first paragraph of section titled "Timeline for parallel docket").

11 *Id.* at 5 (second paragraph of section titled "Timeline for parallel docket").

12 *Id.* at 5-6.

13 *Id.* at 6. At the prehearing conference in this proceeding that occurred on July 28, 2021, Staff clarified that its recommendation is that REPs must assume their transmission-voltage customers have opted out, unless they expressly tell their REP they are opting in.

Intervenors take issue with only one step of that process. Joint Intervenors do not oppose Staff's recommendation that REPs who serve transmission-voltage customers notify the customers of the opt out option in writing. Joint Intervenors support Staff's recommendation that, if a transmission-voltage customer that is served by a REP elects to opt out, that it provide notice that it is opting out to the REP, and not the Commission.

However, Joint Intervenors do oppose Staff's recommendation that "[i]f a [transmission-voltage] customer [that is served by a REP] does not respond [to the REP's written notice of the opt out option] with a statement affirmatively opting [in], then the REP must assume that the customer has elected to opt-out."[14] By requiring transmission-voltage customers to affirmatively opt in to stay on the path to receiving the benefits of HB4492, the last step transforms Staff's proposal into an opt *in* process that does not comply with PURA § 39.653(d)'s express direction for a one-time opt *out* process.

PURA § 39.653(d) requires:

> The commission shall develop a one-time process that allows municipally owned utilities, electric cooperatives, river authorities, a retail electric provider that has the same corporate parent as each of the provider's customers, a retail electric provider that is an affiliate of each of the provider's customers, **and transmission-voltage customers served by a retail electric provider** to **opt out** of the uplift charges by paying in full all invoices owed for usage during the period of emergency. Load-serving entities and **transmission-voltage customers that opt out under this subsection shall not receive any proceeds from the uplift financing**.

(emphasis added).

It is clear that PURA § 39.653(d) expressly requires an "opt out" process. Importantly, PURA § 39.653(d) provides no room for the imposition of an opposite opt in process on transmission-voltage customers. To the opposite, PURA § 39.653(d) makes no distinction between the eligible entities. Further, PURA § 39.653(d) even specifies that the commission shall develop

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[14] Staff's Recommendations on Parallel Docket at 5-6.

"a . . . process," not that the commission shall establish multiple different processes for different entities.

Of key importance to those entities who could receive the funds from the securitization legislation, is that by using an opt out process (as opposed to an opt in process), PURA § 39.653(d) *set the default at being able to receive proceeds from the uplift financing and paying the accompanying uplift charges*. PURA § 39.653(d) makes clear that the mandate is that "transmission-voltage customers that *opt out* under this subsection shall not receive any proceeds from the uplift financing." PURA § 39.653(d) does not say that transmission customers shall not receive any proceeds from the uplift financing unless they take affirmative steps to opt in. This proceeding is not a vehicle for rewriting the statute.

Joint Intervenors acknowledge that Staff crafted the last step of its proposal out of concern that "transmission-voltage customers will inadvertently miss the opportunity to opt out."[15] However, on top of the need to not depart from PURA § 39.653(d)'s text, Staff's concern is overshadowed by additional prevailing considerations. To impose a unique requirement on transmission-voltage customers that they alone must take affirmative action to opt *in* to HB4492's benefits, as Staff's proposal would require, presents an opposite and far greater concern: transmission-voltage customers will, through disparate treatment, inadvertently *miss the opportunity to opt in*.

By setting the standard as "opt out" in PURA § 39.653(d), the Legislature already contemplated, weighed, and decided that, generally, the risks and consequences of inadvertently missing out on the ability to not receive the "uplift charges" by failing to affirmatively opt out, is outweighed by the greater risks and consequences of missing out on the ability to "receive proceeds

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15 Staff's Recommendations on Parallel Docket at 5-6.

from the uplift financing" by failing to affirmatively opt in. Further supporting that the default should remain where Legislature set it—at opt out—is that the consequence of receiving the uplift charges is, actually, merely being subject to PURA Subchapter N's new default regime. The affirmative opt out is also necessary to document which transmission level customers in the future will not have the nonbypassable uplift charges applied. Indeed, almost all customers who enter the market in the future will, per the legislation, receive their share of the uplift charges. The uplift charges are simply part of the new, standard cost of doing business in Texas moving forward. PURA § 39.653(d)'s opt out process is consistent with this regime.

Further, turning to the opposite risk presented by Staff's opt in proposal—that transmission-voltage customers would indeed, and disparately, miss their opportunity to receive proceeds from the uplift financing—it is more than reasonable to expect the unintended consequences of Staff's opt in proposal would be suffered by at least some customers. Not only would an opt in requirement be unexpected because it directly contradicts PURA § 39.653(d) (expressly providing for an "opt out" process), but would also be inconsistent with Staff's other proposals, under which all other eligible entities are subject to an opt out process. Thus, it is entirely reasonable to assume that even with written notice from their REPs, transmission-voltage customers would continue to rely on the plain language of PURA § 39.653(d) and assume that the only affirmative action they must take is opting out—not opting in.

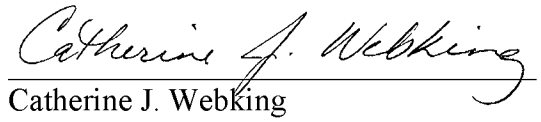
For these reasons, Joint Intervenors propose that Staff's recommendations be modified on this issue, such that "[i]f a [transmission-voltage] customer [that is served by a REP] does not respond [to the REP's written notice of the opt out option] with a statement affirmatively opting [**out**], then the REP must assume that the customer has elected to opt-[**in**]."

II. CONCLUSION AND REQUEST

Accordingly, Joint Intervenors request as follows:

1. that the Administrative Law Judge consider and adopt Staff's recommendations on the parallel proceeding set forth in Commission Staff's Recommendations on Sufficiency of the Application and Notice Request for Good Cause Exception, and Request for Parallel Proceeding (July 27, 2021) at 3-6, except as set forth in item no. 2, below; and
2. as to Staff's recommendation regarding the opt out process for a transmission-voltage customer served by a REP, that the Administrative Law Judge consider and adopt Staff's recommendation with the following modification made, for the reasons discussed herein: If a transmission-voltage customer that is served by a REP does not respond to the REP's written notice of the opt out option with a statement affirmatively opting out, then the REP must assume that the customer has elected to opt in.

Respectfully submitted,



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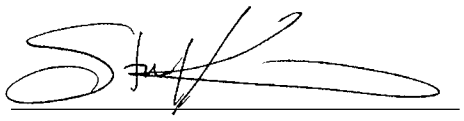
CERTIFICATE OF SERVICE

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 30th day of July 2021.



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