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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 FOR A GOOD CAUSE EXCEPTION	§ § § § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

COMMISSION STAFF'S RESPONSE TO ORDER REQUESTING BRIEFING

On July 16, 2021, The Electric Reliability Council of Texas, Inc. (ERCOT) filed an application for a debt obligation order under PURA[1] chapter 39, subchapter N. On July 21, 2021, an order was filed requesting briefing on two questions as follows:

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? 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 part 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?

The order also established 3:00 p.m. on August 4, 2021, as the deadline for filing a brief on these issues. Therefore, this pleading is timely filed.

I. STAFF'S RESPONSE TO QUESTION NO. 1

When read within the context of the statutory framework of PURA chapter 39, subchapter N (Subchapter N), the phrase "exposed to the costs included in the uplift" does contemplate offsetting the amounts for reliability deployment price adder (RDPA) charges and ancillary service costs in excess of the Commission's system-wide offer cap (collectively, Extraordinary Costs) with payments received for those same services. Central to this conclusion is how to interpret the word exposed.

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

Courts will consider a statute as a whole "reading the chosen words in their context and with a view to their place in the overall statutory scheme."[2] If a statute leaves a term undefined, then a court will use the plain and ordinary meaning of the term and interpret it within the context of the statute.[3] Courts will look first to dictionary definitions to determine a term's common, ordinary meaning.[4] The unambiguous language of a statute controls its construction.[5] "When a statute is clear and unambiguous ... [a court will] not resort to extrinsic interpretive aids, such as legislative history, 'because the statute's plain language is the surest guide to the Legislature's intent.'"[6]

Taken together, the provisions of Subchapter N form a clear and unambiguous statutory scheme that is designed to preserve the viability of the ERCOT market as a whole by buttressing market participants that incurred Extraordinary Costs financially and preventing them from exiting the market. One of the stated purposes of financing the uplift balance in the manner provided in Subchapter N is to alleviate liquidity issues and reduce the risk of additional defaults in the ERCOT wholesale market by allowing wholesale market participants to repay Extraordinary Costs over a longer period of time.[7] In addition, the Legislature expressly found that Subchapter N serves the public purpose of stabilizing the ERCOT wholesale electricity market.[8] Moving further into Subchapter N, PURA § 39.653(a) allows for financing *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." Finally, PURA § 39.653(e) makes it very clear that proceeds from the financing in excess of the amount of a load-serving entity's Extraordinary Costs must be remitted to ERCOT and credited against the uplift balance.

Having established the context in which the term exposed is used, the next step is to consider the word itself. The definition of exposure includes "the fact or condition of being

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[2] *In re Acad., Ltd.*, 19-0497, 2021 WL 2635954, at *3 (Tex. June 25, 2021).

[3] *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020).

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

[5] *City of Richardson v. Oncor Electric Delivery Co.*, 539 S.W.3d 252, 261 (Tex. 2018).

[6] *Id.* (quoting *Paxton v. City of Dallas*, 509 S.W.3d 247, 257 (Tex. 2017)).

[7] PURA § 39.651(b).

[8] PURA § 39.651(c).

exposed: such as…the condition of being at risk of financial loss."[9] This definition of exposure conforms with the purposes of Subchapter N—reducing risk of additional defaults and stabilizing the wholesale market. Viewed in terms of a market participant that was both charged payments and received payments that included ancillary service costs in excess of the Commission's system-wide offer cap, 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. In fact, the market participant may be at no risk at all. Consequently, applying the plain and ordinary meaning of exposure leads to the conclusion that the Commission must look at both sides of the equation and determine exposure on a net basis.

Should the Commission decide that Subchapter N is ambiguous, then it is appropriate to consider the legislative history of the statute. The Texas Legislature has declared that the "legislative history" should be considered in construing Texas laws.[10] The legislative history of House Bill 4492 further bolsters the conclusion that exposure to Extraordinary Costs should be calculated on a net basis.

