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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**

TXU LOAD-SERVING ENTITIES' BRIEF REGARDING "NETTING"

TXU Energy Retail Company LLC (TXU Energy), Ambit Texas, LLC (Ambit), Luminant ET Services Company LLC (ETS), TriEagle Energy LP (TriEagle), and Value Based Brands LLC dba 4Change Energy, Express Energy, and Veteran Energy (VBB) (collectively, the TXU load-serving entities or TXU LSEs) file this Brief pursuant to the Order Requesting Briefing issued by the Commission on July 21, 2021 (Briefing Order). The Briefing Order requires briefs to be submitted by 3:00 p.m. August 4, 2021. This Brief is timely filed.

I. INTRODUCTION

On July 16, 2021, the Electric Reliability Council of Texas (ERCOT) filed an application for a financing order under Subchapter N of PURA[1] Chapter 39. Section 39.653(b)(3) in Subchapter N requires that the financing order "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."[2] Section 39.652(4) defines the "uplift balance" as "an amount of money of not more than $2.1 billion that was uplifted to load-serving entities on a load ratio share basis due to energy consumption during the period of emergency for reliability deployment price adder charges and ancillary services costs in excess of the commission's system-wide offer cap[.]"[3]

The Briefing Order asks, in Question 1, does that statutory language "contemplate offsetting the amounts paid in excess of the commission's system-wide offer cap by amounts

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[1] Tex. Util. Code §§ 11.001-66.016.

[2] *Id.* § 39.653(b)(3).

[3] *Id.* § 39.652(4).

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?" And in Question 2, the Briefing Order asks how to define "entities affiliated with the entity that made such payments." Thus, the Briefing Order asks whether "netting" of exposure against other revenues or against affiliated, non-LSE entities applies and if so, to what entities it would be applied. Because the answer to Question 1 is "no," the TXU LSEs do not address Question 2.

The TXU LSEs were exposed to and paid actual and substantial uplift costs. Their exposures were their own. The costs were uplifted to them on a load ratio share basis due to energy consumption during the period of emergency, attributable to each LSE. They were responsible for the uplift costs assessed to them. The statute directs that the Commission remit bond proceeds to LSEs "who were exposed to the costs included in the uplift balance."[4] The statute does not mention any form of netting an LSE's exposure against any other entity's market outcome. Rather, the statute focuses singularly on each LSE's own uplift exposure.

Netting would be contrary to and in violation of: (A) the clear language of the statute, Subchapter N of Chapter 39; (B) the Governor's and the Legislature's directives to provide adequate incentives for dispatchable generation; (C) longstanding Texas law regarding principles for respecting the legal separateness of corporate entities; and (D) the anti-discrimination mandate in § 39.001(c).

II. NETTING IS CONTRARY TO THE LEGISLATURE'S DIRECTIVES

A. The statutory text does not contemplate netting.

"When construing a statute, [the] primary objective is to ascertain and give effect to the Legislature's intent."[5] A "statute's plain language is the surest guide to the Legislature's intent."[6] And if a statute "uses a term with a particular meaning or assigns a particular meaning to a

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[4] *Id.* § 39.653(b)(3).

[5] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

[6] *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (internal quotation marks).

term," that "statutory usage" controls.[7] Those basic principles lead to the straightforward conclusion that netting would be completely contrary to the statutory text.

Section 39.653(b)(3) authorizes the Commission to issue a "debt obligation order" and states that the order "must . . . 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*."[8] The plain language makes clear that the "exposure" that matters is the exposure faced by a "load-serving entity," and numerous other statutory provisions reinforce that conclusion.[9]

A "load-serving entity" means "a municipally owned utility, an electric cooperative, or a retail electric provider."[10] To be "exposed" is to be "subjected to an action, influence, or condition."[11] The only question is whether "a municipally owned utility, an electric cooperative, or a retail electric provider" was "subjected to" uplift balance costs—not whether the LSE "received [amounts] in excess of the commission's system-wide offer cap" and *certainly not* whether *the parent of* or *an affiliate of* a LSE experienced related or unrelated financial impacts.

