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COMPLAINT OF BROOKDALE
SENIOR LIVING INC. AGAINST
MIDAMERICAN ENERGY
SERVICES, LLC

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BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**FORMAL COMPLAINT OF BROOKDALE SENIOR LIVING INC. AGAINST
MIDAMERICAN ENERGY SERVICES, LLC, REQUEST TO WAIVE INFORMAL
COMPLAINT RESOLUTION FOR GOOD CAUSE, REQUEST TO STAY ANY
DISCONNECTION OF SERVICE, AND REQUEST TO CONSOLIDATE THIS
COMPLAINT WITH PUC DOCKET NO. 52221 AND SIMILAR DOCKETS**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Brookdale Senior Living Inc. (Brookdale) files this Formal Complaint against MidAmerican Energy Services, LLC (MidAmerican) pursuant to 16 Tex. Admin. Code (TAC) § 22.242(e). Through this Complaint, Brookdale requests the Public Utility Commission of Texas (Commission) order MidAmerican to comply with the terms and conditions of its Contract with Brookdale, revise its invoices to Brookdale by removing the “Supplemental Ancillary Services” charges and applicable taxes, and cease and desist from its attempts to collect “Supplemental Ancillary Services” charges and applicable taxes from Brookdale in violation of both its Contract’s terms and conditions and the Commission’s rules. Brookdale further requests that the Commission stay any disconnection of service for the affected properties while this dispute is pending. Brookdale also requests that the Commission waive the informal complaint-resolution requirements for good cause, and consolidate this Complaint with the similar matters currently under consideration by the Commission in the dockets identified below. In support of Brookdale’s Complaint, Brookdale respectfully shows as follows:

I. INTRODUCTION

As the largest operator of senior living communities in the United States based on total capacity, Brookdale serves a large community of vulnerable and at-risk Texans, with 685 communities in 41 states and the ability to serve over 60,000 residents as of March 31, 2021. As of that date, Brookdale operated 54 communities throughout Texas in areas of the state open to retail electricity choice that are served under the MidAmerican Contract and received invoices

with the disputed charges at issue (Brookdale Affected Properties¹). Brookdale offers its senior living residents' access to a broad continuum of services. Brookdale operates and manages independent living, assisted living, memory care, and continuing care retirement communities. A safe, secure, and reliable supply of electricity is critically important to those communities and their residents.

Likewise, a price that is fixed, predictable, and dependable is also highly important. That is precisely why Brookdale agreed to a five-year-and-ten-month supply contract with MidAmerican for *all* of the Brookdale Affected Properties. By executing that agreement, MidAmerican agreed to assume the risk of the fluctuation of electric prices in return for the agreement of Brookdale to pay the contracted price during the term of this contract. So, when MidAmerican can secure electricity for less than the fixed contract price, MidAmerican makes money; the lower the price to MidAmerican, the more money MidAmerican makes. *No matter how much profit MidAmerican makes when prices are low, Brookdale pays the same price to MidAmerican. But, when MidAmerican must pay more than the contracted price to supply electricity to Brookdale, that risk of loss falls squarely on MidAmerican.*

That allocation of risk between buyer and seller is, after all, the point of a fixed-price contract. The more extreme the price swings, the more important it is for both parties to be able to rely on the protections for which they bargained. Now, in the wake of Winter Storm Uri (Uri), MidAmerican wants it both ways. MidAmerican is refusing to honor its agreement to absorb cost increases that were completely foreseeable and is trying to pass those off to its customers. This “heads I win, tails you lose” approach must be rejected by the Commission.

Brookdale asks the Commission to determine that the charges are unauthorized and that MidAmerican is in violation of 16 TAC § 25.481 and the Public Utility Regulatory Act (PURA),² which prohibit retail electric providers (REPs) from assessing unauthorized charges on customers. Brookdale requests that the Commission order MidAmerican to comply with the terms and

¹ Note that the Contract with MidAmerican designates some properties as “residential”; those properties are not at issue in this Complaint and are not included in references herein to the “Brookdale Affected Properties.” The term “Brookdale Affected Properties” refers to the properties within the 54 communities referenced above that are served under the MidAmerican Contract and not designated as “residential” in that Contract.

² Tex. Util. Code §§ 11.001-66.016 (PURA).

conditions of its Contract with Brookdale; revise its invoices to Brookdale by removing the “Supplemental Ancillary Services” charges and applicable taxes; cease and desist from its attempts to collect “Supplemental Ancillary Services” charges and applicable taxes from Brookdale; and refrain from disconnecting (or threatening to disconnect) service on the basis of Brookdale’s rightful refusal to pay those charges.

Brookdale respectfully urges that the interests of justice require that all complainants who dispute the right of MidAmerican to create and pass through a new category of “Supplemental Ancillary Services” charges are afforded a meaningful opportunity to be heard on the question of the interpretation of MidAmerican’s form contract that, on information and belief, each complainant was required to sign. Certainly, Brookdale recognizes that other motions to consolidate filed by similarly situated companies and Commission staff were denied on September 7, 2021 by the Administrative Law Judge (ALJ) in Docket No. 52221 (as well as in Docket Nos. 52300 and 52273), subject to further consideration. Brookdale respectfully requests that the Commission reconsider those decisions.

