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APPLICATION OF ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC. FOR A DEBT OBLIGATION ORDER PURSUANT TO CHAPTER 39, SUBCHAPTER N, OF THE PUBLIC UTILITY REGULATORY ACT	§ § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

EXELON GENERATION COMPANY LLC'S RESPONSE TO THE COMMISSION'S ORDER REQUESTING BRIEFING

Exelon Generation Company, LLC ("Exelon") timely files this Response to the Public Utility Commission of Texas' (the "Commission") Order Requesting Briefing on the following questions:

1. Does the phrase *exposed to the costs included in the uplift* contemplate offsetting the amounts paid in excess of the commission's system-wide offer cap by amounts received in excess of the commission's system-wide offer cap? If so, does this offset include amounts received by entities affiliated with the entity that made such payments?

2. What is the appropriate definition for entities affiliated with the entity that made such payments? If the entity that made such payments is part of a larger business structure, what is the highest level of the business structure (up to the ultimate parent of the larger business structure) that should be used to identify the affiliated entities whose amounts received should be used as an offset when determining the exposure of the entity that made such payment?

I. EXECUTIVE SUMMARY

House Bill 4492 ("H.B. 4492") does not contemplate offsetting or netting uplift balance amounts incurred by a load-serving entity ("LSE") during the "period of emergency" defined under PURA § 39.652 with revenues of separate and distinct power generation companies or other corporate affiliates of a LSE, and, further, Texas law prevents the Commission from doing so. PURA § 39.653(b)(3) requires that the Debt Obligation Order issued in this proceeding must, among other items, "provide the process for remitting the proceeds of the financing to ***load-serving entities*** who were exposed to the costs included in the uplift balance, including a requirement for the ***load-serving entities*** to submit documentation of their exposure."[1] The Commission's briefing

[1] Emphasis added.

order asks whether PURA § 39.653(b)(3)'s reference to the words "exposed to the costs included in the uplift balance" somehow contemplates "offsetting" (i.e., "netting") of affiliate revenues with a LSE's uplift balance. That is not the case. Subchapter N expressly defines a "load-serving entity" to mean a "municipally owned utility, an electric cooperative, or a retail electric provider."[2] Nowhere does Subchapter N expressly or implicitly allow or require netting of a LSE's costs with revenues of its affiliates, and the Commission should reject claims to the contrary. The idea that Subchapter N contemplates or requires netting ignores the plain language of the statute, contravenes the Texas competitive market structure, unduly discriminates against LSEs within corporate holding companies that own power generation companies ("PGCs") and their customers, and violates Texas law by improperly "piercing the corporate veil" between affiliates that are not liable for the debts and obligations of their affiliates and are required by PURA to maintain separate corporate structures.

II. DISCUSSION

A. H.B. 4492 Does Not Contemplate or Authorize Netting the Generation Revenues of One Corporate Entity Against the Payments of a Separate Corporate Entity.

H.B. 4492 added Subchapter N to Chapter 39, PURA, which became effective immediately upon the governor signing the bill on June 16, 2021. Specifically, PURA § 39.653 requires ERCOT to file an application with the Commission to establish a mechanism for the payment of the uplift balance if the Commission finds that such financing will support the financial integrity of the wholesale market and is necessary to protect the public interest, considering the impacts on both wholesale market participants and retail customers.[3] PURA § 39.652 defines the "uplift balance" as an amount of money not to exceed $2.1 billion that was uplifted to ***load-serving entities*** on a load ratio share basis during the period of emergency[4] for reliability deployment price adder ("RDPA") charges, and for ancillary services costs in excess of the Commission's system-wide offer cap.[5]

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[2] PURA § 39.652(2).

[3] PURA § 39.653(a).

[4] PURA § 39.652 defines the "period of emergency" as the period beginning 12:01 a.m., February 12, 2021 and ending 11:59 p.m., February 20, 2021.

[5] PURA § 39.652(4).