The Legislature in defining "uplift balance" likewise described the relevant exposure as limited to retailers—the LSEs. The definition is limited to costs uplifted "on a load ratio share basis due to energy consumption during the period of emergency."[12] LSEs have a load ratio share; generation entities and non-LSE affiliates do not (with the exception of Qualified Scheduling Entities (QSEs), whose load-ratio share merely reflects that of LSEs they represent). If the Legislature wanted to impose netting of affiliate revenues, it could have included the specifics of that mechanism and references to those other entities (e.g., QSEs). It did not.

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[7] *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439.

[8] Tex. Util. Code § 39.653(b)(3) (emphases added).

[9] *See, e.g., id.* § 39.653(c) (requiring an assessment of "uplift charges *to all load-serving entities*" (emphasis added)); *id.* § 39.653(e) (discussing "any load-serving entity that receives proceeds from the financing that exceed *the entity's* actual exposure" (emphasis added)); *id.* § 39.652(4) (defining "uplift balance" to mean money "that was uplifted *to load-serving entities*" (emphasis added)).

[10] *Id.* § 39.652(2).

[11] *Expose*, *Am. Heritage Dictionary*, https://www.ahdictionary.com/word/search.html?q=exposed (last visited Aug. 3, 2021).

[12] *See* Tex. Util. Code § 39.652(4).

Context confirms that the Legislature's decision to focus on the exposure of LSEs themselves—rather than other corporate entities—was no mere drafting error. Just two subsections later, § 39.653(d) provides for an opt-out process that *does* take corporate structure into account.[13] These distinctions are significant: "When the Legislature uses a word or phrase in one part of a statute but excludes it from another, the term should not be implied where it has been excluded."[14] Netting would violate this basic legal command.

The Commission's power here is limited to following the Legislature's directive, and that directive lacks any suggestion that load-serving entities should have "their exposure" netted against any other amounts. Injecting new factors into the analysis that the Legislature did not prescribe would run counter to the plain statutory text and render any resulting agency action arbitrary and capricious.[15]

B. Construed as a whole, the securitization bill does not contemplate netting.

"In construing a statute," the "object sought to be attained" should be considered, especially where that object is codified in the statute.[16] Indeed, the "surest guide to what lawmakers intended is the enacted language of a statute, which necessarily includes any enacted statements of policy or purpose."[17] The "legislative intent derives from an act as a whole rather

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[13] *See* Tex. Util. Code § 39.653(d) ("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.") (emphases added). Moreover, when the Legislature wanted the Commission or an entity to "net" or "offset" costs, it said so explicitly. Indeed, §§ 39.604(c)(2) and 39.654(c)(2) use the term "net" in the context of netting issuance costs from the bond proceeds prior to distribution, and § 39.660 requires LSEs who "receive[] offsets" to reimburse customers to whom they passed through the costs.

[14] *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 658 n.41 (Tex. 2021) (internal quotation marks omitted). Nor is the Commission free to disregard the plain import of the words the Legislature adopted. "[A]n agency's opinion cannot change plain language," *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006), and an agency has no authority to "erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes"—even if the agency sees the new power as a "necessary implication from a specific power, function, or duty expressly delegated," *Pub. Util. Comm'n of Tex. v. GTE-Sw., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995) (internal quotation marks and citation omitted).

[15] *See Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex. App.—Austin 2008, no pet.) (agency action is "arbitrary and capricious if it is based on legally irrelevant factors").