With the filing of this Complaint, the Commission faces yet another matter premised on contractual terms—drafted by MidAmerican—that appear to be identical in relevant respect for all of the pending complaints against MidAmerican thus far. This matter and those proceedings share common contractual terms and similar fact patterns, necessitating a process that allows all complainants a meaningful opportunity to present their arguments regarding the contract-interpretation issue before a decision is rendered. Only through such a process can a just and consistent resolution result. Brookdale respectfully submits that denial of that opportunity constitutes a denial of due process. The most efficient way to achieve a just outcome would be to consolidate the complaints against MidAmerican into one proceeding—at least for the limited purpose of construing the meaning of the identical contractual language apparently at issue in each of these complaints. Brookdale urges the Commission order consolidation of all of the pending matters against MidAmerican resulting from February 2021 billing disputes.

II. JURISDICTION

The Legislature provided certain protections for customers once retail competition began in 2002. The Legislature found it essential that customers have safeguards against fraudulent,

unfair, misleading, deceptive, or anticompetitive business practices.³ The Commission's general jurisdiction over a customer complaint (and specifically a complaint involving billing) is established under PURA §§ 17.001, 17.151, 17.152, 17.157, 39.001, 39.101, and PURA, Chapter 17, Subchapters A, C, and D. Further, PURA requires the Commission to protect customers from specified conduct, including prohibiting electric service providers from attempting to collect unauthorized charges from customers,⁴ and from engaging in "fraudulent, unfair, misleading, deceptive, or anticompetitive business practices."⁵ This Complaint also is founded on the Commission's customer protection authority, and, more specifically, 16 TAC §§ 25.471 and 25.481, particularly as those rules apply to REPs. The Commission also has authority to take enforcement action against MidAmerican under 16 TAC § 25.492, should it choose to do so in a separate docket. This Complaint seeks permanent relief under 16 TAC § 22.242(e) and interim relief (in the form of protection from disconnection during the pendency of the complaint) under 16 TAC § 22.242(h).

III. SECTION 22.242(E) REQUIREMENTS

In compliance with 16 TAC § 22.242(e)(2), Brookdale provides the following information. The Complainant is Brookdale Senior Living Inc.⁶ The Complainant's representatives are:

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³ PURA §§ 17.001, 39.101.

⁴ PURA §§ 17.151, 17.152, 39.101.

⁵ PURA § 17.001.

⁶ See 16 Tex. Admin. Code (TAC) §22.242(e)(2)(A).

⁷ See *id.* §22.242(e)(2)(B), (C).

Brookdale files this Complaint against MidAmerican Energy Services, LLC.⁸ Brookdale is not seeking relief relating to service by a utility received within the limits of a city.⁹ Brookdale attempted informal resolution directly with MidAmerican, but those efforts have been unsuccessful.¹⁰ Brookdale seeks waiver of the requirement for informal complaint resolution at the Commission for good cause, as discussed in further detail in Section IV of this Complaint.¹¹ A detailed statement of facts is provided below in Section V of this Complaint, and relevant documentation is attached hereto.¹²

Brookdale requests that the Commission order MidAmerican to comply with the terms and conditions of its Contract with Brookdale and to cease and desist from its attempts to collect “Supplemental Ancillary Services” charges and applicable taxes from Brookdale in violation of the Contract’s terms and conditions.¹³

IV. REQUEST TO WAIVE INFORMAL COMPLAINT REQUIREMENTS

Ordinarily, Brookdale would be an enthusiastic advocate of an informal dispute resolution process. Indeed, Brookdale and MidAmerican have already engaged in good faith informal negotiations in an effort to resolve their dispute. Those efforts failed. Consistent with similar requests in other Complaints filed against MidAmerican,¹⁴ Brookdale requests that the Commission waive any applicable informal complaint requirements under 16 TAC § 22.242(c)(2). Brookdale’s Complaint is similar to several other formal complaint proceedings brought against MidAmerican that are already before the Commission and appear to concern the same material fact patterns and questions of law. Brookdale’s Complaint involves substantially the same

⁸ See *id.* § 22.242(e)(2)(D).

⁹ See *id.* § 22.242(e)(2)(E), (F).

¹⁰ See *id.* § 22.242(e)(2)(G).

¹¹ See *id.* § 22.242(e)(2).

¹² See *id.* § 22.242(e)(2)(H).

¹³ See *id.* § 22.242(e)(2)(I).

¹⁴ See, e.g., *Complaint of Texas Cotton Ginners’ Association Against MidAmerican Energy Services, LLC*, PUC Docket No. 52273, Complaint at 6 (Jun. 25, 2021); *Complaint of Tuesday Morning Inc. Against MidAmerican Energy Services, LLC*, PUC Docket No. 52300, Complaint at 4 (Jul. 2, 2021); *Complaint of The Ed Rachal Foundation Against MidAmerican Energy Services, LLC*, PUC Docket No. 52462, Complaint at 4-5 (Aug. 23, 2021); see also PUC Docket No. 52300, Commission Staff’s Statement of Position at 2-3 (Jul. 30, 2021) (agreeing that the informal complaint requirement should be waived).

