



Control Number: 52364



Item Number: 537

PROJECT NO. 52364

2021 DEC -3 PM 2:48

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| PROCEEDING FOR ELIGIBLE | § | PUBLIC UTILITY COMMISSION |
| ENTITIES TO FILE AN OPT OUT | § | |
| PURSUANT TO PURA § 39.653(D) AND | § | OF TEXAS |
| FOR LOAD-SERVING ENTITIES TO | § | |
| FILE DOCUMENTATION OF | § | |
| EXPOSURE OF COSTS PURSUANT TO | § | |
| THE DEBT OBLIGATION ORDER IN | § | |
| DOCKET NO. 52322 | § | |

ORDER SEVERING ISSUE INTO A SEPARATE DOCKET

DOCKET NO. 52915

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| PROCEEDING TO DETERMINE THE | § | PUBLIC UTILITY COMMISSION |
| DEADLINE TO FILE A NOTICE OF | § | |
| OPT-OUT IN PROJECT NO. 52364 | § | OF TEXAS |

DECLARATORY ORDER

This Order addresses requests that the Commission determine whether the 3:00 p.m. deadline in 16 Texas Administrative Code (TAC) § 22.71(h) applies to opt-out filings made in Project No. 52364.¹

I. Severance into a Separate Docket

First, the Commission severs the referenced requests and associated documents into a separate docket. As discussed in greater detail below, in the Commission’s order severing issues filed in Docket No. 52322² on August 19, 2021 and its debt obligation order filed in that docket on October 13, 2021 as well as in Order No. 1 filed in Project No. 52364 on November 3, 2021, the Commission has determined that Project No. 52364 is a repository for documents, not a

¹ *Proceeding for Eligible Entities to File an Opt Out Pursuant to PURA § 39.653(d) and for Load-Serving Entities to File Documentation of Exposure to Costs Pursuant to the Debt Obligation Order in Docket No. 52322, Project No. 52364 (pending).*

² *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, Docket No. 52322, Debt Obligation Order (Oct. 13, 2021).*

proceeding under the Commission's rules. Project No. 52364 is not a fact-finding or decision-making procedure. Therefore, the Commission severs out the requests for Commission action into separate Docket No. 52915, *Proceeding to Determine the Deadline to File a Notice of Opt-Out in Project No. 52364*. Accordingly, the Commission moves the following filings from Project No. 52364 into Docket No. 52915 and orders that all future filings related to the severed issues be made in Docket No. 52915:

Item No. 506, motion by Texas Industrial Energy Consumers (TIEC) filed on December 1, 2021;

Item No. 516, Order No. 2 filed on December 1, 2021;

Item No. 519, Pioneer Natural Resources' motion filed on December 1, 2021;

Item No. 528, NET Mexico Pipeline Partners' motion filed on December 2, 2021;

Item No. 530, MP2 Energy Texas LLC's response filed on December 2, 2021;

Item No. 531, joint response of TXU Load-Serving Entities and NRG Energy, Inc. filed on December 2, 2021;

Item No. 533, Commission Staff's response filed on December 2, 2021;

Item No. 534, Calpine Corporation's response filed on December 2, 2021; and

Item No. 535, City of Austin's motion filed on December 2, 2021.

II. Requests for the Commission to Interpret its Rules and Orders

As explained below, the Commission determines that the 3:00 p.m. deadline in 16 Texas Administrative Code (TAC) § 22.71(h) does not apply to opt-out filings made in Project No. 52364. In its debt obligation order in Docket No. 52322, the Commission adopted the 45-day deadline agreed to by the parties in Docket No. 52322 for load-serving entities and transmission-level customers to file notices of opt-out. The requirement that opt-out filings be made 45 days from the date the debt obligation order was signed requires that the filings be made on or before November 29, 2021. Any opt-out filing made on or before November 29, 2021—including after 3:00 p.m. on November 29, 2021—is effective and complies with the deadline set in the Commission's debt obligation order. Any opt-out filing made after November 29, 2021 does not comply with the deadline set in the Commission's debt obligation order.

Background

On November 30, 2021, the Electric Reliability Council of Texas (ERCOT) filed a report in Project No. 52364 regarding which entities it considered to have complied with the Commission's debt obligation order to opt out of the securitization uplift charges. ERCOT stated that it did not include filings made after 3:00 p.m. on November 29, 2021 because of the Commission's procedural rule 16 TAC § 22.71(h), which requires all documents to be filed by 3:00 p.m. on the due date unless otherwise ordered.

On December 1, 2021, TIEC filed a motion requesting that the Commission order ERCOT to honor opt-out filings made after 3:00 p.m. on November 29th. To the extent necessary if the Commission determined that the 3:00 p.m. deadline in 16 TAC § 22.71(h) applied, TIEC requested a good-cause exception to that deadline. On December 1, 2021, Pioneer Natural Resources filed a motion similar to TIEC's and argued that the opt-out filings in Project No. 52364 were not technically pleadings. On December 2, 2021, MP2 Energy Texas LLC doing business as Shell Energy Solutions, the TXU Load Serving Entities,³ NRG Energy, Inc., Calpine Corporation, and the City of Austin all made filings similar to or in support of TIEC's. Commission Staff also filed a response to TIEC's motion that explained its position.