[16] Tex. Gov't Code § 311.023(1); *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

[17] *Youngkin*, 546 S.W.3d at 680 (internal quotation marks and citation omitted).

than from isolated portions."[18] Although the plain text of § 39.653 makes clear that netting is inappropriate, several other sections of the new legislation buttress that conclusion:

- "The proceeds of debt obligations . . . 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*."[19]

- The securitization is intended to "support the financial integrity of the wholesale market" and "to protect the public interest, considering the impacts on . . . retail customers," in part by requiring *load-serving entities* to use proceeds "for the purpose[] of . . . refunding such costs to retail customers."[20]

- The Commission "shall . . . evaluate whether additional services are needed for reliability in the ERCOT power region while providing adequate incentives for dispatchable generation."[21]

First, the Commission must use the proceeds only for remitting to the LSEs to cover costs from the uplift balances. This solitary purpose aimed solely at LSEs underscores that § 39.653(b)(3) does not contemplate piercing any corporate structure or "netting" any costs. And this section again concentrates only on the "costs" and "charges" that were *uplifted* to LSEs. It doesn't mention anything about whether the LSEs (or affiliates) also received other revenues.

Second, the Legislature intended that securitization benefit everyday Texans, who themselves were either directly impacted by higher costs or might face greater cost pressures in future prices due to the uplift balances. That "express purpose" is manifested in the *requirement* that "load-serving entities that receive offsets . . . . adjust customer invoices to reflect the offsets for any charges that were or would otherwise be passed through to customers under the terms of service with the load-serving entity."[22]

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[18] *Id.*

[19] Tex. Util. Code § 39.651(d) (emphasis added).

[20] *Id.* §§ 39.651(d) (last quotation), 39.653(a) (first quotations); *id.* §§ 39.651(c) (financing will "serve[] the public purpose of allowing the commission to stabilize the wholesale electricity market").

[21] *Id.* § 35.004(g)(2).

[22] *Youngkin*, 546 S.W.3d at 681 (first quotation); Tex. Util. Code § 39.660 (second quotation); *see also id.* §§ 39.651(d), 39.653(a).

It would be unreasonable and arbitrarily discriminatory to conclude without explicit direction that the Legislature meant to benefit only customers of certain corporate structures.[23] But that's what the Commission would be concluding if it were to adopt netting—that the Legislature intended to bar from relief some customers who received "passed through" uplift costs simply because of their provider's corporate structure (over which customers have no control). The Commission would be penalizing the people the Legislature intended to protect.[24]

Third, the Legislature and the Governor have directed the Commission to encourage, and provide adequate revenue to, dispatchable generation—but netting would directly contravene those directives. Section 35.004(g)(2) directs the Commission to "evaluate whether additional services are needed for reliability in the ERCOT power region while providing adequate incentives for dispatchable generation."[25] Similarly, the Governor's July 6, 2021 letter to the Commission directs it to "[s]treamline incentives within the ERCOT market to foster the development and maintenance of adequate and reliable sources of power, like natural gas, coal, and nuclear power."[26]

Applying netting would remove—not provide—incentives for companies to operate dispatchable generation and produce energy and ancillary services during extreme conditions. The most likely source of "offsetting" revenue is sales by an LSE's generation affiliate from dispatchable generation that was operating during the winter storm. Netting would signal that a generation company's revenues are subject to being clawed back at the Commission's whim, for purposes wholly unrelated to the generator's operations, without legislative authority. That would discourage—not encourage—development and operation of dispatchable generation.

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[23] *See Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 161 (Tex. 2011) (rejecting proposed interpretation that would "frustrate [the statute's] purpose"); *see also* Tex. Gov't Code § 311.023(5) ("consequences of a particular construction" can be considered).

[24] Barring some LSEs from receiving debt obligation proceeds could also create additional imbalances in the market, which will ultimately harm consumers. *See* Tex. Util. Code § 39.653(a) ("the commission [must] find[] that such financing will support the financial integrity of the wholesale market").

[25] *Id.* § 35.004(g)(2).

[26] Gov. Greg Abbott, *Letter to Public Utility Commissioners* 1 (July 6, 2021), available at https://gov.texas.gov/uploads/files/press/SCAN_20210706130409.pdf.

C. Netting would violate important principles of Texas corporate law.

Netting an LSE's financial exposure against that of its corporate affiliates would contravene well-established principles of Texas law that protect corporate separateness. But it is axiomatic that statutes must be interpreted in harmony with one another because the Legislature is "presumed to have acted with full knowledge of the existing laws."[27] Because § 39.653(b)(3) does not evince a clear intent to pierce the corporate veil, it should not be read to do so.