MidAmerican contractual language and the same time period at issue identified by Thigbe Aggregation Members,¹⁵ Texas Cotton Ginners' Association Members,¹⁶ Tuesday Morning, Inc.,¹⁷ CMA,¹⁸ the Ed Rachal Foundation,¹⁹ TDIndustries, Inc.,²⁰ Radiant Sunset Building, LLC,²¹ GNL Ridglea LLC,²² Suffolk Business Solutions, LLC,²³ Intelligent Epitaxy Technology, Inc.,²⁴ Natural Polymer International Corporation,²⁵ and Powerlab, Inc.²⁶ As the Commission staff reasoned in the *Tuesday Morning, Inc.* matter, requiring Brookdale to file an informal complaint would not yield a result that is markedly different from the results of the previously filed matters involving the same MidAmerican contractual language and the same time period.²⁷

Commission Staff more recently suggested (in another complaint pending against MidAmerican) that the informal complaint process should not be waived for the other complainant

¹⁵ *Complaint of Thigbe Aggregation Members (Over 50 kW) Against MidAmerican Energy Services, LLC*, PUC Docket No. 52221, Complaint at 2 (Jun. 8, 2021).

¹⁶ PUC Docket No. 52273, Complaint at 2 (Jun. 25, 2021).

¹⁷ PUC Docket No. 52300, Complaint at 2 (Jul. 2, 2021).

¹⁸ *Complaint of CMA I Ltd. and CMA II Ltd. Against MidAmerican Energy Services, LLC*, PUC Docket No. 52448, Complaint at 4-8 (Aug. 18, 2021).

¹⁹ PUC Docket No. 52462, Complaint at 4 (Aug. 23, 2021).

²⁰ *Complaint of TDIndustries, Inc. Against MidAmerican Energy Services, LLC*, PUC Docket No. 52473, Complaint at 6-7 (Aug. 25, 2021).

²¹ *Radiant Sunset Building, LLC's Appeal and/or Request for Reconsideration of Customer Protection Division Failure and Refusal to Resolve Informal Complaint No. CP2021061144 Against MidAmerican Energy*, Docket No. 52478, Complaint at 4-6, 14 (Aug. 26, 2021).

²² *Complaint of GNL Ridglea LLC Against MidAmerican Energy Services, LLC*, PUC Docket No. 52512, Complaint at 4-5, 17 (Sept. 2, 2021).

²³ PUC Docket No. 52221, Formal Complaint Against MidAmerican Energy Services LLC and Motion to Allow Suffolk Business Solutions to be Added to PUCT Docket # at 1-4 (Jun. 18, 2021). The Office of Policy and Docket Management (OPDM) has since opened a new docket for this complaint. *Complaint of Suffolk Business Solutions Against MidAmerican Energy Services LLC*, Docket No. 52538 (pending).

²⁴ PUC Docket No. 52221, Formal Complaint of Intelligent Epitaxy Technology, Inc., Request to Waive Informal Complaint Requirement, and Request to Join Docket No. 52221 at 3-5 (Aug. 30, 2021). OPDM has since opened a new docket for this complaint. *Complaint of Intelligent Epitaxy Technology, Inc. Against MidAmerican Energy Services LLC*, Docket No. 52540 (pending).

²⁵ PUC Docket No. 52221, Formal Complaint of Natural Polymer International Corporation, and Request to Join Docket No. 52221 at 3-4 (Aug. 24, 2021). OPDM has since opened a new docket for this complaint. *Complaint of Natural Polymer International Corporation Against MidAmerican Energy Services LLC*, Docket No. 52539 (pending).

²⁶ *Complaint of Powerlab, Inc. Against MidAmerican Energy Services, LLC*, PUC Docket No. 52635, Complaint (Sept. 24, 2021).

²⁷ See PUC Docket No. 52300, Commission Staff's Statement of Position at 1-3 (Jul. 30, 2021).

based on the ALJ's denial of Staff's motion to consolidate the complaint cases against MidAmerican, and the ALJ in that case approved the motion.²⁸ Brookdale respectfully suggests in the first instance that whether multiple disputes are appropriately considered together (in whole or in part) is entirely divorced from whether an informal dispute process is appropriate. On its face, the Commission's rule—which sets forth the informal complaint process—recognizes there are situations when an informal process should not be required. When an informal process has little to no realistic chance of success, forcing Staff and private parties to take those steps unnecessarily wastes the resources of both the Commission and the parties to a complaint.

Requiring larger, non-residential customers like Brookdale to divert resources to an informal process in this particular circumstance would be an error. The Commission's Customer Protection Division has taken the position that such customers are actually not entitled to take advantage of the informal complaint process in the Commission's rules. Specifically, in the *Radiant Sunset Building, LLC* matter, the Customer Protection Division declined to consider an informal complaint filed by another larger, non-residential customer like Brookdale on the basis that the customer waived the applicability of the informal complaint process in 16 TAC § 25.485.²⁹ That outcome supports the view that the informal complaint process is unlikely to result in any review of the merits of Brookdale's complaint and instead would serve only to delay such a resolution through this formal complaint proceeding.