During debate on the Senate floor, Senator Hancock laid out Amendment No. 1 to House Bill 4492.[11] That amendment included much of the language ultimately included the version of House Bill 4492 that was signed by the governor and described above.[12] Senator Campbell and Senator Hancock engaged in the following exchange related to how the $2.1 billion cap on the amount that can be financed through a debt obligation order was calculated:

> CAMPBELL Good. A question has come up about the 2.1 billion cap, where did the cap, setting that cap, where did it come from? And before you answer that part, would you include, does this include netting? We're getting that--
>
> HANCOCK Yes.
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> CAMPBELL It does include netting.

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[9] Merriam Webster definition of exposure, https://www.merriam-webster.com/dictionary/exposure (last visited Jul. 28, 2021).

[10] Tex. Gov't Code § 311.023(3).

[11] Debate on Tex., H.B. 4492 on the Floor of the Senate, 87th Leg., R.S. (May 26, 2021) (the video recording available at https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=16262).

[12] S.J. of Tex., 87th Leg., R.S. 2162-73 (2021).

HANCOCK Another good question. And so, what we've done with that 2.1 is on ancillary and adder charges there are amounts that you owe and there are amounts that certain participants in that market get paid. If you're a retail electric provider, you know, it's a little bit different. But what we did is *we took those participants that both got received funds and those that owed funds into that marketplace and we netted that out and that's really where we came to the 2.1* which is simply in that ancillary and adder provision. And so it is a net amount, it's not the gross of what was total, totally owed in that provision, but it was what was owed and what was paid in the net amount.[13]

Senator Hancock unequivocally confirmed that the $2.1 billion reflects the net amount of ancillary services costs and RDPA charges that are owed to ERCOT and are eligible to be financed using Subchapter N. To be consistent, the Commission should determine the exposure of the market participants that will receive financing on a net basis. Otherwise, there is a substantial risk that the amount of exposure documented by Load Serving Entity (LSEs) will exceed the $2.1 billion. In that event, the Commission will be required to devise a method for prorating and possibly prioritizing the remittance of the financing proceeds to market participants.[14] If that becomes necessary, priority should be given to those LSEs who have the greatest exposure, i.e., are at the greatest risk financially because they did not receive, either on a standalone basis or through an affiliate, any offsetting payments.

Determining exposure on a net basis may necessitate considering amounts paid to or received by affiliates because it is likely that it will be two separate entities within a single, larger corporate structure that were charged payments or received payments that included ancillary service costs in excess of the Commission's system-wide offer cap or based on the RDPA. This reality is reflected in the fact that the ERCOT Nodal Protocols include a definition of "Counter-Party." Specifically, Counter-Party means "[a] single Entity that is a [qualified scheduling entity] and/or a [Congestion Revenue Rights] Account Holder. A Counter-Party includes all registrations as a QSE, all subordinate QSEs, and all CRR Account Holders by the same Entity."[15] Under the

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[13] *Id.* at 2:56:25 – 2:57:25 (emphasis added).

[14] Subchapter N does not address how the Commission should proceed if the amount of exposure documented by LSEs exceeds the $2.1 billion that is eligible to be financed.

[15] ERCOT Nodal Protocol § 2.1 at definition of Counter-Party.

Counter-Party system, credit exposure can be calculated as the net of generation and load, as well as financial-only transactions.[16] In other words, ERCOT is already grouping market participants that all report up to a single corporate parent for the purposes of determining financial exposure. Accordingly, it is appropriate to consider affiliated entities when determining exposure to Extraordinary Costs on a net basis.