The stated purpose of PURA § 39.653 is to allow load-serving entities who were assessed extraordinary uplift charges due to consumption during the period of emergency to pay those charges over a longer period of time to alleviate liquidity issues and reduce the risk of additional defaults in the wholesale market.[6] The $2.1 billion cap on the RDPA and ancillary services limits how much market participants can securitize. Consequently, it is crucial that the $2.1 billion is applied to LSEs on an equitable basis in order to meet the statutory purpose. Representative Paddie, the author of H.B. 4492, confirmed the intent of the legislation in his comments on the House floor:

> . . . just for the purposes of legislative intent, I just want folks to know that by placing a cap on the uplift amount of $2.1 billion, it is my intent that this be applied to all load serving entities on a load-proportionate and equitable basis. It is crucial that we do not discriminate between load-serving entities, in order to protect against market imbalances.[7]

To that end, PURA § 39.651(2)(d) requires that the proceeds of the debt obligations issued under the subchapter "must be used solely for the purpose of financing reliability deployment price adder charges and ancillary service costs that exceeded the commission's system-wide offer cap and were uplifted ***to load-serving entities*** based on consumption during the period of emergency."[8] LSE is defined as a "municipally owned utility, an electric cooperative, or a retail electric provider."[9] Had the Legislature intended the definition of a LSE to include costs or revenues of affiliated corporate entities in determining a LSE's load-ratio share of the default uplift balance, it would have so indicated expressly, but it did not. Indeed, PURA contains numerous instances in which the Legislature ***expressly*** addresses affiliate issues, but the Legislature chose not to do so in Subchapter N, which makes sense given that PURA contemplates that affiliates cannot provide undue preference to each other.[10]

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[6] PURA § 39.651(b).

[7] House Journal at 5452, 60th Day, 87th Legislature, Regular Session, 2021; *See also,* Letter from Representative Paddie, Docket No. 52322 (Aug. 3, 2021).

[8] PURA § 39.651(2)(d) (emphasis added).

[9] PURA § 39.652(2).

[10] *See* PURA § 39.157 (requiring the Commission to adopt rules and enforcement procedures to govern transactions or activities between a transmission and distribution utility and its competitive affiliates to avoid potential market power abused and cross-subsidizations between regulated and competitive activities"). *See also* PURA § 31.002(1)-(2) defining "affiliated power generation company" and "affiliated retail electric provider" and PURA § 35.003 (prohibiting undue preference to electric utility purchases from affiliates).

Nowhere in the bill or legislative intent is netting authorized, or even contemplated, and it would be outside the scope of the authority granted to the Commission to do so in light of statutory language to the contrary. Netting would essentially strip from the statute the intended benefit to a LSE and its customers simply because the LSE has an affiliate that owns generation. Ultimately, netting would continue to expose certain LSEs to the extraordinary uplift charges from consumption during the period of emergency, resulting in an increased likelihood of liquidity issues and additional defaults by market participants, rather than alleviating those concerns as the statute intended.[11]

B. Netting Would Be Contrary to Chapter 39, PURA and the Commission's Substantive Rules.

Netting would also contravene the Texas competitive market structure which mandates separation of the retail (i.e., load-serving) and generation functions. Pursuant to PURA § 39.051, each electric utility was required to separate its business activities from one another into a PGC; a retail electric provider ("REP"); and a transmission and distribution utility ("TDU"). An electric utility was authorized to accomplish the separation either 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.[12] The Commission, through its rulemaking authority, was required to establish enforcement procedures to govern transactions or activities between a TDU and its competitive affiliates to avoid potential market power abuses and cross-subsidizations between regulated and competitive activities both during the transition to and after the introduction of competition.[13] The separate affiliated entities created during the transition to competition were intended to be separate, independent entities from any competitive affiliate.[14]

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[11] The netting discussion in this brief should not be confused with the Independent Market Monitor's estimations related to market price impacts of Ancillary Services prices at $9,000 per MWh that was made in a letter from the IMM dated March 1, 2021, which netted at the corporate level.