In other words, the filing of an informal complaint by Brookdale would not serve the apparent purpose of the informal complaint process in the first place, which presumably is to allow for an informal resolution of a complaint with the assistance of Commission Staff, and thus to obviate the need to file a formal complaint. If the Customer Protection Division will simply dismiss the informal complaint as disallowed due to a waiver of the applicable informal complaint rule in

²⁸ PUC Docket No. 52462, Commission Staff's Statement of Position at 1-2 (Sept. 21, 2021); PUC Docket No. 52462, Order No. 5 (Sept. 27, 2021).

²⁹ PUC Docket No. 52478, Complaint at 34 (Bates) (Aug. 26, 2021) (Customer Protection Division's (CPD's) letter ruling reasoned that Radiant Sunset Building LLC could not take advantage of the informal complaint process in 16 TAC § 25.485(e) because it had waived applicability of that customer protection rule, and thus CPD dismissed the informal complaint without considering the merits); *see also* PUC Docket No. 52635, Complaint (Sept. 24, 2021) (CPD appeared to take the same position in this complaint as well). As indicated later in this Complaint, Brookdale is similarly a larger non-residential customer that has agreed to a different level of protections for the Brookdale Affected Properties than the ones that apply to residential and small commercial customers in Subchapter R of the Commission's Substantive Rules, including the referenced informal complaint provision in 16 TAC § 25.485(e).

Subchapter R of the substantive rules (as it has in other similar matters), then there is no chance that the informal complaint process will enable the informal resolution of the complaint. Further, even if the Customer Protection Division reversed its earlier view and decided informal procedures could apply, Brookdale and MidAmerican, as noted, have already engaged in good faith—albeit fruitless—negotiations. The most effective use of Commission and parties’ resources is for the formal complaint to proceed to consideration. Accordingly, there is good cause for waiver of the informal complaint requirement in this case.

In sum, Brookdale has engaged in good faith attempts to informally resolve this matter with MidAmerican, but these attempts have not been successful. It also appears likely that the filing of an informal complaint will not result in any substantive review of the complaint by Commission Staff. Thus, Brookdale respectfully requests that the Commission waive any applicable informal complaint requirements under 16 TAC § 22.242(c)(2).

V. STATEMENT OF FACTS

The facts of this matter follow the same pattern that the Commission has seen repeated in other pending complaints against MidAmerican. Brookdale and MidAmerican entered into a fixed-price contract. Commission rule 16 TAC § 25.481 prohibits REPs from assessing unauthorized charges on any type of customer. MidAmerican experienced increased costs during Winter Storm Uri and has tried to pass on those increased costs to Brookdale for the Brookdale Affected Properties in violation of its fixed-price contract, which violates 16 TAC § 25.481. The facts are as follows:

A. The Contract

Brookdale is the largest operator of senior living communities in the United States based on total capacity. As of March 31, 2021, Brookdale operated 88 communities in Texas, comprising over 8,300 units. Of those 88 communities, 54 are in areas of Texas that are open to retail electricity choice and received invoices from MidAmerican with the disputed charges.³⁰ MidAmerican supplies electricity to Brookdale for the Brookdale communities in Texas within the competitive

³⁰ As noted in note 1, *supra*, within those 54 communities, there are properties designated as “residential” in the Contract that are not at issue in the Complaint.

areas of the grid operated by the Electric Reliability Council of Texas, Inc. (ERCOT) pursuant to a Retail Electric Supplier Agreement (“Supply Agreement” or the “Contract”) originally entered into in May 2015,³¹ and supplemented with revised Schedules, dated October 31, 2019.³² Under the Contract, Brookdale “agrees to purchase and receive from MidAmerican 100% of its electric energy supply and related services for all the properties listed on the Schedules.”³³ The Contract was prepared by MidAmerican and, based on the numerous pending complaints against MidAmerican involving identical operative language, appears to be a form contract used by MidAmerican in its normal course of business.

Schedule B to the Contract contains the operative language at issue in this Complaint.³⁴ It provides the Fixed Price to be charged for “all usage within the respective Pricing Period”³⁵ and is inclusive of congestion charges (including local, inter-zonal, and HUB to zone congestion charges).³⁶ The Pricing Period, in turn, is set as June 2020 through April 2026.³⁷ Alternatives for the application of variable prices or different prices for peak and off-peak times of usage are offered as options that a customer could select under this Contract. Brookdale did not select any of those options.³⁸

The Fixed Price “includes costs associated with line loss based on applicable transmission and delivery tariff loss factors, renewable compliance costs, all charges assessed by ERCOT ... and Ancillary charges. ... The term ‘Ancillary’ means wholesale electric services, capacity, Regulation Up Service Charges, Regulation Down Service Charges, Responsive Reserve Service Charges, Non-Spinning Reserve Service Charges, Reliability Unit Commitment Charges and other

³¹ See Contract, attached hereto as Confidential Attachment 1.