Even if the Commission is not convinced that Staff's argument conclusively explains the meaning and legislative intent of Subchapter N, the Commission is still empowered to determine a reasonable interpretation of the phrase "exposed to the costs." The Legislature gave the Commission discretion to "provide the process for remitting the proceeds of financing."[17] The purpose and mandate of PURA § 39.653 is to support the "financial integrity of the wholesale market" and "protect the public interest."[18] In order to serve that purpose, a Debt Obligation Order under Subchapter N must look at the market participants as a whole as well as the whole energy market. Nothing in Subchapter N prohibits the Commission from distributing financing proceeds according to affiliate relationships, and doing so would protect the public interest.

II. STAFF'S RESPONSE TO QUESTION NO. 2

The Commission should use the plain language definitions of affiliate and affiliated to determine which entities are affiliated with an entity that was charged for RDPA uplift and for ancillary service costs in excess of the Commission's system-wide offer cap. Because neither the Commission nor ERCOT is privy to the details of the business relationships among and between load-serving entities, resource entities, qualified scheduling entities, and the corporate entities in between or upstream of these market participants, applying broad definitions of affiliate and affiliated is the most practical way to avoid the inadvertent exclusion of an entity that was charged payments or received payments. Accordingly, Staff believes it is advisable to use the following

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[16] ERCOT Nodal Protocol § 16.11.4

[17] PURA § 39.653(b)(3); *see*, *Railroad Comm'n of Tex. v. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011) ("[W]e will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing . . . .")

[18] PURA § 39.653; *see also* PURA § 11.002(c) ("It is the purpose of this title to grant the Public Utility Commission of Texas authority to make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the public interest.").

definition of affiliated: "closely associated with another typically in a dependent or subordinate position."[19]

A. Using a broad definition of affiliate and affiliated has procedural benefits.

A broad definition will capture affiliated entities up to the ultimate parent company. Staff believes that taking a holistic view, inclusive of the highest levels of the corporate structure, is the most uniform way to determine exposure on a net basis. Further, using definitions of affiliate and affiliated that do not require one entity in a chain of ownership exercising control over another will eliminate possible controversy over whether an entity that only owns passive interests in a market participant is considered an affiliate. This point is particularly relevant to resource entities like power generation companies that often have tax equity investors that own interests that do not allow for the management or control of the day-to-day operations of an electric generation facility. [20]

When determining exposure on a net basis, the exercise of documenting that exposure is largely an exercise of documenting known transactions—charges incurred and payments received. As such, Staff believes that casting a wide net for the purpose of identifying affiliated entities will greatly reduce the need to debate whether an LSE has documented its exposure using the "correct" universe of affiliates. As demonstrated by the 90-day deadline for the issuance of a debt obligation order,[21] financing the uplift balance in a timely manner is of the utmost importance. Therefore, establishing a framework for determining net exposure that requires an inclusive approach is one way to limit the amount of time devoted to scrutinizing each entity within a market participant's larger corporate structure to determine whether it falls within the definition of affiliate or affiliated.

B. The definition of affiliate in PURA § 11.003(2) is not applicable.

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[19] Merriam Webster definition of affiliated, https://www.merriam-webster.com/dictionary/affiliated (last visited Jul. 31, 2021); *see also*, Merriam Webster definition of affiliate https://www.merriam-webster.com/dictionary/affiliate (defining affiliates as "an affiliated person or organization").

[20] *See Application of Kinderwood Wind, LLC for Declaratory Order, or in the Alternative, Application Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 48599, Kinderwood Wind LLC Petition for Declaratory Order, or, in the Alternative, Application Under Section 39.158 of the Public Utility Regulatory Act at 4-8 (Aug. 16, 2018) ("the purchase of passive, non-controlling membership interests, as a general matter, does not constitute a merger or consolidation of contracting entities nor does it render them affiliates") (Kinderwood's Petition); *see also*, *Application of Cleco Cajun, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 48266, Order No. 4 Requesting Clarification and Documentation (Jul. 26, 2018) ("The associated entities noted in PURA § 39.158(a) are not limited by the definitional term affiliate as stated in PURA § 11.003(2)").

[21] PURA § 39.653(f).