[12] PURA § 39.051(c).

[13] PURA § 39.157(d); 16 Tex. Admin. Code (TAC) § 25.342(d).

[14] PURA § 39.157(d): "a utility is a separate, independent entity from any competitive affiliates and, except as provided by Subdivisions (8) and (9), does not share employees, facilities, information, or other resources, other than permissible corporate support services, with those competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest."

PURA allowed for the creation of affiliated companies owned by a common holding company in order to accomplish the goal of the transition to competition in favor of customer choice, and those entities were to be treated as separate, independent entities from any competitive affiliate. Netting a LSE's total exposure to RDPA and ancillary services charges based on a separate and independent generation company's revenue from sales made in excess of the system-wide offer cap is contrary to the competitive market structure established in PURA which mandates separate corporate structures for retail and generation. It also arbitrarily penalizes the customers of certain LSEs that have generation within their corporate umbrella, and ignores the dictates of the Texas Legislature with regard to the structure of the competitive electric market.

C. Netting Would Discriminate Against LSEs Affiliated With Power Generation Companies.

Netting would also violate multiple provisions of PURA by discriminating against customers that buy power from LSEs affiliated with power generation companies in favor of customers that buy power from LSEs that do not have generation affiliates. PURA § 35.004(e), for example, bars discriminatory treatment among LSEs for ancillary services. It requires:

> **The commission shall ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive**. In this subsection, "ancillary services" means services necessary to facilitate the transmission of electric energy including load following, standby power, backup power, reactive power, and any other services as the commission may determine by rule. On the introduction of customer choice in the ERCOT power region, acquisition of generation-related ancillary services on a nondiscriminatory basis by the independent organization in ERCOT on behalf of entities selling electricity at retail shall be deemed to meet the requirements of this subsection.[15]

PURA § 39.001(c), similarly, prohibits the PUC from promulgating rules or issuing orders that discriminate against any participant or type of participant in the competitive market.[16] PURA § 39.151(a) also provides that ERCOT must "ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms." Consistent with these statutory requirements, the Commission cannot and should not treat a REP that has generation

[15] Emphasis added.

[16] PURA § 39.001(c).

affiliates differently than a REP that has no generation affiliates with respect to default uplift as defined in H.B. 4492. To do so would contravene longstanding anti-discrimination provisions of PURA and the intent of H.B. 4492.

Specifically, netting the actual costs incurred by a LSE against the revenues of an affiliate that is a separate corporate entity would discriminate against a subset of LSEs that have a PGC as an affiliate, thereby disadvantaging the LSE. Netting would selectively exclude certain LSEs from the benefits of securitization of the total amount of costs actually incurred from RDPA and ancillary services charges above the system-wide offer cap during the period of emergency, resulting in discriminatory treatment between LSEs.

Furthermore, netting would discriminate against customers of certain LSEs, preventing customers of LSEs that have a PGC as an affiliate from receiving the benefits of securitization. A LSE that receives proceeds from the debt obligation order may use the proceeds solely for the purposes of fulfilling payment obligations directly related to such costs and refunding such costs to retail customers who have paid or otherwise would be obligated to pay such costs.[17] Consequently, netting would deny the LSE's customers potential payment offsets or refunds from the uplift financing, while subjecting them to the full weight of the uplift charges. This result is discriminatory and exactly the type of inequitable result PURA and H.B. 4492 sought to avoid. Ultimately, H.B. 4492 was intended to serve the "public purpose of allowing the commission to stabilize the wholesale electricity market in the ERCOT power region."[18] Conversely, netting would artificially reduce the actual costs incurred by a LSE by attributing to the LSE the revenues of an affiliate that is a separate corporate entity, thereby tilting the competitive playing field in favor of LSEs that do not have PGC affiliates and discriminating against those that do. Representative Paddie's remarks when discussing the legislative intent of H.B. 4492 could not have been clearer: "It is crucial that we do not discriminate between LSEs, in order to protect against market imbalances."[19] Yet netting would result in the exact discrimination the legislature expressly warned to avoid.