³² See Contract Schedules, attached hereto as Confidential Attachment 2.

³³ Contract, Confidential Attachment 1, at 2 (Customer Responsibilities).

³⁴ Confidential Attachment 2 contains all the Contract schedules, which, in addition to Schedule B, consist of Schedule A (i.e., all the premises covered by the Contract), and Schedule C (which sets out requirements on the number of properties to be served by MidAmerican). Only the language in Schedule B pertains to the instant dispute; the remaining schedules are provided for completeness.

³⁵ Confidential Attachment 2, Schedule B, at 1.

³⁶ *Id.* at 2.

³⁷ *Id.* at 1-2.

³⁸ *Id.* at 2.

costs required to facilitate delivery of electricity to Customer's Delivery Point."³⁹ In addition to the Fixed Price:

MidAmerican will include and Customer will pay the following as additional line items on the monthly invoice:

- Utility charges, as assigned by the Delivery Company, are applicable to Customer's properties, including but not limited to monthly customer charges, facilities, meter or equipment charges, transition charges, nuclear decommissioning costs, public purpose program costs, environmental program compliance costs and riders. Customer will receive an invoice from MidAmerican for both MidAmerican and Utility charges.
- Any applicable taxes plus Gross Receipts Reimbursement and PUC Assessment.

Any future changes in the business practice or business protocols of the Delivery Company, RTO, or ISO; Ancillary charges or applicable Delivery charges or transmission tariffs that affect the items included in the applicable Fixed Price and/or Variable Price, as defined in this Schedule B, may be incorporated herein as a separate adjustment as of the effective date on which the change occurs or thereafter.⁴⁰

B. The Winter Storm

The week of February 14, 2021 brought an extreme winter storm (Uri) to Texas, forcing numerous power plants offline due to the freezing conditions affecting fuel supplies and generation facility operations. At the same time, beginning in the early morning hours of February 15, 2021, electricity demand soared. At 1:25 a.m. on February 15, 2021, due to electricity demand exceeding supply, ERCOT ordered load shedding. That same day (February 15), and again the following day (February 16), the Commission directed ERCOT to ensure that energy prices cleared at the highest allowable market price of \$9,000 per megawatt-hour (MWh),⁴¹ which ERCOT implemented using

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Oversight of the Electric Reliability Council of Texas*, PUC Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); PUC Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021).

an existing formula in the Protocols that was already being utilized and without changing any language in the Protocols or Other Binding Documents.⁴²

C. MidAmerican's Invoices for "Supplemental Ancillary Services"

Brookdale received invoices from MidAmerican, with dates ranging from April 2, 2021 to May 18, 2021, for the service periods ranging from February 10, 2021 through May 4, 2021 for the Brookdale Affected Properties (Invoices).⁴³ The Invoices included the standard Fixed Price charge for Brookdale's usage within the invoiced Pricing Period; other related charges, including Energy Efficiency Cost Recovery, Transmission Cost Recovery, Nuclear Decommissioning, Distribution Cost Recovery, Distribution System Charge, Customer Charge, and Metering Charge; and "Supplemental Ancillary Services" charges for each date from February 14 to 21, 2021, plus applicable taxes. These Supplemental Ancillary Services charges, totaling over \$2.94 million across 91 Brookdale accounts,⁴⁴ appear to reflect MidAmerican's calculation of expenses incurred as a result of the daily increased market prices during Uri and its aftermath, plus applicable taxes for a total disputed amount in excess of \$3.19 million.

No other invoices received by Brookdale from MidAmerican prior and subsequent to the Invoices relating to usage during February 2021 itemize charges for Ancillary Services, and no charges are assessed for that category of charges generally, or for "Supplemental Ancillary Services" charges specifically. An example of a standard invoice received from MidAmerican is attached to this Complaint as Confidential Attachment No. 5.

⁴² ERCOT explained in a series of market notices that it would implement the Commission's directive by adding the megawatts associated with firm load shed into the block load transfer variable of the Real-Time On-Line Reliability Deployment Price Adder (Price Adder), which already applied to prices during the timeframe at issue. *See* ERCOT Market Notice M-C021521-01 Legal (Feb. 15, 2021); ERCOT Market Notice M-C021521-03 Legal (Feb. 17, 2021); ERCOT Market Notice M-C021521-04 Legal (Feb. 18, 2021); ERCOT Market Notice M-C021521-05 Legal (Feb. 19, 2021).

⁴³ *See* Confidential Attachment 3 an example of the form of invoice received by Brookdale from MidAmerican.

⁴⁴ *See* Confidential Attachment 4 (Summary of Invoices). Note that the 91 accounts referenced above correspond with the approximately 54 communities that are served under the MidAmerican Contract and received invoices with the disputed charges at issue (i.e., the 91 accounts are associated with the Brookdale Affected Properties).