Legal Analysis

Under 16 TAC § 22.71(h), "[a]ll documents shall be filed by 3:00 p.m. on the due date, unless otherwise ordered by the presiding officer." Subsection (a) of that rule, however, clarifies that the section applies to all pleadings as defined in 16 TAC § 22.2 as well as the following documents: "(1) all documents filed relating to a rulemaking proceeding; (2) applications; (3) letters or memoranda relating to any item with a control number; (4) reports required by [the Public Utility Regulatory Act (PURA)⁴], commission rules or request of the commission; or (5) discovery requests and responses." Therefore, unless the opt-out filings fall under one of the categories of documents described in 16 TAC § 22.71(a), the 3:00 p.m. deadline in subsection (h) does not apply.

³ The TXU Load Serving Entities include the following: TXU Energy Retail Company LLC; Ambit Texas, LLC; Luminant ET Services Company LLC; TriEagle Energy LP; Value Based Brands LLC doing business as 4Change Energy; Express Energy; and Veteran Energy.

⁴ Tex. Util. Code §§ 11.001–66.016.

Pleading is defined in 16 TAC § 22.2(32) as “[a] written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.” *Proceeding* is then defined in 16 TAC § 22.2(35) as “[a]ny hearing, investigation, inquiry or other fact-finding or decision-making procedure, including the denial of relief or the dismissal of a complaint, conducted by the commission or the utility division of SOAH.”

The opt-out filings are not pleadings because Project No. 52364 is not a proceeding under the Commission’s definition. In the Commission’s order severing issues filed in Docket No. 52322 on August 19, 2021, the Commission stated that Docket No. 52364 would “be used as a repository for documentation both of exposure to costs included in the uplift balance and of opt-outs under PURA § 39.653(d) and verification of amounts in that documentation” and severed out those issues from Docket No. 52322 into Docket No. 52364.⁵ The Commission reiterated this fact in finding of fact 9 of the debt obligation order.⁶

Accordingly, the Commission’s administrative law judge (ALJ) reclassified 52364 as a *project* rather than a *docket* in Order No. 1.⁷ The Commission ALJ reasoned that Project No. 52364 was not a “proceeding handled as a contested case under the [Administrative Procedure Act⁸]” per the definition of *docket* in 16 TAC § 22.2(19) because there is no opportunity for an adjudicative hearing. According to the Commission ALJ, “[t]here is nothing in [the relevant parts of the debt obligation order] that would authorize or necessitate a contested case hearing for the completion of the opt-out process.”

The Commission’s orders in Docket No. 52322 and the Commission ALJ’s Order No. 1 in Project No. 52364 make clear that Project No. 52364 is not a hearing. The project is also not an investigation or inquiry under the ordinary usage of those terms. Project No. 52364 is not a fact-finding or decision-making procedure either as it is simply a repository for documents. Therefore, Project No. 52364 is not a proceeding under the definition in the Commission’s rules.

⁵ Docket No. 52322, Order Severing Issues (Aug. 19, 2021).

⁶ Docket No. 52322, Debt Obligation Order at 13.

⁷ Project No. 52364, Order No. 1 at 1–2 (Nov. 3, 2021).

⁸ Administrative Procedure Act, Tex. Gov’t Code §§ 2001.001-.902.

And because Project No. 52364 is not a proceeding, filings in that docket cannot be characterized as pleadings, which relate to proceedings.

The opt-out filings are also not one of the other documents listed in 16 TAC § 22.71(a). They are not “documents filed relating to a rulemaking proceeding” because Project No. 52364 is a repository project, not a rulemaking proceeding.⁹ Likewise, they are not applications, which are defined as pleadings that “initiat[e] a proceeding.”¹⁰ Further, the opt-out filings are not letters, memoranda, or reports under the ordinary usage of those terms, nor are they discovery requests or responses.

Because the opt-out filings are not one of the documents listed in 16 TAC § 22.71(a), the 3:00 p.m. deadline in § 22.71(h) does not apply. And because the 3:00 p.m. deadline does not apply, the Commission need not, and does not, grant a good-cause exception.

The only remaining question is what deadline does apply to the opt-out filings. No Commission rule addresses this question. Therefore, the Commission looks at its debt obligation order in Docket No. 52322. In the debt obligation order, the Commission adopted the 45-day deadline agreed to by the parties in Docket No. 52322 for load-serving entities and transmission-level customers to file notices of opt-out. The requirement that opt-out filings be made 45 days from the date the debt obligation order was signed requires that the filings be made on or before November 29, 2021. Because no Commission rule sets a different time as the deadline for the opt-out filings and the Commission has moved to electronic filing,¹¹ any opt-out filing made on or before November 29, 2021—including after 3:00 p.m. on November 29, 2021—is effective and complies with the deadline set in the Commission’s debt obligation order. Any opt-out filing made after November 29, 2021 does not comply with the deadline set in the Commission’s debt obligation order.

The Commission denies all other motions and any other requests for general or specific relief, if not expressly granted.

⁹ 16 TAC §§ 22.71(1), 22.2(43).

¹⁰ 16 TAC §§ 22.71(2), 22.2(6).

¹¹ *Issues Related to the State of Disaster for the Coronavirus Disease 2019*, Second Order Suspending Rules (July 16, 2020).

Signed at Austin, Texas the 3rd day of December 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



WILL MCADAMS, COMMISSIONER



LORI COBOS, COMMISSIONER



JIMMY GLOTFELTY, COMMISSIONER