Texas corporate law confirms that § 39.653(b)(3) does not contemplate netting a load-serving entity's costs with its corporate affiliates' gains. "Texas law presumes that two separate corporations are distinct entities."[28] That is true even if the corporations share a parent-subsidiary relationship,[29] or if they are affiliates of one another.[30] After all, it is a "bedrock principle of corporate law" that individuals may choose to incorporate a business to limit the liability of the entity to its own affairs.[31] Courts respect that choice, and they "will not disregard the corporate veil absent exceptional circumstances."[32] So the mere existence of "centralized control, mutual purposes, and shared finances" is not enough to pierce the corporate veil.[33] Rather, courts may do so only if there is "evidence of abuse, . . . injustice and inequity."[34]

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[27] *Irving Fireman's Relief & Ret. Fund v. Sears*, 803 S.W.2d 747, 750 (Tex. App.—Dallas 1990, no writ); *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) ("we strive to give the provision a meaning that is in harmony with other related statutes"). Courts likewise "construe statutory language against the backdrop of common law, assuming the Legislature is familiar with common-law traditions and principles." *Marino v. Lenoir*, 526 S.W.3d 403, 409 (Tex. 2017).

[28] *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173 (Tex. 2007).

[29] *See, e.g., Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 88 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("[F]or the purposes of legal proceedings, subsidiary corporations and parent corporations are separate and distinct 'persons' as a matter of law . . . .") (citation omitted).

[30] *See, e.g., In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) ("[C]orporate affiliates are generally created to separate the businesses, liabilities, and contracts of each. Thus, a contract with one corporation—including a contract to arbitrate disputes—is generally not a contract with any other corporate affiliates.").

[31] *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006); *see also SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) ("Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace.").

[32] *Adam v. Marcos*, 620 S.W.3d 488, 502 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

[33] *SSP Partners*, 275 S.W.3d at 455.

[34] *Id.* at 451, 455 (examples include "when the corporate structure has been abused to perpetrate a fraud, evade an existing obligation, achieve or perpetrate a monopoly, circumvent a statute, protect a crime, or justify wrong").

This standard is even stricter in the context of a business's contractual obligations.[35] Under § 21.223 of the Texas Business Organizations Code, shareholders and affiliates are not liable for "any contractual obligation of the corporation or any matter relating to or arising from the obligation," unless they caused the corporation to "perpetrate an actual fraud . . . primarily for the[ir] direct personal benefit."[36]

Netting the financial exposure between LSEs and their corporate parents or affiliates would violate the fundamental protections Texas law affords corporations. There is no evidence here of any injustice and inequity—let alone actual fraud—that would justify piercing the corporate veil of any load-serving entity participating in the ERCOT market. And there is nothing in the "express terms or necessary implications" of § 39.653(b)(3) or any other part of Subchapter N that "clearly indicate[s]" the Legislature intended this draconian result.[37]

Because both the common law and the Texas Business Organizations Code protect corporate separateness, and because PURA specifically requires unbundling between a power generation company and retail electric provider,[38] § 39.653(b)(3) should not be read to permit consideration of the finances of a retailer's parents or affiliates in the absence of any "legislative intent to depart from" this well-established principle.[39]

D. Netting would violate PURA's anti-discrimination requirement.

Section 39.001(c) of PURA forbids the Commission from discriminating against any market participant or type of market participant: "Regulatory authorities . . . may not

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[35] *Id.* at 455; *see also, e.g., S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 89 (Tex. 2003) (refusing to disregard the corporate separateness of a utility and its affiliates and rejecting the taxing authority's attempt the treat the corporations as a single business entity for tax purposes); *Bell Oil & Gas Co. v. Allied Chem. Corp.*, 431 S.W.2d 336, 341 (Tex. 1968) (holding parent corporation not liable for contract obligations of affiliated corporation).

[36] Tex. Bus. Orgs. Code § 21.223(a), (b); *see also id.* § 21.224 ("Section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise.").