D. Ancillary Charges are Already Included in the Fixed Price

Under the terms of the Contract and Schedules, Ancillary Charges are already included within the agreed upon Fixed Price.⁴⁵ “Supplemental Ancillary Services” charges are not referenced within the Contract and Schedules and do not constitute an authorized charge that may be assessed by MidAmerican under the Contract and Schedules. MidAmerican should be held to the terms of the Contract it drafted.

E. There is No Basis in the Contract to Support the Excess Charges

No contractual provision allows invoicing “Supplemental Ancillary Services” charges as a line item or additional charge. Further, no “Force Majeure” or “Change in Law” provision of the Contract applies to the timeframe at issue for the disputed Invoices. There were no changes to any applicable statutes, and the Commission has taken the position in pending litigation before the Third Court of Appeals that its emergency directives during Uri did not constitute “rules” or revisions to rules under the Administrative Procedure Act.⁴⁶ Instead, the Commission has characterized its orders during Uri as directives to ERCOT, made under PURA § 39.151, to fix “glitch[es]” in ERCOT’s systems that were causing prices to not be at the market price cap.⁴⁷ Indeed, ERCOT, by its own admission in testimony to the Texas Senate Business and Commerce Committee,⁴⁸ made no changes to the ERCOT Protocols or Other Binding Documents to implement the Commission’s emergency directives. Instead, ERCOT simply included firm load shed megawatts in one existing variable of an existing formula for an administrative Price Adder that already applied to energy prices during the days at issue.⁴⁹

Thus, based on the Commission’s own characterization of its actions during Uri, and ERCOT’s market notices and testimony regarding its response thereto, there was no change in law or in the “business practice or business protocols of the Delivery Company, RTO, or ISO,” no

⁴⁵ *Supra*, at pp. 9-10; Confidential Attachment 2, Schedule B, at 2.

⁴⁶ *Luminant Energy Company LLC v. Pub. Util. Comm’n of Tex.*, No. 03-21-00098-CV, Brief for Appellee at p. 23 (Sept. 2, 2021).

⁴⁷ *Id.* at 48.

⁴⁸ Transcript, Brad Jones Testimony to Texas Senate Business and Commerce Committee, at pp. 7, 9 (May 4, 2021).

⁴⁹ *Supra* note 42 and accompanying text.

changes to Ancillary charges, and no change in the “applicable Delivery charges or transmission tariffs that affect the items included in the applicable Fixed Price,” within the meaning of the Contract.⁵⁰ In short, again, according to the Commission’s statements to the Third Court of Appeals and ERCOT’s statements to the market and the Legislature, none of the contractual bases for charges in addition to the Fixed Price charges are applicable to the Invoices in question here.

F. MidAmerican’s Invoices Violate the Contract and 16 TAC § 25.481

Brookdale does not contest that MidAmerican incurred additional expenses during and shortly following Uri. However, MidAmerican expressly agreed to assume the risk of increased cost of electricity during the term of the Contract and is not authorized to pass on those expenses to Brookdale under the Fixed Price Contract entered into by the parties. As noted above, Ancillary Service Charges are already included in the Fixed Price agreed to by the parties. “Supplemental Ancillary Services” charges are not identified as recoverable costs within the Contract and Schedules with Brookdale. There was no change in business practice or business protocols of the Delivery Company, RTO, or ISO, no new Ancillary service, and no change in the applicable Delivery charges or transmission tariffs that can serve as a basis for passing on the excess charges. MidAmerican has not provided any credible basis for establishing that the Supplemental Ancillary Services charges included in the Invoices constitute authorized charges under the Contract. MidAmerican’s attempt to charge for Supplemental Ancillary Services anyway violates the Contract and 16 TAC § 25.481, which prohibits REPs from assessing “unauthorized” charges on its customers—meaning charges for which the REP lacks clear and express consent from the customer⁵¹—and that consent would have to be (but is not) supplied by the Contract between MidAmerican and Brookdale. Although Brookdale agreed to a different level of protection for the Brookdale Affected Properties than set forth in the bulk of the Commission’s customer protection

⁵⁰ Confidential Attachment 2, Schedule B, at 2.

⁵¹ 16 TAC § 25.481(b) (“(1) The REP shall inform the customer of the product or service being offered, including all associated charges, and **explicitly inform the customer** that the associated charges for the product or service will appear on the customer’s electric bill. (2) The customer **must clearly and explicitly consent** to obtaining the product or service offered and to having the associated charges appear on the customer’s electric bill.”) (emphasis added).

rules, it has not done so (and under applicable Commission rules, could not have done so⁵²) with respect to 16 TAC § 25.481.

MidAmerican should be—and under 16 TAC § 25.481, must be—held to the terms of the Contract it drafted with respect to the types and amounts of charges it can impose on Brookdale. Any other result would preclude Brookdale from obtaining the benefit of the fixed-price contract it negotiated with MidAmerican, grant MidAmerican a benefit beyond what it is permitted under the Contract, and unlawfully attempt to shift the risk of pricing increases during scarcity events like Uri from MidAmerican to its customer, Brookdale. The existence of scarcity pricing during tight market conditions is part of the market design in ERCOT. Thus, some degree of such pricing, when it occurs during a scarcity event, should come as no surprise to a sophisticated market participant like MidAmerican. If a fixed-price contract does not protect Brookdale (and similarly situated customers) against pricing increases during such an event, then the fixed-price “commitment” offered by MidAmerican in its contract is illusory.