The definition of affiliate in PURA § 11.003(2) is unworkable for the purposes of Subchapter N because it references direct or indirect ownership of a "public utility."[22] For purposes of this discussion, a public utility is an electric utility as defined in PURA § 31.002.[23] The definition of electric utility in PURA § 31.002 expressly excludes several types of entities relevant to this proceeding, such as municipal corporations, electric cooperatives, retail electric providers, and power generation companies.[24] Thus, the definition of affiliate in PURA §11.003(2) should not apply in this proceeding.

C. The definition of affiliate in Protocol § 2.1 requires modification.

If the Commission determines that the plain language definitions of affiliate and affiliated are too broad, then the Commission should apply a modified definition of affiliate found in the ERCOT Nodal Protocols. The first five paragraphs[25] of that definition read as follows:

> (1) An Entity that directly or indirectly owns or holds at least 5% of the voting securities of a Market Participant; or
>
> (2) An Entity in a chain of successive ownership of at least 5% of the voting securities of a Market Participant; or
>
> (3) An Entity that has at least 5% of its voting securities owned or controlled, directly or indirectly, by a Market Participant; or
>
> (4) An Entity that has at least 5% of its voting securities owned or controlled, directly or indirectly, by an Entity who directly or indirectly owns or controls at least 5% of the voting securities of a Market Participant or an Entity in a chain of successive ownership of at least 5% of the voting securities of a Market Participant; or
>
> (5) A person who is an officer or director of a Market Participant or of a corporation in a chain of successive ownership of at least 5% of the voting securities of a Market Participant.[26]

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[22] PURA § 11.003(2).

[23] PURA § 11.004(1).

[24] PURA § 31.002(6).

[25] Because these paragraphs reference "voting securities" similar to the definition in PURA § 11.003(2), they may lead to the same issues noted above regarding passive investors in power generation facilities. *See* Docket No. 48599, Kinderwood's Petition at ("…the passive equity interests that are being transferred in the Transaction do not contain full voting rights over the management or control of the Project Companies or, more importantly, the right to control the day-to-day operations or sale of energy from the Projects. Therefore, Siemens will not meet the definition of an affiliate under PURA § 11.003(2).").

[26] ERCOT Nodal Protocol § 2.1 at definition of Affiliate, paragraphs 1-5.

Unlike PURA, this definition captures the universe of market participants relevant to this proceeding because the term "entity" includes natural persons, partnerships, municipal corporations, cooperative corporations, associations, governmental subdivisions, or public or private organizations.[27] In addition, the term market participant includes load-serving entities, resource entities, qualified scheduling entities, and congestion revenue rights account holders.

However, the ERCOT Protocol definition of affiliate excludes an affiliate in a chain of successive ownership of a market participant that does not own 50% or more of the voting securities of any other entity in the chain or the successive owners of such an entity.[28] Without knowing the details of the larger corporate structure specific to each market participant, there is no way to know if this exclusion would result in the elimination of upstream entities that should be included. Therefore, if the Commission decides to use the definition of affiliate from the ERCOT Nodal Protocols, it should limit the definition to paragraphs 1 through 5 of that definition.

III. CONCLUSION

Staff submits the foregoing briefing for the Commission's consideration and respectfully request that the Commission adopt a preliminary order concluding (1) that the phrase "exposed to the costs included in the uplift" contemplates determining exposure on a net basis inclusive of affiliated entities; and (2) that a broad, plain language definition of affiliate and affiliated, that allow for the inclusion of affiliates up to the ultimate parent company, is the definition that should apply when determining which affiliates that were charged costs or received payments should be included in the calculation of net exposure.

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[27] ERCOT Nodal Protocol § 2.1 at definition of Entity.

[28] ERCOT Nodal Protocol § 2.1 at definition of Affiliate, paragraph 6.

Dated: August 4, 2021

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS
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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 on August 4, 2021 in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ R. Floyd Walker
R. Floyd Walker