[37] *Neese v. Lyon*, 479 S.W.3d 368, 380 (Tex. App.—Dallas 2015, no pet.) (similar).

[38] Tex. Util. Code § 39.051.

[39] *Hadley v. Wyeth Labs., Inc.*, 287 S.W.3d 847, 850 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *see also Tolbert v. Standard Acc. Ins. Co.*, 148 Tex. 235, 241–42 (1949) (court "not authorized" "to change the existing common-law rule by doubtful implication . . . in the absence of an obvious legislative intent to the contrary").

discriminate against any participant or type of participant during the transition to a competitive market and in the competitive market."[40]

Implementing netting would violate PURA's anti-discrimination mandate. The Commission would be giving LSEs without affiliates greater compensation for their uplift exposure, while penalizing LSEs that happen to have affiliates who earned unrelated revenues. That would discriminate against one set of LSEs for the benefit of another. But PURA forbids precisely such differential treatment, because it would discriminate against one type of LSE based on an irrelevant and unlawful consideration.

For purposes of Subchapter N, only one fact is relevant to whether LSEs are similarly situated—did the LSE face exposure to uplift? The statute does not ask whether an LSE "and its affiliates" faced such exposure—it takes an entity-by-entity, LSE-centric approach. Further, Chairman Paddie, who authored the House Bill, declared on the House floor regarding the provision of bond proceeds to load-serving entities 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."[41] He emphasized "It is crucial that we do not discriminate between load-serving entities, in order to protect against market imbalances."[42] If the Commission were to inject an extraneous factor—i.e., whether an LSE's *affiliate* had "offsetting" exposure—that would violate the load-proportionate and equitable allocation directed, and instead create an unlevel, discriminatory playing field among LSEs who are similarly situated concerning the only relevant factor, which is whether that specific LSE, standing alone, faced uplift exposure.

III. IF "NETTING" APPLIES, THEN IT ALSO MUST APPLY TO THE IMPOSITION OF UPLIFT CHARGES

The statutory language that directs how to impose the uplift charges (that will be used by ERCOT to pay down the bonds) is the same as the statutory language that describes how to determine what uplift costs have triggered reimbursement through bond proceeds. In each case, the statute describes the costs as "uplifted to" or "charges to" "load serving entities on a load

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[40] Tex. Util. Code § 39.001(c).

[41] H.J. of Tex., 87th Leg., R.S. 5452 (May, 30 2021), available at https://journals.house.texas.gov/HJRNL/87R/PDF/87RDAY60FINAL.PDF.

ratio share basis." Section 39.652(4) defines the "uplift balance" as "an amount of money of not more than $2.1 billion *that was uplifted to load-serving entities on a load ratio share basis* due to energy consumption during the period of emergency[.]"[43] Similarly, regarding imposition of uplift charges, § 39.653(c) directs that the "independent organization shall *assess uplift charges to all load-serving entities on a load ratio share basis*[.]"[44] In each case, the relevant costs are those borne by "load-serving entities on a load ratio share basis." That statutory language is identical. Thus, if the statute regarding eligibility for reimbursement for such uplift balances somehow means "netted against other affiliates or revenues," then that must be its meaning with respect to imposition of uplift charges also. Accordingly, if the Commission adopts "netting" (which it should not), then it must apply to both situations, and the liability for payment of uplift charges must be commensurate with the eligibility for receipt of uplift bond proceeds. Any other approach would be an inconsistent interpretation of the same statutory language and exacerbate the discriminatory treatment of similarly situated LSEs.

IV. CONCLUSION AND PRAYER

For all the foregoing reasons, any implementation of "netting" in this proceeding would contravene Texas law by deviating from the Legislature's direction, undermining Texas corporate law principles, discouraging investment in dispatchable generation, and discriminating against a type of market participant. Accordingly, the TXU load-serving entities respectfully ask the Commission to reject "netting" or "offsetting" as described in the Briefing Order.

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[42] *Id.*

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

[44] *Id.* § 39.653(c) (emphasis added).

Respectfully submitted,

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