VI. REQUEST FOR A STAY OF DISCONNECTION DURING THE PENDENCY OF THE COMPLAINT

16 TAC § 22.242(h) allows the presiding officer in a complaint involving threatened disconnection of service to require that service be continued during the pendency of a complaint, for good cause. In addition, the Commission’s substantive rules, 16 TAC § 25.481(c)(2)(A), prohibit a REP from disconnecting service on the basis of non-payment of an unauthorized charge.⁵³ Pursuant to 16 TAC § 22.242(h) and 16 TAC § 25.481, Brookdale requests that the presiding officer order MidAmerican to continue to provide service to, and not threaten to or

⁵² *Id.* § 25.471(a)(3) (“The rules in this subchapter are minimum, mandatory requirements that must be offered to or complied with for all customers unless otherwise specified. **Except for the provisions of §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider), §25.481 of this title (relating to Unauthorized Charges), and §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling),** a customer other than a residential or small commercial class customer, or a non-residential customer whose load is part of an aggregation in excess of 50 kilowatts, may agree to terms of service that reflect either a higher or lower level of customer protections than would otherwise apply under these rules. Any agreements containing materially different protections from those specified in these rules must be reduced to writing and provided to the customer.”) (emphasis added).

⁵³ 16 TAC § 25.481(c)(2)(A) (“A REP shall not: (A) seek to disconnect electric service to any customer for nonpayment of an unauthorized charge.”).

actually request disconnection of service for, the Brookdale Affected Properties during the pendency of this Complaint.

Brookdale has paid and continues to pay all undisputed charges and has only withheld the disputed Supplemental Ancillary Services charges and associated taxes, on the grounds that they are disallowed under the Contract and thus are unauthorized charges under 16 TAC § 25.481. Because the charges are unauthorized (for the reasons articulated above), MidAmerican is prohibited under 16 TAC § 25.481 from disconnecting service based on non-payment of those charges. Thus, there is necessarily good cause under 16 TAC s 22.242(h) for the presiding officer to order that MidAmerican not disconnect service due to non-payment of those charges during the pendency of this Complaint, and Brookdale respectfully requests that the presiding officer enter such an order.

**VII. REQUEST TO CONSOLIDATE BROOKDALE’S COMPLAINT WITH OTHER
SIMILARLY SITUATED COMPLAINTS
(DOCKET NO. 52221 ET AL.)**

Brookdale believes the ALJ was correct in Docket 52221 to require, *inter alia*, a separate docket be established at the outset for each complainant. The ALJ also properly noted that the question of consolidation could be revisited. Brookdale respectfully urges that the singularly unusual nature of these complaints makes it appropriate to revisit the question of consolidation at least for a limited purpose.

A single question lies at the heart of each Complaint that MidAmerican’s customers have filed and continue to file arising out of MidAmerican’s invoices from the Uri episode—is MidAmerican authorized by its form contract to create and pass through to its customers a new expense category of “Supplemental Ancillary Service” charges solely because MidAmerican incurred additional expenses due to the scarcity pricing that occurred during Uri? Under 16 TAC § 22.34(a), “Proceedings may be consolidated if the presiding officer finds that: the proceedings involve common questions of law or fact; consolidation would serve the interest of efficiency or prevent unwarranted expense and delay; and the applicant’s ability to present its case and other parties’ ability to respond to the applicant’s case are not unduly prejudiced.” Brookdale respectfully urges that its Complaint and the Complaints of similarly situated customers against MidAmerican squarely satisfy the requirement of this Rule. The question of the construction of

MidAmerican's form contract should be consolidated with complaints filed by other similarly situated MidAmerican customers (whether currently pending or subsequently filed); only by assuring each Complainant a fair opportunity to be heard on this pivotal issue at the outset can a fair hearing be granted.⁵⁴

In its initial filing on June 8, 2021, in PUC Docket No. 52221, Thigbe LLC requested the Commission "allow other interested customers to join this complaint in order that the Commission's resources may be better utilized and so that more Texas customers can more easily defend themselves from these egregious charges."⁵⁵ Since that filing, Texas Cotton Ginners' Association Members,⁵⁶ TDIndustries, Inc.,⁵⁷ and GNL Ridglea LLC⁵⁸ each requested consolidation of their respective matters under PUC Docket No. 52221, and Suffolk Business Solutions, LLC, Natural Polymer International Corporation, and Intelligent Epitaxy Technology, Inc. each filed complaints within PUC Docket No. 52221. Commission staff also filed motions to consolidate PUC Docket Nos. 52221, 52273, and 52300, all of which are pending complaints against MidAmerican relating to the same contractual language and concerning the same timeframe as that addressed in Brookdale's Complaint; Commission staff also supported joinder of Suffolk Business Solutions, LLC as an additional complainant in PUC Docket No. 52221.⁵⁹ On September 7, 2021, the ALJ denied the motions to consolidate pending Docket Nos. 52221, 52273, and 52300, and on September 9, 2021, the ALJ ordered that the complaints filed within Docket No. 52221 be separated into individual dockets.