[17] PURA § 39.651(d).

[18] PURA § 39.651(c).

[19] House Journal at 5452, 60th Day, 87th Legislature, Regular Session, 2021.

D. Piercing the Corporate Veil Under Texas Law.

Offsetting a LSE's default uplift costs with the revenues of separate corporate affiliates absent an express statutory requirement to do so also contravenes Texas business organizations law. Netting is essentially an effort to offset the liability of a LSE who made payments in excess of the Commission's system-wide offer cap with the revenues generated by a parent, subsidiary, or affiliate entity. Separate business entities and corporate structures are typically established by corporations to shield shareholders or affiliate entities from liability. Thus, piercing the corporate veil is explicitly prohibited unless it is demonstrated that a holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating, and did perpetrate an actual fraud on the obligee, primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.[20] Ultimately, the power to pierce the corporate veil "is to be exercised "reluctantly" and "cautiously" and the burden of establishing a basis for disregard of the corporate fiction rests on the party asserting such claim."[21] By protecting "affiliates" of the corporation as well as shareholders, Section 21.223 protects affiliated entities of the corporation from an attempted veil piercing to impose liability on the affiliate for a contractual obligation of the corporation.[22] The strict standards for piercing the corporate veil in a case arising out of a contract of the corporation under Sections 21.223-21.226, Texas Business Organizations Code, are also applicable to a limited liability company (LLC), and the LLC's members, owners, assignees, affiliates, and subscribers.[23]

The Texas Supreme Court, in addressing jurisdictional veil piercing to exercise personal jurisdiction over the parent company of a subsidiary that did business in Texas, ruled that:

> To 'fuse' the parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence

[20] Tex. Bus. Orgs. Code Ann. § 21.223(b).

[21] *Coryell v. Phipps*, (5th Cir. 1942), 128 F.2d 702, 704, aff., 317 U.S. 406, 63 S. Ct. 291, 87 L.Ed. 363 (1943).

[22] *Phillips v. United Heritage Corp.*, 319 S.W.3d 156 (Tex. App.—Waco 2010, no pet.).

[23] Tex. Bus. Orgs. Code Ann. § 101.002.

> must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.[24]

Additionally, the Texas Supreme Court has required in jurisdictional veil piercing cases "that the party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities prove this allegation, because Texas law presumes that two separate corporations are distinct entities."[25] Therefore, in the case of either substantive or jurisdictional veil piercing, Texas law does not allow for the actions of one corporate entity to be ascribed to an affiliate entity without the party seeking to pierce the corporate veil establishing a basis for disregard of the corporate structure rooted in actual fraud or injustice. The burden of proof is on the party seeking to pierce the corporate veil.

Consequently, in the absence of any express indication in the legislation to the contrary, it would be inappropriate for the Commission to engage in netting amounts received over the system-wide offer cap by one corporate entity against the amounts paid for RDPA and ancillary services charges above the system-wide offer cap by a separate, distinct corporate entity without first establishing a basis for disregard of the corporate structure that is rooted in actual fraud or injustice.

III. CONCLUSION

Exelon requests that the Commission determine the answer to the first briefing order question is "no" because H.B. 4492 does not permit netting on a LSE's default uplift obligation with the assets of a separate corporate affiliate, that answer also being consistent with PURA, the Commission's substantive rules, and Texas common law. Based on that answer, the remaining briefing order questions are moot.

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[24] *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 175 (Tex. 2007). See also *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983); *Conner v. Conti Carriers & Terminals, Inc.*, 944 S.W.2d 405, 418 (Tex. App.-Houston [14th Dist.] 1997, no writ); and *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571, 573 (Tex. 1975).

[25] *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading has been forwarded to all parties of record via electronic mail on August 4, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50064. Pursuant to Order No. 2, filing this document on the Commission's Interchange constitutes service of the document on all parties to this proceeding.

/s/ Meghan Griffiths
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