⁵⁴ As of the date of this Complaint filing, those include PUC Docket Nos. 52221 (Thigbe Aggregation), 52538 (Suffolk Business Solutions), 52539 (Natural Polymer International Corporation), 52540 (Intelligent Epitaxy Technology, Inc.), 52273 (Texas Cotton Ginners Association), 52300 (Tuesday Morning, Inc.), 52248 (CMA I Ltd. and CMA II Ltd.), 52462 (The Ed Rachal Foundation), 52473 (TDIndustries, Inc.), 52512 (GNL Ridglea LLC), and 52635 (Powerlab, Inc.). The complainant in PUC Docket No. 52478 (Radiant Sunset Building, LLC) has agreed that its complaint may be dismissed while it attempts to negotiate a settlement with MidAmerican. PUC Docket No. 52478, Radiant Sunset's Response to Order No. 1 (Sept. 20, 2021).

⁵⁵ PUC Docket No. 52221, Complaint at 1 (Jun. 8, 2021).

⁵⁶ PUC Docket No. 52273, Complaint at 1-2, 6 (Jun. 25, 2021).

⁵⁷ PUC Docket No. 52473, Complaint at 1 (Aug. 25, 2021) (requesting consolidation "if deemed appropriate").

⁵⁸ PUC Docket No. 52512, Complaint at 1 (Sept. 2, 2021) (requesting consolidation "if deemed appropriate").

⁵⁹ See, e.g., PUC Docket No. 52373, Commission Staff's Statement of Position and Motion for Consolidation with Docket No. 52221 (Jul. 26, 2021); PUC Docket No. 52300, Commission Staff's Statement of Position and Motion for Consolidation with Docket No. 52221 (Jul. 30, 2021); PUC Docket No. 52221, Commission Staff's Supplemental Statement of Position (Aug. 18, 2021).

Brookdale, as noted, does not object to the requirement that separate dockets are appropriate for each complainant. Also as noted, however, Brookdale strongly believes that the existence of a single common question of contract construction in multiple disputes arising out of a single fact pattern is precisely the type of situation for which consolidation exists. Accordingly, Brookdale respectfully urges the Commission reconsider—at least for the limited purpose of construing the common contract language—the motions to consolidate filed by Thigbe LLC, Texas Cotton Ginners’ Association Members, and the Commission staff. Brookdale respectfully requests that Brookdale’s Complaint be consolidated with other Complaints filed against MidAmerican under PUC Docket Nos. 52221, 52273, and 52300, as well as other similarly situated complaint filings against MidAmerican, again, at least for the limited purpose of contract construction determination. It is critical that the Commission consider the pivotal interpretation of the MidAmerican contract language at issue—which appears to be identical in relevant respect for all the pending complaints against MidAmerican thus far—in a uniform and consistent manner, and it is critical that all complainants have a meaningful opportunity to present their arguments regarding the contract interpretation issue before any dispositive decision on that question is rendered. Brookdale respectfully submits that the most efficient way to achieve that outcome is consolidating the complaints against MidAmerican into one docket, at least for the limited purpose of construing the contract language at issue.

VII. RELIEF SOUGHT

Brookdale respectfully requests that the Commission (or presiding officer, as applicable):

- (1) Waive the informal complaint resolution requirements for good cause;
- (2) Consolidate this Complaint with the matters currently under consideration by the Commission referenced above and any subsequently filed complaints against MidAmerican predicated upon the same or similar breach of contract by MidAmerican;
- (3) Issue an order prohibiting MidAmerican from disconnecting service at the Brookdale Affected Properties on the basis of non-payment of the disputed “Supplemental Ancillary Services” charges and applicable taxes during the pendency of the Complaint;

- (4) Order MidAmerican to comply with the terms and conditions of its Contract with Brookdale, by (a) revising its invoices to Brookdale to remove the “Supplemental Ancillary Services” charges and applicable taxes; and (b) ceasing and desisting from its attempts to collect “Supplemental Ancillary Services” and applicable taxes from Brookdale; and
- (5) Grant Brookdale any other relief to which the Commission decides Brookdale is entitled.

Respectfully submitted,

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By: 

Attorneys for Brookdale Senior Living Inc.

CERTIFICATE OF SERVICE

I certify that on October 8, 2021, a true copy of Brookdale Senior Living Inc.'s Formal Complaint against MidAmerican Energy Services, LLC was served by First-Class mail, fax, and email on the following:

MidAmerican Energy Company
Attn: Unregulated Retail Services Electric Contract
Administration
4299 NW Urbandale Drive
Urbandale, IA 50322
Fax: 515.242.4354
contractAdmin-electric@midamerican.com

Kelcey A. Brown, President
MidAmerican Energy Company
P.O. Box 657
Des Moines, IA 50306-0657

MidAmerican Energy Services, LLC
Attn: Electric Contract Administration
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Urbandale, IA 50322
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Lynn Needles